



August 9, 2022

Honorable Members of the Snohomish County Council:

The Office of the County Performance Auditor has completed a performance audit of the operations and staffing of the Snohomish County Office of Public Defense (OPD). The enclosed report, entitled “Performance Audit of the Office of Public Defense,” presents our observations, conclusions, and recommendations, as well as the written response of the Director of OPD.

This audit was conducted pursuant to Chapter 2.700 of the Snohomish County Code, which charges the Office of the County Performance Auditor with the responsibility to review, evaluate, and report on—in part—the efficiency and effectiveness of County operations and programs, and to do so in accordance with Generally Accepted Government Auditing Standards. This audit was also conducted pursuant to Snohomish County Council Motion No. 21-412 directing Council staff to issue a notice to proceed to the Office of the Performance Auditor to complete this audit (Audit Topic A.1 in the *2022 Audit Plan*, Motion No. 22-046).

I look forward to the opportunity to present this report at an upcoming Council committee meeting.

Respectfully Submitted,

A handwritten signature in blue ink that reads "George J. Skiles".

George J. Skiles
County Performance Auditor
Partner, Sjoberg Evashenk Consulting

cc: James Martin, Senior Legislative Analyst, Snohomish County Council
Heidi Beazizo, Legislative Analyst, Snohomish County Council

Performance Audit of the Office of Public Defense

August 2022



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RESULTS

Despite incremental budgetary increases since 2017, workload indicators reveal declining caseloads managed by the Snohomish County Office of Public Defense (OPD) and its contractors—a potential sign of declining operational efficiency. This audit ultimately found, however, that past budget increases represent significant efforts to right-size the County's public defense program and that current caseload reductions, which stem primarily from the pandemic, have resulted in case-to-attorney ratios that were mostly in line with County-adopted Indigent Defense Standards in 2000 and 2021. However, future caseload and workload demands remain uncertain and require monitoring, OPD requires improved cost controls to better ensure efficient and effective management of its third-party attorney contracts.

BACKGROUND

OPD administers Snohomish County's assigned counsel program, providing legal defense services for indigent persons in both criminal and civil cases.

This requires OPD to screen defendants for eligibility, assign eligible defendants to contracted attorneys for representation, and monitor compliance with the standards for indigent defense issued by the Washington State Bar Association.

The County utilizes an outsourced service delivery model in which all assigned counsel are third-party attorneys employed either by the Snohomish County Public Defenders Association (SCPDA) or as part of OPD's conflict panel, a pool of private attorneys or law firms that provide additional capacity for OPD, enabling it to assign cases to a variety of attorneys in the event SCPDA has a conflict or is at capacity.

KEY FINDINGS

- While OPD's budget increased 42 percent between 2017 and 2021, from \$10.5 million to \$14.9 million, data reveal fewer cases were worked. OPD screened 68 percent fewer defendants in 2021 (1,643) than it did in 2019 (5,143); it referred 44 percent fewer cases to the conflict panel in 2018 (502) than it did in 2021 (279); and it referred 44 percent fewer felony and misdemeanor cases to SCPDA in 2021 (3,750) than it did in 2017 (6,713).
- Prior to the pandemic, felony, misdemeanor, and civil commitment cases assigned to and accepted by SCPDA exceeded key thresholds. Standards establish a cap of 150 felonies per attorney, but data show a ratio as high as 240 felonies per attorney in 2017; standards establish a cap of 300 misdemeanors per attorney, but data show a ratio as high as 312 cases per attorney in 2017; standards establish a cap of 250 civil commitments per attorney, but data show a ratio as high as 488 cases per attorney in 2018. Likewise, the standards require agencies to provide one full-time supervisor for every 10 staff lawyers; as late as 2019, OPD's contract with SCPDA provided one supervisor for as many as 41.5 attorney positions. Progress has been made and, as of 2021, SCPDA complied with most but not all standards.
- OPD's contracts with third-party attorneys did not exhibit necessary cost controls. Its contract with SCPDA did not contemplate significant reductions in case assignments resulting from the pandemic, or the potential impact this could have on compensation. OPD also did not require, gather, or analyze performance data regarding cases assigned, or the resources required to manage and resolve those cases, and thus lacked data essential to informed decision-making. Finally, OPD routinely engaged the services of conflict panel attorneys without formal contracts and, because of constraints in the labor market, sometimes negotiated hourly rates without adequate cost controls.

SUMMARY OF KEY RECOMMENDATIONS

- Seek authorization from the County Council to modify contract provisions relating to the allocation of FTE resources to ensure consistency with County-adopted indigent defense standards.
- Modify the SCPDA contract to recognize an acceptable caseload that can be assigned, including a range above which resources cannot be expected to effectively provide representation and below which resources can no longer be justified.
- Implement a case-reporting and management information system that enables periodic reviews of caseload, workload, and other trends related to the performance of the County's public defense program.
- Ensure formal contracts, with appropriate cost controls, are executed between OPD and conflict panel attorneys immediately upon assignment of cases.

A. Introduction and Background

The Snohomish County Office of Public Defense (OPD) administers the assigned counsel program, providing legal defense services for indigent persons in both criminal and civil cases in which a jail sentence or involuntary confinement is a possibility. OPD is responsible for the administration of indigent defense services for Snohomish County, which includes screening defendants for eligibility, advising the court on bail and release for individuals whose cases are pending trial, managing contracts with attorneys and law firms providing indigent defense services, assigning counsel to contracted attorneys, managing expert and investigator services and fees, and ensuring compliance with the standards for indigent defense issued by the Washington State Bar Association.¹

Washington State law requires local legislative authorities to establish caseload standards that limit the number of cases counties assign to public defense attorneys at any given time. The purpose of this requirement is to ensure that public defense attorneys maintain a manageable workload that is not so large that it impairs the attorneys' ability to adequately represent their clients. State law encourages, but does not require, local jurisdictions to adopt and utilize the Indigent Defense Standards established and promulgated by the Washington State Bar Association.² As described further in Finding C.2 of this report, these standards establish varying caseload limits for different types of cases, such as a maximum of 150 felony cases or 300 misdemeanor cases per attorney per year.

The Snohomish County Council adopted these standards, stating that "Snohomish County adopts by reference the standards applied to private attorneys defending paying clients and the Standards for Public Defense services adopted in 1989 by the Washington Defender Association and approved by the Washington State Bar Association as the standards for public defense services in Snohomish County as required by RCW 10.101.030."³ This includes standards requiring (a) assigned counsel to provide services in a professional, skilled manner consistent with the minimum standards set forth by the American Bar Association; and (b) compensation of assigned counsel to be commensurate with their training and experience, sufficient to attract and retain qualified personnel, and comparable to those of attorneys and staff in prosecutorial offices in the area.

Program Overview

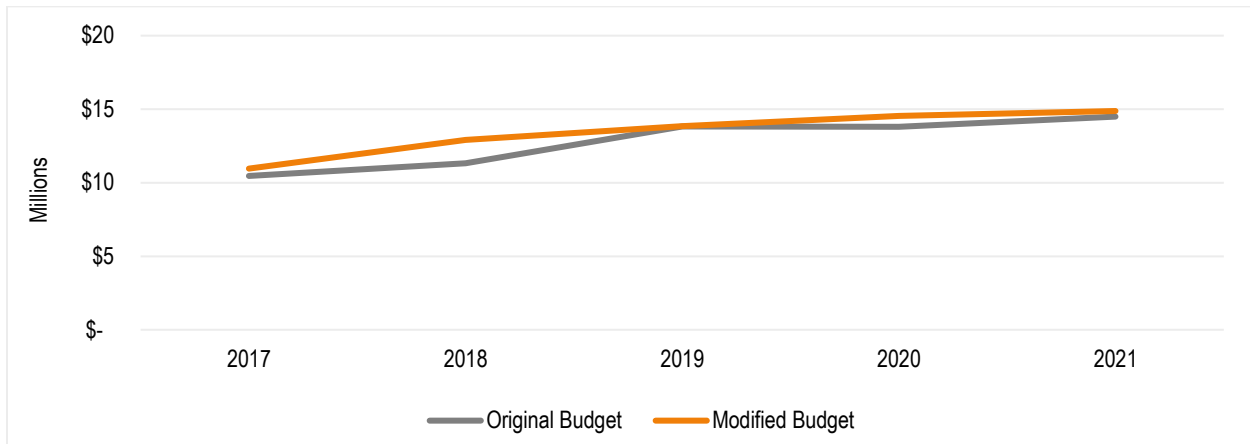
The County utilizes an outsourced service delivery model in which all assigned counsel are third-party attorneys providing legal services through a contractual or other arrangement with OPD. As of December 2021, OPD employed eight Full-Time Equivalent (FTE) personnel, including a director, an office manager, and six support staff. Between 2017 and 2021, the County Council increased OPD's budget from \$10.5 million to \$14.9 million, as illustrated in Exhibit 1—a 42 percent increase over the five-year period.

¹ Snohomish County Code Section 2.09.010

² Revised Code of Washington Section 10.101.030

³ Snohomish County Code Section 2.09.080

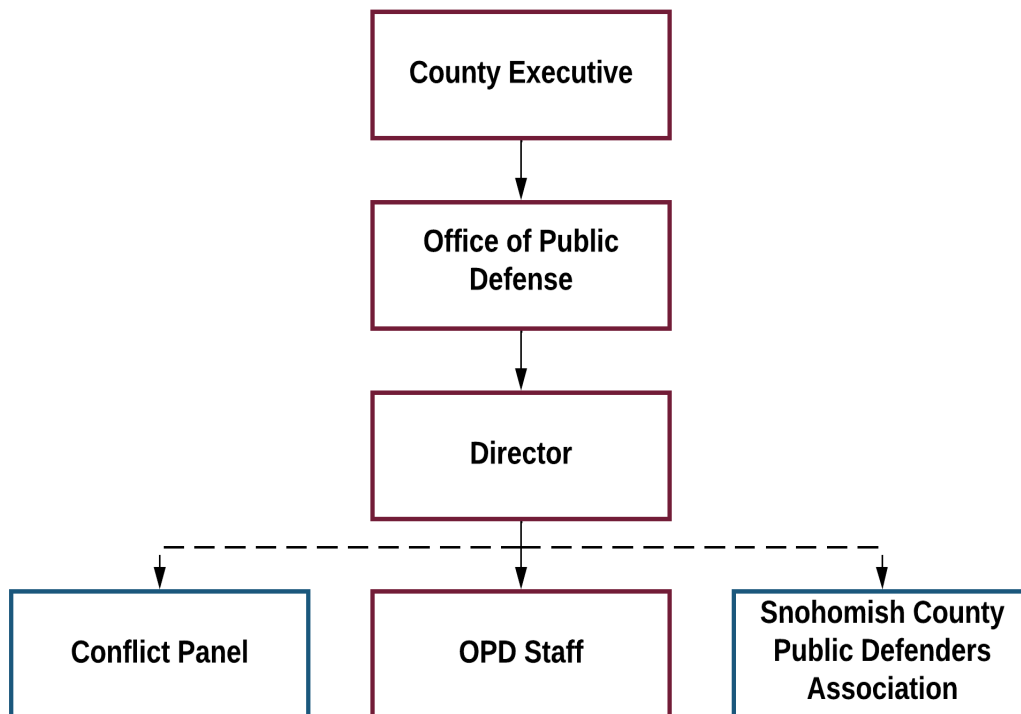
EXHIBIT 1. SNOHOMISH COUNTY OFFICE OF PUBLIC DEFENSE ANNUAL BUDGETS, 2017-2021



Source: County-generated Budget-to-Actual reports, 2017-2021.

OPD management is primarily responsible for managing attorney contracts, assigning cases to contracted attorneys, reviewing and paying attorney invoices, and managing the indigent screening process. This includes indigency screenings of defendants who are in need of appointed counsel—such as defendants involved in family law, child dependency, and criminal cases—as well as interviewing all in-custody clients as part of OPD’s pretrial services program. For defendants eligible for assigned counsel, OPD staff assign the cases to one of several third-party attorneys or law firms contracted with the County or the Washington State Office of Public Defense, as illustrated in the organizational structure presented in Exhibit 2 below.

EXHIBIT 2. SNOHOMISH COUNTY OFFICE OF PUBLIC DEFENSE ORGANIZATIONAL CHART



Source: Auditor-generated.

OPD maintains two types of contracts with private attorneys and law firms. First, OPD has long maintained a contract with the Snohomish County Public Defenders Association (SCPDA). The SCPDA is a private, non-profit law office that provides defense services to persons facing a loss of liberty under criminal and civil laws, and is primarily funded from indigent defense contracts with Snohomish County, Skagit County, Tulalip Tribal Court, and other counties and municipalities and the State of Washington.

Second, OPD maintains contracts and other arrangements with a pool of independent private attorneys or law offices that provide additional capacity for OPD, enabling it to assign cases to a variety of attorneys in the event SCPDA has a conflict or is at capacity. This pool of attorneys is referred to the “conflict panel.”

Exhibit 3 shows OPD’s annual expenditures associated with SCPDA and the conflict panel. Over the five-year period between 2017 and 2021, OPD’s payments to SCPDA and the conflict panel increased by 45 percent and 14 percent, respectively.

EXHIBIT 3. OPD EXPENDITURE TRENDS FOR THIRD-PARTY ATTORNEYS, 2017-2021

	2017	2018	2019	2020	2021	% Change
SCPDA	\$8,187,707	\$9,894,571	\$10,332,668	\$11,112,584	\$11,866,325	45%
Conflict Panel	\$894,434	\$1,076,277	\$1,163,322	\$1,172,136	\$1,022,397	14%

Source: Snohomish County expenditure reports by vendor, 2017-2021.

Snohomish County Public Defender Association

OPD’s contract with the SCPDA is structured in a manner that is designed to secure capacity in the form of full-time equivalent (FTE) attorneys. That is, between 2017 and 2021, SCPDA was contractually required to provide between 37.3 and 48.5 FTE attorney positions that could be assigned to varying case types—felony, misdemeanor, juvenile, civil commitment, and other case types—along with other support positions, such as supervisors, investigators, and legal assistants. Annually, OPD and SCPDA negotiate a budget required to fund these positions, and OPD pays SCPDA monthly installments equal to one-twelfth of the contractual budget. In return for this compensation, SCPDA agrees to accept a full caseload for each FTE attorney. That is, SCPDA is required to accept all cases and clients referred by OPD unless withdrawal from representation is permitted or otherwise allowed due to circumstances provided for in the contract. For instance, if SCPDA determines that their representation of a defendant would result in any actual or potential legal, ethical, or professional conflicts of interest, SCPDA management must immediately inform OPD and request appointment of other counsel. This would also include instances where SCPDA is unable to certify compliance with the Indigent Defense Standards issued by the Washington State Bar Association.

Per the contract, OPD agrees to refer enough felony and misdemeanor cases to SCPDA to maintain full caseloads for all attorney FTE positions required in the contract. To determine a full caseload for each FTE, the contract stipulates that SCPDA will strive to meet the caseload standards promulgated by the Washington State Bar Association. Specifically, the contract states “[t]he County recognizes the desirable case load standards adopted in 2011 by the Washington State Bar. These standards constitute a goal for the County in its budgeting for the Public Defender Program and for the [SCPDA] in its allocation of resources.” As mentioned above, these standards place limits on how many cases a single FTE attorney can reasonably take on each year. For example, among a variety of other case types, the caseload limit of a full-time public defense attorney or assigned counsel should not exceed the following:

- 150 Felonies per attorney per year; or
- 300 Misdemeanor cases per attorney per year or, in jurisdictions that have not adopted a numerical case weighting system as described in this Standard, 400 cases per year; or
- 250 Juvenile Offender cases per attorney per year; or
- 250 Civil Commitment cases per attorney per year.

Recognizing that there is wide variation in the types of cases that could be filed under each of these categories, the standards recommend local governments establish a case weighting system that allows for the differentiation of cases within each category, and the recognition that some cases require a greater or lesser workload to manage as compared to an average case. In lieu of this requirement, OPD established a case credit system in its contract with SCPDA that allows SCPDA to petition OPD for additional case credits when the work required by a particular case exceeds or is expected to exceed the level of effort considered to be normal for a case of a particular type.

These standards were altered by the Washington State Bar Association during the COVID-19 pandemic. The Association found that, because of the duration of the pandemic, public defense counsel across the state increasingly have workloads that threaten their ability to provide effective representation, even if the number of cases assigned to them were at or below the maximums set forth by the caseload standards. This is because, according to the Association, “the pandemic has forced many courts to stop or severely limit trials. Public defense attorneys, now required to work remotely, have struggled to communicate with clients, many of whom do not have technology for secure online communication. Obtaining discovery has become time consuming. Pretrial offers from prosecutors to resolve cases without a trial have been far fewer as a result. During the pandemic period, prosecutors have tended to prioritize the most serious charges when filing new cases, thereby increasing the complexity of public defense attorney workloads. ... During that same period the rate at which cases get resolved has significantly decreased.”

Conflict Panel

If SCPDA is unable to take a contractually referred case due to either a conflict of interest or an inability to certify caseload compliance, OPD will refer the cases to its conflict panel. Conflict panel attorneys have historically been compensated through a flat fee assessed on the basis of case type, with an hourly compensation rate available if the case goes to trial. In instances of “exceptional” or more complex cases, OPD has the option to compensate panel attorneys on an hourly rather than flat fee basis, even without going to trial.

Conflict panel attorneys are paid different rates depending on the type of case they are assigned. For instance, according to 2022 conflict panel contracts, OPD pays a flat fee of \$1,875 for Class A Felony Cases, \$1,300 for Class B Felony Cases, and \$825 for Class C Felony Cases, plus an hourly rate if the case goes to trial. Per their recent 2022 contract, OPD also pays a standard hourly rate for less complex cases, including \$50 per hour for misdemeanors or felonies filed with the Everett District Court. Juvenile cases are compensated at a rate of \$65 per hour, while felonies may be compensated between \$55 and \$85 per hour depending on the category (e.g., Class A-C, murder, etc.).

Because conflict panel attorneys manage their own private caseload as well as assigned indigent defense cases, OPD does not monitor the full caseload of its conflict panel attorneys. Rather, contracted conflict panel attorneys are required to provide a quarterly report detailing the extent of their caseload, including the number and type of cases in their private practice as well as public defense contracts. Additionally, they must provide total hours billed for non-public defense cases as well. This provides OPD insight into the overall capacity of the conflict panel to take on cases. Like the SCPDA, conflict panel attorneys are bound by the Indigent Defense Standards to not accept new cases when doing so would exceed maximum thresholds defined in the Indigent Defense Standards.

A.2 Report Overview

The remainder of this report is organized into two (2) sections. Section B focuses on the objectives and scope of this audit and provides an overview of the methodological approach employed by the audit team to evaluate the Office of Public Defense. Section C presents our findings, conclusions, and recommendations. We also provide, in Appendix A, a summary of recommendations and corrective action plan and, in Appendix B, the written response of the Office of Public Defense to this audit report.

B. Scope and Methodology

On November 15, 2021, the Snohomish County Council passed Motion No. 21-412 directing Council staff to issue a notice to proceed to the Office of the Performance Auditor to complete a performance audit of the Office of Public Defense (Audit Topic A.1 in the *2022 Audit Plan*, Motion No. 22-046). The scope of this audit included an evaluation of existing practices, including a review of activities between Calendar Years 2018-2021. The objective of this audit was to determine the efficiency and effectiveness of the Office of Public Defense (OPD), including the sufficiency of staffing to support key functions and responsibilities and the adequacy of OPD's oversight of contracted services. To meet this objective, the audit team performed the following procedures:

- B.1 Interviewed management and key representatives of OPD and the Snohomish County Public Defenders Association (SCPDA) to obtain a general understanding of key services and business operations, the structure of the contractual arrangement between the two, information systems and methods for tracking performance data, and the protocols employed to carry out key functions and responsibilities of the OPD.
- B.2 Reviewed SCPDA and conflict panel contracts, detailed expenditure reports, workload indicators, fee structures, and data showing cases assigned to the conflict panel and SCPDA.
- B.3 Evaluated caseload standards adopted by Snohomish County and the methods employed by OPD to ensure County compliance with the standards, including the Washington State Bar Association Standards for Indigent Defense, Chapter 2.09 of Snohomish County Code, and Revised Code of Washington (RCW) 10.101.030
- B.4 Conducted trend analyses to evaluate indigent screenings, case filings and assignments, case types, workload trends, and compliance with caseload standards.
- B.5 Interviewed and obtained insights from industry experts to gain a general understanding of attorney workload trends and ongoing research, nationwide trends and challenges, and alternative public defense models.

Audit fieldwork was performed between December 2021 and June 2022. On August 4, 2022, the Office of the County Performance Auditor provided the Office of Public Defense with a draft of this report and, on August 8, 2022, discussed the report findings and recommendations in an exit conference with management. Responses and input provided by the Office of Public Defense were considered and incorporated where applicable in the final report. The Director of the Office of Public Defense generally agreed with the conclusions and recommendations of this report. The Department's formal response to the findings and recommendations contained in this report is included in Appendix B.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

C. Findings and Conclusions

This audit revealed three primary conclusions. First, OPD data show that while its budgetary resources have increased over the past several years, workload indicators reveal fewer cases were worked. This is often a potential indicator of declining operational efficiency in an organization or program. We evaluated these trends and ultimately found that the data reflect the County's incremental efforts to right-size its public defense program. In fact, case-to-attorney ratios historically exceeded maximum thresholds established by the Indigent Defense Standards, but as of 2021 the case-to-attorney ratios were mostly in line with County-adopted standards—a milestone OPD management stated had not been achieved in recent memory. Further, while OPD appeared closer in 2021 to being right-sized for managing its ongoing workload than it had been at any time since 2017, future caseload and workload demands remain uncertain and require monitoring.

Second, related to our conclusion that OPD caseloads are more in line with Indigent Defense Standards than it has been in recent years, this audit found that case-to-attorney ratios were historically not compliant with Indigent Defense Standards. While case-to-attorney ratios were mostly compliant in 2021, some caseloads remained out of compliance with the standards. And, where compliance had been achieved, it was primarily because of a combination of incremental increases in funding over the past few years and significant reductions in case filings resulting from the Covid-19 pandemic. It is unknown whether compliance will be sustained after case filings normalize over the next several years.

Third, while OPD relies heavily on third-party contractors to provide assigned counsel services, the structure of OPD's contracts, including its contracts with SCPDA and the conflict panel, lacked adequate cost-control measures designed to provide assurances to the County and its contractors that workloads and program outputs remain within acceptable ranges. Pressures induced by the pandemic and its effects on the labor market revealed shortcomings with OPD's contracts and the lack of readily available data regarding OPD's and its contractors' performance, including indigent screenings, case referrals, case types, hours charged by attorneys, and other indicators. This resulted in a lack of transparency necessary to support informed decision making. Ultimately, we found that OPD did not have sufficient controls in place to record, monitor, and control workloads and costs associated with third-party representation.

Each finding is discussed in detail through the remainder of this report.

C.1 Since 2017, OPD Experienced Sustained Budgetary Increases and an Overall Decline in Cases Worked

Between 2017 and 2021, the County Council increased OPD's budget from \$10.5 million to 14.9 million, a 42 percent increase over the five-year period. At the same time, all reliable and available workload indicators suggest a declining caseload. OPD conducted fewer indigent screenings overall and referred 44 percent fewer new cases to SCPDA and to the conflict panel in 2021 than it had in 2017. SCPDA managed 22 percent fewer active cases (newly assigned cases and unresolved cases from prior years) in 2021 than it did in 2017. These trends are described below.

- ✓ While OPD did not retain data regarding indigency screenings performed in 2017 and 2018, data show a marked decline in the number of indigency screenings performed from 2019 through 2021. Specifically, OPD performed 5,143 screenings in 2019 and 1,643 screenings in 2021, a decline of 68 percent. Most likely, a significant portion of this decline was caused by the pandemic and the ensuing reduction in criminal filings by the Prosecuting Attorney’s Office; these reductions are likely to be reversed in coming years. At the same time, a portion of this decline could also have been caused by changes in state law affecting the criminal status of drug offenders; these reductions are likely to be sustained in coming years.
- ✓ While OPD did not retain data regarding case referrals to its conflict panel for the 2017 calendar year, referral data for other years showed OPD referred 502 cases to the conflict panel in 2018, with a pre-pandemic decline to 348 cases in 2019, and a mid-pandemic decline to 279 in 2021, as shown in Exhibit 4. This represents an overall decline of 44 percent in cases referred by OPD to the conflict panel between 2018 and 2021. At the same time, conflict panel expenditures remained relatively steady ranging between \$1 and 1.2 million per year.

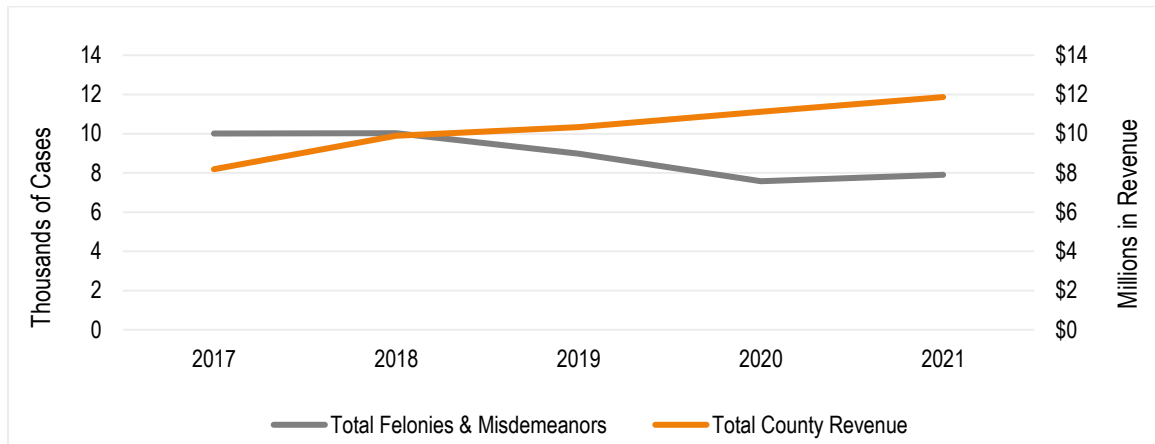
EXHIBIT 4. OPD CONFLICT PANEL REFERRALS, 2018-2021

	2018	2019	2020	2021
Felony Cases Referred	502	348	352	279
Conflict Panel Contract Expenditures	\$1,076,277	\$1,163,322	\$1,172,136	\$1,022,397

Source: OPD Excel files documenting case referrals to conflict panel attorneys and Snohomish County expenditure reports by vendor, 2017-2021.

- ✓ SCPDA managed 22 percent fewer felony and misdemeanor cases per year in 2021 than it did in 2017—as illustrated in Exhibit 5. This decline was largely due to the precipitous decline in OPD’s referral of cases to SCPDA. In 2017, OPD referred 6,713 felonies and misdemeanors to SCPDA; a variety of factors contributed to nearly 2,000 fewer case filings by 2019, before the impacts of the pandemic were felt. By 2021, case referrals to SCPDA were down to 3,750, a 44 percent decline from 2017. It is important to note that, while new case assignments decreased, so did case resolutions, which prolonged case resolution and required continued attention by OPD contractors while accepting new referrals.

EXHIBIT 5. SCPDA’S ACTIVE OPD-ASSIGNED CASES BY YEAR, 2017-2021



Source: SCPDA data extracts from its case management systems showing total annual cases referred by OPD and total cases open at the end of each year, and Snohomish County expenditure reports by vendor, 2017-2021.

All of this suggests a changing landscape for public defense services within Snohomish County. While measurable trends suggest declining caseloads—a potential indicator of operational inefficiency—other indicators suggest OPD operations are, for the first time in years, becoming appropriately right-sized to manage its caseload. For the first time in as far back as OPD management can recall, the OPD assignment of cases to SCPDA are mostly within the caseload standards, as is illustrated in the next finding. Yet, there is substantial uncertainty regarding what future caseloads—or associated workloads—will look like in the coming years.

Some factors that contributed to this shift in attorney caseloads are temporary, such as the impact of the pandemic on courtroom scheduling and case filing decisions by the Prosecuting Attorney’s Office. We found limited data available that would enable the audit to estimate with any precision the proportion of decreased filings resulting specifically from the pandemic or the potential future growth filings OPD can expect as the pandemic subsides. Nonetheless, case filings and referrals to SCPDA and the conflict panel are likely to increase. To illustrate, the Prosecuting Attorney’s Office reports an 80 percent increase in referrals awaiting review for filing decisions since the beginning of the pandemic (from 3, 965 felony referrals in February 2020 to 7,128 felony referrals in February 2022)—cases that represent a backlog that could impact OPD’s caseload. What is also evident, however, is that certain case filings are unlikely to return to pre-2019 levels—barring unforeseeable socio-economic dynamics or population growth—because recent Supreme Court rulings and changes in statute have impacted case filings and criminal sentencing. Having the most significant impact on case filings is likely to be *State v. Blake (2021)*, which held certain statutes criminalizing position of controlled substances to be unconstitutional, and which will reduce controlled substance-related filings in the future. In 2017 and 2018, there were approximately 750 controlled substance-related felonies referred to SCPDA each year, amounting to about 23 percent of all felonies referred.

As the pandemic subsides and the full impact of recent court rulings and legislative changes begin to stabilize case filings, it will be crucial that OPD ensure it has the mechanisms in place to identify, track, and evaluate trends in case filings; to measure the impact of these trends on actual attorney workloads; and to request that Council respond to workload and resource shifts in an informed and transparent manner.

C.2 SCPDA Caseloads Have Not Historically Complied with County-Adopted Caseload Standards

The Revised Code of Washington (RCW) requires counties to adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office.⁴ Counties throughout the state have some discretion in how they establish standards, including latitude in establishing specific caseload thresholds and the methods employed to count cases and measuring compliance with the adopted standards.

The Snohomish County Council adopted the standards set forth by the Washington State Bar Association, which includes specific caseload thresholds for different categories of cases (e.g., felony, misdemeanor, juvenile offender, civil commitment, etc.) as well as specific ratios for support staff required by attorneys to effectively carry out their work (e.g., supervisors, legal assistants, investigators, etc.). Yet, this audit revealed that, between 2017 and 2021, OPD's assignment of cases to the SCPDA regularly did not comply with the County-adopted standards. In the discussions that follow, we demonstrate how (a) prior to the pandemic, caseloads routinely exceeded adopted standard thresholds and (b) even though caseloads were within the thresholds established by the standards for most case types in 2021, SCPDA continues to fall short of requirements for specific support staff.

OPD's Assignment of Cases to SCPDA Did Not Always Comply with County-Adopted Standards

Below, we present four major categories of cases assigned to SCPDA—felony, misdemeanor, civil commitment, and juvenile offender—and compare the assigned caseload to applicable County-adopted standards. With the exception of juvenile offender cases, the number of cases OPD assigned to and were accepted by SCPDA generally exceeded the thresholds established in the standards between 2017 and 2019. In 2021 and 2022, caseloads generally aligned with the standards.

In the following discussions of caseload trends, it is important to note that the data upon which our analysis relied captured SCPDA's categorization of case assignments to its attorneys, not the number of cases filed by the Prosecuting Attorney's Office, and for felony and misdemeanor cases the aggregate "case credits" those assignments amounted to. For both felony and misdemeanor cases, we provide both case counts and aggregate case credit data.

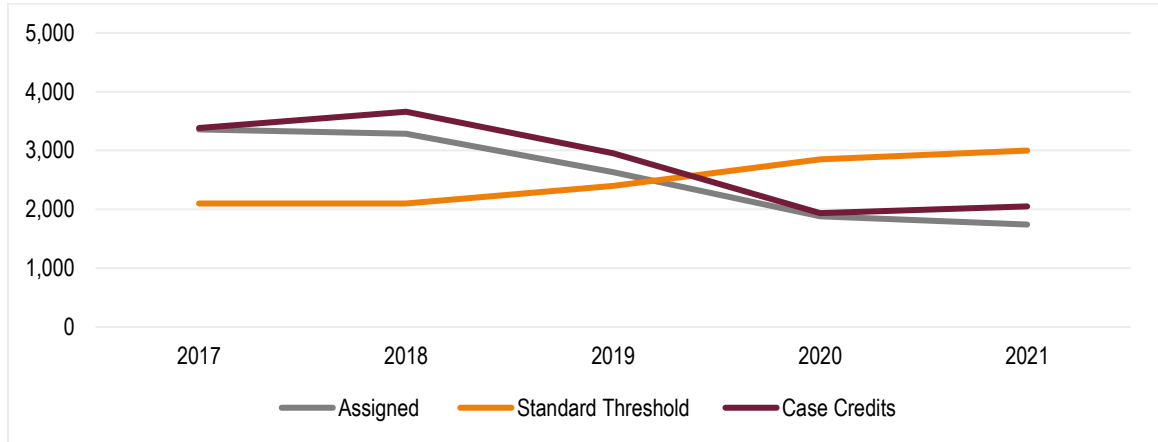
✓ Felony Cases

The Indigent Defense Standards and OPD's contract with SCPDA stipulate that the caseload limit for full time public defense felony attorneys not exceed 150 cases per year. Between 2017 and 2021, OPD's contract with SCPDA incrementally increased the number of felony attorneys from 14 to 20. Prior to the pandemic, SCPDA's acceptance of felony cases exceeded the threshold established by the Indigent Defense Standards. However, when combined with a significant decline in felony cases filed and an increase in felony attorneys in 2020 and 2021, OPD achieved an

⁴ RCW 10.101.030

attorney-to-caseload ratio that complied with adopted standards. This is illustrated in Exhibits 6 and 7 below.

EXHIBIT 6. TRENDS IN FELONY CASES ASSIGNED TO SCPDA, 2017-2021



Source: SCPDA data extracts from its case management systems showing cases referred by OPD to SCPDA, SCPDA case credit tracking spreadsheets, and annual contracts between OPD and SCPDA detailing the allocation of attorney FTE positions for felony cases, 2017-2021.

EXHIBIT 7: FELONY CASES ASSIGNED TO SCPDA BY TYPE, 2017-2021

	2017	2018	2019	2020	2021	Change
FTE Attorneys	14	14	16	19	20	43%
Case Assignments by Category						
Assault	331	371	324	272	292	-12%
Controlled Substance	765	740	519	315	136	-82%
Homicide	22	19	21	19	15	-32%
Motor Vehicle Theft	210	224	189	143	259	23%
Robbery	86	62	64	84	67	-22%
Sex Crime	75	88	76	90	78	4%
Theft/Burglary	813	980	719	389	369	-55%
Other	1,057	803	723	568	526	-50%
Total	3,359	3,287	2,635	1,880	1,742	-48%
Cases per FTE Attorney	240	235	165	99	87	-64%

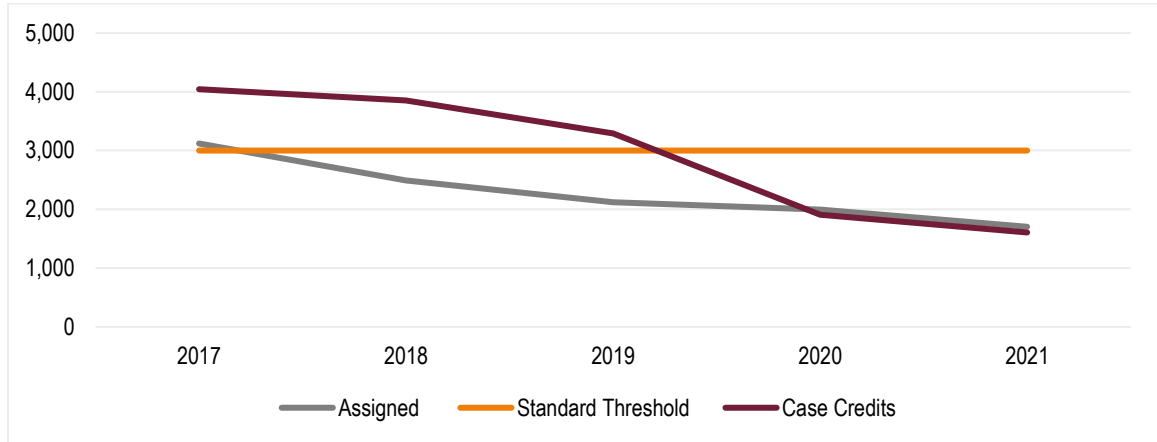
Source: SCPDA data extracts from its case management systems showing cases referred by OPD to SCPDA by type and annual contracts between OPD and SCPDA detailing the allocation of attorney FTE positions for felony cases, 2017-2021.

✓ Misdemeanor Cases

The Indigent Defense Standards and OPD’s contract with the SCPDA stipulate that the caseload limit for full time public defense misdemeanor attorneys not exceed 300 cases per year. Since 2017, OPD’s contract with SCPDA consistently allocated 10 full time misdemeanor attorneys to handle cases appearing before each of the County’s nine district courtrooms and its misdemeanor jail calendar. This provides a caseload threshold of 3000 cases per year pursuant to the Indigent Defense Standards. While a review of case credits suggest a higher workload, an analysis of

actual misdemeanor case assignments reveal SCPDA's compliance with the standard in every year except for 2017, as indicated below in Exhibits 8 and 9.

EXHIBIT 8: TRENDS IN MISDEMEANOR CASES ASSIGNED TO SCPDA, 2017-2021



Source: SCPDA data extracts from its case management systems showing cases referred by OPD to SCPDA, SCPDA case credit tracking spreadsheets, and annual contracts between OPD and SCPDA detailing the allocation of attorney FTE positions for misdemeanor cases, 2017-2021.

EXHIBIT 9: MISDEMEANOR CASES ASSIGNED TO SCPDA BY TYPE, 2017-2021

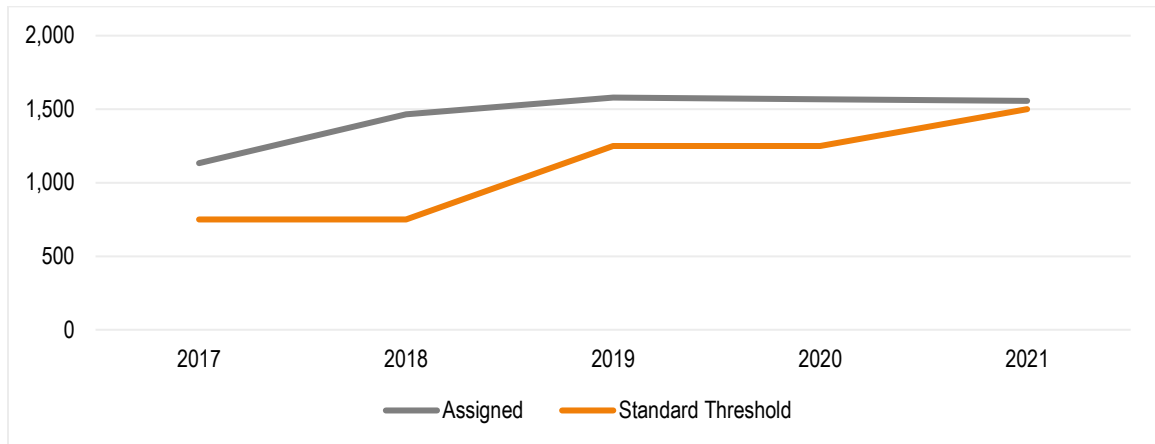
	2017	2018	2019	2020	2021	Change
FTE Attorneys	10	10	10	10	10	0%
Case Assignments by Category						
DUI/Physical Control	904	918	946	669	565	-38%
Non-Traffic Misdemeanors	1,787	1,183	948	958	834	-53%
Traffic-Related Misdemeanors	349	319	205	360	217	38%
Post-Conviction/Other	80	69	25	9	88	10%
Total	3,120	2,489	2,124	1,996	1,704	-45%
Cases per FTE Attorney	312	249	212	200	170	-45%

Source: SCPDA data extracts from its case management systems showing cases referred by OPD to SCPDA by type and annual contracts between OPD and SCPDA detailing the allocation of attorney FTE positions for misdemeanor cases, 2017-2021.

✓ Civil Commitment Cases

The Indigent Defense Standards and OPD's contract with the SCPDA stipulate that the caseload limit for full time public defense civil commitment attorneys not exceed 250 cases per year. This threshold was exceeded each year between 2017 and 2021. Between 2019 and 2021, OPD's contract with SCPDA incrementally increased the number of civil commitment attorneys from three to six to manage an increasing number of civil commitment case filings. Ultimately, the increase in attorney FTEs allowed SCPDA to reduce its attorney-to-caseload ratio from a high of 488 cases per attorney in 2018 to a low of 260 cases per attorney in 2021. This is illustrated in Exhibits 10 and 11.

EXHIBIT 10. TRENDS IN CIVIL COMMITMENT CASES ASSIGNED TO SCPDA, 2017-2021



Source: SCPDA data extracts from its case management systems showing cases referred by OPD to SCPDA and annual contracts between OPD and SCPDA detailing the allocation of attorney FTE positions for civil commitment cases, 2017-2021.

EXHIBIT 11. CIVIL COMMITMENT CASES ASSIGNED TO SCPDA, 2017-2021

	2017	2018	2019	2020	2021	Change
FTE Attorneys	3	3	5	5	6	100%
Case Assignments	1,133	1,465	1,579	1,568	1,557	37%
Cases per FTE Attorney	378	488	316	314	260	-31%

Source: SCPDA data extracts from its case management systems showing cases referred by OPD to SCPDA by type and annual contracts between OPD and SCPDA detailing the allocation of attorney FTE positions for civil commitment cases, 2017-2021.

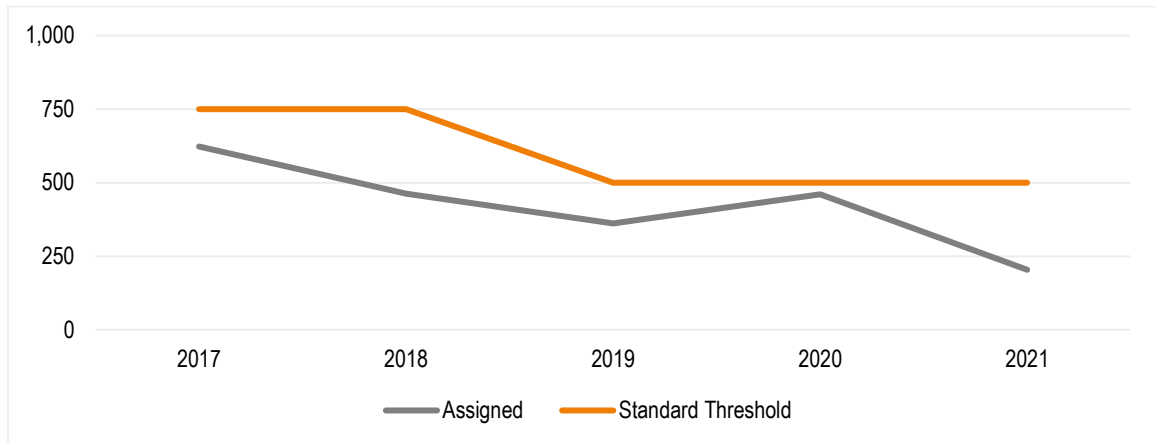
Based on this data, we recommend that OPD continue to monitor caseloads for civil commitment attorneys. While the current caseload per attorney 260 cases exceeds the threshold of 250 cases per year, the excess caseloads may not justify the cost of an additional FTE attorney. Trends in civil commitment filings appeared to be stabilizing or possibly declining as of 2021, and the number of excess cases appear manageable by SCPDA. If this proves not to be the case, OPD can assign cases to the conflict panel if needed. Should caseloads begin to increase, consideration should be given to increasing FTE attorneys dedicated to civil commitment cases.

✓ Juvenile Offender Cases

Unlike felony, misdemeanor, and civil commitment cases, OPD routinely assigned juvenile offender cases to SCPDA in a manner consistent with the adopted Indigent Defense Standards.

Specifically, standards stipulate that the caseload limit for full time public defense juvenile offender attorneys not exceed 250 cases per year. As indicated below, the SCPDA’s juvenile attorney allocations have historically been well within this standard, with case assignment ranging from 102 to 231 juvenile offender cases per year as shown in Exhibits 12 and 13.

EXHIBIT 12. TRENDS IN JUVENILE OFFENDER CASES ASSIGNED TO SCPDA, 2017-2021



Source: SCPDA data extracts from its case management systems showing cases referred by OPD to SCPDA and annual contracts between OPD and SCPDA detailing the allocation of attorney FTE positions for juvenile offender cases, 2017-2021.

EXHIBIT 13. JUVENILE OFFENDER CASES ASSIGNED TO SCPDA, 2017-2021

	2017	2018	2019	2020	2021	Change
FTE Attorneys	3	3	2	2	2	-33%
Case Assignments	623	463	361	461	204	-67%
Cases per FTE Attorney	208	154	181	231	102	-51%

Source: SCPDA data extracts from its case management systems showing cases referred by OPD to SCPDA by type and annual contracts between OPD and SCPDA detailing the allocation of attorney FTE positions for juvenile offender cases, 2017-2021.

SCPDA Supervisory and Investigative Resources Dedicated to Snohomish County Public Defense Cases Do Not Meet the Requirements Set Forth in County-Adopted Standards

In addition to establishing maximum thresholds for cases assigned to public defense attorneys in a given year, the Indigent Defense Standards also prescribe specific standards relating to administrative and other support deemed necessary for the effective representation of indigent defendants. This includes the responsibility of local jurisdictions to provide for expert witnesses, administrative resources (telephones, law library, case management, etc.), investigative resources, legal assistance, social work support, supervision, and other supportive resources. Generally, we found that OPD’s contract with SCPDA provides for supportive resources in a manner consistent with the standards. The budget set forth in the contract provides for office space and other overhead costs, social work and mental health professionals, and legal assistants in a manner commensurate with the standards.

However, SCPDA has routinely been short on supervisory and investigative resources throughout the five-year period between 2017 and 2021, though we do not find the contract to be out of compliance with the standards as it relates to administrative, legal, and clerical support positions. Specifically:

✓ Supervisors

The standards require agencies or firms providing public defense services to provide one full-time supervisor for every 10 staff lawyers. OPD’s contract with SCPDA consistently fell short of this standard. Between 2017 and 2019, SCPDA dedicated one supervisor to oversee the work of

approximately 37-41 FTE attorneys, as illustrated in Exhibit 14. Since 2020, SCPDA has increased the number of supervisors to 2.75 FTE by 2021—yet this effort falls short of the nearly 5 FTE supervisor positions needed to meet standards. Failure to provide adequate supervision can impact the quality of representation and/or result in inefficiencies and insufficient information, which can impact SCPDA’s ability to record and report performance metrics relevant to OPD’s management of the County’s public defense program.

EXHIBIT 14. SCPDA’S SUPERVISORY FULL-TIME EQUIVALENT POSITIONS DEDICATED TO SNOHOMISH COUNTY PUBLIC DEFENSE CASES, 2017-2021

	2017	2018	2019	2020	2021
Staff Attorney FTEs	37.3	38.3	41.5	47	48.5
Dedicated Supervisory FTEs	1	1	1	2.5	2.75

Source: OPD contracts with SCPDA detailing the allocation of attorney and supervisor FTEs annually.

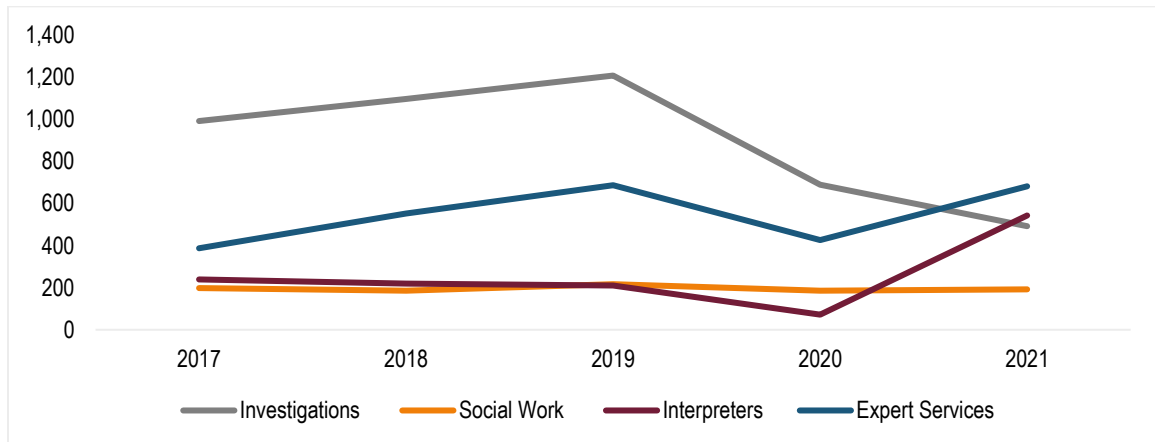
Based on this, we recommend that OPD seek budgetary approval from the County Council for additional supervisory FTE positions sufficient to comply with County-adopted Indigent Defense Standards.

✓ Investigators

The standards also require agencies or firms providing public defense services to provide one full-time investigator for every four staff lawyers. Between 2017 and 2018, OPD’s contract did not specify the number of investigators SCPDA was required to provide in support of Snohomish County indigent defense cases. However, beginning in 2019, SCPDA dedicated seven investigators to Snohomish County indigent defense cases; in 2021, the number of investigator FTE positions was increased to 7.5. Yet, with 48.5 FTE attorneys assigned to Snohomish County cases, the standards require approximately 12 investigator FTE positions. While this increase in investigative resources is notable, it falls short of the standard by nearly five FTE positions.

However, despite falling short of Indigent Defense Standards, evidence suggests that SCPDA’s use of investigator FTE resources has declined during the pandemic. Exhibit 15 illustrates support service request data maintained by SCPDA, showing the number of requests for investigations, social work services, interpreter services, and expert services submitted by misdemeanor and felony attorneys between 2017 and 2021. In most cases, requests for other types of support services remained stable or increased during the pandemic. However, request for investigations fell by 50 percent.

EXHIBIT 15. FELONY AND MISDEMEANOR SUPPORT SERVICE REQUESTS 2017-2021



Source: SCPDA data extracts from its case management systems showing attorney requests for investigations, social work services, interpreter services, and expert services for OPD-assigned cases, 2017-2021.

The reason for this decline is unknown and may be related to the overall decrease in felony and misdemeanor case filings observed during this period or the manner in which assigned counsel managed cases during this time. However, it is reasonable to assume that that requests for investigations will increase as case filings begin to increase. Therefore, we recommend that OPD monitor overall trends in caseloads and corresponding investigations to ensure that (a) the rate of investigations requested and performed is consistent with historical trends and OPD expectations, and (b) SCPDA maintains the level of investigator FTE positions needed to effectively perform investigations in a manner consistent with professional standards. As caseloads and the need for investigative services begin to increase, so too should the number of investigators funded by OPD in order to bring the number of investigators in line with the thresholds established by County-adopted Indigent Defense Standards.

✓ Legal Assistants

The standards also require agencies or firms providing public defense services to provide one full-time position providing administrative, legal, and technical support for every four (4) staff lawyers. Specifically, the standards state: “At least one full-time legal assistant should be employed for every four attorneys. Fewer legal assistants may be necessary, however, if the agency or attorney has access to word processing staff, or other additional staff performing clerical work. Defenders should have a combination of technology and personnel that will meet their needs.” The Indigent Defense Standards also state that the caseload limits reflect the maximum caseloads for “fully supported” defense attorneys. This is ambiguous. OPD’s contract with SCPDA funds 17.25 FTE administrative, legal, and technical support FTE positions. These include individuals in job classifications of Law Office Assistant, Legal Secretary, Legal Assistant, Paralegal, Law Office Assistant Supervisor, and Technical Support. Based on this, we do not find evidence to suggest the levels of administrative, legal, and technical support detailed in the contract fail to comply with the Indigent Defense Standards.

While case-to-attorney ratios have improved over the five-year period between 2017 and 2021, bringing OPD in line with County-adopted Indigent Defense Standards, certain non-attorney resources available to assigned counsel fall below levels established by the standards as essential for effective representation. This audit recommends taking an incremental approach to bringing attorney and non-attorney FTE position ratios into compliance with Indigent Defense Standards, while monitoring trends in actual caseloads and workloads as County case filings begin to normalize post-pandemic.

C.3 Enhancing Cost Controls for Third-Party Attorneys Is Necessary

The Washington State Bar Association found that, because of the duration of the pandemic, public defense counsel across the state increasingly had workloads that threatened their ability to provide effective representation, even when the number of cases assigned to them were at or below the maximums set forth by the caseload standards. For this reason, in October 2020, the SCPDA began declining new out-of-custody referrals for Class A, Sex, and violent B felony cases from OPD—referrals that it had historically accepted in the past—notifying OPD that its attorneys were unable to accept additional cases because doing so would, by reason of the size of their workload, interfere with the rendering of quality representation. In doing so, SCPDA stated that it was unable to certify compliance with caseload standards due to a) cases taking longer to resolve, and b) increasing complexity of cases they were receiving. Without the ability to send cases to SCPDA as it had in the past, OPD began assigning cases to the conflict panel, which itself was experiencing strains prompted by the pandemic and the tightening labor market.

These unforeseen circumstances revealed several weaknesses in the structure or administration of OPD's contracts with SCPDA and the conflict panel. This includes the manner in which OPD's contract with SCPDA establish expected service levels; OPD's methods for recording, monitoring, and reporting case and performance data; the cost structure within OPD's contracts with the conflict panel; and OPD's compliance with Snohomish County Code provisions requiring formal contracts, and Council approval for such contracts, when employing third-party professional services. Each is described below.

✓ OPD's Contract with SCPDA Did Not Contemplate a Scenario in Which SCPDA Could Not or Would Not Accept a Maximum Workload Referred by the OPD

OPD's contract with SCPDA requires the SCPDA to employ 20 felony attorneys and 10 misdemeanor attorneys (along with a variety of other attorneys to hear different case types), and states that "the Administrator will refer enough felony and misdemeanor cases to the Association to maintain full caseloads for this staff." Recognizing the Indigent Defense Standards adopted by the Washington State Bar Association, the contract also states that "these standards constitute a goal for the County in its budgeting for the Public Defender Program and for the Association in its allocation of resources." Together, these provisions imply an assumption that OPD can refer and SCPDA will accept all non-conflict felony and misdemeanor cases filed with the courts, up to and potentially beyond the County-adopted caseload standards. In return for accepting this workload, OPD would pay SCPDA one-twelfth of the total amount budgeted each month.

OPD's contract with SCPDA is silent on the possibility, even in 2021—after SCPDA began declining cases—that SCPDA would decline cases that it would have ordinarily accepted in the past. It is also silent on the consequences should OPD not be able to meet its contractual

obligation to refer enough cases to put every lawyer at caseload maximums or how any refusal to accept new cases could or should impact compensation. While we find that SCPDA's decision to decline cases was consistent with guidance issued by the Washington State Bar Association, this decision effectively changed the definition of a "full caseload" as applied in the contract and required OPD to divert cases from SCPDA to the conflict panel.

This event exposed a key shortcoming in the contract in that it assumes a maximum caseload is the only reasonable workload and does not recognize that a reasonable workload for any FTE, or staff of FTE positions, is variable. In years with fewer filings, FTE staff could reasonably manage a relatively light workload without being considered wasteful; in busy years, FTE staff could reasonably manage a relatively heavy workload without being considered unmanageable or excessive. At the same time, there may come a point at which workloads can become so light that existing levels of FTE positions can no longer be justified, or that workloads can become so burdensome that existing FTE positions cannot reasonably be expected to perform the work with due professional care. In such years, it is reasonable to evaluate the need for resource reductions or for additional resources, respectively. A "full workload" should be considered a range that is both acceptable to the County and SCPDA, and the contract should consider relevant drivers of workload including, but not limited to, new case assignments.

✓ Methods Employed to Count Caseloads Lack a Substantive Link to Actual Workloads

In determining that the caseload of a full-time public defense attorney shall not exceed defined caseload thresholds, the Indigent Defense Standards recognize that there are differing ways that local jurisdictions may count cases. In recognizing this, the standards suggest counties "responsible for employing, contracting with or appointing public defense attorneys *should* adopt and publish written policies and procedures to implement a numerical case-weighting system to count cases," which recognizes "the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved ... [and] be periodically reviewed and updated to reflect current workloads." The standards require counties to establish or recognize a maximum threshold above which public defense counsel jeopardizes the quality of representation it is able to provide to clients. To monitor performance against this threshold, counties must establish a method for quantifying workload or "case counting."

OPD's contract with SCPDA establishes a "case credit" system that, while not meeting the criteria for a case weighting system, was intended to fulfill this requirement by recognizing that some cases require extraordinary levels of effort and providing additional case credits on a case-by-case basis. However, this system as put into practice reveals fundamental problems. The system does not weight cases based on the class or severity of a violation, except for three-strikes cases, nor does it provide credits based on the amount of work required of an attorney to represent a defendant in such cases. While the system logically lays out a rationale for how and why different charges shall be counted and provides discretion to allow additional credits for particularly complex cases, it does not create a nexus between different case categories (e.g., different types of felonies) or the actual FTE resources required to represent defendants in such cases. Doing this

requires data, particularly data in the form of case type information and the staff hours required to manage cases of different types. Recognizing the need for this type of information, the Indigent Defense Standards require that public defense attorneys or offices maintain a case-reporting and management information system which includes the number and type of cases, attorney hours, and disposition.⁵ Consistent with this requirement, OPD's contract with SCPDA requires all staff attorneys to maintain records of all hours spent on each individual case and the nature of the work completed during the documented time, information that is essential for the monitoring of the actual workloads experienced by indigent defense attorneys and to inform and update the case credit system.⁶

Yet, OPD did not maintain a case-reporting and management information system that includes the number and type of cases, attorney hours, and disposition for all cases it referred to SCPDA and to the conflict panel. While SCPDA maintained its own case management system to track cases, it did not sufficiently track attorney hours to allow for an analysis of the resources required to represent clients for various case types and, in 2020, it implemented a new case management system that changed the way it categorized case types—both of which rendered an analysis of attorney caseloads and the associated workloads impossible.

Similarly, for conflict panel cases, OPD tracked very little information, which was limited to the number of felony, misdemeanor, and other broad case classifications, as well as the attorneys and compensation rates associated with the case. However, OPD did not track case types or attorney hours for such cases. It did not have in place a formal case management system typically employed by law office to record, administer, and monitor caseloads, and to track resources required to manage cases of varying types and complexity. While it utilized other information technology resources such as Excel and SharePoint to record case assignments and information, the records produced were insufficient to facilitate management reporting and analysis.

This presented challenges to OPD in its ability to respond to requests for information regarding its workload and overall performance trends. It also created a substantial barrier to fulfilling a critical element of maintaining a numerical case-weighting system and to periodically review and update the system of case counting to reflect current workloads. Without this information for cases assigned to SCPDA and the conflict panel, OPD will be at a disadvantage in developing a reliable case credit system or using it effectively—as outlined in the contract—to determine time and effort spent on cases, understand what a full workload for attorneys should be, or create units of measurement that can be used to predict future workloads. Without it, case credit counts are not any more reliable than counting case types.

As a result, when SCPDA states that they are not able to certify compliance with caseload standards, OPD does not have the feedback system in place to effectively assess this issue or to efficiently control costs and manage SCPDA caseloads in the future.

⁵ Washington State Bar Association Indigent Defense Standards, Standard Eight: Reports of Attorney Activity

⁶ PDA 2021 Contract; Attorney Time Record Provision

✓ Employment of Conflict Panel Attorneys Requires Attention

With SCPDA declining cases that it had historically accepted, OPD was forced to assign cases to the conflict panel. However, the conflict panel experienced similar strains as SCPDA with attorneys often generally unwilling to take on as many cases as they previously accepted prior to the pandemic. This, coupled with the tightening of the labor market experienced throughout the nation, contributed to a shortage of public defense attorney resources to which OPD could assign cases. These two pressures contributed to an increase in cost-per-case assigned to the conflict panel, increases that could turn into a problematic trend for OPD without mitigating steps.

Overall, Snohomish County pays relatively low rates to conflict panel attorneys when compared to other counties. Conflict panel contracts establish a flat fee rate structure for paying conflict panel attorneys. For instance, OPD to pay flat fee of \$1,875 for Class A felonies, \$1,300 for Class B felonies, and \$825 for Class C felonies. Most other counties established formal processes to pay conflict panel attorneys on an hourly basis, with King County paying the highest for Class A and Class B Felonies at \$150 per hour, and a comparatively lower rate of \$65 per hour for Class C Felonies. Pierce County offers the lowest Class A Felony rates at \$80 per hour, and \$65 per hour for both Class B and Class C Felonies. When OPD did pay conflict panel attorneys on an hourly basis, its rates were generally below the market rates established by other counties. Further, the flat fees paid by OPD covered about 13 to 20 hours of work that an attorney working for another county would have to work to get paid the same amount.

EXHIBIT 16. COMPARABLE COUNTIES: CONFLICT PANEL RATES OF COMPENSATION

	Snohomish	King	Skagit	Pierce	Island	Thurston	Chelan
Class A	\$75/\$85	\$150	\$95	\$80	\$90	\$90	\$90
Class B	\$65	\$150/\$75	\$90	\$65	\$90	\$90	\$90
Class C	\$55	\$65	\$90	\$65	\$90	\$90	\$90

Source: Washington State Office of Public Defense Draft 2021 County Compensation Rate Data and hourly rates historically paid by Snohomish County Office of Public Defense.

According to OPD management, attorneys that had typically accepted OPD's rates began declining case assignments in 2020. It is unknown whether conflict panel attorneys refused cases because workload demands were such that they could not take on more cases or because other counties or private clients were offering rates that were higher. Between 2017 and 2019, data showed that OPD paid conflict panel attorneys generally in line with the rates described above. However, in 2020, OPD began negotiating fees and increasing rates paid to conflict panel attorneys for felony cases. In fact, according to OPD records, OPD paid conflict attorneys higher rates on 11 different cases in 2020 and 20 times in 2021. This included paying attorneys \$125 per hour for a Class A Felony rather than the standard of \$75 per hour, and \$100 an hour for a Class C Felony rather than the standard \$55 per hour—equating to rate increases between 66 percent and 80 percent, though still lower than King County, with whom Snohomish County competes for legal services.

While OPD's contracts with the conflict panel contain provisions that allow OPD to modify rates of compensation in extraordinary circumstances, the ad hoc nature of the increases we observed suggest opportunities for improvement. Specifically:

- Consideration should be given to modifying the conflict panel rate schedule to be more consistent with counties within the same geographical region as Snohomish County, as these counties are likely to compete with OPD for the same pool of private public defense attorneys. Indigent defense standards for compensation of counsel require that public defense attorneys and staff should be compensated at a rate commensurate with their training and experience, and comparable to those of attorneys and staff in prosecutorial offices in the area.⁷
 - When hourly rates are used, implement caps or other measures to manage and control costs. Currently, hourly rate agreements with conflict panel attorneys contain no provisions limiting the number of hours attorneys may charge, and no provision designed to mitigate the risk that attorneys could charge excessive hours on cases. There is no mechanism that effectively limits the County's liability for potential inefficiencies of contractors, or that provides sufficient information that would enable OPD management to determine what the appropriate number of hours should be for a given case type. Rather, the County must pay the bill. For other professional services, government contracts typically include provisions that limit the County's exposure or liability, a maximum dollar amount on a contract or task order, for instance. If the service provider exceeds the limit, they bear the cost. While OPD may find that such provisions are untenable for public defense contracts, where the contractor has little control over the time a case remains open, some cost control measures may still be appropriate. OPD could implement a cap beyond which, under extraordinary circumstances, the service provider may seek authorization to increase the limit. The County has discretion to do so. OPD's current agreements with the conflict panel do not contain such limits, and this could result in unforeseen and unreasonable costs.
- ✓ OPD's Use of the Conflict Panel Did Not Comply with County Contracting Requirements

Snohomish County Code 2.09.040 authorizes the Office of Public Defense (OPD) to execute contracts for Indigent Criminal Defense legal services. Specifically, OPD is authorized to administer all contracts with private attorneys for the provision of indigent defense services in the district and superior courts. As such, OPD is authorized to make assignments of counsel who have signed contracts with the office on the basis of experience and qualifications. Snohomish County Code 3.04.140(2) states that consultant contracts not subject to competitive bidding requirements and valued at less than \$25,000 can be executed by the county executive.

However, as stipulated in County Code 3.04.190, consultant contracts and special service contracts not subject to competitive bidding requirements for more than \$25,000 requires council approval. In executing contracts with the conflict panel attorneys, OPD did not consistently receive council approval to enter into contracts with panel attorneys for all contracts over \$25,000. In

⁷ Washington State Indigent Defense Standards, Standard One: Compensation

addition, for some panel attorneys without established contracts, OPD consistently paid invoices without purchase orders authorizing the transaction.

Between 2017 and 2021, OPD hired a total of 45 third-party attorneys or law firms to provide conflict panel services. Of the 45 attorneys or law firms, OPD engaged with 22 of the entities prior to executing a contract. In some cases, OPD continued to receive services from and pay the attorneys for several years without a contract; in other cases, OPD employed an attorney for only one year or for very limited services. Of the 22 attorneys or law offices used by OPD without an executed contract, six were paid amounts that exceeded the \$25,000 threshold in any given year, with annual compensation ranging between \$25,397 and \$186,287.

In part, the lack of formal contracted services is due to factors external from OPD control. When the existing conflict panel is unable to accommodate a case due to attorney workload or legal conflicts, OPD is forced to ensure immediate representation for indigent clients, even when that may entail paying non-contracted attorneys to take a case because there are few or no other options available. To comply with County Code, however, OPD should promptly execute a contract with the attorney or law firm in a manner consistent with the delegations of authority provided in County Code and by the County Executive.

C.3 Audit Recommendations

In order to ensure compliance with caseload standards related to caseload-to-attorney ratios and attorney-to-support staff ratios, and to ensure adequate cost-control measures as the County continues to right-size its public defense program, we recommend that the Office of Public Defense:

- Seek authorization from the County Council to modify contractual provisions relating to the allocation of FTE resource to ensure consistency with County-adopted Indigent Defense Standards. In doing so, OPD should continue the incremental approach it has taken in recent years bring attorney and non-attorney FTE position ratios into compliance with Indigent Defense Standards, while monitoring trends in actual caseloads and workloads as County case filings begin to normalize post-pandemic. This should include:
 - Increasing supervisory FTE positions sufficient to comply with County-adopted Indigent Defense Standards;
 - Continuing to monitor caseloads for civil commitment attorneys to ensure an effective caseload-to-attorney ratio of 250:1; and
 - Continuing to monitor trends in caseloads and corresponding investigations to ensure that (a) the rate of investigations requested and performed is consistent with historical trends in the number and types of cases assigned, and (b) SCPDA maintains the level of investigator FTE positions needed to effectively perform investigations in a manner consistent with professional standards.
- Modify the SCPDA contract to recognize an acceptable caseload that can be assigned given the compensation provided, including a maximum above which existing FTE resources cannot

reasonably be expected to effectively provide representation and below which existing FTE resources can no longer be justified.

- Implement a case-reporting and management information system that includes number and type of cases, attorney hours, and disposition for all cases referred to SCPDA and the conflict panel, and use this information to periodically review and update the system of case counting (i.e., case credit system) to reflect current workloads.
- Ensure formal contracts are executed between OPD and conflict panel attorneys and firms immediately upon agreement to assign cases to the attorney and/or firm, if not prior to such an assignment. In establishing conflict panel contracts:
 - Consideration should be given to modifying the conflict panel rate schedule to be more consistent with counties within the same geographical region as Snohomish County.
 - When hourly rates are used, implement not-to-exceed dollar thresholds applicable to specific cases assigned to the attorney or firm and to the aggregate number of cases assigned to the attorney.

Appendix A – Summary of Recommendations and Corrective Action Plan

	Recommendation	Responsible Entity	Priority	Entity's Response
1	<p>Seek authorization from the County Council to modify contractual provisions relating to the allocation of FTE resource to ensure consistency with County-adopted Indigent Defense Standards. In doing so, OPD should continue the incremental approach it has taken in recent years bring attorney and non-attorney FTE position ratios into compliance with Indigent Defense Standards, while monitoring trends in actual caseloads and workloads as County case filings begin to normalize post-pandemic. This should include:</p> <ul style="list-style-type: none"> Increasing supervisory FTE positions sufficient to comply with County-adopted Indigent Defense Standards; 	OPD	High	OPD sees this as the highest priority for SCPDA. Completion by December 2022
	<ul style="list-style-type: none"> Continuing to monitor caseloads for civil commitment attorneys to ensure an effective caseload-to-attorney ratio of 250:1; and 	OPD	Medium	OPD and SCPDA are and will continue to monitor Civil Commitment caseloads and communicate needs to the Executive and Council.
	<ul style="list-style-type: none"> Continuing to monitor trends in caseloads and corresponding investigations to ensure that (a) the rate of investigations requested and performed is consistent with historical trends in the number and types of cases assigned, and (b) SCPDA maintains the level of investigator FTE positions needed to effectively perform investigations in a manner consistent with professional standards. 	OPD	Low	OPD will coordinate with SCPDA to provide routine reports on the use of investigation and other expert services, particularly as courts resume to normal functions post-COVID.
2	<p>Modify the SCPDA contract to recognize an acceptable caseload that can be assigned given the compensation provided, including a maximum above which existing FTE resources cannot reasonably be expected to effectively provide representation and below which existing FTE resources can no longer be justified.</p>	OPD	Medium	OPD sees this as the second highest priority for SCPDA. SCPDA has been requested a modification for years and OPD welcomes the chance to collaborate with SCPDA to alter the contract provisions to create a defined acceptable workload for attorneys. Completion by Dec. 31, 2022
3	<p>Implement a case-reporting and management information system that includes number and type of cases, attorney hours, and disposition for all cases referred to SCPDA and the conflict panel, and use this information to periodically review and update the system of case counting (i.e., case credit system) to reflect current workloads.</p>	OPD	Medium	OPD is in the middle of the RFP process for a case management system. Once implemented, the system can be designed to collect needed case-reporting. Procurement by Dec. 31, 2022; and system implementation by Dec. 31, 2023.

Recommendation	Responsible Entity	Priority	Entity's Response
<p>4 Ensure formal contracts are executed between OPD and conflict panel attorneys and firms immediately upon agreement to assign cases to the attorney and/or firm, if not prior to such an assignment. In establishing conflict panel contracts:</p> <ul style="list-style-type: none"> • Consideration should be given to modifying the conflict panel rate schedule to be more consistent with counties within the same geographical region as Snohomish County. • When hourly rates are used, implement not-to-exceed dollar thresholds applicable to specific cases assigned to the attorney or firm and to the aggregate number of cases assigned to the attorney. 	OPD	Medium	OPD sees this as the highest priority item. OPD has drafted a budget package to address the compensation. OPD can utilize soft cap provisions used in some of its other contracts in the conflict panel contract. OPD will work with the Executive's Office to create and implement a system for signing contracts which can be responsive to OPD's Constitutional requirement to immediately appoint counsel. Completion by Dec. 31, 2022

A – High Priority: The recommendation pertains to a high priority conclusion or observation. Due to the seriousness or significance of the matter, immediate management attention and appropriate corrective action is warranted.

B – Medium Priority: The recommendation pertains to a moderately significant conclusion or observation. Reasonably prompt corrective action should be taken by management to address the matter. Recommendation should be implemented no later than six months.

C – Low Priority: The recommendation pertains to a conclusion or observation of relatively minor significance or concern. The timing of any corrective action is left to management's discretion.

N/A: Not Applicable

Appendix B – Management’s Response

A letter submitted by the Office of Public Defense in response to this audit report is presented on the following pages.



Snohomish County
Office of Public Defense
3000 Rockefeller Ave.
Everett, WA 98201-4046

August 9, 2022

To: George Skiles, Sjoberg Evashenk Consulting

From: Jason Schwarz, Director Snohomish County Office of Public Defense

Thank you for all your hard work on this audit. Your dedication to understanding OPD's operations have been obvious in our meetings and they're also reflected in this report. While the scope of this audit is limited to financial and operational efficiencies, I appreciate that our conversations continued to focus on the County's ability to provide effective assistance of counsel for indigent people involve in the legal system. Your sensitivity to the way in which COVID has impacted public defenders and their workloads has made our conversations efficient and enjoyable.

The audit process was professional and thorough. The performance auditor, the Office of Public Defense (OPD) staff, and the Snohomish County Public Defender Association (SCPDA) staff worked cooperatively to gather data to better understand the administration of public defense in Snohomish County.

I offer the following response to the key findings and recommendations.

Key Findings:

I generally agree with the three primary findings of the audit and recommendations. Any disagreements with factual findings or recommendations are highlighted below.

- ✓ OPD has sustained budgetary increases while temporarily experiencing a decrease in case filings due to the pandemic. The budgetary increase of recent years is largely due to multi-year increases in staff salaries to bring SCPDA into alignment with equivalent county positions and into compliance with caseload standards. While filings have decreased due to the pandemic, there is no reason to believe that this trend is permanent. Future attention to staffing will be necessary as filings increase. COVID has illustrated the failures of relying solely on case filings to determine a public defender's acceptable workload. While OPD contractors experienced a decline in assigned cases, they universally attest that their workload has increased. Increased workloads, even amidst a backdrop of declining new assignments, is consistent with statewide

trends.¹ This is also consistent with Snohomish County Superior data² which shows a 301% increase in the length of time a case stays open. COVID impacted public defense in two distinct ways: decreased case assignments and decreased case resolutions. Superior Court reports a 63% decrease in case resolutions since 2020. Practically, this means that cases stay open longer, requiring on-going attention by OPD contractors even while accepting new referrals. During COVID, public defenders report that the inability to meet and review discovery with clients resulted in delayed resolutions and increased work to accommodate COVID restrictions. Thus, while the raw number of cases decreased, the amount of open and pending cases increased. When cases stay open longer, more than average time is spent on each case, creating an increase in workloads. This was an unforeseen and unique feature of COVID not completed in the contract. But it also suggests that caseloads may not be the best metric of workloads.

SCPDA also reports that the composition of the felony caseloads for each Class A and sex offense qualified public defender contains a higher percentage of sex of violent crimes over the course of the pandemic. In 2022, the number of homicide referrals is higher now than the annual numbers from 2017 to 2022. These more complicated and time-consuming cases require additional attention and litigation, which contributes to increased workloads. This trend demonstrates that the contract structure needs to consider unpredicted circumstances and the way those trends impact workload metrics including, but not limited to, caseloads. If SCPDA is expected to take on a higher percentage of complex cases as a percentage of caseload, even as caseloads decline, a contract mechanism must be put in place to report increased workload.

- ✓ SCPDA caseloads have not historically complied with National, State, and county-adopted caseload standards. Some of the data provided in this audit supplements OPD's understanding of SCPDA's workloads. There is no reason to doubt the data's veracity and this audit's conclusions. The audit concludes that SCPDA has historically and is currently out of caseload compliance. SCPDA is out of compliance with the Washington State Bar Association Indigent Defense Standards for most non-lawyer positions. Historically, SCPDA has also been out of compliance with lawyer positions, but the decreased filings during COVID has alleviated some of the caseload strain on the lawyers.

SCPDA filed attorney compliance certifications with the OPD and the courts in compliance with CrR 3.1, CrLJ 3.1, and JuCR 9.2 during the relevant period, 2017 to 2021. OPD has monitored attorney certification forms since the rules were implemented in 2012. This date coincides with the County-launched 5-year plan to fund public defender attorneys the same salaries as prosecutors. The County is still making incremental progress toward salary parity for non-attorney positions. Each year, SCPDA evaluates its staffing and needs against relevant standards, prioritizes those needs and requests additional annual funds to improve compliance with county-adopted standards.

Two areas of concern should be highlighted:

¹ Defending Clients in the COVID-19 Environment: Survey Results from Public and Private Defense Counsel, Katrin Johnson and Jason Schwarz, 2021. https://www.opd.wa.gov/documents/00847-2021_DefendingClients.pdf

² 2022 Budget Note concerning Law and Justice Backlog due to COVID-19

- Civil Commitment filings have significantly increased in 2022. At the current rate, SCPDA can expect 224 more cases beyond the 2021 filings. SCPDA is projected to have 1784 cases in 2022, which would constitute a filing increase of 14%.
- I disagree with the audit’s conclusion that there is not evidence that SCPDA is staffed below acceptable caseload levels, but do concede that both the contract and the standards themselves fail to sufficiently define some staff roles, leading to confusion. Standards require one legal assistant for every four lawyers. With 48.5 FTE attorney positions, SCPDA should be staffed with 12 legal assistants. It is currently staffed with 8 legal assistants. The audit concludes that the current staffing is sufficient because the contract also provides for non-legal assistant support staff. While the contract does provide for essential non-legal support staff (receptionists, IT staff, conflict checkers, discovery processors, etc), they do not provide the same work as legal assistants and cannot replace their expertise. Legal assistant’s duties include supporting the lawyer in managing and processing cases. This work can include drafting and filing motions, communicating with expert witnesses, civilian witnesses, and clients, as well as other communications with relevant professionals to resolve the assigned case. Other support staff support the operational efficiency of the Association. Each of these roles is necessary in a law firm of SCPDA’s size. While the County does not have equivalent job titles, the Prosecutor’s Office also has staff who provide the same function as legal assistants. At the Prosecutor’s Office, there are 2 administrative staff, or legal assistant equivalents, for every lawyer.³ In addition to concerns about legal assistant staffing, I have concerns that SCPDA is sufficiently staffed to meet its technology and IT needs.⁴ The contract provides for one IT FTE for 70 staff. SCPDA has experienced delays and disruption to services due to insufficient IT resources. By comparison, the Prosecutor’s Office is budgeted for \$1,572,139 to cover its IT needs, which is 15 times the amount expended at SCPDA.⁵ Nonetheless, the audit highlights that the contract could define the roles of support staff to assist in determining future staffing needs. The contract should also create a mechanism to determine the need for changing staffing needs for non-legal assistant staff positions.

- ✓ Enhancing Cost Controls for Third-Party Attorneys are necessary. This Director has worked to bring OPD into compliance with SCC contracting requirements for criminal conflict panel lawyers. Recent efforts to get annual contracts for all vendors has resulted in significantly higher percentage of contracts signed prior to the date work begins. Currently, there are only two conflict panel attorneys who have been assigned cases without a contract. OPD has some logistical challenges with contracting with conflict panel vendors.

Contracting practices prior to this Director's tenure, combined with lower compensation rates than other adjacent regions, created an emergent scenario where OPD is forced to seek vendors for legal services outside of our contracted pool of lawyers in order to meet Constitutional and legal guidelines. Some vendors decline to sign a contract with the County because the listed

³ The Prosecutor administrative support staffing mirror’s the National Public Defender Association standards for support staff: [NAPD Policy Statement on Public Defense Staffing \(publicdefenders.us\)](https://www.publicdefenders.us/policy-statement-on-public-defense-staffing). The national recommended standard is two administrative staff, one paralegal and one other administrative, for every four public defenders.

⁴ WSBA Indigent Defense Standard Seven: Support Services “Public defense attorneys shall have adequate number of investigators, secretaries, word processing staff, paralegals, social workers, mental health professionals, and other support services, including computer system staff and network administrators.”

⁵ 2022 Snohomish County IT Scorecard Prosecuting Attorney.

compensation rate is low. This results in a criminal conflict panel pool that is too small meet filing demands. When more cases are filed than SCPDA and the contracted criminal conflict panel attorneys can take, the County still has a Constitutional duty to provide counsel outside of the contracted pool. When SCPDA and the criminal conflict panel lawyers are unavailable, OPD is required to negotiate with a new vendor to provide services.

Increasing compensation for panel lawyers will result in fewer uncontracted vendors. Currently, compensation for Snohomish County criminal conflict panel lawyers is lower than adjacent counties. Were the County to offer a more market-driven compensation contract for its criminal conflict panel attorneys, we would have more contracted attorneys and would not need to go outside of our contracted pool for services. Data summarized in this audit shows that while SCPDA saw 45% increase in expenditures over the examined period, conflict panel expenditures barely tracks inflation, suggesting an increase in compensation is justified. A 2019 report by the Washington State Association of Counties ranks Snohomish County third-to-last among Washington counties in dollars spent on public defense per capita. Snohomish County spent \$12.42 per capita on public defense whereas Skagit, Chelan, and King Counties paid \$33.98, \$32.23, and \$30.32 respectively.⁶ An increase in conflict panel compensation would bring Snohomish County's public defense expenditures consistent with adjacent counties.

The County contracting process cannot respond to the Constitutionally mandated appointment of counsel fast enough for counsel to meet their obligations to appear in court or see their client within 24-48 hours after appointment if the lawyer were to have to wait until a contract is signed. OPD will work with the Executive's Office to find solutions to the problem of timing. One option would be for the Executive's Office to sign a contract for services under \$25,000 until the parties can get a contract to Council. Another solution would be to delegate signing authority to the Director of OPD to expedite the contracting process.

Recommendations

I agree with the listed recommendations.

- ✓ Increase supervisory FTE at SCPDA – OPD sees this as the highest priority for SCPDA
- ✓ Monitor Civil Commitments – OPD and SCPDA are and will continue to monitor Civil Commitment caseloads and communicate needs to the Executive and Council.
- ✓ Monitor investigator FTE and assignments – OPD will coordinate with SCPDA to provide routine reports on the use of investigation and other expert services, particularly as courts resume to normal functions post-COVID.
- ✓ Modify SCPDA contract to recognize acceptable caseloads/workloads including a maximum – OPD sees this as the second highest priority for SCPDA. SCPDA has been requested a modification for years and OPD welcomes the chance to collaborate with SCPDA to alter the contract provisions to create a defined acceptable workload for attorneys.

⁶<https://app.powerbi.com/view?r=eyJrIjoiOGFIMDM3OWEtNWQ5MS00M2NILWFhMTA4ZGI5M2FkOWMwM2FkIiwidCI6Ijg3N2M5YjgILWwOGYtNDNjMCIiImJY2LTQ4MDNhNDgyYmEyMyIsImMiOiZ9>

- ✓ Implement a case-reporting and management system – OPD is in the middle of the RFP process for a case management system. Once implemented, the system can be designed to collect needed case-reporting.
- ✓ Contracts with the panel including panel compensation rates and a soft cap on hours per case – OPD sees this as the highest priority item. OPD has drafted a budget package to address the compensation. OPD can utilize soft cap provisions used in some of its other contracts in the conflict panel contract. OPD will work with the Executive’s Office to create and implement a system for signing contracts which can be responsive to OPD’s Constitutional requirement to immediately appoint counsel.

Thank you again for all your time and collaboration.

Best,



Jason Schwarz | Director
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