

**Advisory Notice by the WSBA Council on Public Defense**  
**Response to the Emergency Caused by Pandemic Driven Increased**  
**Public Defender Caseloads**

**Public defenders struggle to represent their clients** because of a **combination of a** surge of newly filed cases, unresolved cases open for longer than average, backlogs of trials, and a push to re-open jury trials has resulted in overwhelming public defenders. Many lawyers have felony caseloads of over 100 open felonies.

**Counties and Cities must provide public defense resources to address increased workloads and should address the backlog as a systemic issue.**

Recommendations include:

- Using the newly available federal funds to increase defender resources.
- Meeting with public defense providers to reconsider the number of cases assigned to ensure adequate time to work on each case during this emergency.
- Working with courts, defenders, and prosecutors to consider creative alternatives.
- Comparing the open, unresolved case numbers with pre-pandemic caseloads.
- Respecting the defenders’ assessment of their workloads and the resources they need to have adequate time for each client.

**Public defender caseloads continue to increase as cases take longer to resolve.**

Felony case resolutions in 2020 were 28% less than in 2019. Simultaneously, many prosecutors chose to “hold” cases until the pandemic eased and are now filing them.<sup>1</sup> One county prosecutor had more than 700 cases holding to file.

| <b>County</b>  | <b>Felony resolutions</b> | <b>Felony Filings</b> |
|----------------|---------------------------|-----------------------|
| <b>Benton</b>  | Decreased 31%             | Decreased 4%          |
| <b>Cowlitz</b> | Decreased 51%             | Decreased 10%         |
| <b>King</b>    | Decreased 29%             | Decreased 11%         |
| <b>Whatcom</b> | Decreased 34%             | Increased 4%          |

Courts suspended jury trials and deferred hearings. In many jurisdictions, many cases remain unresolved. This delay has increased workloads for defenders who struggle to represent new clients and meet their obligations for existing clients.

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<sup>1</sup> Administrative Office of the Courts and King County Felony Filing and Case Resolution data



A recent survey by the Office of Public Defense documented the strain defenders across the state are experiencing. The report stated: “The COVID-related backlog of criminal and juvenile cases in the courts uniquely impacts defense attorneys.”<sup>2</sup>

Highlights include:

- 90% of the attorneys reported interviews and trials are more difficult.
- 69% spend more time per case during the pandemic.
- 90% report witness interviews and trial preparation are more difficult.
- 65% have seen their pending caseloads increase.
- 58% of respondents with felony caseloads have a higher percentage of serious or violent cases.

Survey responses included the following:

- “The volume of cases means less time for all of my clients. I find too that clients need more attention and contact during this time.”
- “We cannot resolve cases in a fair and efficient manner.”
- “The court flooded our dockets with the backlog of arraignments and pre-trials, which meant we were required to provide attorney coverage every day which left us little time to do other work such as research, or client meetings.”
- “Prosecutors keep filing non-violent cases and judges continue issuing warrants. Both actions make the case backlog worse, burden public defense, and increase the number of people in our courthouses and jails. Prosecutors need to take the lead in reducing cases in the system and being very bold about resolving the ones in the system.”

**Public defenders must comply with their ethical obligations to provide diligent representation.**<sup>3</sup> If a lawyer has an excessive workload, “the lawyer should not accept new clients.” Washington’s Standards require the same. Public defense attorneys should not accept “workloads that, by reason of their excessive size, interfere with the rendering of quality representation.”<sup>4</sup>

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<sup>2</sup> Defending Clients in the COVID-19 Environment: Survey Results from Private and Public Defense Counsel, Washington State Office of Public Defense; [https://www.opd.wa.gov/documents/00847-2021\\_DefendingClients.pdf](https://www.opd.wa.gov/documents/00847-2021_DefendingClients.pdf)

<sup>3</sup> Formal Opinion 06-441 *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation*, American Bar Association Standing Committee on Ethics and Professional Responsibility [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ethics\\_opinion\\_defender\\_caseloads\\_06\\_441.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf)

<sup>4</sup> Washington Supreme Court, Indigent Defense Standard 3.2 <https://www.opd.wa.gov/standards>

**The conditions the federal court condemned and led to financial liability for municipalities in *Wilbur v. City of Mount Vernon*<sup>5</sup> are happening again.** Defenders have not been able to meet confidentially with in-custody clients or to conduct investigations consistently. These conditions seriously undermine the ability of the defenders to give each client the time and effort necessary to ensure constitutionally adequate representation. As the Federal Court noted, “actual innocence could conceivably go unnoticed and unchampioned.”<sup>6</sup> Without additional resources, cities and counties could face tremendous financial liability because of the denial of effective representation to thousands of indigent clients.

**Local efforts to address excessive public defense workload may include these and other systemic approaches:**<sup>7</sup>

- Delay filing or diverting some cases to be resolved non-criminally.
- Reduce reliance on pre-trial incarceration.
- Reserve show cause and review hearings for the most serious allegations.
- Adjust case assignments.
- Increase public defense attorney and staff resources.

For public defense attorneys who are compensated per case or on a flat monthly fee, the contracted number of cases may exceed a reasonable workload because of a surge in cases and the backlog of pending cases. In that case, caseloads should be adjusted downward.

Local officials could review the Advisory Notice by WSBA Council on Public Defense on Implementation of the Standards for Indigent Defense During the Coronavirus Emergency.<sup>8</sup>

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<sup>5</sup> *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013).

<sup>6</sup> *Wilbur v. City of Mount Vernon and City of Burlington*, 989 F. Supp. 2d 1122, 1126 (2013)

<sup>7</sup> ABA Eight Guidelines of Public Defense Related to Excessive Workloads (2009).

[https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_eight\\_guidelines\\_of\\_public\\_defense.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.pdf).

<sup>8</sup> Available at [https://www.opd.wa.gov/documents/00804-2020\\_WSBAnotice.pdf](https://www.opd.wa.gov/documents/00804-2020_WSBAnotice.pdf).

**Advisory Notice by WSBA Council on Public Defense**

**Implementation of the Standards for Indigent Defense  
During the Coronavirus Emergency**

- **Coronavirus impact on public defense attorney workloads.**

COVID-19 and the restrictions imposed to limit exposure to the virus have dramatically altered how public defense attorneys can hold confidential meetings with clients, go to court safely, investigate, and prepare cases. Attorneys must ensure that their clients' due process rights are protected, but also must protect their clients, themselves, their staff, and their families from exposure to the novel Coronavirus.

As courts begin to resume hearings and trials, and as prosecutors start to file a backlog of cases, public defense attorneys face an increased volume of cases and an increased complexity in their work. For example, the public defense workload becomes more complicated when attorneys must utilize time-consuming telephone/video conferences for client meetings and court appearances, or when social distancing requirements hamper an attorney-client communication during in-person court activities.

These new conditions require courts and public defense attorneys to pay close attention to the Standards for Indigent Defense adopted by the Washington Supreme Court, which establish minimum requirements for public defense representation. *See* CrR 3.1 Stds, CrRLJ 3.1 Stds, and JuCR 9.2 Stds. Attorneys who represent persons in other assigned cases will also be impacted by the current crisis, including involuntary treatment commitment, 71.09 commitment, family defense, status cases, support enforcement, and appeals.

The purpose of this notice is to assist public defense agencies, contract and list appointed attorneys, courts, and local contracting authorities in interpreting and applying the Standards for Indigent Defense during the Coronavirus emergency and ongoing recovery efforts. Additional guidance can be found in the WSBA performance guidelines, WSBA Standards for Indigent Defense, Washington Defender Association Standards for Public Defense Services, and the pending involuntary treatment guidelines.



- **Applying the standards during the coronavirus emergency and recovery.**

The Standards for Indigent Defense identify numeric caseload limits and require that caseloads must be reduced to accommodate unusual circumstances or increased workload.

Consistent with obligations under these Standards, public defense agencies, courts, and contracting authorities, in consultation with public defense attorneys, should reconsider the number of cases assigned to ensure adequate time to work on each case during this emergency.

- **Reduced caseloads may be necessary to maintain compliance with the standards.**

**Standard 3.2** establishes that public defense attorneys may not accept cases beyond their ability to provide quality representation to all their clients.

The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, “quality representation” is intended to describe the minimum level of attention, care, and skill that Washington citizens would expect of their state’s criminal justice system.

**Standard 3.3** limits the number of cases lawyers can handle and recognizes that if there is a “surge” of cases beyond normal expectations or if the cases assigned become more complex, the caseload must be reduced. The standards state that:

Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort.

Caseload limits assume a reasonably even distribution of cases throughout the year.

Reasonably even distribution of cases throughout the year means that lawyers will not be assigned more than 1/12 of their annual maximum caseload in any given month. For felonies, this is 12 cases per month. For misdemeanors, it should be no more than 33 misdemeanor cases per month.

Standard 3.3 also requires that when the public defense workload becomes more difficult or time-consuming due to work circumstances, per-attorney caseloads should be reduced.

The increased complexity of practice in many areas will require lower caseload limits. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward offenses or case types that demand more investigation, legal research and writing, use of experts, use of social workers, or other expenditures of time and resources.

- **Attorneys should determine ability to handle caseload.**

Each attorney should evaluate and determine their capacity to provide quality representation to all clients within the typical numeric caseload limits. If an attorney determines that they are not able to provide quality representation within the typical caseload, they should be presumed to be correct, and the caseload should be adjusted.

In 2019, the Washington Supreme Court held that a lower court had abused its discretion when it sanctioned a public defender for seeking a time accommodation that the defender determined was necessary to comply with “his constitutional obligations and the Standards of Indigent Defense.” *State v. Graham*, 194 Wn.2d 965, 968, 454 P.3d 114 (2019). The Court credited the defender’s assessment of his own caseload and recognized that:

...where counsel needs an extension of time to fulfill his obligations of representation, it is appropriate to grant an extension without the imposition of sanctions. Recent cases have highlighted the constitutional importance of maintaining proper caseloads in indigent defense cases. *See, e.g., Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013); *State v. A.N.J.*, 168 Wn.2d 91, 102, 225 P.3d 956 (2010).

*Graham*, 194 Wn.2d at 970.

The Court emphasized the importance of adhering to the Standards:

The Standards for Indigent Defense provide that the caseload of public defenders must allow each lawyer to give each client the time and effort necessary to ensure effective representation.

*Graham*, 194 Wn.2d at 969.

Options to address increased workload may include adjusting case assignments, increasing resources including additional public defenders and staff, as well as other systemic approaches, as presented in the appendix.

Some attorney contracts pay based on each case assigned or pay a flat monthly fee for a specific number of cases. In these situations, as courts resume hearings and trials, the contracted number of cases may exceed a reasonable workload because of a surge in cases and the backlog of pending cases. Defenders are also less able to resolve cases, complete investigations, and meet with clients in the way they would have before the coronavirus crisis. If the workload required to provide quality representation increases, because of delays and barriers in investigating cases and meeting with clients, the caseload should be adjusted downward. Basic contract principles require that when circumstances change significantly, the parties should be open to renegotiation and amendment of contracts. Public defense providers should accept fewer cases or be compensated additionally to hire more staff. Additional resources for public defender services may also be necessary to re-open courts for trial and disposition hearings.

- **Coronavirus funding and resources should be directed to public defense.**

Many local governments are receiving significant emergency funding from federal and state Coronavirus mitigation sources. These emergency resources can and should be used to support public defense services.

For example, CARES Act funding may be used to increase the number of public defense attorneys and staff to address surging workloads, as well as to provide personal protective equipment for public defense attorneys, staff, and clients. Emergency funding may also be used to provide new technology to public defense attorneys, their clients, and jails to facilitate effective participation in court-conducted hearings, permit confidential attorney-client communications and to allow for timely electronic filing of pleadings.

- **Appendix One**

In considering how to address the emergency, the American Bar Association's *Eight Guidelines of Public Defense Related to Excessive Workloads* (2009) should guide public defense providers, local governments, and the courts.

**Possible systemic options to address coronavirus impacts on public defense workload.**

- Contract with additional attorneys to spread out new case assignments more equitably.
- Charge low level, non-violent adult felony offenses as gross misdemeanors.
- Charge low level, non-violent misdemeanor and gross misdemeanor offenses as infractions.
- Increase the use of pre-filing diversion for adult criminal and juvenile offender cases.
- Enhance prosecutorial review of cases filed by law enforcement officers, to minimize the number of cases that might otherwise result in early dismissal.
- Continue to minimize the number of in-custody defendants.
- Reduce status hearings for pre-trial and compliance hearings.
- Allow counsel to waive their client's appearances for non-essential hearings.
- Expand diversion alternatives.
- Reduce the issuance of warrants for failures to appear and allow defendants and youth to appear for hearings remotely.
- Reserve show cause and probation review hearings for the most serious allegations.
- Encourage courts to accept ex-parte orders with electronic signatures in all non-testimonial matters.
- Request that courts that have not initiated remote hearings begin doing so to reduce backlog.
- Consult with the Washington State Office of Public Defense or experienced practitioners in how to implement the Standards.