

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

ANNUAL REPORT

FISCAL YEAR 2003



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MISSION STATEMENT

The mission of Washington State Office of Public Defense (OPD) is to "implement the constitutional guarantee of counsel and to ensure the effective and efficient delivery of indigent appellate services funded by the state of Washington," RCW 2.70.005.

INTRODUCTION

Washington State Office of Public Defense is an independent judicial branch agency. Created by the Legislature in 1996, the agency works to ensure high quality representation through study and actions including:

- implementing procedures for appointment and evaluation of indigent appellate attorney services;
- administering funds appropriated for court-appointed counsel in appellate cases;
- initiating legislative proposals and court rule changes;
- supporting the appellate cost recovery system through timely responses to requests;
- administering a state funded parents' representation program; and
- providing information, special reports and recommendations to the Legislature including an annual prioritized list of aggravated murder costs submitted by the counties.

An Advisory Committee, including state legislators and members appointed by the Governor, the Washington State Supreme Court Chief Justice, the Court of Appeals Executive Committee, and the Washington State Bar Association, oversees the activities of the agency.

During fiscal year 2003, the Advisory Committee conducted business at quarterly meetings and met additionally as necessary to consider time-sensitive issues. The Advisory Committee reviewed legislative and court rule proposals, established agency policies and procedures, provided oversight of the budget and of agency programs, and resolved fiscal appeals pursuant to court rules.

This year marked the fortieth anniversary of the landmark United States Supreme Court decision, Gideon v. Wainwright, which affirmed an indigent defendant's right to counsel. Justice Hugo Black wrote for the unanimous Court that any person brought into court "who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . lawyers in criminal courts are necessities, not luxuries."

Both the federal and state constitutions as well as state statutes guarantee the right to appeal a variety of superior court decisions, including criminal convictions, dependency orders, parental rights terminations, criminal contempt convictions, and involuntary civil

commitments. Indigent parties involved in these cases, in which their fundamental interests are at risk, are entitled to representation at state expense. In addition to appeals as a matter of right, indigent defendants are entitled to court-appointed representation for responses to state appeals and for motions for discretionary review and petitions for review that have been accepted by an appellate court, personal restraint petitions in death penalty cases, and non-death penalty personal restraint petitions that the court has determined are not frivolous.

When an indigent defendant files an appeal as a matter of right, the trial court determines indigency. If the facts warrant an order of indigency, the court appoints an attorney and authorizes payment of specified case costs. The parties designate relevant material from the clerk's file and the trial court proceedings for the appellate court to review. The court clerk and court reporter prepare these documents, called the clerk's papers and the verbatim report of proceedings, for use during the appeal by the appellate court and the prosecuting and defense attorneys. In performing publicly funded indigent appellate representations, appointed attorneys review these documents, consult with the client, research the law, prepare and file briefs on the issues and applicable law, and deliver oral arguments in cases if so ordered by the appellate court.

Appellate attorneys, court reporters, county clerks, the appellate courts, and others who have worked on the case file invoices with Washington State OPD. The agency reviews each invoice and authorizes payment for the court-ordered services rendered, based on Washington State Court Rules and rates adopted by the Washington State OPD Advisory Committee. The agency denies payment if reimbursement is not authorized.

AGENCY STRUCTURE

*Daily business of the Washington State OPD is conducted
by an efficient, experienced staff.*

The agency staff is composed of a director, a deputy director, a budget analyst, a senior financial analyst, an executive assistant, and an administrative assistant. The budget analyst analyzes the budget and processes invoices. The senior financial analyst processes invoices for indigent appellate defense services. They both also respond to inquiries regarding billing procedures and allowable claims. The executive assistant responds to inquiries related to cost-recoupment and manages office and document preparation matters, and the administrative assistant provides support and technical expertise. The director and deputy director manage the budget and carry out the tasks described below.

AGENCY TASKS AND ACCOMPLISHMENTS IN FISCAL YEAR 2003

***The agency processed 13,065 invoices in fiscal year 2003:
Statistical Report***

During fiscal year 2003 Washington State OPD staff processed 13,065 invoices: 5,298 invoices from attorneys; 3,420 invoices for pro se transcripts and court reporters; 2,425 invoices from county clerks; and 1,922 invoices from appellate courts for photocopying briefs. An additional 682 administrative invoices were also processed during the fiscal year.

Invoices totaled \$4,031,997 for fiscal year 2003 attorney services, and \$1,619,650 for other services, for a total of \$5,651,647. Each invoice submitted is verified by reference to the Judicial Information System and the agency's database.

During daily operation, the agency in fiscal year 2003 also responded to approximately 1200 requests for information and assistance from courts, attorneys, defendants, and the public.

***The agency continued to work to ensure effective
representation for capital defendants.***

For trial level death penalty representation, a new rule proposed by OPD (SPRC 2) went into effect, requiring superior court judges with a death penalty case to appoint two experienced trial counsel, at least one of whom has been determined to be adequately qualified by a Capital Counsel Panel. The OPD Director attended the Fall 2002 State Judges Conference to make the lead presentation on a panel introducing the new rule to superior court judges. To encourage implementation, OPD adopted counties' compliance with the rule as a factor in prioritizing counties' petitions for reimbursement under the Extraordinary Criminal Justice Costs Act.

In appellate death penalty cases in fiscal year 2003, OPD continued to use its Rotating Appointment Roster process for recommending the appointment of death penalty counsel for Supreme Court cases. Counsel are recommended from the Capital Counsel Panel qualified list. In fiscal year 2003, the Rotating Appointment Roster was used to timely recommend appointed counsel for one appellate level death penalty case, State v. Yates.

In accordance with a 2001 legislative directive to establish a Death Penalty Assistance Center, OPD conducted a competitive procurement and contracted with The Defender Association in Seattle to establish the Death Penalty Assistance Center (DPAC) to provide support and training to trial lawyers who represent defendants in death penalty cases.

During fiscal year 2003, DPAC conducted several training seminars, in Yakima and Seattle, and planned an August 2003 seminar in Spokane. In addition, the center held meetings with defense counsel; instituted procedures to determine when aggravated murder cases were filed; provided information to trial courts to assist with their appointment of qualified counsel pursuant to SPRC 2; and provided resources and research to attorneys in trial. Based on the center's performance, OPD extended the contract with the center for two more years in order to build on its experience to continue to improve legal representation in death penalty cases.

The agency enhanced the existing indigent appellate representation system.

As required by the OPD mandate—to ensure effective and efficient delivery of indigent appellate services—the agency continued its efforts to improve the quality and efficiency of appellate representation. Under court rules, the superior courts in each county appoint counsel for appeals of non-death penalty cases. Because this system has resulted in varying levels of quality of indigent appellate representation throughout the state, OPD has continued to work to improve the quality of representation statewide.

In 1999, OPD instituted a new contract system in Divisions II and III to implement uniformly high quality defense attorney representation standards in indigent appeals. In 2002, the agency undertook a rigorous evaluation of fourteen contract attorneys in Divisions II and III, resulting in contract offers to four of them. The agency also continued to oversee the work of 33 other contract attorneys, in addition to the work of the two contract firms in Division I.

During fiscal year 2003, OPD renewed the contracts for existing contractors, thereby continuing the high quality representation which has been developed during the past four years, and issued a Request for Proposals for work in Divisions II and III of the Court of Appeals to attract additional qualified attorneys. Over a dozen proposals were received and reviewed, with briefs subjected to a blind evaluation by appellate experts under contract with OPD. As a result of this RFP process, OPD added seven attorneys to its existing contract list for Divisions II and III.

Since trial courts are responsible for appointing appellate counsel, OPD has continued its efforts in communicating with counties to provide lists of qualified appellate attorneys for appointment. This effort has enjoyed overall success, with contract attorneys representing indigent appellants in over 75% of the cases statewide. Nevertheless, varying levels of quality of representation continue to exist, and this variance is an issue OPD continues to address.

The agency's efforts to enhance indigent appellate representation in 2003 included formalizing a communications protocol and developing an on-line brief bank.

In fiscal year 2003, the agency also worked to improve indigent appellate representation by formalizing a communications protocol and developing an on-line brief bank.

To address concerns initially raised by Division I, OPD met with contract attorneys in all three divisions to formalize a communications protocol for attorneys. The majority of attorneys demonstrated that they had in place a procedure to keep clients informed and meet ethical obligations under professional standards of representation, including RPC 1.2(a), and 1.4, which deal with the scope of an attorney's representation of a client and the duty to keep a client informed. Attorneys provided copies of their communications procedures to OPD and, based on these written procedures as well as several group discussions, OPD was able to formulate Communication Guidelines, which are now a requirement of attorney contracts. A copy of the communication guidelines is posted at OPD's website, www.opd.wa.gov, and may be found attached as Appendix A.

When attorneys submit invoices for appellate briefs, OPD requires that they submit a copy of their brief as well. OPD began working several years ago with contractors to accept briefs in electronic format. OPD began development in fiscal year 2003 of an on-line brief bank. The goals of the brief bank include improving attorney efficiency, avoiding "reinventing the wheel," and keeping attorneys updated on the newest issues and arguments in Washington State appellate courts. The brief bank is expected to be available on-line with over 4,000 briefs in the fall of 2003.

The agency supported the appellate cost recovery system through rapid responses to cost summary requests.

Under the Rules of Appellate Procedure, the appellate court determines the costs taxed to unsuccessful appellants. When an indigent defendant is unsuccessful on appeal, these costs become part of the legal financial obligations that can be imposed by judgment. The rules require that a cost bill, prepared by the prosecuting attorney, be filed with the appellate court within ten days of the filing of an appellate decision terminating review. Prosecutors' offices forward requests for appellate case cost summaries to Washington State OPD. The agency responds within 24 hours in most cases. In fiscal year 2003, Washington State OPD answered over 760 prosecutors' requests, up 10% over the number of requests last year.

*The agency initiated an amendment to the DNA test statute
to improve tracking defendants' requests.*

RCW 10.73.170 permits convicted felons who qualify to petition for testing of DNA evidence in their cases. The statute provides for post conviction testing if DNA evidence was not admitted in a case because the court ruled that DNA testing did not meet acceptable scientific standards or if DNA testing technology was not sufficiently developed to test the DNA evidence in the case.

Inmates send test requests to the county prosecutor. The statute provides that the request shall be granted if there is a likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. Requestors may appeal an adverse decision to the Office of the Attorney General. Requests must be received by January 1, 2005. After that date, any requests have to be raised at trial or on appeal. Although there was initial apprehension that there would be a flood of requests, the Washington State Patrol Crime Lab and prosecuting attorneys have reported less than ten requests annually.

In 2001, OPD wrote a legislative report entitled *Postconviction DNA Testing: Report on the Act Relating to DNA Testing of Evidence*. OPD recommended that test requests continue to be tracked so the Legislature could review the Act's implementation before its sunset.

Since the Act's passage, OPD worked in cooperation with the Washington Association of Prosecuting Attorneys to track the requests. However, the process was cumbersome since the requests could be directed to any of the prosecutors in Washington's thirty-nine counties.

In 2003, OPD requested an amendment, which was passed by the Legislature, to provide that the test requests be sent to OPD instead of to the prosecutors. OPD will transmit the requests to the appropriate prosecutors and will track them.

After the amendment was passed, OPD informed Department of Corrections contract attorneys, county prosecutors, prison law librarians and others of the change. OPD will continue to work with the Washington Association of Prosecuting Attorneys, defense attorneys and DOC contract attorneys to track the requests submitted under this statute.

A copy of the amended statute may be found at Appendix B.

The agency continued implementation of the Parents' Representation Program in Pierce and Benton-Franklin juvenile courts and secured continued legislative funding through the new biennium.

Recognizing the importance of funding legal defense representation for indigent parents in dependency and termination cases, the Washington State Legislature voted a supplemental appropriation for OPD of \$170,000 for fiscal year 2003. These funds, along with grants from the Marguerite Casey Foundation, the Foundation of Mercy, and agency savings and funds, as well as local funds; allowed continuation of the Parents' Representation Pilot Program in Pierce County for all of fiscal year 2003 and in Benton-Franklin Juvenile Court for most of fiscal year 2003. A \$1,550,000 appropriation was passed for fiscal years 2004 and 2005. The funding will provide for a continuation of the Parents' Representation Program through the new biennium.

The program is the result of a study performed by OPD at the direction of the 1999 Legislature. The study found that the parents' resources to respond in these cases were dwarfed by the resources available for the state. The program provides parents with better attorney services to aid them in navigating through the complex legal system. This program emphasizes communication with the parent clients, better preparation of cases, and oversight over the parent clients' ability to participate in services. The parents' attorneys utilize investigative and expert services and spend additional hours.

A study of the Parents' Representation Program by the National Council of Juvenile and Family Court Judges (NCJFCJ) reflected an increase in family reunifications during the program as compared to pre-program cases. In addition to addressing the tragedy of family disintegration, the success of the program in keeping families together can help decrease costs to the state by reducing the need for foster care and adoption subsidies. An audio CD to explain the effects of the improved legal representation provided by the program was produced by OPD with grant funds from the Marguerite Casey Foundation and included the voices of court commissioners, judges, parents and attorneys describing their experiences.

The OPD program has gained media attention, with articles in the *Tri-Cities Herald* and the *Seattle Post-Intelligencer*, and a report on the local National Public Radio station, as well as articles in the Fall 2003 Juvenile and Family Court Journal and the April 2003 ABA Child Court Works Newsletter.

In addition to work on the Parents' Representation Program, the OPD Director participated in statewide groups examining dependency and termination issues, including the Court Improvement Program, Families for Kids Partnership and the Domestic Violence/Child Protective Services Planning Committee.

***The Dependency and Termination Equal Justice Committee
completed its legislatively mandated tasks.***

During fiscal year 2003, the Dependency and Termination Equal Justice (DTEJ) Committee discussed and researched issues in termination and dependency cases and completed its recommendations for improvement of these cases in Washington State courts. The Committee was mandated as a new judicial branch committee to examine problems in dependency and termination proceedings that may act as barriers to equal justice for parents and that obstruct achievement of early permanency placement for children.

Chaired by Justice Bobbe J. Bridge, the DTEJ Committee included representatives of all parties and governmental groups involved with dependency and termination cases—juvenile court judges and commissioners, legislators, parents’ attorneys, representatives of DSHS, the Office of the Attorney General, court administrators, and other persons interested in these issues.

The Committee distributed five surveys, which were developed with the assistance of the Washington State Institute of Public Policy and sent to all county and state funded service providers. Based on the survey results and other research, subcommittees focused on several key areas of concern—experts and evaluators, caseloads and continuances, and access to services. The subcommittees formulated specific recommendations for courts to follow. Tangible results are already occurring in some courts such as Pierce County Juvenile Court, where judges, parents’ attorneys, assistant attorneys general, DSHS case workers, guardians ad litem, and court personnel participated in a reorganizational retreat which resulted in the implementation of major changes in processing dependency and termination cases to achieve earlier permanency for children. A similar retreat was held in Benton-Franklin Juvenile Court to address these process and policy issues.

***The agency developed and submitted the 2002 Extraordinary
Criminal Justice Costs Act prioritized list.***

The Extraordinary Criminal Justice Costs Act, RCW 43.330.190, allows counties which have experienced high-cost aggravated murder cases to petition for state reimbursement. Under the Act, Washington State OPD annually implements the petition process and submits a prioritized list to the Legislature. Pursuant to the statute, priority is based on the comparatively disproportionate fiscal impact on the individual county’s budget.

In December 2002, petitions were filed by Chelan, King, Kitsap, Snohomish, and Whatcom counties. Costs claimed in these petitions were audited and verified, including investigation, prosecution, indigent defense, jury impanelment, expert witnesses, interpreters, incarceration, and other adjudication expenses. The agency created a prioritized list in

consultation with the Washington Association of Prosecuting Attorneys and the Washington Association of Sheriffs and Police Chiefs, and submitted the list to the Legislature, which granted partial reimbursement to one of the petitioning counties. King County demonstrated extraordinary costs of over 2% of their criminal justice budget and received a total of \$766,000 to offset some of the costs it experienced in 2002 due to the prosecution of Gary Ridgway, who was charged in the Green River killings.

CONCLUSION

Washington State OPD continuously seeks ways to improve the quality of its services and more fully meet its joint mandates of implementing the constitutional guarantee of counsel and ensuring the effective and efficient delivery of indigent appellate services. During fiscal year 2003, OPD encouraged counties to appoint qualified indigent appellate attorneys, extended contracts of contractors who had been evaluated in earlier years, sought new qualified attorneys by issuing an RFP, formalized an attorney-client communication protocol, and began development of an on-line brief bank to support attorneys throughout the state. In the area of DNA testing, OPD initiated an amendment to the DNA statute to improve tracking defendants' requests.

The agency also secured legislative funding for the successful Parents' Representation Program in Pierce and Benton-Franklin juvenile courts to carry the program through the new biennium, and the Dependency and Termination Equal Justice Committee completed recommendations to improve dependency and termination cases in the state.

At the same time, agency staff efficiently managed state funds provided for appellate indigent defense and other agency operations, and provided appropriate and timely services to the public, court reporters, attorneys, and the courts.

APPENDIX A

**WASHINGTON STATE OFFICE OF PUBLIC DEFENSE
CLIENT COMMUNICATIONS PROTOCOL GUIDELINES**

The Rules of Professional Conduct require attorneys to keep their clients reasonably informed to enable them to make informed decisions about their case [RPC 1.2; 1.4(a); 1.4(b)]. At a minimum, communication protocols need to address client communications as appropriate at the following points of the representation:

APPOINTMENT LETTER	At the initial time of the appointment, the attorney shall write to the client to outline the scope of the representation, to describe the stages of the appeal, to note the possible assessment of costs for appellate representation, and to provide an address and/or phone number by which the client can communicate with the attorney.
EVALUATIVE COMMUNICATION OR EVALUATIVE LETTER	<p>The attorney shall either:</p> <ul style="list-style-type: none">• Communicate with the client, by letter or telephone, regarding the fact that the attorney has read the record and analyzed the case and regarding the specific means by which the client may contact the attorney to fully discuss the merits and other factors involved in the client’s case and to exercise his or her options. <p style="text-align: center;">or, alternatively,</p> <ul style="list-style-type: none">• Summarize in a letter the results of the attorney’s investigation and analysis of the merits of the case, remind the client that costs may be assessed in case of an unsuccessful appeal, and provide an opportunity for the client to contact the attorney to exercise his or her options. <p>Some attorneys may choose to provide an evaluative communication or letter before writing the brief; others may choose to provide an evaluative communication or letter after writing the brief and/or accompanying the brief.</p>
LETTER ACCOMPANYING BRIEF	The attorney shall send the client the opening brief and inform the client of the right to obtain a copy of the transcript and to file a Statement of Additional Grounds for Review pursuant to RAP 10.10.

<p style="text-align: center;">STATUS REPORTS</p>	<p>While the case is on-going, the attorney may update the client on developments. Examples include informing the client of the date of oral argument and forwarding a copy of the state’s brief and any reply brief.</p>
<p style="text-align: center;">LETTER ACCOMPANYING DECISION</p>	<p>The attorney shall send the client a copy of the appellate court’s decision and shall inform the client whether the attorney plans to file a Petition for Review or whether the client has the option to file a petition and if so, the time constraints for such a petition.</p>
<p style="text-align: center;">LETTER ACCOMPANYING MANDATE</p>	<p>The attorney shall send the client a copy of the mandate and inform the client of the applicable time constraints for any further state or federal relief.</p>

APPENDIX B

**RCW 10.73.170
DNA TESTING REQUESTS**

(1) On or before December 31, 2004, a person in this state who has been convicted of a felony and is currently serving a term of imprisonment and who has been denied postconviction DNA testing may submit a request to the state Office of Public Defense, which will transmit the request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2005, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. The prosecutor shall inform the requestor and the state Office of Public Defense of the decision, and shall, in the case of an adverse decision, advise the requestor of appeals rights. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(3) A person denied a request made pursuant to subsections (1) and (2) of this section has a right to appeal his or her request within thirty days of denial of the request by the prosecutor. The appeal shall be to the attorney general's office. If the attorney general's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis, then the attorney general's office shall request DNA testing by the Washington state patrol crime laboratory.

(4) Notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case prior to July 22, 2001, may not be destroyed before January 1, 2005.

[2003 c 100 § 1; 2001 c 301 § 1; 2000 c 92 § 1.]

NOTES:

Construction -- 2001 c 301: "Nothing in this act may be construed to create a new or additional cause of action in any court. Nothing in this act shall be construed to limit any rights offenders might otherwise have to court access under any other statutory or constitutional provision." [2001 c 301 § 2.]

Report on DNA testing -- 2000 c 92: "By December 1, 2001, the office of public defense shall prepare a report detailing the following: (1) The number of postconviction DNA test requests approved by the respective prosecutor; (2) the number of postconviction DNA test requests denied by the respective prosecutor and a summary of the basis for the denials; (3) the number of appeals for postconviction DNA testing approved by the attorney general's office; (4) the number of appeals for postconviction DNA testing denied by the

attorney general's office and a summary of the basis for the denials; and (5) a summary of the results of the postconviction DNA tests conducted pursuant to RCW 10.73.170 (2) and (3). The report shall also provide an estimate of the number of persons convicted of crimes where DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or where DNA testing technology was not sufficiently developed to test the DNA evidence in the case." [2000 c 92 § 2.]

Intent -- 2000 c 92: "Nothing in chapter 92, Laws of 2000 is intended to create a legal right or cause of action. Nothing in chapter 92, Laws of 2000 is intended to deny or alter any existing legal right or cause of action. Nothing in chapter 92, Laws of 2000 should be interpreted to deny postconviction DNA testing requests under existing law by convicted and incarcerated persons who were sentenced to confinement for a term less than life or the death penalty." [2000 c 92 § 4.]