

Determining and Verifying Indigency for Public Defense

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Executive Summary

The U.S. Constitution, the Washington Constitution, and numerous state statutes and court rules ensure the right to legal counsel for indigent persons facing certain court proceedings, including criminal charges, civil commitment, and child welfare cases. When an individual has a right to counsel, the government is obligated to provide a competent public defense attorney to represent that person if he or she is financially unable to hire an attorney. This report examines the policies and practices associated with determining whether a person is indigent and eligible for public defender services.

In addition to ensuring the constitutional right to counsel, systematic application of uniform indigency criteria can increase fairness and consistency in public defense appointments, improve accountability, and reduce government costs by appropriately limiting appointments to those determined to be eligible. Although Washington's indigency statute provides uniform criteria consistent with recognized best practices, these are not always systematically and consistently applied statewide, according to a 2013 survey of trial courts. Some jurisdictions engage in detailed indigency screening and verification for every person who requests public defense services. Others take a more limited approach to screening.

With a goal of supporting indigency screening that complies with constitutional and statutory requirements and that can be implemented by diverse courts throughout the state, this report offers several recommendations, including:

- OPD should annually update and distribute the prescribed screening form.
- OPD should periodically survey and publish a statewide schedule of private attorney fees to assist local screeners who are required to consider the usual and customary charges of attorneys.
- OPD should develop a training protocol for courts and screeners that can be accessed electronically.
- Courts should include comprehensive presentations on indigency screening for new judicial officers.
- The Legislature should clarify the statutory indigency screening requirements consistent with the Supreme Court's 2011 ruling in *State v. Hecht*.

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Introduction

When a person involved in a court action has a constitutional or statutory right to be represented by legal counsel, and is indigent, he or she may be eligible for a publicly funded attorney – commonly known as a public defender. The enabling statute for the Washington State Office of Public Defense (OPD) requires the agency to, among other duties, “recommend criteria and standards for determining and verifying indigency ... compile and review the indigency standards used by other state agencies, and periodically submit the compilation and report to the legislature on the appropriateness and consistency of such standards.”¹

Since the first report in 2001, OPD’s periodic reviews of public defense indigency screening have helped identify and implement a variety of system improvements, including updated statewide court rules for indigency determinations on appeal, a streamlined indigency screening form for the trial courts, as well as greater awareness and utilization of provisional attorney appointments consistent with statutory requirements.

In keeping with previous reports, this document offers a brief history of the right to counsel; examines the current state of indigency screening law in Washington, including applicable case law, statutes, and court rules; and explores how Washington courts apply in day-to-day practice the requirements for determining whether a person is indigent and eligible for a public defender. The report also summarizes indigency criteria common in other states. Finally, the report includes recommendations to ensure indigency screening that complies with the U.S. and Washington constitutions, and conserves taxpayer dollars while ensuring individual due process.

¹ RCW 2.70.020(5). Criteria and standards for determining and verifying indigency are not to be confused with public defense attorney quality standards for client representation, which also are required by statute and court rule and have been promulgated by the Washington Supreme Court, the Washington State Bar Association and the Washington Defender Association.

Background

A fundamental guarantee of the U.S. Bill of Rights, the Sixth Amendment to the Constitution provides that a person accused in a criminal prosecution is entitled “to have the assistance of counsel for his defense.”²

Beginning early in the 20th Century the U.S. Supreme Court issued the first³ in a long line of decisions that ultimately, over several decades, applied the Sixth Amendment right to counsel to state court proceedings through the due process clause of the Fourteenth Amendment. Perhaps the most well-known in this line of cases is the 1963 decision in *Gideon v. Wainwright*,⁴ which established the right to counsel in state courts for all indigent defendants charged with felonies. Nine years later, in *Argersinger v. Hamlin*,⁵ the Court further recognized the right in all criminal prosecutions involving the possibility of incarceration. *In Re Gault*,⁶ ensured the right for juveniles charged with criminal offenses. Other U.S. Supreme Court decisions have systematically addressed the right to counsel at various stages of a case, including pre- and post-trial proceedings.⁷

While those cases outline a broad federal constitutional basis for the right to counsel, Article I, Section 22 of the Washington Constitution also enumerates certain rights of the accused, including the right to counsel.⁸ In addition, many Washington statutes and court rules specifically provide a right to counsel for indigent persons. In Washington, whenever someone is charged with a crime or juvenile offense, faces commitment to a mental health facility, has their children removed by the state, or otherwise faces a loss of liberty, that person has the right to be represented by a lawyer, and if he or she is indigent, to have a public defense attorney appointed. The Washington Supreme Court has overturned convictions where counsel was not appointed.⁹

² U.S. Const. amend. VI.

³ *Powell v. Alabama*, 287 U.S. 45 (1932), which established a due process right to counsel in state capital cases.

⁴ 372 U.S. 335 (1963).

⁵ 407 U.S. 25 (1972).

⁶ 387 U.S. 359 (1970)

⁷ See *Miranda v. Arizona*, 384 U.S. 437 (1966) (custodial interrogation); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *U.S. v. Wade*, 388 U.S. 218 (1967) (post-indictment lineups); *Kirby v. Illinois*, 406 U.S. 682 (1972) (pre-indictment lineups); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment); *Rothgery v. Gillespie County*, 554 U.S. 191 (2008)(initial appearance).

⁸ Wash. Const. Art. I, Sec. 22. “ ... the accused shall have the right to appear and defend in person, or by counsel ...”

⁹ See, e.g., *McInturf v. Norton*, 85 Wash.2d 704 (1975).

In 1989, following extensive study by the legislatively established “Washington Indigent Defense Task Force,”¹⁰ the Legislature approved a variety of indigent defense reforms, including requirements that cities and counties adopt standards for the delivery of public defense services as well as apply certain criteria for determining whether a person is indigent and eligible for a public defender. Prior to 1989, there were no statewide indigency criteria and many cities and counties did not have any routine screening or cost-recovery procedures in place. Continued attention over two decades built on the 1989 reforms, and in 2005 for the first time included a modest amount of state funding to promote quality improvements in trial-level public defense.

In Washington trial courts, an indigent person’s right to counsel is generally addressed by local public defense programs funded and administered largely by counties and cities. Even with the 2005 statutory funding authorization, state contributions account for less than 5 percent of all funding for trial-court criminal indigent defense. For certain specialized types of cases the Washington State Office of Public Defense (OPD) is funded by the state to contract with attorneys to represent indigent clients in the trial courts. OPD also provides the attorneys for indigent persons who pursue a right to appeal in the Washington Court of Appeals and the Supreme Court.

¹⁰ See Washington Indigent Defense Task Force, *Indigent Defense Services in Washington*, February 1989, and *Indigent Defense in Washington State*, June 1990.

Indigency Screening Policies

Legal Authority for Determining Indigency and Appointing Counsel in Washington Courts

When an individual has a constitutional or statutory right to counsel, the government is obligated to provide a competent public defense attorney to represent that person if he or she is financially unable to hire an attorney. A review of regulations throughout the country finds Washington within the mainstream of states in its approach to determining whether a person qualifies for public defense services.¹¹

In Washington State, case law, court rules, and statutes form the basis for determining whether a person is indigent and eligible for publicly funded legal counsel. Statewide court rules adopted by the Supreme Court and statutes adopted by the Legislature both embody the basic requirements established in case law. While the statutes and court rules are worded differently and typically do not cross reference one another, they are not in conflict.

Case Law

Case law offers guidance on making a determination of eligibility for indigent defense services, and federal and state courts have consistently and clearly provided that the definition of “indigent” cannot be narrowly limited to require complete destitution. In its 1948 decision in *Adkins v. E.I. Dupont Co.*,¹² the U.S. Supreme Court stated:

We cannot agree ... that one must be absolutely destitute to enjoy the benefit of the [federal *in forma pauperis*] statute. We think an affidavit is sufficient which states that one cannot, because of his poverty, pay or give security for costs ... and still be able to provide himself and dependents with necessities of life.

Likewise, in *Hardy v. United States*,¹³ the Court admonished:

Indigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.

¹¹ See Appendix C for an overview of indigency considerations in the various states.

¹² 335 U.S. 331 (1948).

¹³ 375 U.S. 277, 289 n.7, (1964).

In addition, the Washington Supreme Court held in *Morgan v. Rhay*:

To qualify for appointed counsel, it is not necessary that an accused person be utterly destitute or totally insolvent. Indigence is a relative term, and must be considered and measured in each case by reference to the need or service to be met or furnished. In connection with the constitutional right to counsel, it properly connotes a state of impoverishment or lack of resources which, when realistically viewed in the light of everyday practicalities, effectually impairs or prevents the employment and retention of competent counsel.¹⁴

A 2001 Spokane County Superior Court decision further clarified that the indigency determination process cannot systematically delay appointment of public defense attorneys, and required appointment of counsel on a provisional basis pending a determination of indigency.¹⁵

These baseline requirements are reflected in current Washington policies for determining indigency. As discussed in the New Developments section below, recent case law has further refined the definition of “indigent and able to contribute” and clarified the interplay between Washington statutes and court rules.¹⁶

Court Rules

The right to counsel for indigent persons is addressed in a number of statewide procedural rules promulgated by the Washington Supreme Court, including the Rules of Appellate Procedure (RAP), Superior Court Criminal Rules (CrR), Juvenile Court Rules (JuCR), Superior Court Special Proceedings Rules – Criminal (SPRC), Criminal Rules for Courts of Limited Jurisdiction, (CrRLJ), and the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ).

For example, CrR 3.1 and CrRLJ 3.1 provide that in criminal matters the state’s trial courts shall provide a lawyer to any person “who is financially unable to obtain one without causing substantial hardship to the person or to the person's family. A lawyer shall not be denied to any person merely because the person's friends or relatives have resources adequate to retain a lawyer or because the person has posted or is capable of posting bond.”¹⁷ The rules contemplate that courts will screen for indigency, and further provide that “information given to assist in the determination of whether he or she is financially able to obtain a lawyer shall be under oath....”¹⁸ The court rules also recognize that some persons who cannot afford to pay the full costs of a private attorney nonetheless may have the ability to pay a portion of the costs, and authorize the

¹⁴ *Morgan v. Rhay*, 78 Wash.2d 116, 119 (1970).

¹⁵ *Knox v. Spokane County District Court*, Case No. 00205858-1, Writ of Mandamus and Order, at 9 (February 1, 2001).

¹⁶ See *State v. Hecht*, 173 Wash.2d 92 (2011).

¹⁷ CrR 3.1(d)(1) and CrRLJ 3.1(d)(1).

¹⁸ CrR3.1(d)3) and CrRLJ 3.1(d)(3).

courts to condition assignment of a public defender upon payment of some amount.¹⁹ Similarly the rules provide that upon finding certain services other than a lawyer are needed for an adequate defense, and that the defendant is financially unable to obtain them, the court or its designee shall authorize the services at government expense.²⁰ The criminal arraignment rules further provide that if a defendant is not represented at arraignment and is indigent and unable to obtain counsel, counsel shall be assigned by the court,²¹ unless the defendant knowingly and voluntarily waives the right to counsel.²²

Juvenile Court rules ensure lawyers for juveniles and their parents in certain child welfare proceedings²³ as well as for youth facing criminal charges²⁴ and offers of diversion.²⁵ The Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) authorize the limited jurisdiction courts to handle questions relating to indigency for municipal and district court decisions on appeal to Superior Court.²⁶

Similar rules apply for public defense services in the appellate courts. RAP 15.2 requires a party who has a constitutional or statutory right to appeal and who seeks appellate review partially or wholly at public expense to submit a motion to the trial court, which shall “grant the motion for an order of indigency if the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses of appellate review... .”²⁷ While the determination of indigency for appeals remains a decision of the trial court, a 2005 amendment to RAP 15.2 established that the appellate court, rather than the trial court, is the proper entity to appoint appellate public defense attorneys, who are paid by the state pursuant to contracts with Washington State OPD.

Statutes

Numerous Washington statutes specifically codify the right to counsel for various types of court actions. A few statutes require that a lawyer be appointed to represent someone who appears without counsel in a particular type of court proceeding, regardless of the person’s financial status. However, for the most part, statutes provide that only persons who are determined to be indigent will have public defenders appointed to represent them.

¹⁹ CrR 3.1(d)(2) and CrRLJ 3.1(d)(2).

²⁰ CrR 3.1(f) and CrRLJ 3.1(f).

²¹ CrR 4.1(c) and CrRLJ 4.1(c).

²² CrR4.1(d) and CrRLJ 4.1(d).

²³ JuCr 9.2

²⁴ *Id.*

²⁵ JuCr 6.2

²⁶ RALJ 4.1.

²⁷ RAP 15.2(b)(1).

The financial criteria and screening requirements for determining indigency are found primarily in Chapter 10.101 RCW, which states that:

An indigent person is one who, at any stage of a court proceeding, is:

- (a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, supplemental security income; or
- (b) Involuntarily committed to a public mental health facility; or
- (c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; or
- (d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.²⁸

Consistent with the requirements articulated in *Rhay*, the statute also directs courts in determining indigency to take into consideration the anticipated length and complexity of the proceedings, as well as the usual and customary charges of attorneys in the community, “and any other circumstances presented to the court which are relevant to the issue of indigency.”²⁹

Chapter 10.101 RCW allows persons to be deemed “indigent and able to contribute,” that is, they may be found to have some personal assets available to pay a portion of their anticipated defense costs.³⁰ Persons who are found financially able to contribute to their defense costs are required under the statute to sign a promissory note. Recent Washington case law, discussed in the New Developments section below, further addresses the category of indigent and able to contribute and authorizes financial contribution from persons receiving public assistance. Regardless of whether a person is determined to be indigent, indigent and able to contribute, or not indigent, if convicted he or she may be subject to recoupment and assessed fines and court costs including attorney fees.

Applicants for public defender services are required to sign an affidavit swearing under penalty of perjury that the income and assets they report are complete and accurate, and that they will notify the court of any change in financial status.³¹ While the court is not required to independently investigate the income and assets reported by each applicant, the statute provides that the information is subject to verification.³²

²⁸ RCW 10.101.010(3).

²⁹ RCW 10.101.020(2).

³⁰ RCW 10.101.010(4).

³¹ RCW 10.101.020(5).

³² RCW 10.101.020(6).

If the court or its designee cannot complete the screening process to determine whether a person is eligible for public defense services before “the first services are to be rendered,” which generally is the arraignment or first appearance in court, the court must appoint counsel on a provisional basis.³³ However, if it is later determined that the person is not indigent, then the court will terminate a provisional appointment.

The Washington indigency statute is among several favorably cited in a 2008 report by New York University Law School’s Brennan Center for Justice.³⁴ Other states are recognized for various elements of their indigency statutes, including Oregon and Massachusetts for uniform screening criteria; Louisiana for presumptive eligibility based on public assistance; Nevada for presumptive eligibility based on residence in a mental health facility; and Vermont for protecting applicant confidentiality in the screening process. Washington statutes and court rules include these elements as well.

³³ RCW 10.101.020(4).

³⁴ Access to Justice Program, Brennan Center for Justice, New York University School of Law, *Eligible for Justice: Guidelines for Appointing Defense Counsel*, 2008.

Applying the Law in Washington

Indigency Screening in the Trial Courts

In addition to ensuring the constitutional right to counsel, systematic application of uniform indigency criteria can increase fairness and consistency in public defense appointments, improve accountability, and reduce government costs by appropriately limiting appointments to those determined to be eligible.³⁵ Although the Washington indigency statute provides uniform criteria consistent with recognized best practices, these are not always systematically and consistently applied statewide, according to recent survey responses summarized below.

Washington trial courts predominantly are the entities that determine whether defendants/respondents are indigent and eligible for public defense services. The indigency statute – Chapter 10.101 RCW – allows courts to delegate indigency screening to non-court entities or individuals, but relatively few report that they do so. In a 2013 survey, the vast majority of responding cities and counties identify the judge, judge’s staff, or court staff as responsible for gathering and verifying financial information to determine eligibility for public defense services in their courts.

Twelve responding jurisdictions report using a separate non-court entity with professional staff whose primary job is to conduct indigency screening. In addition, several cities and counties say jail, probation or pre-trial services employees screen criminal defendants for indigency as secondary job functions. Just a few jurisdictions that use a non-court screening entity also authorize the entity to directly appoint public defense counsel for applicants who are determined to be indigent -- a practice recognized as reducing judicial work and saving court time.³⁶

OPD training and screeners conferences. Several times in the past decade OPD has coordinated statewide conferences to discuss emerging issues related to indigency screening. Attendees have included local court staff and county employees whose primary job is screening for public defense eligibility. The most recent OPD conference in May 2010 was held at the Snohomish County Office of Public Defense with approximately 25 attendees from around the

³⁵ *Id.* at 2. The Brennan Center highlights financial screening as a critical step among its recommended best practices for courts and other entities tasked with determining eligibility for public defense services. “Well-designed screening can save money by ensuring that communities provide counsel only to individuals who are unable to afford their own lawyers. ...And it can usefully reduce the risk of backlash against the public defense system fueled by perceptions that taxpayer money is used to represent wealthy defendants.” *Id.*

³⁶ See Elizabeth Neeley & Alan Tomkins, *Evaluating Court Processes for Determining Indigency*, The Journal of the American Judges Association, 2007.

state. The agenda for the daylong program included case law updates, legislative updates, and a round-table discussion of best practices and challenges.

Written Application Form

When a court or its designee inquires whether a person is indigent, its opinion as to indigency is reported on a form prescribed by state OPD, based on information obtained from the defendant/respondent and subject to verification.³⁷ In many jurisdictions jail staff provide indigency applications to persons who are in custody pending their first court appearance. Defendants unable to fill out the paperwork because of language or literacy barriers may receive assistance from jail staff or other designated screeners. The indigency statute requires that information provided by defendants/respondents in the screening process shall be kept confidential and not be available to prosecutors.³⁸

More than 89 percent of jurisdictions responding to the 2013 survey report that they currently use the OPD form or a substantially similar screening form. Although local screening practices vary, use of the OPD form helps ensure greater statewide uniformity, consistent with statutory requirements and recommended best practices.³⁹ OPD periodically updates the form to reflect changes in the law; an updated form is attached at Appendix B and is available at www.opd.wa.gov.

In determining indigency, the court or designated screening entity must take into consideration the indigency criteria in RCW 10.101.010 as well as the length and complexity of the proceedings, the usual and customary fees of attorneys in the community for similar matters, the availability and convertibility of any personal or real property, the accused's earning capacity and living expenses, credit standing, outstanding debts and liabilities and family independence, as well as any other circumstances which could impair or enhance the ability to advance or secure such attorney's fees as would ordinarily be required to retain competent counsel.⁴⁰ Public defense services may not be denied based on the financial resources of the applicant's family or friends, although a spouse's or domestic partner's financial resources may be taken into account if the spouse or partner is not the victim of the charged offense(s). Public defense services may not be denied based on the defendant's ability to make bond.⁴¹

Administrative Fees

Of the jurisdictions responding to the 2013 survey, four counties and one city charge an administrative fee (also called a processing fee or an application fee) to persons being screened

³⁷ RCW 10.101.020. OPD's updated form is attached at Appendix B. The form identifies and requires the information necessary to provide a basis for making a determination of indigency.

³⁸ RCW 10.101.020(3)

³⁹ See Brennan Center, *supra* note 34 at 6.

⁴⁰ See Rhay, *supra*, note 14 at 119-20, and RCW 10.101.020.

⁴¹ RCW 10.101.020(2).

to determine their eligibility for public defense services. While the fee is requested at the time of indigency screening, the government cannot condition services upon payment of an up-front fee, which the courts have held would impede the right to counsel.⁴² If the fee is not paid at the time of screening it typically is included in a promissory note or recoupment of court costs – collection efforts upheld by the appellate courts because they do not interfere with an indigent defendant’s timely exercise of his or her right to counsel.⁴³

The City of Airway Heights reports that it charges a \$5 fee for indigency screening for public defense services in its municipal court. Jefferson, Skagit and Snohomish counties each report a \$10 fee for indigency screening in their superior, district, and juvenile courts. Pierce County charges a \$25 fee, and until recently King County charged a \$25 fee. The Metropolitan King County Council repealed that county’s fee November 1 at the request of the county executive and the newly reorganized King County Department of Public Defense, which determined the fee to be inconsistent with the agency’s expanding social justice focus.⁴⁴ Snohomish County appears to be the only jurisdiction that refunds a screening fee if all charges are dismissed or the person is acquitted. Skagit County offers a credit for the fee against any amount in a promissory note.

Provisional Counsel Required

In a criminal matter, arraignment is a critical stage of the proceeding, triggering the constitutional right to counsel, because the court advises defendants of the charges against them and they enter pleas of not guilty or guilty. The arraignment hearing often is a defendant’s initial appearance in court; in jurisdictions where the judge determines indigency it also may be the first opportunity to evaluate whether a defendant is eligible for a public defender.

However, waiting until arraignment to begin the indigency screening process can delay not only the appointment of counsel and but also can postpone critical court proceedings. Court rules mandate that unless an unrepresented defendant asserts a valid waiver of counsel, “the court shall not proceed with the arraignment until counsel is provided.”⁴⁵

In order to comply with the rules, a typical practice has been to advise defendants at arraignment that they have the right to counsel and if indigent they have the right to a public defender, but if they exercise this right their arraignment will be continued to a later hearing time so their indigency status can be reviewed and counsel can be appointed. In some cases, this means in-custody defendants remain incarcerated for several additional days (perhaps a week or more if the case is in a municipal court that meets infrequently) at significant cost to the local

⁴² See *State ex re/ Brundage v. Eide*, 83 Wash. 2d 676 (1974) and *State v. Barklind*, 87 Wash 2d 814 (1976).

⁴³ *Id.*

⁴⁴ See For The Defense, News from the Department of Public Defense, King County, WA (Dec. 19, 2013), available at <http://content.govdelivery.com/accounts/WAKING/bulletins/9824e0>.

⁴⁵ CrR 4.1(d) and CrRLJ 4.1(d).

government as well as the defendant who can lose a job, home or benefits even if the charges are dismissed or there is an acquittal. The additional time in custody may exceed what the jail sentence would have been if an attorney had been present to help resolve the matter at the first appearance.

Washington's indigency statute includes provisions intended to avoid such delays. If the court or its designated screener is not able to obtain sufficient financial information or otherwise cannot determine whether a person seeking a public defender is indigent and eligible for the service before or at the initial appearance in court, the statute requires temporary appointment of a so-called provisional attorney until a determination of indigency can be made.

If a determination of eligibility cannot be made before the time when the first services are to be rendered, the court shall appoint an attorney on a provisional basis. If the court subsequently determines that the person receiving the services is ineligible, the court shall notify the person of the termination of services, subject to court-ordered reinstatement.⁴⁶

As discussed above, a 2001 Spokane County court decision confirmed that the indigency determination process cannot systematically delay appointment of public defense attorneys noting that "If Respondent (The Spokane County District Court) or its designee is unable to determine the applicant's eligibility or ineligibility for public defender services at the time of application, or the extent of the applicant's ability to contribute to the cost of such services, respondent or its designee shall immediately appoint counsel on a provisional basis."⁴⁷

An increasingly common practice, especially among misdemeanor courts, is to assign one or more public defense attorneys to be available to consult with unrepresented defendants before their first court appearance. For some cases this practice may satisfy the statutory requirement for provisional counsel while also reducing court delays and ensuring defendants have an opportunity to confer with a defense lawyer before deciding how to proceed with their case.⁴⁸ For example, provisional counsel in these situations can be instrumental in assisting in-custody defendants with requests for bail and in providing the court timely information that is helpful when making decisions about bail. Defendants represented by provisional counsel who plead not

⁴⁶ RCW 10.101.020(4).

⁴⁷ Knox v. Spokane County District Court, Case No. 00205858-1, Writ of Mandamus and Order, at p.9 (February 1, 2001).

⁴⁸ Jurisdictions that provide first-appearance counsel should be aware of Standard 3.4, Standards for Indigent Defense, adopted by the Washington Supreme Court. "...[R]esolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients" See also, Wilbur v. Mount Vernon, No. C11-100RSL, U.S. Dist. for the Western District of Washington, Dec. 4, 2013, which cautions against appointing public defense counsel as merely a formality to elicit a quick guilty plea.

guilty and ask for ongoing public defense services likely will have adequate time to complete the indigency screening process before the next court date.

In 2001 and again in 2007 OPD found that provisional counsel was not consistently being appointed in the Washington trial courts, despite the statutory requirement.⁴⁹ OPD responded by providing additional training on the statutory mandate as well as encouraging counties and cities to offer first-appearance attorneys. Although progress has occurred in ensuring access to counsel at or before arraignment, about half of jurisdictions responding to the 2013 survey report that they do not routinely provide provisional counsel. However, in comparing the survey responses to data reported in recent county and city applications for state funding, it appears that several jurisdictions may actually satisfy the requirement for provisional counsel through their routine use of first-appearance attorneys.

Verifying Financial Information

Washington's indigency statute does not require that the financial information reported by applicants always be verified, but rather establishes that it is "subject to verification."⁵⁰ In addition, statewide court rules require that any information given to assist in the determination of whether a person is financially able to obtain a lawyer shall be under oath.⁵¹ Washington courts or their designated screeners use various approaches to substantiate an applicant's financial status and determine whether he or she is eligible for public defense services. To assist in this process, OPD annually publishes a table of income limits calculated at 125 percent of current Federal Poverty Guidelines,⁵² one of the statutory criteria for determining indigency.

A number of jurisdictions responding to the 2013 survey say they routinely require some type of verification or documentation of financial information, though methods vary. Larger jurisdictions employing salaried screening staff request and review a variety of documents from all applicants. For example, screening staff in King, Pierce, Snohomish and Skagit counties require applicants to provide current proof of public assistance, pay stubs for defendant/respondent and his/her spouse, tax returns, bank statements, and monthly bills.

Smaller jurisdictions and municipal courts without salaried screening staff tend toward more-targeted verification efforts, focusing limited resources and attention on those applicants who present inconsistent financial information or other apparent discrepancies. Circumstances that may trigger a detailed inquiry in these courts include evidence of personal property of substantial value, significant spousal income or assets, seasonal income, equity in real property or ownership interest in a business.

⁴⁹Washington State Office of Public Defense, *Criteria and Standards for Determining and Verifying Indigency(2001); Update on Criteria and Standards for Determining and Verifying Indigency (2007)*.

⁵⁰ RCW 10.101.020(6).

⁵¹ CrR 3.1(d)(3), CrRLJ 3.1(d)(3).

⁵² Available at www.opd.wa.gov/index.php/resources/16-res/69-indigency.

Although the indigency statute grants a great deal of discretion regarding verification, some jurisdictions report in the 2013 survey that they require no verification of an applicant's reported financial status. Indigency screening in these courts is exercised predominantly by judges or court staff in addition to their primary duties. When asked why they don't require verification they typically respond that they don't have time and they believe the cost of hiring additional professional staff to pursue verification and possibly find some applicants ineligible would be greater than the costs of providing counsel. This approach is not unique to jurisdictions in Washington State and is discussed in the literature.⁵³

Costs and savings associated with verification. As a matter of public policy and taxpayer accountability, local government officials generally want to ensure that public defense services are available for the people who truly cannot afford private counsel and likewise want to avoid appointing public defenders for those who are able to pay the full cost of counsel. Effective indigency screening may help achieve this policy goal, but a systematic screening program itself generates costs.

Among the jurisdictions responding to the 2013 online survey, four report amounts spent on screening in 2012, ranging from \$96,000 in Lewis County to \$180,000 in Skagit County, \$425,574 in King County just for screeners' compensation, and \$782,957 in Snohomish County for the county's entire Office of Public Defense budget, about half of which pays for screening activities. Though their screening costs are substantial, some counties also are able to document at least partial cost recovery. The King County Department of Public Defense reports collections in 2011 of \$466,704 – more than the amount spent to compensate screeners, though not quite half of the \$955,644 that clients owe for processing fees and promissory notes. Snohomish and Skagit counties report 2012 collections of \$171,835 and \$80,000 respectively.

In general the jurisdictions reporting robust screening programs do not appear to appoint public defense counsel significantly more or less frequently than jurisdictions that report less rigorous screening. However, as a result of the screening process – whether by a judge or designated screening staff – they may be more likely to identify persons who are indigent and able to contribute, and subsequently secure promissory notes and some cost recovery.

One researcher has concluded that systematic screening programs “appear to discourage applicants who are not eligible from pursuing their requests,” and recommends clear eligibility guidelines such as presumptive tests for applicants in order to hold down screening costs.⁵⁴ An evaluation of a four-year pilot project in Nebraska observed that diligent screening and

⁵³ See, e.g., Robert L. Spangenberg et al, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures*, Issues and Practices in Criminal Justice, National Institute of Justice, U.S. Department of Justice, September 1986. See also, Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, *Missouri Law Review*, Summer 2010.

⁵⁴Spangenberg, *supra* note 53, at 66.

verification procedures did not result in significant cost savings, particularly when the salary and benefits of professional screeners were factored in, but demonstrated certain intrinsic value and were politically attractive based on a perception of their ability to deter potential “freeloaders.”⁵⁵

Public assistance. Where an indigency determination is based initially on a person’s receipt of public assistance, Washington’s counties and cities accept a variety of official documents to verify the applicant’s reported financial status. These documents may include a current award letter, electronic benefits card, Medicaid card, and the like. The state agencies that review a person’s application for public assistance have already engaged in a thorough examination of the individual’s finances, and it is reasonable for public defense screeners to rely on the sufficiency of that earlier screening in considering eligibility for public defense services.⁵⁶ For example, persons receiving Temporary Assistance for Needy Families (TANF) and other types of assistance must meet strict eligibility requirements, including maximum income limits that are below the federal poverty level and a detailed audit of various types of income, assets, and expenses.⁵⁷ Each applicant also undergoes a personal interview with a Department of Social and Health Services (DSHS) representative and must submit to a review process at least once every 12 months.⁵⁸ If the department doesn’t receive from the applicant sufficient necessary information upon which to make a determination of eligibility, it will deny or stop benefits.

Under those circumstances there may be limited need for public defense screeners to duplicate the DSHS screening and independently investigate each applicant who can show valid proof of current public assistance. Researchers analyzing the verification component of the Nebraska pilot project found the percentage of defendants who were caught providing false financial information to screeners was minimal, and those caught lying were more likely to overstate their financial security than to falsely claim indigence.⁵⁹ In Washington, pursuant to the *Hecht* decision discussed below, if a person receiving public assistance also has assets, he or she may be required to contribute to the payment of defense.

Indigency rates. Though the data are limited, sources throughout the country routinely estimate that 80 percent to 90 percent of all felony defendants are represented by public defense counsel or could have been had they not waived the right to counsel. These national data are consistent with felony indigency rates reported by Washington counties in the 2013 OPD survey. However,

⁵⁵ Neeley & Tomkins, *supra* note 36, at 9.

⁵⁶ See, e.g. ESA Briefing Book, State Fiscal Year 2012, Economic Services Administration, Wash. State Dept. of Social and Health Services.

⁵⁷ See WAC 388-478-0035 for the maximum earned income limits allowed in order to qualify for TANF and other public assistance benefits. For example, a single person is limited to a maximum income of \$610 per month; a family of three is limited to a maximum income of \$955 per month. By comparison, the federal poverty level for a single person is \$958 per month; for a family of 3 is \$1,628 per month. See 2013 Poverty Guidelines, Federal Register, U.S. Dept. of Health and Human Services.

⁵⁸ See various sections of WAC 388-271 to WAC 388-490.

⁵⁹ Neeley & Tomkins, *supra* note 36 at 10.

estimated indigency rates reported by misdemeanor courts participating in the survey vary widely from a low of 21 percent reported by Gig Harbor Municipal Court to a high of 90 percent reported by SeaTac Municipal Court.⁶⁰ A separate review of five years of data provided by 38 counties in their annual applications for state public defense funding shows an average 47.7 percent indigency rate in Washington’s district courts.

Indigent and Able to Contribute

Under Washington’s indigency screening law, persons who have some assets but not enough to secure private counsel may be considered “indigent and able to contribute.” The statute applies this status to someone “who, at any stage of a court proceeding, is unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost.”⁶¹

When the screening process finds someone to be indigent and able to contribute to his or her defense in a trial court proceeding, the court will appoint a public defense attorney and the person will commit to repay the county or city for a portion of the attorney fees. All jurisdictions responding to the 2013 survey report that some applicants for public defense counsel are determined to be indigent and able to contribute, but the numbers vary widely. As few as 1 percent are found able to contribute in Pierce County and Mason County superior courts, and as many as 85 percent are found able to contribute in Bremerton and Tukwila municipal courts.

Until recently, persons determined indigent because they receive certain qualifying types of public assistance generally were not also considered able to contribute. However, the Washington Supreme Court’s decision in *State v. Hecht* clarifies that the two categories are not mutually exclusive.⁶² Under *Hecht*, while a person receiving public assistance is *presumptively* indigent and eligible for public defense services, the existence of assets may establish him or her

⁶⁰ These variations reflect income and poverty levels in the different communities. For example, per capita income for Gig Harbor residents is \$45,191, while per capita income for SeaTac residents is \$22,061. U.S. Census Bureau, American Community Survey 5 year estimates, 2008-2012.

⁶¹RCW 10.101.010(4). The term “available funds” is defined at RCW 10.101.010(2) as “liquid assets and disposable net monthly income calculated after provision is made for bail obligations. For the purpose of determining available funds, the following definitions shall apply: (a) “Liquid assets” means cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in motor vehicles. A motor vehicle necessary to maintain employment and having a market value not greater than three thousand dollars shall not be considered a liquid asset. (b) “Income” means salary, wages, interest, dividends, and other earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security, and public assistance programs. It includes any contribution received from any family member or other person who is domiciled in the same residence as the defendant and who is helping to defray the defendant’s basic living costs. (c) “Disposable net monthly income” means the income remaining each month after deducting federal, state, or local income taxes, social security taxes, contributory retirement, union dues, and basic living costs. (d) “Basic living costs” means the average monthly amount spent by the defendant for reasonable payments toward living costs, such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.”

⁶² 173 Wash. 2d 92 (2011).

as also able to pay a portion of the public defense costs. Implications of the *Hecht* case are discussed in more detail in the New Developments section.

Cost of private counsel. In addition to requiring a review of the personal finances of a person who requests public defense counsel, the indigency statute requires the court or its designee to also consider “the anticipated length and complexity of the proceedings and the usual and customary charges of an attorney in the community for rendering services.”⁶³ Among the jurisdictions responding to the 2013 survey, Skagit County reports that it periodically polls the local Bar to discern typical fees for private defense attorneys in the community. Based on information it collected in 2010, the county reports that the usual and customary charges for private criminal defense counsel in Skagit County range from initial fees of \$5,000 to \$25,000 for a Class A felony, \$5,000 to \$7,000 for Class B and C felonies, \$2,000 to \$5,000 for DUI, \$1,500 to \$2,500 for other types of misdemeanors, and \$300 to \$1,500 for a probation violation. These are just the initial attorney fees and don’t include costs for investigators and experts or additional attorney fees for more complex or otherwise time-consuming cases.

Likewise, Oregon compiles a statewide schedule of typical private retainer rates that indigency screeners can consult in determining a person’s ability to pay some or all of the likely attorney fees. Oregon’s private attorney fee schedule for adult criminal and juvenile offender cases ranges from \$100,000 for a charge of aggravated murder to \$1,500 for a probation violation. Among non-criminal case types, the private attorney fee schedule includes \$4,000 per client for a juvenile dependency and \$10,000 per client for a termination of parental rights.⁶⁴

Except for Skagit County, other Washington jurisdictions indicate that they do not formally survey the fees of private counsel in their communities. However, they likely have a basic working knowledge of fees for different case types because they occasionally need to secure private attorneys as conflict counsel in public defense cases. In addition, applicants who are initially found ineligible for public defense services may bring the court or its designated screener several quotes for attorney retainers to show that they are not able to pay the full cost of private counsel, and based on that may have their status reclassified as indigent and able to contribute. Nevertheless, some counties and cities say they would like to have access to a credible private fee schedule and have asked OPD to periodically survey the private defense Bar and publish the results.

Promissory Notes

If applicants for public defense services are found during the screening process to be able to contribute some amount to the cost of their defense, Washington’s indigency statute requires that

⁶³ RCW 10.101.020(2).

⁶⁴ See Private Attorney Fee Schedule, Chapter 3, ACP/Verification Desk Manual (2009) (updated 2012), Business and Fiscal Services Division, Office of the State Court Administrator, Oregon Judicial Department.

they sign a promissory note.⁶⁵ Court rules similarly recognize that some people who can't afford the full costs of a private attorney nonetheless may have the ability to pay a portion of the costs. While the statute requires a promissory note, the court rule merely authorizes collection of some amount pursuant to an established method of collection.⁶⁶

A promissory note is generally based on a standard fee depending on the type of case, as established by the county or city. It may also include an administrative fee that some jurisdictions charge to defray the cost of screening. If a promissory note is not paid in full by the end of the trial court proceedings, the note may be discharged, or in the case of conviction, the remaining cost may be rolled into the judgment and sentence for recoupment. Fifty-one percent of jurisdictions responding to the 2013 indigency survey report that they require promissory notes, though all jurisdictions say they find some applicants able to contribute.

Recoupment of Costs

Recoupment is the process by which various fines and fees, including attorney fees, are “recouped” from a person who pleads guilty or is convicted of a crime. The Washington Supreme Court at one time disfavored the imposition of repayment obligations on an indigent person.⁶⁷ However, after a 1974 U.S. Supreme Court decision established certain safeguards⁶⁸ and such restrictions were added to the state criminal code,⁶⁹ the Washington Court was satisfied that recoupment of public defense costs following conviction does not impermissibly burden a defendant’s constitutional right to counsel.⁷⁰ The Court commented in *State v. Barklind*, “We fail to perceive the constitutional deficiency in the system which allows the trial court discretion

⁶⁵ RCW 10.101.020(5).

⁶⁶ CrR 3.1(d)(2); CrRLJ 3.1(d)(2)

⁶⁷ *State ex rel Brundage v. Eide*, 83 Wash. 2d 676 (1974).

⁶⁸ *Fuller v. Oregon*, 417 U.S. 40 (1974).

⁶⁹ RCW 10.01.160, originally adopted as Act of 1975-’76 2nd Ex. Sess., ch. 96 § 1

⁷⁰ *State v. Barklind*, 87 Wash 2d 814 (1976), noting that Washington recoupment statute is identical to statute upheld by the U.S. Supreme Court in *Fuller v. Oregon*, *supra* note 72. A constitutionally permissible repayment structure provides that:

- (1) Repayment must not be mandatory;
- (2) Repayment may be imposed only on convicted defendants;
- (3) Repayment may only be ordered if the defendant is or will be able to pay;
- (4) The financial resources of the defendant must be taken into account;
- (5) A repayment obligation may not be imposed if it appears there is no likelihood the defendant’s indigency will end;
- (6) The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
- (7) The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry 118 Wash.2d 911 (1992), quoting *State v. Eisenman*, 62 Wash. App. 640, 644 n. 10 (1991)(citing *Barklind*).

to grant probation and in effect, as a condition, tell the defendant that he should recognize some obligation to society for the crime which he voluntarily committed.”⁷¹

Among the recoupment safeguards outlined in case law is a requirement that attorney fees not be mandatory but be assessed at the court’s discretion. Most jurisdictions responding to the 2013 survey report that upon conviction a defendant is assessed some portion of public defense costs. Reported recoupment amounts for attorney fees range from \$50 to \$500 for misdemeanor convictions and \$100 to \$2,250 for felony convictions. In some courts the amount imposed depends on the seriousness of the charge or whether the case was resolved by plea or trial.

Recoupment distinguished from “able to contribute.” Imposing attorney fees in the recoupment process is distinguished from determining a person to be indigent and able to contribute. Recoupment is imposed upon persons who are convicted or plead guilty, regardless of their financial status. It may be a condition of probation and generally includes a variety of fines, fees and other court-ordered costs. Contribution payments, on the other hand, are assessed only on persons who seek public defense counsel and through the screening process are determined to be “indigent and able to contribute.” However if a person who is indigent and able to contribute is convicted, the assessed attorney fee contribution may be rolled into the recoupment process.

Considerations in Non-Criminal Matters

In general, the same indigency screening criteria used to determine eligibility for public defense services in criminal cases are applicable in non-criminal matters where the right to counsel attaches. Several statutes governing unique substantive areas of law guarantee the right to counsel and specifically provide that public defense will be provided for respondents who want counsel but are unable to pay the cost of private counsel. Some of these statutes directly cross-reference RCW 10.101.010-020 as the applicable criteria and process for determining indigency, though others are silent as to process.

Juvenile Cases

Young people facing juvenile offender charges or diversion offers have the right to be represented by an attorney and if unable to pay a lawyer to have a lawyer appointed.⁷² For all practical purposes juveniles in these cases are indigent and should receive appointed counsel, though their parents or legal guardians may be found able to contribute or assessed attorney fees at recoupment. In addition, statutes and court rules require that counsel be appointed for all children involved in Child in Need of Services or At Risk Youth proceedings.⁷³

⁷¹ *Id.* at 817.

⁷² See RCW 13.40.050, RCW 13.40.080, RCW 13.40.140, RCW 13.40.145, JuCR 6.2, JuCR 9.2.

⁷³ See JuCR 9.1.

Counties responding to the 2013 survey report that they routinely appoint counsel for all youth facing juvenile offender charges. Only a few courts say that they typically screen the parents of juveniles facing charges to determine indigency. Six courts say they seek to recoup costs from parents following disposition of juvenile offender cases.

Child Welfare Cases

Under Washington law, parents involved in child dependency or termination of parental rights proceedings have a right to be represented by counsel and if indigent to have public defense counsel appointed.⁷⁴ Most parents involved in these cases are living in poverty and qualify for appointed counsel.

OPD operates its Parents Representation Program in 25 counties providing contracted local defense attorneys to represent indigent parents in these counties, but the trial courts or their designees determine indigency and appoint the attorneys. Counties responding to the OPD survey report that some parents are found able to contribute. While a majority of responding counties indicates that the screening process for dependency/termination cases is different than for criminal cases, the differences appear to be minor.

The appointment of counsel to represent children involved in dependency and/or termination of parental rights proceedings is currently generating attention among interest groups and Washington legislators who are considering bills that would expand the right to counsel for children.⁷⁵ Washington statutes currently require that children age 12 and older, who are the subject of a dependency or termination proceeding, be notified that they have the right to request an attorney.⁷⁶ At the request of a party or on the court's own initiative, statewide court rules require the appointment of counsel for a child who has no guardian ad litem.

Civil Commitment Cases

The right to counsel extends to people facing mental health detention and civil commitment proceedings. Persons who already reside in a public mental health facility, including a jail mental health unit, are considered indigent and eligible for a public defense attorney under the statutory criteria of RCW 10.101.010. In some cases, regardless of indigency, state law directs courts to appoint counsel for mental health respondents who appear in court unrepresented.⁷⁷

In sex predator civil commitment cases, Chapter 71.09 RCW specifically cross-references the indigency statute for purposes of determining whether respondents are eligible for public defense

⁷⁴ RCW 13.34.090 - 13.34.092, JuCR 2.3, JuCR 9.2(c)(2).

⁷⁵ HB 1285 and SB 5461, introduced in 2013 session, passed their respective chambers and remain under consideration in 2014.

⁷⁶ RCW 13.34.100(6).

⁷⁷ See RCW 71.05.300.

services.⁷⁸ Respondents who have progressed to an annual review proceeding are considered indigent pursuant to RCW 10.101.010 because they are already involuntarily committed. For all practical purposes most respondents involved in pre-commitment court proceedings likely also are indigent because they have spent years serving a criminal sentence and typically are transferred directly from a penitentiary to pre-commitment detention at the Special Commitment Center on McNeil Island.

The vast majority of respondents in these cases have public defense counsel appointed to represent them. A few choose to proceed without counsel, though they may consult with public defense attorneys as standby counsel and use public defense expert services. In 2012 OPD began providing contracted defense attorneys to represent indigent clients in these cases statewide but the trial courts or their designees are relied on to screen for indigence.

Among counties responding to civil commitment questions on the 2013 survey, 75 percent said they follow the same screening practices for civil commitment cases under Chapter 71.09 RCW as for criminal cases. However, responses from two large jurisdictions that handle a significant number of sex predator commitment cases indicate that they believe a different entity is responsible for screening respondents, perhaps because the cases generally are prosecuted by the state attorney general and receive public defense services from OPD. OPD is following up with all counties to clarify that they remain responsible for indigency screening in these cases.

⁷⁸ See, e.g., RCW 71.09.050(1), which states in part “At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent as defined in RCW 10.101.010, the court, as provided in RCW 10.101.020, shall appoint office of public defense contracted counsel to assist him or her.”

Indigency on Appeal

Persons who have been convicted of a crime, or who have lost custody of their children in dependency and/or termination of parental rights cases, or who have been involuntarily civilly committed can appeal the trial court decision to a higher court. They initiate an appeal by filing a notice in the trial court, and if they wish to have a public defense attorney represent them on appeal they must be determined eligible by the trial court judge.

Even though many requests for appellate defense counsel are from persons the trial court has already found to be indigent, the court is expected to re-evaluate their financial status before issuing an Order of Indigency for the appeal. The Order of Indigency is to be granted if “the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses of appellate review.”⁷⁹ As discussed in the *Hecht* case below, the indigency criteria of RCW 10.101.010 should be used to determine “poverty” as applied in the appellate rule.

Once the trial court issues an Order of Indigency, the appellate court appoints counsel from a list of qualified appellate attorneys under contract with OPD, which has administered indigent appellate defense statewide since 1996. RAP 15.2 was amended in 2005 to establish that the appellate courts, rather than the trial courts, are to coordinate with OPD and appoint counsel for indigent appellants.

Concerns and Challenges

The 2013 OPD survey asked counties and cities to share their concerns about existing public defense indigency screening policies and practices. Following is a summary of the concerns identified in survey responses.

Screening Criteria and Verification

Of 48 responses, 83 percent said they believe the screening criteria in RCW 10.101.010 are effective in properly determining who receives public defense services. Among those who believe the criteria are not effective, several said receipt of public assistance should not necessarily determine that a person is unable to pay the cost of counsel. As discussed in the New Developments section below, however, this issue was recently addressed by the Supreme Court’s ruling in *Hecht*, which allows courts or their screeners to find that persons receiving public assistance also are able to contribute to the costs of defense.

Similarly, some courts expressed concern that applicants for public defense services do not provide adequate verification of finances. While verification is not mandatory, the indigency

⁷⁹ RAP 15.2(b)(1).

statute and court rules authorize the trial courts or their designated screeners to require certain documentation or otherwise take steps to verify an applicant's financial status. Some courts say they would like to pursue greater verification, but report that they have inadequate staffing and other resources to do so.

Inconsistent Practices

Several survey responses cite concerns that indigency screening practices vary significantly among local jurisdictions, despite the existence of uniform statutes and court rules. OPD shares this concern. While some variation may reasonably be expected in a decentralized criminal justice system that is administered and funded primarily by local governments, Washington residents are guaranteed the same due process rights regardless of the county or city involved. The Recommendations Section below identifies several steps OPD and others can take that may promote greater consistency in screening practices.

New Developments

Since 2007, when OPD last reported on the status of indigency screening, several developments have occurred that impact the law and practice of determining whether a person is eligible for public defense services. These range from new case law to increased use of technology to changes in public assistance benefits.

State v. Hecht, 173 Wash. 2d 92 (2011)

The Washington Supreme Court in this case reviewed the process for determining indigency under RCW 10.101.010-020.⁸⁰ In its analysis of the statute, the Court clarified that while a person receiving public assistance is to be presumed indigent under the criteria of RCW 10.101.010(3), the person can also be found able to contribute to his/her defense under RCW 10.101.010(4).

The use of the disjunctive ‘or’ indicates that a person is indigent if he is able to satisfy any one of the statutory criteria. ...Hecht is therefore presumptively indigent because he receives public assistance in the form of food stamp benefits. ...To the extent he may have access to funds to pay a “portion” of the “anticipated costs of counsel” ... Hecht is potentially “indigent and able to contribute” to his representation. But in that case he is still entitled to indigency status, even if only to obtain public assistance for part of his appellate expenses.⁸¹

The type of public assistance at issue in *Hecht* was benefits under the Basic Food Program, the state’s version of the federal Supplemental Nutrition Assistance Program (SNAP), formerly known as food stamps. But the Supreme Court’s reasoning and analysis would logically apply to all types of public assistance. The Court’s approach in *Hecht* may become particularly important as eligibility for Medicaid expands under Washington’s implementation of the federal Affordable Care Act and more individuals with higher incomes obtain Medicaid benefits.

⁸⁰ 173 Wash. 2d 92 (2011) at 95.

⁸¹*Id.* In Mr. Hecht’s situation, he had retained private counsel to defend against charges at the trial level, where a jury in 2009 found him guilty of felony harassment and patronizing a prostitute. He asked the court to find him indigent and eligible for public defense services to pursue his right to appeal the conviction. By this time, he was no longer employed, was in declining health, owed significant debts, and although he owned real property was not able to secure a line of credit on his equity, and was receiving food stamps.

Wilbur v. Mount Vernon, No. C11-1100RSL, U.S. Dist., Western District of Washington, Memorandum of Decision (Dec. 4, 2013)

The U.S. District Court in Seattle ruled in a class action lawsuit that two Washington cities systematically failed to provide meaningful assistance of counsel for indigent defendants facing misdemeanor criminal charges, as required by the U.S. and Washington constitutions. The court found that contracted public defense attorneys had excessively high caseloads, rarely consulted with clients in a confidential setting, and rarely investigated the facts of a case or researched possible legal defenses. The court further found that the cities of Mount Vernon and Burlington made deliberate policy and fiscal choices that led to the deprivation of individual rights.

While *Wilbur* does not directly relate to determining whether a person is indigent and eligible for a public defender, the case may further encourage local governments to improve indigency screening practices as part of overall improvements to their public defense systems. This could help ensure that meaningful indigent defense services – consistent with *Wilbur* – are available for people who truly cannot afford private counsel.

Technology Use

Some Washington trial courts and/or their designated screening entities are utilizing Web-based applications or other computer programs to assist in determining whether persons are eligible for public defense services. Such practices reportedly can improve efficiency and consistency in screening practices.

Changes in Public Assistance Benefits

Amendments occur periodically in federal and state law related to eligibility for various types of public assistance. For example, in recent years the Washington Legislature has established an Aged, Blind, Disabled assistance program to replace the Disability Lifeline program, which replaced General Assistance Unemployable program. The eligibility criteria were adjusted with each change.

Under the federal Affordable Care Act, Washington State has expanded Medicaid eligibility up to 133 percent of the federal poverty level. Given this higher income threshold for receiving Medicaid, courts or their designated screeners may determine that some Medicaid recipients who apply for public defense services are “able to contribute” to the costs of their defense.

Senate Bill 5020

The Washington Legislature in 2013 considered Senate Bill 5020⁸² to amend the definition of “indigent” in Chapter 10.101 RCW. The bill would require courts or their designated screeners to consider public assistance, involuntary commitment, and annual income as factors in making a

⁸² Available at www.leg.wa.gov/billinfo.

determination of whether a person is indigent or indigent and able to contribute. The bill received a public hearing in the Senate Judiciary Committee and remains under consideration going into the 2014 legislative session.

Proponents of SB 5020 have articulated concerns that some persons who receive public assistance are automatically receiving public defense counsel, even when there is evidence that they have assets available to assist with defense costs. As discussed above, the *Hecht* decision addressed a similar concern and interprets the existing statute to allow courts to require financial contribution from persons receiving public assistance.

Conclusions & Recommendations

While Washington has enacted statewide policies that provide a uniform framework for determining indigency and eligibility for public defense services, consistent implementation continues to be a challenge for trial courts and local governments. Some jurisdictions engage in detailed indigency screening and verification for every person who requests public defense services. Others take a more limited approach to screening, often because they lack resources necessary to develop and maintain a systematic screening program. With a goal of supporting effective and efficient indigency screening that complies with the U.S. and Washington constitutions and that can be implemented fairly and consistently by diverse courts throughout the state, OPD makes the following recommendations:

- OPD should update its screening form annually and distribute each update to all trial courts in Washington, as well as continue to make the form available on the OPD and AOC websites.
- OPD should continue to publish an annual update of income limits calculated at 125 percent of Federal Poverty Guidelines to assist local screeners in implementing the statutory indigency criteria.
- OPD should periodically conduct a statewide survey of private attorney fees and publish a fee schedule to assist local screeners who are required to consider the usual and customary charges of attorneys.
- OPD should develop a formal training protocol that can be accessed electronically. Particular attention should focus on requirements for provisional counsel, indigency screening in non-criminal case types, and other issues as they arise.
- OPD should continue to coordinate a conference for screeners at least every other year.
- Judicial training programs should consider including comprehensive presentations on indigency screening for new judicial officers. OPD should be available to assist with judicial training.
- If it considers amendments to the indigency statute, the Legislature should clarify the screening requirements consistent with the Supreme Court's ruling in *Hecht*. The Legislature should consider updating the allowed market value of a motor vehicle, which has been capped at \$3,000 since the statute was first enacted in 1989.

Appendix A

Methodology

In developing this report, OPD relied on several primary sources of information, including surveys, city and county applications for state grant funding, a review of indigency laws in other states, and national and state studies.

Surveys

OPD distributed an extensive online survey to the trial courts in Washington to gather data on topics addressed in this report. Twenty-seven of 39 counties responded with information for district, superior and juvenile courts. District courts that provide services on behalf of city municipal courts generally included those cities in their responses. In addition, 24 stand-alone municipal courts responded to the survey. Several courts have designated a non-court entity to screen applicants for public defense services and make determinations of eligibility, and in those cases the non-court entity responded to the survey.

Applications for State Funding

County and city applications for state funding for public defense improvements under Chapter 10.101 RCW also provided data regarding indigency screening in those jurisdictions. A few applications contained information inconsistent with the survey responses, and in these instances OPD made follow-up inquiries in an attempt to resolve the discrepancies.

Laws in other States

OPD researched other states' statutes and court rules related to determining indigence. Appendix C includes an overview of indigency considerations that are common among the states.

Document Review

OPD gathered and reviewed a variety of documents, including historic Washington task force reports regarding public defense, law review articles, publications from national organizations such as the National Center for State Courts, the U.S. Department of Justice, the Brennan Center for Justice, and the National Legal Aid and Defender Association.

Appendix B

OPD Screening Form

SAMPLE INDIGENCY SCREENING FORM

CONFIDENTIAL

[Per RCW 10.101.020(3)]

Name _____

Address _____

City _____ State _____ Zip _____

1. Place an "x" next to any of the following types of assistance you receive:

- Welfare** **Poverty Related Veterans' Benefits**
- Food Stamps** **Temporary Assistance for Needy Families**
- SSI** **Refugee Settlement Benefits**
- Medicaid** **Aged, Blind or Disabled Assistance Program**
- Pregnant Women Assistance Benefits**
- Other – Please Describe** _____

Recipients of public assistance are presumed indigent, but may be found able to contribute to the costs of their defense under RCW 10.101.010. *State v. Hecht*, 173 Wash. 2d 92 (2011).

2. Do you work or have a job? yes no. If so, take-home pay: \$ _____
Occupation: _____ Employer's name & phone #: _____

3. Do you have a spouse or state registered domestic partner who lives with you? yes
 no Does she/he work? yes no If so, take-home pay: \$ _____
Employer's name: _____

4. Do you and/or your spouse or state registered domestic partner receive unemployment, Social Security, a pension, or workers' compensation? yes no
If so, which one? _____ Amount: \$ _____

5. Do you receive money from any other source? ___ yes ___no If so, how much? \$_____
6. Do you have children residing with you? ___ yes ___no. If so, how many? _____
7. Including yourself, how many people in your household do you support? _____
8. Do you own a home? ___yes ___no. If so, value: \$_____ Amount owed: \$_____
9. Do you own a vehicle(s)? ___yes ___no. If so, year(s) and model(s) of your vehicle(s):_____ Amount owed: \$_____
10. How much money do you have in checking/saving account(s)? \$_____
11. How much money do you have in stocks, bonds, or other investments? \$_____
12. How much are your routine living expenses (rent, food, utilities, transportation) \$_____
13. Other than routine living expenses such as rent, utilities, food, etc., do you have other expenses such as child support payments, court-ordered fines or medical bills, etc.? If so, describe: _____
14. Do you have money available to hire a private attorney? ___yes ___no

15. ***Please read and sign the following:***

I understand the court may require verification of the information provided above. I agree to immediately report any change in my financial status to the court.

I certify under penalty of perjury under Washington State law that the above is true and correct. (Perjury is a criminal offense-see Chapter 9A.72 RCW)

Signature Date

City State

FOR COURT USE ONLY - DETERMINATION OF INDIGENCY

_____ Eligible for a public defender at no expense

_____ Eligible for a public defender but must contribute \$_____

_____ Re-screen in future regarding change of income (e.g. defendant works seasonally)

_____ Not eligible for a public defender

JUDGE

Appendix C

Public Defense Indigency Laws in Other States

As is the case with Washington counties and cities, the identity of who makes the determination of indigency varies widely among the other states. In some states the trial judge determines eligibility. In other states a court clerk, an independent third-party entity designated by the court, or an administrative division of the public defender office reviews applications and determines indigency. Likewise, state requirements for determining indigency and eligibility for public defense services range from broad local discretion, with varying degrees of statutory guidance, to a rigid, formulaic, detailed calculation of each applicant's assets and liabilities. The following elements typically play into the states' various approaches to determining indigency.

Affidavit

Nearly all states require a person seeking public defense services to execute a sworn statement or affidavit asserting indigency and summarizing the applicant's financial situation. The form typically includes a prominent warning of criminal penalty for perjury.

Federal Poverty Guidelines

Many states look to the federal poverty guidelines in determining whether a person is indigent. A common threshold is 125 percent of the federal poverty level, however, an income of up to 200 percent of the federal poverty level qualifies a person as indigent for purposes of receiving public defense services in some states.

Assets/Property

Many states require consideration of assets, including equity in real estate and the value of certain personal property that could be sold, such as automobiles. Some states include a homestead exemption, or exempt an automobile up to a certain value.

Public Assistance

In some states the receipt of various types of public assistance is sufficient to establish that a person is indigent and eligible for public defense services. In other states public assistance gives rise to a presumption of eligibility.

Residing in a State Institution

Persons sentenced in a state correctional institution or housed in a mental health facility typically are presumed indigent.

Verification of Financial Data

Many states grant indigency screening entities authority to verify financial information provided by persons requesting public defense services. Some states, however, require specific verification procedures or even a detailed inquiry into each applicant's financial status.

Ability to Post Bond

Generally, release on bail or ability to post bail is not considered a sufficient basis to find a person not indigent.

Cost of Private Counsel

Many states also require consideration of the usual and customary costs to retain private counsel to address the specific charges of the case and the defendant/respondent's actual ability to pay these costs without undue hardship.
