

PUBLIC
DEFENSE
ADVISORY
BOARD
2020 Annual
Report

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KING COUNTY PUBLIC DEFENSE
ADVISORY BOARD

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INTRODUCTION

This report is prepared under KCC §2.60.031(H), which requires the Public Defense Advisory Board (Board) to issue an annual report on the “[S]tate of county public defense.” In preparation of this report, the Board has interviewed these members of the criminal legal system and of the Department of Public Defense (DPD):

- The Superior Court Criminal Presiding Judge and the Assistant Criminal Presiding Judge in Seattle
- The Superior Court Criminal Presiding judge at the RJC
- The Presiding judge in District Court
- The Presiding judge in Seattle Municipal Court
- The Presiding judge in Juvenile court
- The lead judge in Dependencies
- The lead judge in Drug Court
- The Involuntary Treatment Act judge
- The Prosecuting Attorney and the Chief Criminal Deputy
- The Managing Attorney from each of the four DPD divisions
- The Director, Deputy Director and the Chief Financial Officer
- A panel of DPD employees
- The Director of Choose 180, a DPD community partner
- Collective Justice NW, a DPD community partner

Because of the direction from the ordinance, the scope of this report is not limited only to the work of DPD. DPD is only a part of a larger system. To determine the state of public defense, it is necessary to also consider the other components of the system: the courts, the Prosecuting Attorney’s Office, the jails, and the community. Input received from institutional entities in the criminal legal system—and those most impacted by the CLS—will better illuminate the areas where public defense is supported and the areas that hinder it.

The past year has been remarkable because of the COVID-19 pandemic. The virus has only exacerbated the challenges facing public defenders in King County.

TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

The American Bar Association’s Ten Principles of a Public Defense Delivery System “were created as a practical guide for government officials, policymakers, and other parties” to use as “fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” King County adopted these principles in 2013 by “[e]nsuring that the American Bar Association Ten Principles for [sic] a Public Defense Delivery System ... guide the

management of the department and development of department standards for legal defense representation. ..." KCC §2.60.026 (4). The Board conducted interviews of judges, supervising attorneys, line attorneys, staff, and DPD leadership and make the following findings and recommendations.

Principle 1: The public defense function, including the selection, funding, and payment of defense counsel, is independent.

Board Comment: The Department functions independently of political and judicial supervision or interference. Overall management of the Department—including hiring of attorneys, interns, and staff and the development of departmental policies, procedures, and guidelines—is conducted by the Director or the Director’s designees. The Board is aware of no political or judicial interference in the day-to-day operations to either the departmental or divisional levels of the Department of Public Defense. Departmental duties under the King County Code include “fostering and promoting system improvements, efficiencies, access to justice and equity in the criminal justice system.” KCC §2.60.020(7). The code also reaffirms this obligation on the Director, whose duties include “[f]ostering and promoting system improvements, efficiencies, access to justice, and equity in the criminal justice system.” KCC §2.60.026(A)(8). Thus, both the Director and the Department as a whole are required to provide independent defense and to advocate for access to justice and equity within the criminal legal system. DPD has taken positions on criminal and juvenile policies, advocated for its budget, and made hiring decisions without interference by County officials. The onset of the COVID-19 pandemic in February of 2020 provided a test to the Department’s leadership. As of the writing of this Annual Report, over 500,000 individuals in the United States have died due to COVID-19, with almost 5,000 deaths in Washington State. Early in the pandemic, the King County courts were slow responding to the pandemic, with some courts clinging to continuing in-person hearings and summoning of large pools of defendants to court calendars. Interviewees unanimously agreed that Director Khandelwal aggressively advocated for the Department, attempting to mitigate the risk to the Department’s personnel who were regularly exposed to infected individuals, resulting in quarantines. Interviewees also report that the Director’s Office worked hard maintaining the quality of representation of the Department’s clients, continuing to hire and train new and existing attorneys and staff. The Board strongly approves of Director Khandelwal doing what an independent defender must do—protecting the ability DPD personnel to competently represent their clients even when doing so goes against the position of other County officials.

There is no evidence the Executive or Council took any budgetary or other action against DPD or the Director because of DPD taking public policy positions with which they disagree or advocating for the safety of Department attorneys and staff. The judges of King County, the attorneys and staff of the Department of Public Defense, and community partners agree that the DPD Director properly asserts independent policy positions.

Principle 2: Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

Board Comment: Principle 2 addresses the need for a coordinated plan for the active participation of the private bar where caseloads are sufficiently high, as is the case in King County, to require outside appointment of counsel. Public defense inevitably creates many conflicts of interest requiring assignment of cases to outside private counsel. The range of repetitive conflict problems requires an active and competent outside private counsel assignment panel. In 2016-17, DPD conducted a review and evaluation of all members of the panel. New attorneys were added to the panel and some attorneys, who did not meet the new criteria, were removed. At that time, DPD also began including outside counsel in training, supervising of caseloads, and setting standards for outside assigned counsel. That supervision, according to judicial comments, has substantially improved panel representation standards. The assigned counsel panel in King County handles cases when conflicts of interest prevent the divisions from representing the client or when DPD attorneys are at capacity and additional assignments would violate caseload standards. Comments from judges interviewed for this report suggest that the quality of representation by the assigned counsel panel is generally consistent with that provided by DPD staff attorneys and has improved.

In past Annual Reports, we found the County did not comply with Principle 2 because it failed to adequately fund the assigned counsel panel. The 2019- 2020 County budget provided for a much-needed and long-neglected increase in the rates paid to assigned counsel; however, as outlined in the Board's 2019 Budget Report, more must be done to attract and retain quality conflict counsel.

Principle 3: Clients are screened for eligibility and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

Board Comment: New procedures adopted in January 2017 added telephone financial screening to in-person screening of applicants for appointed counsel. This enhancement provided a more efficient, expedited process, but the extent to which it has shortened the time from arrest to assignment of counsel and to a face-to-face meeting between attorney and client has been greatly affected by the COVID-19 pandemic. Interviewees report that it is much more difficult for the DPD line attorneys to meet with their clients when they are restricted from face-to-face contact. All interviewees noted this concern. However, the judges interviewed unanimously felt that the DPD attorneys always seem to have found a way to talk to their clients, and they have received very few client complaints about communication with their counsel. The judges' comments indicate that DPD attorneys went to great lengths to mitigate the challenges presented by COVID-19

Principle 4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

Board Comment: Although the former, not-for-profit corporations that preceded the creation of the Department of Public of Defense had differing policies about face-to-face contact with clients at the earliest possible opportunity, the Department has set a requirement that face-to-face contact, particularly for in-custody clients, take place prior to arraignment and/or first

appearance. That standard complies with national standards. Department policy requires counsel to meet with clients within 24 hours of their detention and well before any court appearances. Private meeting space is available at the DPD offices for out-of-custody clients, and it is normally available at jails¹ and occasionally available at courthouses where defense counsel, paralegals, investigators, mitigation specialists and interpreters can meet with clients in confidential settings. As with many of the 10 Principles, COVID-19 has had a drastic impact on this issue. Due to social distancing requirements, the available meeting spaces have been drastically reduced in both the courthouses and in the jail facilities in King County. The ability to meet with clients has been greatly reduced, resulting in a heavier reliance on video conferencing, which is often unavailable or technically difficult from the jails. An additional problem is the inability or unwillingness of interpreters to meet face to face with attorneys/specialized staff and the clients, resulting in difficulty communicating with non-English-speaking clients. At the time of the writing of this Annual Report, vaccinations in Washington State are increasing, and we are seeing a reduction in new infections statewide. It is hoped that in the next year, the ability of the Department to comply with this principle will return to pre-pandemic status.

Principle 5: Defense counsel's workload is controlled to permit the rendering of quality representation.

Board Comment: DPD has been complying with the State Supreme Court-mandated caseload standards (based on standards developed in 1973) through a staffing model that was developed in 2015 by a task force led by the Director of the County's Office of Performance, Strategy, and Budget and that included representatives of the Department and the PDAB. The Board believes that applying this staffing model and the supplemental credit system resulted in compliance with 1973 caseload standards prior to the COVID-19 pandemic.

In fall of 2019 and prior to the onset of the COVID-19 pandemic in the winter of 2020, King County saw a large increase in criminal case filings. While the Department was absorbing those increased filings, the onset of the pandemic resulted in several actions contributing to caseload increases beyond the normal capacity of the Department. While the King County Prosecutor slowed the filings on non-serious criminal charges for a brief period, it continued to file serious cases and has since increased the number of non-serious case filings. The Washington State Supreme Court, meanwhile, extended speedy trial on all criminal cases until it was safe to convene juries again. At the writing of this report and almost exactly a year from the beginning of the pandemic, jury trials have largely not resumed. Trials were conducted for a brief period during the summer, when only a handful of trials occurred. County and city prosecutors began to work from home almost exclusively, which, coupled with the lack of speedy trial pressure, seems to have greatly affected negotiations over these cases. The reduction in staff in the County and City offices has also slowed discovery being timely disclosed. This slowdown in providing discovery to defense is confirmed by many of the judges interviewed. Finally, the

¹ There are usually sufficient regular attorney visiting booths for attorneys and clients to meet, however, there are not sufficient face-to-face booths, particularly in the Seattle jail. Additionally, these booths can be used only if the attorney is present. An investigator or a mitigation specialist cannot meet face to face with a client unless the attorney is present.

courts were required to implement remote hearings using video conferencing, which they were largely ill-equipped for and the learning curve of this technology greatly reduced the number of cases addressed in a day. The culmination of this storm of change has swelled the caseload of the Department, and interviewees all unanimously report that the Department is experiencing burnout and a loss of attorneys and staff. All interviewees note that the entire court system is being affected by the case backlog created by the pandemic, and it is not clear how easily or quickly this will be resolved in the future.

[Principle 6: Defense counsel’s ability, training, and experience match the complexity of the case.](#)

Board Comment: In addition to certifying compliance with the basic professional qualifications in Standard 14.1 of the Washington Supreme Court Standards, an attorney representing a defendant accused of a Class A felony must also certify that he/she meets the experience requirements set forth in Standard 14.2. Managing attorneys in each of the four divisions are responsible for ensuring these standards are met. Interviews confirm that the quality of representation provided by Department attorneys is good and, while individual concerns have been expressed as to specific lawyers, most concerns have been addressed. One of the judges interviewed noted that even the brand-new attorneys appear to have been well trained and prepared for their cases.

Even with the COVID-19 pandemic, the Department has maintained a robust training program for its attorneys and staff. Attorney interviews noted that the Department is still maintaining weekly trainings and offering them at times making them accessible to large numbers of attorneys and staff. One issue raised by the specialized staff was that in-house training is largely for the attorneys and they believe that the training department is not as able to meet the training needs of specialized staff. The Department should conduct information gathering from the specialized staff and determine what gaps in training exist.

[Principle 7: The same attorney continuously represents the client until the completion of the case.](#)

Board Comment: DPD attorneys are assigned to represent each client at all stages of their case through trial with the exception of the initial appearance (e.g., arraignment calendar) at which a calendar lawyer may represent the client. It has been DPD’s policy to do “vertical” representation other than the initial calendar appearance. Interviewees noted that with the changes brought by the COVID-19 pandemic the courts are seeing more withdrawals and substitution of counsel. Interviewees also noted turnover among Department attorneys in the Juvenile Court were initially a concern, but the attorneys put in place by the Department were experienced, and few problems were seen. One issue raised by the Juvenile Court was that the current practice of withdrawing after disposition created delay and inconsistency of appointment when the case was taken up on the sealing calendar. The Department could consider reviewing this policy to see if there is a way to maintain the goal of same-attorney representation throughout the entire juvenile court process.

Principle 8: There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

Board Comment: Parity with the Prosecuting Attorney's Office is an issue that was raised while negotiating the most recent collective bargaining agreement signed by SEIU and the County in March 2018. Salary parity has largely been reached between similar job classifications.

Identifying other criteria to determine parity with the Prosecutor's Office has proven quite difficult to define and implement. A recent King County Office of Performance, Strategy, and Budget report about parity between the Prosecuting Attorney's Office and the Department of Public Defense, dated July 8, 2019, recognizes that no common definition of office function can be easily established. Each office has substantially different functions from the other. More nuanced definitions of parity, other than salary-by-position parity, which has largely been achieved, still need to be developed. There appears to be substantially greater supervisory and support staff in the Prosecutor's Office than in comparable DPD divisions other than ITA. Issues remaining to be resolved are the number of senior attorney slots between the two offices and whether or not they should be relatively equal in number; how to reach parity for defense investigators either in number or salary when compared to the police agencies available to the prosecution, etc. The Board has undertaken a project to determine a definition of "parity" other than salary parity which may be useful in future budgeting decisions. Unfortunately, the COVID-19 pandemic has slowed these initiatives.

To the extent "parity" means "equal partner" in the justice system, the Department through its Director and designees participates regularly in criminal justice initiatives and reform efforts. The King County Prosecutor's Office has emphasized its desire to further partner and collaborate with the Department on systemic reforms. The Board encourages such cooperation and joint presentation where feasible.

Principle 9: Defense counsel is provided with and required to attend continuing legal education.

Board Comment: Professional training is a high priority for the Department, and substantial resources, both human and financial, are devoted to providing opportunities for attorneys and non-attorney staff alike. Many in-house CLEs took place in 2019 and 2020, as documented in the previous Director's Report. Training is a priority for Director Khandelwal, who has encouraged higher utilization of in-house expertise. DPD attorneys and staff are encouraged to also attend Washington Defender Association and Washington Association of Criminal Defense Lawyers trainings.

Principle 10: Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

Board Comment: In the past year, DPD has increased the use and dissemination of data to supervisors and managing attorneys to assist them in reviewing attorneys' work. DPD's collective bargaining agreements, as well as the Washington State Bar Association standards, set forth a requirement that each agency providing public defense services provide one full-time supervisor for every 10 staff lawyers. This results in supervisors often carrying

cases in addition to their supervisory duties. Interviews of the judges found that there appears to be a good working relationship between the bench and the supervising attorneys. They noted that the supervising attorneys were proactive with the judges if there were issues the Department believed needed to be addressed. Likewise, when the judges had concerns with any Department attorney or policy, the supervising attorneys promptly responded and worked toward solutions.

The previous Annual Report recommended that the formulas for supervising attorneys and staff should be reviewed. However, the COVID-19 pandemic required the Department to focus more closely on providing competent representation with the limitations imposed by local, state, and federal safety requirements.

DEPARTMENT OF PUBLIC DEFENSE

Quality of Representation

The quality of representation has remained high during the pandemic, despite numerous obstacles. The commitment and dedication of DPD personnel is a strength of the Department. One Managing Attorney noted that the attorneys have put themselves in harm's way for the past year to represent their clients. Most of the judges we spoke with noted the quality of representation remained high during the COVID-19 pandemic.

The judges consistently commented that the attorneys maintained good communication with their clients despite the obstacles created by the various public health orders requiring them to socially distance from others.² The attorneys are well versed in the facts and history of their cases. One judge noted that some attorneys are "amazing." The attorneys are "consummately prepared" and their preparation is "very impressive."

Many judges praised the work of the DPD attorneys overall but tempered that with a comment that the DPD attorneys are not universally excellent, which is not unexpected. One judge said that some attorneys are more adept than others. The judge commented that the overall work is impressive given the lack of resources, which was also true during the pandemic. DPD adjusted well to the COVID-19 environment and worked hard to keep the staff safe. Several people interviewed by the Board also spoke favorably of DPD's adjustment to COVID-19.³

COVID-related social distancing has resulted in a marked increase of the use of video for court appearances and client meetings. DPD leadership⁴ has previously opposed the use of video in

² Issues concerning communication with clients is discussed in more detail below.

³ This was not, however, a universal view. One judge thought that some of DPD's positions were extreme and one thought that there was a reluctance on the part of DPD to work with the court on administrative issues. Those views appeared to be the minority view.

⁴ DPD leadership refers to those employed in the Director's Office and the Managing Attorneys. The Director's Office (DO) refers only to those employed in the DO.

both. Video for court appearances does not always allow for confidential communications between the attorney and client, which was one reason it was opposed prior to COVID-19. However, the virus has changed that calculus. DPD modified its view and agreed to video for court, with the client's consent, and client visits. Some proceedings, such as dependency cases, have been conducted almost entirely by video during the pandemic.

A second adjustment by DPD was a shift from a reliance on the attorney of record (AOR) to a much greater reliance on an attorney of the day (AOD). Normally, the AOR is expected to appear and represent the client at all of the client's hearings. As this is considered a foundation of proper representation, the move to a larger AOD system was a significant change. However, that approach simply put too many people at risk and leadership allowed the AOD to appear in court for the client while the AOR appeared by phone⁵. However, several attorneys, as evidence of their commitment, continued to appear personally when they deemed it appropriate. The judges we spoke with noted this system was working well.

DPD continued to make good use of its resources during the pandemic, particularly the mitigation specialists.⁶ Some judges were impressed by the release plans prepared in part by the mitigation specialists—usually presented for a release hearing and sometimes submitted before arraignment. One judge also thought the reports were good and commented that she would like to see the mitigation specialists appear in court more frequently.

Likewise, the lack of some resources continues to create issues in DPD and throughout the system. One such limited resource are the investigators⁷. Some judges mentioned that the lack of enough investigators resulted in a greater number of motions to continue. The lack of a sufficient investigation resources was the basis for continuances since the defense investigators had not had time to conduct the interviews necessary for the case. The lack of funding for sufficient investigation resources has been an ongoing problem for DPD.

The supervisors of DPD are also a strength. Often, the supervisors are the main communication conduit between DPD and the courts. Many judges were impressed by the work of the supervisors in different practice areas, e.g., felonies, juvenile, district court, Seattle Municipal Court, etc. For many judges the main source of interaction with DPD management is with the supervisors. The judges noted there was good communication with the supervisors. They are responsive and open to feedback. One judge, in praise of the supervisors, noted they are

⁵ Unlike defense counsel, the overwhelming majority of prosecutors appear remotely and are not physically present in court.

⁶ Mitigation specialists were social workers in the agencies prior to the formation of DPD. Mitigation specialists frequently work with the client to develop background information on the client including social history, educational history, history of substance abuse or mental illness. This information can be used to prepare a mitigation report, for the court or the prosecutor, which seeks to establish a reduced culpability of the client. The information can also be used to help connect the client to services or establish a treatment plan or a release plan if the client is in custody.

⁷ See the PDAB 2020 Budget Report for more information regarding investigators.

“superstars,” “good leaders,” and “the best at what they do.” The Board heard only positive comments regarding the supervisors.

Equity and Social Justice

The report on the state of county public defense shall include an assessment of the progress of the county in promoting equity and social justice related to the criminal justice system and may include recommendations for advancing equity and social justice.

DPD centers their work based on the needs of their clients and of the broader community most impacted by policing and punishment. DPD continues to put systemic racism at the forefront of their policy work and worked with the community to push for structural solutions to the challenges facing their clients. Through both their every-day representation of clients and their policy work, DPD staff continue to address racial disparities by addressing the failings of the criminal legal system.

The COVID-19 pandemic had an inequitable impact on the most vulnerable communities, including DPD clients who faced incarceration in close quarters without adequate protection from infection. DPD was involved in constant coordination with the Prosecuting Attorney’s Office, the Executive, and DAJD to reduce the jail population. COVID-19 seemed to make clear what DPD staff have said for years—that pretrial incarceration is harmful. Additionally, DPD staff were instrumental in advocating for in-person visitation for children in foster care in Washington State, alongside other advocacy for parents with children in the dependency system.

Beginning in summer 2020, the pandemic overlapped with an uprising in defense of Black lives, spurred by the police murders of George Floyd and Breonna Taylor. DPD staff partnered with community groups in crafting policy demands in line with the nationwide racial justice reckoning, which included calls to defund the Seattle Police Department and rethink public safety in Seattle. Some of the highlights of DPD’s community-partnered efforts include:

- Organizing a community-sign on letter to CAO Pete Holmes calling for the City Attorney to exercise his discretion to stop prosecuting most misdemeanor offenses and calling on the City Council to defund prosecution of most misdemeanors, calling for a reduction to the probation department, and calling on the City to transfer resources from the criminal legal system to a restitution fund. City Council reduced the probation department’s budget, in part in response to these community-led, DPD-partnered efforts.
- Partnering with community organizations to propose legislation that would expand the duress defense so that a Seattle Municipal Court judge could consider whether a person was trying to meet a basic need or struggling with a mental health or substance use disorder at the time of the behavior that led to the arrest, as well as expanding the de minimis ordinance to achieve a dismissal under the same circumstances. While the

proposed legislation was not formally introduced, it was widely championed by community organizations, including 300+ community groups that formed part of the “Solidarity Budget” efforts and helped raise awareness of the practice of criminalizing poverty and mental health struggles in the City of Seattle.

DPD’s litigation efforts in 2020 also sought to continue to address inequities in the criminal legal system and the dependency system. Highlights included:

- DPD pursued an appeal in *In re Dependency of Z.J.G and M.E.J.G*, a case involving the Indian Child Welfare Act (ICWA). The State Supreme Court ruled in favor of DPD’s client and the Tlingit and Haida Tribes in a landmark decision. Justice Raquel Montoya-Lewis led a unanimous court in affirming core provisions of the ICWA, ensuring that the law’s protections apply early enough to prevent the unnecessary removal of Native children from their families. The decision is a resounding defense of ICWA, passed in 1978 in an effort to end a long and egregious history of states forcibly separating indigenous families. Justice Montoya-Lewis stated:

“In Native American communities across the country, many families tell stories of family members they have lost to the systems of child welfare, adoption, boarding schools, and other institutions that separated Native children from their families and tribes. This history is a living part of tribal communities, with scars that stretch from the earliest days of this country to its most recent ones.”

The decision reverses a lower court ruling, advocated by the Washington State Attorney General’s Office, which would have denied protection to our Native American clients at the critical stage in a case when the state seeks to remove their children.

- DPD continues to be involved in litigation efforts on inquest proceedings, representing families whose loved ones have been killed by law enforcement, in an effort to ensure families can fully and fairly investigate the events that led to their loved one’s death, that officers who killed a community member be required to testify at the inquest, and allowing the inquest jury to consider whether the officers engaged in criminal activity in their use of deadly force.
- DPD joined forces with community groups in an amicus brief addressing the racial bias and inhumanity in the state’s three strike laws. DPD filed the amicus in *State v. Jenkins*, which would make the removal of Robbery 2 from the so-called strike list retroactive, giving people currently facing Life without Parole due to this offense the chance at freedom.
- DPD filed an amicus brief urging courts to consider issues of race and children’s relationships prior to terminating parental rights. The brief notes that a “best interests” inquiry is, by nature, highly discretionary and therefore invites implicit bias and calls on the appellate court to identify objective factors—for instance, that it is in the best interest of a child to remain with siblings and, if Black, to be raised by caregivers who can help the child develop their racial identity.

DPD also looked inward during 2020 and continues to make strides to address racial equity within the department.

- Intern Hiring and Staff Hiring: In order to create a pipeline of defenders coming from communities most impacted by policing and imprisonment, DPD has prioritized outreach and recruitment of interns from BIPOC communities, with the goal of hiring interns permanently. DPD has prioritized engagement with Black and Native law student associations, sought to get offers out early to students of color applicants, and attended minority job fairs to increase applications.
- Partnership with the Freedom Project: Knowing that communicating effectively with clients is among defenders' most important tasks, DPD contracted with the Freedom Project, an organization led by and for formerly incarcerated persons, to train DPD staff to improve client communication skills, with an emphasis on taking into account race and racism in a defender's own conduct.

In the Public Defense Advisory Board's 2019 Annual Report, the Board recommended that the county address the racial disparity in pretrial release and detained youth and provide better outcomes for foster youth. Once again partnering with community, DPD made several encouraging moves in these areas.

- Youth Rights Ordinance: DPD worked with youth, teachers, activists, pediatricians, parents, and their community partners—Creative Justice, Community Passageways, and Choose 180—to help pass the MiChance Dunlap-Gittens Youth Rights Ordinance in King County and the City of Seattle. Young people often lack the cognitive development to understand the consequences of their decisions, and this ordinance requires legal representation before they can waive some of their most important constitutional rights. This is a strong step for racial justice: In 2019, 86% of youth jailed in King County were BIPOC and 72% of the youth prosecuted in the County were BIPOC. DPD committed to advocating for this change to be extended to the state level, through pursuing state legislation, thus broadening the impact of this win.
- Quashing outstanding warrants: DPD took a number of actions related to juvenile warrants. First, at the beginning of the pandemic, DPD advocated for outstanding warrants to be quashed and worked with the courts and the PAO to quash many outstanding warrants. Second, DPD (along with several community partners) sent a letter to King County Superior Court urging the court to immediately stop incarcerating youth for status offenses (which disproportionately impacts youth of color). Third, DPD joined with several community partners to call for a new Juvenile Court Rule (JuCR 7.16) to govern the issuance of warrants to youth subjected to juvenile offense proceedings. DPD and others were concerned about the disproportionate impact of warrants issued when a youth violates a court order related to a juvenile offense proceeding, as well as the harm of incarcerating young people. JuCR 7.16 permits a judge to issue a warrant for a youth who misses a court date or violates probation only if the judge finds incarceration is necessary to protect against a serious threat to public safety. It would

also quash all outstanding warrants unless a finding was made of serious threat to public safety. The proposed rule was adopted by the Supreme Court in November.

- Restorative Community Pathways: DPD also looked to influence the County budget process as a creative avenue to reform the juvenile legal system. They were part of a community-driven effort to divert money out of the racially disproportionate juvenile criminal legal system and put \$6.2 million over the next two years into Restorative Community Pathways. The PAO has suggested a willingness to expand this path in the future, and up to 90% could be eligible for diversion under this program.
- Behavioral Health Response: In another example of DPD's willingness to work within the budget process and advocate with County Council as a means to address racial inequity, in part due to DPD advocacy, the funds used for Juvenile Drug Court were shifted to a trauma-informed, community-based behavioral response for youth who face juvenile prison. While youth had limited access to Drug Court and high rates of failing out, the Behavior Health Response should give more youth an opportunity for case dismissals and reduced charges. For example, Robbery 1 affects Black youth at very disproportionate rates but was not a charge that was even eligible for drug court. Now youth charged with an offense like Robbery 1 will be able to receive community-based, healing-centered services, rather than being ripped from their families and communities and incarcerated in a juvenile prison.

DPD Leadership

As noted above, DPD has worked hard to navigate the pandemic. DPD has sought to balance maintaining high-quality representation of the clients and keeping staff safe. They have succeeded. One Managing Attorney with whom we met said the staff believes that DPD leadership is concerned about the health and safety of everyone in the Department. Once DPD had sufficient guidance on how to respond, DPD leadership acted quickly to get the materials and supplies, e.g., PPEs, to keep staff safe. DPD developed a plan to ensure that both staff and the clients were safe. The staff noted that they are still concerned about COVID-19, which is understandable, but they voiced no criticisms of the Department's efforts. Leadership also ensured that the attorneys maintained good contact with their clients. Some difficulties in this effort are discussed below.

DPD also ensured that the staff who were telecommuting had the resources to do their jobs properly. This included ensuring the staff had computers and broadband access sufficient for their work.

DPD is mindful of the comment by some judges there is some unevenness in the skills of the attorneys. In response, the training established by the Department is robust and still evolving. Leadership has improved and standardized the training. New attorneys attend a week-long training program, which is well regarded. The curriculum continues to be updated. A staff member suggested that the training include not only technical trial skills but also address other areas, such as caseload management, which has now been incorporated into the training. DPD

staff noted the training offered, not just the new attorney training, is good. However, some thought that the support staff training was not as good as the attorney training. In 2020 DPD:

- Offered 90 trainings, most of which were recorded, in addition to a five-day core skill training for newer attorneys and three three-part workshops for attorneys on client communication.
- Offered a total of over 90 CLE credits, not including the new attorney training, and 19.5 CEU credits.
- Continued to offer PD 101 classes and PD 201 classes covering most of DPD's practice areas.
- Offered COVID-specific training covering: the legal history of quarantine cases, a panel discussion of COVID-19 in correctional facilities, and speedy trial issues during the pandemic.

Leadership also plays a role not only in the training but also in the evaluation process of the attorneys. The Deputy Director meets regularly with the Managing Attorneys to ensure there is a thorough evaluation process, including reading the briefs submitted by the attorneys and observing the attorneys in court.⁸

Communication

DPD works to ensure good, open lines of communication between the DO and everyone in the divisions. The Director and/or the Deputy Director will meet weekly with the Managing Attorneys and monthly with the supervisors in each practice area. One topic of these meetings is usually the upcoming Bench/Bar meetings between the courts and representatives of the prosecutor and the defense to discuss the current issues and ensure everyone agrees on the position of DPD.

The Managing Attorneys believed that the DO provided sufficient support to the line attorneys and stated that the communication between the DO and the divisions is good. A couple of the Managing Attorneys and the Deputy Director noted there has been some turnover in the position of the Criminal Practice Director, which might account for the belief there was a disconnect between the DO and the line attorneys, which is discussed below. Managing Attorneys mentioned that one concern regarding communication between the DO and the divisions is that while the DO frequently provides information to line attorneys in email, it seems that line attorneys often do not have time to read and process the information in that medium. It may be beneficial for the DO to consider triaging information flow and using different methods to communicate critical information.

The Managing Attorneys commented that the DO is both responsive and accessible. The DPD employees' panel we spoke with said that both the Director and the Deputy Director have met with the employees, which was appreciated. Overall, the Managing Attorneys felt they were

⁸ The DO limits their review to only publicly available materials in order to maintain client confidentiality.

able to openly express their views to the DO and that the DO listened. One example of the level of communication is the work of the Communications Manager. Beginning in late March she sent out daily updates to DPD staff to keep them informed. In early May, the updates were issued twice weekly. COVID-19 has been a major focus of the updates, but they address a broad range of topics. These updates, numbering over 100 since they began and which are in addition to any information provided by the Director, were mentioned favorably by several people we spoke with within DPD. They thought the updates were very helpful.

One criticism that emerged during our interviews with some stakeholders was the sentiment that DPD leadership do not sufficiently advocate for the line attorneys. Many people we spoke with commented on “a disconnect between leadership and line attorneys.” The genesis of these concerns seems to be the perception that while the leadership’s policy work has been very good, they do not devote the same energies or staff to the issues facing the line attorneys, e.g., the court policies or practices, which affect the everyday work of the attorneys.⁹

One judge commented that the Director’s Office doesn’t always ensure that the day to day, in the courts, is working. Other judges made similar comments. One judge questioned whether this was a communication issue since some things don’t always trickle down to the line attorneys.

One Managing Attorney thought this might be a by-product of the structure of DPD. The DO is responsible for the larger, broad-based systemic issues and the divisions are more responsible for the day-to-day issues. The DPD employees also noted a concern that information regarding challenges the employees face doesn’t always make it up the chain. They also noted it is not always clear who is responsible for certain issues, which follows the comment that the structure of DPD may be at the heart of some of these issues.

CRIMINAL LEGAL SYSTEM

COVID-19 Impact

In order to determine the State of Public Defense, it is necessary to step back and view the system from some distance. COVID-19 created an unfortunate and unique environment. Some of the system’s responses to COVID-19 showcased the strength of DPD’s role in the system and

⁹ However, one example of DPD working to change policies which benefit both defense counsel and the clients is an agreement DPD reached with the PAO regarding redacted discovery. Currently, CrR 4.7(h)(3) precludes the client from receiving a copy of the discovery unless appropriate redactions are made and agreed to by the prosecutor. The King County PAO has required a client to set a case for trial if the client sought redacted discovery prior to setting the case for trial, regardless of whether the client wanted to set the case for trial. Setting a case for trial causes the EPU offer to be revoked. DPD and the PAO reached an agreement that the case no longer must be set for trial if redacted discovery is requested. This is a significant benefit for the clients. Now they are permitted to personally review the discovery in their case without be forced to take actions which could be detrimental to their case.

the obstacles defense counsel face, and some responses highlighted longstanding issues in the system as a whole.

Courts

There are three court systems that should be considered here: King County Superior Court, which includes Juvenile Court, Involuntary Treatment Court and Dependencies; King County District Court; and Seattle Municipal Court (SMC). It would not be fair or accurate to discuss all three as a single entity.

Of the three, the response of SMC to the pandemic was the most thoughtful and cautious. SMC was the first to stop holding out-of-custody hearings. SMC reduced the calendar quickly. And the City Attorney's Office (CAO) stopped filing out-of-custody cases and filed only a handful of cases per day. This response protected DPD's clients and the staff.

It is difficult to get a clear picture of the District Court response. Some people thought it responded well, while others said it did not. One person thought that District Court did not have a plan on how to respond and brought too many people into court.

Superior Court was very slow to respond to the pandemic and continued to bring people into court long after it was clearly unsafe to do so, putting all the participants at unnecessary risk. The Court was unwilling to close or slow down the cases and did not do so until the Supreme Court ordered it to stop conducting trials and to limit the calendars.

The Superior Court was slow to move to a remote system and required too many attorneys to appear in court.¹⁰ Several people noted that the Court did not take a leadership role. None of the judges we spoke with took that position. The attorneys believed that the court was not concerned about the safety of either DPD staff or of the clients who needed to appear in court.

Over the summer, the court continued to conduct multiple types of hearings, including case setting hearings, discussed in more depth below, and trials. This brought hundreds of attorneys and clients into court. The result was people were needlessly put at risk. Over the summer the Court conducted approximately 24 trials, until trials were again suspended. The Court was proud of their ability to work through the pandemic and continue moving cases through the system. Unfortunately, the benefits of this approach were dwarfed by the risks. There are thousands of criminal cases filed in King County Superior Court each year. Resolving 24 cases is insignificant and is even more so when compared to the damage even one illness or death could cause. The court was lucky to have avoided an outbreak among all involved. The Court did not properly consider the risks nor did it consider the message that those trials sent to the

¹⁰ One judge, however, noted, with frustration, that the Court had moved to a remote system yet attorneys continued to appear in court in person. The Board seeks to strike a balance here. While we commend attorneys who appear in court, at risk to themselves, because they believe it is appropriate, it is ultimately the Court's obligation to ensure that during the pandemic it conducts only hearings that are absolutely necessary.

parties or the attorneys: the resolution of a handful of cases was more important than the health and safety of the people involved.

Nor was the Court sensitive to the impact the pandemic had on defense counsel. The Court sought to adjust the calendars to reduce the number of people in court. For the Case Setting calendar, the court allowed waivers to be signed by defendants and submitted before the scheduled date. But that option has always existed. However, the Court did not seem to realize the additional burden this placed on the defense, since it was the defense obligation to visit the client, obtain the waiver, and submit it to the court before the scheduled hearing. The Board heard complaints that it took too long for Superior Court to agree to make accommodations to dispense with in-person signatures for certain hearings, necessitating risky and unnecessary face-to-face contacts.

Two other issues stand out in the Court's response: Interpreters and the Case Setting calendar.

Under RCW §2.43, it is the Court's obligation to appoint an interpreter for non-English-speaking individuals charged with a crime. However, due to the pandemic, most if not all interpreters were unwilling to go to the jail to meet with the attorney and the client. The Court seemed unwilling to address this issue. The Court did not seek to order the interpreters to go to the jail to meet with the attorney and the client, which we acknowledge would be troubling, but neither did it seek any middle ground that might have alleviated the problem of meaningful language access.

The King County Department of Adult and Juvenile Detention (DAJD) adopted procedures which allowed some communication between the client, the attorney, and the interpreter.¹¹ However, DAJD did this only when it had sufficient staff. As the Court increased the number of hearings over the summer, DAJD no longer had sufficient staff to assist, since they needed the corrections officers to transport the clients to and from court. Again, the Court did not respond to these concerns. The Court continued to increase the number of hearings and the DAJD staff could not continue to assist with the three-way interpreter calls. This was indicative of the challenges defense counsel faced daily. The Court's approach was viewed as demonstrating a lack of concern for the defense and the clients.

The second issue, the Case Setting calendar,¹² is a long-standing problem and predates the pandemic. The Case Setting calendar is a creature of King County. A Case Setting hearing is scheduled when a defendant is arraigned. The hearing is usually scheduled for 10-14 days after the arraignment. At a Case Setting hearing a defendant has three options. They can: 1) enter a

¹¹ DAJD provided cell phones to in custody clients to facilitate a three-way call with the interpreter and the attorney.

¹² A recent amendment to CrR 3.4 has effectively eliminated mandatory Case Setting hearings. The rule limited the types of hearings at which a court can require a defendant to appear. Case Setting is not included in the rule as a mandatory hearing. It is the Board's understanding that the hearings are currently voluntary. Additionally, the Board is not aware of either the Court or the PAO's long-term plans regarding Case Setting. The Board's position remains unchanged—that the Case Setting hearings, even voluntary hearings, should be eliminated.

plea of guilty, 2) set the case for trial or, 3) continue the hearing, which includes an extension of the time for trial. There is no provision for the hearing in the court rules. The court rules require that when a plea of not guilty is entered, which is usually at the arraignment, the court set an Omnibus hearing.¹³ The rules also require that a defendant be given a trial date either within 15 days of the actual arraignment or at the Omnibus hearing.¹⁴ Neither of those occur in King County.

The Case Setting hearing, which has been used by King County for at least 35 years, is geared to dovetail with the King County Prosecutor's Early Plea Unit (EPU). The goal of EPU is to negotiate and resolve cases early in the process.¹⁵ The negotiation is expected to occur while the case is on the Case Setting calendar. There are a handful of prosecutors assigned to handle the EPU negotiations. Once a case has been set for trial, the EPU offer is revoked and the case is assigned to a trial deputy to prepare for trial. There are benefits to Case Setting. It allows defense counsel more time to work with the client, to familiarize themselves with the facts of the case, and possibly to investigate the case. The disadvantages, however, far outweigh any benefits.

The Case Setting hearing fits well with the PAO's staffing approach. At the Case Setting hearings, which occur Mondays through Thursdays, almost every public defender with a felony practice in King County appears.¹⁶ They can be there for as long as two hours, resulting in very crowded courtrooms (often exceeding fire code limits).

Conversely, only four to five prosecutors need to appear in both Kent and in Seattle. The disparity of resources required by the defense compared to the prosecutor is striking. This contrast was even more stark during this pandemic. The prosecutors appear remotely while at a minimum at least one defense attorney from each division—the AOD—must appear, but in reality many defense attorneys appear to fulfill their obligations to their clients.

The Board considers the massive use of public defender time and resources to staff these check-in hearings as wasteful. The system could get all the benefits of the EPU process, and schedule plea hearings when needed, just as is done now, all without ever holding a Case Setting hearing. The PAO has the discretion to maintain the same staffing model, with most cases initially assigned to EPU, if that is the decision PAO management makes, but there is no need or compelling justification for a wasteful make-work hearing.

The Court should no longer utilize a hearing not required by the rules and which benefits one party over another. The Court should eliminate the Case Setting calendar and comply with the court rules. The pandemic has clarified this.

¹³ CrR 4.5(a).

¹⁴ CrR 3.3(d)(1).

¹⁵ The PAO position is that the best offer the defendant will be given will be given at EPU, while the case is still on the Case Setting calendar. That is true in many cases but once a case has been set for trial and the more in-depth investigation begins, the facts of the case drive any resolution.

¹⁶ There are approximately 60-70 DPD attorneys practicing in Superior Court felonies at any given time.

This is not simply the view of the Board. Some judges we spoke with also voiced concerns about both the Case Setting calendar and EPU. One judge commented that EPU is not beneficial. A case is not assigned to a trial deputy until later, which, the judge noted, slows down discovery and other case preparation. Another judge was even more direct, stating that the Case Setting hearing is a legal fiction and there is no sense of urgency to seek resolutions of cases. The judge also said there are too many cases on the calendar and there are too many continuances. The hearings serve as are a “tickler” or reminder for the attorneys. The judge also expressed frustration with defense counsel for continuing to appear at the hearings and for, according to the judge, using the hearings as an opportunity to see their clients.

Prosecuting Attorney

The prosecutor’s initial responses to the pandemic matched the urgency of the situation. The office reduced the number of filings and limited the filings to those cases with an impact on public safety. Many people we spoke with thought the PAO has responded well to the pandemic. One judge said that the PAO response to COVID-19 was more effective than DPD’s response. The judge noted that the PAO was forthcoming with ideas that would improve the court procedures. Not everyone we spoke with shared that view, however. While the PAO reduced filings at first, the number of cases filed has steadily increased, and the types of cases filed have also changed. The filings are no longer focused on public safety issues. The PAO has been filing a greater number of property and drug offenses, offenses considered lower priority cases in any environment. Filing these low-priority cases puts defense counsel and clients at risk.

DPD operates downstream from the PAO and has no control over the number and cases filed, leading to system overload and issues with caseload limits.

A second issue is that cases are no longer moving through the system. The pandemic appears to have removed a sense of urgency by the PAO. Cases are still being filed but are not being resolved. One person said there is no incentive for the PAO to resolve the cases, in part because there are no trials. And certainly, the handful of trials conducted provided no motivation. The PAO has an obligation to actively negotiate and resolve cases, regardless of the number of trials conducted. One of the stated purposes of EPU is to resolve many cases quickly. The lack of negotiations and resolutions creates issues for defense counsel since they continue to receive new cases but cannot resolve old cases, so the active caseload of the attorneys continues to increase.

Department of Adult and Juvenile Detention

DAJD has responded well to the pandemic and has resolved several issues created by the pandemic. DAJD has worked with DPD on several issues, including working to reduce the jail population. DAJD also developed some innovative solutions to some problems. DAJD

established a spreadsheet to assist defense counsel in contacting their clients in either the Seattle facility or the facility at RJC. Under this system, when the defense counsel needed to contact a client, the attorney would contact the facility and add the client's name to the spreadsheet. The facility would then provide the client with a cell phone so they could speak with their attorney. A similar process was used with clients who needed an interpreter. The jail would provide a cell phone so the client could participate in a three-way call with their attorney and with an interpreter. Unfortunately, DAJD was able to provide these services only if they had staff, which it had when the court reduced the number of hearings. The reduction in the number of hearings freed up jail staff who would otherwise transport clients to and from court. When the court increased the number of hearings, DAJD staff that had helped with the phones were repurposed to transport the clients again.

These issues highlight longstanding problems with DAJD procedures, however. The first is that clients should be able to receive calls from defense counsel. While clients can call out, there is no way for them to accept calls. In Pierce County, clients have been able to accept calls from defense counsel for several years. That ability should be available in King County. The second issue is limitations in the use of the face-to-face booths. Most attorney/client visits are conducted in the standard visiting booths, which have a phone but also have glass separating the attorney and client. The face-to-face booths have no such limitations. These booths allow, as the name suggests, face-to-face contact without glass between the parties.¹⁷ However, per DAJD regulations, these booths can be used only by the attorneys or by a retained expert. A mitigation specialist cannot use one to meet with the client unless the attorney is present. This is an unnecessary burden on the defense. When a mitigation specialist needs to meet with a client (which they do regularly but which has taken on a greater urgency during the pandemic) the attorney must be present. The attorney is frequently unnecessary for the meeting but must remain there while the mitigation specialist meets with the client. This is an unproductive use of attorneys' time.

Recommendations

1. Eliminate Case Setting. As noted above, a recent amendment to the Court Rules has effectively eliminated the Case Setting hearings. The hearings are still being held on a voluntary basis. It is not clear if the Court or the PAO will attempt to maintain the hearings on a mandatory basis. The Board recommends the elimination of Case Setting in any form, either voluntary or mandatory.
2. Allow for clients to receive calls from defense counsel. In other jurisdictions, e.g., Pierce County, an attorney can call their client in the detention facility. This greatly enhances the communication between the attorney and the client, but this option is not available in either the Seattle facility or the RJC facility. The Board recognizes there are financial and logistical issues with this recommendation but nevertheless recommends action.

¹⁷ These booths are very limited in the Seattle jail, with one to two per floor. In Kent there are six to eight booths on the ground floor of the facility.

3. Allow designated members of DPD staff to use the face-to-face booths without counsel present. Face-to-face booths in the DAJD facilities are a limited resource and can only be used by DPD staff if an attorney is present. This further limits this resource. Designated staff of DPD, i.e., mitigation specialists and investigators, should be permitted to use the booths without the attorney present. Eliminating the requirement that the attorney be present would allow greater access by the designated DPD staff.