


11-2013

## The Undersigned Attorney Hereby Certifies – The Washington Supreme Court Rule on Standards and Its Implications

URL: <https://digitalcommons.law.seattleu.edu/sjsj/vol11/iss3/art8>

 Part of the [Administrative Law Commons](#), [Agriculture Law Commons](#), [Arts and Humanities Commons](#), [Justice Sheryl Gordon McCloud](#), [Banking and Finance Law Commons](#), [Civil Rights and Discrimination Commons](#), [Commercial Law](#)

[Justice Susan Owens](#), [Constitutional Law Commons](#), [Consumer Protection Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Disability and Equity in Education Commons](#), [Disability Law Commons](#), [Educational Leadership Commons](#), [Educational Methods Commons](#), [Marc Boman](#)

[Joanne Moore](#), [Lobbies Law Commons](#), [Family Law Commons](#), [Fourteenth Amendment Commons](#), [Health Law and Policy Commons](#), [Housing Law Commons](#), [Human Rights Law Commons](#), [Immigration Law Commons](#), [Indian and Aboriginal Law Commons](#), [Insurance Law Commons](#), [Intellectual Property Law Commons](#), [International Trade Law Commons](#), [Juvenile Law Commons](#), [Labor and Employment Law Commons](#), [Land Use Law Commons](#), [Law and Gender Commons](#), [Law and Psychology Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal History Commons](#), [Legal Remedies Commons](#), [Legislation Commons](#), [Marketing Law Commons](#), [National Security Law Commons](#), [Natural Resources Law Commons](#), [Other Education Commons](#), [Other Law Commons](#), [Privacy Law Commons](#), [Property Law and Real Estate Commons](#), [Secured Transactions Commons](#), [Securities Law Commons](#), [Sexuality and the Law Commons](#), [Social and Behavioral Sciences Commons](#), [Social and Philosophical Foundations of Education Commons](#), [Social Welfare Law Commons](#), [Transnational Law Commons](#), and [the Water Law Commons](#)

---

### Recommended Citation

Gordon McCloud, Justice Sheryl; Owens, Justice Susan; Boman, Marc; and Moore, Joanne (2013) "The Undersigned Attorney Hereby Certifies – The Washington Supreme Court Rule on Standards and Its Implications," *Seattle Journal for Social Justice*: Vol. 11 : Iss. 3 , Article 8.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol11/iss3/8>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

## **The Undersigned Attorney Hereby Certifies – The Washington Supreme Court Rule on Standards and Its Implications (03/08/2013)**

---

### INTRODUCTORY NOTE:

At The Defender Initiative's Third Annual Conference on Public Defense, a panel discussed the recently enacted Washington Supreme Court Rule on Standards for public defense counsel.<sup>1</sup> The panel included the following: Justices Susan Owens and Sheryl Gordon McCloud, Joanne Moore (Director of the Washington State Office of Public Defense), and moderated by Marc Boman (a partner at the Seattle-based office of Perkins, Coie and former chair of the Washington State Bar Association Council on Public Defense).

The panel discussed the reasons the Court passed the rule and the importance of standards. An edited transcript of their conversation follows.

**MARC BOMAN:** Before I say anything about our program, I want to compliment Bob Boruchowitz and Seattle University. I attended this morning's program and this is really an outstanding educational program for our community.

Welcome to this discussion of the new Washington criminal and juvenile court rules that require attorneys to certify compliance with standards in order to receive court-appointment. I'm very honored to moderate this panel discussion with our distinguished panelists. Each of them has extensive experience with the criminal justice system and public defense in Washington.

---

<sup>1</sup> Superior Court Criminal Rule (CrR) 3.1 Stds (2012), *available at* [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=sup&set=CrR](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=CrR).

The Panelists have expressed a preference to have this be interactive. To briefly set the stage, I think the article that's in your materials by Chief Justice Madsen is very aptly titled, "Enacting standards for public defenders: a difficult but necessary balance."<sup>2</sup> I think that's true. The chief justice explained that more than fifty years after the Gideon decision, the promise of effective assistance of counsel was not being achieved throughout our state, and the court recognized that it needed to take some action.

So more than two and a half years ago, in July 2010, and perhaps not coincidentally, just a few months after the decision in *A.N.J.*,<sup>3</sup> the Washington State Supreme Court amended the criminal rules to provide that before appointing an attorney to represent an indigent person, the court shall require the lawyer to certify compliance with standards to be approved by the supreme court.

At the time, there were no standards by the court. And this kicked off a lengthy process within the Washington State Bar Association, starting with the Council on Public Defense, to recommend standards to the court, and this was followed by a public comment period and then what the chief justice refers to in her article as an "intense internal discussion."<sup>4</sup> And then, in July of last year, the court adopted standards to implement the certification requirement. Certification began with respect to some standards in October of last year. These related to the requirement for having an office, telephone, and postal address, to minimum experience

---

<sup>2</sup> Barbara Madsen, *Enacting standards for public defenders is a difficult but necessary balancing act*, FULL COURT PRESS (2012).

<sup>3</sup> See *State v. A.N.J.*, 168 Wash. 2d 91, 225 P.3d 956 (2010) (holding that because of the ineffectiveness of a child's appointed counsel, the child was not adequately informed of the nature of the charge against him or the consequences of a guilty plea, and finding that the Washington Defender Association Standards for Indigent Defense and those of the Washington State Bar Association "may be considered with other evidence concerning the effective assistance of counsel.").

<sup>4</sup> Madsen, *supra* note 2.

qualifications and requirements for investigator services. Certification with regard to numerical caseloads, caseload limits, is now scheduled to begin in September of this year.<sup>5</sup>

I thought it might be nice, on this fiftieth anniversary of the *Gideon* case,<sup>6</sup> to ask our panelists to share any thoughts they have on the progress, or the lack of progress, in public defense over their careers. Justice Owens, would you like to say a few words?

**JUSTICE SUSAN OWENS:** Yes, I was of course a mere child when the *Gideon* case came out, I mean, I really was. But I have read the book and I have seen the movie. I think when I was in college. Having grown up in North Carolina, and during college and law school having visited many courts there, I do not believe *Gideon* was being implemented on a wide-scale basis.

When I moved into Clallam County in 1976, the system was “everyone got appointed.” No matter what you did, no matter how much experience or inexperience you had, you got to be appointed. Very shortly after my arrival, a case came out that reversed a series of felony convictions based on ineffective assistance of counsel. I felt sorry for the lawyer, because he had tried to tell the judge that he had no experience in this area and pretty much begged not to be appointed, but was appointed anyway. That set in motion the creation of the non-profit public defender system in Jefferson and Clallam Counties, and it was quite successful, and it had the most excellent attorneys.

---

<sup>5</sup> Memorandum from Denise Foster to the Rules Comm. (May 23, 2013), available at [http://www.opd.wa.gov/TrialDefense/Standards/0099-2013\\_SupremeCourtOrder.pdf](http://www.opd.wa.gov/TrialDefense/Standards/0099-2013_SupremeCourtOrder.pdf).

(The Washington State Supreme Court postponed implementation of the misdemeanor caseload limit until January 2015 and the other caseload limits are to be effective October 1, 2013. See CrR 3.1 STDS, Standard 3.4.).

<sup>6</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

We will probably talk about this a little later—the culture that you come from. So, the culture I came from, the best trial attorneys in the county were the public defenders. Because it was a rural county, we did not have a huge caseload or high crime rates, but of course over the years, that gradually changed, particularly when the economic demise began to happen with the natural resource industry (the shrinking of fishing industries and the logging industry) and the caseloads began rising again. Nevertheless, we always, with some exceptions, had very good public defenders.

I did do criminal defense and although was never a public defender, I had a temporary contract to take all the district court cases for a six-month period while the agency was looking for a new person to hire. I certainly never thought about treating my appointed clients any differently than my private clients. Of course with private clients when they want to talk to you, you talk to them all they want you to because you are billing them by the hour or maybe you are doing them on a flat rate, but you listen to them and make yourself available to them and you return their phone calls, that is just the way you practice.

So fast forward to the present day, when I came on the Court. Early on, I was asked to be on the Blue Ribbon Panel for Public Defense. Marc Boman was one of the co-chairs with former Justice Robert Utter. We started talking about whether there needed to be a standing committee with the Bar Association on public defense. The committee, the Blue Ribbon Panel, morphed into the Council on Public Defense as a standing committee.

So it seems to me that we have been talking about standards for a very long time. But it was a great surprise to me, coming from the culture that I came from, to hear about cases where people had never met with their public defender before they saw them in court. Then we had the Grant County cases where the Supreme Court ended up disciplining, disbaring as

it were, three of the public defenders over there.<sup>7</sup> To me, it was quite shocking to hear that in three years there were no suppression hearings at all. I mean it was kind of like “how could that possibly happen?” We had them all the time whether we needed one or not—we had them.

Our public defenders loved to go to trial. They were so happy to have a jury trial, and they were quite aggressive advocates. To hear that there had not been any jury trials there in some number of years was again shocking to me.

So at any rate, the committee finally got on board with caseload standards. There had always been standards, I knew that we had them in Clallam County, but they were not mandatory. I think the commissioners adopted the ones the Bar proposed, which did not really have any teeth in them, but because I wasn't having problems with public defenders, it was not really on my radar that that was a problem until I lived in more populated areas.

The Rules Committee of the Supreme Court moves with the speed of a glacier, and the standards and the caseload limits were introduced in 2007. We published for comment in 2008. We first had our discussion in June of 2009. The original rule came in the form of the judge was going to be doing the certifying about whether or not the lawyer was in compliance.

This did not go over well with the judges, myself included. We had a lot of discussion about that. In the original form, it never passed from the Court Rules Committee. We kept tweaking it. It morphed over time, at the same time the Rules Committee was dealing with it. We kept meeting four times a year, or maybe two times a year, we would talk about it because you are sending things out to comment to various groups, prosecutors, defender agencies, and they are tweaking it or suggesting tweaks, and then the courts tweaked it, and then we think “oh gee, they tweaked it, we tweaked it, and

---

<sup>7</sup> See, e.g., Ken Armstrong, *Former Public Defender Disbarred, Accused of Enriching Self at Poor Clients' Expense*, SEATTLE TIMES, May 8, 2004.

we have to send it back out for publication. Or at least send it out for comment.”

We did pass the rule eventually in 2010. Like Marc said, we did not have any standards, so we were waiting on the committee and the subcommittee to get an agreement on the standards. They finally did, and of course, because it is going to take time for implementation and development of best practices, we kicked the mandatory aspect of the rule forward to this year. Why did we pass the rule? Because the process was so long, and I guess the simple answer was because nothing was really changing on the ground even though everyone seemed to agree that it needed to change. No one was taking steps. Our rules are actually aspirational, not mandatory, but seeing as it is being implemented like it is mandatory, whether that will really change anything, I really do not know, I think we will probably get to that a little later. We hope that it will, whether it does or not, I do not know. But it is a good place to start.

**MARC BOMAN:** Justice McCloud?

**JUSTICE SHERYL GORDON MCCLOUD:** I came to the Court after the rule had been passed. So I can't take the credit or blame for that. But I wanted to say that I'm incredibly proud of where Washington is compared to a lot of other places. I was elected in November; I'm the newest justice on the Court. Following the primary, I had a single opponent, and, I think it was the only race I've heard of anywhere in the country where the two candidates were fighting over which one supported public defense more than the other. And you know nobody loses when that's the caliber of the discussion in the election.

I'm not sure if you could've had that debate like that anyplace else because in Washington we really do appreciate the constitutional right to counsel. And so there's another thing about Washington that I'm extremely proud of. I'm sure you went over the history of *Gideon* this morning, so

1932: *Powell v. Alabama*,<sup>8</sup> right to counsel in capital cases; 1963: *Gideon*, right to counsel in felony cases; 1972: *Argersinger v. Hamlin*,<sup>9</sup> right to counsel in misdemeanor cases; and then those of us who've had an appellate practice never want to forget 1985: *Evitts v. Lucey*,<sup>10</sup> right to counsel for indigents in appellate cases.

But there's another date in there for Washington. It's 1854, which was in the territory of Washington, the right to counsel for those who could not afford a lawyer when they were charged with a crime, was first recognized well before *Gideon v. Wainright*, understandably and maybe more aspirational than applied everywhere, but it's something that we as Washingtonians can be proud of.

Given that history, I can tell you—I was at the public defender office doing trials in the 80s. And after that, I wanted to get into appellate work. And I did get into appellate and post-conviction work in the state and federal systems starting in the 90s, and in that capacity I had the chance to review transcripts from all over the state, and some from other states too. And I can tell you that I never saw a transcript of a felony trial where there was absolutely no lawyer unless the defendant waived the right to counsel. I never saw a transcript of a misdemeanor trial where there was absolutely no lawyer unless the defendant waived the right to counsel, and I never saw in Washington a transcript of a trial where the lawyer was asleep like the lawyer in *Burdine v. Johnson*,<sup>11</sup> that Texas death penalty case, was asleep. So we've never had to fight here in Washington about whether one presumes prejudice when there's uncontroverted proof that the lawyer was literally asleep at the switch. I never saw that.

What did I see? It was not complete deprivation of the right to counsel on the whole. What I saw was counsel who was figuratively asleep at the

---

<sup>8</sup> 287 U.S. 45 (1932).

<sup>9</sup> 407 U.S. 25 (1972).

<sup>10</sup> 469 U.S. 387 (1985).

<sup>11</sup> 262 F.3d 336 (5<sup>th</sup> Cir. 2001).



switch. Not all the time, but in significant cases. *Lord v. Wood*<sup>12</sup> was a case that I handled with my co-counsel out of Kitsap County where a man was sentenced to death for a murder, following what the Washington Supreme Court on appeal called one of the most complex cases that they had ever seen at the time. It was factually complex. There were all different kinds of scientific and trace evidence. The lawyers were working under incredible time pressures. The prosecutor had withheld exculpatory evidence. Fortunately, it was discovered before the end of trial, but it necessitated days and days of preparation and hearings to get that out. And there were lawyers, who although they were excellent criminal defense lawyers, were so under the gun and had so much to do and were being paid so little, and had so little access to additional services, that they couldn't get to everything they needed to get to. So ultimately, Mr. Lord's conviction was reversed because there were three witnesses, who saw the victim—the girl who was murdered—alive one day later than the only time when the client could have killed her. And it was reversed due to the ineffective assistance of counsel because although there were some reports about this girl, the lawyers never followed up on her.

Well that's one category of lawyers falling down on the job. And I've placed that into the category of overworked, underpaid lawyers with inadequate standards to guide what they get funding for.

Of course there's a different category that I've also seen, and that was a reversal in another death penalty case by the [Washington] State Supreme Court, *In re Brett*<sup>13</sup> in 2001. That was a reversal because the Court agreed that the trial lawyer was ineffective in failing to investigate the defendant's mental and physical disabilities and present them to the jury. Justice Talmadge wrote a separate decision and disagreed that that was ineffective, but said the lawyer was disbarred and that's ineffective and we're reversing

---

<sup>12</sup> 184 F.3d 1083 (9<sup>th</sup> Cir. 1999).

<sup>13</sup> 142 Wash.2d 868 (2001).

because of that. So I've placed that into a different category, a category of for whatever reasons, personal problems, substance abuse leading to disbarment, there's a culture that led to failure to discharge one's duties. I've seen that - I've seen that in reading transcripts in my own appeals, and unfortunately a lot of it, and several times, they've been cases where there's been suspension, disbarments, substance abuse, illegalities committed by the lawyer, and the like.

So, what I want to say, I've seen in the course of reviewing transcripts from all over the state during this time is that standards would've certainly helped raise the level of practice in many of those cases, but not in all of them. They are a necessary but certainly not a sufficient determinant that the lawyer is going to give effective assistance of counsel to the client. And I hope we get to talk more about other determinants of that as we go on.

**MARC BOMAN:** Joanne?

**JOANNE MOORE:** The State Office of Public Defense (OPD) is in Olympia, and one of our duties is try to obtain funding to improve criminal public defense, parents representation, and appellate representation.

As far as *Gideon* goes, one important thing about the case is that when talking to a legislator, if you say "You know the *Gideon* case," they do. Everyone who's an American knows what *Gideon v. Wainwright* is, and everyone supports it. That always helps get things back into perspective.

At OPD, we analyze and examine what is going on around the state with public defense, and publish a report every year. It's challenging to track progress in public defense because we have such a varied situation in Washington. Each jurisdiction runs its own system, and they range from sublime to miserable. While two counties are right next to each another, defendants may get a totally different trial and/or case representation in one than in the other.

The standards are instant—they bring instant accountability. Last summer, when the Supreme Court adopted, on June 15<sup>th</sup>, the requirement that every public defense attorney who is going to be appointed by a judge to represent an indigent client, has to first certify that the attorney meets certain enumerated standards, that was statewide. That was a brand new thing, requiring discussion and outreach, and there was some panic among many public defenders and judges regarding administering this. I am happy to report back to you that we recently surveyed all the courts asking “how did it go?” We received responses from ninety courts, and 88 percent of them said the first day was like any other day; and with respect to the certifications, there was no problem at all. We only heard about a couple of problems and they were minor. So the standards are having an immediate impact and while we do have a long way to go with certification, it is a giant step forward.

**MARC BOMAN:** Justice Owens mentioned the issue of culture. In her article, Chief Justice Madsen notes the numerical caseload was really the hottest topic during the comment period, but she also refers to the fact that the certification that is required under the new rules also requires these additional certifications that take place in October, having an office, phone service, a postal address. The question I have, as a person coming from a private practice, is this: Why is it necessary to tell lawyers to investigate their case? Why is it necessary to tell a lawyer they need to have phone service or something of that nature? Have some lawyers not had proper training? Are they not exposed to an office culture that requires seemingly basic tasks that need to be performed? Or is this really just about money? Is that really what this is all about? I’ll just throw that out there if anyone wants to respond.

**JOANNE MOORE:** In a lot of courts, in various places, public defense attorneys are poorly paid and that’s the culture, they’ve always been poorly

paid, and as a result these contracts do not pay enough to support a basic office. The attorneys do not have offices, but work out of their home offices and they use cell phones. You cannot answer your cell phone when you are in court, obviously. This is how the system has operated for many, many years in some areas. The standards include basic resource requirements because it is really difficult to practice effective assistance of counsel under those conditions.

**JUSTICE SHERYL GORDON MCCLLOUD:** I have nothing to add to that. You can't even comply with the RPCs if you're not having communication with your client.

**JOANNE MOORE:** An example of what I am talking about is one jurisdiction in Washington, which is not a poor city, that pays attorneys for what is a full time caseload number-wise, \$36,000 a year, for the attorney's salary and overhead, staff, taxes, and bar fees. The pay level does lead to ineffective practice.

**MARC BOMAN:** From what has been said in some CLEs about standards during the comment period, I think to some extent, a lot of what is done in practice is like the story of the frog in the hot water. Gradual increases in the temperature go undetected, and eventually the frog will die without even really realizing it. It gets to that point in regards to caseloads.

In order to meet the budgets, you'll see new practices developed to move cases through, and then that becomes the new standard. When the caseloads continue to increase, some new short cut is implemented and that becomes the standard. As a result, it's amazing how people can feel they can handle so many. Some attorneys say, "I can handle 1200 cases a year. I can do it, and I think I'm providing effective assistance of counsel." They just have become so acculturated to the system that allows it, and they don't realize

that stepping out of this world they live in; this is not really representing a client; it's handling and processing cases.

With that, unless someone else would like to say anything, there's a relatively new development. In December, the Court ordered Joanne of the Office of Public Defense to prepare a report on implementation of standards of attorney certification and to submit it to the Court by next Friday.<sup>14</sup> So it's nice that Joanne's here. And the issues the Court has asked the Office of Public Defense to discuss were case-weighting approaches, an inventory of common diversion programs, information on the potential impact of criminal law changes, and the analysis of attorney inexperience on caseload capability. Justice Owens, would you like to say something?

**JUSTICE SUSAN OWENS:** Well I think we wanted to know if things were being complied with and in what manner.

**JOANNE MOORE:** OPD is excited about the opportunity to conduct some in-depth analysis on what is happening with the standards so far. Our office has conducted some surveys of all public defenders and county prosecutors and county and city administrators asking them basic questions about their programs, how much time is spent on various types of court cases, their current attorney caseload size, and what kind of case-weighting they're implementing.<sup>15</sup>

---

<sup>14</sup> *Report to the Washington Supreme Court on the Implementation of Standards for Indigent Defense*, WASHINGTON STATE OFFICE OF PUBLIC DEFENSE, (Mar. 2013), [http://www.opd.wa.gov/TrialDefense/0094-2013\\_Standards-Report.pdf](http://www.opd.wa.gov/TrialDefense/0094-2013_Standards-Report.pdf).

<sup>15</sup> *See Wanted: Attorneys Interested in Joining a Misdemeanor Study*, WASHINGTON STATE OFFICE OF PUBLIC DEFENSE, [http://www.opd.wa.gov/TrialDefense/TimeStudy/0105-2013\\_TimeStudy.pdf](http://www.opd.wa.gov/TrialDefense/TimeStudy/0105-2013_TimeStudy.pdf) (providing information on the time study data gathering conducted by OPD); *See also In the Matter of the Standards for Indigent Defense Implementation: Order No. 25700-A-1016*, (Apr. 8, 2013), [http://www.opd.wa.gov/TrialDefense/Standards/0096-2013\\_SupremeCourtOrder.pdf](http://www.opd.wa.gov/TrialDefense/Standards/0096-2013_SupremeCourtOrder.pdf) (ordering the OPD to do a time study and prepare a model case weighting approach).

189 public defenders, thirty-three prosecutors, and forty-six court administrators answered the survey, providing information about the various jurisdictions, or at least some representative jurisdictions statewide.

We have done electronic research on judicial information systems—to find out what’s happening with the cases around the state. And here’s a tidbit of what’s coming up: one new relevant factor that we’ve learned is that the actual caseload in Washington courts has gone down significantly during the last two or three years. There aren’t as many cases going through the courts in a conventional manner. That’s what we were talking about at lunch: How can cases be moved out of the caseload—the trial caseload—and be resolved in another way, like diversion? What is the psychology of the recession in terms of cases being filed? We know anecdotally it has had an effect on the number of cases filed and now we have been able to track that significantly fewer cases are in the caseload, which is great news in terms of addressing caseload limits. We are excited about what we’re learning.

**MARC BOMAN:** You’ll notice that I kept looking over at the clock, because we really did want to make sure that this was interactive, and we certainly welcome more questions. We would like to open it up and see if there are some. Go ahead, please.

**AUDIENCE MEMBER:** I just had a question about earlier on Prof Boruchowitz had talked about misdemeanors, how one city as a policy matter was going to start weighting the cases...and I think there were only like four or five or so misdemeanors that they were counting as one...and there were other types of cases weighted down to a third, or two-thirds and this was how they were going to decide whether their attorneys met caseloads or not, and that was interesting to me because first of all, that’s going to be different from jurisdiction to jurisdiction (...) but I wonder if that’s something the office of public defense could monitor, and how that’s

being distributed, whether there will be in future standards to make that statewide consistent?

**JOANNE MOORE:** There are a couple of rules dealing with case weighting in the standards, but there seems to be confusion as to what is appropriate. Case weighting does not mean just looking at your caseload level and figuring out how to maintain it. One of the rules requires that case weighting policies be filed with the Office of Public Defense, but not for approval, we have no authority to approve or endorse case weighting systems. It is left up to the courts, or to the jurisdictions actually.

**MARC BOMAN:** When the Council on Public Defense first went to the board of governors of the state bar with our recommendations, one case was one case. This elicited a tremendous amount of concern in some misdemeanor practitioners. So we asked the board of governors to approve the remaining recommendations to the Supreme Court and let us go back to work. It was only misdemeanors, by the way...there was nothing in there that anyone objected to beside misdemeanor case load numbers. So we went back and that's when the Council, with the help of outsiders who were invited to participate, decided on the case weighting idea. The subcommittee worked very hard and others worked very hard on case weighting language. We also reviewed the history about case limit numbers. Where did they come from and how far back did they go. If you use case weighting, a certain number of misdemeanors are in the caseload. If you don't do case weighting, then it is a different number. So that was then presented to the court and that proposal went forward. That became the recommendation to the Supreme Court.

**JUSTICE SUSAN OWENS:** I think that is one reason that we asked for OPD to do the report, at least I had reported to the rest of the Court that there might be something going on with the weighting process. I think one of the

other issues was the experience factor. The people with contracts and public defenders who had been handling the cases for years, the judges are happy with it, and the prosecutors are happy with it. They feel like they had the ability to process a lot of cases, and that was a big push because it was hard to argue against the experience. It is also very subjective how you factor in the experience criteria, if that is the word to use, but I think that was one of the main drivers for the weighted caseloads, I certainly would not have thought of that myself.

**MARC BOMAN:** Questions? This gentleman here.

**AUDIENCE MEMBER:** With the implementation of drug courts, community courts, and informal dispositions by prosecutors, the rest of the caseload is more complex. How is that taken into account?

**JOANNE MOORE:** That must be taken into account in case weighting. If cases are more complex or serious, they're supposed to be weighted up.

**MARC BOMAN:** The language in the standard actually anticipates that some cases would be weighted more than others, and others would be weighted less. In some of the policies we have seen from cities, all of the weighting is a half or a third, and that raises questions of whether the spirit of the weighting system is understood.

One thing that we have talked about a lot in the Council on Public Defense is the issue of consequences of conviction. As budgets have become much more lean or strained, there becomes a greater tension between the public's desire to criminalize behavior and the unwillingness to pay for the defense, though they're charged as criminals.

A couple years ago when the recession was really hitting, it was in 2009 or 2010, the Council organized summits hosted by the deans of the three law schools in the state, with each hosting a session at their law school.



These were attended by people from across the criminal justice spectrum, including the chief of police for Seattle, the state patrol chief, representatives of the prison system, defenders, prosecutors, and a lot of others. The idea was what could we do when we have leaner and leaner budgets to try to manage our system, the criminal justice system. And one of the issues that came out every single time—we did it two years in a row—and in each year, the main point was we need to do something about...the dockets in the misdemeanor courts. I'm not sure if it's the public, but it's seems to be "criminalize this, criminalize that, but we don't want to pay defenders to take on those cases." A lot of peoples' lives were dramatically changed because they were convicted of misdemeanors, perhaps more so than ten or twenty years ago. So these issues are other reasons these caseload standards are so important.

**JOANNE MOORE:** The upcoming report talks about recent law changes. The state now cannot suspend the license of the driver who had a nonmoving violation—broken taillight, or an equipment failure, or not having insurance—the state cannot suspend that driver's license.<sup>16</sup> So there has been a change in the suspended driver license law and in prosecutors moving to diversion.<sup>17</sup> And then the second big change is the marijuana

---

<sup>16</sup> See WASH. REV. CODE § 46.20.289 effective June 1, 2013; WAC 308-104-160; Joanne I. Moore & David K. Chapman, *Driving While License Suspended 3<sup>rd</sup> Degree: Survey of Courts of Limited Jurisdiction*, WASHINGTON STATE OFFICE OF PUBLIC DEFENSE, (2008), [http://www.opd.wa.gov/TrialDefense/090602\\_DWLS3Survey.pdf](http://www.opd.wa.gov/TrialDefense/090602_DWLS3Survey.pdf).

<sup>17</sup> See, e.g., Presentation, Spokane City Prosecutor, Defender Initiative Conference, *Diversion for Relicensing*, (Feb. 25, 2011), available at <https://www.regonline.com/custImages/260000/269600/845am%20Diversion%20for%20Relicensing.pdf>. See also JOEL M. SCHUMM, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, A.B.A., NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 9 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_national\\_indigent\\_defense\\_reform.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf).

initiative.

[An audience member asked about whether consolidating municipal and district courts was not possible.]

**JUSTICE SUSAN OWENS:** No, it is not completely dead. There is a BJA [Board for Judicial Administration] committee working on unification. I was opposed to it initially, and I was on a committee when I heard a former Justice...talk about a unified system, and I went from being opposed to 100 percent in favor. For those who do not know, I was a district court judge for nineteen years in the western part of Clallam County, but there is a part of Jefferson County that comes around and ends up on the ocean side, and the people lived there and actually committed crimes there and for a while there I was, pro tem as a visiting judge, but you know it made no sense for them not to have a closer court to come into. If they wanted to contest something, they had to drive to Port Townsend. That committee is in full recommendation mode. Because of the budget, it is probably not going to move any time soon, but no, it is definitely not new.

**JUSTICE SHERYL GORDON MC CLOUD:** I want to go back to the question about the legislature passing laws and the wisdom of it, and you heard this side of the table pretty quiet during that question. The legislature can pass whatever the legislature is going to pass, that's their job. But the right to a lawyer and the right to effective assistance of counsel is a constitutional right under the state and federal constitutions, and the legislature can't undermine that. I guess I wanted to take this opportunity, now that I'm on this side of the table, to say how important I think that the independence of the judiciary is in enforcing that right and not being intimidated away from enforcing that right. So the legislature can do whatever the legislature is going to do in terms of passage and criminalization of whatever it thinks is

best, but the role of the courts is to protect and uphold constitutional rights, regardless of what they do.

**PROFESSOR ROBERT BORUCHOWITZ:**<sup>18</sup> For the people who are worried about their local jurisdictions, adopting a stupid case weighting scheme, or ignoring the impact of the specialty courts; I encourage you to look at the standards closely, because although we couldn't cover everything, we did try to think about all of these areas, and we addressed specialty courts, we addressed getting people to recognize that even though it's in the specialty court that doesn't have jury trials, you may still end up with more than one case credit for that case, because you may have more hearings on that case than you might have had you pled out at omnibus or something.

And so, I don't think the standards are vague, someone said that the standards are vague, but they can't be precise on every point, but it is possible to use what's in there to form a discussion for how they should be done, case weighting has to be done on what's actually required, but you can't just sit down and say "we have 1200 cases and we need to turn it into 300," you can't do that.

So if you have time records for instance, you can look at those records, and you have to decide of course whether those time records are valid, because if you have 1200 cases, your time records are no good either. And so if you don't have the resources to do a real case weighing study, then you have to somewhere in the middle find records that are reliable, and if you can't do that, you can't just sit around and say DUI cases are two-thirds of a case...you can't do that. These numbers are based on a maximum value than a human being can handle. How many clients you can actually represent effectively, and if you go back to the slide, about how many hours

---

<sup>18</sup> Defender Initiative Director Professor Robert C. Boruchowitz convened the conference. He is a member of the WSBA Council on Public Defense and chairs its Standards Subcommittee.

there are in a year that you can work, you start getting up over 400 cases and you don't have time for that. And if you start talking to people, number crunchers or whoever, and explain what's required to represent somebody, you have to meet them, you have to talk to the prosecutor, you have to read the police report, you have to do some research, you have to go to court, people can understand that's more than an hour and a half. And the bottom line that I think you can sometimes get through to folks on is that everybody knows someone whose been charged with a crime. Anybody here doesn't know a friend, a relative, a colleague who hasn't been charged with a crime? Anybody? No? Everybody knows, whether it's minor in possession of alcohol, or DUI, or something more serious, and everybody knows somebody, and if you get the funders to think about if you were meeting with a lawyer for someone you cared about and the lawyer said they would spend two hours on the case, you would walk out, you wouldn't hire that lawyer. So I think you can make those kinds of arguments to get people to see .... I think there's enough in the standards to address the questions that have been raised.