

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

ANNUAL REPORT

FISCAL YEAR 2005



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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 2005, 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 counsel for indigent persons in criminal cases and other cases involving basic rights, including dependency

proceedings, 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, 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 2005, OPD also worked with concerned legal community leaders on critical issues regarding the delivery of trial level indigent defense in Washington State. At the request of the 2005 Legislature, the agency took on additional responsibilities in the area of trial level public defense to provide information to counties regarding contracting for public defense services, to provide for training and resource attorneys for trial level public defenders, and to implement pilot programs to improve public defense in trial courts.

AGENCY STRUCTURE

During most of fiscal year 2005, the agency staff was composed of a director, a deputy director, a budget analyst, a senior financial analyst, an executive assistant, and an administrative assistant. The budget analyst analyzed the budget and processed invoices. The senior financial analyst processed invoices for indigent appellate defense services. They both also responded to inquiries regarding billing procedures and allowable claims. The executive assistant responded to inquiries related to cost-recoupment and managed office and document preparation matters, and the administrative assistant provided support and technical expertise. The director and deputy director managed the budget and carried out the tasks described below.

As a result of legislative directives, the agency added four new positions at the end of fiscal year 2005, including two public defense services managers, a parents representation managing attorney, and a parents representation social services manager. These new positions support the expansion of services in the areas of trial level public defense and parents representation.

AGENCY TASKS AND ACCOMPLISHMENTS IN FISCAL YEAR 2005

***OPD implemented a new system for Court of Appeals
appointment of appellate attorneys.***

Pursuant to OPD's mandate to ensure effective and efficient delivery of indigent appellate services, the agency continued in fiscal year 2005 to improve the quality of appellate representation. Effective July 1, 2005, the Washington State Supreme Court approved a rule change proposed by OPD establishing appointment of appellate attorneys by the Court of Appeals, rather than by individual county superior courts. For over two decades prior to the rule change, the superior courts in each county had appointed counsel for indigent appeals of non-death penalty cases. This system 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 34 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 were responsible for appointing appellate counsel, OPD provided them with lists of contract-qualified appellate attorneys and requested that they appoint from the list. While this system resulted in contract attorneys representing indigent appellants in over 80% of the cases statewide, nevertheless, varying levels of quality of representation continued to exist in a number of counties and this variance was an issue of concern.

To implement the 2005 rule change, OPD worked with Court of Appeals and Washington State University computer programmers to design a system which designates OPD contract attorneys on a rotating basis and provides the names to the Court of Appeals instantly upon request. Using prior years' case appointments, the new system was tested extensively before its installation. The system selects attorneys based on their location, type of case they handle, number of cases assigned in the current year and the current month, and the number of cases for which they have contracted.

During fiscal year 2005, OPD continued to work with attorneys appointed to 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. The Death Penalty

Assistance Center provides support and training to trial lawyers who represent defendants in death penalty cases. The Center has conducted trainings across the state, advised attorneys representing clients in death penalty cases, and established an extensive website to provide online resources for attorneys.

The agency added 1,500 briefs to its online brief bank, supported attorneys in the use of the online Judicial Information System (JIS), conducted a competitive procurement for new contract attorneys, and provided continuing legal education classes.

In fiscal year 2005, the agency supported indigent appellate representation with an online brief bank, assistance in the use of the Judicial Information System, and continuing legal education classes.

The online brief bank added over 1,500 new briefs in fiscal year 2005, providing attorneys with access to 6,500 indigent appellate briefs for their research. The brief bank allows both historical searching and also up-to-the-minute issue sharing as briefs are added monthly when they are received by OPD. The immediate access to research performed by all OPD attorneys saves time and improves the quality of representation statewide in a cost-effective way. Attorneys throughout the state and around the nation have accessed the brief bank for their research, and OPD has also provided information to other states that are interested in setting up similar online resources.

The online Judicial Information System (JIS) is another online resource which appellate attorneys are continuing to use with OPD technical support. 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.

In 2005, OPD conducted a competitive procurement for appellate attorneys to increase the number of contract attorneys handling cases in Court of Appeals Divisions II and III. After a review of qualifications submitted and a scored evaluation of the brief writing by independent evaluators, contracts were signed with six new appellate attorneys.

OPD presented continuing legal education classes in Spokane and Ellensburg in fiscal year 2005. OPD's fiscal year 2005 CLE courses included training in brief writing and developing a defense theory of the appellate case, presented in Spokane by Ira Mickenberg, a nationally known appellate trainer. In October 2004, appellate attorneys gathered in Ellensburg for a class which dealt with Washington v. Blakely and Washington v. Crawford, two United States Supreme Court cases with far reaching implications for criminal practice. In addition, King County Superior Court Judge Ronald Kessler reviewed caselaw from the previous year and addressed sentencing issues in Washington State. The all-day program also provided time for attorneys to meet in small, geographically diverse groups to exchange information about current cases and build relationships for mutual support.

OPD began expansion of the Parents Representation Program to 30% of the counties in Washington State.

Based on the success of the Parents Representation Program in Benton-Franklin and Pierce County juvenile courts, the 2005 Legislature funded an expansion of the program to a limited number of additional counties. OPD solicited applications from counties wishing to participate in the program and received requests from most of them. These applications underscore the statewide need in the area of parents representation in dependency and termination cases

Through a juvenile court application process, OPD made efforts to select counties with the most pressing need and in which the program would make the most impact. OPD selected Cowlitz, Ferry, Stevens, Pend Oreille, Grant, Grays Harbor, Kittitas, Pacific, Skagit, and Yakima Counties in addition to continuing the program in Pierce, Benton and Franklin Counties.

Working with judges, court staff, the Office of the Attorney General, and local attorneys, OPD began planning for implementation of the program in the new counties. OPD will select the most qualified attorneys through an RFP process, contracting with a sufficient number to ensure that caseloads meet agency standards in a timely manner. Planning has also begun for monitoring the contracts and providing training to all of the dependency and termination attorneys in each county.

The pilot program was initially started as a 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. Communication with parent clients, better

preparation of cases, and oversight over the parent clients' ability to participate in services are emphasized. The parents' attorneys are able to utilize investigative and expert services and spend additional hours working on these cases under 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 Washington State Supreme Court Commission on Children in Foster Care, the Court Improvement Program Committee, Catalyst for Kids, and the Domestic Violence/Child Protective Services Planning Committee.

Based on the emergent need for adequate parents representation expressed by Washington's juvenile courts, OPD will seek funding for a statewide Parents Representation Program in the 2006 Legislature.

The 2005 Legislature directed OPD to conduct pilot programs to improve public defense; to distribute funds to counties meeting standards for public defense; to assist counties with public defense contracts; and to provide training and resource attorneys for trial level public defenders.

Responding to reports by the media, the ACLU, the Washington State Bar Association Blue Ribbon Task Force on Indigent Defense, the Court Funding Task Force, and the Board for Judicial Administration, the Legislature recognized the urgent problems with trial level indigent defense and established action in several ways in fiscal year 2005. The Legislature directed OPD to conduct pilot programs to improve public defense; to distribute funds to counties who met standards for public defense; to assist counties with public defense contracts; and to provide training and resource attorneys to trial level public defenders.

Under HB 1542, OPD was directed to distribute any funds provided by the Legislature to counties meeting public defense standards endorsed by the Washington State Bar Association or making "substantial, measurable" improvement toward meeting the standards. (A copy of HB 1542 is located at Appendix A and a copy of the standards for public defense is located at Appendix B.) In order to receive funding, counties must ensure that specific minimum standards for public defense are enforced in their counties, including required training; minimum qualifications for attorneys who handle the most serious cases; and independent funding for conflict counsel, investigators, and experts. Although funding has not yet been appropriated

for this bill, the Legislature did fund other measures to improve public defense in OPD's budget.

In SB 5454, the Legislature provided specific funding for pilot programs to improve public defense in selected jurisdictions. OPD will work with jurisdictions which are able to make effective use of additional attorney positions to improve public defense and will track the results to report to the Legislature. In addition, OPD's new public defense services managers will begin work with individual counties as requested to improve trial level public defense contracts. Other resource attorneys—two half-time positions, one for felonies and one for misdemeanors—will be provided through an OPD contract with the Washington Defender Association (WDA).

Finally, with the new funding, OPD will support WDA's trial advocacy training, and OPD will also initiate a series of regional trainings throughout Washington State for trial level public defenders. Since most counties do not have public defender offices, but rather contract with individual attorneys to represent indigent defendants, many attorneys lack training and they practice without supervision. Regional trainings will help to raise the standard of public defense practice and will encourage networking among public defense practitioners.

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. Originally, the statute provided 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. Requesters could appeal an adverse decision to the Office of the Attorney General. Under the statute, inmates had 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.

Since the sunset of this bill on January 1, 2005 could have led to the destruction of DNA evidence now being retained, OPD and WAPA requested legislation on an emergency basis in 2005, and the Legislature passed the bill as one of its first acts in January 2005. (A copy of the legislation may be found at Appendix C.)

The new legislation allows inmates to submit their requests for DNA testing to the trial court instead of to the prosecutor who tried the case. In addition, the basis for granting the DNA request is expanded to allow the testing if it is significantly more accurate than prior testing or would provide significant new information. The bill also allows the trial court to appoint counsel to assist the inmate with the petition for testing.

OPD developed and submitted the 2004 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 2004 petitions were filed by Grant, King, Snohomish and Yakima 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 in the 2005 budget bill to one county—Grant County.

***The agency processed 12,178 invoices in fiscal year 2005:
Statistical Report***

During fiscal year 2005 Washington State OPD staff processed 12,178 invoices including attorney invoices, pro se transcripts invoices, court reporter invoices, county clerk invoices, appellate court brief photocopying invoices and administrative invoices.

Invoices totaled \$3,647,818 for fiscal year 2005 contract and non-contract attorney services and death penalty expenses and \$1,368,661 for court reporter and

county clerk costs, for a total of \$5,016,479. 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 2005 also responded to approximately 1200 requests for information and assistance from courts, attorneys, defendants, and the public.

In fiscal year 2005, vendors continued to submit invoices on a timely basis pursuant to OPD's payment policies posted on the OPD website. The policies, instituted in fiscal year 2004, require timely submission of vendor invoices and proscribe penalties for late invoices. These changes have improved OPD's 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 decisions in Blakely v. Washington and Crawford v. Washington generated dozens of supplemental briefs ordered by the appellate courts to review cases under this new caselaw.

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 2005, Washington State OPD answered over 648 prosecutors' requests.

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. Fiscal year 2005 presented a variety of new challenges for OPD. In the area of appellate services, OPD developed and tested a new software system to implement the Washington State Supreme Court's change to RAP 15.2. Starting

July 1, 2005, under the amended rule for indigent criminal appeals, the Court of Appeals, rather than county superior courts, will appoint appellate attorneys designated by OPD.

OPD also assisted appellate attorneys by expanding the OPD online brief bank, helping attorneys gain access to AOC's online Judicial Information System, and providing continuing legal education classes.

In the area of DNA testing, OPD worked with WAPA and other groups to succeed in the passage of an amendment to improve the effectiveness of the DNA testing statute and continue it past its sunset date of December 31, 2004.

In the area of parents' representation, OPD began implementing the Legislature's expansion of the program to 30% of the state. Pursuant to the objective of the 2005 Legislature, OPD began working with the new counties, as well as continuing the program in Pierce and Benton-Franklin counties.

OPD also joined with the legal community, the courts, and interested groups to improve trial level public defense. Two important bills were passed by the Legislature in 2005 emphasizing the state's role in supporting and overseeing trial level public defense. Consequently, OPD will be working with counties to improve public defense contracting, and will be initiating regional trainings and implementing pilot programs to improve public defense.

APPENDIX A

CERTIFICATION OF ENROLLMENT
SECOND SUBSTITUTE HOUSE BILL 1542

Chapter 157, Laws of 2005

59th Legislature
2005 Regular Session

PUBLIC DEFENSE SERVICES

EFFECTIVE DATE: 7/24/05

Passed by the House March 11, 2005
Yeas 95 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 7, 2005
Yeas 42 Nays 6

BRAD OWEN

President of the Senate

Approved April 22, 2005.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is SECOND SUBSTITUTE HOUSE BILL 1542 as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

April 22, 2005 - 4:04 p.m.

Secretary of State
State of Washington

SECOND SUBSTITUTE HOUSE BILL 1542

Passed Legislature - 2005 Regular Session

State of Washington 59th Legislature 2005 Regular Session

By House Committee on Appropriations (originally sponsored by Representatives Lantz, Hinkle, Appleton, Rodne, Lovick, Newhouse, Buri, Darneille, Williams, McDermott, Clibborn, Schual-Berke, O'Brien, McIntire, Kagi, Hasegawa, Dickerson, Green, Kenney and Kilmer)

READ FIRST TIME 03/08/05.

1 AN ACT Relating to indigent defense services; amending RCW
2 10.101.005 and 10.101.030; adding new sections to chapter 10.101 RCW;
3 and creating a new section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 10.101.005 and 1989 c 409 s 1 are each amended to read
6 as follows:

7 The legislature finds that effective legal representation
8 ((~~should~~)) must be provided for indigent persons and persons who are
9 indigent and able to contribute, consistent with the constitutional
10 requirements of fairness, equal protection, and due process in all
11 cases where the right to counsel attaches.

12 **Sec. 2.** RCW 10.101.030 and 1989 c 409 s 4 are each amended to read
13 as follows:

14 Each county or city under this chapter shall adopt standards for
15 the delivery of public defense services, whether those services are
16 provided by contract, assigned counsel, or a public defender office.
17 Standards shall include the following: Compensation of counsel, duties
18 and responsibilities of counsel, case load limits and types of cases,

1 responsibility for expert witness fees and other costs associated with
2 representation, administrative expenses, support services, reports of
3 attorney activity and vouchers, training, supervision, monitoring and
4 evaluation of attorneys, substitution of attorneys or assignment of
5 contracts, limitations on private practice of contract attorneys,
6 qualifications of attorneys, disposition of client complaints, cause
7 for termination of contract or removal of attorney, and
8 nondiscrimination. The standards endorsed by the Washington state bar
9 association for the provision of public defense services (~~may~~) should
10 serve as guidelines to (~~contracting~~) local legislative authorities in
11 adopting standards.

12 NEW SECTION. Sec. 3. A new section is added to chapter 10.101 RCW
13 to read as follows:

14 The Washington state office of public defense shall disburse
15 appropriated funds to counties and cities for the purpose of improving
16 the quality of public defense services. Counties may apply for up to
17 their pro rata share as set forth in section 4 of this act provided
18 that counties conform to application procedures established by the
19 office of public defense and improve the quality of services for both
20 juveniles and adults. Cities may apply for moneys pursuant to the
21 grant program set forth in section 6 of this act. In order to receive
22 funds, each applying county or city must require that attorneys
23 providing public defense services attend training approved by the
24 office of public defense at least once per calendar year. Each
25 applying county or city shall report the expenditure for all public
26 defense services in the previous calendar year, as well as case
27 statistics for that year, including per attorney caseloads, and shall
28 provide a copy of each current public defense contract to the office of
29 public defense with its application. Each individual or organization
30 that contracts to perform public defense services for a county or city
31 shall report to the county or city hours billed for nonpublic defense
32 legal services in the previous calendar year, including number and
33 types of private cases.

34 NEW SECTION. Sec. 4. A new section is added to chapter 10.101 RCW
35 to read as follows:

36 (1) (a) Subject to the availability of funds appropriated for this

1 purpose, the office of public defense shall disburse to applying
2 counties that meet the requirements of section 3 of this act designated
3 funds under this chapter on a pro rata basis pursuant to the formula
4 set forth in section 5 of this act and shall disburse to eligible
5 cities, funds pursuant to section 6 of this act. Each fiscal year for
6 which it receives state funds under this chapter, a county or city must
7 document to the office of public defense that it is meeting the
8 standards for provision of indigent defense services as endorsed by the
9 Washington state bar association or that the funds received under this
10 chapter have been used to make appreciable demonstrable improvements in
11 the delivery of public defense services, including the following:

12 (i) Adoption by ordinance of a legal representation plan that
13 addresses the factors in RCW 10.101.030. The plan must apply to any
14 contract or agency providing indigent defense services for the county
15 or city;

16 (ii) Requiring attorneys who provide public defense services to
17 attend training under section 3 of this act;

18 (iii) Requiring attorneys who handle the most serious cases to meet
19 specified qualifications as set forth in the Washington state bar
20 association endorsed standards for public defense services or
21 participate in at least one case consultation per case with office of
22 public defense resource attorneys who are so qualified. The most
23 serious cases include all cases of murder in the first or second
24 degree, persistent offender cases, and class A felonies. This
25 subsection (1)(a)(iii) does not apply to cities receiving funds under
26 sections 3 through 6 of this act;

27 (iv) Requiring contracts to address the subject of compensation for
28 extraordinary cases;

29 (v) Identifying funding specifically for the purpose of paying
30 experts (A) for which public defense attorneys may file ex parte
31 motions, or (B) which should be specifically designated within a public
32 defender agency budget;

33 (vi) Identifying funding specifically for the purpose of paying
34 investigators (A) for which public defense attorneys may file ex parte
35 motions, and (B) which should be specifically designated within a
36 public defender agency budget.

37 (b) The cost of providing counsel in cases where there is a

1 conflict of interest shall not be borne by the attorney or agency who
2 has the conflict.

3 (2) The office of public defense shall determine eligibility of
4 counties and cities to receive state funds under this chapter. If a
5 determination is made that a county or city receiving state funds under
6 this chapter did not substantially comply with this section, the office
7 of public defense shall notify the county or city of the failure to
8 comply and unless the county or city contacts the office of public
9 defense and substantially corrects the deficiencies within ninety days
10 after the date of notice, or some other mutually agreed period of time,
11 the county's or city's eligibility to continue receiving funds under
12 this chapter is terminated. If an applying county or city disagrees
13 with the determination of the office of public defense as to the
14 county's or city's eligibility, the county or city may file an appeal
15 with the advisory committee of the office of public defense within
16 thirty days of the eligibility determination. The decision of the
17 advisory committee is final.

18 NEW SECTION. Sec. 5. A new section is added to chapter 10.101 RCW
19 to read as follows:

20 The moneys shall be distributed to each county determined to be
21 eligible to receive moneys by the office of public defense as
22 determined under this section. Ninety percent of the funding
23 appropriated shall be designated as "county moneys" and shall be
24 distributed as follows:

25 (1) Six percent of the county moneys appropriated shall be
26 distributed as a base allocation among the eligible counties. A
27 county's base allocation shall be equal to this six percent divided by
28 the total number of eligible counties.

29 (2) Ninety-four percent of the county moneys appropriated shall be
30 distributed among the eligible counties as follows:

31 (a) Fifty percent of this amount shall be distributed on a pro rata
32 basis to each eligible county based upon the population of the county
33 as a percentage of the total population of all eligible counties; and

34 (b) Fifty percent of this amount shall be distributed on a pro rata
35 basis to each eligible county based upon the annual number of criminal
36 cases filed in the county superior court as a percentage of the total

1 annual number of criminal cases filed in the superior courts of all
2 eligible counties.

3 (3) Under this section:

4 (a) The population of the county is the most recent number
5 determined by the office of financial management;

6 (b) The annual number of criminal cases filed in the county
7 superior court is determined by the most recent annual report of the
8 courts of Washington, as published by the office of the administrator
9 for the courts;

10 (c) Distributions and eligibility for distributions in the
11 2005-2007 biennium shall be based on 2004 figures for the annual number
12 of criminal cases that are filed as described under (b) of this
13 subsection. Future distributions shall be based on the most recent
14 figures for the annual number of criminal cases that are filed as
15 described under (b) of this subsection.

16 NEW SECTION. Sec. 6. A new section is added to chapter 10.101 RCW
17 to read as follows:

18 The moneys under section 3 of this act shall be distributed to each
19 city determined to be eligible under this section by the office of
20 public defense. Ten percent of the funding appropriated shall be
21 designated as "city moneys" and distributed as follows:

22 (1) The office of public defense shall administer a grant program
23 to select the cities eligible to receive city moneys. Incorporated
24 cities may apply for grants. Applying cities must conform to the
25 requirements of sections 3 and 4 of this act.

26 (2) City moneys shall be divided among a maximum of five applying
27 cities and shall be distributed in a timely manner to accomplish the
28 goals of the grants.

29 (3) Criteria for award of grants shall be established by the office
30 of public defense after soliciting input from the association of
31 Washington cities. Award of the grants shall be determined by the
32 office of public defense.

33 NEW SECTION. Sec. 7. If specific funding for the purposes of this
34 act, referencing this act by bill or chapter number, is not provided by

1 June 30, 2005, in the omnibus appropriations act, this act is null and
2 void.

Passed by the House March 11, 2005.
Passed by the Senate April 7, 2005.
Approved by the Governor April 22, 2005.
Filed in Office of Secretary of State April 22, 2005.

APPENDIX B

WASHINGTON DEFENDER ASSOCIATION STANDARDS FOR PUBLIC DEFENSE SERVICES

Objectives and minimum requirements for providing legal representation to poor persons accused of crimes or facing Juvenile or Civil Commitment proceedings in Washington State

October 1989

ENDORSEMENT

These Standards were endorsed by the Washington State Bar Association Board of Governors in January, 1990.

ACKNOWLEDGEMENTS

Publication of these Standards was made possible in part by funding from the Washington Indigent Defense Task Force.

INDEX

- STANDARD ONE: Compensation
- STANDARD TWO: Duties and Responsibilities of Counsel
- STANDARD THREE: Caseload Limits and Types of Cases
- STANDARD FOUR: Responsibility for Expert Witness Fees
- STANDARD FIVE: Administrative Expenses
- STANDARD SIX: Investigators
- STANDARD SEVEN: Support Services
- STANDARD EIGHT: Reports of Attorney Activity and Vouchers
- STANDARD NINE: Training
- STANDARD TEN: Supervision
- STANDARD ELEVEN: Monitoring and Evaluation of Attorneys
- STANDARD TWELVE: Substitution of Attorneys or Assignment of Contracts
- STANDARD THIRTEEN: Limitation on Private Practice of Contract Attorneys
- STANDARD FOURTEEN: Qualifications of Attorneys
- STANDARD FIFTEEN: Disposition of Client Complaints
- STANDARD SIXTEEN: Cause for Termination or Removal of Attorney
- STANDARD SEVENTEEN: Nondiscrimination
- STANDARD EIGHTEEN: Guidelines for Awarding Defense Contracts

STANDARDS FOR PUBLIC DEFENSE SERVICES

STANDARD ONE: Compensation

Public defense attorneys and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys and staff in prosecutorial offices in the area.

For assigned counsel, reasonable compensation should be provided. Compensation should reflect the time and labor required to be spent by the attorney and the degree of professional experience demanded by the case. Assigned counsel should be compensated for out-of-pocket expenses.

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

STANDARD TWO: Duties and Responsibilities of Counsel

The legal representation plan shall require that defense services be provided to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, applicable state bar association standards, the Rules of Professional Conduct, case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client.

STANDARD THREE: Caseload Limits and Types of Cases

The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

- 150 Felonies per attorney per year; or
- 300 Misdemeanors per attorney per year; or
- 250 Juvenile Offender cases per attorney per year; or
- 60 Juvenile dependency clients per attorney per year; or³
- 250 Civil Commitment cases per attorney per year; or
- 25 Appeals to appellate court hearing a case on the record and briefs per attorney per year.

A case is defined by the Office of the Administrator for the Courts as: A filing of a document with the court naming a person as defendant or respondent.

Caseload limits should be determined by the number and type of cases being accepted and on the local prosecutor's charging and plea bargaining practices. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not

accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

STANDARD FOUR: Responsibility for Expert Witnesses

Reasonable compensation for expert witnesses necessary to preparation and presentation of the defense case shall be provided. Expert witness fees should be maintained and allocated from funds separate from those provided for defender services. Requests for expert witness fees under Court Rule 3.1 f should be made through an ex parte motion. The defense should be free to retain the expert of its choosing and in no cases should be forced to select experts from a list pre-approved by either the court or the prosecution.

STANDARD FIVE: Administrative Expenses

Contracts for public defense services should include the administrative costs associated with providing legal representation. These costs may include travel, telephones, law library, financial accounting, case management systems, the reporting requirements imposed by these standards, and other costs necessarily incurred in the day to day management of the contract.

STANDARD SIX: Investigators

Public defender offices, assigned counsel, and private law firms holding contracts to provide representation for poor people accused of crimes should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every four attorneys.

STANDARD SEVEN: Support Services

The legal representation plan should provide for adequate numbers of investigators, secretaries, paralegals, social work staff, mental health professionals and other support services. These professionals are essential to ensure the effective performance of defense counsel during trial preparation, in the preparation of dispositional plans, and at sentencing.

1. Secretaries - At least one full-time secretary should be employed for every four staff attorneys. Fewer secretaries may be necessary, however, if the agency has access to word processing or overload secretaries, or other additional staff performing clerical work.
2. Social Work Staff - Social work staff should be available to assist in developing release, treatment, and dispositional alternatives.
3. Mental Health Professionals - Each agency should have access to mental health professionals to perform mental health evaluations.

STANDARD EIGHT: Report of Attorney Activity and Vouchers

The legal representation plan shall require that the defense attorney or office maintain a case-reporting and management information system which includes number and type of cases, attorney hours and disposition. This information shall be provided regularly to the Contracting Authority and shall also be made available to the Office of the Administrator of the Courts. Any such system shall be maintained independently from client files so as to disclose no privileged information.

A standardized voucher form shall be used by assigned counsel attorneys seeking payment upon completion of a case. For attorneys under contract, payment should be made monthly, or at times agreed to by the parties, without regard to the number of cases closed in the period.

STANDARD NINE: Training

Attorneys providing public defense services should participate in regular training programs on criminal defense law, including a minimum of seven hours of continuing legal education annually in areas relating to their public defense practice.

In offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held to inform them of office procedure and policy. All attorneys should be required to attend regular in-house training programs on developments in criminal law, criminal procedure and the forensic sciences. Attorneys in civil commitment and dependency practices should attend training programs in these areas. Offices should also develop manuals to inform new attorneys of the rules and procedures of the courts within their jurisdiction.

Every attorney providing counsel to indigent accused should have the opportunity to attend courses that foster trial advocacy skills and to review professional publications and tapes.

STANDARD TEN: Supervision

Each agency or firm providing public defense services should provide one full-time supervisor for every ten staff lawyers or one half-time supervisor for every five lawyers. Supervisors should be chosen from among those lawyers in the office qualified under these guidelines to try Class A felonies. Supervisors should serve on a rotating basis, and except when supervising fewer than ten lawyers, should not carry caseloads.

STANDARD ELEVEN: Monitoring and Evaluation of Attorneys

The plan for public defense services should establish a procedure for systematic monitoring and evaluation of attorney performance based upon publicized criteria. Supervision and evaluation efforts should include review of time and caseload records, review and inspection of transcripts, in-court observations, and periodic conferences.

Performance evaluations made by a supervising attorney should be supplemented by comments from judges, prosecutors, other defense lawyers and clients. Attorneys should be evaluated on their skill and effectiveness as criminal lawyers or as dependency or civil commitment advocates.

STANDARD TWELVE: Substitution of Attorneys or Assignment of Contract

The attorney engaged by local government to provide public defense services should not sub-contract with another firm or attorney to provide representation and should remain directly involved in the provision of representation. If the contract is with a firm or office, the contracting authority should request the names and experience levels of those attorneys who will actually be providing the services, to ensure they meet minimum qualifications. The employment agreement shall address the procedures for continuing representation of clients upon the conclusion of the agreement.

STANDARD THIRTEEN: Limitations on Private Practice of Contract Attorneys

Contracts for public defense representation with private attorneys or firms shall set limits on the amount of privately retained work which can be accepted by the contracting attorney. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

STANDARD FOURTEEN: Qualifications of Attorneys

1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
 - A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and
 - B. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.
2. **Trial attorneys' qualifications according to severity or type of case:**
 - A. **Death Penalty Representation.** Each attorney acting as lead counsel in a death penalty case shall meet the following requirements:
 - i. The minimum requirements set forth in Section 1; and
 - ii. at least five years criminal trial experience; and
 - iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and
 - iv. have served as lead or co-counsel in at least one jury trial in which the death penalty was sought; and
 - v. have completed at least one death penalty defense seminar within the previous two years.
 - B. **Adult Felony Cases - Class A.** Each staff attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:
 - i. Minimum requirements set forth in Section 1, and
 - ii. Either:
 - a. has served two years as a prosecutor; or
 - b. has served two years as a public defender; or
 - c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in five felony cases that have been submitted to a jury.
 - C. **Adult Felony Cases - Class B Violent Offense or Sexual Offense.** Each attorney representing a defendant accused of a Class B violent offense or sexual offense as defined in RCW 9A.20.020 shall meet the following requirements:
 - i. Minimum requirements set forth in section 1, and
 - ii. Either:
 - a. has served one year as prosecutor; or
 - b. has served one year as public defender; and
 - c. has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.
 - D. **Adult Felony Cases - All other Class B Felonies, Class C Felonies, Probation or Parole Revocation.** Each staff attorney representing a defendant accused of a Class B felony not defined in c above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:
 - i. Minimum requirements set forth in section 1, and
 - ii. Either:
 - a. Has served one year as a prosecutor; or
 - b. Has served one year as a public defender; or

- c. has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and
 - iii. Each attorney shall be accompanied at his or her first felony trial by a supervisor.
 - E. **Juvenile Cases - Class A** - Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:
 - i. Minimum requirements set forth in section 1, and
 - ii. Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; or
 - c. has been trial counsel alone of record in five juvenile Class B and C felony trials; and
 - iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.
 - F. **Juvenile Cases - Classes B and C**. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:
 - i. Minimum requirements set forth in Section 1; and
 - ii. Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; or
 - c. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and
 - iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor
 - G. **Misdemeanor Cases**. Each attorney representing a defendant involved in a matter concerning a gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.
 - H. **Dependency Cases**. Each attorney representing a client in a dependency matter shall meet the following requirements:
 - i. The minimum requirements as outlined in Section; and
 - ii. Attorneys handling termination hearings shall have six months dependency experience or have significant experience in handling complex litigation.
 - I. **Civil Commitment Cases**. Each attorney representing a respondent shall meet the following requirements:
 - i. Minimum requirements set forth in Section 1; and
 - ii. Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and
 - iii. Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:
 - a. served one year as a prosecutor, or
 - b. served one year as a public defender, or
 - c. been trial counsel in five civil commitment probable cause hearings.
 - J. In order to advance from one qualification category to the next, an attorney must participate in a supervised trial of the next higher category.
- 3. **Appellate Representation**. Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:
 - A. The minimum requirements as outlined in Section 1; and
 - B. Either:
 - i. has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or
 - ii. has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing or other comparable work.
 - iii. Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years' criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions.

4. **Legal Interns.**

- A. Legal interns must meet the requirements set out in APR 9.
- B. Legal interns shall receive training pursuant to APR 9 and Standard Nine, Training.

STANDARD FIFTEEN: Disposition of Client Complaints

The legal representation plan shall include a method to respond promptly to client complaints. Complaints should first be directed to the attorney, firm or agency which provided representation. If the client feels that he or she has not received an adequate response, the contracting authority or public defense administrator should designate a person or agency to evaluate the legitimacy of complaints and to follow up meritorious ones. The complaining client should be informed as to the disposition of his or her complaint within one week.

STANDARD SIXTEEN: Cause for Termination of Removal of Attorney

Contracts for defense services shall include the grounds for termination of the contract by the parties. Termination of an attorney's contract should only be for cause. Good cause shall include the failure of the attorney to render adequate representation to clients; the willful disregard of the rights and best interests of the client; and the willful disregard of the standards herein addressed.

The representation in an individual case establishes an inviolable attorney-client relationship. Removal of counsel from representation therefore normally should not occur over the objection of the attorney and the client.

STANDARD SEVENTEEN: Non-Discrimination

Neither the Contracting Authority, in its selection of an attorney, firm or agency to provide public defense representation, nor the attorneys selected, in their hiring practices or in their representation of clients, shall discriminate on the grounds of race, color, religion, national origin, age, marital status, sex, sexual orientation or handicap. Both the contracting authority and the contractor shall comply with all federal, state, and local non-discrimination requirements.

STANDARD EIGHTEEN: Guidelines for Awarding Defense Contracts

The county or city should award contracts for public defense services only after determining that the attorney or firm chosen can meet accepted professional standards. Under no circumstances should a contract be awarded on the basis of cost alone. Attorneys or firms bidding for contracts must demonstrate their ability to meet these standards.

Contracts should only be awarded to a) attorneys who have at least one year's criminal trial experience in the jurisdiction covered by the contract (i.e., City and District Courts, Superior Court or Juvenile Court), or b) to a firm where at least one attorney has one year's trial experience.

City attorneys, county prosecutors, and law enforcement officers should not select the attorneys who will provide indigent defense services.

APPENDIX C

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1014

Chapter 5, Laws of 2005

59th Legislature
2005 Regular Session

DNA TESTING

EFFECTIVE DATE: 3/09/05

Passed by the House February 28, 2005
Yeas 96 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate February 16, 2005
Yeas 47 Nays 0

BRAD OWEN

President of the Senate

Approved March 9, 2005.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1014** as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

March 9, 2005 - 3:42 p.m.

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 1014

AS AMENDED BY THE SENATE

Passed Legislature - 2005 Regular Session

State of Washington 59th Legislature 2005 Regular Session

By House Committee on Criminal Justice & Corrections (originally sponsored by Representatives Darneille, O'Brien, Cody, Morrell, Chase and Schual-Berke)

READ FIRST TIME 01/25/05.

1 AN ACT Relating to DNA testing; amending RCW 10.73.170; and
2 declaring an emergency.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 10.73.170 and 2003 c 100 s 1 are each amended to read
5 as follows:

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

17 (2) ~~The prosecutor shall screen the request. The request shall be~~
18 ~~reviewed based upon the likelihood that the DNA evidence would~~
19 ~~demonstrate innocence on a more probable than not basis. The~~

1 ~~prosecutor shall inform the requestor and the state Office of Public~~
2 ~~Defense of the decision, and shall, in the case of an adverse decision,~~
3 ~~advise the requestor of appeals rights. Upon determining that testing~~
4 ~~should occur and the evidence still exists, the prosecutor shall~~
5 ~~request DNA testing by the Washington state patrol crime laboratory.~~
6 ~~Contact with victims shall be handled through victim/witness divisions.~~

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

15 ~~(4) Notwithstanding any other provision of law, any biological~~
16 ~~material that has been secured in connection with a criminal case prior~~
17 ~~to July 22, 2001, may not be destroyed before January 1, 2005.)~~ A
18 person convicted of a felony in a Washington state court who currently
19 is serving a term of imprisonment may submit to the court that entered
20 the judgment of conviction a verified written motion requesting DNA
21 testing, with a copy of the motion provided to the state office of
22 public defense.

23 (2) The motion shall:

24 (a) State that:

25 (i) The court ruled that DNA testing did not meet acceptable
26 scientific standards; or

27 (ii) DNA testing technology was not sufficiently developed to test
28 the DNA evidence in the case; or

29 (iii) The DNA testing now requested would be significantly more
30 accurate than prior DNA testing or would provide significant new
31 information;

32 (b) Explain why DNA evidence is material to the identity of the
33 perpetrator of, or accomplice to, the crime, or to sentence
34 enhancement; and

35 (c) Comply with all other procedural requirements established by
36 court rule.

37 (3) The court shall grant a motion requesting DNA testing under
38 this section if such motion is in the form required by subsection (2)

1 of this section, and the convicted person has shown the likelihood that
2 the DNA evidence would demonstrate innocence on a more probable than
3 not basis.

4 (4) Upon written request to the court that entered a judgment of
5 conviction, a convicted person who demonstrates that he or she is
6 indigent under RCW 10.101.010 may request appointment of counsel solely
7 to prepare and present a motion under this section, and the court, in
8 its discretion, may grant the request. Such motion for appointment of
9 counsel shall comply with all procedural requirements established by
10 court rule.

11 (5) DNA testing ordered under this section shall be performed by
12 the Washington state patrol crime laboratory. Contact with victims
13 shall be handled through victim/witness divisions.

14 (6) Notwithstanding any other provision of law, upon motion of
15 defense counsel or the court's own motion, a sentencing court in a
16 felony case may order the preservation of any biological material that
17 has been secured in connection with a criminal case, or evidence
18 samples sufficient for testing, in accordance with any court rule
19 adopted for the preservation of evidence. The court must specify the
20 samples to be maintained and the length of time the samples must be
21 preserved.

22 NEW SECTION. Sec. 2. This act is necessary for the immediate
23 preservation of the public peace, health, or safety, or support of the
24 state government and its existing public institutions, and takes effect
25 immediately.

Passed by the House February 28, 2005.

Passed by the Senate February 16, 2005.

Approved by the Governor March 9, 2005.

Filed in Office of Secretary of State March 9, 2005.