

PUBLIC DEFENSE BEST PRACTICES

AN ANALYSIS FOLLOWING THE DECISION IN *WILBUR V. MT. VERNON*

Key Findings

*A snapshot of where
we are at*

*Best practices for
moving forward*

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What's the big deal about *Wilbur v. Mt. Vernon*?

Wilbur v. Mt. Vernon, is the latest case in Washington dealing with inadequacies in public defense.

Two other cases, *Best v. Grant County* and *State v. ANJ* have also dealt with this issue. What makes *Wilbur v. Mt. Vernon* unique, however, is the detail into which the opinion goes in analyzing the factors that caused the public defense system in Mt. Vernon to be determined by the court to be woefully inadequate. By doing so, Federal District Court Judge Lasnik, who presided over the case and authored the opinion, therefore gives other jurisdictions, including ours, plenty of material by which to proverbially “learn from the mistakes of others.”

The Benton & Franklin Counties Office of Public Defense is dedicated not only to providing quality public defense to its clients but also to a spirit of continual improvement.

This publication is a detailed analysis of the opinion in *Wilbur v. Mt. Vernon* in terms of what it means for our local public defense system, how our current system “rates” and what changes are necessary.

Key Findings

Layered Approach

System v. Case

*Attorney-Client
Relationship*

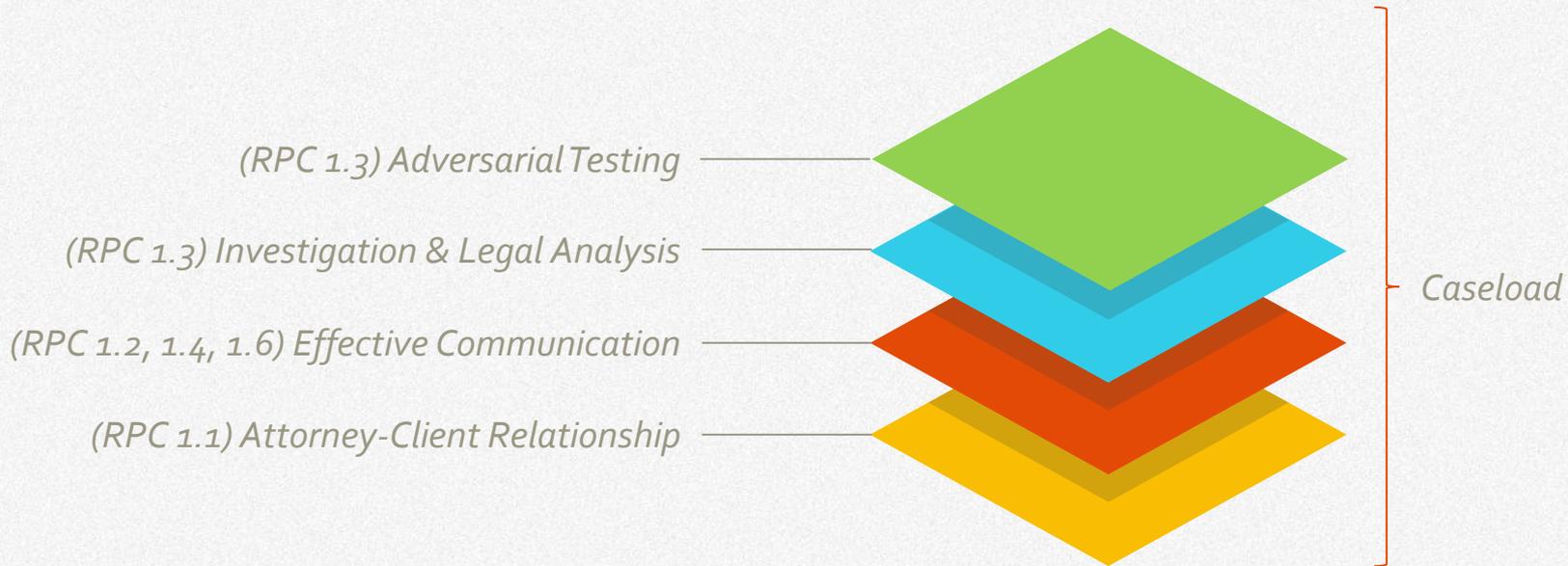
Effective Communication

*Investigation and Legal
Analysis*

Adversarial Testing

Caseload

Consider a “Layered Approach” to Effective Defense



Each layer represents one metric and serves as the foundation for the next layer. A system of public defense is not adequate unless it provides for each layer on a systematic basis. Having a manageable caseload is very important but merely creates an environment in which effective defense can be a reality.

System v. Case

It's the system we're talking about here

Before discussing the individual factors identified and discussed in *Mt. Vernon*, it is important to make a distinction between *system-based* issues and *case-specific* issues.

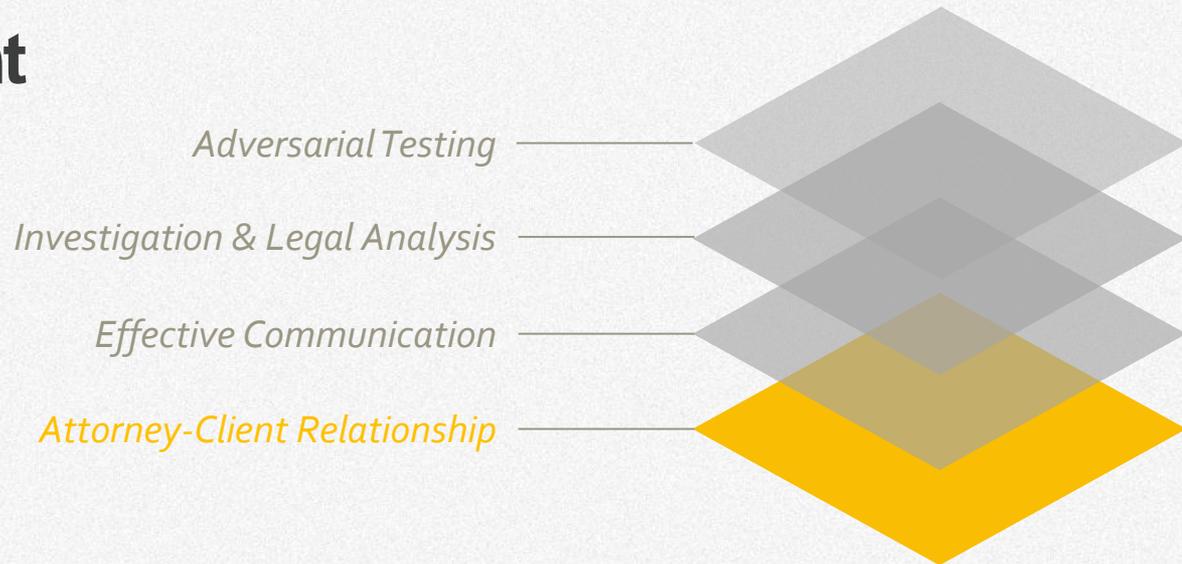
While providing inadequate counsel on an individual case may subject an individual attorney to liability for malpractice, may subject the case to reversal for ineffective assistance of counsel, and may even result in professional sanctions, this type of issue is neither the topic of discussion in *Mt. Vernon* nor addressed in this analysis. Rather, what was at issue were significant *systematic* problems with the public defense system in *Mt. Vernon*. Accordingly, this analysis also addresses issues, problems, and solution on a system-basis.

This distinction is important as we examine individual findings. For example, lack of investigation was determined by the court in *Mt. Vernon* to be a systematic problem. For our purposes, this doesn't mean

that suddenly every case requires in-depth investigation. This simply is not the case. However, our system of public defense must provide a means for evaluating every case for investigative needs and following up with such needs (whether personally by assigned counsel or with an assigned investigator) as necessary. Similarly, the level of investigation necessary from case to case may vary greatly. Obviously a DWLS3 case where the client acknowledges receipt of the suspension notice and the traffic stop is appropriate is going to require a different level of investigation than a Robbery in the Second Degree case with multiple co-conspirators.

It is important to keep the case v. system distinction in mind as we discuss the court's findings in *Mt. Vernon*. It's the system we are talking about.

Attorney-Client Relationship



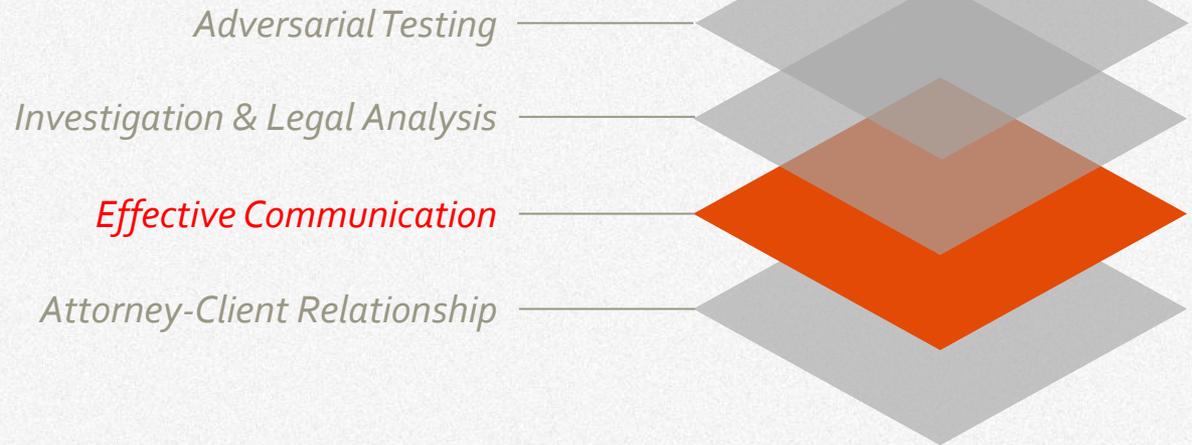
The Court in *Mt. Vernon* spoke at length about the concept of an effective attorney-client relationship at length in its Memorandum of Decision. It is obviously an important foundational issue.

In large part because of the incredibly large caseloads assigned to their public defenders, but also because of other system-based inadequacies, the Court found that Mt. Vernon’s public defense system provided no opportunity for clients and defenders to ever develop an attorney-client relationship. The Court went as far as to describe the system as a “meet and plead” system and said clients “could not fairly be said to have been “represented by [public defenders} at all.”

Several topics of discussion that can only be had if there is a proper attorney-client relationship were identified:

- A) Possible defenses;
- B) Investigation;
- C) Mental and physical health issues;
- D) Immigration status;
- E) Client goals;
- F) Potential dispositions

Effective Communication



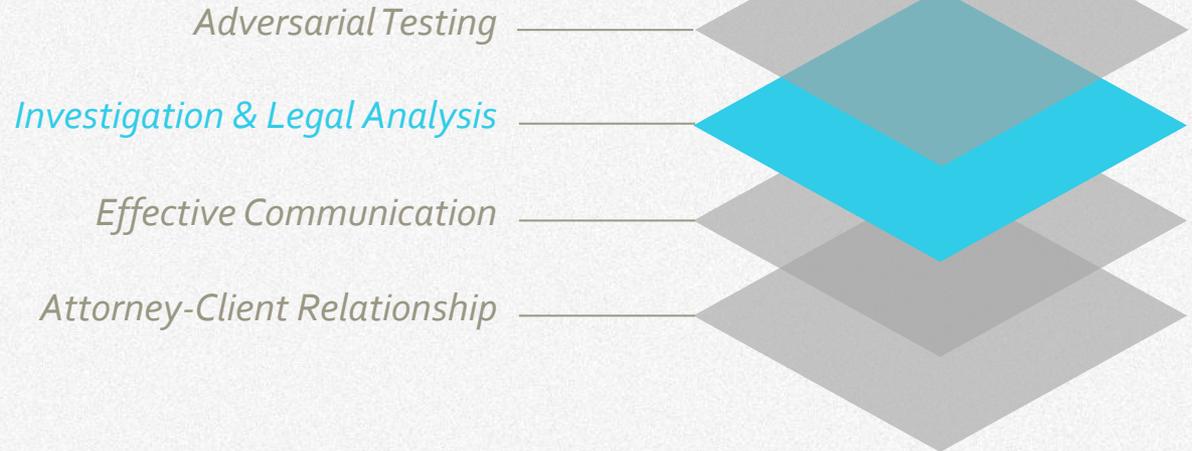
Communication between an attorney and client must be *timely* and *confidential*. “A failure of communication precludes the possibility of informed judgment.”

Based on its belief that *timely* and *confidential* communication between an attorney and client is of great importance, the Court found several glaring flaws in Mt. Vernon’s public defense practices in this regard:

having perfunctory and public meetings in court).

- A) Failure to have an initial consultation;
- B) Failure by defenders to meet with incarcerated clients;
- B) Failure to have confidential meetings with clients (often just

Investigation & Legal Analysis

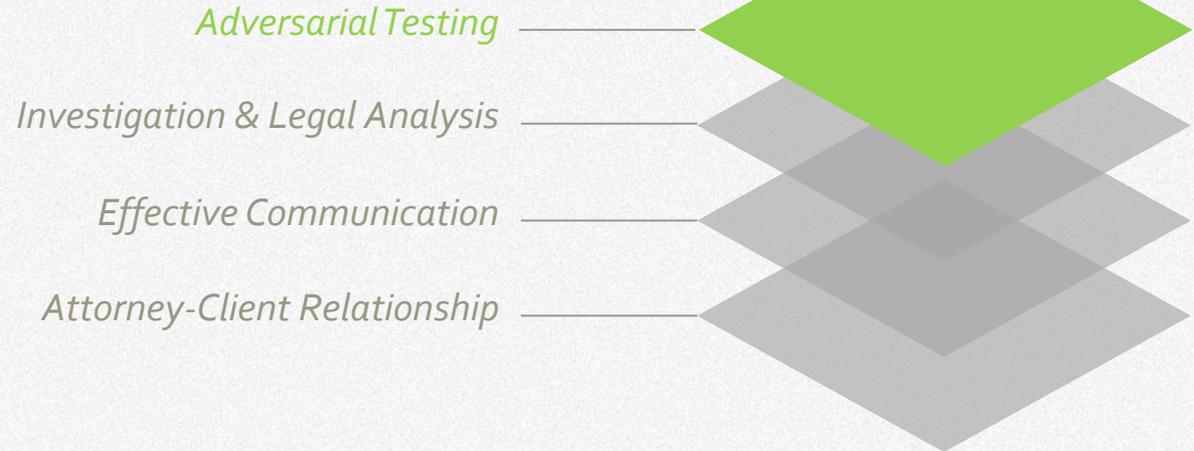


"In general, counsel presumed that the police officers had done their jobs correctly and negotiated a plea bargain based on that assumption."

The Court found the investigation and analysis of cases defended by Mt. Vernon public defenders to be woefully inadequate. In fact, after reviewing thousands of cases, they found almost *no evidence* that any investigations were done on the cases and saw no notes in the files indicating that there was any legal analysis conducted regarding the elements of the crime charged or possible defenses. There was also no indication that elements of the crime or possible defenses were ever

discussed with clients.

Adversarial Testing

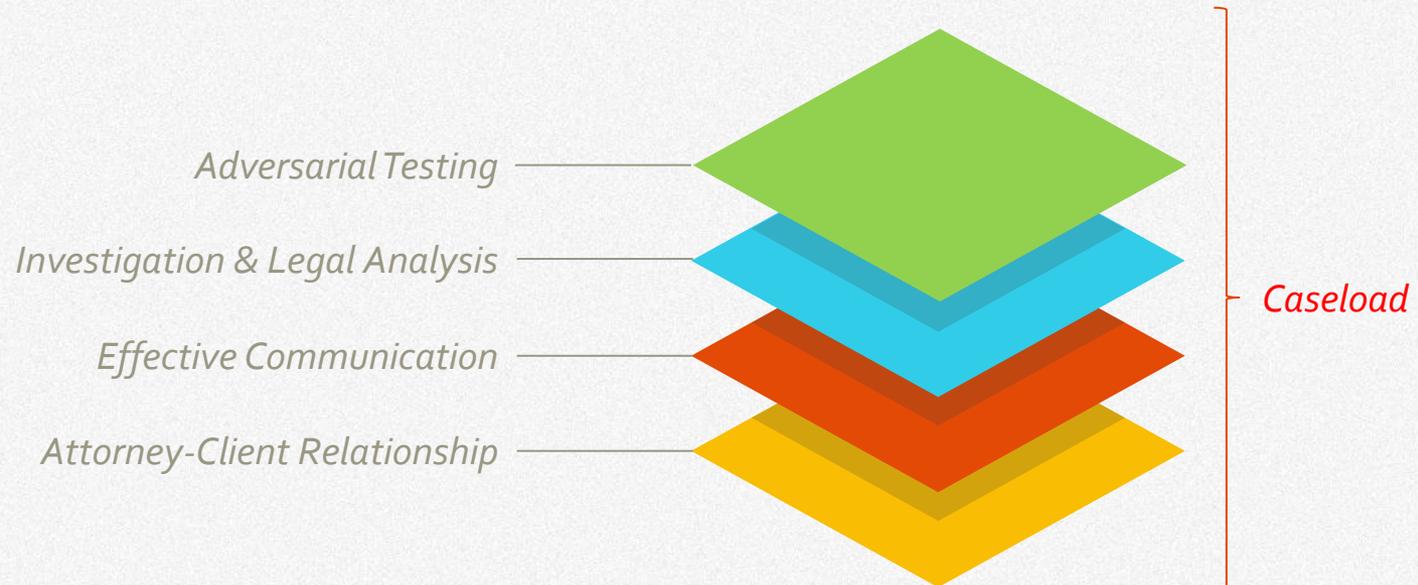


“When asked to explain why there were so few trials during his tenure as a public defender, Mr. Witt essentially said trials were unnecessary because “we all knew where we were going.””

The Court found “adversarial testing” of prosecution cases (defined as motions and trials) to be a very important part of a properly functioning public defense system. We have probably all seen this in action – when public defenders challenge sloppy investigations with motions and weaker cases with trials, the result is better investigations, less invasion of rights, and more attention paid by prosecutors to case and charge filing discretion.

Again, the Court found glaring problems in this regard. Specifically, a statistical analysis found substantive hearings to be extremely rare, and the number of cases going to trial to both incredibly small and “wildly out of line” with the number of trials occurring in nearby (and sometimes overlapping – ie Skagit County) jurisdictions.

Caseload



“While a hard caseload limit will obviously have beneficial effects and the WA Supreme Court’s efforts in this area are laudable, the issue [is]... constitutionally adequate representation for the client and...the integrity of our adversarial criminal justice system.”

As can be gleaned by the quote to the left of this slide, while the Court recognizes the benefits of caseload limits and fully acknowledges that many of the previously identified problems with Mt. Vernon’s system were the result of the overwhelmingly voluminous caseloads there, it is the adequacy of representation that ultimately matters.

This is further reinforced by many instances in the opinion where the Court makes the point of indicating

that it did not intend to prescribe any “hard and fast” numeric requirements (even as to number of pre-trial motions and trials held).

In other words, caseload numbers by themselves are not indicative of adequacy of representation but, instead, serve to create an environment where adequate representation can exist.

How do we stack up?

*Attorney-Client
Relationship*

Effective Communication

*Investigation and Legal
Analysis*

Adversarial Testing

Caseload

Attorney-Client Relationship

*DATA NOT CURRENTLY READILY
AVAILABLE*

See discussion on this topic later in this publication. No immediate plans are in place for collecting or monitoring data for this metric but best practices are recommended.

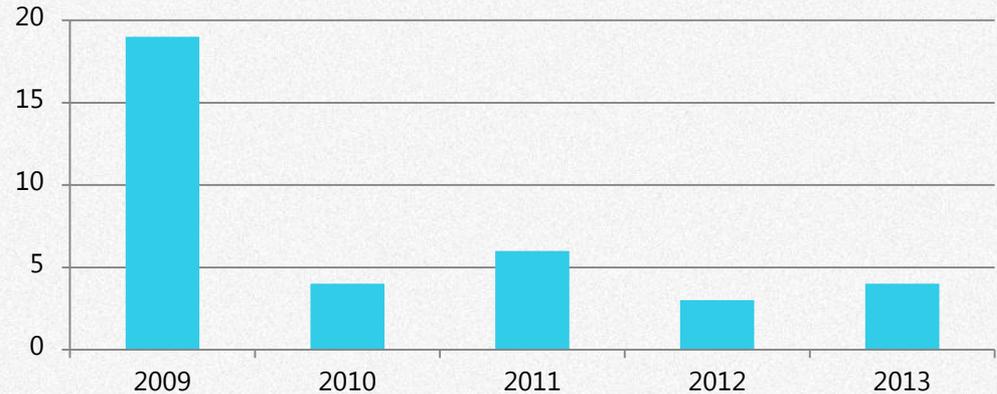
The Court spoke at length about the importance of an effective and “real” attorney-client relationship. For practical purposes this really does form the bedrock of an effective defense.

Attorney Complaints

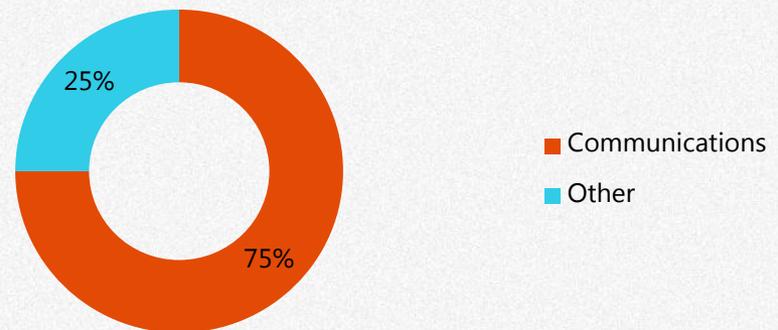
Effective Communication

Failure to communicate is probably the #1 reason why clients complain about their public defenders. OPD's complaint resolution process is designed to hopefully facilitate communication before any complaints escalate to a "Formal Complaint" status.

Number of Complaints Received



Nature of Complaint



Jail Visits

Effective Communication

*DATA NOT CURRENTLY READILY
AVAILABLE*

See discussion on new jail visitation system for information on how data will be collected and published from here on out.

Visiting incarcerated clients is an essential aspect of effective communication.

While the Court did not speak as to this issue at length in its opinion, Plaintiff's counsel described how collecting this data was a very important part of the pre-lawsuit investigation.

Investigation & Legal Analysis

DATA NOT CURRENTLY READILY AVAILABLE – not readily published from Superior Court case data, not available at all for District Court cases.

See discussion on this topic in the next chapter for recommended best practices and requests for data.

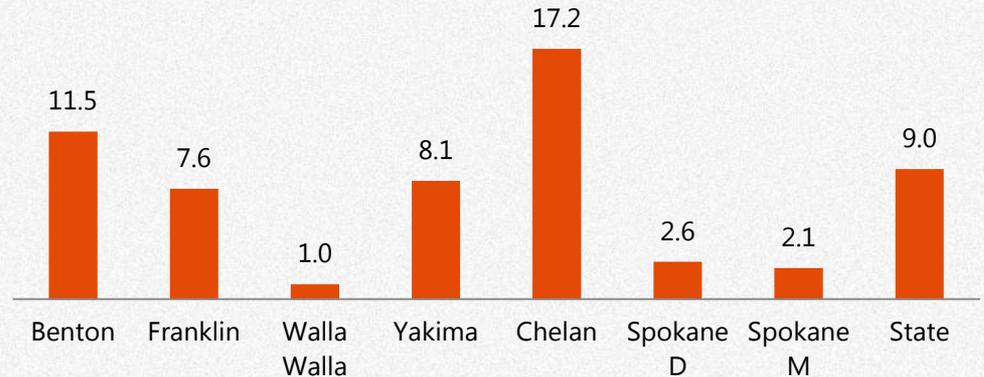
Without investigation and legal analysis it is impossible to mount an effective defense to a criminal case. However, the scope and complexity varies greatly from case to case.

Trials Held – District Court

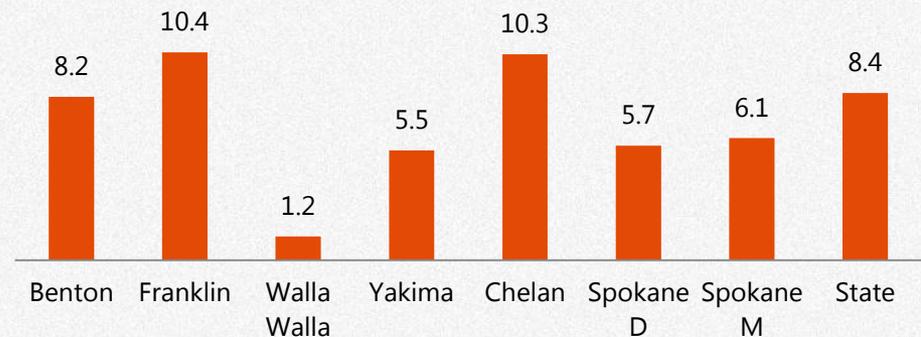
Adversarial testing

While, judging strictly by number of trials held, Benton County appears to be doing quite well both as compared to state averages and other Eastern WA jurisdictions, this is an incomplete measure since the percentage of these cases that are public defense cases is not easily known.

2013 District Court Trials per 1,000 Cases Filed



2009-2013 Avg District Court Trials per 1,000 Cases Filed

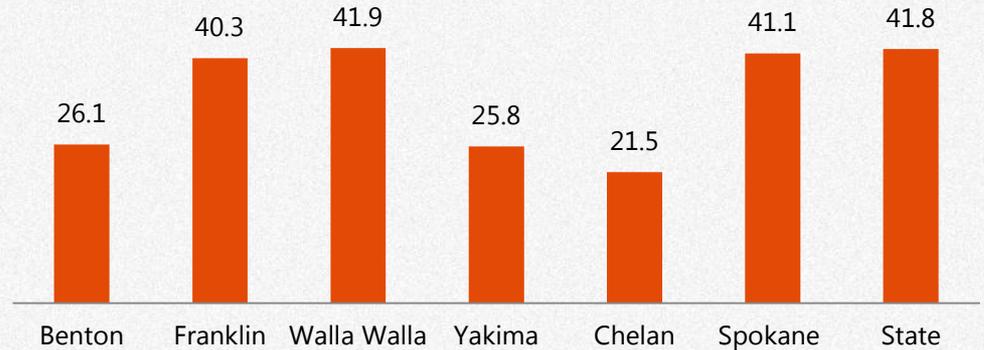


Trials Held – Superior Court

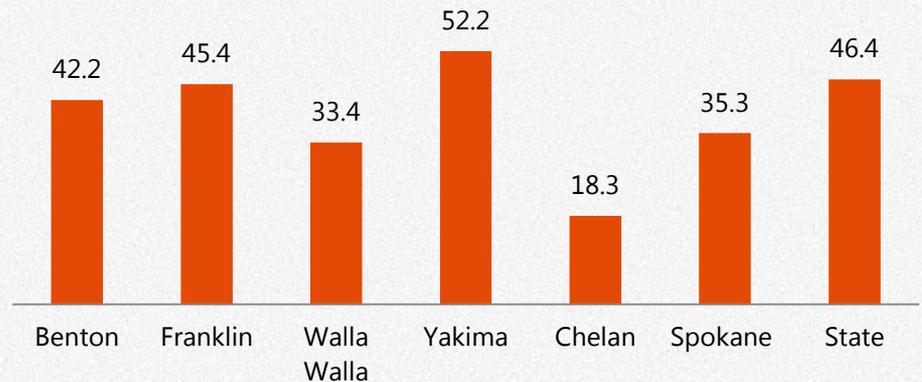
Adversarial testing

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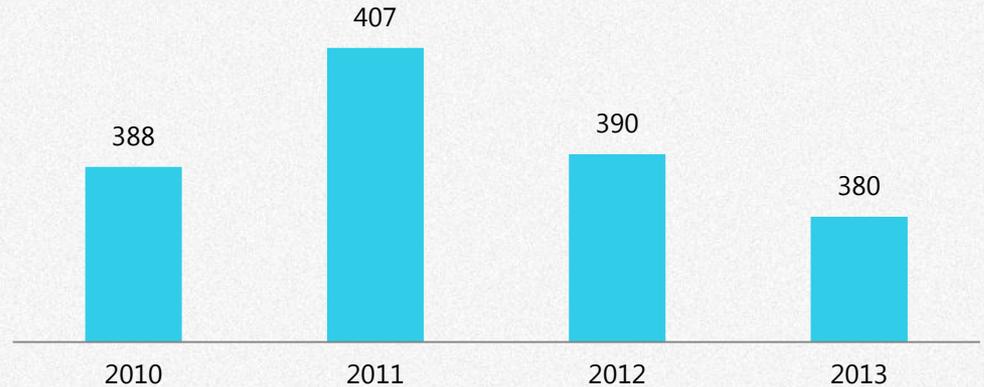


Caseloads

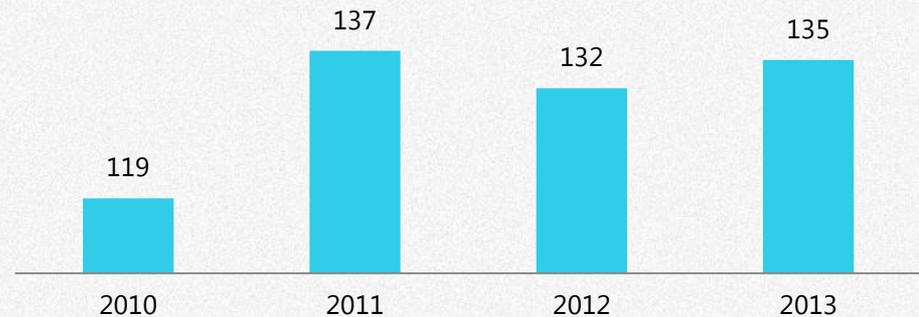
The Right Environment for Effective Representation

The Court was very emphatic about stating that having caseloads within workable limits and that meet standards is only the beginning – ie creating an environment wherein effective representation can take place.

Benton County District Court Per Defender Caseloads



Benton County Superior Court Per Defender caseloads



Moving Forward

*Attorney-Client
Relationship –
Recommended Practices*

*Effective Communication
– Data Monitored*

*Investigation and Legal
Analysis – Request for
Data*

*Adversarial Testing – Data
Monitored*

Caseloads

Attorney-Client Relationship

Best Practice Recommendations



- Schedule initial consultations. The Court recommends this happen before the first pre-trial appearance.
- Visit in-custody clients **within 72 hours** of appointment. The Court was very adamant about this.
- Use checklists. Case intake checklists are being developed for in-house use but will be available as a tool for contractors as well.



In addition to publishing these best practices, every public defense client will be provided with a copy of the newly drafted **Public Defense Client Statement of Rights**. The Rights contained in this document are taken directly from the opinion in *Wilbur v. Mt. Vernon*.



Remember, a little bit of problem solving can go a long ways. When you really get to know a client and his/her circumstances, you can sometimes help them by:

- Referring them to public agencies or non-profits that can help their situation (contact OPD for more information about available resources).
- Properly advising them about collateral consequences.

Attorney Complaints

Effective Communication

Failure to communicate is probably the #1 reason why clients complain about their public defenders. OPD's complaint resolution process is designed to hopefully facilitate communication before any complaints escalate to a "Formal Complaint" status.

OPD's complaint resolution process recognizes two types of client complaints: a) Informal Complaints; and b) Formal Complaints.

Informal Complaints almost always pertain to inability to contact public defenders and OPD's only role in those situations is to facilitate the communication after which the transaction is regarded as closed.

Formal Complaints, on the other hand, go through the complaint resolution process and formal findings are made and recorded in the public defender's file.

Complaints and a complaint resolution process are obviously important but constitute a poor and extremely reactive manner of promoting effective communication. OPD is in the process of developing "best practice" tools to facilitate effective communication and is also looking into the feasibility of a regular post-representation satisfaction questionnaire to be a bit more proactive in encouraging and monitoring effective communication.

Jail Visits

Effective Communication

Visiting incarcerated clients is an essential aspect of effective communication.

While the Court did not speak as to this issue at length in its opinion, Plaintiff's counsel described how collecting this data was a very important part of the pre-lawsuit investigation.

Currently the Jail visitation log system at the Benton County Jail is simply a paper log kept in a three ring binder and archived thereafter and therefore not very conducive to the extraction or reporting of useful data.

Fortunately, effective the beginning of April, 2014, a new system, which was developed in cooperation between BFOPD, Benton County IT and the Sheriff's Office, will record all jail visits electronically by database and therefore provide much needed data to allow us to monitor and report on our performance on this important measure.

To ensure that your visits are properly recorded, please remember to always identify yourself not only as an "attorney" when signing in, but also an "OPD attorney." This will ensure the proper categorization and recording of your visits.

Investigation and Legal Analysis

Best Practice Recommendations



- Have a set manner in which you review and prep all of your files for defense.
- Consider the use of Case Defense Templates. These have been developed for use in-house and are mandatory with OPD Staff Defenders. These are also available as a tool for contract defenders.
- OPD has the beginnings of a case bank. Further work on this would be great but needs your help.



Remember that documentation is critical. The reason why the court in *Mt. Vernon* was able to conclude that almost no investigation or legal analysis in the cases defended by Mt. Vernon's public defenders is because a review of thousands of their case files showed no such indication. **Therefore if there is no documentation, it never happened!**

Important note about investigator/expert funding in Benton County District Court.

OPD is working toward getting funding but while it is managed by District Court, please make motions as required and make sure we get a copy of the motions to justify the need for funding.

Trials Held

Adversarial testing

Data will be tracked for trials held since this was identified as an important indicator for the Adversarial Testing metric. Specifically, the following will be tracked and published:

Number of trials held as compared to regional counties

Number of trials conducted by public defense counsel as a proportion of total trials held.

While, judging by the sheer number of trials held, Benton County appears to be doing quite well both as compared to state averages and other Eastern WA jurisdictions, this is an incomplete measure since the percentage of these cases that are public defense cases is not easily known.

CONCLUSION

Effective and adequate public defense isn't just a good idea, it is legally required and is the very reason our office exists.

OPD is committed to creating a system and environment whereby effective and adequate public defense isn't just **possible** and **facilitated**, but where it actually **flourishes** and **can be measured**. I hope everyone who is part of the OPD team shares this vision.

ERIC HSU, Public Defense Manager