



Internet Email: opd@opd.wa.gov

**WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE**

(360) 586-3164
FAX (360) 586-8165

MEMORANDUM

May 29, 2009

**TO: County and City Elected Officials;
County and City Administrators;
Superior, District and Municipal Court Judges**

FROM: Joanne Moore, Director, Washington State Office of Public Defense

RE: Indigent Defense Services Contract Issues

The Washington State Office of Public Defense (OPD) has a program to assist county officials, city officials, judicial officers, and public defense attorneys across the state regarding indigent defense issues, including local contracts. Indigent defense contract issues have recently been in the news, and as part of OPD's statewide outreach we have heard concerns regarding certain indigent defense contract provisions and practices.

This memo is intended as a tool to help counties and cities review existing indigent defense contracts, and, if necessary, prepare contract amendments. OPD encourages all contract administrators and attorneys to examine existing contracts for compliance with statute, court rules, Rules of Professional Conduct, and adopted local public defense plans.

The Rules of Professional Conduct (RPCs), commonly known as attorney "ethics rules," are adopted by the Washington Supreme Court and govern the professional conduct of attorneys licensed in the state. The violation of an RPC can have serious negative consequences for the attorney involved. In particular, RPC 1.8 (m) prohibits attorneys from entering into three types of contract provisions as explained below.

Attorney compliance with the RPCs is mandatory.

RCW 10.101.060 requires counties and cities that receive state funding for criminal indigent defense address a number of issues in indigent defense contracts. RCW 10.101.030 mandates that local governments adopt standards for indigent defense services, and recommends the Washington State Bar Association (WSBA) Standards for Indigent Defense Services as guidelines for local standards. **The WSBA Standards, while not mandatory, reflect "best practices."**

The following list of potential contract issues is based on recent concerns identified by OPD. The list does not attempt to represent all possible issues that could be associated with a particular indigent defense contract. Identifying and remedying specific contract deficiencies is the responsibility of the contracting authority and its contractors.

I. *RPC 1.8(m) Mandatory Requirements for Attorneys:*

- a. **Costs of Providing Conflict Counsel** – An attorney shall not make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting attorney or law firm to bear the cost of providing conflict counsel. *(See also RCW 10.101.060.)*
- b. **Costs of Providing Investigation or Expert Services** – Costs for providing investigation or expert services shall not be paid by the contracting attorney or law firm, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the attorney, law firm, or law firm personnel. *(See also RCW 10.101.060.)*
- c. **Sub-Contracting Attorney** – An attorney shall not knowingly accept compensation for the delivery of indigent defense services from an attorney who has entered into a current agreement in violation of paragraphs I.a. or I.b. above.

II. *Chapter 10.101 RCW Mandatory Requirements for Counties and Cities that Receive Chapter 10.101 RCW Funds:*

- a. **Compensation for Extraordinary Cases** – Indigent defense contracts should address the subject of compensation for extraordinary cases. *(See RCW 10.101.060.)*
- b. **Reports on Attorney Activity** – Each attorney or law firm that contracts to perform indigent defense services for a county or city shall report to the county or city hours billed for nonpublic defense legal services in the previous calendar year, including number and types of private cases. *(See RCW 10.101.050.)*
- c. **Training** – Each Chapter 10.101 RCW applying county and city must require that attorneys providing indigent defense services attend training approved by the Office of Public Defense at least once per calendar year. *(See RCW 10.101.050 and RCW 10.101.060.)*
- d. **Qualifications of Attorneys** – Each county receiving Chapter 10.101 RCW must require attorneys who handle the most serious cases (includes all cases of murder in the first or second degree, persistent offender cases, and class A felonies) to meet specified qualifications as set forth in the Washington State Bar Association endorsed standards for public defense services or participate in at least one case consultation per case with Office of Public Defense resource attorneys who are so qualified *(See RCW 10.101.060.)*

III. *WSBA Indigent Defense Standards Recommendations (mandatory if WSBA Indigent Defense Standards are incorporated in local ordinance, resolution, or court rule)*

- a. **Caseload Limits and Types of Cases** – Indigent defense contracts should specify the types of cases for which representation is being provided and the maximum number of cases each attorney is expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. *(See WSBA Standards for Indigent Defense Services, Standard Three: Caseloads Limits and Types of Cases.)*
- b. **Administrative Costs** – Indigent defense contracts should provide for or include support and administrative costs associated with providing legal representation. Public defense attorneys should have an office that accommodates confidential meetings with clients and

receipt of mail, and adequate telephone services to ensure prompt responses to client contact. (See *WSBA Standards for Indigent Defense Services, Standard Five: Administrative Costs and WSBA Standards for Indigent Defense Services, Standard Seven: Support Services.*)

- c. **Reports on Attorney Activity** – It is recommended that the contracting defense attorney or law firm maintain a case-reporting and management information system that includes number and types of cases, attorney hours, and disposition. This information should be provided regularly to the county or city. (See *WSBA Standards for Indigent Defense Services, Standard Eight: Reports of Attorney Activity.*)
- d. **Sub-contracting** – The contracting defense attorney or law firm should not sub-contract with another attorney or law firm to provide legal representation and should remain directly involved in the provision of representation. (See *WSBA Standards for Indigent Defense Services, Standard Twelve: Substitution of Counsel.*)
- e. **Limitations on Private Practice of Contract Attorneys** – Contracts for indigent defense representation with private attorneys or law firms should set limits on the amount of privately retained work that can be accepted by the contracting attorney. These limits should be based on the percentage of a full-time caseload which the public defense cases represent. (See *WSBA Standards for Indigent Defense Services, Standard Thirteen: Limitations on Private Practice of Contract Attorneys.*)
- f. **Cause for Termination of Services** – Indigent defense contracts should include the grounds for termination of the contract by the parties. (See *WSBA Standards for Indigent Defense Services, Standard Sixteen: Cause of Termination of Defender Services and Removal of Attorney.*)
- g. **Non-Discrimination** – Indigent defense contracts should require the contracting attorney or law firm to comply with all federal, state, and local non-discrimination requirements. (See *WSBA Standards for Indigent Defense Services, Standard Seventeen: Non-Discrimination.*)

If you have any questions, please contact an OPD Public Defense Services Manager. Kathy Kuriyama is at 360 586-3164 ext. 114 or kathy.kuriyama@opd.wa.gov . David DeLong is at 360 586-3164 ext. 110 or david.delong@opd.wa.gov.

RESOURCES (verified as of 5/29/09)

Washington Rules of Professional Conduct:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC

WSBA Standards for Indigent Defense Services:

<http://www.opd.wa.gov/TrialDefense/TDCriminalDefense.htm>

Washington Indigent Defense Services Act (Chapter 10.101 RCW)

<http://apps.leg.wa.gov/RCW/default.aspx?cite=10.101>

Washington State Office of Public Defense: www.opd.wa.gov