

Budget Report of the King County Public Defense Advisory Board

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King County

King County Public Defense Advisory Board

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Introduction

This report is prepared pursuant to King County Code sec. 2.60.031(h), which requires the Public Defense Advisory Board (PDAB or Board) to prepare a report on the Board's review of the Executive's proposed bi-annual budget for public defense. The report is required even if the budget has already been approved by the County Council, as is the case this year.

The Board noted in previous reports that an adequately funded public defense system is an issue of equity and social justice. Funding for public defense in King County is guided largely by the staffing model established by the Office of Performance, Strategy and Budget (PSB) and the Department of Public Defense (DPD). The staffing model determines the number of career service attorneys and staff allotted to DPD. The staffing model incorporates aspects of the caseload standards in the Court Rules¹, the Washington State Bar Association Standards for Indigent Defense and the guidelines established in the Washington Defender Association (WDA) Standards for Public Defense Services.

Staffing Model

There are concerns with the staffing model and the underlying standards and guidelines. The staffing model, and the standards, created in the 1970s, are out of date and do not reflect the realities of a criminal practice today. Given that the model determines, in many respects, the number of attorneys and staff, those flaws impact both the work of DPD and the quality of representation.

Using a felony practice as an example, the caseload standards codified in CrR 3.1 state the maximum caseload for a felony attorney is 150 cases. This standard was established in 1973. The changes in a criminal practice since then are far-reaching. Criminal convictions have a much greater impact on the convicted person's life today than the convictions did a half century ago. For example, convictions now detrimentally impact a person's immigration status and can affect access to housing and/or access to government programs, including student loan programs. Defense counsel is required to both know these impacts and factor that into efforts to resolve the case.²

The changes in criminal practice also include an increased reliance on forensic and scientific evidence. The most obvious of these is the widespread use of DNA evidence, which did not exist when the caseload standards were set in 1973. And, using comparative evidence, e.g., ballistics and fingerprints, regardless of an increase in use, has been challenged in several

¹ Criminal Court Rule (CrR) 3.1, Juvenile Court Rule 9.2 (JuCrR) and Court Rules for Courts of Limited Jurisdiction 3.1 (CrRLJ)

² Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010)

arenas and can no longer be accepted at face value by defense counsel.³ There is also a much greater reliance in criminal cases on expert review and testimony with regard to scientific and psychological evidence.

The obligations of defense counsel have also increased since the caseload standards were established. Defense counsel has always had an obligation to properly investigate each case. However, the breadth of that obligation was recognized in *State v. A.N.J.*⁴ This case clarified that defense counsel has an obligation to investigate a case to properly evaluate the evidence against the client.⁵ Similarly, once relatively uncomplicated aspects of representation, like plea bargaining and sentencing, now require significant time and resource investment in the development of mitigation evidence.

The sheer quantity of evidence has also increased. When the caseload standards were first developed there was little if any use of video evidence. That is not true today. Besides the increased use of security camera video, there has been an explosion in the use of law enforcement body camera and citizen cell phone video. This increased use of video has affected criminal defense practice in multiple ways. All video generated in connection to a single incident from a multitude of sources must be reviewed, often requiring hours of viewing for even brief occurrences; defense counsel cannot be limited to reviewing only that evidence which the State seeks to admit, or exculpatory evidence will inevitably be missed. Attorneys will frequently rely on investigators to assist in reviewing video evidence, which obviously puts a greater burden on the investigators, who, like defense counsel, are stretched thin. Audio and video evidence, itself, often requires reliance on experts to enhance, manipulate, or impeach the quality or accuracy of the recording.⁶

While DPD policies provide some relief for felony attorneys by providing for additional credits on cases when attorney time exceeds approximately 25 hours, this does not adequately account for the change in practice.

The staffing model also does not include an adequate ratio of investigators per attorney. The WDA Standards for Public Defense Services mandate one investigator for every four attorneys. The concerns discussed above regarding the increased complexity of cases and the increased workload applies to both investigators and attorneys. A ratio of one investigator for every four attorneys is no longer sufficient and hampers the effective representation of the clients.

³ See *National Research Council, Strengthening Forensic Science in the United States: A Path Forward*

⁴ 168 Wn.2d 91,110 (2010).

⁵ "The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." A.N.J., 168 Wn.2d at 111-112.

⁶ For in-custody clients, the State's improved ability to monitor and record telephone conversations has also led to an explosion in the number of cases that include hours of recorded conversations that must be reviewed.

The staffing model fails to account for mitigation specialists. Although the WDA standards do not account for mitigation specialists (also referred to as social workers), their work is integral to representing clients. The mitigation specialists work closely with the clients to develop valuable background information about the clients, including information regarding the clients' mental illness, substance abuse, and educational, social and family history. This information is often used to assist the client in obtaining a release from custody in a release plan or a treatment plan. And the information is frequently used, as alluded to above, in a mitigation report presented to the King County Prosecutor (PAO) or the court for a variety of purposes.⁷

The absence of a specific ratio for mitigation specialists in the WDA standards means they are not included in the staffing model and they are not part of the staffing funded through the model in the budget. Another way to say this is that as attorneys are added due to the staffing model, mitigation specialists, because they are excluded from the model, are not increased proportionately. The mitigation specialist resources available to attorneys is reduced as more attorneys are added. In order to address this valued and necessary resource, DPD has had to utilize other FTE positions within the staffing model and has short-changed these resources, particularly investigator FTEs, due to budgetary considerations as the salaries between these two classifications are similar, with mitigation specialists salaries slightly higher than investigators. DPD recognizes the value of mitigation specialists, however, and continues to utilize them despite the impact on funding. This, unfortunately and unavoidably, results in the reduction of the number of available investigators, leaving DPD's staffing out of compliance with the required investigator/attorney ratio.

Another shortcoming in the staffing model was exposed in 2019. The staffing model relies on data from previous years to predict the number of cases, and therefore necessary staff, for the coming year. The model also assumes an even distribution of case number and complexity throughout the year. That never occurs, but in most years, the monthly variation has not caused significant issues. That was not true in 2019. During the year there were marked variations between the monthly case assignments as a result of a spike in filings by the PAO. Those spikes sent more cases than DPD could appropriately handle given the caseload standards in the court rules. Many cases were sent to assigned counsel. But the assigned counsel list was designed for clients with whom DPD has a conflict of interest; it was never intended as an overflow panel. Because DPD represents clients in a variety of practice areas and because of the volume of work in King County, DPD must frequently rotate attorneys from one area to another; while this benefits attorneys and clients by providing attorneys an opportunity to develop a diverse set of skills and clients with attorneys who have a diverse set of skills, it also means that a felony unit may be staffed with a relatively small number of Class A qualified attorneys, who then receive a disproportionate number of very serious cases

The most glaring problem is the staffing model's reliance on caseload-related court rules, resulting in the disconnect between the intent of the standards contained in the court rules and the application of those standards. The court rules create caseload maximums, which must not

⁷ Meeting with Dan Satterberg and the Chief Criminal Deputy, Dan Clark, Nov. 24, 2020.

be exceeded, while the staffing model treats those maximums as targets. Treating the standards as targets presupposes that all attorneys will be at or near the maximum caseload at all times. That is neither realistic nor beneficial. The goal must be to provide high-quality representation to all clients. The County's commitment to Equity and Social Justice requires that public defense have the resources to achieve this goal. That commitment cannot be met by maximizing the case assignments. That goal can be better achieved by determining the time a case requires and assign cases based on that. See the discussion of a Delphi study below.

2021-2022 Budget

PSB and DPD have worked diligently to refine the model in the 2021-2022 biennium budget to account for some of the recognized shortcomings. A major step forward was the recognition addressed above: the monthly variations in filings and assignments.

To address this issue, the budget reflects two modifications to the staffing model. First, the budget authorizes an additional FTE when the filings over a 60-day period exceed the predicted number of assignments by an amount equal to an attorney's anticipated monthly assignments. If the actual cases exceed the predicted cases by eight over that 60-day span, DPD is authorized an additional FTE. This is a significant change in the staffing model and the budget, and it provides DPD with the flexibility to respond to the fluctuations in case filings and case assignments.

The second modification is an authorization in the budget to add an additional 28.5 FTEs for 2021. This increase in FTEs is a recognition by the Executive and PSB that DPD lacked sufficient staff to respond to the spikes in filings, particularly in 2019, and that an annualized view of case filings and assignments is insufficient to accurately predict the staffing needs of DPD.

There is a third component to the attempt to address the monthly filing variations: the creation by DPD of an overflow panel. The overflow panel is intended to provide an interim response to an increase if filings stretch DPD's capacity. The overflow panel can be utilized during the 60-day period when cases have increased but the threshold for an additional FTE has not yet been met. Using the overflow panel allows DPD to properly monitor the representation of the clients, in compliance with the American Bar Association's Ten Principles of Public Defense. This panel will be funded through savings in the reduction in cases sent to the assigned counsel panel and a separate budget authorization.

Unfortunately, the budget also decreases DPD's FTE authorization by 30 for 2022 based on a promise from the PAO to reduce felony filings by 1,000 cases in 2022 through diversion programs not yet described or implemented by the PAO. Because DPD's work is downstream from the PAO, reducing DPD's capacity to handle cases in front of any actual reduction in case amount puts the cart before the horse.

Delphi Study

The current 2021-2022 budget reflects the County's commitment to public defense, but there is more to be done. One method by which the County can ensure the continued quality of public defense and address the shortcomings in the staffing model is to conduct a Delphi study. A Delphi study was recommended in the Board's 2019 Budget Report. The Board stands by that recommendation and renews it here:

The Delphi method was introduced in 1962 by researchers at the Rand Corporation. The method was described as a "new" research technique utilized by the Air Force in the 1950s to gather expert opinion and generate a reliable consensus. As a methodological strategy, the Delphi method proposed that a succession of surveys be given to a group of experts, with structured feedback presented to the experts at each interval stage. The surveying practices applied by the Delphi method could be interviews or questionnaires that focus on some fundamental question of significance to the group of experts convened for feedback.⁸

A Delphi study tries to determine how much time an attorney *should* spend on a particular type of case based on currently existing legal community practice standards. Currently, rather than case type, the amount of time an attorney can devote to a case depends on the number of cases that attorney is assigned.⁹ Because of this, DPD possesses the ability to measure only how much time an attorney could afford to spend on any particular case and can never answer the question of how much time an attorney should spend on a particular kind of case. If the results of a Delphi study are implemented, that approach would be reversed and the number of cases that an attorney is assigned would depend on the time each case type requires. A Delphi study would replace the antiquated and arbitrary caseload standards with a model based on both actual time spent on a case and the recommended amount of time.

The budget also did not include necessary funding for DPD in two areas: salaries and COVID relief. The budget authorized funding for the salaries of DPD attorneys based on the average salary for DPD attorneys. However, unlike other County salary schedules, the current attorney salary schedule has inconsistent percent increases between each step within the range. Most other County salary schedules have a standard difference of 2.5% between each step within a range. The difference between steps in the attorney salary schedule varies from 15.9% to 1.25%. In terms of funding, the impact can be significant when a number of attorneys receive a step increase greater than the budgeted 2.5% budgeting standard, resulting in insufficient funding to meet the step increases. For the 2021-22 biennium, this shortfall is estimated to be

⁸ [The-Missouri-Project-2014-Public-Defender-Study.pdf](#)

⁹ DPD uses a supplemental case credit system in which an attorney receives an additional case credit if the hours devoted to a case exceed certain thresholds. This creates challenges for DPD in case assignments and in predicting available capacity since the Department will not know how many case credits an attorney will earn in advance.

\$1.2 million. The budget authorization should recognize the union contract attorney salary schedule and authorize funding for salaries that reflects the salary schedule in the contract.

The second area is COVID relief. Because of the pandemic, the County sought to provide additional assistance to county employees in responding to and adapting to a very challenging environment. One measure the County provided was free parking for county employees in the Goat Hill Garage. This and other measures were both appropriate and welcomed. But while the parking was free for the employees, DPD still needed to reimburse the County for those expenses. DPD also purchased a significant amount of computer equipment and office furniture to allow staff to create home offices to ensure staff safety during the pandemic. The cost of these measures should fall on the County and not the individual departments. The budget should not shift those costs to DPD, and the budget should include a reimbursement to DPD for the costs of the COVID relief.

Recommendations

1. The County Council should provide the funding necessary for DPD to conduct a Delphi study. The study will aid the County and DPD in determining the resources necessary for quality public defense.
2. The budget for DPD should reflect the actual salaries paid in accordance with the union contract rather than the average salary paid to DPD attorneys.
3. The budget should provide reimbursement to DPD for the COVID relief measures that were instituted by the County.