

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

ANNUAL REPORT

FISCAL YEAR 2004



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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 actions including:

- implementing procedures for appointment of attorneys and evaluation of indigent appellate attorney services;
- administering funds appropriated for court-appointed counsel in appellate cases;
- supporting efforts to improve the quality of trial level indigent defense in Washington State;
- 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.

The Washington State Office of Public Defense Advisory Committee, made up of 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 2004, 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 agency programs, and resolved fiscal appeals pursuant to court rules. 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.

In addition to working to improve delivery of appellate level indigent defense in fiscal year 2004, OPD also worked with concerned legal community leaders on critical issues regarding the delivery of trial level indigent defense in Washington State. Media coverage of substandard public defense in some counties and of severe underfunding of the system statewide has provided additional impetus to the dialogue on public defense in Washington.

AGENCY STRUCTURE

The six-person 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 2004

OPD proposed a new system for appointing attorneys for appeals.

As required by the OPD mandate of ensuring effective and efficient delivery of indigent appellate services, the agency continued to improve the quality of appellate representation. Under court rules, the superior courts in each county have appointed counsel for appeals of non-death penalty cases for the past two decades or more. This system has resulted in varying levels of quality of indigent appellate representation throughout the state.

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. The agency continues to oversee the work of 37 contract attorneys in Divisions II and III, in addition to the work of two contract firms in Division I, who first contracted with OPD in 1996. Before contracting with any attorney, OPD undertakes a rigorous evaluation of their written work pursuant to a Request for Proposal process.

Since trial courts are responsible for appointing appellate counsel, OPD has provided them with lists of contract-qualified appellate attorneys and requests that they appoint from the list. This effort has enjoyed overall success, with contract attorneys representing indigent

appellants in over 80% of the cases statewide. Nevertheless, varying levels of quality of representation continue to exist in a number of counties and this variance has been an issue of concern.

In order to address this issue, OPD staff conferred with a large number of judges, clerks and staff members at the Supreme Court, the Courts of Appeal, and superior courts during fiscal year 2004. As a result, the agency proposed a court rule change to the Supreme Court to establish that appellate courts, instead of trial courts, appoint appellate counsel designated by OPD. The Supreme Court adopted the proposed rule in September 2004, with an effective date of July 1, 2005. OPD will work with the courts and OPD attorneys on this change to the appointment system.

During fiscal year 2004, OPD continued to work with attorneys appointed to seven pending appellate death penalty cases. In addition, in accordance with a 2001 legislative directive to establish a Death Penalty Assistance Center, OPD also continued its contract with The Defender Association in Seattle to run the Death Penalty Assistance Center (DPAC) to provide support and training to trial lawyers who represent defendants in death penalty cases.

The agency implemented an online brief bank, trained attorneys in the use of the online Judicial Information System (JIS), and provided Continuing Legal Education courses.

In fiscal year 2004, the agency enhanced indigent appellate representation by implementing an online brief bank and training OPD attorneys in the use of the Judicial Information System.

Using a substantial number of briefs collected by Nielsen, Broman and Koch, a contract attorney firm located in Seattle, as well as briefs provided by OPD attorneys throughout the state, OPD launched an online brief bank which now contains over 5,000 briefs for use by defense attorneys preparing their clients' cases. The brief bank allows both historical searching and also up-to-the-minute issue sharing as briefs are added monthly as they are received by OPD. The immediate access to research performed by all OPD attorneys saves time and improves the quality of representation statewide.

OPD presented Continuing Legal Education classes in Olympia, Burien and Spokane in fiscal year 2004. In addition to training in the use of the brief bank, attorneys received training in the use of the online Judicial Information System (JIS), available to public defense attorneys at no cost through the Washington State Administrative Office of the Courts. The JIS system allows access to the dockets of both the superior courts and the appellate courts, so attorneys can check court actions from their office computers. Thus, JIS access saves attorney and court time by reducing in-person visits and telephone calls to the courts for information.

OPD's fiscal year 2004 CLE courses included training in brief writing techniques and oral argument. In November, nationally known appellate trainer Ira Mickenberg presented a thought provoking all-day class at the Washington State Criminal Justice Training Commission in Burien on effective oral advocacy. In Olympia and Spokane in the spring, Professor Connie Krontz of the Legal Writing Program at Seattle University Law School presented advanced training on writing an ethical, persuasive statement of facts in appellate briefs.

OPD oversaw the Parents' Representation Program in Pierce and Benton-Franklin juvenile courts.

Using the continued legislative funding for the OPD Parents' Representation Program in Pierce and Benton-Franklin juvenile courts, OPD contract attorneys worked in dependency and termination cases, carrying caseloads which met agency caseload standards and using available funds for additional investigation and improved communication with their clients. This program was funded by a \$1,550,000 appropriation from the Legislature.

The program is the result of a study performed by OPD at the direction of the 1999 Legislature. This study found that parents' resources to respond in these cases are 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 are able to utilize investigative and expert services and spend additional hours working on these cases because of the program.

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 Committee, the Families for Kids Partnership and the Domestic Violence/Child Protective Services Planning Committee, as well as the OPD-managed Dependency and Termination Equal Justice Committee.

Building on the accomplishments of the Parents' Representation Program, OPD will seek funding for a statewide Parents' Representation Program in the 2005 Legislature.

In April 2004, the Children's Justice Committee honored OPD Director Joanne Moore with the Lee Ann Miller Award, given each year to an individual, group or program making a profound impact in promoting the safety, protection and well-being of children. Ms. Moore received the award for her work in implementing the Parents' Representation Program and her efforts in the Dependency and Termination Equal Justice Committee, among other efforts she has made to improve equal justice in the dependency process.

In fiscal year 2004, the Dependency and Termination Equal Justice Committee issued a report including 34 recommendations.

In a December 2003 report, the Dependency and Termination Equal Justice Committee (DTEJ) completed recommendations for improvement in termination and dependency cases in Washington State courts. DTEJ's mandated task was 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. The committee was chaired by Washington State Supreme Court Justice Bobbe Bridge and managed by OPD.

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 and the Office of the Attorney General, court administrators, CASA, 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 juvenile court judicial officials, experts, chemical dependency programs, social workers, and 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.

Most of the 34 DTEJ recommendations do not require any additional financial resources for implementation. Recommendations included longer judicial rotations, better continuance rules, mutually appointed experts, improved services access for parents, expanded family visitation, and the adoption of OPD's Parents' Representation Program statewide, among others. The 2004 Legislature passed legislation implementing the DTEJ Committee's recommendations on the appointment of evaluators in dependency cases and on family visitation for dependent children.

OPD presented Washington's first statewide Parents' Representation Conference.

OPD obtained a \$24,000 grant from the Court Improvement Program to present Washington's first Parents' Representation Conference, attended by more than one hundred attorneys in June 2004. Washington State Supreme Court Justice Bobbe Bridge made opening remarks to the conference attendees, who also heard from a parent who had been through the dependency process and succeeded in overcoming drug addiction and reunifying with her children. The two-day event included presentations on securing services for clients, representing substance abuse clients, using experts and evaluators in preparing a case, communicating with clients, and advocating for visitation between parents and children. An

appellate track concentrated on appellate representation and on working with trial practitioners to improve timing and assure a record which will accurately reflect the issues in the case.

Due to the statewide lack of high-quality resource materials for parents' attorneys, OPD created a comprehensive, 272-page Parents' Representation Deskbook, funded by a \$5,000 grant from the Washington Defenders' Association. Experienced Washington parents' attorneys contributed chapters to the deskbook.

The conference participants evaluated the conference as providing excellent presentations, superior training materials, and an unprecedented opportunity to share information about varying county practices in dependency cases and to network with fellow attorneys.

In fiscal year 2004, OPD worked with the legal community to improve trial level indigent defense.

In March 2004, the ACLU issued a report titled "The Unfulfilled Promise of Gideon," concluding that a number of Washington counties do not deliver acceptable public defense representation services. In April 2004, a *Seattle Times* series, "Unequal Justice," examined serious public defense deficiencies in Grant and other counties. Soon thereafter, the ACLU sued Grant County for failing to provide adequate public defense. In May 2004, the Washington State Bar Association's (WSBA) Blue Ribbon Task Force on Indigent Defense's report was released, finding that public defense is substandard in most counties. In the summer, the Court Funding Task Force and the Board for Judicial Administration named indigent defense as a major concern statewide, and recommended that the state assume 100% of its funding.

These reports, articles, and actions all were based on the conclusion that many locally contracted public defense attorneys do not provide adequate counsel to the indigent defendants they represent. In particular, many fail to communicate adequately with their clients, conduct investigations, or complete other necessary case preparation.

As noted by the WSBA report, OPD is the state agency charged with the responsibility to implement the guarantee of counsel, and is in a unique position to provide "meaningful oversight, monitoring, reporting, and training designed to ensure that legislatively mandated defense standards are adopted and implemented and, if state funding is available, to disburse such funding contingent on adherence to statutorily mandated defense standards." In the upcoming year, OPD will continue to work with groups who are striving to improve trial level indigent defense.

The agency sought new legislation to improve the effectiveness of the DNA test statute.

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.

Under the statute, inmates may request tests from the county prosecutor. The request shall be granted if there is a likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. Requesters may appeal an adverse decision to the Office of the Attorney General. Under the statute, inmates have until January 1, 2005 to forward DNA requests to prosecutors. Although there was initial apprehension upon the statute's adoption in 2000 that there would be a flood of requests, the Washington State Patrol Crime Lab and prosecuting attorneys reported fewer 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.

In 2003, the Legislature amended the statute at OPD's request, providing that the test requests be sent to OPD instead of directly to the various prosecutors. OPD transmits the requests to the appropriate prosecutors and tracks them.

In 2004, based on information collected from the DNA test requests, OPD and the Washington State Association of Prosecuting Attorneys (WAPA) recommended to the Legislature passage of an amendment to allow inmates to submit requests for DNA testing to the trial court, instead of the prosecutor who tried the case. Although there was broad support for this amendment and approval by the relevant legislative committees, the Legislature did not reach a vote on the amendment. Since the sunset of this bill on January 1, 2005 could lead to the destruction of DNA evidence now being retained, OPD and WAPA plan to request the legislation on an emergency basis in 2005.

OPD developed and submitted the 2003 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 2003, petitions were filed by King, Kitsap, Snohomish and Spokane 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. While King County's claim was for 18 active cases including four death penalty cases, the majority of the claimed costs were expended on the Ridgway case, which totaled over \$6 million. The Legislature allocated a total of \$807,000 to King County in response to the information provided by OPD.

***The agency processed 12,552 invoices in fiscal year 2004:
Statistical Report***

During fiscal year 2004 Washington State OPD staff processed 12,552 invoices including attorney invoices, pro se transcripts invoices, court reporter invoices, county clerk invoices, and invoices from appellate courts for photocopying briefs. An additional 626 administrative invoices were also processed during the fiscal year.

Invoices totaled \$4,279,480 for fiscal year 2004 contract and non-contract attorney services and death penalty expenses and \$1,566,816 for court reporter and county clerk costs, for a total of \$5,846,296. OPD verifies each invoice submitted by referring to the Judicial Information System and the agency's database.

During daily operation, the agency in fiscal year 2004 also responded to approximately 1200 requests for information and assistance from courts, attorneys, defendants, and the public.

In order to improve budget monitoring, OPD this year distributed policies requiring more timely submission of vendor invoices and proscribing new penalties for late invoices. These changes resulted in the collection of outstanding invoices from closed cases, the revision of vendor billing procedures to meet OPD timelines, and improved ability to forecast future budget demands. Notwithstanding the new policies, OPD's funding requirements continue to fluctuate based on appellate case filings which vary with prosecutorial and criminal defense decisions beyond the control of OPD. For example, the U.S. Supreme Court's, June 2004 decision in Blakely v. Washington is generating additional appellate (and trial level) caseloads as its impacts on exceptional sentences in Washington State are litigated.

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 2004, Washington State OPD answered over 810 prosecutors' requests, up 6.5% over the number of requests last year.

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 2004, OPD encouraged counties to appoint qualified indigent appellate attorneys, implemented an online brief bank to support attorneys throughout the state, trained appellate attorneys, and supported groups working to improve trial level indigent defense. In the area of DNA testing, OPD sought an amendment to improve the effectiveness of the DNA testing statute.

The Dependency and Termination Equal Justice Committee issued a report with recommendations to improve dependency and termination cases in the state, and succeeded in securing new legislation to improve evaluations and visitation in dependency cases. OPD continued to implement its successful Parents' Representation Program in Pierce and Benton-Franklin counties, and provided Washington's first statewide conference for parents' attorneys.

At the same time, agency staff implemented improved payment policies, 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.