

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.