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Walking in Their Shoes

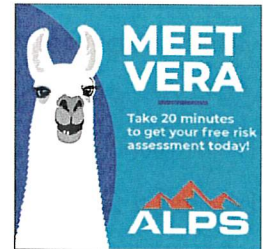
Life in the public defense machine amid newly recommended caseload standards



Illustration © Getty/Vasyi Cheipesh

BY COLIN RIGLEY

When the WSBA Board of Governors adopted new caseload standards for indigent defense services, as



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recommended by the Council on Public Defense (CPD),¹ it was a key step toward mending a collapsing public defense system in Washington, but it's no panacea.

On March 7, the CPD took its recommendations to the WSBA Board of Governors, which adopted them on a 12-1 vote. By Washington statute, the WSBA's standards serve as guidelines to cities and counties as they adopt their own standards for delivery of public defense services. Next up, the Washington Supreme Court will review for possible adoption corresponding changes to its own Standards for Indigent Defense, which require attorneys to certify compliance. The CPD developed these revised standards over more than two years of study, an effort that was recently boosted by a landmark national public defense workload study published in late 2023²—a study that prompted the court to officially ask the CPD to recommend changes to the current standards. Washington's recommended new standards drop the caseload limit for felony cases from 150 to 47 and for misdemeanor cases from 400 to 120. The new standards are recommended to be phased in beginning in 2025, with the maximum felony caseload recommended to drop to 110 and misdemeanor cases to 280, with full implementation scheduled for 2027.

In a WSBA news release, CPD Chair Jason Schwarz called the passage of new standards "a watershed moment for public defense in Washington."³ He further stated, "These changes will provide public defenders with workable caseloads that allow them to effectively represent the accused. ... They are critical for upholding our [c]onstitutional obligations to the

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accused and critical to assuring litigants have access to a fair trial.”

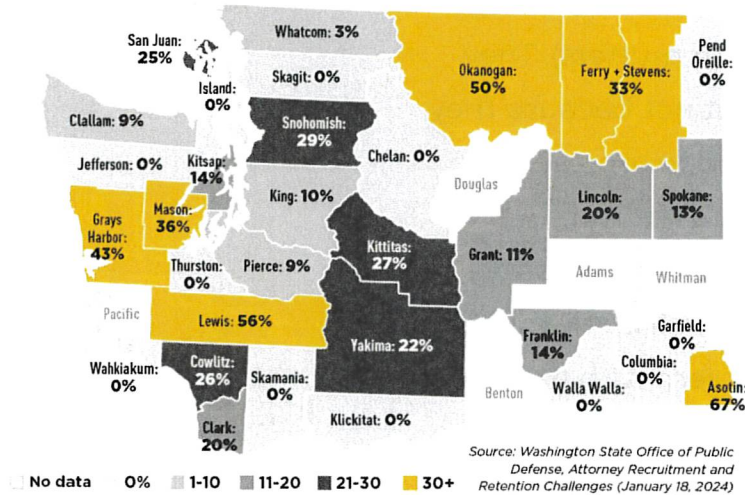
Yet, implementation presents a variety of challenges that vary from city to city, county to county. To do so will require more money, more attorneys, and more coordination across local public defense agencies that, as of now, remain largely siloed from each other. In a statement about the new standards, the Association of Washington Cities said “the proposed standards are not financially feasible for local governments. Regardless of whether a city contracts with their county or provides their own public defenders, the financial implications of the WSBA adopted standards are drastic and untenable.”⁴

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Public Defense Attorney Vacancy Rates

Combination of Agency Staff and Contractor Positions, Dec. 2023



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As the WSBA was just beginning to share information about the new standards, I was on the road to Eastern Washington to spend a couple days shadowing two public defenders. First, I tagged along with a long-time contract public defender who currently works in Kennewick, then with a full-time staff public defender who has been on the job for five years in Spokane. What I learned can be summarized neatly like this:

Policy changes already in the works and still to come are both welcomed and feared, and there's nothing about the state of public defense that can be summarized neatly.

THE GREAT HUMAN-PROCESSING CONTRAPTION

I'm standing in line waiting to pass through security at the Benton County District Court. It's a crisp Wednesday morning in Kennewick and a handful of people who are waiting in line alongside me are chatting to pass the time—trading notes and generally trying to make sense of a system that feels on the verge of collapse and that has abandoned them to a Sisyphean loop of weekly court appearances.

They sound confused, a little scared, and somewhat pissed ("Thanks, Inslee," one of them mutters). They also sound strangely optimistic, but not because they expect to have an attorney assigned to represent them and have their actual day in court. The scuttlebutt in line is that if they keep coming back every week, after 90 days their case will be dismissed for lack of representation. The problem with this belief is that it's probably wrong.

Later, when I share this with Shelley Ajax, a contract public defense attorney I'm following for the day, she scoffs. Public defense shortage or not, charges are still being filed and dismissals are rare, Ajax says. It's more likely that those people in line will keep coming back until someone is available to represent them, and others will wait in jail until then.

“People on the west side, what they’re not going to understand is our people don’t get out the next day,” Ajax says.

On this day, which is typical for this court, the morning docket is more of a human-processing machine that churns through defendants to get them filed into a system that’s still trying to catch up from the last batch. It feels like waiting in the DMV, except here there’s the very real possibility of incarceration.

A court staffer in Judge Dan Kathren’s courtroom asks members of the public who do not have an attorney to all sit on the left side of the room and, after a bit of shuffling and grumbling, more people make their way to the left side until it outnumbers the right by about four to one. A representative from the local Office of Public Defense—going by the acronym OPD, and not to be confused with the state OPD—makes her way row by row to get folks’ information and start processing them. Their names are called one by one. They approach a podium, things are read into the record, and Judge Kathren tells them to come back next week and, essentially, try again. It’s all punctuated by the whirring sound of a printer spitting out documents that tell them in writing to come back next week. It goes on like this, over and over: new defendant, new court date, the printer whirs back to life.

During a break I overhear a couple behind me saying, “They don’t care about us; we’re just another number out here.” From what I can see, the court does care, but it’s hard to argue with the latter point. Because weekly reappearances are so routine, the court can even serve as an unintentional welfare check. Judge

Kathren—who for most of the morning has been cheery and avuncular—notices that one defendant has for the first time missed a court appearance.

“She’s been coming every week, so I’m a little concerned about her,” he says in a way that sounds more familial than judicial. “I hope everything’s alright.”

Not long after, there’s tension surrounding one of the in-custody defendants who has been growing visibly frustrated with the mounting confusion until he erupts.

“I got kids,” he snaps. “I’m the provider out there. I need to figure out how to get back to my kids.”

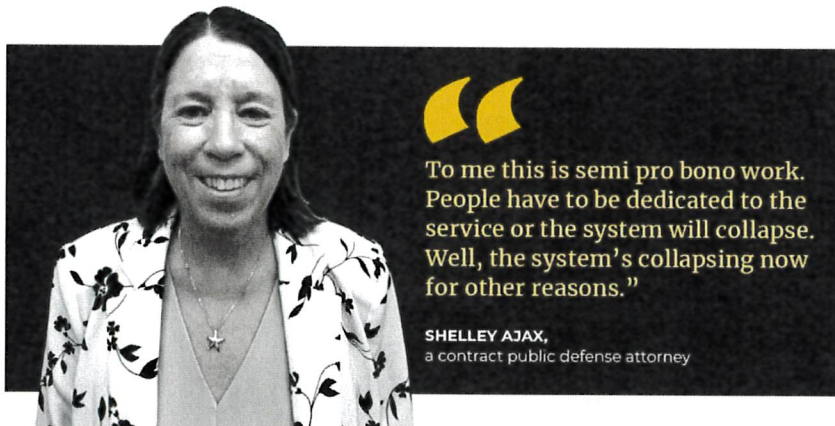
Ajax tells me she predicted long ago that things would unravel as they are now. That’s part of what led her to transfer from superior court to district court, where she believes the system is better equipped to handle the load, but still underequipped to address the full need. And now it’s why she’s considering leaving public defense altogether.

“To me this is semi pro bono work,” Ajax says. “People have to be dedicated to the service or the system will collapse. Well, the system’s collapsing now for other reasons.”

For example, in nearby Franklin County, Ajax had to go to court after the fact and argue why she should receive back pay in a prior case. In that instance, Ajax had reached the end of her contract in the middle of an active case, but she feared that withdrawing would be an ethical violation, as she would be leaving that client in a worse position because no other public

defender was available to step in. In the end, she was able to convince the court to retroactively compensate her for the work, which came to about \$35,000 for more than 90 hours of work—a number that doesn't account for the total hours she actually put in or the other resources she had to devote to the case.

"I just did what I was told and I'm just in the middle of the crossfire," Ajax tells me. "It's a disaster."



In Benton County, the backlog of unrepresented defendants is exacerbated by strict new local ordinances, as well as a steady flow of low-level offenses like property crime, driving violations, and drug charges, which haven't shown signs of slowing, according to Ajax and Heather Carlson, another contractor in Benton. Both share examples of relatively insignificant cases that have gone to trial, such as a stolen bowl of pho, or restitution orders that have been entered for as little as \$2. Meanwhile, Ajax says she has motions for mental health evaluations of clients who've been waiting for a year, and it's not uncommon for defendants to wait in jail for upward of 200 days.

"It's like rolling a snowball downhill," she says, meaning every case that gets jammed into the system

adds to the backlog.

Ajax and the 18 other contract public defenders (the Benton County OPD also employs four in-house attorneys and, according to Public Defense Manager Charlie Dow, expect to have two additional in-house hires by October) are paid on an hourly, per-case basis, the total of which is capped according to Washington's current caseload standards. A Benton County public defense contractor, for example, can still maintain a private practice and generate additional income, as long as their total caseload doesn't exceed the standard. Ajax and other attorneys I spoke with fear that reducing those caseloads will reduce their income, and their livelihoods will take a dramatic fall. Rural Washington is already struggling to recruit and retain enough attorneys to serve the local population, and some fear reduced caseloads and correspondingly lower public defender income will accelerate the bleeding and make it even harder to attract the attorneys needed for a real fix.

"If all the contractors leave the whole system collapses," Ajax says. "It's already collapsing, but if they leave then it's done."

MONEY PROBLEMS

Think of the crisis in public defense like a string of old holiday lights: if one light burns out, the whole string doesn't work. Likewise, to implement new indigent service caseload standards, more attorneys are needed to take on the extra work. More attorneys require more money, the sources of which have yet to be identified.

Between 2010 and 2022, expenditures on county-funded public defense increased by 90 percent statewide, from a total of \$104.5 million to \$198.7 million.⁵ Nearly all of the funding, however, has come out of county and city coffers. Over the same 12-year period, the state has paid for a small percentage of the total bill, an amount that has bounced between a high of \$6.18 million and a low of \$5.39 million.

This funding discrepancy was at the heart of a lawsuit the Washington State Association of Counties filed against the state, in which it claimed “The State has failed to give counties the resources or funding necessary to furnish constitutionally adequate trial court indigent defense services”⁶ On March 22, Thurston County Superior Court Judge Allyson Zipp dismissed the case.

In Olympia, several bills pertaining to indigent defense failed to gain traction in the state Legislature’s most recent session, notably SB 5773, which would have required the state to cover half the cost by 2028. The Legislature did, however, pass SB 5780,⁷ which creates a law student rural public defense program to encourage more law students to pursue public defense in rural Washington and help fill the gaps in places where the demand for public defense exceeds the supply of public defenders—and the gap is often wide.

In a survey of public defense staff and contract attorneys, in which 32 of 39 counties responded, the vacancy rate for public defense attorneys fluctuated from as little as zero percent to as much as 67 percent. Statewide, the vacancy rate is 14.63 percent, on average.⁸ That

average vacancy breaks down further, to 9.23 percent among staffed public defense agencies and far worse among public defense contractors where, on average, 25.04 percent of positions are unfilled. According to the survey, “[d]espite active recruitment attempts, there are simply fewer applicants for staff and contract positions, and even fewer attorneys who meet mandatory qualification requirements.”

When I asked state OPD Deputy Director for Government Relations Sophia Byrd McSherry about public defense funding and, significantly, how Washington can fund enough positions under reduced caseload maximums, she said: “That’s a crystal ball question because we haven’t been able to do all of the analysis to do all of it—to really study that.”

State OPD Deputy Director for Operations Katrin Johnson added that funding is one aspect, but there are other issues, such as parts of the state where police file charges with the court without prosecutors screening to check whether charges should be filed at all. “So a lot of charges get filed that shouldn’t.”

The administration of indigent defense can vary widely from place to place, depending on whether the jurisdiction has a staffed public defense agency, a pool of contract public defenders, or a mixture of both, as well as the many other factors that contribute to a growing backlog. The state OPD distributes state funds to local jurisdictions, but to date there hasn’t been a centralized process of collecting and analyzing the many data points that contribute to a functioning—or dysfunctional—indigent defense system.

“What I’ve always said and I continue to believe ... in many of our jurisdictions there is no structure for the

attorneys to work under,” Johnson said.

Although public defense accounts for a narrow slice of the legal profession, a lack of public defenders in backlogged courts creates further slowdowns across the board, in civil as well as criminal matters, according to a number of people I've spoken to for this and previous coverage of the crisis in public defense. Without an adequate supply of public defenders, Byrd McSherry said, “the court's dead in the water, they can't do their jobs.

“The longer it takes the more you are potentially losing evidence, losing witnesses, and I think there's a legitimate concern about the workload for the attorneys and their ability to provide quality due process.”

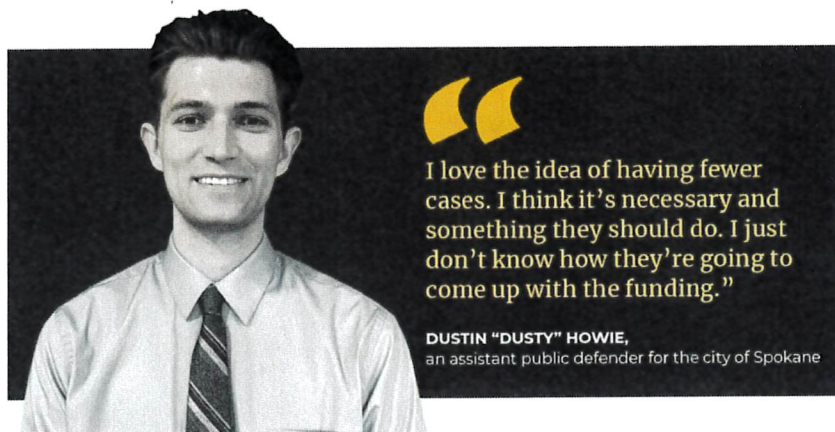
REGARDING FOOTWEAR

I'm in a small, mostly beige upstairs hearing room in Spokane when I find myself thinking way too much about footwear.

I've started to develop a quick hack to identify public defenders in the wild by paying attention to their shoes. At the table of attorneys in front of me, the prosecutors on one side are wearing the expected formal footwear, while the public defenders on the other side tend toward something that strikes a better balance toward comfort than strict formality.

It's about 1:30 p.m. and I've been shadowing Dustin “Dusty” Howie, an assistant public defender for the city of Spokane, for about five hours. More accurately, I've been power walking to keep up with Howie while he scurries between his office, courtrooms, and the

jail. Howie confirms to me that comfortable shoes are a must for this type of work and this type of pace. He used to wear a Fitbit step-counter, he says, but stopped because the notifications were getting out of hand “and I would always hit above 10,000.”



Howie spends much of his time on his feet. In court, he usually stands in the back, ready to confer with both newly assigned clients and existing ones. Otherwise, he operates in the hallways, his desk a strip of particle board bolted to the wall.

In a gray suit, with a brown leather bag slung over his shoulder, neatly trimmed goatee, and cushiony brown leather shoes, Howie is chatty, personable, and comes across with an almost suspiciously cheery attitude toward exhaustion that I usually associate with Ironman triathletes.

“Now, because I’ve got 40 minutes until next appearance, I’ve got time to prepare for first appearances,” Howie says as we’re sitting in his office in between the early morning docket in district court and the slightly later morning in-custody appearances.

His office—shared with his wife, Alex, who was first hired on a grant to handle *Blake* cases⁹ before coming in full-time—is a testament to a highly kinetic work life. What follows is a short list of items I spot on a bookshelf in their office:

- Files in manilla folders
- Files in spiral binders
- Packets of madras lentils
- Cheetos
- Cans of chili
- Cans of soda
- A dog leash and poop bags

In addition to parenting two young children, the couple parents foster dogs, some of whom get adopted by their coworkers. Today Honey and Lily are wandering from room to room in search of pets. Outside the office, Howie and Alex still have to squeeze work into the margins of home.

“It’s not uncommon that we come home and do work, and because we have kids it has to wait until they go to bed,” Howie says.

“It is a lot,” Alex continues. “Your days and afternoons are packed. I’m kind of relishing today because I don’t have court so I can actually get some stuff done.”

By noon Howie had appeared in municipal court, closed cases for two clients in district court, and represented about 10 first appearances. These first appearances also highlight stark differences between the life of a public defender and everyone else: The judge and prosecutor sit together in the hearing room, while Dustin appears over video from the jail. This setup creates a host of difficulties: Imagine the

frustrating video-audio experience of a Zoom call with a bad connection, while trying to provide legal representation to a shackled person whom you've likely never met, with a line behind you of other in-custody clients waiting for their turn. Today there are also technical issues with the court's internal network—Howie tells me the system is great when it's working, but court grinds to a halt when it's not. The bailiffs have also decided to bring in one client who's shirtless and shackled to a wheelchair, and they don't seem too concerned about taking him out of the room when he starts interrupting other people ahead of him by frequently and loudly saying things like "hurry up, bitch."

"Do you know what lunar phase we're in?" the judge says after sending away that client for being disruptive. "Feels like a full moon."

Not long ago, Howie would have been in the same room as the judge and prosecutor. Before becoming a public defender, he worked for the Office of the Spokane Prosecuting Attorney. He started there as an intern, got hired full-time, but jumped ship because, as he describes, "the public defenders came calling." Steven Clark, another local attorney I meet when he whispers in my ear about Howie, "he's wonderful; make him look good," took an opposite route. Clark started in public defense and stayed for about four years before shifting into private practice where the pay was better, the hours fewer, and the stress lower. Unlike almost any other practice area, public defense provides a new attorney with a wealth of real-world experience but, Clark says, "there's just so many cases, and every time you think you've gotten to zero they pile more on you."

Howie says he usually has between 80 and 100 cases on his plate. It's a lot, but he and Alex have found a balance, which is helped by working in the same office and being able to tag team and help each other out both at work and at home.

Although no one is going to get rich in public defense, in Spokane Howie has found a job that pays the bills and, because his office is represented by one of the city's largest unions, provides some perks almost unheard of in other public defense offices, such as consistent pay increases and even allowances for CLE courses. Some people in the office have been working there 10 or even 20 years. Spokane public defenders have such a good deal that they refer to the benefits as "golden handcuffs."

"Almost nobody else leaves," Howie says.

"I mean why would you? It's so good," Alex adds.

Howie works a hefty caseload, unsurprisingly, and his colleagues do a good job of sharing the load to ensure that the office can meet the substantial demand without burning out any one attorney. He and Alex also try to share their skills and knowledge where it's needed. Attorneys in the office have met with other offices in the state to provide education on such topics as the state toxicology lab, which has its own backlog of about 12 to 14 months, Howie says. In fact, following our interview, Howie and Alex are going to scoop up the kids and head to King County to give a presentation. Howie says he and other Spokane public defenders also share their resources as much as possible with other public defense contractors who don't have an office with support staff, for instance.

My day with Howie showed me a Spokane public defense system that appears highly functional, but operates at a blistering pace. If the public defense system in Kennewick is an assembly line, Spokane is speed dating. In just the afternoon, Howie confers with about a half-dozen clients, most of whom he meets in the hallways, leaning against those little wedge tables to handle everything from consoling a brother who says his non-English-speaking sister was badgered and threatened by police, to simple license suspensions, to a case that should've been a prosecutorial slam dunk but—in a move that even surprised Howie—got thrown out due to police misconduct. What I saw in Spokane differed greatly from the scene in Kennewick, but when I talk to Howie about the new caseload standards, I hear something similar. There are about 20 staff attorneys in Howie's office; to fit within lower caseload standards they would likely need two to three times that staffing level.

"I love the idea of having fewer cases," Howie says when we discuss this at the end of the day. "I think it's necessary and something they should do. I just don't know how they're going to come up with the funding."



ABOUT THE AUTHOR

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NOTES

1. The WSBA Council on Public Defense “unites representatives of the bar, private and public criminal defense attorneys, current and former prosecutors, the bench, elected officials and the public to address new and recurring challenges that impact the public defense system.” www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/council-public-defense.
2. Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee, and Stephen F. Hanlon, “National Public Defense Workload Study,” 2023, www.rand.org/pubs/research_reports/RRA2559-1.html.
3. “State Bar Adopts New Public Defense Standards,” WSBA media release, www.wsba.org/news-events/media-center/media-releases/state-bar-adopts-new-public-defense-standards.
4. “Council on Public Defense proposed revised standards for indigent defense and caseload limits,” Association of Washington Cities,

<https://wacities.org/advocacy/News/advocacy-news/2024/03/13/council-on-public-defense-proposed-revised-standards-for-indigent-defense-and-caseload-limits>.

5. Trial Court Public Defense Dashboard, Washington State Association of Counties, <https://wsac.org/trial-court-public-defense-dashboard/>.

6. Colin Rigley, "Confronting a Crisis," *Washington State Bar News*, February 2024, <https://wabarnews.org/2024/02/08/confronting-a-crisis/>.

7. <https://app.leg.wa.gov/billsummary?BillNumber=5780&Year=2023&Initiative=false>.

8. "Attorney Recruitment and Retention Challenges," Washington State Office of Public Defense, Jan. 18, 2024.

9. In 2021, the Washington Supreme Court in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521, struck down RCW 69.50.4013, the strict liability statute that made possession of a controlled substance a felony punishable by up to five years in prison. The Legislature later recategorized possession crimes as misdemeanors with mandatory diversion to services.

COVER STORY FEATURE PUBLIC DEFENDERS

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