

WASHINGTON STATE  
OFFICE OF PUBLIC DEFENSE

# ANNUAL REPORT

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FISCAL YEAR 2009



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## OFFICE OF PUBLIC DEFENSE

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## MISSION STATEMENT

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

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## INTRODUCTION

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The Washington State Office of Public Defense (OPD) is an independent judicial branch agency. Created by the Legislature in 1996, and permanently reauthorized in 2008, the agency works to ensure high-quality legal representation for indigent clients, consistent with constitutional and statutory requirements, by:

- implementing quality-control procedures for appointment of appellate attorneys and evaluation of indigent appellate attorney services;
- administering funds appropriated for court-appointed counsel in appellate cases and supporting the appellate cost recovery system through timely responses to requests;
- administering state funds to eligible counties and cities, and supporting efforts to improve the quality of trial-level indigent defense in Washington state;
- initiating and responding to legislative policy proposals and court rule changes;
- administering a state-funded Parents Representation Program for indigent parents in child dependency and termination of parental rights cases; and
- providing information, special reports and recommendations to the Legislature, including an annual prioritized list of aggravated murder costs eligible for state reimbursement.

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, the Washington State Bar Association, the Washington State Association of Counties, and the Association of Washington Cities, oversees the activities of the agency. Pursuant to statutory amendments adopted by the Legislature in spring 2008, the Committee began the 2009 fiscal year with two new positions representing the interests of The Washington State Association of Counties and The Association of Washington Cities. Counties and cities became a significant constituency for OPD in 2006, when the Legislature first appropriated state funding to OPD to improve local trial-level indigent defense services.

During fiscal year 2009, the Advisory Committee conducted business at quarterly meetings in March, June, September, and December, and met additionally by conference call as necessary to consider time-sensitive issues. As required by RCW 2.70.030 the Advisory Committee reviewed draft legislation and court rule proposals, adopted 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 fundamental rights, including dependency proceedings, parental rights terminations, criminal contempt convictions, and involuntary civil commitments. Indigent parties involved in these cases, in which their constitutional interests are at risk, are entitled to representation at state expense. Indigent defendants are also 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.

Despite increasingly bleak state revenue forecasts and voluntary agency budget reductions during the fiscal year, OPD maintained its direct services to clients with statewide appellate level indigent defense services and the Parents Representation Program in 25 counties. OPD also continued working with concerned legal community leaders on critical issues regarding the delivery of trial-level criminal indigent defense in Washington State. The agency consulted with counties to identify and implement appropriate uses for state funds to improve public defense, provided Continuing Legal Education (CLE) programs throughout the state for local public defense attorneys, and concluded three pilot programs that demonstrated best practices for public defense in the trial courts.

OPD attained “permanent” status as a state agency in fiscal year 2009 following legislative removal of a sunset date and reauthorization of the OPD enabling statute Chapter 2.70 RCW. The reauthorizing legislation also clarified OPD’s duties, explicitly directing the agency to “provide oversight ... to ensure the effective and efficient delivery of services in the office’s program areas” and to “collect information regarding indigent defense services funded by the state and report annually to the advisory committee, the legislature and the supreme court.”

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## AGENCY STRUCTURE

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During fiscal year 2009, the agency staff was composed of a director, a deputy director, an executive assistant, a senior financial analyst, a senior fiscal analyst, an administrative technical assistant, three public defense services managers, three parents representation managing attorneys, an appellate managing attorney, a parents representation social services manager, and an administrative assistant. As concerns escalated over the future of the state budget, OPD did not fill an additional support staff position that became vacant during 2009. By the end of the fiscal year the agency was in the process of laying off one attorney and implementing staff furloughs.

The public defense services managers and the parents representation managing attorneys develop and implement procedures to improve provision of defense services to indigent defendants in trial-level criminal proceedings and to indigent parents in dependency and termination proceedings. The social services manager implements procedures to improve social services to assist parents and their attorneys in dependency and termination proceedings.

Since 2008, OPD has contracted with the Administrative Office of the Courts (AOC) for budget support services, and maintained this relationship during fiscal year 2009. An AOC budget manager works with OPD's director and senior fiscal analyst to plan and implement the agency budget.

***OPD ensured quality indigent appellate services through the appellate appointment system, resources for appellate attorneys, and evaluations of attorney work products.***

**Appellate Appointments.** During fiscal year 2009, OPD worked with the Courts of Appeal to maintain the agency's indigent appellate program, including the Appellate Appointment Program, first initiated in 2005. Pursuant to court rule, the agency designates appellate attorneys for appointment by the courts in approximately 1,500 cases per year. In Division I, the Court makes rotating appointments to two OPD contract attorney firms. In Divisions II and III, the Courts appoint an OPD contract attorney designated for each individual case through the Appellate Appointment Program. Located at OPD, the system is accessible to the courts through a password-protected web page. Attorneys are selected in rotation based on their location, the case type, and the number of cases assigned in the current year and month. The Appellate Appointment Program continued to operate efficiently in fiscal year 2009, allowing OPD to monitor the

program and ensuring that the courts were provided qualified and available attorneys in a timely manner.

**Resources for Attorneys.** OPD continued to add appellate briefs to the agency's on-line brief bank, which offers access to more than 11,000 briefs. Briefs are added to the brief bank periodically. This searchable collection allows attorneys to save time and improve the quality of their research. Attorneys throughout the state and around the nation have accessed the brief bank, and upon request, OPD has provided information to other states that are interested in setting up similar on-line resources.

OPD continued to encourage its contracted attorneys to use a variety of electronic resources. The agency provides appellate contract attorneys with technical support and training updates on the use of the legal research service Westlaw as well as the state's Judicial Information System (JIS). JIS is available to public defense attorneys at no cost through the Administrative Office of the Courts, allowing access to superior court and appellate court dockets. OPD also continued to work with attorneys and counties to encourage the use of electronic access to court files, which appellate attorneys must review to prepare their briefs.

During 2009 the Appellate Program Manager completed rigorous individualized performance evaluations of all contracted appellate attorneys and renewed contracts with 20 attorneys. Nine other contracts were not renewed, based in large part on a budget-related preference for full-time rather than part-time contracts. Of those nine, six replied to a subsequent Request For Proposal and five were awarded new contracts.

OPD presented Continuing Legal Education (CLE) programs for appellate contract attorneys during the fiscal year, including a statewide conference in November. The topics focused on issues for direct appeal from a post-conviction relief perspective. Because many of the contract attorneys are sole practitioners who are geographically remote from other contract attorneys, these specialized CLEs provide unique opportunities to exchange information about current cases and build relationships for mutual support.

***The Parents Representation Program matured and continued to improve practice standards.***

**Program Expansion.** The Parents Representation Program provides attorney representation for parents in dependency and termination cases, as is required by state statutes and the Washington Constitution. The program began as a pilot to improve standards for parents' representation in 2000 in Benton-Franklin and Pierce juvenile courts. After several positive evaluations of the pilot over a five-year period, the

Legislature expanded the program to 10 counties in fiscal year 2006 and added another five counties in fiscal year 2007. The 2007-2009 biennial budget added seven more counties in fiscal year 2008, for a total of 25—two-thirds of the counties across the state.<sup>1</sup> State budget limitations have precluded further expansion since 2007, though Senate Bill 5454 in 2005 expressed unambiguous legislative intent to extend the program statewide.

**Program Structure.** Parents’ attorneys under contract with OPD follow enhanced practice standards that emphasize frequent communication with parent clients, careful case preparation, and vigilant oversight over parents’ ability to access services ordered by the court. In addition, OPD makes limited social worker services available to program attorneys through contracts with program social workers, who work with individual parents as requested by attorneys. The social worker component of the program efficiently supports both attorneys and parents by providing access to social work theory and resources available in the community, and by helping attorneys evaluate ways their clients can participate in their cases successfully. Whenever possible, the OPD program seeks to engage in collaborative, non-adversarial relationships with child welfare professionals.

The Parents Representation Program is managed by three experienced attorneys who conduct both formal and informal trainings for contracted program attorneys throughout the state, provide support and one-on-one consultation for attorneys, and oversee the program’s contracts. A Social Services Manager oversees the social worker component of the program by selecting experienced social workers and managing their contracts, conducting training, and providing resources and support.

**Training and Quality Management.** During fiscal year 2009, OPD conducted two statewide Parents Representation Program trainings for program attorneys and two regional conferences. Presentations were made on the impacts of poverty, ethical issues that arise in representing parents, termination case representation, new legislative mandates and case law, and other relevant topics. Uniform, high-quality education is viewed as a critical step for improving practice standards

OPD attorneys participated in a number of the state’s child welfare policy committees and groups during fiscal year 2009, including the Court Improvement Program Committee, Catalyst for Kids, and the Birth Parent Advocacy Group. The OPD director

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<sup>1</sup> The 25 counties are: Benton, Franklin, Chelan, Clallam, Clark, Cowlitz, Jefferson, Ferry, Stevens, Pend Oreille, Grant, Grays Harbor, Kittitas, Kitsap, Klickitat, Mason, Pacific, Pierce, Skagit, Skamania, Snohomish, Spokane, Thurston, Wahkiakum, Yakima.

is a member of the Washington State Supreme Court Commission on Children in Foster Care.

In response to newly adopted legislation directing the agency to exercise oversight and gather information on program effectiveness, OPD initiated an “Outcomes Analysis” of the Parents Representation Program in late fiscal year 2009. The data study, based on official court orders, will compare case outcomes in OPD program counties both before and after the program became effective, and will compare case outcomes in OPD program counties with non-program counties. The purpose of the study is to assess the impact of the OPD Parents Representation Program on the rate of family reunifications as well as overall case resolution. Once complete, the data study will be subject to audit and validation by the Washington State Center for Court Research with final results available in 2010.

***OPD improved trial-level public defense by distributing state funds and consulting services to counties and cities, and providing training and resources to attorneys.***

**State Funds to Improve Public Defense.** In recent years, the public and all branches of government have become aware of urgent problems in trial-level public defense in Washington. The courts’ Justice in Jeopardy initiative and Washington State Bar Association (WSBA) reports have consistently emphasized the state’s duty to address chronic underfunding of public defense and a general lack of adequate oversight over much of the state’s public defense system. In 2005, the Legislature passed SB 5454, a Justice in Jeopardy bill, which created a new public defense program at OPD, and HB 1542, which amended Chapter 10.101 RCW to create a state funding process for improving public defense. Following an initial appropriation in 2006, the Legislature has continued funding the program at \$6 million annually. Public defense improvement funds are distributed to local jurisdictions by OPD under the program.

OPD conducted the third annual grant application process in fiscal year 2009, distributing each of the 38 participating counties’ pro-rata share of state funds, calculated in accordance with a formula established in Chapter 10.101 RCW. Pursuant to the statute, 10 percent of the appropriated funds were distributed to cities, which competed for grants pursuant to a separate OPD application process. Twenty-three cities applied and 14 were awarded grants.

During the 2008 legislative session, OPD had sought but failed to secure additional state funding to specifically address public defense shortcomings in juvenile offender cases. At that time more than one-third of the juvenile courts in the state were not consistently able to provide access to counsel at the first court appearance for children

charged with crimes. In an effort to at least partially address this issue the Washington Supreme Court during fiscal year 2009 adopted a statewide court rule to limit the ability of a child to waive his or her right to counsel without first having the opportunity to speak with an attorney. In response to the court rule and with technical assistance from OPD, counties have begun to remedy the lack of counsel at juvenile first appearances.

In fiscal year 2009, OPD published the [2008 Status Report On Public Defense In Washington State](#). This third such annual report compiles information reported by the counties in their Chapter 10.101 RCW state funding applications, as well as other statewide data, to provide an up-to-date detailed description of Washington's public defense systems. Prior to the Chapter 10.101 RCW process, much of this information was not available in a comprehensive format from a single source. OPD plans to publish this document each year, providing an annual progress report on the public defense improvement efforts of the local jurisdictions and the state.

During fiscal year 2009 OPD continued a longstanding engagement in the courts' Justice in Jeopardy Implementation Committee. This Committee is co-chaired by Chief Justice Gerry Alexander and King County Superior Court Judge Deborah Fleck, who co-chaired the Court Funding Task Force. Membership is comprised of judges from all court levels, Washington State Bar Association representatives, private attorneys, court administrators, Equal Justice Coalition representatives, and others. The Committee's purpose is to broaden awareness of the critical role of the judicial branch in maintaining the rule of law in a free society, and in protecting the rights and enforcement of obligations for all, as well as to pursue adequate, stable, long-term funding for the judicial branch. As the head of a judicial branch agency, the OPD director is an active participant.

OPD also actively participated in the WSBA Committee on Public Defense, which during the fiscal year was reauthorized by the Bar as a permanent WSBA organization and renamed the Council on Public Defense (CPD). The WSBA first appointed a committee to thoroughly analyze public defense problems and issues and make recommendations for reform in 2003, and has continuously maintained such a committee since then. The OPD director is a member and OPD staff participate in CPD meetings and projects.

**Resource Attorneys.** OPD's Public Defense Services Managers provide consultation services regarding public defense issues to local jurisdictions, among other tasks. During the year, they provided numerous in-person and telephone consultations to counties and cities upon request. By the end of the fiscal year OPD had planned or executed visits to all 14 cities that received state grant funding as well as to more than 20 counties, focusing first on counties that were not visited in the previous fiscal year.

In addition, OPD continued to contract with the Washington Defender Association for resource attorney services during fiscal year 2009, pursuant to legislative directive and

Chapter 10.101 RCW. Two attorneys are funded through this program to provide consultation and support to individual public defense attorneys who contact them about specific case issues. The resource attorneys each provided hundreds of consultations with individual local attorneys during the year.

**Training Program.** OPD continued its regional training curriculum for trial-level public defense attorneys during fiscal year 2009. Many of Washington's public defense attorneys do not work in public defender agencies, but rather contract with local jurisdictions to provide public defense. Most of these attorneys practice in remote geographic areas without professional supervision or access to locally available relevant Continuing Legal Education (CLE) programs.

When setting up the CLEs, OPD concentrated on outreach and providing high-quality programs. OPD communicated with jurisdictions to compile contact lists of all contract public defense attorneys in the various regions, and individually invited these attorneys to the CLE located closest to them. During fiscal year 2009 the agency presented six one-day trainings in Everett, Mount Vernon, Olympia, Spokane, Wenatchee, and Yakima. Approximately 300 local public defense practitioners attended these programs, evaluating the CLEs as being high-quality and often noting their appreciation of the programs' local nature. The legislative allotment to OPD for training covers the cost of materials and CLE credits. These regional seminars help raise the quality of public defense practice and encourage networking among otherwise isolated public defense practitioners.

**Pilot Programs.** Pursuant to legislative direction, in 2006 OPD established pilot projects in Bellingham Municipal Court, Thurston County District Court, and Grant County Juvenile Court. The purpose of the pilot projects was to test the impacts of implementing the Washington State Bar Association's (WSBA) public defense standards in these courts.

Prior to the inception of the pilot projects, public defense attorneys in the three courts had caseloads far exceeding WSBA standards. None of the courts had public defense attorneys available to speak with defendants prior to or at their arraignment or other initial court appearance. Additional attorneys were hired for each jurisdiction, bringing the caseloads of the municipal and district court attorneys down to 400 cases per year, and the juvenile offender attorneys down to 250 cases per year. The pilot projects also added attorneys at every initial appearance calendar.

In February 2009, a formal, independent evaluation of the Pilot Projects was completed. The evaluation is available at [www.opd.wa.gov](http://www.opd.wa.gov).

Interviews with key court participants and analysis of court records showed several impressive findings resulting from the pilot projects, including: substantially improved caseloads for public defenders; representation for all indigent defendants at arraignment;

faster resolution of criminal charges; improved communications between public defenders and their indigent clients; improved indigency screening of defendants; reductions in the number of cases filed at all pilot sites; and increases at two sites in the use of deferred prosecutions.

During the year, OPD worked closely with the pilot project jurisdictions to ensure that the gains achieved in the pilots would continue after their completion. Due to the significant positive impact of the public defense improvements initiated in the pilots, each jurisdiction has retained the program improvements, devoting Chapter 10.101 RCW state funding and additional county and city funding to that purpose.

<http://www.opd.wa.gov/Reports/TrialLeveServices/090301Public-Defense-Pilot-Project-R.pdf>

***OPD developed and submitted the 2008 Extraordinary Criminal Justice Costs Act prioritized list.***

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

In December 2008 Franklin, King, Skagit, Spokane and Yakima counties filed petitions seeking a total reimbursement of \$3,652,213. OPD audited and verified costs claimed in these petitions, including costs for investigation, prosecution, indigent defense, jury empanelment, expert witnesses, interpreters, incarceration, and other allowable expenses. As required by the statute, OPD prioritized the petitions 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. In April 2009 the Legislature adopted and the Governor signed a budget that granted partial reimbursement to each applicant from a total state appropriation of \$500,000.

***The agency processed 12,739 invoices in fiscal year 2009.***

During fiscal year 2009 OPD staff processed 12,739 invoices including attorney invoices, pro se transcript invoices, court reporter invoices, county clerk invoices, appellate court brief photocopying invoices, and administrative invoices.

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 policies, OPD's appellate funding requirements continue to fluctuate based on case filings, which vary for reasons beyond the control of OPD or its contract attorneys.

During routine operation, the agency in fiscal year 2009 also responded on a daily basis to requests for information and assistance from courts, attorneys, county officials, incarcerated persons, criminal defendants, and the public.

***OPD 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 assessed to unsuccessful appellants. When an indigent defendant is unsuccessful on appeal, the appellate costs become part of the legal financial obligations that can be imposed by judgment. The rules require that a cost bill, prepared by the original prosecuting attorney, be filed with the appellate court within 10 days of the filing of an appellate decision terminating review. Prosecutors' offices forward requests for appellate case cost summaries to OPD. The agency responds within 24 hours in most cases. In fiscal year 2009, OPD answered 727 requests from prosecutors.

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## CONCLUSION

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OPD continuously seeks ways to improve the quality of its services and more fully meet its mandates of implementing the constitutional and statutory guarantees of counsel and ensuring the effective and efficient delivery of state-funded indigent defense services.

In the area of appellate services, OPD evaluated the performance of all contract appellate attorneys, encouraged the use of electronic research services, and conducted Continuing Legal Education classes.

In the area of parents' representation, OPD maintained program services as authorized in two-thirds of the counties, and initiated an "Outcomes Analysis" to evaluate the program's impact on the rate of family reunifications as well as overall case resolution.

In the area of trial level public defense, OPD received a highly favorable independent evaluation of three pilot programs, provided resource attorneys, advised counties and cities when requested regarding public defense contracting, conducted regional trainings for attorneys throughout the state, and enhanced programs to distribute public defense funding to counties and cities to improve the local delivery of public defense services.

Throughout fiscal year 2009, OPD worked with the legal community, the courts, and interested groups to improve trial level public defense and will continue to seek funding from the Legislature to improve public defense in Washington State