

Clerk of the Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Sent via electronic mail

Re: Comments on the Suggested Amendments to Standards for Indigent Defense

Honorable Chief Justice and Associate Justices:

The Washington State Association of Counties (WSAC) has closely followed the progression of the proposed caseload standards and public comments the Court has invited during your consideration. Our members remain steadfast in support of the right to effective counsel as demonstrated by the fact that counties fund 97% of the costs associated with the trial court public defense. That level of local support is nearly unheard of in the rest of the country.

Unfortunately, the State of Washington has ignored its constitutional obligation creating a system of justice by geography and this growing crisis. Many, including the Legislature and this Court, have expressed concern over the current state of the public defense system:

- Larry Jefferson, Director of the Washington State Office of Public Defense, wrote in a letter on November 27, 2023, to the Washington State Supreme Court that the public defense system is now “facing a grave crisis,” and is “on the verge of collapse;”ⁱ
- Justice Gonzales, Chief Justice of the Washington State Supreme Court wrote in his concurring opinion in *Davison et al. v. State et al.*, No. 96766-1,ⁱⁱ that “[t]he State has known for a long time that delegating primary responsibility for public defense to local governments has often led to the systematic deprivation of effective assistance of counsel....” He also stated, in an interview conducted by Jerry Cornfield for the Washington State Standard, that “[t]he crisis [delays in appointment of counsel] exists fairly broadly across the state but is far more acute in some counties than others and it tends to be acute in rural areas;ⁱⁱⁱ and
- The Seattle Times, in an article published on February 25, 2024, states that “[t]here are consequences [to the current system]. In some instances, people presumed innocent are languishing in jail without counsel. In others, prosecutions have been delayed or dismissed because defendants lack representation, potentially putting crime victims and others at risk. In still others, defendants are getting shortchanged because their attorneys are too busy. It’s difficult to get a grip on the scale of such problems, because statewide data is lacking.”^{iv}

In previous comments before the court, WSAC testified to the extraordinary cost and impracticality of the WSBA recommendation. By now you’ve heard from many of our

members about the impacts specific to their jurisdiction. Some are already making the hard decision to release suspects charged with serious crimes when no public defender can be found to take their case. These occurrences will increase dramatically if the proposed standards are adopted. One county was recently sued by the ACLU for ineffective counsel despite the commission dramatically increasing pay and offering signing bonuses to attract public defenders.

Even if counties had unlimited resources at their disposal and no other responsibilities, we cannot escape the fact that there aren't nearly enough attorneys in Washington to fill the obligations created by the proposed standards. In fact, we've heard from contract counsel across the state that if adopted, they will no longer accept public defense clients, further exacerbating the crisis.

Beyond the impracticality of the WSBA's recommendation, WSAC believes adopting such standards would exceed the Court's authority and infringe upon the constitutional separation of powers. The Legislature encompassed jurisdiction on the subject in RCW 10.101.030, directing local governments to set standards for public defense:

Each county or city under this chapter shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination.

Certainly, the Supreme Court has authority to establish rules for courts in Washington. However, we do not believe it has the authority to direct spending levels by the State or counties outside a question of constitutionality. The courts also retain jurisdiction over individual cases of ineffective counsel with sanctions and vacation as remedies.

Recognizing this conflict, the WSBA proposal claims to avoid direction to local governments in its preamble. "To the extent that certain standards may refer to or be interpreted as referring to local governments, *the court recognizes the authority of its rules is limited to attorneys and the courts.*" However, the rule does apply both to county employed public defenders and contract counsel, which results in a distinction without difference and the same outcome.

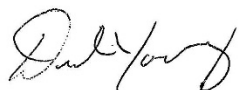
While WSAC does not believe the court has the power to adopt a prophylactic rule on the right to counsel, we do believe the Court has tools at its disposal to improve the system. As you're aware, WSAC filed suit against the State on this subject, which is pending appeal of the trial court's dismissal on standing. WSAC also drafted a bill for the Legislature that would provide adequate funding to protect the 6th amendment rights of defendants in Washington.

As you contemplate the WSBA's standards, we urge you to:

1. Partner with counties and demand the State of Washington fulfill its 6th Amendment constitutional obligations. Ask the Legislature to provide dedicated funding for this critical purpose and a statewide system that guarantees rights of indigent defendants;
2. Acknowledge the Washington public defense system's critical state and recognize the State's failure to meet its constitutional obligation for indigent defense;
3. Hold the State accountable for its financial responsibility, and commit to not further burdening underfunded counties;
4. Order a state level analysis in Washington. The Rand Study acknowledges that "[local] factors can vary substantially from jurisdiction to jurisdiction, the most accurate weighted caseload model is developed specifically for an individual state or jurisdiction." We shouldn't force the expenditure of hundreds of millions of dollars without absolute certainty that it is necessary.
5. Remain mindful that there is a shortage of both public defenders and prosecutors in Washington that funding alone will not improve. This will require efforts to initiate new programs, incentives, and other tools to ensure proper staffing of the entire civil and criminal justice system. The Court's recommendations on increasing the public sector legal workforce would be helpful.

Thank you for considering our request. Please let us know if we can offer further information or answer any questions.

Respectfully,



Derek Young, Interim Executive Director

ⁱ <https://opd.wa.gov/sites/default/files/2023-12/000045-Memo%20to%20WSSC%20on%20Workload.pdf>

ⁱⁱ <https://www.courts.wa.gov/opinions/pdf/967661.pdf>

ⁱⁱⁱ <https://www.courts.wa.gov/opinions/pdf/967661.pdf>

^{iv} <https://www.seattletimes.com/seattle-news/politics/was-public-defender-system-is-breaking-down-communities-reeling/>