

2019 Audit of Trial-Level Compliance with the Standards for Indigent Defense

Washington State Office of Public Defense

Final Report

June 2019 – Updated July 11, 2019

Summary of Recommendations

OPD

1. OPD should require counties and cities to submit certification forms for one certification period in their applications for Chapter 10.101 RCW funds.
2. OPD should work with the District and Municipal Court Management Association to identify a retention period for certification forms, and to have the Secretary of State include this in the statewide retention guidance provided for local governments. Currently the retention schedule for Superior Courts requires attorney certifications be retained for 75 years after the filing date.
3. OPD should update its FAQs and provide guidance for city and county public defense administrators on the following:
 - a. Steps they can take to help attorneys gain sufficient experience to rise in qualification levels.
 - b. Ways to award case credit to attorneys who are second-chairing trials to gain experience necessary to meet the qualifications standard.
 - c. Options for counting transferred/inherited caseloads for jurisdictions that do not use case weighting.
 - d. Options for counting probation violations for jurisdictions that do not use case weighting.
4. OPD should create and provide a sample form for annual reporting of caseload information (public defense and private work) to contract managers/public defense administrators.
5. OPD should review case weighting policies, notify cities/counties of provisions that are inconsistent with the Standards, and provide a checklist of components that are mandatory to ensure case weighting policies are consistent with the Standards.
6. OPD should increase training opportunities for public defense attorneys on the importance of using investigators, and how to work effectively with investigators, particularly in juvenile and misdemeanor cases.
7. OPD should encourage trial courts to assess and provide confidential meeting space for attorneys and clients.

Courts

1. The Supreme Court should require education for all new judicial officers regarding the public defense certification requirement, and other requirements of the Supreme Court Standards for Indigent Defense.
2. Trial courts should specifically track and code public defense assignments in the courts' case management systems, as a reliable statewide tool is needed to help identify public defense attorneys' caseloads.
3. The Supreme Court should consider the following edits to the certification form as described below, and as illustrated in Appendix A:
 - a. Modify the wording in Line 1 to clarify that the percentage of time spent on public defense pertains to the particular jurisdiction in which the certification form is filed.
 - b. For attorney with public defense caseloads in multiple courts, add a new section to indicate which courts and what percentage of time is spent on each caseload.
 - c. Combine sections 2.a and 2.e regarding Qualifications.
4. The Supreme Court should consider alternative certification requirements for government and non-profit public defense agencies that regularly track attorney caseloads and comply with the Standards. For example, individual attorney certification could be limited to an annual basis, and/or agency-wide certifications that list each staff attorney could be filed as an alternative.
5. The Supreme Court should consider modifying the trial experience requirements to qualify for adult and juvenile felony representation.

The Supreme Court should consider modifying the wording in Standard 3.4 from *should not exceed* to *shall not exceed*.

6. The development of an enforcement mechanism should be considered.

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I. Background

The purpose of this audit is to evaluate how jurisdictions and public defense attorneys implement the Washington Supreme Court Standards for Indigent Defense (Standards) at the local level, and identify steps to ensure compliance. Adult and juvenile public defense services are managed at the county and city level, resulting in a wide array of public defense management approaches. Similarly, the Standards have impacted jurisdictions in varied ways, and some jurisdictions have implemented the requirements more strictly than others.

Since the mid-1980s, the Washington courts, Legislature and community stakeholders have struggled with how to effectively and efficiently deliver quality defense representation to the indigent. Beginning in 1985, the Washington State Bar Association (WSBA) endorsed the Washington Defender Association's (WDA) newly adopted Standards for Public Defense Services. The 1989 Legislature mandated cities and counties to similarly implement public defense standards based on those adopted by the WSBA. In 2004, both the American Civil Liberties Union (ACLU) and the Seattle Times published reports spotlighting the difficult state of indigent defense in some Washington counties. That same year, the WSBA's Blue Ribbon Panel on Criminal Defense reported that cities and counties were not implementing the 1989 legislative mandate to adopt enforceable standards, especially those impacting defense caseloads. The report said that inaction by the cities and counties jeopardized an attorney's ability to effectively represent clients.

The Panel's final report recommended the WSBA continue the committee's work by establishing a Committee on Public Defense. The Committee, now known as the Council on Public Defense, undertook a number of reforms to improve the access to counsel and to enhance the quality of counsel throughout the state.

The Supreme Court discussed the WSBA Standards in its 2010 decision, *State v. A.N.J.*, allowing a juvenile to withdraw his guilty plea as a result of his lawyer's ineffective assistance of counsel. The Supreme Court then adopted amendments to the criminal and juvenile court rules¹ requiring that to be appointed to represent an indigent person, counsel must certify compliance with "applicable Standards for Indigent Defense Services." The Council on Public Defense, at the request of the Supreme Court, developed standards for certification by attorneys which were adopted by the Court in June of 2012. Certification for felony and juvenile attorneys began in October 2013 and misdemeanor attorneys in 2015.

Another significant development in public defense occurred within the same timeframe. In December 2013 the U.S. District Court of the Western District of Washington held in *Wilbur, et al., v. City of Mount Vernon, et al.*, which favorably cited to the WDA and Supreme Court

¹ [Superior Court Criminal Rule 3.1](#); [Criminal Rule for Courts of Limited Jurisdiction 3.1](#); and [Juvenile Court Rule 9.2](#).

Standards, that the named cities were liable under 42 USC 1983 for systemic flaws in the administration of public defense services. This decision spurred many cities to increase compensation to contract public defense counsel and reduce per-attorney caseloads.²

The mandatory caseload limits and other requirements established in the Supreme Court Standards are no longer new. Many jurisdictions have made staffing and budgetary adjustments to accommodate the requirements. The Standards now play a central role in public defense administration.

This report begins by describing how jurisdictions process the filing of quarterly attorney certifications, and recommends steps to better guarantee full compliance with this requirement. The report next moves into the subject matter areas addressed on the certification form – attorney qualification levels, caseload size, use of investigators, and office space, using the results of interviews, data research, and many contacts with public defense stakeholders.

II. Quarterly Filing of Certifications

A. Observations:

1. Compliance with Quarterly Filing

The Standards require, in criminal and juvenile cases, that appointed attorneys file written certifications on a quarterly basis in each court where they have been appointed as counsel. The certification form used by attorneys must be substantially similar to the sample provided in the Standards.

For this audit OPD selected eight counties – Adams, Clallam, Grays Harbor, Island, Lewis, Okanogan, Skagit, and Whitman – from which to request copies of filed certification forms. The primary goal was to determine whether the public defense attorneys in these counties filed certifications. OPD collected certifications filed in the third quarter of 2018 because it provided an opportunity to compare for completeness. Every year in August or September counties submit documentation

SEPARATE CERTIFICATION FORM

Court of Washington [] No: _____
for _____ [] Administrative Filing
State of Washington Plaintiff
vs. _____
Defendant

CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CR 3.1 / CrRLJ 3.1 / JuCR 9.2

The undersigned attorney hereby certifies:

- Approximately ____% of my total practice time is devoted to indigent defense cases.
- I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:
 - Basic Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1.
 - Office:** I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.
 - Investigators:** I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.
 - Caseload:** I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective October 1, 2013 for felony and juvenile offender caseloads; effective January 1, 2015 for misdemeanor caseloads: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]
 - Case Specific Qualifications:** I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013]

Signature, WSBA# _____ Date _____

² [“Aberdeen’s Cost of Public Defense to Double in 2015,”](#) InsuranceNewsNet, Aug. 14, 2014; [“New State Standards will Double Kelso’s Public Defender Budget in 2015,”](#) The Daily News, Aug. 19, 2014; [“Longview Council Approves \\$200,000 for Additional Public Defenders,”](#) The Daily News, Sep. 26, 2014; [“Vancouver Nearly Doubles Indigent Defense Fund,”](#) The Columbian, Dec. 15, 2014; [“City Doubles Amount for Indigent Defense Fees,”](#) Union-Bulletin, Feb. 11, 2016

to OPD via the application process to receive state funds pursuant to RCW 10.101.070. Those applications include a detailed list of all contract and assigned counsel attorneys who provide public defense services. Because both sets of documentation are generated within the same timeframe, the attorneys listed in the 2018 applications should match the certifications filed with their courts for the third quarter of 2018.

OPD requested all certifications from the eight counties' District and Superior Court Administrators, and Superior Court Clerks. Each county provided copies of certifications in a timely manner. In its review of the certifications, OPD found the following:

- Three counties (Adams, Lewis, and Okanogan) produced certifications for each attorney listed in the Chapter 10.101 RCW funding applications.
- Clallam County and Skagit County produced complete sets of certifications for all attorneys employed by local public defense agencies. However, not all private attorneys who contract for public defense filed their certifications.
- Grays Harbor, Island, and Whitman counties provided partially complete sets of certification forms. Grays Harbor County had certifications for the majority of their contract attorneys. Island and Whitman counties possessed certifications for only a minority of their listed public defense attorneys. Contract attorneys who primarily handle public defense cases were among those missing.

These results show that the two public defense agencies, both government and non-profit, submitted complete sets of certifications for their employee attorneys. However contract or assigned counsel attorneys, as a group, were less compliant with certification requirements.

In addition, not all county systems had a process for verifying attorney compliance with certification requirements. Beginning in 2018, applications for RCW 10.101.070 funds included a question asking whether someone in the county had “verified that all attorneys that provide public defense ... filed certifications for the first and second quarters” of the current year. In 2018, 36 out of 38 counties affirmed that someone verified the certifications on file. Two counties responded in the negative: Pacific and Whatcom.

During the audit, OPD identified a common misperception regarding certification. A number of individuals from different jurisdictions believed that the certification process only applied to full-time public defense attorneys, not contract and conflict counsel with partial caseloads.

2. Process and Mechanics of Certification

OPD conducted interviews with public defense administrators from eight counties and two cities³ about the process and mechanics for quarterly certifications. Most locations assigned someone to oversee and verify the submissions by the public defense attorneys. Several administrators commented that monitoring the certification process can be time intensive.

When asked whether anyone made a public record request for copies of certifications, almost all interviewed jurisdictions said no. In most jurisdictions, OPD was the only entity that had requested certifications. Recently, several individuals incarcerated at a county jail requested copies of their assigned counsels' certifications. All interviewees stated that there is no mention of certification during court hearings or when counsel is appointed. It is the perception of most interviewed public defense administrators that judges do not track which attorneys have or have not filed certifications.

Several court administrators from municipal and district courts requested guidance on determining an appropriate retention schedule for the certification forms. Superior Court Clerks use a statewide Records Retention [Schedule](#) that specifies a retention period of 75 years after being filed with the court, but municipal and district courts lack an official statewide retention schedule for attorney certification forms.

3. Content of the Certification Form

The audit revealed most attorneys use the same version of the certification form as found in the Standards. However, OPD found some exceptions. In one jurisdiction, attorneys representing clients in civil commitment cases modified their form for this case type. In another jurisdiction, a public defense agency supervising attorney added significant language to the form, reiterating the availability of resources and her additional time commitment as essential components for complying with the Standards. Other attorneys from the same public defense agency also used this certification model.

Attorneys who practice in multiple jurisdictions expressed some confusion regarding Line 1 of the certification form which states, "Approximately ___% of my total practice time is devoted to indigent defense cases." Attorneys were unclear whether the number should correspond to the percentage of time spent on public defense in that particular court, or cumulatively in all contracted courts.

For example, among the certifications collected, were forms filed by one attorney practicing in both Grays Harbor County and Lewis County. In his certification for each county, he entered 99% for total practice time devoted to public defense. Unless administrators know cumulatively

³ Benton, Clark, Franklin, Snohomish, Spokane, Stevens, Thurston and Walla Walla Counties, and the Cities of Olympia and Yakima.

how many public defense cases the attorney has in total, it is difficult to ascertain whether the attorney is spending the appropriate time on the public defense caseload for any given county.

4. Attitudes and Opinions about Certification

OPD asked public defense administrators about attitudes and opinions regarding the certification process. Attitudes and opinions vary, but most indicated that the attorneys appear neutral and do not mind filing quarterly certifications. A small number of attorneys felt offended by having to file certifications, since prosecutors are not held to a similar standard of accountability. Several administrators indicated that attorneys regard the certifications as a way to guard against high caseloads and to ensure availability of resources such as investigators.

The administrators valued the certification requirement as a tool to hold attorneys accountable to caseload limits, particularly private attorneys who have a mix of private/public caseloads and public defense contracts from multiple jurisdictions. They also felt that the certification process serves as a helpful reminder to attorneys about the requirements under the Standards. As one person said, “Out of sight, out of mind,” to indicate how easily attorneys can forget about these requirements.

Nonetheless, public defense agency directors feel that quarterly certification is too frequent and would prefer an annual or semi-annual process. The two interviewed public defense agency directors stated that they employ processes to actively monitor caseloads and compliance with other Standards requirements as part of their ongoing supervisory function. Quarterly filing of certification creates an additional administrative step that takes time and coordination. They would like to see the option of an institutional exemption for full-time public defense agencies that already engage in active monitoring practices.

B. Recommendations

Based on these findings and observations, OPD makes the following recommendations:

- OPD should require counties and cities to submit certification forms for one certification period in their applications for Chapter 10.101 RCW funds.
- OPD should work with the District and Municipal Court Management Association to identify a retention period for certification forms. Currently the retention schedule for Superior Courts requires certifications be retained 75 years after the filing date.
- Alternative certification requirements should be explored for government and non-profit public defense agencies that regularly track attorney caseloads and comply with the Standards. For example, individual attorney certification could be limited to an annual basis, and/or agency-wide certifications that list each staff attorney could be filed as an alternative.

- New judges should receive education regarding the certification requirement, and other requirements of the Standards.
- The Court should consider making edits to the certification form to clarify the percentage of time spent on public defense cases, add language where attorneys indicate the courts in which they have public defense and the corresponding percentage of time spent on those cases, and make administrative updates such as removing effective date references which have since passed. The recommended edits to the certification form can be found in Appendix A.

III. Case Type Qualification Requirements (Standard 14)

The purpose of Line 2.a. of the Certification Form is to verify that an attorney meets the basic professional qualifications articulated in Standard 14.1, and Line 2.e. confirms compliance with case-specific qualifications found in Standard 14.2. Prior to the implementation of the Standards, attorneys with no experience were permitted to represent clients facing felony charges. The qualification standards now establish minimum baseline requirements for all public defense counsel as well as case-level specific requirements.

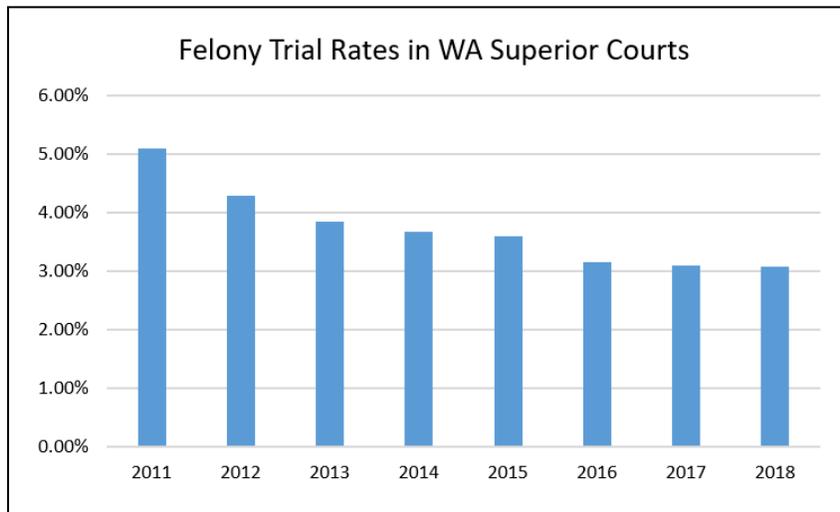
A. Observations:

The audit revealed that the vast majority of indigent defense attorneys meet their caseload type qualification levels. All counties and cities that have applied for state funds in recent years have reported that their attorneys meet the qualification requirements of Standard 14.⁴ In fact, all persons interviewed for this audit agreed that the qualification requirements have improved the quality of representation, and that most requirements in Standard 14.2 are appropriate. The one exception, however, relates to the necessary qualifications to represent juveniles charged with felonies. Standard 14.2 requires that attorneys possess a higher level of trial experience to represent juveniles charged with any felony class as compared to the lower level of experience necessary to represent adults charged under the same felony categories. Interviewees expressed that these requirements should, at a minimum, be consistent.

Trial practice is a key requirement to advance in qualification levels in both adult and juvenile case types. Counties with an active trial practice report little challenge in meeting these requirements. Counties with low trial rates, however, experience obstacles in obtaining a sufficient number of attorneys qualified to represent individuals facing serious felony charges.

⁴ See, however, *State v. Flores*, 197 Wn.App. 1 (2016). The defense attorney at trial did not have two years of criminal practice experience as was required by Standard 14.2.B. Division III of the Court of Appeals held that a violation of the Standards is not a categorical Sixth Amendment denial of counsel.

Trial rates⁵ vary by county. The criminal case trial rates in Superior Courts in 2018 ranged from 19% (San Juan County) to less than one percent (Garfield, Pend Oreille, Skagit, Wahkiakum, and Yakima counties). The statewide average in 2018 was 3.07%. These rates include a combination of public defense, retained counsel, and pro se



defendants, as it is currently impossible to identify trial rates specifically for public defense cases. In addition, criminal trial rates have steadily decreased in recent years. Despite increases in filings during the same timeframe, over the past eight years the statewide trial average for Superior Court criminal cases has dropped from 5.10% to 3.07%.

In many regions public defense attorneys must second-chair trials to obtain the requisite experience necessary to represent adults charged with a serious felony. However, counties tend not to include this work within the attorneys' compensation or caseload calculations. For example, in public defense agencies, attorneys sometimes second-chair felony trials to develop qualification experience *in addition to* carrying a full-time misdemeanor caseload. Similarly, counties do not regularly compensate contract defense counsel for their time and work spent second-chairing trials. Second-chairing has become a new necessary component for ensuring the continuing advancement of attorneys and sustaining a sufficient pool of qualified local attorneys.

The qualification category most difficult to sustain in public defense is Class A felony attorneys (adult and juvenile). Many attorneys who achieve this level of experience move to private practice and may not take such time-intensive cases at public defense compensation rates. Public defense agencies experience particular staffing challenges when Class A felony qualified attorneys leave on a permanent or short-term basis. Fewer attorneys are available to inherit portions of the open caseload, and as a result the few Class A felony qualified attorneys remaining on staff end up with an even greater concentration of high-stakes cases.

⁵ Trial rate percentages in this report are calculated based on the number of felony filings per year (excluding non-charges and appeals from lower court) and the combined number of bench and jury trials, as reported by the Administrative Office of the Courts <http://www.courts.wa.gov/caseload/>. Trial data does not include filings or trials in Pierce County.

B. Recommendations

Based on these findings and observations, OPD makes the following recommendations:

- Because many jurisdictions have low trial rates and rely on attorneys second-chairing trials to gain sufficient experience in qualification levels, guidance should be created to help counties in awarding some amount of case credit for such trial activity.
- The trial experience requirements for adult and juvenile felony qualification levels should be reviewed.
- Guidance for city and county administrators on proactive steps they can take to help attorneys gain sufficient experience to rise in qualification levels should be provided.

IV. Compliance with Caseload Limits

Standard 3.4 addresses appropriate caseload limits for public defense attorneys. It specifies that a full-time, fully supported attorney's caseload should not exceed the following:

- 150 felonies per year; or
- 400 misdemeanors or gross misdemeanors per year, or 300 if the jurisdiction has adopted a numerical case weighting system; or
- 250 juvenile offender cases per year; or
- 250 civil commitment cases per year; or
- 36 appeals to an appellate court; or
- 80 open juvenile dependency cases.

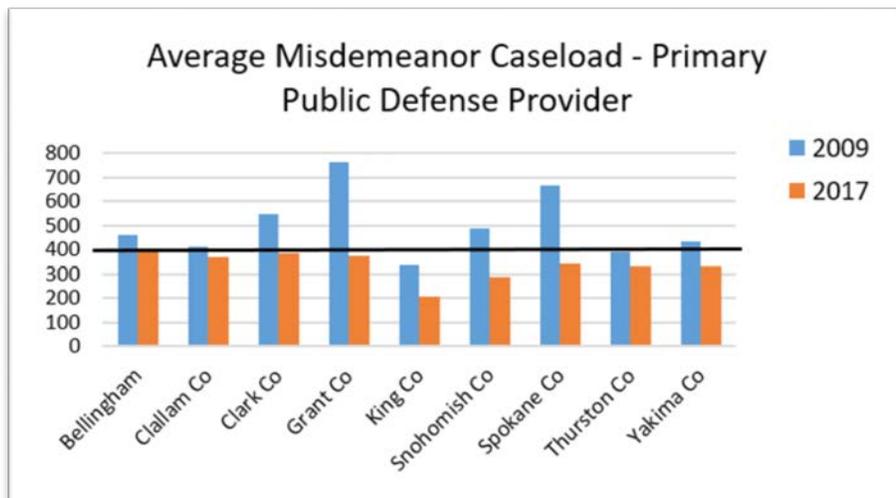
Case assignments should be reasonably distributed throughout the year, so as to avoid excess cases within any given timeframe. Contract attorneys who also maintain a private practice should spend time on their public defense cases proportionate to the size of their caseload. For example, an attorney who contracts for 75 felonies per year should spend at least, on average, 17-20 hours per week on those cases. Resolution of cases by guilty pleas at preliminary hearings or arraignment must each count as one case.

A. Observations:

1. Compliance with Caseload Limits

Caseload limits have become a fundamental component of public defense in Washington. All people interviewed for this report were well aware of the caseload limits, and each jurisdiction has some process in place to track attorneys' case assignments. All cities and counties that have applied for Chapter 10.101 RCW funds in recent years reported to OPD that their staff and contract attorneys have caseloads within the Standards' limits, and the majority of public defense contracts require adherence to the limits.

Prior to implementation of the Standards, most full-time felony and juvenile caseloads were close to or within the limits. However, most misdemeanor caseloads have experienced great reductions since implementation of the Standards. The following chart compares average misdemeanor caseloads for full-time public defense staff attorneys in 2009 and 2017:⁶



Public defense administrators agree that mandatory caseload limits have been helpful in securing the necessary funds from city/county administrators. Numeric limits lead to objectively based staffing levels. However, funders often require that staff attorneys carry full-time caseloads at the maximum levels at all times. Continuous operation at these upper limits can create difficulties when staffing changes occur, such as attorneys leaving for several months on family and medical leave, or turnover in staff. When all remaining attorneys already have maximum caseloads, they have less flexibility to take on reassignments.

There are still a variety of opinions on the impact of the caseload limitations. Most attorneys feel that the reduced caseloads provide them more time to dedicate to representing their clients. A minority of attorneys state that they have more time available, but they have not changed the way they defend their cases.

Most contract attorneys appear to have criminal and juvenile caseloads within the limits. However, there are still some attorneys who exceed the limits, particularly when combining contracts from multiple jurisdictions. Some attorneys who exceed the caseload limits rely on the wording in Standard 3.4 that caseloads *should* not exceed the listed levels. They view this as aspirational and not a strict limit.

⁶ Data reported by the jurisdictions to OPD in their applications for Chapter 10.101 RCW funds.

As part of this audit, OPD obtained data from the Administrative Office of the Courts for 60 attorneys⁷ who contract for public defense assignments. The data include the number and type of cases each attorney was assigned within a one-year period.

Some attorneys focused their practice on specific case types and within a certain jurisdiction. However, most attorneys handled a combination of criminal and civil cases, and worked in multiple courts (the range of courts per attorney spanned from one to 24, with an average of 5.2). As attorneys' caseloads become more diverse, it is increasingly challenging to gauge compliance with the Standards. To illustrate this, below is a sampling of three attorneys' case assignments for 2018:

Example Attorney A

| Type | Cases | Court |
|------------------|-------|---------------------------------|
| Misdemeanors (6) | 1 | Camas/Washougal Municipal Court |
| | 5 | Clark County District Court |
| Felony (106) | 106 | Clark County Superior Court |

Example Attorney B

| Type | Cases | Court |
|--------------------|-------|---|
| Misdemeanors (125) | 3 | Anacortes Municipal Court |
| | 1 | Island County District Court |
| | 2 | Mount Vernon Municipal Court |
| | 118 | Skagit County District Court |
| | 1 | Snohomish County District Court |
| Felonies (82) | 5 | Island County Superior Court |
| | 1 | San Juan County Superior Court |
| | 76 | Skagit County Superior Court |
| Juvenile (5) | 5 | Skagit County Superior Court |
| Civil (4) | 4 | Skagit County District and Superior Court |
| Domestic (3) | 3 | Skagit County Superior Court |
| Infractions (7) | 1 | Anacortes Municipal Court – Traffic |
| | 1 | Clark County District County – Traffic |
| | 1 | Island County District Court – Traffic |
| | 4 | Skagit County District Court – Traffic |
| Probate (1) | 1 | Skagit County Superior Court |

⁷ Forty of the attorneys were selected because they contract with counties for public defense services – two of each from the twenty counties with the highest case counts. Half contracted for Superior Court cases, and half for District Court cases. Twenty additional attorneys were selected because they contract with cities for indigent defense services. The names of attorneys were randomly selected from each county or city. These attorneys' names were made available to OPD through the counties' and cities' Chapter 10.101 RCW applications for state funding.

Example Attorney C

| Type | Cases | Court |
|-----------------------|-------|--|
| Misdemeanors (226) | 146 | Yakima District Court |
| | 1 | E. Klickitat District Court |
| | 1 | Granger Municipal Court |
| | 1 | Lower Kittitas District Court |
| | 3 | Selah Municipal Court |
| | 3 | Sunnyside Municipal Court |
| | 8 | Wapato Municipal Court |
| | 33 | Yakima Municipal Court |
| | 30 | Zillah Municipal Court |
| Felony (28) | 28 | Yakima Superior Court |
| Juvenile (3) | 3 | Yakima Superior Court |
| Civil (24) | 24 | Yakima District Court and Superior Court |
| Adoption (2) | 2 | Yakima Superior Court |
| Domestic (21) | 21 | Yakima Superior Court |
| Infractions (43) | 43 | Yakima District and Yakima Municipal |
| Parking (1) | 1 | Yakima Municipal Court |
| Probate (1) | 1 | Yakima Superior Court |

JIS attorney caseload data can be a helpful tool for better understanding attorneys' caseloads. However, this data does have limitations. JIS does not distinguish between public defense and private pay cases; is unable to identify if attorneys have withdrawn early due to conflict or retention of private counsel; and does not reflect transactional work outside of court such as drafting contracts or wills.

2. Mechanics of Tracking Caseloads

Attorneys and public defense administrators use varying approaches for tracking and reporting caseloads. While some used advanced case management software, some still track case assignments by hand. Regardless, interviews showed that at least someone at the county or city level takes responsibility for monitoring attorneys' new case assignments on a monthly or quarterly basis.

Some jurisdictions track attorneys' "outside" work – private cases and public defense contract work in other jurisdictions -- but many jurisdictions focus exclusively on case assignments within that city/county. In jurisdictions without public defense directors/administrators, court administrators are typically assigned the task of tracking caseloads. They often are responsible for assigning cases to contract counsel, and use the assignment process as a way to track the cumulative number of cases a contract attorney has received in that court.

3. Case Weighting

The Standards give jurisdictions the option of using case weighting to calculate public defense caseloads. Per Standard 3.5, case weighting systems should include the following components:

- Include policies and procedures that have been adopted and published by the local government;
- Recognize the greater or lesser workload required for cases compared to an average case based on an assessment that documents the workload involved;
- Adhere to the Standards, professional performance guidelines, and the Rules of Professional Conduct;
- Undergo periodic review and updating;
- Be filed with OPD; and
- Weigh noncomplex sentence violations and early resolutions with non-criminal dispositions as at least one-third of a case.

Ten cities and 15 counties have filed case weighting policies with OPD. In 2014 OPD conducted a misdemeanor time study and used its results to develop a [model case weighting policy](#). Only six jurisdictions have used all or portions of OPD’s misdemeanor model policy. None of the other policies appear to be based on a time study.

Each of the 25 case weighting policies includes case types that are weighted at *less than* an average case. Common examples include low-level misdemeanor offenses and early case resolutions. However, six of those policies lack any increased weights which would value certain case types as *more than* an average case. Thus all case categories in the six policies are valued at one case weight or less. Exclusive down-weighting of cases can result in caseloads that are greater than those permitted by Standard 3.4.

Most local case weighting policies include language replicating the Standards’ provision that guilty pleas at arraignment must be counted as one case, but others are silent on that issue. The majority count probation violations as one-third of a case, a few count them as less. Most county case weighting policies include felony and juvenile cases. The policy used in Pierce County is a hybrid model – case weights are dependent on both the type of charges and the number of hearings that occur during the life of a case.

4. Requests for Clarifications on Case Counts

During interviews, attorneys and public defense administrators identified situations where the Standards lack specificity for case counting, most frequently regarding probation violations. Standard 3.3 makes a short reference that sentence violations should be “taken into account when assessing an attorney’s numerical caseload,” and jurisdictions have implemented this in a variety of ways. The counting of probation violations tends to fall within the following four scenarios:

1. Count each new probation violation as a new case.
2. Count probation violations as one-third of a case per a case weighting policy.
3. Count probation violations as one-third of a case, even in the absence of a case weighting policy.
4. Count probation violations as part of the original case. With this approach, attorneys do not withdraw from representation at sentencing, but instead keep the cases open during the probation period. If probation violation hearings occur, no additional count or weight is given.

This fourth approach is not necessarily a maneuver to avoid counting cases. Rather, some jurisdictions systematically assign fewer cases to the attorneys to make up for the “extra” probation work. They prefer to keep attorneys assigned to the cases to guarantee vertical representation and ongoing representation of clients during the probationary period.

Additionally, there are other substantive and procedural case types for which administrators have requested guidance:

- Misdemeanor appeals to Superior Courts
- Contempt of court – child support enforcement
- Expedited felonies
- Cases returning on warrant
- Therapeutic court cases – drug court, mental health court, community court, etc.
- Transferred or inherited open cases to accommodate an attorney’s Family and Medical Leave Act leave
- Second-chairing trials

B. Recommendations

Based on these findings and observations, OPD makes the following recommendations:

- Given that jurisdictions have had several years to secure funding and staffing levels to meet the caseload limits in Standard 3.4, the language *should not exceed* should be changed to *shall not exceed*.
- Public defense appointments should be specifically tracked and coded in the trial courts’ case management systems, as a reliable statewide tool is needed to help identify public defense attorneys’ caseloads.
- OPD should create and provide a sample form for annual reporting of caseload information (public defense and private work) to contract managers/public defense administrators.
- OPD should develop a checklist of components that are mandatory to ensure case weighting policies are consistent with the Standards.

- OPD should actively review case weighting policies, and notify cities/counties of provisions that are inconsistent with the Standards.
- Written guidance on counting transferred/inherited caseloads should be developed for jurisdictions that do not use case weighting.
- Written guidance should be developed on counting probation violations for jurisdictions that do not use case weighting.

V. Use of Investigators

Investigation plays a valuable role in public defense services.⁸ Consequently item 2.c of the certification form requires that all indigent defense attorneys have access to investigators, and use investigators when appropriate.

A. Observations:

OPD receives data on the use of investigators in counties' and cities' applications for Chapter 10.101 RCW funds. In their most recent applications, all jurisdictions reported that funding is available for public defense attorneys to use investigators. Thirty counties specifically track investigator costs, and cumulatively reported spending \$7,545,840 on staff and contract investigator expenses in 2017.

The frequency of investigator usage varies by jurisdiction and case type. Among the 38 counties that submitted applications in 2018, 35 reported that public defense counsel used investigators in felonies during 2017; 29 reported that they used investigators in misdemeanor cases; and 30 reported that they used investigators in juvenile cases.

In interviews conducted with counties and cities for this audit, OPD inquired about investigation. All persons responded that, overall, attorneys have access to investigators when requested, and the request process is well streamlined. Each also stated that the frequency of investigator usage is appropriate. Attorneys employed in governmental and non-profit public defense agencies usually have access to in-house investigators, and make requests through an intra-agency process. Alternatively most contract attorneys are required to submit ex-parte motions for investigation to the court. In some counties, such as Snohomish and Thurston, administrators who oversee public defense contracts have discretion to approve requests for investigator funds. Most interviewees stated that they had a sufficient number of local investigators available to defense counsel, and that most investigators were retired law

⁸ "The degree and extent of investigation required will vary depending up on the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *State v. A.N.J.*, 168 Wash.2d 91 (2010).

enforcement officers. Some private attorneys who contract for misdemeanor public defense stated that they often handle investigation themselves, feeling it is more efficient.

B. Recommendation

- Increase training opportunities for public defense attorneys on the importance of using investigators, and how to work effectively with investigators, particularly in juvenile and misdemeanor cases.

VI. Offices for Confidential Meetings, Postal Address, Telephone

Client confidentiality is a cornerstone of any attorney-client relationship,⁹ and Standard 5.2.B and item 2.b of the certification form require all public defense counsel to have access to an office that accommodates confidential meetings with clients, a postal address, and adequate telephone service to ensure prompt response to clients.

A. Observations:

Almost all persons interviewed for this audit reported that public defense attorneys have offices for confidential meetings. All reported that staff and contract attorneys have postal addresses and telephone services. Two jurisdictions reported that a small number of attorneys lacked offices, but the counties provide private meeting space that the attorneys may use. Even in some rural areas where attorneys work only part time, some contracts require maintaining local “office hours” so that clients need not travel long distances to meet their attorneys.¹⁰ In an increasing number of locations, contract public defense attorneys use “virtual offices” – shared office space that is rented on an hourly or daily basis.

Each year OPD trial-level managers conduct site visits to many municipal and county courts. Most courts provide conference rooms for private meetings between attorneys and clients, but many do not. For example, historic county courthouses often lack conference rooms, and most municipal courts use city council chambers which lack such amenities. OPD managers have overheard countless confidential conversations between attorneys and clients in various open settings - hallways, the back of courtrooms, and at counsel table in front of spectators. However, some jurisdictions have invested in the construction of confidential meeting rooms for defense counsel, such as the Cities of Sunnyside, Bremerton, and Selah. The City of Tukwila used Chapter 10.101 RCW grant funds to purchase portable sound-absorbing partitions to create make-shift office space for public defense counsel on court days.

⁹ Rules of Professional Conduct 1.6.

¹⁰ For example, the contract for public defense services in Ferry County states, “If the Attorney does not have an office in Ferry County, Attorney shall hold office hours at least one day a week at a centrally-located fixed location that is generally accessible to the public and which accommodates confidential meetings with clients.”

B. Recommendation:

- Encourage trial courts to assess and provide confidential meeting space for attorneys and clients.

Appendix A – Proposed Revisions to Certification Form

| | |
|---|---|
| <input type="checkbox"/> Superior Court <input type="checkbox"/> Juvenile Department <input type="checkbox"/> District Court <input type="checkbox"/> Municipal court For <input type="checkbox"/> City of <input type="checkbox"/> County of _____, State of Washington CERTIFICATION BY: [NAME], [WSBA#] FOR THE: [1 ST , 2 ND , 3 RD , 4 TH] CALENDAR QUARTER OF [YEAR] | <input type="checkbox"/> No.: _____ <input type="checkbox"/> Administrative Filing CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CRR 3.1 / CRRLJ 3.1 / JuCR 9.2 |
|---|---|

The undersigned attorney hereby certifies:

1. My current public defense caseload is comprised of the following:
 - a. Approximately ____% of my total practice time is devoted to indigent defense cases in this court.
 - b. I am appointed by courts in other jurisdictions to provide public defense representation. My practice time in each is approximately as follows: ___ Not Applicable

| | |
|--------------|----------------------------|
| Court: _____ | % of total practice: _____ |
| Court: _____ | % of total practice: _____ |
| Court: _____ | % of total practice: _____ |

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that :
 - a. **Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1. I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case.
 - b. **Office:** I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.
 - c. **Investigators:** I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.
 - d. **Caseload:** I will comply with Standard 3.2 during representation of the defendant in my cases. I will not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.

 Signature, WSBA#

 Date