AWC
ASSOCIATION OF WASHINGTON CITIES
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VIA REGULAR U.S. MAIL AND ELECTRONIC MAIL: supreme@courts.wa.gov

Washington Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Re: Indigent Defense Standards

Dear Chief Justice González, Rules Committee Chair Justice Yu, and Justices of the Supreme Court:

On behalf of the Association of Washington Cities (AWC) and the 281 cities and towns in the State of Washington, thank you for the opportunity to comment on the proposed changes to the Court's adopted standards for public defense.

As an active member of the Washington State Bar who began her own legal career as a public defender, I have a deep appreciation, and a deep respect, for the important and challenging work that public defenders do. Everyone accused of a crime or otherwise facing a loss of liberty has a right to timely access to competent counsel and effective legal representation.

While well intentioned, the proposed amendments would exacerbate rather than ameliorate the challenges being faced by our municipal criminal justice system today. We therefore urge the Court to work with us to address the real-world issues of our criminal justice system and to partner with us to develop real, sustainable, holistic solutions to the challenges that face us.

Washington state faces significant attorney workforce challenges, especially in rural communities, and the proposed amendments would exacerbate these challenges

We are facing both a national and statewide shortage of public defenders. If the Court were to adopt the standards as proposed, local jurisdictions will have approximately 30 months to triple the number of attorneys representing indigent defendants. This functionally amounts to hiring roughly 100 attorneys statewide every month for 30 months. This is double the number of graduates from all three Washington state law schools annually. Simply put, training and onboarding this many attorneys in the proposed time frame is an impossible task.

The workforce challenges in Washington are not shared equally across the state. There is a particular shortage of attorneys outside the greater Puget Sound area.

We urge the Court to carefully review the individual letters submitted by cities all across Washington who are already struggling to retain enough attorneys to handle cases under existing caseload standards.

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These challenges are not unique to public defenders. Indeed, many communities, especially rural communities, are struggling to find enough attorneys to practice as prosecutors as well. In many cases, there are fewer attorneys practicing in an entire county than the number of attorneys that would be needed to take on these proposed caseloads. It should also be noted that these recruiting challenges are being felt not just in rural areas, but also in some of our largest cities, like Yakima, and Vancouver.

Cities support a concerted effort to increase the workforce pipeline for public defenders, prosecutors, and other key court staff. We took a step forward earlier this year with the passage of Senate Bill 5780, which has a goal of encouraging law students to enter public defense practice and prosecution, and to remove barriers to practice in underserved areas including rural areas of the state.

This is a laudable effort and a good first step, but it will take time to produce results. If the standards are adopted as proposed, we will not have time. Instead, local jurisdictions would have approximately 30 months to triple the number of defense attorneys.

The challenges these communities are facing in recruiting public defenders are not caused by the current caseload standards, and they will not be solved by reduced caseload standards. Indeed, in some cases the issues facing cities will be exacerbated by decreasing caseload standards. For example, many jurisdictions have found that the firm(s) they have retained to handle indigent defense are highly capable and well able to handle the cases assigned to them. Their challenges come instead from finding counsel to handle conflict cases. If defense counsel are required to take only one-third of their existing caseloads, this will require an influx of new attorneys that do not currently exist. This will result in the paradoxical result of having defendants represented by less experienced counsel rather than the current highly capable attorneys. This is not the right result for cities, or for defendants accused of crimes.
Cities support interventions to increase the number of attorneys going into the field, but this will take time, money, and a concerted effort of working together to address our current workforce shortage.

The Court should conduct a Washington state specific study to hone in on the challenges facing public defenders in Washington, and convene leaders to address those challenges

The proposed changes to the state's Standards for Indigent Defense are predicated on a July 2023 national study completed by the RAND organization. In September 2023, this Court asked the Washington State Bar Association (WSBA) to review that study and make recommendations and in March 2024, the Bar adopted new WSBA standards relating to indigent defense as proposed by the WSBA Council on Public Defense. The WSBA forwarded the standards to the Washington Supreme Court for consideration.

As the WSBA Council on Public Defense noted at their November 3, 2023 meeting, the WSBA Council on Public Defense "is an insular group and additional outreach is needed with practitioners and administrators to verify." While it has been suggested that the Council had a robust stakeholder process, the Council did not do any outreach with municipal representatives in its rush to make a recommendation. This represents a significant gap in any efforts to develop a proposal that takes into account the true complexities of indigent defense and our criminal justice system.

This study did not look at how Washington cases are handled, at our current case load standards, or any other Washington-specific data. There was no input from municipal public defenders or other representatives at the municipal level.

Furthermore, the RAND report itself says that the results of the study are "primarily applicable to locations or for purposes where jurisdictionally focused workload standards have not already been produced." Washington state currently has caseload standards in place. The report continues to state that, "the most accurate weighted caseload model is developed specifically for an individual state or jurisdiction." Further, the study's authors state that its recommendations should be considered for those jurisdictions "where a state or locally focused study is not feasible at this time." There has been no showing before the Court that a state study cannot or should not be done in Washington.

In response to the study, two states (Colorado and Maryland) have called for local, rigorous study and analysis. According to state municipal league directors and inquiries to colleagues at the National Center for State Courts, no other state has adopted or is considering adopting the RAND study recommendations without conducting their own state analysis. Washington can, and should, proceed along the same route with a neutral researcher. These issues are too important to rush in haste to a solution.

The need for a Washington state-specific study is particularly pronounced when it comes to misdemeanor cases. As the RAND study notes, "interstate differences in criminal defense practice at the most serious felony levels are far less pronounced than what takes place in misdemeanor courts." For example, in some states discovery is limited in misdemeanor cases, which could require extensive independent investigation in those states. None of the attorneys who participated in the RAND study were experienced in handling misdemeanor cases in Washington.

A Washington-specific study can and should look at why some attorneys report struggling with workloads in some counties, and not in others (based on the testimony before the Court at the September 25, 2024, and in written testimony provided to the Court). It is notable that the bulk of the written and oral testimony in support of the proposed amendments to the standards came from King County, where the majority of attorneys practicing in Washington state are based. This suggests that the challenges facing these attorneys may be due to far different factors than those found in more rural communities. As noted in testimony at the Court's September 25, 2024 hearing on this topic by Larry Jefferson, Executive Director of the Washington State Office of Public Defense, criminal law practice differs significantly between different jurisdictions in Washington state. It also suggests, as noted by Mr. Jefferson at that hearing, that "no one size fits all rule should apply."

The Washington State Office of Public Defense (OPD) has acknowledged that such a study should be done, and in 2024 requested funding for an independent evaluation of county and city public defense. In that request, OPD noted that "Washington lacks a comprehensive evaluation of current local public defense services, and lacks a plan for how the state can most effectively channel resources to support constitutionally effective representation in trial courts statewide."

The Court can and must consider the fiscal and practical implications of enacting changes to the standards for indigent defense

It is eminently appropriate for the Court to consider the fiscal and practical impacts of this proposed rule change. This is not a case pending before the Court wherein an individual is alleging that their constitutional rights have been violated. Rather, the Court is acting in its rule making capacity, where the Court's role is to promote justice by ensuring a fair and expeditious process. In promulgating rules under GR 9, the Court seeks to ensure that adoption and amendment of rules proceed in an orderly and uniform manner, and that the proposed rules are necessary statewide.

In this case, these considerations argue against enactment of the proposed changes. While some advocates have submitted heart wrenching testimony about their challenges in handling the cases assigned to them, many other public defenders from jurisdictions across the state have urged the Court to reject the proposed changes, explaining how this proposed rule change would negatively impact their practice. Moreover, enacting these changes would have a negative impact on the criminal justice system as a whole.

The criminal justice system requires coordination and functioning of all moving parts, including prosecutors, defense attorneys, judges, court administrators and staff, victims' advocates, investigators, social workers, and even external resources like substance use and behavioral health treatment providers. It also requires coordination with the other branches of government to ensure that the system is adequately funded.

Identifying the challenges facing public defenders across Washington state is a first step. Looking at how proposed changes would affect other aspects of the criminal justice system is a necessary next step. Addressing all of those issues in a holistic manner is where we should be heading. None of these goals will be served by enacting these changes as proposed.

Those jurisdictions where the changes would be beneficial are able to enact changes to their caseload standards now, without a statewide rule change.[1]

Cities do not have sufficient funding to triple the number of public defenders

Based on initial estimates, implementation of the recommended revisions to the Standards for Indigent Defense would cost upwards of a **billion** dollars to implement in Washington state, and could cost cities upwards of $400 million dollars annually.[2] Cities cannot afford this cost, and do not have the tools to raise the needed revenue.

Cities pay public defense costs out of their general fund budgets. Funding sources for a city's general fund are statutorily and constitutionally limited, in addition to being constrained by residents' ability and willingness to pay. The State currently funds only a small fraction of public defense costs (less than 3%). Given the current state budgetary forecasts, this is unlikely to change in the near future. Washington state ranks at or near the bottom for state funding of public defense, with the costs being borne by counties and cities, who are least able to afford this additional cost.

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[1] See, e.g., Agreement Between King County And Service Employees International Union, Local 925, Department of Public Defense. "DPD will maintain caseload standards that, in the judgment of DPD, conform to applicable standards and requirements." Further, "The caseload restrictions provided for herein do not preclude employees from requesting relief from caseloads which, even though they are assigned in conformance with these restrictions, are, in the opinion of the employee, excessive. The supervisor will meet with the employee who requests relief in order to review the employee's caseload assignment, to consider any circumstances brought to their attention by the employee, and to attempt to resolve the problem."

[2] In his September 25, 2024 testimony before the Court, Executive Director of OPD Larry Jefferson noted that OPD would be making an "historic" budget request to the legislature of $143 million dollars. This request is appreciated, and needed. But it pales in comparison to the estimated need for additional state funding should this proposal be adopted.

The right to indigent defense is guaranteed by the state constitution, and its cost should be borne by the state. Until and unless it is, we will not be getting at the root of these challenges.

Cities in Washington are leading the nation in terms of upstream interventions and reforms to ensure that we are addressing root causes of crime. From therapeutic courts to diversion programs, to alternative response models, to hiring social workers and mental health professionals, we are moving in a positive direction.

These programs and innovations are happening at the local level, but they take time, and they take funding. There is a very real possibility that cities would be forced to abandon promising new programs if confronted with tripling their public defense costs, particularly if required to do so in such a short window.

These proposed standards come at a time when cities are already facing extraordinary challenges in the criminal justice system. Post-*Blake*, a large number of cases that had previously been the responsibility of counties have shifted to the purview of municipal prosecution. Funding has not followed this shift in caseloads. If these new standards are adopted and counties are forced to reduce by 70% the caseloads for public defenders, we can be sure that one of the ways they will handle this is by charging fewer crimes as felonies. The impact of this will be yet another increase in misdemeanors, adding further strain to cities. At the same time, we are still getting through the caseload backups from Covid shutdowns, and are reeling from the fentanyl crisis, and other significant behavioral health needs in our communities. This a perfect storm heading straight for cities. Without significant additional state funding, the options for cities are a Sophie's Choice. Do we cut promising programs? Do we decline to prosecute cases, ignoring the wishes of our residents, and the rights of victims? These are not tenable options. But they are our reality if we have this significant additional expense added to our already overloaded plate.

Not charging cases is not a tenable option

At the September 25, 2024 hearing, some individuals who testified suggested that the solution to funding decreased caseloads for public defenders would be to charge fewer crimes, and implied that cases were being overcharged currently. This implication is not grounded in fact.

The State of Washington has the lowest number of officers per capita of any state in the country, an ignominious distinction that we have held for over a decade. Washington state has 1.29 officers per 1,000 people. The national average is 2.33 officers per capita. And our numbers have been decreasing. Washington currently has the fewest commissioned law enforcement officers per thousand residents since the state began tracking this data in 1980. Just to meet the average, Washington needs to hire 8,000 officers, an increase of over 80%. Because of this, both candidates for Washington state governor have proposed substantially increasing funding (by up to $100 million) for local government to hire additional law enforcement personnel.

This is consistent with the demand we see from the public. According to recent polling, crime is the top issue for residents across the state. This is a concern in both small and large communities. In Seattle, as in the rest of the state, public safety has risen to the list of top concerns for voters, and 53% of voters say the city needs to do more on public safety.

As I have traveled across the state this fall, the impact of this proposed rule is one of the biggest concerns I have heard from mayors, councilmembers, and city managers from cities and towns of all

sizes. The public expects them to uphold their oath of office, and to support the Constitution of the United States and the Constitution and laws of the State of Washington, and all local ordinances. City officials are responsible for ensuring the safety of their communities and their residents, and ensuring that laws within their jurisdiction are enforced.

The Court should exempt misdemeanor and gross misdemeanor cases from any rule change

As noted above, the RAND study was particularly lacking when it comes to misdemeanor cases. There was no input from municipal public defenders or other representatives at the municipal level. Additionally, the bulk of the oral testimony and written comments to this Court in support of this rule change have related to felony cases, not misdemeanors. There has been no case made that a rule change is necessary or even advisable for misdemeanor cases in Washington. If the court is inclined to adopt the new caseload standards for felonies, we would urge you to pause on adopting new misdemeanor standards both to take the time to do a Washington-specific look at appropriate caseload standards for misdemeanors, as well as to consider the cascading impact on cities of enacting these caseload standards at the felony level.

The Court should approve those portions of the proposed recommendations that are feasible and achievable within current revenue and workforce limits, and which will improve public defense

The proposed caseload limits have been the focus of much of the attention related to the WSBA's recommendations, however, some components of the proposed revisions are feasible and would strengthen Washington's public defense services. For example, cities support the training and qualification requirements for misdemeanor public defenders. While the staff ratios envisioned in the proposed standards may not be workable everywhere, we support the idea of providing adequate social workers, investigators, and support staff for attorneys. Cities have had conversations with OPD about possibly having a statewide network of social workers, for example, to provide support in rural and underserved areas. These types of reforms are positive steps forward but may not happen if the rigid requirements of the proposed revisions are adopted.

If the Court adopts new caseload standards for attorneys, the timeline must be extended significantly

Even within the public defense world, the community is split on the need for new standards and the timing of enacting new standards (if any are enacted). As the Court heard at its September 25, 2024 hearing, public defenders from many areas of the state have urged this Court **not** to enact the new standards. Larry Jefferson, Executive Director of the Washington State Office of Public Defense, testified at the September 25 hearing that a three-year time frame was not achievable, and instead argued for a 10% annual reduction in caseloads. At their February 22, 2024 meeting, the WSBA Council on Public Defense split on the appropriate timeline for adoption of new caseload standards, with nine members voting for the three year proposed implementation period before the Court today, and eight members voting to extend the implementation period to five years.

We urge the Court to not enact amendments to indigent defense standards without a Washington-specific study, and robust process to ensure that all key stakeholders in the criminal justice system are involved in crafting practical solutions to the present challenges. If the Court does move forward with action prior to taking those necessary steps, it should at a minimum change the timeline for implementation to ensure that such a process can take place and that the intent of the rule can be effectuated.

In summation, we urge the Court to work with us on ways to truly resolve these challenges, rather than adopting a course that is unaffordable given the budgetary realities of cities, unworkable given our current workforce challenges, and likely to add to the criminal justice challenges faced by cities.

Let's not set ourselves up for failure. Let's work to tackle these challenges – together. Creating sustainable, meaningful change will require bringing together communities. It will require us to bring to the table not just public defenders, but also prosecutors, judges, crime victims, and funders including cities, counties, and the state. As cities, we stand ready and willing to work toward a system that respects and upholds the constitutional rights of defendants, but also serves the needs of crime victims and our communities as a whole.

In so doing we can work to rebuild trust with the public, and ensure that our residents have faith in our courts and our criminal justice system. I look forward to partnering with you in this important effort.

Best,

Deanna Dawson
Chief Executive Officer