



October 2, 2023

King County Council
Law, Justice, Health and Human Services Committee

Re: Class A Public Defense Attorney Attrition Crisis

Dear Committee Members:

I appreciate your providing an opportunity to review the issue of public defense attorney attrition and the new National Public Defense Workload Study.¹

There is a real crisis in attrition of experienced defender attorneys driven by extremely difficult workloads. The new national study underscores the need to reduce defender workloads.

I have the perspective of having nearly 50 years' experience in Public Defense. I worked at The Defender Association for 33 years, 28 as Director. For the past 16 years I have been at Seattle University School of Law, where I direct a small project called The Defender Initiative. I have participated in assessments of defender services in Oregon, Utah, Idaho, Nevada, Louisiana, Mississippi, Illinois, D.C., and New Hampshire. I have been an expert witness in cases in New York, California, Louisiana, Florida, and Washington.

King County can be proud of the progress it has made in improving public defense since The Defender Association was founded as the first defender office in 1969. As early as 1979, a national study — Criminal Violence, Criminal Justice — referred to Seattle as setting the standard for criminal defense, noting the use of investigators, social workers, an appeals section, and senior lawyers to consult on difficult questions of law or strategy.

The Defender Association was recognized in a 2003 law review article with the Public Defender Service of the District of Columbia for its innovative and client-centered representation.

¹ Pace, Nicholas M., Malia N. Brink, Cynthia G. Lee, and Stephen F. Hanlon, National Public Defense Workload Study. Santa Monica, CA: RAND Corporation, 2023.
https://www.rand.org/pubs/research_reports/RRA2559-1.html.

The Council has been instrumental in the gradual improvement of public defense, and both the City of Seattle and the County have supported for more than 30 years the implementation of defender caseload limits. King County and Seattle were among the first jurisdictions to set maximum caseloads for lawyers.

In 2012, the Washington Supreme Court passed a rule limiting caseloads, recognizing that complex cases should be weighted more heavily and result in a lower limit. Attorneys' experience should match the type of case they handle. King County has followed that, giving lawyers more case weight for complex cases.

But even with that recognition, the lawyers doing the most complex cases have too many. A lawyer with six open homicide cases also has more than 60 other cases. The new national study makes it clear that a defender should not be assigned more than eight murder cases a year with no other assignments.

The new study, released by the Rand Corporation, the American Bar Association, the National Center for State Courts, and Lawyer Steve Hanlon, took more than a year, informed by 17 other studies from around the country and included the analysis of 33 experienced defense attorneys. It found that a lawyer doing only low-level felonies could not effectively represent clients in more than about 47 felonies a year.

The practice of criminal law has changed dramatically in the 30 years since the King County Bar Association published its standards and in the 11 years since the Washington Supreme Court announced its court rule limiting cases. The national study emphasized what King County practitioners know—that the previous standards of 150 felonies per lawyer per year “reflect a criminal justice system that no longer exists and professional responsibilities that have since been greatly expanded.”

The current caseload limits were based on National Advisory Commission standards that are 50 years old. The practice has changed dramatically, and defenders now must understand a variety of technology and forensic evidence that did not exist when the standards were developed. They must digest terabytes of digital data and review hours of police video camera footage. There have been significant developments in scientific evidence, including shaken baby syndrome and fetal alcohol syndrome, brain science, and the psychology of false confessions.

The new Study identified these changes as well as the need to review “cell phone data, and social media data; the increasing use of forensic evidence; and the expanding scope of a criminal defense lawyer’s obligations, such as advising clients on the collateral consequences that attend criminal convictions.”

Sentences have become longer, and as less serious cases have become diverted out of the criminal legal system into alternatives, caseloads are more difficult because the percentage of complex cases has increased.

Workload issues are leading to litigation. The Oregon Supreme Court heard argument September 19, 2023, on a writ of mandamus on the questions of whether defenders may withdraw when their caseload is excessive and whether cases should be dismissed if adequate counsel cannot be timely appointed.²

Even though King County defenders have caseloads lower than the court rule limits, given the changes in practice since the court rule was adopted, they struggle to provide effective representation to all their clients.

In a recent Seattle Times op-ed, Department of Public Defense Director Anita Khandelwal and King County Councilmember Girmay Zahilay described the King County defenders' caseloads as unsustainable. They wrote, "These caseloads grow even worse daily as experienced defenders qualified to handle the most serious cases quit, leaving a smaller and smaller number of attorneys to handle those most serious cases."³

They added: "The situation for the shrinking number of attorneys qualified to handle the most serious offenses, such as murder or other crimes that carry a life sentence, has become even more dire."

The Washington State Bar Council on Public Defense (CPD) Standards Committee has been reviewing the study and how to apply it to the Washington practice. I expect that the CPD will recommend to the Supreme Court a three-year plan to implement dramatically lower caseload limits.

In August, the American Bar Association published revised Ten Principles of a Public Defense Delivery System.⁴ The Principles state: "Workloads should never be so large as to interfere with the rendering of quality representation or to lead to the breach of ethical obligations."

Citing the new national study in a footnote, the Principles state that national workload standards should never be exceeded.

There are two ways to provide relief to the current situation. The caseload limits need to be reduced, particularly for the lawyers doing the most complex cases. And we need to invest in

² [Public Defender of Marion County, Inc. v. Izell Guajardo-McClinton](https://www.courts.oregon.gov/courts/appellate/go/Pages/sc-calendar.aspx), calendar at <https://www.courts.oregon.gov/courts/appellate/go/Pages/sc-calendar.aspx>.

³ "Our public defender system is at the breaking point", Seattle Times, August 15, 2023, available at <https://www.seattletimes.com/opinion/our-public-defender-system-is-at-the-breaking-point/>.

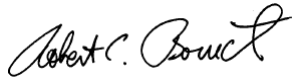
⁴ ABA Ten Principles of a Public Defense Delivery System, August 2023, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-603-public-def-principles-2023.pdf.

more diversion programs and in housing, education, mental health, and substance abuse treatment so that there are fewer cases needing public defenders.

We need to work together to stop the erosion of public defense, which is critical to preserving the fairness and integrity of the criminal legal system.

Thank you for your consideration.

Sincerely,



Robert C. Boruchowitz
Professor from Practice