THE RIGHT TO COUNSEL IN OREGON

Presented by
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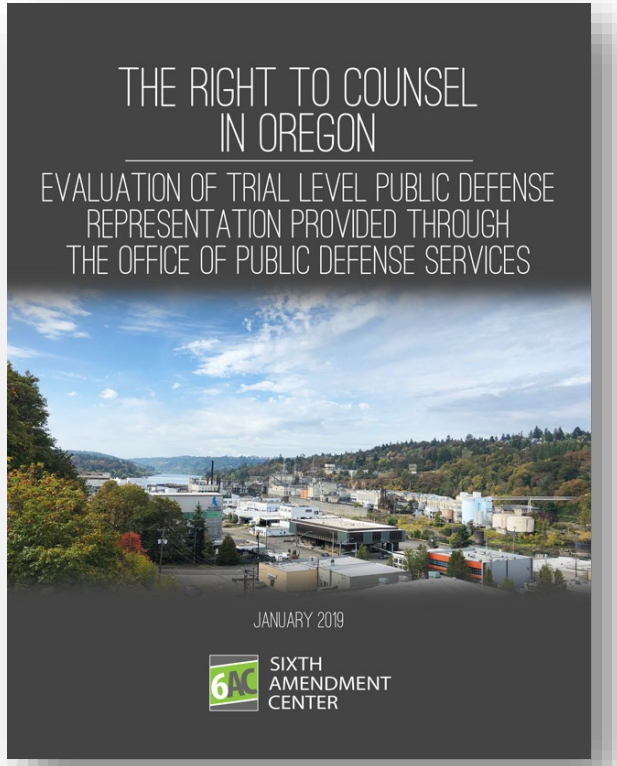
Presentation to Public Defense Services Commission
OPDS Public Defense Provider Summit – Feb. 23, 2023

Findings

1. Complex bureaucracy, little oversight
2. Flat fee compensation
3. PDSC lacks independence
4. No authority over justice & municipal courts

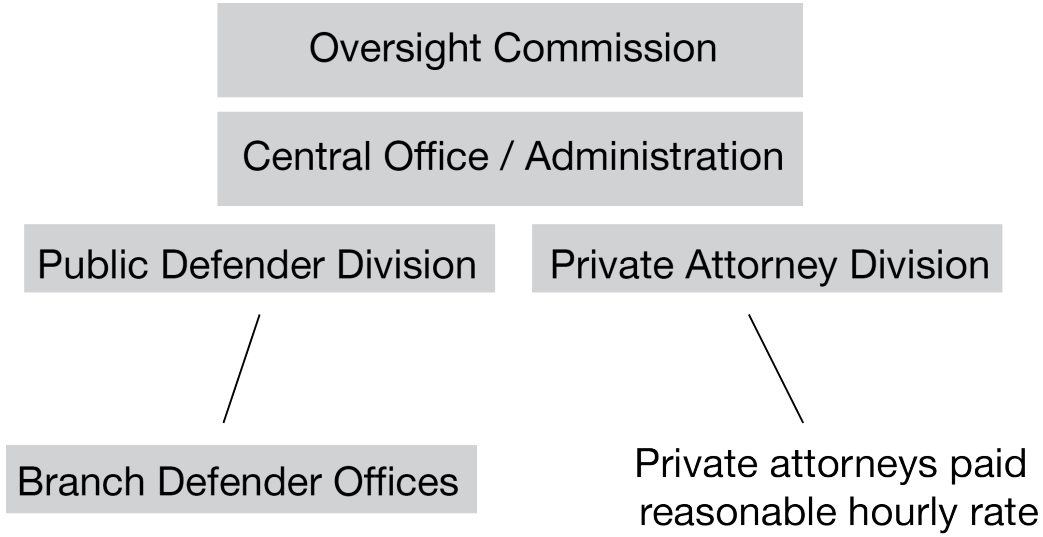


Oversight

1. Independence: equal appointment by all three branches of government
2. Commission should be 9 to 13 members
3. No current judges, prosecutors, defense attorneys, law enforcement
4. Diversity of constituencies represented on PDSC
5. Broad standards-setting authority
6. Oversight of **all** courts statewide

Mixed Public/Private System

- Abolish fixed fee contracting
- Hourly rate:
  actual overhead + reasonable fee
- Governmental public defender offices



"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

- Gideon v. Wainwright

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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-441 **May 13, 2006**

Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

Lawyer supervisors, including heads of public defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, lawyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

In this opinion,[1] we consider the ethical responsibilities of lawyers, whether employed in the capacity of public defenders or otherwise, who represent indigent persons charged with criminal offenses, when the lawyers' workloads prevent them from providing competent and diligent representa-

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.

tion to all their clients. Excessive workloads present issues for both those who represent indigent defendants and the lawyers who supervise them.[2]

Ethical responsibilities of a public defender[3] in regard to individual workload

Persons charged with crimes have a constitutional right to the effective assistance of counsel.[4] Generally, if a person charged with a crime is unable to afford a lawyer, he is constitutionally entitled to have a lawyer appointed to represent him.[5] The states have attempted to satisfy this constitutional mandate through various methods, such as establishment of public defender, court appointment, and contract systems.[6] Because these systems have been created to provide representation for a virtually unlimited number of indigent criminal defendants, the lawyers employed to provide representation generally are limited in their ability to control the number of clients they are assigned. Measures have been adopted in some jurisdictions in attempts to control workloads,[7] including the establishment of procedures for assigning cases to lawyers outside public defenders' offices when the cases could not properly be directed to a public defender, either because of a conflict of interest or for other reasons.

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2. For additional discussion of the problems presented by excessive caseloads for public defenders, *see* "Gideon's Broken Promise: American's Continuing Quest For Equal Justice," prepared by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants 29 (ABA 2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (last visited June 21, 2006).

3. The term "public defender" as used here means both a lawyer employed in a public defender's office and any other lawyer who represents, pursuant to court appointment or government contract, indigent persons charged with criminal offenses.

4. U.S. CONST. amends. VI & XIV.

5. The United States Supreme Court has interpreted the Sixth Amendment to require the appointment of counsel in any state and federal criminal prosecution that, regardless of whether for a misdemeanor or felony, leads or may lead to imprisonment for any period of time. *See generally,* Alabama v. Shelton, 535 U.S. 654, 662 (2002); Strickland v. Washington, 466 U.S. 668, 684-86 (1984); Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972); Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963); Johnson v. Zerbst, 304 U.S. 458. 462-63 (1938).

6. Most states deliver indigent defense services using a public defender's office (eighteen states) or a combination of public defender, assigned counsel, and contract defender (another twenty-nine states), according to the Spangenberg Group, which developed a report on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants. *See* The Spangenberg Group, "Statewide Indigent Defense Systems: 2005," *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf (last visited June 21, 2006).

7. *See generally,* National Symposium on Indigent Defense 2000, *Redefining Leadership for Equal Justice, A Conference Report* (U.S. Dep't of Justice, Bureau of Justice Assistance, Wash. D.C.) 3 (June 29-30, 2000), *available at* http://www.ojp.usdoj.gov/indigentdefense/symposium.pdf (last visited June 21, 2006) (common problem in indigent defense delivery systems is that "lawyers often have unmanageable caseloads (700 or more in a year")).

Model Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation.[8] These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area. The Rules provide no exception for lawyers who represent indigent persons charged with crimes.[9]

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8. Rule 1.1(a) provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
Rule 1.2(a) states:

> [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."
Rule 1.4(a) and (b) states:

> (a) A lawyer shall:
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> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

9. *See* ABA Formal Opinion Op. 347 (Dec. 1, 1981) (Ethical Obligations of Lawyers to Clients of Legal Services Offices When Those Offices Lose Funding), in FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495 at 139 (ABA 1985) (duties owed to existing clients include duty of adequate preparation and a duty of competent representation); ABA Informal Op. 1359 (June 4, 1976) (Use of Waiting Lists or Priorities by Legal Service Officer), *id*. at 237 (same); ABA Informal Op. 1428 (Sept. 12, 1979) (Lawyer-Client Relationship Between the Individual and Legal Services Office: Duty of Office Toward Client When Attorney Representing Him (Her) Leaves the Office and Withdraws from the Case), *id*. at 326 (all lawyers, including legal services lawyers, are subject to mandatory duties owed by lawyers to existing clients, including duty of adequate preparation

Comment 2 to Rule 1.3 states that a lawyer's workload "must be controlled so that each matter may be handled competently."[10] The Rules do not prescribe a formula to be used in determining whether a particular workload is excessive. National standards as to numerical caseload limits have been cited by the American Bar Association.[11] Although such standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties.[12] If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation.[13]

A lawyer's primary ethical duty is owed to existing clients.[14] Therefore, a

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and competent representation). *See also* South Carolina Bar Ethics Adv. Op. 04-12 (Nov. 12, 2004) (all lawyers, including public defenders, have ethical obligation not to undertake caseload that leads to violation of professional conduct rules).

The applicability of Rules 1.1, 1.3, and 1.4 to public defenders and/or prosecutors has been recognized by ethics advisory committees in at least one other state. *See* Va. Legal Eth. Op. 1798 (Aug. 3, 2004) (duties of competence and diligence contained within rules of professional conduct apply equally to all lawyers, including prosecutors).

10. Principle 5 of *The Ten Principles of a Public Defense Delivery System* specifically addresses the workload of criminal defense lawyers:

> *Defense counsel's workload is controlled to permit the rendering of quality representation.* Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

Report to the ABA House of Delegates No. 107 (adopted Feb. 5, 2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf (last visited June 21, 2006) (emphasis in original).

11. *Id.*

12. *Id*. *See also* Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d 1045, 1051-52 (1998) (supervising lawyer violated Rule 5.1 by assigning too many cases to supervised lawyer, assigning cases day before trial, and assigning cases too complex for supervised lawyer's level of experience and ability).

13. Rule 1.16(a) states that "a lawyer shall not represent a client or, where representation has begun, shall withdraw from the representation of a client if the representation will result in violation of the Model Rules of Professional Conduct or other law."

14. *See* ABA Formal Opinion Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 369 (ABA 2000); ABA Formal Opinion Op. 347, *supra* note 9.

lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.

When a lawyer receives appointments directly from the court rather than as a member of a public defender's office or law firm that receives the appointment, she should take appropriate action if she believes that her workload will become, or already is, excessive. Such action may include the following:

- requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation; and
- if the excessive workload cannot be resolved simply through the court's not assigning new cases, the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.[15]

If the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation.

When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:

- transferring non-representational responsibilities within the office, including managerial responsibilities, to others;
- refusing new cases;[16] and
- transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s).[17]

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15. Whenever a lawyer seeks to withdraw from a representation the client should be notified, even if court rules do not require such notification. *See* Rule 1.4.

16. It should be noted that a public defender's attempt to avoid appointment or to withdraw from a case must be based on valid legal grounds. Rule 6.2(a) provides, in pertinent part, that "[a] lawyer *shall not seek to avoid* appointment by a tribunal to represent a person *except for good cause*, such as representing the client is likely to result in violation of the Rules of Professional Conduct or other law." (Emphasis added). Therefore, a public defender should not claim an excessive workload in an attempt to avoid new cases or to withdraw from current cases unless good cause objectively exists.

17. It is important to note that, for purposes of the Model Rules, a public defender's office, much like a legal services office, is considered to be the equivalent of a law firm. *See* Rule 1.0(c). Unless a court specifically names an individual lawyer within a public defender's office to represent an indigent defendant, the public defender's office should be considered as a firm assigned to represent the client; responsibility for handling the case falls upon the office as a whole. *See* ABA Informal Op. 1428, *supra* note 9 (legal services agency should be considered firm retained by client; responsibility for handling caseload of departing legal services lawyer falls upon office as whole rather than upon lawyer who is departing). Therefore, cases may ethically be reassigned within a public defender's office.

If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until either relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office.

In presenting these options, the Committee recognizes that whether a public defender's workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer's cases and other factors.[18] When a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor's resolution ordinarily will constitute a "reasonable resolution of an arguable question of professional duty" as discussed in Rule 5.2(b).[19] In those cases where the supervisor's resolution is not reasonable, however, the public defender must take further action.[20]

Such further action might include:

- if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office;[21] and
- if the lawyer is still not able to obtain relief,[22] filing a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.[23]

If the public defender is not allowed to withdraw from representation, she must obey the court's order while taking all steps reasonably feasible to insure that her client receives competent and diligent representation.[24]

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18. *See* note 12, *supra*, and accompanying text.

19. *See* Comment [2].

20. *See, e.g.*, Atty. Grievance Comm'n of Maryland v. Kahn, 431 A.2d 1336, 1352 (1981) ("Obviously, the high ethical standards and professional obligations of an attorney may never be breached because an attorney's employer may direct such a course of action on pain of dismissal. . . .")

21. *See* Michigan Bar Committee on Prof. & Jud. Eth. Op. RI-252 (Mar. 1, 1996) (in context of civil legal services agency, if subordinate lawyer receives no relief from excessive workload from lawyer supervisor, she should, under Rule 1.13(b) and (c), take the matter to legal services board for resolution).

22. Rule 5.2 makes clear that subordinate lawyers are not insulated from violating the Rules of Professional Conduct and suffering the consequences merely because they acted in accordance with a supervisory lawyer's advice or direction unless it was in regard to "an arguable question of professional duty."

23. A public defender filing a motion to withdraw under these circumstances should provide the court with information necessary to justify the withdrawal, while being mindful of the obligations not to disclose confidential information or information as to strategy or other matters that may prejudice the client. *See* Rule 1.16 cmt. 3.

24. Notwithstanding the lawyer's duty in this circumstance to continue in the representation and to make every attempt to render the client competent representation, the lawyer nevertheless may pursue any available means of review of the court's order. *See* Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Hughes, 557 N.W.2d 890, 894

Ethical responsibility of a lawyer who supervises a public defender

Rule 5.1 provides that lawyers who have managerial authority, including those with intermediate managerial responsibilities, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct. Rule 5.1 requires that lawyers having direct supervisory authority take reasonable steps to ensure that lawyers in the office they supervise are acting diligently in regard to all legal matters entrusted to them, communicating appropriately with the clients on whose cases they are working, and providing competent representation to their clients. As an essential first step, the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers.

If any subordinate lawyer's workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients. These might include the following:

- transferring the lawyer's non-representational responsibilities, including managerial responsibilities, to others in the office;
- transferring case(s) to another lawyer or other lawyers whose workload will allow them to provide competent representation;[25]
- if there are no other lawyers within the office who can take over the cases from which the individual lawyer needs to withdraw, supporting the lawyer's efforts to withdraw from the representation of the client;[26] and finally,
- if the court will not allow the lawyer to withdraw from representation, providing the lawyer with whatever additional resources can be made available to assist her in continuing to represent the client(s) in a manner consistent with the Rules of Professional Conduct.

(Iowa 1996) ("ignoring a court order is simply not an appropriate step to test the validity of the order under our Code of Professional Responsibility"); Utah Bar Eth. Adv. Op. 107 (Feb. 15, 1992) (if grounds exist to decline court appointment, lawyer should not disobey order but should seek review by appeal or other available procedure).

25. *See* note 17, *supra*.

26. *See* In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1138-39 (Fla. 1990) (in context of inadequate funding, court stated that if "the backlog of cases in the public defender's office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw"); *see also* In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender, 612 So.2d 597 (Fla. App. 1992) (en banc) (public defender's office entitled to withdraw due to excessive caseload from representing defendants in one hundred forty-three cases).

When a supervised lawyer's workload is excessive and, notwithstanding any other efforts made by her supervisor to address the problem, it is obviously incumbent upon the supervisor to assign no additional cases to the lawyer, and, if the lawyer's cases come by assignment from the court, to support the lawyer's efforts to have no new cases assigned to her by the court until such time as she can adequately fulfill her ethical responsibilities to her existing clients.

In dealing with workload issues, supervisors frequently must balance competing demands for scarce resources. As Comment [2] to Rule 5.2 observes, if the question of whether a lawyer's workload is too great is "reasonably arguable," the supervisor of the lawyer has the authority to decide the question. In the final analysis, however, each client is entitled to competent and diligent representation. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under Rule 5.1(c),[27] the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct.[28]

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27. Rule 5.1(c) states:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

See also Rules 1.16 (a) and 8.4 (a).

28. *See, e.g.*, Attorney Grievance Comm'n of Maryland v. Ficker, 706 A.2d at 1052, *supra* note 12); Va. Legal Ethics Op. 1798 *supra* note 9 (lawyer supervisor who assigns caseload that is so large as to prevent lawyer from ethically representing clients would violate Rule 5.1); American Council of Chief Defenders, Nat'l Legal Aid and Defender Ass'n Eth. Op. 03-01 (April 2003), *available at* http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf (last visited June 21, 2006) ("chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case…. When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."); Wisconsin State Bar Prof. Ethics Comm. Op. E-91-3 (1991) (assigning caseload that exceeds recognized maximum caseload standards, and that would not allow subordinate public defender to conform to rules of professional conduct, "could result in a violation of disciplinary standards"); Ariz. Op. No. 90-10 (Sept. 17, 1990) ("when a Public Defender has knowledge that subordinate lawyers, because of their caseloads, cannot comply with their duties of diligence and competence, the Public Defender must take action."); Wisconsin State Bar Prof. Ethics Comm. Op. E-84-11 (1984) (supervisors in public defender's office may not ethically increase workloads of subordinate lawyers to point where subordinate lawyer cannot, even at personal sacrifice, handle each of her clients' matters competently and in non-neglectful manner).

Conclusion

The obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients. If the problem of an excessive workload cannot be resolved through the non-acceptance of new clients or by other available measures, the lawyer should move to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn. If permission of a court is required to withdraw from representation and permission is refused, the lawyer's obligations under the Rules remain: the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to provide competent and diligent representation to the defendant.

Supervisors, including the head of a public defender's office and those within such an office having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, supervisors must, working with the lawyers they supervise, monitor the workload of the subordinate lawyers to ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct.

FORMAL OPINION NO 2007-178

Competence and Diligence: Excessive Workloads of Indigent Defense Providers

Facts:

Lawyer *A* is employed by a public defender firm ("the firm"), where Lawyer *A* represents indigent clients accused of criminal offenses. Lawyer *B* is the direct supervisor of Lawyer *A*. Lawyer *C* is the executive director of the firm. A board of directors, which includes some lawyers, oversees the business of the firm. Lawyer *C*'s responsibilities include negotiating and entering into the firm's contracts with a state agency pursuant to which the firm agrees to represent a certain number of clients annually.

Lawyer *D* is a partner in a small firm that is part of a consortium of firms that contract with the state to accept court appointments to represent indigent defendants. Lawyer *E*, also a member of the consortium, negotiates the contract between the consortium and the state and also administers the contract for the consortium. A board of directors, which includes some lawyers, oversees the business of the consortium.

Lawyer *F* is a sole practitioner who is paid by the state on an hourly basis to accept court appointments to represent indigent defendants.

Lawyers *A*, *D*, and *F* each believe that they have an excessively large caseload of court-appointed clients.

Questions:

1. What are the ethical obligations of Lawyers *A*, *D*, and *F* with respect to representation of their court-appointed clients?

2. What are the ethical obligations of lawyers who supervise other lawyers who may have excessive caseloads?

Conclusions:

See discussion.

Discussion:

On May 13, 2006, the American Bar Association (ABA) adopted Formal Ethics Opinion 06-441, entitled "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Case-loads Interfere with Competent and Diligent Representation,"[1] which includes a comprehensive discussion of the questions presented in this opinion. Because the ABA opinion relies, with one notable exception addressed below, on the Model Rules of Professional Conduct (RPCs) that are identical or very similar to the Oregon RPCs, the ABA opinion offers useful guidance for Oregon lawyers. For that reason, the opinion is quoted often and at length herein.

Under Oregon RPCs

- 1.1,[2]
- 1.2(a),[3]

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[1] The opinion may be ordered from the ABA at <www.abanet.org/cpr/pubs/ethicopinions.html>.

[2] Oregon RPC 1.1, entitled "Competence," provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[3] Oregon RPC 1.2, entitled "Scope of Representation and Allocation of Authority between Client and Lawyer," provides in section (a):

> Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

- 1.3,[4] and
- 1.4,[5]

all lawyers are required to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make. As ABA Formal Ethics Opinion No 06-441 observes, the rules "provide no exception for lawyers who represent indigent persons charged with crimes." For each client, a lawyer is required to, among other things, "keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients," among other responsibilities. ABA Formal Ethics Op No 06-441. A lawyer who is unable to perform these duties may not undertake or continue with representation of a client. Oregon RPC 1.16(a).[6]

A caseload is "excessive" and is prohibited if the lawyer is unable to at least meet the basic obligations outlined above. The ABA opinion

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[4] Oregon RPC 1.3, entitled "Diligence," provides: "A lawyer shall not neglect a legal matter entrusted to the lawyer." Cf. ABA Model RPC 1.3, which requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

[5] Oregon RPC 1.4, entitled "Communication," provides: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Model RPC 1.4(a) also requires a lawyer to promptly inform the client of any decision or circumstance requiring the client's informed consent, consult with the client about the means to achieve the client's objectives, and consult with the client about any relevant limitation on the lawyer's conduct if the lawyer knows the client expects assistance not permitted by the rules of professional conduct or other law.

[6] Oregon RPC 1.16(a) provides in part that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . the representation will result in violation of the Rules of Professional Conduct or other law[.]"

notes that various jurisdictions have suggested or adopted numerical caseload standards for public defense providers, and Oregon has also approved a "guide" to maximum caseloads.[7]

But the ABA opinion correctly observes that the determining factor is not the number of cases a lawyer may be asked to handle but whether the workload is excessive. Although the number of cases may be a major determinant of workload, other factors include "case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties." Thus, if Lawyers *A*, *D*, and *F* believe that their workload prevents them from fulfilling their ethical obligations to each client, then their workload "must be controlled so that each matter may be handled competently." ABA Model RPC 1.3 cmt [2].[8]

How a lawyer controls his or her workload will depend on the environment in which that lawyer works, keeping in mind that a lawyer's primary obligation is to existing clients. Thus, Lawyer *A*, who works at a public defender firm, should seek supervisor approval from Lawyer *B* for

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[7] Oregon State Bar, *Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases* (1996) (available at <www.osbar.org/surveys_research/performancestandard/index.html>).

[8] ABA Formal Ethics Opinion No 06-441 refers to Principle 5 of the ABA's *Ten Principles of a Public Defense Delivery System* (2002), which requires: "Defense counsel's workload is controlled to permit the rendering of quality representation." Similarly, the *Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense*, adopted by the Oregon Public Defense Services Commission on February 6, 2006, provides that "[n]either defender organizations nor assigned counsel shall accept workloads that, by reason of their size or complexity, interfere with rendering competent and adequate representation or lead to the breach of professional obligations." (Available at <www.oregon.gov/OPDS/CBS/pages/qualificationstandards.aspx>.) Furthermore, language from the model contracts signed by public defense providers in Oregon requires that providers meet the minimum professional standards of the Oregon State Bar and the American Bar Association, and that each provider maintain "an appropriate and reasonable number of attorneys and support staff to perform its contract obligations." (Available at <www.oregon.gov/OPDS/CBS/pages/modelcontractterms.aspx>.)

a variety of remedial measures, which might include transfer of nonrepresentational duties to others within the office, declining appointment on new cases, transferring current cases, and filing motions with the court to withdraw from enough cases to achieve a manageable workload. If a supervisor fails to approve appropriate relief, then Lawyer *A* should "continue up the chain of command within the office," ultimately appealing to the executive director, Lawyer *C*. If satisfactory relief is still not received, Lawyer *A* "must take further action," suggesting appeals to the firm's board of directors and the filing, without firm approval, of motions to withdraw. Lawyer *A* might also seek assistance from the state agency that administers the firm's contract, and the Public Defense Services Commission, which approves the contract.

Lawyer *D* must take similar steps to control her workload, first requesting that Lawyer E, the administrator of the consortium, withhold the assignment of new cases, and/or approve the transfer of cases to another lawyer within the consortium, as long as another lawyer will be able to provide ethical representation. If Lawyer *E* does not provide appropriate assistance, then Lawyer *D* might appeal to the governing body for the consortium. Ultimately, Lawyer *D* may also move to withdraw from a sufficient number of cases to achieve a manageable workload.

The actions that Lawyer *F*, the sole practitioner, might take include declining new appointments until that lawyer's workload is reduced to a level that permits accepting new cases, and/or filing motions to withdraw from a sufficient number of cases to achieve a manageable workload.

Supervisory lawyers, including a firm director or manager, may violate ethical responsibilities when subordinate lawyers have excessive workloads. The ABA opinion describes two ways such violations may occur. First, under ABA Model RPC 5.1(a) firm managers "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Second, in subsection (b), the Model Rule requires that a lawyer with supervisory authority over another lawyer "shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." The Oregon RPCs have no

counterpart to Model RPC 5.1(a) or (b). However, Oregon RPC 5.1(a) and (b), like ABA Model RPC 5.1(c), make a lawyer responsible for the misconduct of another lawyer if "the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved," or, in the specific case of supervisory lawyers, that lawyer "knows of conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[9]

If supervisory Lawyer *B* or executive director Lawyer *C* know that Lawyer *A* or other subordinate lawyers have workloads that prevent them from providing competent representation to each client, they are responsible for the misconduct of the subordinate lawyer if they fail to take effective remedial actions. The ABA opinion acknowledges, however, that a supervisory lawyer's assessment of whether a subordinate lawyer's workload is excessive is "a difficult judgment." As a result, "[w]hen a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor's resolution ordinarily will constitute a 'reasonable resolution of an arguable question of professional duty' as discussed in [ABA Model] Rule 5.2(b)." When the resolution is "reasonable" on an issue that is "arguable," under either ABA Model RPC 5.2(b) or Oregon RPC 5.2(b), a subordinate lawyer may be excused from misconduct if that lawyer acts at the direction of a supervisory lawyer. However, Oregon RPC 5.2(b)

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[9] Oregon RPC 5.1, entitled "Responsibilities of Partners, Managers, and Supervisory Lawyers," provides:

> A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:
>
> (a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

does not protect the supervisory lawyer, whose remedial action will still be tested against a "reasonableness" standard."[10]

How these rules apply to Lawyer *E*, who administers the work of a consortium, depends on the structure of the consortium and the relationship between Lawyer *D* and Lawyer *E*. For example, if Lawyer *D* may not decline new appointments to indigent clients or may not file motions to withdraw from current-client cases without the prior approval of Lawyer *E*, then Lawyer *E* may have established herself as a de facto supervisory lawyer and incurred potential responsibility under Oregon RPC 5.1.[11]

As noted, the ABA opinion does not address the ethical responsibilities of lawyers involved in the process of contracting for the provision of public defense services. For the reasons discussed above, Lawyer *C,* who heads a public defender office, and Lawyer *E,* who negotiates the contract for a consortium, may be responsible for the misconduct of other lawyers if they contract for caseloads knowing that they do not have adequate lawyer and other support staff to provide competent representation to each client. Likewise, managers who knowingly "induce" other lawyers to violate the RPCs by knowingly contracting for excessive caseloads may violate Oregon RPC 8.4(a)(1), which makes it "professional misconduct for a lawyer to . . . violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

Lawyers representing indigent clients must refuse to accept a workload that prevents them from meeting their ethical obligation to each

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[10] Oregon RPC 1.0(k) defines *reasonable* as the conduct of a "reasonably prudent and competent lawyer."

[11] Oregon RPC 1.0(d), in defining a *law firm*, recognizes that even in the absence of a firm agreement or association, lawyers may organize themselves or work together in such a manner to create "indicia sufficient to establish a de facto [sic] law firm among the lawyers involved." Furthermore, Comment 2 to ABA Model RPC 1.0 observes that if lawyers "present themselves to the public in a way that suggests that they are a firm *or conduct themselves as a firm,* they should be regarded as a firm for the purposes of the Rules" (emphasis added).

client. Lawyers who work in public defense organizations should seek the assistance of supervisors and managers in achieving manageable workloads. When those supervisors and managers have knowledge of excessive workloads among firm lawyers, they must make reasonable efforts to remedy the problem.

Approved by Board of Governors, September 2007.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.2 to § 7.2-8 (competence), § 7.3 (diligence), § 7.5-1 (abiding by client's decision; scope of representation), § 7.4 (client communication) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 11–12 (2000) (supplemented periodically).

OREGON OFFICE OF Public Defense Services

Ethics: Balancing Attorney Workloads and Conflicts

David Elkanich, Buchalter PC

July 23, 2023
2023 PDSC Provider Summit
Bend, Oregon

Buchalter

LOS ANGELES
NAPA VALLEY
ORANGE COUNTY
PORTLAND
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SAN DIEGO
SAN FRANCISCO
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- Introductions

- Goals of the Session:
  1. How to assess current workload (as compared to caseload)?
  2. How to analyze the ethics issues implicit in such caseloads, and identify paths to gain relief
  3. How to respond to protect your clients' interests (and your own mental health).
  4. Conflict issues and a recommended change

- Questions?

A "Hypothetical": Statement of the Problem

- Attorney Uma is employed by a public defender firm ("the firm"), where she represents indigent clients accused of criminal offenses. She has a "robust" caseload of felony and misdemeanor cases.
- Due to the backlog of pandemic cases, Attorney Anthony (Uma's direct supervisor) wants to make sure that all defendants are competently represented. Anthony is interested in learning whether Uma can take on more cases. Uma would like to stop accepting anymore appointments but is fearful that she may lose her job or it may affect her reputation internally, with the court, or with other public defenders.

Discussion Points

- What are Uma's ethical obligations?
- How about Anthony?

- What steps should they take to uphold their duties to their clients?
- What ethical rules provide guidance for them?
- What court rules or standards will provide guidance?

Instructional Guides

- Oregon Rules of Professional Conduct
- OSB Ethics Op. 2007-178
- ABA Ethics Op. 06-441
- ABA Guidelines
- OPDS Contract, Standards and Best Practices

Constitutionally Adequate Counsel

- Indigent defendants have a right "to a lawyer who provides adequate assistance." *Krummacher v. Gierloff,* 290 Or 867 (2022).
- What does this mean:
  - —"Adequate assistance of counsel requires the lawyer's devotion to the interests of the defendant." *Id*.
  - —"Counsel's functions include informing the defendant, in a manner and to the extent appropriate to the circumstances and to the defendant's level of understanding, of the existence and consequences of nontactical choices which are the defendant's to make, so as to assure that the defendant makes such choices intelligently." *Id*.
  - —"Counsel must investigate the facts and prepare himself on the law to the extent appropriate to the nature and complexity of the case so that he is equipped to advise his client, exercise professional judgment and represent the defendant in an informed manner." *Id*. at 875.

OSB Formal Ethics Op 2007-178

- Deals with:
  - —Employees of public defender firm, their supervisors and the one who negotiates
  - —Small firm that is part of consortium, the partner and the one who negotiates
  - —Solo practitioner who accepts appointments on an hourly basis
- The lawyers employed and accepting appointments believe they have "an excessively large caseload"
- What do the lawyers?
- What do their supervisors do?
- See also – ABA Op. 06-441

The RPCs

- RPC 1.1: Duty of competence
- RPC 1.2(a): Scope of representation and allocation of authority
- RPC 1.3: Diligence
- RPC 1.4: Duty of communication
- There is "no exception for lawyers who represent indigent persons charged with crimes."
- A caseload is "excessive" and is prohibited if the lawyer is unable to at least meet these basic obligations.

But What Does it Mean to Have an Excessive Caseload?

- Factors to consider (workload analysis):
  - —Number of cases
  - —Case complexity
  - —Custody status
  - —Trial/case schedule
  - —Language issues
  - —Availability of non-lawyer support
  - —Lawyer's experience and ability
  - —Lawyer's nonrepresentational duties
  - —Crushing weight / emotional burdens
  - —Other?

What Can the Lawyer Do?

- Depends on the lawyer's environment and firm culture
- Discuss with supervisor and go "up the chain of command"
- Possible remedial measures:
  - —Transfer of nonrepresentational duties to others
  - —Transfer cases intra-office
  - —Decline cases
  - —Motion to withdraw from cases

Burdens on Supervisors

- No counterpart to ABA RPC 5.1(a) or (b)
- When can a supervisor be responsible for a subordinate lawyer's excessive caseload?
- Important safe harbor for subordinate lawyers
  - —5.2(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty

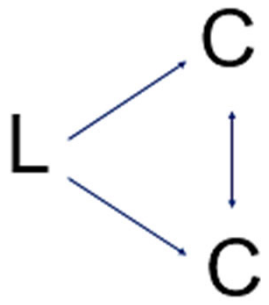
Authority to Consider

- *Court grants relief re excessive caseload:*
  - —*State v. Grahm*, 194 Wn.2d 965, 968 (2019)
- *Discipline/Mitigation – to provide (some minimal) guidance*
  - —*In re Kesner*, 21 DB Rptr 199 (2007)
  - —*State* v. *A.N.J.,* 168 Wn.2d 91, 102, 225 P.3d 956 (2010)
  - —In re Phillips, 226 Ariz. 112, 244 P.3d 549 (Ariz. 2010)
  - —Att'y Grievance Comm'n of Maryland v. Kimmel, 955 A.2d 269 (Md. 2008)
  - —Matter of Bryant, 183 A.D.2d 147 (NY 1992)
  - —Iowa Supreme Ct. Att'y Disciplinary Bd. v. Said, 953 N.W.2d 126, 147 (Iowa 2021)
  - —Akron Bar Assn. v. DeLoach, 34 N.E.3d 88, 91 (Ohio 2015)

CONFLICTS 101

Current Client Conflict Basics – RPC 1.7

- Direct adversity conflicts:
  - —Cross-examine
  - —Co-defendants
- Material limitation conflicts
  - —Confidential info
  - —Cooperating clients
  - —Personal conflicts



Former Client Conflict Basics – RPC 1.9

- A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in **the same or a substantially related matter** in which that person's interests are **materially adverse** to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

- Matters are substantially related if:
  - —the rep of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or
  - —there is a **substantial risk** that confidential factual information **as would normally have been obtained** in the prior representation of the former client would **materially advance** the current client's position in the subsequent matter

Summary Points re Conflicts

- Have, use and update your conflicts check system

- When seeking consent, seek consent from both affected clients

- Most conflicts are imputable to the whole firm, which means that you cannot typically screen to avoid a conflict of interest. Except:
  - —With consent
  - —Lateral hire from another firm (or the government) - Oregon RPC 1.10(c)

- Can we make former client conflicts easier:

Proposed Amendment to RPC 1.10

- (d) A lawyer employed by an indigent defense provider is not prohibited from representing a person with interests materially adverse to those of a client previously represented by the indigent defense provider, even where the matter would otherwise normally disqualify the provider under RPC 1.7 or RPC 1.9, so long as:
  - —(1) the lawyer who previously represented the former client is promptly screened from any form of participation or representation in the matter;
  - —(2) the indigent defense provider segregates confidential information relating to the former client; and
  - —(3) written notice of the screening procedures employed is promptly given to any affected former client but if the former client is unavailable or cannot be reached, then such notice is filed with the Court.

Screening Implementation and Considerations

- Screening checklist
- Email to applicable staff and lawyers
  - —Update as needed by billing partner
- Label files & limit electronic access
- Physical copy of rules to screened parties
- Add information to master list of screens
- Written notice of screening procedures (i.e., letter) to opposing party/counsel
- Final review of screen

But What if the Former Lawyer Has Left the Firm:

- The provider may represent the current client unless any lawyer remaining at the provider "has information protected by Oregon RPC 1.6 and Oregon RPC 1.9(c) that is material to the matter." See Oregon RPC 1.10(b) & OSB Ethics Op 2005-128 Opinion:

- "If [provider] takes sufficient steps to assure that no lawyer at [provider] has or will actually acquire information relating to the representation of [former client] while [former lawyer] was at [provider]—by, for example, segregating, restricting access to, or destroying such materials or returning them to [former client] without retaining copies—[provider] has or will have established that no lawyer remaining at [provider] will have such information, and any obligations under Oregon RPC 1.10(b) will clearly have been met."

Being / Staying Vigilant About Conflicts

- Your responsibility – Court requires you to have a reasonably reliable conflict system (See In re Knappenberger).

- Only as good as you make it

- Be careful about party designations

- Input, add, and update conflicts

RPC 5.3: Supervising Nonlawyer Assistance

- Nonlawyers in the firm:
  - —Give appropriate instruction and supervision
  - —Be responsible for work product
- Nonlawyers outside the firm:
  - —Make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations
  - —Varies depending on circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information
- Technology and no lawyer assistance

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David Elkanich is a Shareholder at Buchalter and chairs the Firm's new Professional Responsibility Practice Group. David focuses his practice on legal ethics, risk management, and discipline defense. David advises both lawyers and law firms in a wide range of professional responsibility matters

David is an avid speaker and tweets (occasionally) at @DavidElkanich.

David is an adjunct professor at Lewis & Clark Law School, where he has taught ethics since 2012. He received his J.D. from the University of Oregon School of Law and his B.A., magna cum laude, from the University of Arizona.

DIVERSITY RECRUITMENT AND MENTORSHIP

Tristen Edwards (MPD)

Diversity is Important

- For our clients
- For our co-workers
- For the legal community as a whole

From New York to Portland: My experience

- Portland and Oregon as “white places”
- BALSA community → ???
- What does a commitment to diversity really mean?

OCDLA’s Diversity Equity and Inclusion Committee

OCDLA's DEI Committee is dedicated to increasing the diversity of the criminal and juvenile defense bar as well as improving retention through developing community and promoting a sense of belonging amongst OCDLA's BIPOC members. The DEI Committee is committed to uplifting the experiences of these diverse members, in order to promote fair treatment.

Community Building

- Biweekly Virtual BIPOC Meet Ups
- In Person Gatherings (in the process of formalizing + finding funding)
- BIPOC Defenders and Allies listserv

Relationship Building: Mentorship

- Establishing relationships with the Oregon Law Schools and Colleges (mentorship opportunities, career fairs, engagement with career services, etc.)
- Connecting with out of state candidates of color

Interviewing Applicants of Color

- Talk about the importance of diversity and acknowledge that building a diverse workforce takes time and commitment.
- Talk about OCDLA's efforts to build community and support BIPOC defenders.
- Refer them to speak with a member of the DEI committee.
- If you are going to say that the office is committed to diversity, have concrete examples to support that statement.

Hopes for the future

- Funding for in person gatherings
- Scholarships and Internship stipends
- Mentorship Handbook
- Relationships with national organizations
- Dedicated resources for BIPOC recruitment efforts

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	Case No. 06-125
	)	
MICHAEL A. KESNER,	)	
	)	
Accused.	)	

Counsel for the Bar:	Stacy J. Hankin
Counsel for the Accused:	None
Disciplinary Board:	None
Disposition:	Violation of RPC 1.1 and RPC 8.4(a)(4). Stipulation for discipline. 60-day suspension.
Effective Date of Order:	August 28, 2007

ORDER APPROVING STIPULATION FOR DISCIPLINE

This matter having been heard upon the Stipulation for Discipline entered into by the Accused and the Oregon State Bar, and good cause appearing,

IT IS HEREBY ORDERED that the stipulation between the parties is approved and the Accused is suspended from the practice of law for 60 days for violation of RPC 1.1 and RPC 8.4(a)(4), effective the day after this order is approved.

DATED this 27th day of August 2007.

/s/ Jill A. Tanner
Hon. Jill A. Tanner
State Disciplinary Board Chairperson

/s/ Arnold S. Polk
Arnold S. Polk, Esq., Region 4
Disciplinary Board Chairperson

STIPULATION FOR DISCIPLINE

Michael A. Kesner, attorney at law (hereinafter "Accused"), and the Oregon State Bar (hereinafter "Bar") hereby stipulate to the following matters pursuant to Oregon State Bar Rule of Procedure 3.6(c).

1.

The Bar was created and exists by virtue of the laws of the State of Oregon and is, and at all times mentioned herein was, authorized to carry out the provisions of ORS Chapter 9, relating to the discipline of attorneys.

2.

The Accused was admitted by the Oregon Supreme Court to the practice of law in Oregon on April 21, 1977, and has been a member of the Oregon State Bar continuously since that time, having his office and place of business in Washington County, Oregon.

3.

The Accused enters into this Stipulation for Discipline freely and voluntarily. This Stipulation for Discipline is made under the restrictions of Bar Rule of Procedure 3.6(h).

4.

On December 7, 2006, a Formal Complaint was filed against the Accused pursuant to the authorization of the State Professional Responsibility Board (hereinafter "SPRB"), alleging violation of RPC 1.1 and RPC 8.4(a)(4). The parties intend that this Stipulation for Discipline set forth all relevant facts, violations, and the agreed-upon sanction as a final disposition of the proceeding.

Facts

5.

In 2005, Congress passed a Bankruptcy Reform Act. The new law was to take effect on October 15, 2005. As a result of the new law, a significant number of people sought to file for bankruptcy protection on or before October 14, 2005. During the months before the new law was to take effect, the Accused undertook to represent more clients than he was capable of handling.

6.

Between October 7, 2005, and October 14, 2005, the Accused filed Chapter 7 bankruptcy petitions on behalf of over 90 clients. With regard to those petitions, the Accused did not act with the thoroughness and preparation reasonably necessary for the representation in that many of the documents he filed were incomplete, inaccurate, inconsistent, or did not comply with applicable law.

7.

The court subsequently issued orders directing that deficiencies in the original petitions be corrected. With regard to those orders, the Accused did not act with the thoroughness and preparation reasonably necessary for the representation in that he did not timely respond to, or did not adequately or completely comply with, the orders.

8.

In early 2006, another lawyer undertook to represent the Accused's clients and by the end of that year all of the matters were adequately concluded.

Violations

9.

The Accused admits that, by engaging in the conduct described in paragraphs 5 through 8, he violated RPC 1.1 and RPC 8.4(a)(4).

Sanction

10.

The Accused and the Bar agree that in fashioning an appropriate sanction in this case, the Disciplinary Board should consider the ABA *Standards for Imposing Lawyer Sanctions* (hereinafter "*Standards*"). The *Standards* require that the Accused's conduct be analyzed by considering the following factors: (1) the ethical duty violated, (2) the attorney's mental state, (3) the actual or potential injury, and (4) the existence of aggravating and mitigating circumstances.

A. *Duties Violated.* The Accused violated his duty to provide clients with competent representation and his duty not to engage in conduct prejudicial to the administration of justice. *Standards,* §§ 4.5 and 6.0.

B. *Mental State.* The Accused acted negligently. At the time he filed the petitions, the Accused believed he could handle the additional cases, but failed to appreciate the time and effort he would have to expend to do so.

C. *Injury.* The bankruptcy court and U.S. Trustees Office sustained injury as a result of the Accused's conduct. Both spent considerable time reviewing the Accused's filings and issuing orders requiring additional filings and information. The potential for injury to the Accused's clients was substantial. Had another lawyer not stepped in, some of the petitions would have been dismissed and petitions that had already been dismissed would not have been reinstated. Those clients would not have been in a position to take advantage of the benefits available to them under the old law.

D. *Aggravating Circumstances.* The following aggravating circumstances are present:

1. *Selfish motive.* The Accused sought to increase his income by taking on a substantial caseload in a short period of time. *Standards,* § 9.22(b).

2. *Multiple offenses. Standards,* § 9.22(d).

3**.** *Substantial experience in the practice of law.* The Accused has been a lawyer in Oregon since 1977, although he did not actually engage in the practice of law until 2002. *Standards,* § 9.22(i).

E. *Mitigating Circumstances.* The following mitigating circumstances are present:

1. Absence of a prior disciplinary record. *Standards,* § 9.32(a).

2. Absence of a dishonest motive. *Standards,* § 9.32(b).

3. A good faith effort to rectify the consequences of his misconduct. The Accused cooperated with his clients' new lawyer. *Standards,* § 9.32(d).

4. Cooperative attitude toward the proceedings. *Standards,* § 9.32(e).

5. Imposition of other penalties or sanctions. In March 2006, the Accused signed a stipulated judgment in the United States Bankruptcy Court for the District of Oregon case *United States Trustee v. Kesner,* No. 06-3146-HD, in which he agreed that he would no long practice bankruptcy law in Oregon. *Standards,* § 9.32(*l*).

6. Remorse. *Standards,* § 9.32(m).

11.

Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client. *Standards,* § 4.52. Suspension is also generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. *Standards,* § 6.12.

12.

Lawyers who have engaged in somewhat similar conduct in Oregon have been suspended for varying periods of time. *In re Bettis,* 342 Or 232, 149 P3d 1194 (2006) (30-day suspension imposed on lawyer who failed to devote minimal amount of effort necessary to adequately advise his client to waive the fundamental constitutional right to trial by jury); *In re Roberts,* 335 Or 476, 71 P3d 71 (2003) (60-day suspension imposed on lawyer who violated DR 1-102(A)(4) and DR 6-101(A) in the course of representing a conservator); *In re*

Gresham, 318 Or 162, 864 P2d 360 (1993) (91-day suspension imposed on lawyer for violating DR 1-102(A)(4), DR 6-101(A), and DR 6-101(B) when he failed to comply with the legal requirements in a probate matter, failed to pursue that matter for long periods of time, notwithstanding repeated assurances to the court that he would do so, and neglected another matter for five months); *In re Rudie*, 294 Or 740, 662 P2d 321 (1983) (seven-month suspension imposed on lawyer who, in one matter, failed to provide competent representation, engaged in neglect, and failed to carry out a contract of employment where lawyer had previously been reprimanded for neglect).

Generally, lengthy suspensions have been imposed when the accused lawyer also engaged in other serious misconduct. Here, the Accused did not engage in other serious misconduct. Moreover, in this case, the Accused, who practiced bankruptcy law exclusively, has agreed that he will no longer do so in Oregon.

13.

Consistent with the *Standards* and Oregon case law, the parties agree that the Accused shall be suspended from the practice of law for 60 days for violation of RPC 1.1 and RPC 8.4(a)(4), the suspension to be effective on the day after this Stipulation for Discipline is approved by the Disciplinary Board.

14.

In addition, on or before the end of the 60-day suspension, the Accused shall pay to the Oregon State Bar its reasonable and necessary costs in the amount of $536.30, incurred for the taking of his deposition and the cost of transcript. Should the Accused fail to pay $536.30 in full on or before the end of the 60-day suspension, the Bar may thereafter, without further notice to the Accused, apply for entry of a judgment against the Accused for the unpaid balance, plus interest thereon at the legal rate to accrue from the date the judgment is signed until paid in full.

15.

This Stipulation for Discipline is subject to review by Disciplinary Counsel of the Oregon State Bar and to approval by the SPRB. If approved by the SPRB, the parties agree the stipulation is to be submitted to the Disciplinary Board for consideration pursuant to the terms of BR 3.6.

EXECUTED this 21st day of August 2007.

/s/ Michael A. Kesner
Michael A. Kesner
OSB No. 770411

EXECUTED this 22nd day of August 2007.

OREGON STATE BAR

By: /s/ Stacy J. Hankin
Stacy J. Hankin
OSB No. 862028
Assistant Disciplinary Counsel

Oregon Office of Public Defense Services

OPDS Data and the FCMS Project

Jim Conlin, Chief Information Officer
Jim.Conlin@opds.state.or.us

February 23, 2023

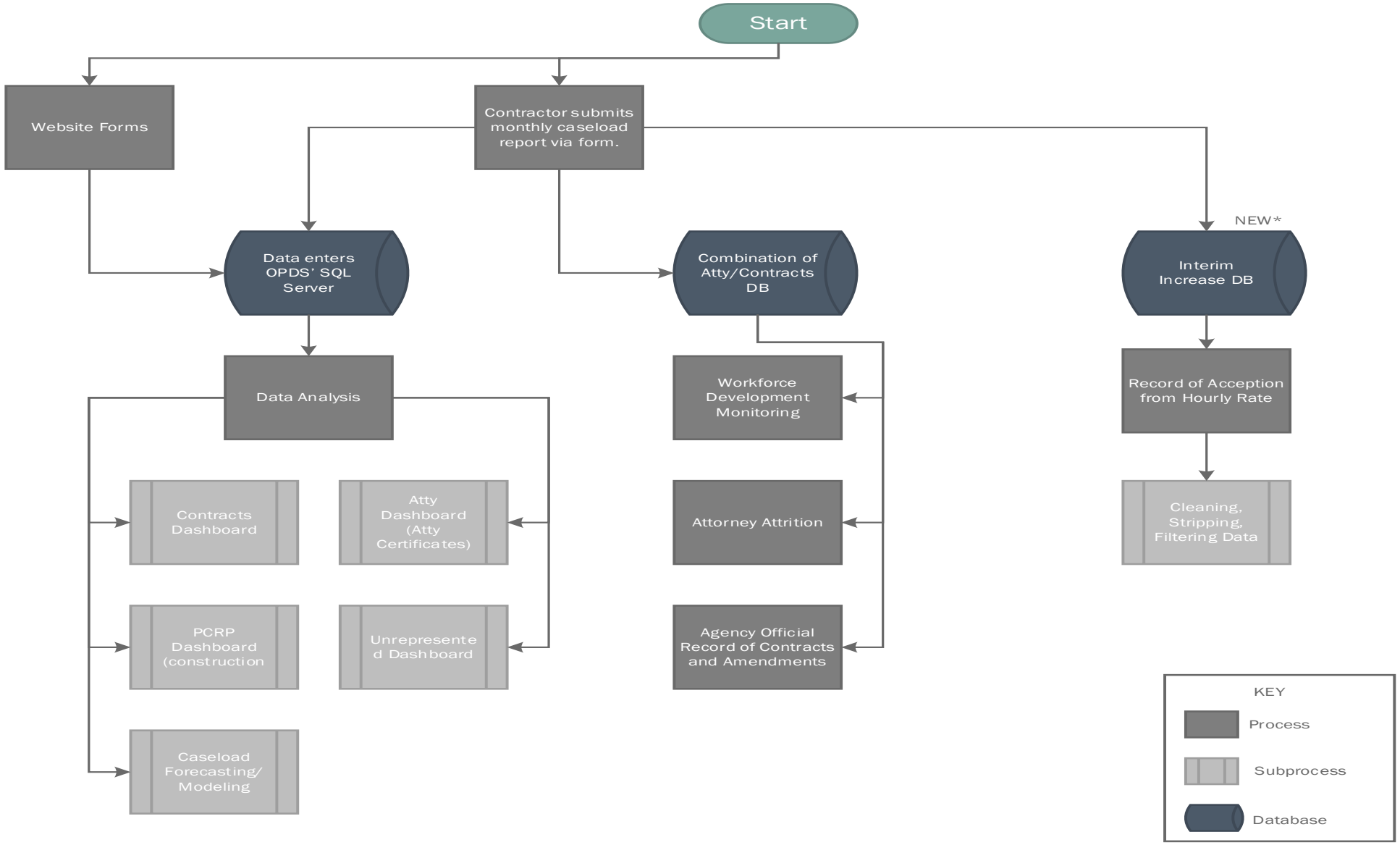
OREGON OFFICE OF Public Defense Services

OPDS Data & FCMS Project

Today we will be discussing how OPDS currently utilizes data, the inefficiencies, and advancements for best practices moving forward.

Current Processes

OPDS Current Data Process



How do we use the data?

- Determination if the case reported for the reporting period is new, open, or closed.
- Total the cases reported by appointed, open, closed by case type category by standards and weight
- Total the cases by contact entity by standards and weight
- Total the case by attorney by standards and weight
- Apply the MAC standards to the total cases reports (by contract entity and attorney)
- Calculate the MAC reported against the contracted MAC, determine the remaining MAC
- Display what the current MAC is for the contract based on the number of months reported
- Display the MAC projected/target to end of contract cycle
- Track what reports have been submitted or not submitted
- Track the mix of case types by contract and attorney for appointed cases and for open/closed cases

Inefficiencies

Inefficiencies with OPDS Data

- Between 2010 and 2019 OPDS obtained a consistent data format which allowed the agency to compare stable data across many subsets.
- In early 2020 reporting requirements changed and required that OPDS collect additional data points for future analysis of case life cycle and open case evaluation. contract standards and reporting mechanisms changed.
- As a result of continuous change, OPDS has had to adapt and reconfigure previous analytics to assist current data analyses and forecasting.

OPDS Data Advancements

Current Advancements

- OPDS has been able to convert antiquated tables and databases into a backend SQL server and provides the following benefits.
    - Data is stored securely and limits manual manipulation as it is accessed only by those with proper credentials.
    - Assists with reportability, speed, and overall security.
    - Added datapoints that were not available previously.
    - Tables are now linked and no longer independent of one another.

Moving Forward

Although OPDS has been able to dramatically update the many independent tables and databases there are still many limitations, such as:

- There are slow inefficiencies that cannot be fixed in the current system.
- The system relies on VPN or direct network access to function.
- A lot of data is not captured in a meaningful manner.
- There is no possibility of incorporating non-employee data into the system (providers cannot import data).
- No unified case data entry system. All providers have their own reporting or case catalog database making it difficult for providers to export data points as requested by OPDS.

Legislative Action

Over the last several biennia the Oregon Legislature have released funds to begin initial phases for the procurement of a Financial and Case Management System (FCMS). PDSC in the last year has made credible advances in this process to include:

- Finalizing a Project Business Case, and Project Scope
- Hired a Quality Assurance Vendor to review all project documentation, operations, and next steps.
- Formed a Governance Committee, Steering Committee, and have identified methods to reach external stakeholders.

What is the FCMS Project?

Financial Management

- Attorney/Provider reimbursement claims
- Payment schedule
- Audit functions
- Payment Tracking

Case Management

- Comprehensive data collection
  - Case Milestones
  - Basic event data
  - Case information
- Attorney qualifications
- Attorney caseload
- Contract oversight
- Potential Timekeeping

Reporting

- System canned reports
- System ad hoc reports
- Direct database access via PowerBI or other platforms for custom reporting

Goals and Outcomes

Nine previously identified Goals (Early 2020)

*Redraft of Goals is currently with the Governance Committee

- An internal and external accessible system that collects and manages data to support accountability and transparency
- Provide case cost accountability to Oregon's taxpayers
- Enhanced ability to manage request for Case Support Services (CSS)
- Timely payments to providers through improved payment process
- Ability to monitor caseload assignments per attorney
- Ability to report on the impact of public defense services through detailed data of attorney activity with assigned client
- Ability to report on caseloads, client interaction, case prep work, court appearance, and case related meetings per the Parent Child Representation Program (PCRP) general recommendations
- Reduction in manual data entry of client/case information
- Collect data on client race, gender identity, ethnicity, and economic situation to provide data that can be used to analyze how those factors affect case outcomes

2023 Public Defense Provider Summit

High-Level Requirements

Categories of Case Requirements

1. Role of Party
2. Client Information
3. Client Demographics
4. Case Information
5. Activity
6. Charge Information
7. Attorney/Provider Information
8. Service Providers
9. Attorney Case Information
10. Billing Information

Each of these categories have a defined list of elements which are understood to be high level project requirements.

Through these elements OPDS should for the first time be able to capture effective data to express Oregon's public defense outcomes.

For a full list of data elements please see the handout included in your meeting materials.

We Need Your Support!

The FCMS Project team needs support from not only the Governance and Steering Committees, but Stakeholders as well. By acquiring support from these bodies, the project will be equipped with proper requirements to meet most end user's operational needs.

We are asking for interested parties to provide us with the following:

- Name, Entity, Contact Info

The FCMS Project team will be scheduling town halls with the Stakeholder community in hopes of gathering requirements and providing status updates of project progression.

We look forward to partnering with you!

Thank you

End slide, with title left-aligned to add space and breathing room within other slides cohesive to transition slides.

OREGON OFFICE OF
Public Defense Services

Jessica Roeser
Assistant Deputy SCA for Operations

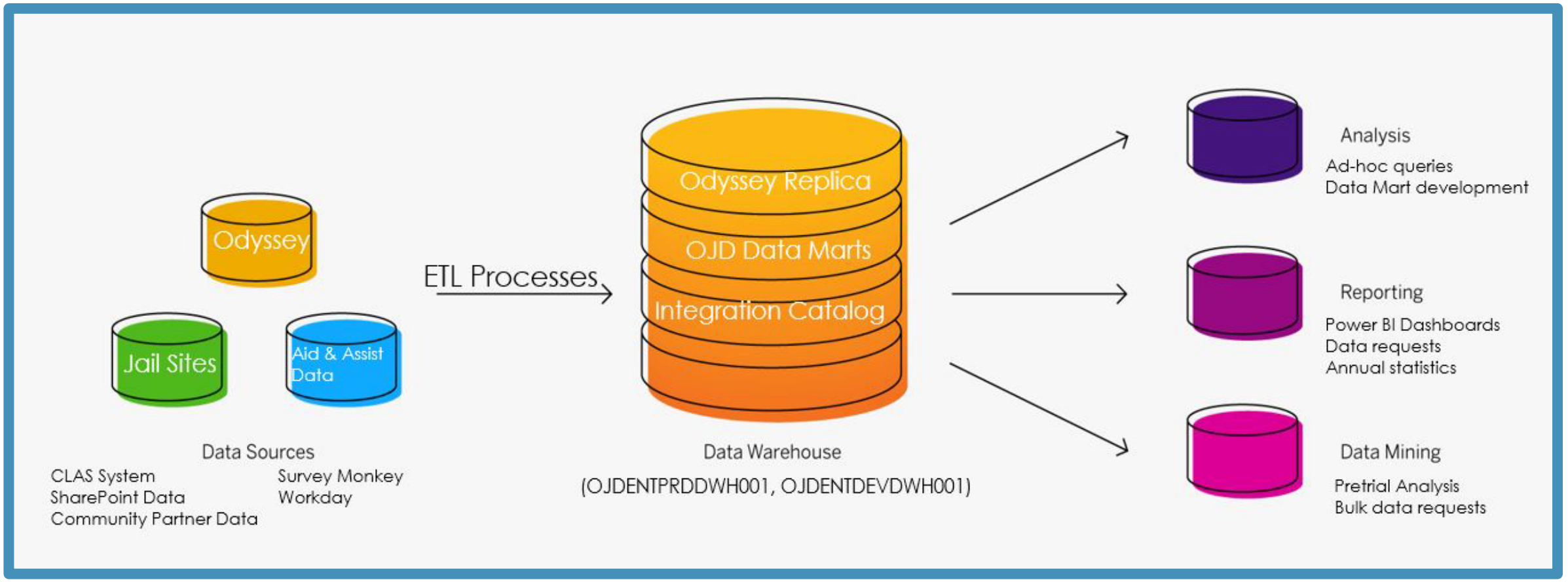
Presented to PDSC Provider Summit
February 23, 2023

OVERVIEW OF JUDICIAL DATA

OREGON JUDICIAL DEPARTMENT

PRESENTATION OVERVIEW

- OJD's criminal circuit court data
- Criminal caseload trends
- Statewide efforts to resolve cases and track unrepresented individuals
- Tracking public defense caseloads
- Data challenges/gaps
- How we move forward together with future collaborations and integrations

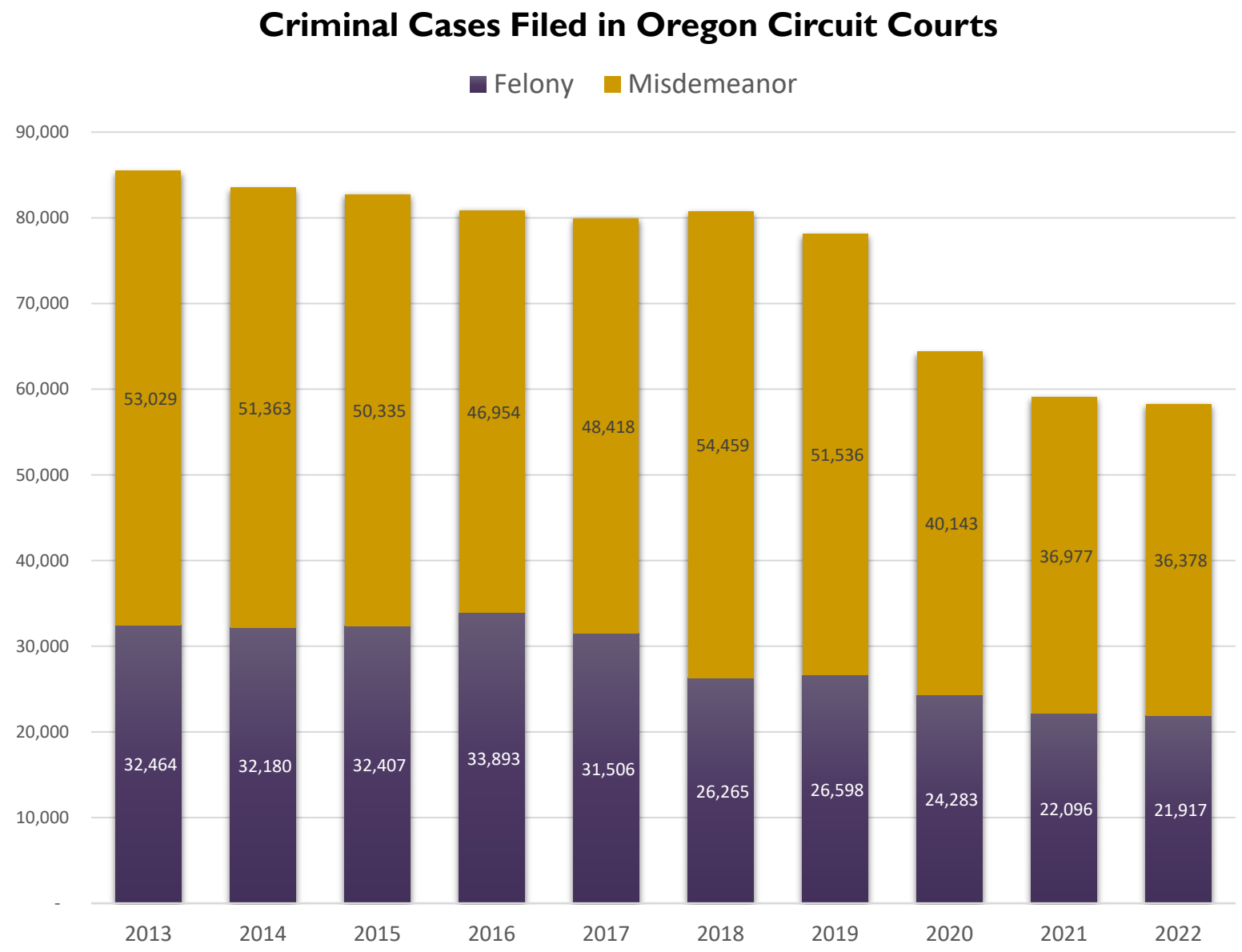


JUDICIAL DATA WAREHOUSE

Criminal Cases

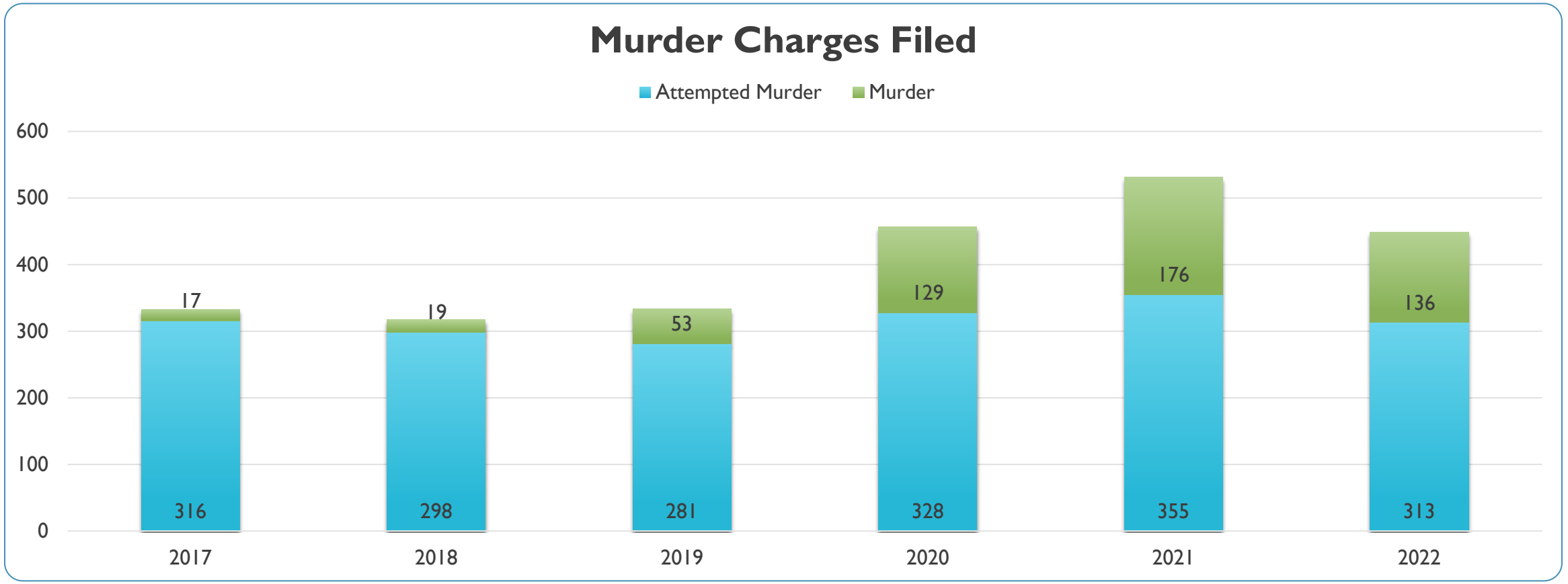
Criminal cases are **37%** of court workload

- Criminal caseloads are changing, more demand for felony qualified attorneys
- Courts are working through felony backlogs
- Courts are focusing on resolving in-custody cases
- Firm trial dates facilitate resolution of the case by settlement or trial



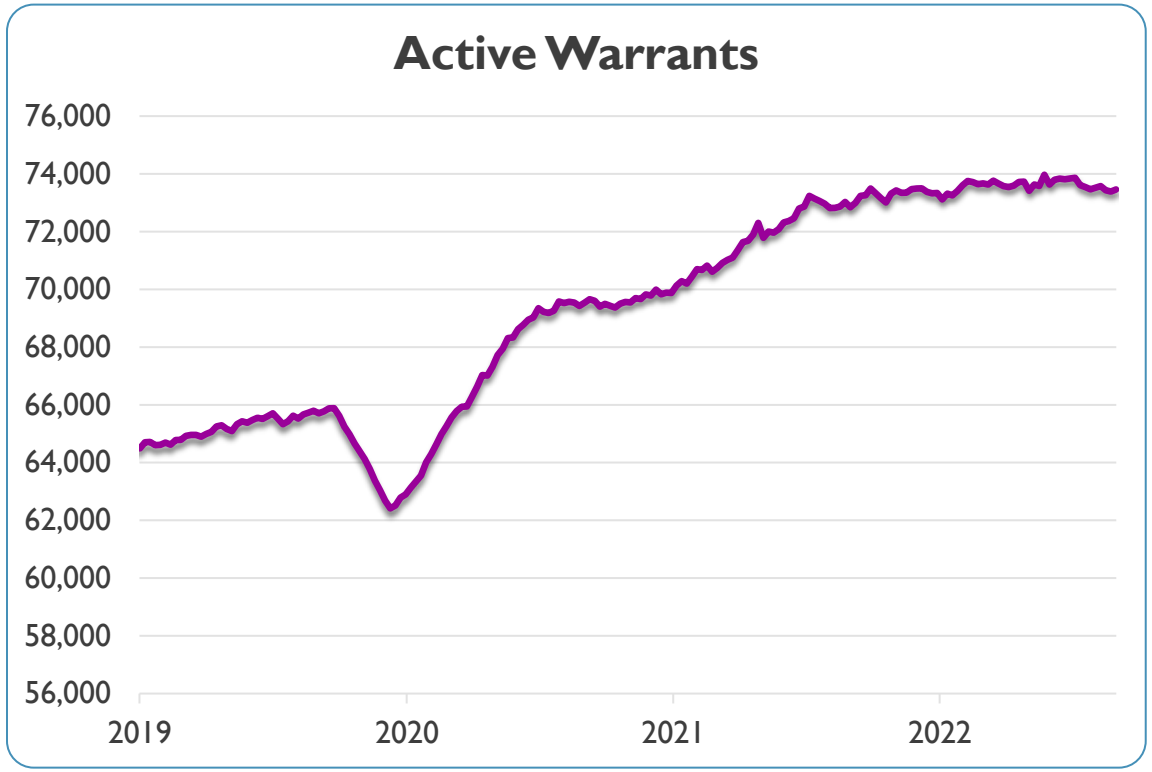
Recent Changes to Filings

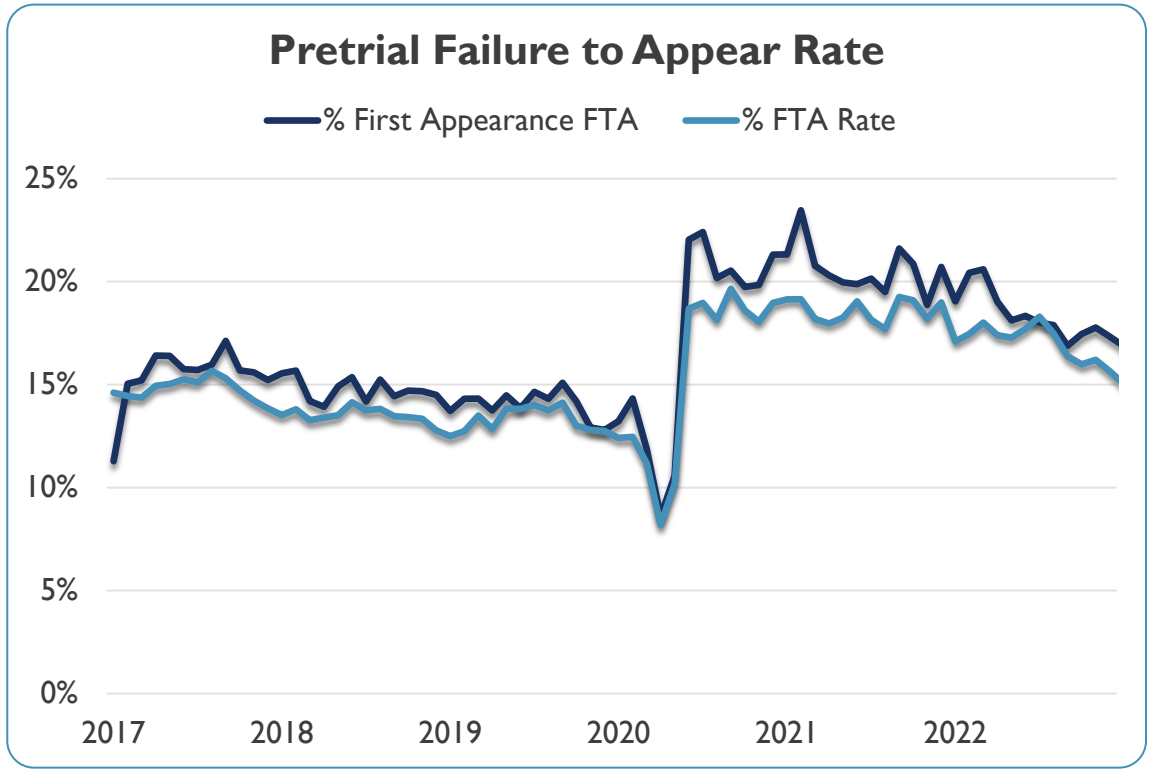
- Misdemeanor and Felony filings decline due to pandemic and law changes related to Marijuana and PCS
- More serious felony crimes (Murder, Attempted Murder) increase 46%
- Out of custody dockets increase during COVID along with FTA rates and warrants
- Aid & Assist caseload increasing



MURDER CHARGES INCREASE 46% 2020-2022 COMPARED TO 2017-2019

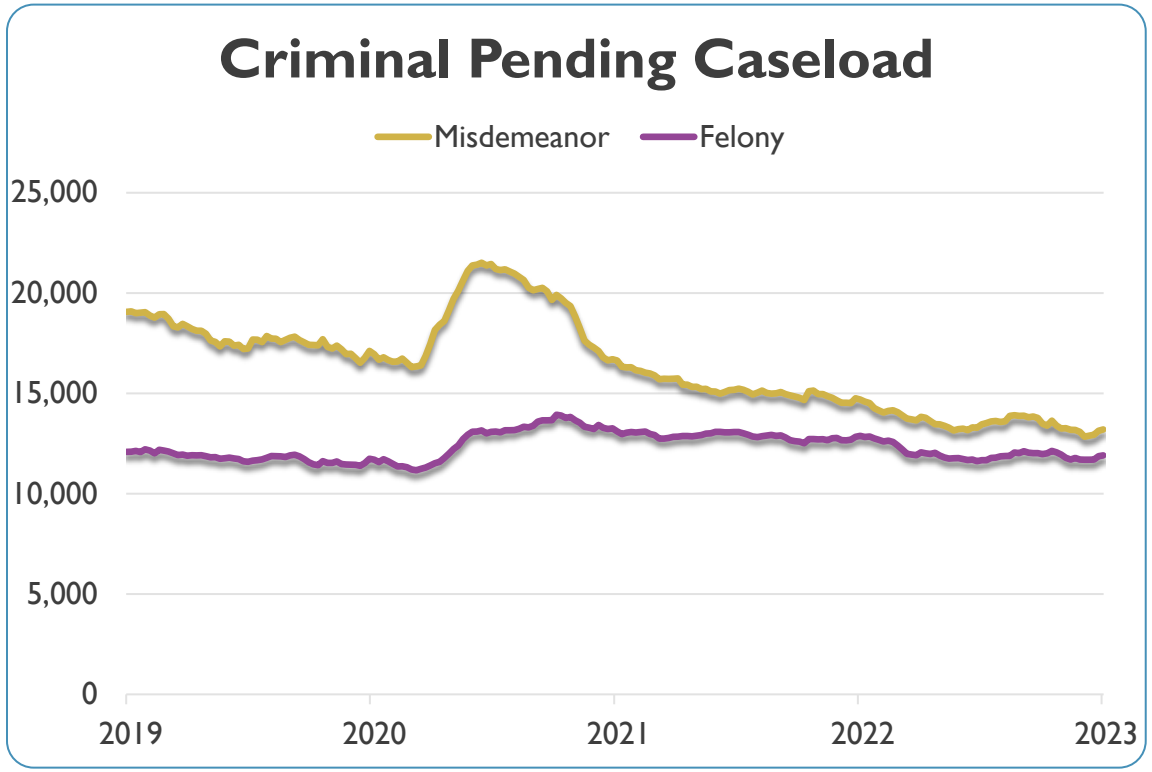
ACTIVE WARRANTS AND FAILURE TO APPEAR RATES CREATE DELAYS

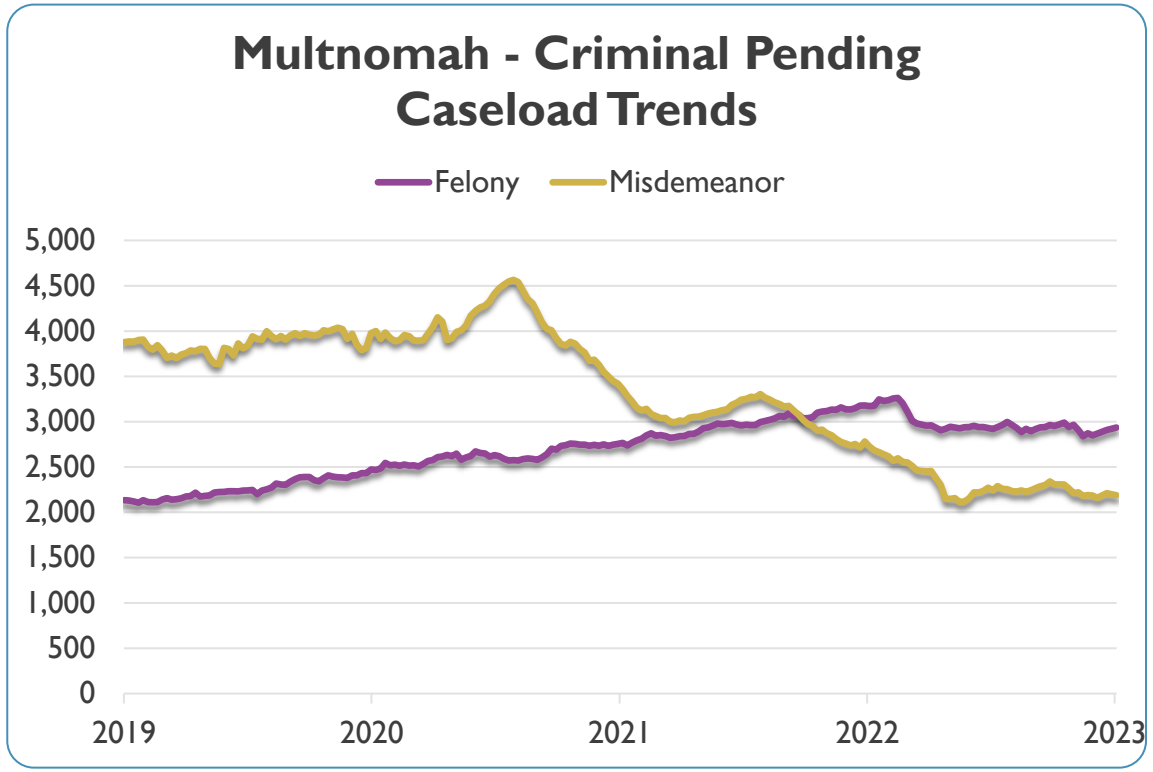




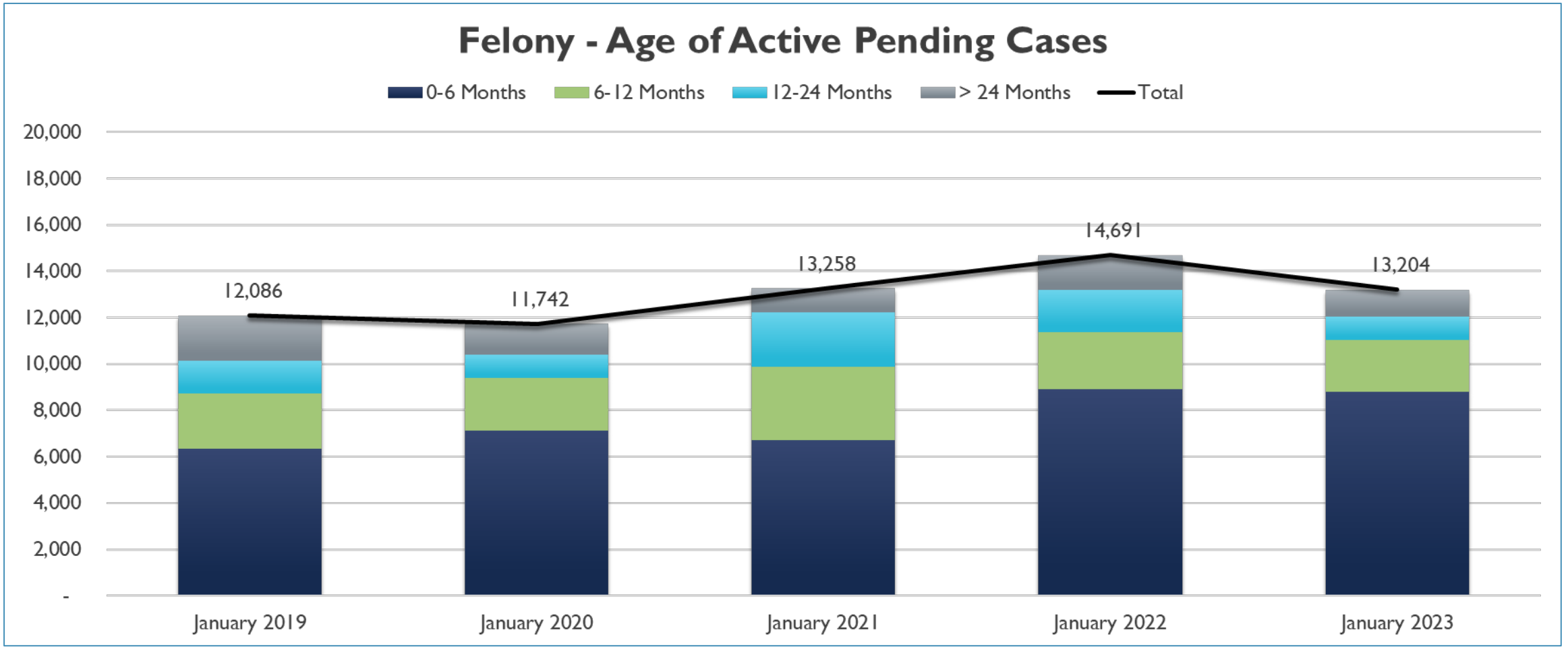
CRIMINAL PENDING CASELOADS ARE CHANGING

Overall, Pending Criminal Caseload Continues To Drop, But Challenges Remain.





COURTS ARE WORKING THROUGH FELONY BACKLOGS



STATEWIDE EFFORTS TO RESOLVE CASES

TRACKING PUBLIC DEFENSE CASELOADS IN ODYSSEY

Good News

The Odyssey system is capable of tracking attorney caseloads and representation status for defendants/litigants

Challenges

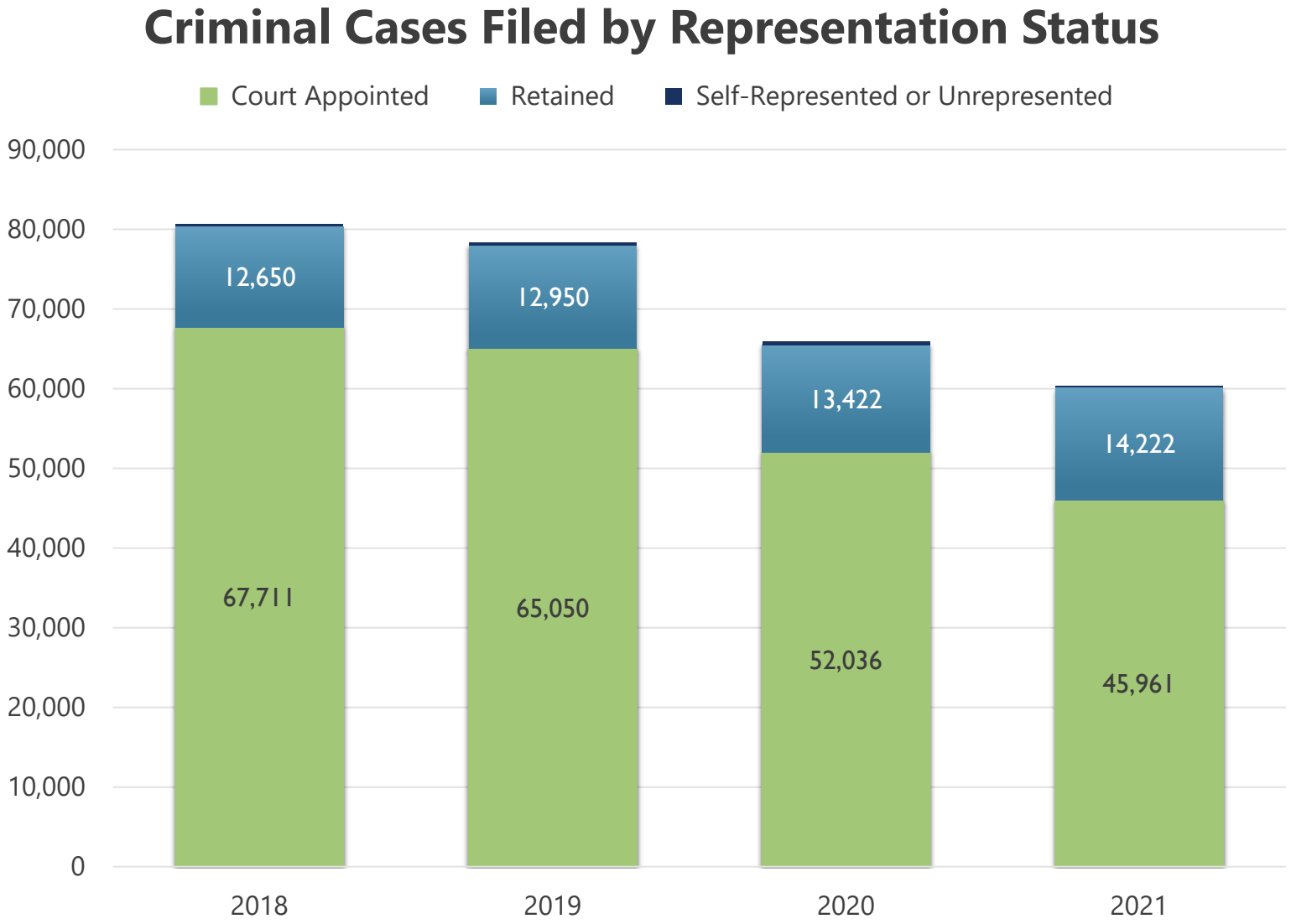
Need consistent/coordinated and efficient business processes across OJD, OPDS, and public defense providers

Moving Forward

OJD and OPDS are working on data sharing and standard business processes

WHAT WE CAN TRACK

- Type of representation
- Appointment date
- Case information (status, time to disposition, activity)
- Changes over time



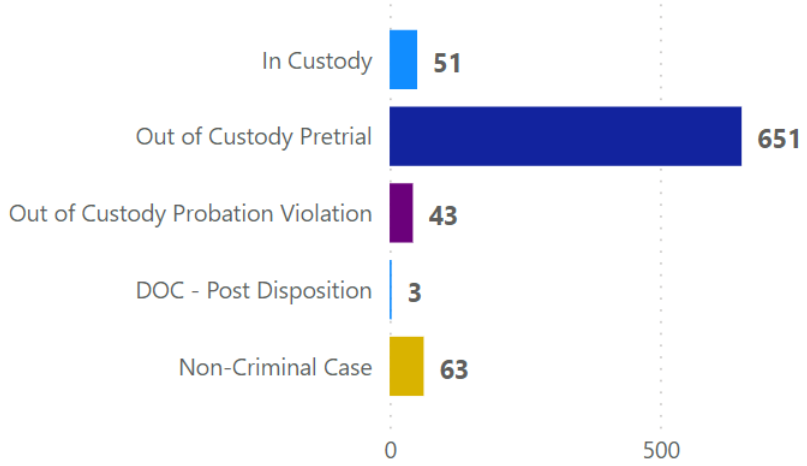
TRACKING UNREPRESENTED INDIVIDUALS

OJD implemented a statewide business process on 8/22/2022 to accurately track and report the number of individuals who are eligible for a court appointed attorney, but no attorney is available to appoint ("unrepresented individuals").

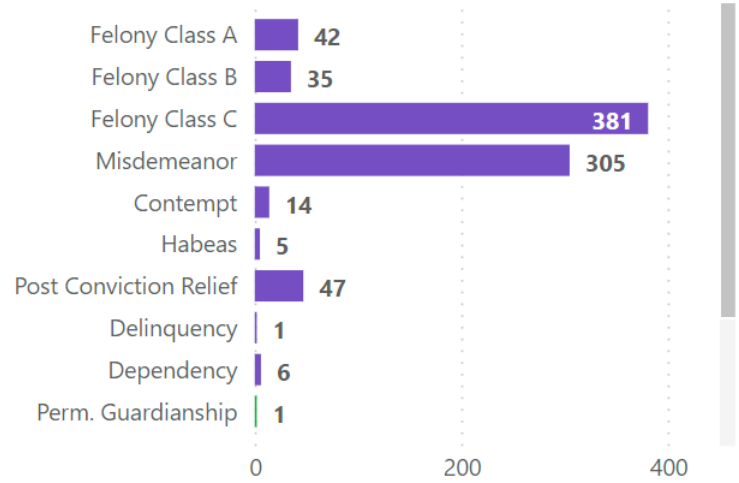
OJD collects data from each county public jail roster (online) and matches the county jail data to Odyssey court data to identify individuals who are unrepresented and in custody. This data collection and matching process could fail if:

- the public jail roster or county website becomes unavailable,
- the county jail does not include enough information to match an individual in the county jail data to an individual in the Odyssey court data,
- the county jail data includes incorrect information,
- the individual uses an alias, and/or
- party records in Odyssey are not merged and/or there are not enough personal identifiers on the party records to make a match.

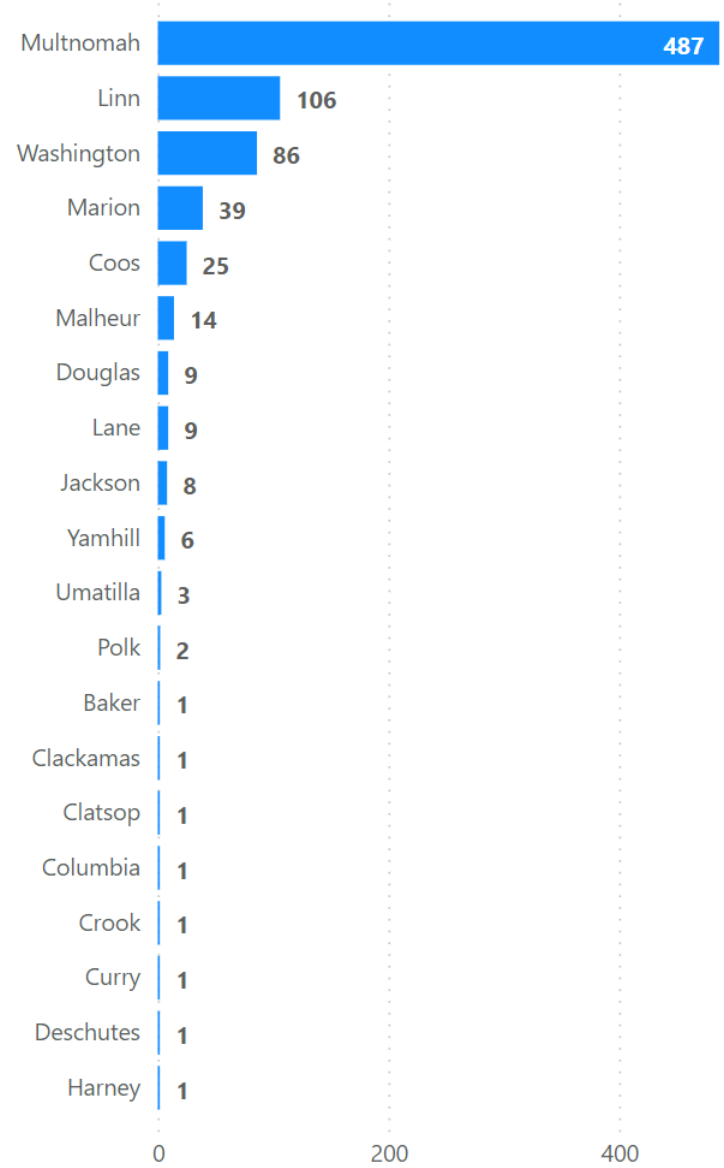
Unrepresented By Category



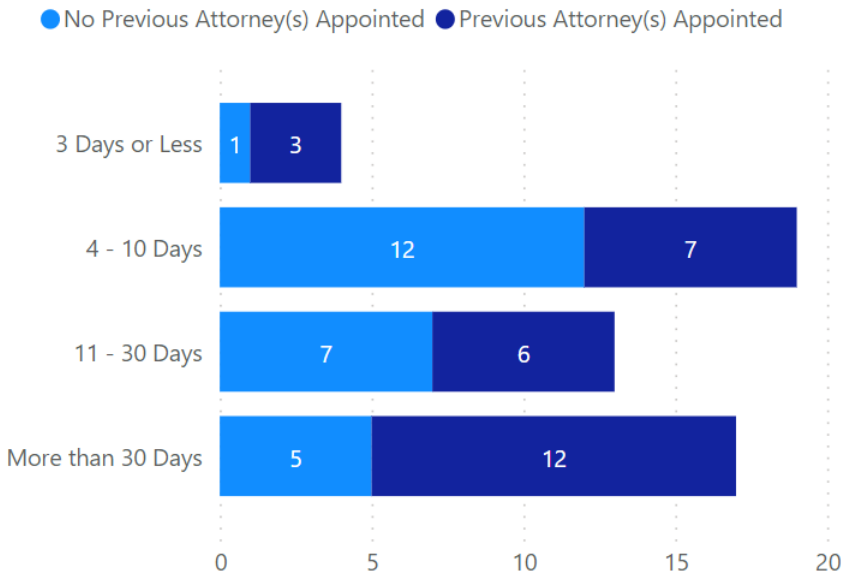
Unrepresented By Offense Group or Case Type



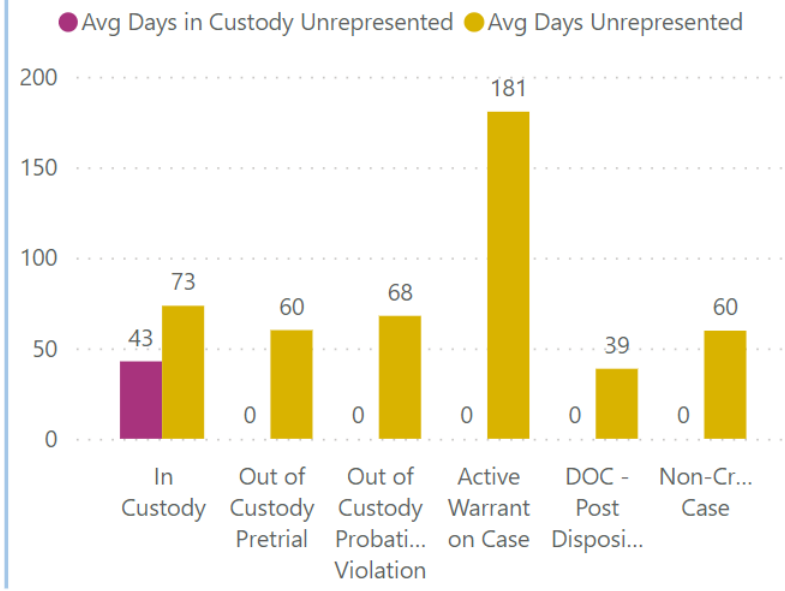
Unrepresented By Court



Days In Custody Unrepresented



Avg Days Unrepresented



CHALLENGES

TRACKING PUBLIC DEFENSE ATTORNEY CASELOADS IN ODYSSEY

- Date representation ends
  - Substitutions of attorney
  - Pre-disposition programs (treatment court, DUII diversion)
  - Warrants
- Case closure gray areas
  - Post-disposition events
  - Probation violations
- Data entry that differentiates between those who still need counsel appointed and those who have declined appointed counsel

OJD AND OPDS MOVING FORWARD TOGETHER

- Regular meetings to discuss data, definitions, business processes
- Data sharing to understand our systems, data entry, and business processes
- Engaging with court staff, judges and OPDS to validate data
- Working together to build data visualizations and define requirements for reporting and tracking attorney caseloads

THANK YOU!
QUESTIONS?

168 Wash.2d 91
Supreme Court of Washington,
En Banc.

STATE of Washington, Respondent,
v.
A.N.J., Appellant.

No. 81236–5.
|
Argued May 21, 2009.
|
Decided Jan. 28, 2010.

Synopsis
Background: Juvenile defendant who pled guilty to first-degree child molestation filed motion to withdraw plea.

Holdings: The Superior Court, Grant County, Ken L. Jorgensen, J., The Supreme Court, Chambers, J., held that:

[1] counsel rendered deficient assistance by failing to conduct meaningful investigation of defendant's case before proceeding to guilty plea;

[2] defendant's plea was involuntary, where defendant was misinformed that a juvenile sex conviction could be removed from his record; and

[3] defendant's plea was involuntary, absent evidence that defendant understood that any contact he had with victim had to be for sexual gratification to constitute the crime with which he was charged.

Reversed and remanded.

Madsen, J., concurred in result only.

J.M. Johnson, J., concurred and filed opinion.

Sanders, J., concurred and filed opinion.

West Headnotes (30)

[1] **Criminal Law** Amendments and rulings as to indictment or pleas

Generally, appellate court reviews a decision on a motion to withdraw guilty plea for abuse of discretion.

13 Cases that cite this headnote

[2] **Criminal Law** Grounds for Allowance

A defendant may withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. CrR 4.2(f).

12 Cases that cite this headnote

[3] **Criminal Law** Time for application

The timing of a motion to withdraw guilty plea may be considered by the court together with all other evidence bearing on the issue.

3 Cases that cite this headnote

[4] **Criminal Law** Time for application

The timing of a motion to withdraw guilty plea should be given weight only when it is made promptly after discovery of the previously unknown consequences or the newly discovered information.

2 Cases that cite this headnote

[5] **Criminal Law** Time for application

Timing of motion to withdraw guilty plea should be given particular weight if the motion is made before any other benefit to the defendant or detriment to the State is known, and if the motion is grounded in the core concerns recognized in *State v. Taylor*, whether the plea was voluntary, knowingly and intelligently made, and made

with an understanding of the nature of the charge and the consequences of the please.

1 Cases that cite this headnote

[6] **Criminal Law** Pleas

Challenges to trial court's findings at hearing on motion to withdraw guilty plea are reviewed for substantial evidence.

10 Cases that cite this headnote

[7] **Criminal Law** Burden of showing error

Defendant challenging denial of motion to withdraw guilty plea bears the burden of showing that there is not sufficient evidence to persuade a reasonable person of the trial judge's findings.

4 Cases that cite this headnote

[8] **Criminal Law** Requisites and Proceedings for Entry

Evidence at plea hearing did not support trial court's finding that juvenile defendant pleading guilty to charges of first-degree child molestation "accepted the State's version of the alleged facts"; defendant did not make a statement at the plea hearing, trial court relied upon police report, which said among other things that defendant denied that he had touched victims, and finding was not supported by the statements of defendant's parents or by any statement made by defendant when his plea was admitted.

[9] **Criminal Law** Presumptions and burden of proof in general

Criminal Law Deficient representation and prejudice in general

Defendant alleging ineffective assistance of counsel bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him.

34 Cases that cite this headnote

[10] **Criminal Law** Plea

A defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence. U.S.C.A. Const.Amend. 6.

10 Cases that cite this headnote

[11] **Criminal Law** Plea

Defense counsel rendered deficient assistance to twelve-year-old juvenile defendant by failing to conduct meaningful investigation before proceeding to guilty plea on charges of first-degree child molestation; although counsel believed that defendant was going to confess, counsel's failure deprived defendant of the opportunity to make a meaningful decision as to whether or not to plead guilty. U.S.C.A. Const.Amend. 6.

10 Cases that cite this headnote

[12] **Criminal Law** Standard of Effective Assistance in General

Professional standards for defense counsel do not establish minimum Sixth Amendment standards; however, relevant standards are often useful to courts in evaluating things like effective assistance of counsel and may be considered with other evidence concerning the effective assistance of counsel. U.S.C.A. Const.Amend. 6; West's RCWA 10.101.030.

11 Cases that cite this headnote

[13] **Criminal Law** Plea

Counsel has a duty to assist a defendant in evaluating a plea offer. U.S.C.A. Const.Amend. 6; RPC 1.1, 1.2(a).

5 Cases that cite this headnote

[14] **Criminal Law** Plea

Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. U.S.C.A. Const.Amend. 6.

29 Cases that cite this headnote

[15] **Criminal Law** Plea

Though the degree and extent of investigation required will vary depending upon the issues and facts of each case, 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. U.S.C.A. Const.Amend. 6.

30 Cases that cite this headnote

[16] **Criminal Law** Indigent's or incompetent's counsel and public defenders

If a public defender contract requires the defender to pay investigative, expert, and conflict counsel fees out of the defender's fee, thus creating an incentive not to investigate client cases or hire experts, the contract may be considered as evidence of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[17] **Criminal Law** Experts; opinion testimony

Depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[18] **Criminal Law** Consultation with counsel; privacy

Infants Parental notice or contact by authorities

Infants Right to Counsel

Infants Access to counsel; deprivation of services

A juvenile client should be given the opportunity to consult with and confide in his attorney without his parents present.

[19] **Criminal Law** Voluntary Character

Infants Parental notice or contact by authorities

Infants Pleas, plea agreements, and procedures

The failure to provide to a juvenile defendant the opportunity to consult with and confide in his attorney without his parents present is a factor that may be considered by a court when considering whether a plea was knowingly, voluntarily, and intelligently made.

[20] **Criminal Law** Ascertainment by court; advising and informing accused

A defendant must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea, and while a defendant cannot be positively misinformed about the collateral consequences of a guilty plea, those collateral consequences can be undisclosed without rendering the plea involuntary; the distinction between direct and collateral consequences of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.

18 Cases that cite this headnote

[21] **Criminal Law** Ascertainment by court; advising and informing accused

While a defendant cannot be positively misinformed about the collateral consequences of a guilty plea, those collateral consequences can be undisclosed without rendering the plea involuntary.

13 Cases that cite this headnote

[22] **Criminal Law** Lack or incompetence of counsel

The failure of counsel to advise juvenile defendant that a juvenile sex conviction would remain on his record forever, in and of itself, would not rise to a manifest injustice entitling defendant to withdraw guilty plea to first-degree child molestation. West's RCWA 9.94A.525(2).

2 Cases that cite this headnote

[23] **Criminal Law** Ascertainment by court; advising and informing accused

Defense counsel's misinforming juvenile defendant that a juvenile sex conviction could be removed from his record rendered guilty plea to first-degree child molestation involuntary. West's RCWA 9.94A.525(2).

1 Cases that cite this headnote

[24] **Criminal Law** Plea

Defense counsel representing twelve-year-old juvenile defendant who was pleading guilty to first-degree child molestation rendered ineffective assistance of counsel in misinforming juvenile defendant that a juvenile sex conviction could be removed from his record. U.S.C.A. Const.Amend. 6; West's RCWA 9A.44.083(1), 9.94A.525(2).

5 Cases that cite this headnote

[25] **Constitutional Law** Guilty pleas

Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily. U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote

[26] **Criminal Law** Voluntary Character

Criminal Law Ascertainment by court; advising and informing accused

Twelve-year-old juvenile defendant's guilty plea to child molestation in the first degree was not knowing and voluntary, as there was no evidence in the record that defendant understood the law in relation to the facts and that he understood that mere contact with the genitals of another person was not sufficient for the crime charged; defendant's alleged touching of victim's genitals as part of a child's game did not necessitate sexual gratification, and in addition to the lack of any colloquy with the court, neither the charging documents, the plea document, nor other evidence of record showed that defendant understood that any contact he had with victim had to be for sexual gratification to constitute the crime with which he was charged. West's RCWA 9A.44.010(2), 9A.44.083(1); CrR 4.2(d).

2 Cases that cite this headnote

[27] **Criminal Law** Plea

Defense counsel representing twelve-year-old juvenile defendant who was pleading guilty to first-degree child molestation, based on his conduct in touching victim's genitals, rendered ineffective assistance of counsel in failing to ensure that defendant understood that any contact he had with victim had to be for sexual gratification to constitute the crime with which he was charged. U.S.C.A. Const.Amend. 6; West's RCWA 9A.44.010(2), 9A.44.083(1).

2 Cases that cite this headnote

[28] **Criminal Law** Grounds for Allowance

A defendant may withdraw a guilty plea if it was not knowing, voluntary, and intelligent.

14 Cases that cite this headnote

[29] **Criminal Law** Voluntary Character

A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.

6 Cases that cite this headnote

[30] **Criminal Law** Grounds for Allowance

Criminal Law Lack or incompetence of counsel

Manifest injustice entitling defendant to withdraw plea includes instances where the plea was not voluntary or effective counsel was denied. U.S.C.A. Const.Amend. 6.

9 Cases that cite this headnote

Attorneys and Law Firms

****958** George M. Ahrend, Garth Louis Dano, Dano Gilbert & Ahrend PLLC, Moses Lake, WA, for Appellant.

D. Angus Lee, Grant County Prosecuting Attorney, Carole Louise Highland, Attorney at Law, Grant County Prosecuting Attorney Office, Ephrata, WA, for Respondent.

Opinion

CHAMBERS, J.

***96** ¶ 1 In 2004, when A.N.J. [1] was 12 years old, he pleaded guilty to first degree child molestation. Almost immediately, he moved to withdraw his plea upon realizing his juvenile sex offense criminal history would remain ****959** on his record once he was an adult, that he might have to register as a sex offender for the rest of his life, that he would have to notify his school, and that he would probably be shadowed by an adult while he was at the school. A.N.J. contends his court appointed counsel was ineffective because he failed to do an adequate investigation, failed to consult with experts, failed to fully inform him of the consequences of his plea, and failed to form a confidential relationship with him independent of his parents. He also argues that the trial judge did not adequately confirm that he understood the elements of the crime. He argues that under the facts of this case, his plea was not knowing, voluntary and intelligent, and that he should have been allowed to withdraw it. We conclude several of A.N.J.'s contentions have merit and remand to the trial court with directions that A.N.J. be allowed to withdraw his plea.

¶ 2 The right of effective counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty. [2] More than 45 years ago Clarence Earl Gideon told his trial judge, " 'The United States Supreme Court says I am entitled to be represented ***97** by Counsel.' " *Gideon v. Wainwright,* 372 U.S. 335, 337, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (quoting transcript). The trial judge disagreed, and without counsel at his side, Gideon was convicted and sentenced to five years in prison. The United States Supreme Court granted Gideon's handwritten petition and concluded that the right to appointed counsel was implicit in the Bill of Rights. *Gideon,* 372 U.S. at 337 n. 1, 344, 83 S.Ct. 792.

¶ 3 The Bill of Rights is part of our founding compact. It promises everyone certain fundamental rights, including the right not to be put in jeopardy of the loss of life or liberty without due process of law, not to be subject to unreasonable searches and seizures, not to be induced to self incrimination, and not to be put twice in jeopardy for the same offense. U.S. Const. amends. IV–VI, XIV; *see also* Wash. Const. art. I, §§ 3, 9, 22. Without an attorney, these fundamental rights are often just words on paper. As Justice Black wrote:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.... From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed

> to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Gideon, 372 U.S. at 344, 83 S.Ct. 792. The United States Supreme Court held that Gideon was entitled to a new trial and that under the Sixth and Fourteenth Amendments, states were required to appoint counsel for indigent accuseds, like Gideon before they could lawfully hale men and women into court and subject them to the penalties of the law. *Id.* at 343–44, 83 S.Ct. 792. Since *Gideon,* the high court has found that the right to counsel extends to children and in misdemeanor prosecutions whenever the defendant faces a risk of loss of liberty. ***98** *Argersinger v. Hamlin,* 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *In re Gault,* 387 U.S. 1, 41, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Later, in *Strickland,* the Supreme Court made clear that the Constitution guaranteed the poor not just an appointment of counsel, but also effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

****960** ¶ 4 Yet 45 years after *Gideon,* we continue our efforts to fulfill *Gideon's* promise. While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance. Public funds for appointed counsel are sometimes woefully inadequate, and public contracts have imposed statistically impossible case loads on public defenders and require that the costs of experts, investigators, and conflict counsel must come out of the defenders' own already inadequate compensation. *See* Gene R. Nichol, *The Charge of Equal Justice,* JUDGES' J., Summer 2008, at 38 . 41 n. 12 (citing Deborah Rhode, *In the Interests of Justice: A Comparative Perspective on Access to Legal Services and Accountability of the Legal Profession,* in 56 CURRENT LEGAL PROBS. 93, 96–98 (2003)); THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 53, 57, 64, 67–68 (2009); Ex. 13, at 7–8 (Am. Decl. of John A. Strait). Such public contracts for public defenders discourage appropriate investigation, testing of evidence, research, and trial preparation, and literally reward the public defender financially for every guilty plea the defender delivers. Such public defender systems have been called " 'meet 'em, greet 'em and plead 'em' " justice. Deborah L. Rhode, The Constitution of Equal Citizenship for Good Society: *Access to Justice,* 69 Fordham L. Rev. 1785, 1793 & n.42 (2001) (citing Alan Berlow, *Requiem for a Public Defender,* AM. PROSPECT, June 5, 2000, at 28). It is clear, even if not calculated, that the prosecution benefits from a system that discourages vigorous defense and creates ***99** an economic incentive for indigent defense lawyers to plea bargain. [3]

¶ 5 This case challenges the constitutional adequacy of the prior indigent criminal defense that was provided by Grant County under a previous public defender contract. [4] Since this case, public defense in Grant County was reorganized and improved in response to changes to the Rules of Professional Conduct that addressed several of the troublesome structural components of the system.

A.N.J.

¶ 6 On April 7, 2004, Deputy Matney received a report that five-year-old T.M. of Moses Lake had been sexually molested by another child. On May 3, Deputy Matney interviewed T.M., who reported that his neighbor, A.N.J., had touched him and his four-year-old sister "over and under [their] clothing." Clerk's Papers (CP) at 1, 21–23.

¶ 7 Eleven days later, the deputy called A.N.J.'s parents. Apparently, after speaking with an unnamed attorney, A.N.J.'s parents agreed to have their son talk to the police. According to A.N.J., five-year-old T.M. had attempted to instigate a game of "Icky Poke–U," which, it seems, involves putting one's hands down another's pants. A.N.J. told the deputy he had declined to play and had touched neither child. The deputy noted in his report that he did not believe A.N.J. because he stopped making eye contact and started crying.

***100** ¶ 8 A.N.J. was charged with one count of first degree child molestation under RCW 9A.44.083 and assigned a public defender, Douglas Anderson. Anderson had contracted with Grant County to provide public defender services in juvenile cases, among other things, for a flat fee. A 2000 version of the contract set the fee at $162,000 per year. Under the contract, Anderson was required to pay for "expert witnesses, investigators and other service necessary to an adequate ... defense ... except for extraordinary ****961** cases." Ex. 8, at 5.[5] Additionally, if conflict counsel was required, it was Anderson's responsibility to notify the court and pay for that counsel out of his flat fee. Under recent revisions of the rules governing attorneys' professional conduct, it is now unethical for an attorney to sign a public defender contract to deliver public defense if the contract requires the attorney to pay for conflict counsel, expert witness, or investigative costs out of a lump fee. RPC 1.8(m). The year he represented A.N.J., Anderson represented 263 clients under this contract. Additionally, he carried an average of 30–40 active dependency cases at any one time, and about another 200 cases. Anderson's only assistant was his wife, who had been home with a sick child at the time he was representing A.N.J.

¶ 9 Anderson filed a notice of appearance on behalf of A.N.J. on July 29, 2004. He met with his 12–year–old client and his client's parents once before the August 2, 2004, arraignment for about five minutes, and then briefly before the arraignment itself. Client and lawyer did not meet again before the pretrial conference on September 14, 2004, though A.N.J.'s father called in weekly. Anderson did little if any investigation or research into the case. Despite being given the names of witnesses who might have been able to testify that the victim had been abused by others, which could have provided an alternative explanation for T.M.'s ***101** report and knowledge, Anderson called these witnesses only once, did not reach them, and did not follow up. He never spoke to the investigating officer. He made no requests for discovery and filed no motions. At the pretrial conference, Anderson spent 5 to 10 minutes with A.N.J. and his parents.

¶ 10 The day after the pretrial conference, the State offered a deal. If A.N.J. would plead guilty to one count of first degree child molestation, the State would recommend a special sex offender disposition alternative program (SSODA). If A.N.J. successfully finished treatment, the charge would be reduced to second degree child molestation. Anderson believed the State's offer was a good deal and would have the added benefit to A.N.J. that he would not be charged with molesting T.M.'s younger sister.

¶ 11 On September 17, 2004, Anderson met with A.N.J.'s family to discuss the plea offer. Before this meeting, the evidence suggests Anderson had met with A.N.J. three times and spent somewhere between 20 and 30 minutes with them. A.N.J.'s parents estimated 5 to 10 minutes. CP at 119 (5 minutes), 122, 193 (10–20 minutes); Hr'g Tr. (Sept. 14, 2004) (5 minutes). At first, Anderson testified that he had a copy of the plea agreement at the September 17 meeting but later admitted that he did not.[6] Anderson testified that he spent "well over a half hour" discussing the plea offer. A.N.J.'s parents estimated it was between 5 and 10 minutes. CP at 32, 177. On September 22, just before the plea hearing, A.N.J. saw the plea documents for the first time. Anderson estimated that he saw A.N.J. for only about 5 minutes before the plea hearing. Anderson did not read the entire statement on plea to A.N.J.; instead he "just explained a couple of brief things regarding registering ***102** as a sex offender and the fact that [A.N.J.] could not own a firearm or have contact with the victim." CP at 35. The statement on the guilty plea recites the elements of the crime and gives the standard range sentence as 15–36 weeks. It also says that A.N.J. must register as a sex offender, though it says nothing about whether there is, or is not, the possibility of having the registration requirement removed. The box next to "school notification" is not checked.

****962** ¶ 12 Based on Anderson's testimony as a whole, it appears that he spent as little as 55 minutes with A.N.J. before the plea hearing, did no independent investigation, did not carefully review the plea agreement, and consulted with no experts.[7] Based upon the testimony of A.N.J.'s parents, Anderson spent between 35 and 40 minutes with their son before the plea.

¶ 13 A.N.J. did not make a statement at his plea hearing. The judge reviewed the record and found that there was a factual basis to accept the plea. Before accepting the plea, the judge asked A.N.J. if his attorney had read him the statement, whether he understood it, and whether he understood that he could serve up to 36 weeks, not attend the same school as the victim, have to pay a fine, and register as a sex offender.

A.N.J. said that he did. A.N.J. also said he had no questions. The judge did not review the elements of the crime with A.N.J. on the record. The trial judge checked a box on the form that said that "[t]he Respondent asserted that ... [t]he respondent's lawyer has previously read to [him] the entire statement above and that [he] understood it in full." CP at 11.

¶ 14 In November 2004, A.N.J. hired a new lawyer and within five weeks moved to withdraw his guilty plea. His parents submitted declarations in support stating that Anderson had not contacted any of the witnesses they supplied, did not return their calls, and met with them only ***103** briefly. His mother also said that she "specifically asked Mr. Anderson when this charge would be dropped from [A.N.J.'s] record." According to A.N.J.'s mother, Anderson said, " '[T]he laws change every year and I'll have to look into it, but it can be done either when [A.N.J.] turns eighteen (18) or twenty-one (21).' " CP at 29; *see also* CP at 32 (father's similar declaration). Both parents testified they were not told that A.N.J.'s school would be informed or what the SSODA would entail. A.N.J. did not testify or submit a declaration. Anderson also initially submitted a declaration in support of A.N.J.'s motion. He acknowledged he had done no investigation, that he had not read the plea agreement to A.N.J. or had him do so, and that he had told A.N.J.'s parents that he "believed" the convictions could be removed from A.N.J.'s record when he turned 18 or 21. [8]

¶ 15 However, in a subsequent declaration and at the hearing on A.N.J.'s motion to withdraw his plea, Anderson waffled on his signed declaration. A.N.J. unsuccessfully moved to limit Anderson's testimony on the ground that he had not generally waived attorney/client privilege. The ***104** judge concluded that A.N.J. had completely waived attorney/client confidentiality by moving to withdraw his guilty plea based on ineffective assistance of counsel. [9] During the hearing, ****963** Anderson acknowledged that he probably did not review the mandatory minimum sentence with A.N.J., or the requirement that he inform his school that he was a sex offender. Anderson also acknowledged that he did not talk to the investigating officers himself and had not used an investigator during the contract year. However, he denied misleading A.N.J. about the consequences of the plea. [10]

***105** ¶ 16 A.N.J. also assembled experts. Dr. Tasha Boychuk–Spears, an expert in interviewing children, submitted a declaration stating that the police detective's investigation was "insufficient" in a variety of ways, mostly because it did not take into account the suggestibility of young children. CP at 39. Seattle University School of Law Professor John A. Strait also submitted a declaration and testified pro bono as an expert witness in support of allowing A.N.J. to withdraw his plea. Professor Strait flatly concluded that Anderson's representation did not meet Sixth Amendment standards because, among other things, he did not do an adequate investigation, did not develop a rapport with A.N.J. individually, and did not spend sufficient time.

¶ 17 The court was not impressed. The trial judge did not explicitly reach in his ruling whether A.N.J. had been misinformed that the child molestation conviction could ever be stricken from his record. He found that A.N.J. had acknowledged the facts. CP at 209 ("It's my finding that the parents as well as the child accepted the position, the factual position of the State."). The judge did find that A.N.J. was not informed that he would be shadowed while at school, but concluded that was a collateral consequence that did not justify withdrawing a plea. He also explicitly found that A.N.J. had not shown ineffective assistance of counsel. At sentencing, which took place on August 29, 2006, the prosecutor did not recommend a SSODA, on the ground that "[A.N.J.] has not evidenced amenability to that type of alternative disposition." Tr. of Proceedings (July 22, 2005 & Aug. 29, 2006) at 18. The record suggests that A.N.J. had declined to be evaluated for SSODA pending final resolution on his motion to withdraw his guilty plea. Nearly two years after his plea, A.N.J. was sentenced to 15–36 weeks in custody, and required to undergo HIV (human immunodeficiency virus) and DNA (deoxyribonucleic acid) testing, and to register as a sex offender. The Court of Appeals affirmed.

***106** MOTION TO WITHDRAW THE PLEA

[1] **[2]** **[3]** **[4]** **[5]** ¶ 18 A.N.J. sought, and the trial judge denied, a motion to withdraw his guilty plea. Generally, we review this decision for abuse of discretion. *State v. Marshall,* 144 Wash.2d 266, 280, 27 P.3d 192 (2001) (citing ****964** *State v. Olmsted,* 70 Wash.2d 116, 422 P.2d 312 (1966)). Under the criminal rules, "[t]he court shall allow a defendant to withdraw the defendant's plea of guilty whenever

it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). A.N.J. stresses that he moved to withdraw his plea immediately upon learning that his juvenile conviction of a sex offense would stay on his record for the rest of his life. Before the adoption of CrR 4.2(f), this court followed a dual standard for the withdrawal of pleas. A more liberal standard was applied if the defendant moved to withdraw before sentencing. Former RCW 10.40.175 (1881), *repealed by* LAWS of 1984, ch. 76, § 27, provided, "At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted." The motion was addressed to the sound discretion of the court, "to be exercised liberally in favor of life and liberty." *State v. Hensley,* 20 Wash.2d 95, 101, 145 P.2d 1014 (1944) (citing *State v. Cimini,* 53 Wash. 268, 101 P. 891 (1909)). Following the adoption of CrR 4.2(f), we abandoned the dual standard in favor of a singular, and more stringent, standard of allowing " 'a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.' " *State v. Taylor,* 83 Wash.2d 594, 595, 521 P.2d 699 (1974) (quoting CrR 4.2(f)). We adopted the uniform standard because an examination of other rules connected to CrR 4.2(f) "prevents a court from accepting a plea of guilty until it has ascertained that it was 'made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the ***107** plea.' " *Taylor,* 83 Wash.2d at 596, 521 P.2d 699 (quoting CrR 4.2(d)). [11] However, a claim by a defendant that he did not understand the consequences of his plea may simply be more credible if made before sentencing than it would be if the defendant rolls the dice on a favorable sentence and is disappointed. We adhere to the single manifest injustice standard. But the timing of a motion may be considered by the court together with all other evidence bearing on the issue. However, the timing of the motion should be given weight only when it is made promptly after discovery of the previously unknown consequences or the newly discovered information. Timing should be given particular weight if the motion is made before any other benefit to the defendant or detriment to the State is known, and if the motion is grounded in the core concerns recognized in *Taylor,* whether the plea was voluntary, knowingly and intelligently made, and made with an understanding of the nature of the charge and the consequences of the plea. *See generally id.*

SUFFICIENCY OF THE EVIDENCE

[6] **[7]** ¶ 19 A.N.J. begins his task of demonstrating manifest injustice by challenging the sufficiency of the evidence for several of the court's findings at the hearing on the motion to withdraw his plea. We review such challenges for substantial evidence. *Soltero v. Wimer,* 159 Wash.2d 428, 433, 150 P.3d 552 (2007) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue,* 120 Wash.2d 935, 942, 845 P.2d 1331 (1993)). A.N.J. bears the burden of showing that there is not sufficient evidence to persuade a reasonable person of the trial judge's findings. *Nordstrom,* 120 Wash.2d at 939–40, 845 P.2d 1331 (citing *Grein v. Cavano,* 61 Wash.2d 498, 507, 379 P.2d 209 (1963)).

[8] ¶ 20 Several of the trial court's findings flow from its finding that A.N.J. "accepted the State's version of the ***108** alleged facts." CP at 215 (Finding of Fact (FOF) 10). This finding is not consistent with anything that A.N.J. himself said or did at any point in the proceedings other than making the plea itself. A.N.J. did not make a statement at the plea hearing. The trial court relied upon the police report, which said among other things that A.N.J. insisted that he declined to play "Icky Poke–U" and had touched neither child. Nor is the finding supported by the statements of A.N.J.'s parents or by any statement made by A.N.J. ****965** when his plea was admitted. The strongest supporting evidence is Anderson's declaration that A.N.J. "began to admit" the conduct and that his father accepted it. Ex. 3. But Anderson failed to elaborate on what "began to admit" meant. Substantial evidence does not support the finding of fact.

¶ 21 The trial judge also found that A.N.J. initiated the conduct with the victim. There is no evidence in the record of this. A.N.J.'s father's testified that he believed the victim initiated the conduct. The State contends without specific citation that the transcript of the officer's discussion with the victim establishes that A.N.J. initiated the conduct, but we find nothing in the transcript sufficient to support this finding.

¶ 22 A.N.J. challenges the trial court's finding that he "possessed the requisite intent." CP at 215 (FOF 10). This finding may follow reasonably from the judge's findings that A.N.J. accepted the State's versions of the facts and initiated

the contact. But there is no direct evidence anywhere that A.N.J. had the requisite intent and there is significant reason to doubt he did. As discussed below, from the record, A.N.J. might easily have believed that the mere contact alone was sufficient to support a child molestation charge, not that the State had to prove the contact was for sexual gratification. *State v. Lorenz,* 152 Wash.2d 22, 33, 93 P.3d 133 (2004).

¶ 23 Finally, A.N.J. challenges the trial court's factual finding that his plea was knowing, voluntary, and intelligent. To the extent that is a factual finding, there is very ***109** little evidence for it; to the extent that it is a legal one, it will be discussed below.

INEFFECTIVE ASSISTANCE OF COUNSEL

[9] ¶ 24 Most of A.N.J.'s challenges are to the effectiveness of his counsel's representation. He bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him. *State v. McFarland,* 127 Wash.2d 322, 334–35, 899 P.2d 1251 (1995); *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. While generally the trial judge's decision on whether to allow a defendant to withdraw a guilty plea is reviewed for abuse of discretion, "[b]ecause claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo." *In re Pers. Restraint of Fleming,* 142 Wash.2d 853, 865, 16 P.3d 610 (2001) (citing *State v. S.M.,* 100 Wash.App. 401, 409, 996 P.2d 1111 (2000)).

1. ADEQUACY OF INVESTIGATION

[10] **[11]** ¶ 25 A.N.J. challenges the adequacy of Anderson's investigation and his failure to consult with an expert witness. Anderson did no meaningful investigation. He called two witnesses provided by A.N.J.'s parents who might have testified that the complaining witness had been sexually abused before making these allegations against A.N.J. When he did not reach them on his first try, it appears he made no follow up attempts. While no binding opinion of this court has held an investigation is required, a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence. *See State v. Bao Sheng Zhao,* 157 Wash.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J., concurring).

[12] ¶ 26 The Washington Defender Association (WDA) has established standards for adequate representation. *See* WDA, STANDARDS FOR PUBLIC DEFENSE SERVICES std. 6 & cmt at ***110** 52–53 (2006). [12] The State essentially argues that we should not consider these standards because they have not been adopted by the court. We disagree. We accept the State's point that professional standards do not establish minimum Sixth Amendment standards. *Cf. Helling v. Carey,* 83 Wash.2d 514, 518–19, 519 P.2d 981 (1974) (quoting *Texas & Pac. Ry. v. Behymer,* 189 U.S. 468, 470, 23 S.Ct. 622, 47 L.Ed. 905 (1903)). " 'Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.' " *Id.* at 519, 519 P.2d 981 (emphasis omitted) (quoting ****966** *The T.J. Hooper,* 60 F.2d 737, 740 (2d Cir.1932)). However, while not binding, relevant standards are often useful to courts in evaluating things like effective assistance of counsel. *See, e.g., In re Pers. Restraint of Brett,* 142 Wash.2d 868, 879–80, 16 P.3d 601 (2001). We note that state law now requires each county or city providing public defense to adopt such standards, guided by standards endorsed by the Washington State Bar Association. RCW 10.101.030; *see also* WASH. STATE BAR ASS'N, STANDARDS FOR INDIGENT DEFENSE SERVICES (Sept. 20, 2007). While we do not adopt the WDA *Standards for Public Defense Services,* we hold they, and certainly the bar association's standards, may be considered with other evidence concerning the effective assistance of counsel.

[13] **[14]** **[15]** ¶ 27 The State essentially argues that Anderson, categorically, had no duty to investigate once he believed his client "began to admit" guilt. We disagree. First, we have already held that the failure to investigate, at least when coupled with other defects, can amount to ineffective assistance of counsel. *In re Brett,* 142 Wash.2d at 882–83, 16 P.3d 601. Second, and more importantly, the fact that Anderson seemed to believe that his client was going to confess, or even was guilty, was not enough to excuse some investigation. False confessions (especially by children), mistaken eyewitness identifications, and the

fallibility of child testimony are well documented. *See* Richard A. Leo et al., ***111** *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty–First Century,* 2006 WIS. L. REV. 479, 480–85 (2006) (discussing the false confessions by juveniles to the Central Park jogger case); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post–DNA World,* 82 N.C. L. REV. 891, 904 (2004); *Bernal v. People,* 44 P.3d 184, 190 (Colo.2002) (discussing fallibility of eyewitness testimony). A criminal defense lawyer owes a duty to defend even a guilty client. RPC 3.1; WDA, *supra,* at 9; AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION std. 4-4.1(a) (3d ed. 1993) .[13] Counsel has a duty to assist a defendant in evaluating a plea offer. RPC 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires ... thoroughness and preparation reasonably necessary for the representation"); RPC 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer,* as to a plea." (emphasis added)); *State v. Osborne,* 102 Wash.2d 87, 99, 684 P.2d 683 (1984) (citing *State v. Cameron,* 30 Wash.App. 229, 232, 633 P.2d 901 (1981)). Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. *S.M.,* 100 Wash.App. at 413, 996 P.2d 1111. 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 ***112** make a meaningful decision as to whether or not to plead guilty.[14]

[16] **[17]** ¶ 28 A.N.J. also argues the Grant County public defender contract in place at the time created an incentive for attorneys not to investigate their clients' cases or hire experts. We agree. Entering such contracts ****967** is now a violation of the Rules of Professional Conduct. RPC 1.8(m). The system effectively paid a bounty for every guilty plea delivered by assigned defense counsel to the county prosecutor. This was a dysfunctional system. We do not, at this time, go so far as the Arizona Supreme Court in holding that the system itself violates a defendant's constitutional rights to due process and right to counsel. *Cf. State v. Smith,* 140 Ariz. 355, 362, 681 P.2d 1374 (1984) (finding somewhat similar system of public defense constitutionally defective). However, we hold that if a public defender contract requires the defender to pay investigative, expert, and conflict counsel fees out of the defender's fee, the contract may be considered as evidence of ineffective assistance of counsel. We further hold that depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant.

2. ATTORNEY'S DUTY TO FORM CONFIDENTIAL RELATIONSHIP WITH CLIENT

¶ 29 A.N.J. was always accompanied by his parents when he met with Anderson. Citing Washington State Bar Association (WSBA), American Bar Association (ABA) and local defense bar standards, A.N.J. criticizes Anderson for not meeting with him privately and creating a confidential ***113** attorney/client relationship with him. A.N.J. contends that the WSBA standards have been incorporated by reference into Washington statutes, which currently state that "[t]he standards endorsed by the Washington state bar association for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards." RCW 10.101.030. That is a strong reading of the text. At the time that A.N.J. pleaded guilty, the statute merely said that bar endorsed standards "may serve as guidelines." Laws of 1989, ch. 409, § 4. We conclude that the professional standards are evidence of what should be done, no more.

[18] **[19]** ¶ 30 Professor Strait condemned the constant presence of A.N.J.'s parents in both his declaration (attached to the petitioner's supplemental brief) and in testimony at the motion hearing itself. A child, it is argued, may be more candid with his lawyer and more willing to express his own view if his parents are not present. Professor Strait contends, among many other things, that "[c]andor cannot be accomplished ... when the meeting is held jointly with the parents. There is a substantial risk that the child defer to the parents under such circumstances when advice on the decision to plead guilty or to go to trial is being provided." Ex. 13, at 11–12 (Am. Decl. of John A. Strait). Thus, he suggests, by failing to establish a confidential relationship with A.N.J., Anderson undermined

the attorney/client relationship, undermined client autonomy, and potentially waived attorney/client privilege. *Id.* A juvenile client should be given the opportunity to consult with and confide in his attorney without his parents present. We hold that the failure to provide that opportunity to a juvenile defendant is a factor that may be considered by a court when considering whether a plea was knowingly, voluntarily, and intelligently made but is not dispositive in this case.

CONSEQUENCES OF GUILTY PLEA

[20] **[21]** ¶ 31 A defendant "must be informed of all the direct consequences of his plea prior to acceptance of a ***114** guilty plea." *State v. Barton,* 93 Wash.2d 301, 305, 609 P.2d 1353 (1980). Again, A.N.J. largely bases his claim on ineffective assistance of counsel. While a defendant cannot be positively misinformed about the collateral consequences, those collateral consequences can be undisclosed without rendering the plea involuntary. "The distinction between direct and collateral consequences of a plea 'turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.' " *Id.* (quoting *Cuthrell v. Director, Patuxent Inst.,* 475 F.2d 1364, 1366 (4th Cir.1973)). A.N.J. argues that he should be allowed to withdraw his guilty plea because, he contends, his counsel misled him about the consequences of his plea.

¶ 32 The trial judge made no relevant findings, perhaps because he believed that ****968** A.N.J.'s challenge went to the registration requirement and that the registration requirement was merely a collateral consequence of a guilty plea. This court has never held that a preexisting automatic statutory requirement of sex offender registration is not a direct consequence of a plea, though we decided a related but different issue in *State v. Ward,* 123 Wash.2d 488, 513–14, 869 P.2d 1062 (1994). Ward challenged the sex offender registration statute itself, which imposed a registration obligation on people convicted long before it was enacted. *See id.* Several offenders who either had pleaded guilty or had been convicted of sex offenses before the registration statute was enacted challenged the registration obligation on constitutional grounds. The State argued, among other things, that the registration requirement was not ex post facto and need not be in place at the time the plea (or conviction) was entered. We agreed that the postconviction registration requirement did not violate the constitution:

> [W]e conclude there was no constitutional requirement to advise Doe of his duty to register as a sexual offender at the time of his guilty plea. Although the duty to register flows from Doe's conviction for a felony sex offense, it does not enhance Doe's sentence or punishment. "A defendant must understand ***115** the *sentencing* consequences for a guilty plea to be valid." (Italics ours.) *State v. Miller,* 110 Wash.2d 528, 531, 756 P.2d 122 (1988). As we concluded under our ex post facto analysis, registration as a sex offender does not alter the standard of punishment. Because registration as a sex offender does not alter the standard of punishment, we hold the duty to register is collateral, and not a direct, consequence of a guilty plea.

Id. at 513–14, 869 P.2d 1062. *Ward* considered a statutory consequence that came into existence only after the conviction, not an existing, automatic statutory consequence. Under existing statutes, the obligation to register follows directly from the conviction. *E.g.,* RCW 9A.44.130. While the registration obligation does not affect the immediate sentence, its impact is significant, certain, and known before a guilty plea is entered. A.N.J. argues that he was misled as to both the direct and collateral consequences of his plea, but since he was correctly informed that he had an obligation to register as a sex offender, it is unnecessary for us to decide whether a current statutory duty to register as a sex offender is a direct consequence of a plea for the purposes of establishing whether a plea was involuntarily made.

¶ 33 A person convicted of a sex crime can petition to be relieved of the obligation to register. RCW 9A.44.140. Anderson says he told A.N.J. and his parents that "up to the discretion of the court ... he could have the requirements to register as a sex offender removed" when he was 18 or 21. CP at 29, 164. Broadly speaking, that is the case; but the process is conditional and discretionary. [15] However, under ***116** current law, the record of juvenile sex offenses never goes away. RCW 9.94A.525(2); *cf. In re Pers. Restraint of LaChapelle,* 153 Wash.2d 1, 4, 100 P.3d 805 (2004) (discussing prior times when juvenile offenses did wash out). The record of A.N.J.'s conviction of a juvenile sex offense will remain with him the rest of his life.

[22] **[23]** **[24]** ¶ 34 The failure to advise A.N.J. that the juvenile sex conviction would remain on his record forever, in and of itself, would not rise to a manifest injustice. *See, e.g.,* ****969** *State v. Oseguera Acevedo,* 137 Wash.2d 179, 195, 970 P.2d 299 (1999). But if A.N.J. was misinformed that his conviction could be removed from his record, then he should be allowed to withdraw his plea. *State v. Stowe,* 71 Wash.App. 182, 188, 858 P.2d 267 (1993) (When there are "additional consequences of an unquestionable serious nature ..., it may be manifestly unjust to hold the defendant to his earlier bargain."); *State v. McCollum,* 88 Wash.App. 977, 982, 947 P.2d 1235 (1997).

¶ 35 The record establishes that Anderson allowed A.N.J. and his parents to have an erroneous understanding that his juvenile conviction as a sex offender could be removed from his record and failed to adequately distinguish between the registration requirement and A.N.J.'s criminal record. See Ex. 3, at 3. Earlier, Anderson remembered "some confusion when A.N.J.'s parents asked when the charge could be removed from A.N.J.'s record." CP at 35. Anderson's original signed declaration said he told the parents he "believed" the conviction would be removed from A.N.J.'s record when he was 18 or 21, and A.N.J.'s parents testified consistently. CP at 29, 32 (parents' declarations). [16] Anderson further declared he "never ... advise[d] [A.N.J. and his parents] further regarding their question" and "never ... ***117** fully explained it to them." CP at 35. Anderson's subsequent testimony that sex offenses could not be "sealed up," "but that he could have the requirements to register as a sex offender removed" hardly added clarity to the issue. CP at 164. Importantly, the record reflects that A.N.J. and his parents simply did not understand the difference between registration as a sex offender and the record of a conviction.

¶ 36 Anderson spent precious little time with his client considering the gravity of the charges against A.N.J. A conviction as a juvenile sex offender will have a significant impact on his life. Taken together, the contractual constraints under which Anderson was working, the limited time he spent with his client before the plea, the fact he did not return A.N.J.'s parents' phone calls, the limited time he spent with A.N.J. to go over the statement on plea, A.N.J.'s prompt motion to withdraw his plea upon discovering the consequences of the plea, and Anderson's declaration that there was some "confusion" about when the charge could be removed, and that Anderson "believed" the conviction could be removed from A.N.J.'s record when he turned 18 or 21, we have no difficulty concluding A.N.J. was misinformed as to the consequences of his plea. He is entitled to withdraw it.

A.N.J.'S UNDERSTANDING OF THE CHARGE

[25] **[26]** **[27]** ¶ 37 A.N.J. also argues that it was error to deny his motion to withdraw his plea because his plea was not knowing and voluntary because he did not understand the nature of the charges against him. Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily. *In re Pers. Restraint of Mendoza Montoya,* 109 Wash.2d 270, 277, 744 P.2d 340 (1987); *Boykin v. Alabama,* 395 U.S. 238, 242–43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Court rules prohibit the court from accepting a plea without first assuring the defendant understood the "nature of the charge and the consequences of the plea" as required by CrR 4.2(d), among other things. ***118** A.N.J. was charged with first degree child molestation. Under the statute:

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1). " 'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire." RCW 9A.44.010(2). Gratification is not an element of the crime. It is part of the definition of ****970** sexual contact. *Lorenz,* 152 Wash.2d at 33, 93 P.3d 133. To satisfy the requirements of CrR 4.2(d) and with exceptions not relevant here, there must

be sufficient evidence of a factual basis for the plea for a jury to conclude that the defendant is guilty of the crime charged. *Zhao,* 157 Wash.2d at 198, 137 P.3d 835 (citing *State v. Newton,* 87 Wash.2d 363, 370, 552 P.2d 682 (1976)). We agree with the Court of Appeals' reasoning in *S.M.* and hold that in such cases, there must be evidence in the record that A.N.J. understood the law in relation to the facts and that he understood that mere contact with the genitals of another person was not sufficient for the crime charged. [17]

¶ 38 In the case before us, nothing in the colloquy with the judge shows that A.N.J. understood that the physical act was not itself sexual contact; that it had to be done for sexual gratification. RCW 9A.44.010(2) (" 'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire.") A child's game of "Icky Poke–U" certainly does not necessitate ***119** sexual gratification. In addition to the lack of any colloquy with the court, we also conclude that neither the charging documents, the plea document, nor other evidence of record shows that A.N.J. understood the meaning of sexual contact. In addition, the record does not affirmatively disclose that A.N.J. understood that any contact he had with T.M. had to be for sexual gratification to constitute the crime with which he was charged, the court violated his right to due process when it accepted his plea and erred when it denied his motion to withdraw his plea. *Cf. S.M.,* 100 Wash.App. at 409, 996 P.2d 1111.

CONCLUSION

[28] **[29]** **[30]** ¶ 39 A.N.J. seeks to withdraw his plea largely because of ineffective assistance of counsel and because he was misinformed of the consequences of the plea. To do so, he must establish manifest injustice. While "manifest injustice" has not been definitively defined, this court has clearly held that a defendant may withdraw a guilty plea if it was not knowing, voluntary, and intelligent. "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." *In re Pers. Restraint of Isadore,* 151 Wash.2d 294, 298, 88 P.3d 390 (2004). "Manifest injustice includes instances where ... 'the plea was not voluntary' [or] 'effective counsel was denied.' " *Zhao,* 157 Wash.2d at 197, 137 P.3d 835 (quoting *Marshall,* 144 Wash.2d at 281, 27 P.3d 192).

¶ 40 We conclude that court appointed counsel's representation fell below the objective standard guaranteed by the constitution and that A.N.J. was prejudiced. [18] When asked about the "record," Anderson responded by saying the registration requirement could be removed. This misled A.N.J. to the consequences of his plea. Considering the ***120** contractual constraints under which Anderson was working, the limited time he spent with his client before the plea, the fact he spent just a few minutes with A.N.J. to go over the statement on plea, A.N.J.'s prompt motion to withdraw his plea upon discovering the consequences of the plea, and Anderson's declaration that there was some "confusion" about when the charge could be removed and that Anderson "believed" the conviction could be removed from A.N.J.'s record when he turned 18 or 21, we conclude that A.N.J. has ****971** established that he was misinformed as to the consequences of his plea.

¶ 41 Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily. CrR 4.2(d) prohibited the court from accepting a plea without first assuring the defendant understood the "nature of the charge and the consequences of the plea." A.N.J. was charged with first degree child molestation. Sexual contact for the purposes of that crime must be done for gratifying sexual desire. RCW 9A.44.010(2). There is nothing in the colloquy with the court, the charging documents, or any other record before this court to show that A.N.J. was informed that mere contact with another was insufficient to constitute the crime. His plea should not have been accepted.

¶ 42 Having concluded that because of ineffective assistance of counsel, A.N.J. was misinformed of the consequences of his plea and was not adequately informed of the nature of the charge against him, we find it unnecessary to reach the remainder of his claims. We reverse and remand to the trial court with directions that A.N.J. be allowed to withdraw his plea.

WE CONCUR: BARBARA A. MADSEN, C.J., result only, SUSAN OWENS, CHARLES W. JOHNSON, MARY E. FAIRHURST, GERRY L. ALEXANDER, RICHARD B. SANDERS, JJ., and PHILIP J. THOMPSON, J.P.Tem.

***122** J.M. JOHNSON, J. (concurring).

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

¶ 48 Twelve-year-old A.N.J. was charged by information on June 30, 2004, with first degree child molestation for having sexual contact with a six-year-old neighbor. Clerk's Papers (CP) at 1. Douglas Anderson was appointed by Grant County to represent A.N.J. in juvenile court in connection with the charge. [19] CP at 2. Anderson met with A.N.J. on at least three and as many as five occasions prior to A.N.J.'s entry of a plea of guilty on September 21, 2004. CP at 163, 176–77, 200. A.N.J.'s parents were both present during these meetings to participate in the discussion and to help their son understand the proceedings. Anderson separately discussed the case with A.N.J.'s father over the phone several times prior to entry of the guilty plea. CP at 163, 176.

¶ 49 ***123** Over the course of these meetings and phone calls, Anderson for the most part provided effective assistance to A.N.J. He advised A.N.J. and his parents of the basic nature of the crime and its elements, the sentence that A.N.J. faced, and the possibility of having that sentence suspended and the charge reduced to second degree child molestation if A.N.J. successfully completed a treatment program. CP at 76, 85, 174, 178, 193. Anderson also discussed with A.N.J. the merits of the offer made by the prosecution. CP at 162. Only after A.N.J. began admitting the alleged misconduct did Anderson counsel him to accept the State's offer, a recommendation that Anderson made after weighing the consequences of the guilty plea against the possibility of keeping A.N.J. out of custody, reducing the charge, and avoiding a second charge for similar conduct involving the victim's younger sister. CP at 184.

¶ 50 In making this recommendation, Anderson explained the basic components of the plea agreement in language comprehensible to a 12–year–old child, including the requirement that A.N.J. register as a sex offender, the limits that would be imposed on A.N.J.'s contact with younger children, the victim, and the victim's siblings, and the firearm restrictions associated with the commission of a felony. CP at 76, 167, 176–79, 196–97, 199. Anderson also described what would happen in the courtroom if A.N.J. pleaded guilty and were advised to respond "yes" when the judge asked him whether he had read the statement on the guilty plea or whether the statement had been read to him. ****972** CP at 167–68. Anderson explicitly ensured that his client was making the plea freely and voluntarily. CP at 179. At this point, Anderson believed that he had adequately advised A.N.J. regarding potential outcomes and that A.N.J. had been adequately informed of the nature of the charge. CP at 181.

¶ 51 Anderson learned otherwise a few weeks later when A.N.J. notified him of his desire to withdraw the plea. Pursuant to standard practice, Anderson promptly contacted Brian Barlow, another public defender, to handle the case so as to avoid a conflict of interest. CP at 12, 169, 171.

¶ 52 ***124** In other circumstances, these efforts may be found to constitute effective assistance. Here, however, I agree with the majority in its finding that Anderson's performance was deficient in two crucial respects, those being (i) that he misinformed A.N.J. of several consequences of his plea and (ii) that he failed to sufficiently inform A.N.J. of the precise nature of the crime to which he pleaded guilty. Majority at 119-20. These technical mistakes support the court's finding that A.N.J.'s plea was not knowingly made and therefore was invalid.

¶ 53 Although I concur with the majority in this respect, I write separately to stress the limited nature of the present holding. This case is a rare exception to the strong presumption that plea agreements are valid and enforceable by the courts. *See, e.g.,* *State v. Neff,* 163 Wash.2d 453, 468, 181 P.3d 819 (2008) ("Washington State has a strong public policy in favor of accepting and enforcing the terms of voluntary plea agreements where they have been entered into knowingly, voluntarily, and intelligently."). It should not be taken to suggest that a juvenile plea agreement can be invalidated whenever a juvenile offender cannot recite the exact meaning of the legal jargon in his plea agreement or claims to have been confused about an aspect of his sentence after verifying his understanding during colloquy with a

judge. This case is the exception, not the rule, and its holding should be limited to its particular facts.

¶ 54 Accordingly, I emphasize again that Anderson's representation of A.N.J. was objectively deficient *only* with respect to the two issues mentioned above that rendered A.N.J.'s plea not knowingly made. For that reason, and that reason alone, A.N.J.'s guilty plea in this case is unenforceable.[20] These two deficiencies are unique to the facts of this ***125** case and do not merit the majority's discussion of the ways in which modern public defender contracts have left the guaranty of effective counsel unfulfilled for some criminal defendants. Majority at 96-99. The majority goes too far beyond the bounds of the present case with this discussion and threatens to erode public confidence in our defender system and cast doubt on valid, enforceable juvenile plea agreements.

¶ 55 I concur in a limited holding on this record that A.N.J. did not receive effective assistance of counsel prior to his decision to plead guilty to the charge of first degree child molestation. Because of my reservations about the majority's critique of the State's generally laudable public defense system, as well as concerns about the ramifications on other juvenile plea bargains from an overbroad reading of today's decision, I limit the scope of my agreement to a simple "I concur."

***121** SANDERS, J. (concurring).
[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

¶ 43 I have signed the majority opinion; however, I write separately to urge the judiciary to take a more proactive role to facilitate the appointment of effective counsel for indigent criminal defendants. Here the appointed attorney was obviously out of compliance with the standards endorsed by the Washington State Bar Association referenced in RCW 10.101.030. *See* Wash. State Bar ****973** Ass'n, *Standards for Indigent Defense Services* (2007), http://www.wsba.org/lawyers/groups/committee&1fonpublicdefense.htm. Just because a county attempts to balance its budget on the backs of indigent criminal defendants is no reason for the court to facilitate this constitutional violation by appointing lawyers who are not in a position to get the job done. Moreover I would argue violation of these standards by appointed counsel should be regarded as prima facie evidence of ineffectiveness.

¶ 44 *State v. Wilson,* 144 Wash.App. 166, 181 P.3d 887 (2008), also illustrates the problem. In that case the court appointed the public defender for Asotin County to represent the defendant. The public defender made a request to appoint either a co-counsel or a lead counsel because she had been a member of the bar only two years, had no felony trial experience, and did not have the experience necessary to be sole counsel. "The court denied the motion, expressing concern for the 'thousands upon thousands upon thousands of dollars' Asotin County would have to pay if experienced counsel was appointed." *Id.* at 178, 181 P.3d 887 (quoting Report of Proceedings at 7).

¶ 45 Later in the proceeding, the appointed attorney filed a motion to withdraw based largely on the court's denial of her motion for co-counsel. "She stated she was 'overwhelmed and unable to shoulder this burden alone' " (quoting Clerk's Papers at 107) and "explained that she did not have the resources or experience to deal with a case of this size." *Id.* at 178–79, 181 P.3d 887. Eighteen days before trial the court appointed co-counsel; however that did not provide a reasonable time for investigation and preparation. The Court of Appeals held: "financial concerns should not be used as a justification for inhibiting the constitutional rights of criminal defendants." *Id.* at 180, 181 P.3d 887. Although the Court of Appeals did not reach the issue of ineffective assistance of counsel because it reversed the conviction on other grounds, the situation remains most problematic and illustrates a systemic failure.

¶ 46 The judiciary should accept no shortcuts when it comes to discharging its constitutional obligation to appoint effective attorneys to represent indigent criminal defendants. If no such attorney is to be found because adequate funding is not available, then no attorney should be appointed and the case dismissed. It is not up to the judiciary to tax or appropriate funds; these are legislative decisions. However, it *is* up to the judiciary to facilitate a fair proceeding with effective appointed counsel if there is to be one.

¶ 47 I concur.

All Citations

168 Wash.2d 91, 225 P.3d 956

Footnotes

1 Under RAP 3.4, we direct the clerks' offices of the superior and appellate courts to replace the petitioner's name with his initials in the caption and other publically available sources associated with this opinion.

2 As the fundamental principles of professional conduct put it:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.
>
> Lawyers, as guardians of the law, play a vital role in the preservation of society.
>
> RPC, *Fundamental Principles of Professional Conduct.*

3 Those same attorneys who prosecute crimes often provide legal advice to county officials on the public defense contracts. At oral argument, we were informed that the chief deputy prosecuting attorney drafted the contract in question. Wash. Supreme Court oral argument, *State v. A.N.J.,* No. 81236–5 (May 21, 2009), at 40 min., 6 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http: www.tvw.org. The contract that is part of the record has an unsigned signature line for the chief deputy prosecuting attorney.

4 Twenty-eight states provide full funding for indigent defense; most states provide all or most of the cost of indigent defense. Washington is among 16 states that require local governments to bear a majority of the cost of indigent defense. THE CONSTITUTION PROJECT, *supra,* at 53–54.

5 The contract also provided: “3. *Services Other Than Counsel.* Reasonable compensation for expert witnesses, investigators and other services necessary to an adequate preparation and presentation of the defense case shall be paid by CONTRACTOR, except for extraordinary cases which call for extraordinary expert testimony and/or investigation.” Ex. 8, at 5.

6 Anderson originally testified that “a few days” before the plea hearing, he “went over the Statement on Plea of Guilty.” CP at 176–77 (Tr. of Sept. 2, 2005 hearing). Six months later, Anderson testified that “I didn't have the plea agreement with me on the 17th. I went over the plea agreement with him on the 21st.” CP at 77 (Tr. of Mar. 16, 2006 hearing). He acknowledged he spent about five minutes going over the plea agreement with A.N.J. with the plea agreement in hand.

7 Anderson's estimate of time spent with A.N.J. ranged between 55 and 90 minutes. See Pet. for Review, App. at 18 (calculating total time).

8 Anderson's declaration included the following:

> 4. I do remember that [A.N.J.]'s parents gave me names of witnesses to contact. I made an attempt, but never was able to speak with them.
>
> 5. I never independently investigated the claims regarding the alleged victim nor do a background check on the family. I simply reviewed the police reports.
>
> 6. I did not read "word for word" the statement on plea of guilty to [A.N.J.] or have [A.N.J.] do so. I just explained a couple of brief things regarding registering as a sex offender and the fact that [A.N.J.] could not own a firearm nor have contact with the victim.
>
> 9. I do remember some confusion when [A.N.J.]'s parents asked when the charge could be removed from [A.N.J.]'s record. I did not know exactly what the law stated and told them that the laws were changing all the time. I told them that I believed it was 18–21 years of age.
>
> 10. I never did research or advise [A.N.J.'s parents] any further regarding their question. I never specifically answered their question or fully explained it to them.
>
> 11. [A.N.J.] did not read the Statement on Plea or Guilty. I read some portions of it to him. I told [A.N.J.] that the judge would ask him if he had read it or if I had explained it to him and to say yes.
>
> 13. I spent approximately (5) minutes with [A.N.J.] going over his statement just before we were called into court.

CP at 34–35.

9 The trial judge ruled from the bench, "[i]n my view, when a defendant comes before this court and says: 'I want to withdraw my plea and the reason why I want to withdraw my plea is because of conversations and contact with my attorney.' In my view, he has waived his attorney/client privilege completely." CP at 147. The scope of that ruling is questionable under *State v. Cloud,* 95 Wash.App. 606, 613, 976 P.2d 649 (1999), where the court held an ineffective assistance claim only waives attorney/client privilege to the limited extent necessary to evaluate the claim. But A.N.J. does not challenge it on appeal, perhaps because he also implicitly contends that Anderson's conduct waived any attorney/client privilege. Anderson permitted [A.N.J.]'s parents to come to all of the attorney/client meetings.

10 Anderson testified:

> I advised [A.N.J.'s parents] that sex offenses are not able to be sealed up but that there is, with juveniles, the possibility that they could get the registration requirement removed, and that's where I said I was not completely familiar with the law. That that law was somewhat in flux. There was also, it was kind of up to the discretion of the court, but that he could have the requirements to register as a sex offender removed.

CP at 164. On cross examination, he elaborated:

> Anderson: I just briefly discussed with him the fact that he would be required to register as a sex offender and it was somewhere in that range that the question came up about having this matter removed from his record. And I don't remember whether it was through that point or elsewhere and that's where our discussion about whether or not he could have it removed came into play.

Judge: What was your advice about having it removed?

Anderson: My advice was that at this time that sex offenses and Class A felonies were not allowed to be sealed up and, but that the requirement to register as a sex offender could be removed, and that's one of the reasons why I felt his plea of guilty was a good idea, because if he was ... ultimately found guilty of a Child Molestation to the 2nd degree, it would [be] more than likely the court could rule that it was no longer necessary for him to register as a sex offender.

CP at 178–79.

11 In *Taylor,* the defendant claimed that new information had come to defense counsel but did not disclose the nature of that information, whether the defendant knew of the information before the plea, or how a manifest injustice would result if the defendant was not permitted to withdraw his plea. *Taylor,* 83 Wash.2d at 598, 521 P.2d 699.

12 The standards are available at http://www.defensenet.org/re sources/publications–1/wdastandards–for–indigent–defense (last visited Dec. 17, 2009).

13 That standard reads:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Std. 4–4.1(a), available at www.abanet.org/crimjust/standards.

14 It has been suggested that under *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), defense attorneys have no duty to investigate, and might in fact violate client autonomy by investigating the State's case once the client has decided to plead guilty. Our attention has not been drawn to any particular part of *Faretta* that supports this proposition. *Faretta* established that a defendant may knowingly and intelligently waive counsel. *Id.* at 835–36, 95 S.Ct. 2525. It says nothing about the attorney's duty to provide effective representation.

15 Under the law:

An offender having a duty to register [for an] offense committed when the offender was a juvenile may petition the superior court to be relieved of that duty. The court shall consider the nature of the registrable offense committed, and the criminal and relevant noncriminal behavior of the petitioner both before and after the adjudication, and may consider other factors.

....

(b) The court may relieve the petitioner of the duty to register for a sex offense ... that was committed while the petitioner was under the age of fifteen if the petitioner (i) has not been adjudicated of any additional sex offenses or kidnapping offenses during the twenty-four months following the adjudication for the offense giving rise to the duty to register, and (ii) proves by a preponderance of the evidence that

future registration of the petitioner will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, and 72.09.330.

RCW 9A.44.140(4).

16 Anderson's second declaration tended to contradict his early one, and he testified that he told A.N.J. the conviction would stay on his record. Ex. 3, at 2–3 (second decl.); CP at 164 (Anderson's testimony).

17 In S.M., a 12–year–old boy was charged with raping his 9–year–old brother. S.M. admitted he had sexual contact with his brother and pleaded guilty. *S.M.,* 100 Wash.App. at 403, 996 P.2d 1111. S.M.'s counsel met with him only once, just before the plea hearing, and did not review the plea form with S.M. *Id.* at 404, 996 P.2d 1111. S.M. told the trial judge that he knew what sexual intercourse was, but the trial judge "did not ask what he thought it meant or inquire into his understanding of the nature of the charges." *Id.* at 415, 996 P.2d 1111. The Court of Appeals reversed the trial court and allowed S.M. to withdraw his plea. *Id.*

18 While our description of Anderson's performance is unflattering, our concern is focused on the system he and other public defenders have been asked to work under and we do not mean to suggest any particular ethical violation on his part. The record suggests Anderson believed he acted in the best interest of his client which is evidenced by his willingness to sign a declaration detailing his inadequate performance in support of A.N.J.'s motion to withdraw his plea.

19 In evaluating an appeal from juvenile court proceedings, we must keep in mind the fact that, although juvenile offenders enjoy many of the same constitutional protections as adult offenders, juvenile rights do differ in a number of noteworthy respects from those of accused adults. *See* *State v. Kuhlman,* 135 Wash.App. 527, 533, 144 P.3d 1214 (2006). For example, juveniles do not have the right to a jury trial. *See* *State v. Schaaf,* 109 Wash.2d 1, 16–17, 743 P.2d 240 (1987).

20 Although the majority seems to suggest otherwise in its unsympathetic account of Anderson's work on the case, I cannot conclude that Anderson's representation of A.N.J. was ineffective because of the way he chose to manage the case or because he did not spend a particular number of hours investigating the facts. Majority at 96-99. Decisions regarding the proper amount of time to spend investigating and developing cases and the manner in which to manage them are best left to public defenders and those more familiar with the circumstances of each case than to appellate judges such as ourselves working with a cold record.