

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

ANNUAL REPORT

FISCAL YEAR 2011



WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE
ANNUAL REPORT

FISCAL YEAR 2011

Washington State Office of Public Defense
711 Capitol Way South, Suite 106
PO Box 40957
Olympia, Washington 98504-0957

Phone: (360) 586-3164
Facsimile: (360) 586-8165
Email: opd@opd.wa.gov
Website: www.opd.wa.gov

ADVISORY COMMITTEE MEMBERS

Honorable Bobbe Bridge, Chair
Retired Washington Supreme Court Justice

Robert Flennaugh II
The Law Office of Robert Flennaugh II, PLLC

Honorable Sherry Appleton
Washington State House of Representatives

Jeff Hall
State Court Administrator

Jane Ragland-Kirkemo
Association of Washington Cities

Honorable Kathy Lambert
Washington State Association of Counties

Andy Pascua
Gubernatorial Appointee

Honorable Debbie Regala
Washington State Senate

Honorable Matt Shea
Washington State House of Representatives

Honorable Karen Seinfeld
Retired, Washington Court of Appeals Judge

Catherine Smith
Edwards, Sieh, Smith & Goodfriend

Honorable Val Stevens
Washington State Senate

OFFICE OF PUBLIC DEFENSE

Joanne I. Moore, Director
Sophia Byrd McSherry, Deputy Director
711 Capitol Way South, Suite 106
PO Box 40957
Olympia, Washington 98504-0957

MISSION STATEMENT

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

INTRODUCTION

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:

- 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 counties and eligible 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;
- administering pass-through state funding to the Washington Defender Association (WDA) and the Death Penalty Assistant Center (DPAC), which provide training and resources to public defense attorneys throughout Washington; and
- providing information, special reports and recommendations to the Legislature, including an annual prioritized list of aggravated murder costs eligible for state reimbursement.

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 legal representation at public 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.

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.

During fiscal year 2011, the Advisory Committee conducted business at quarterly meetings in September 2010, December 2010, March 2011 and June 2011. 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. OPD's administration and activities during fiscal year 2011 are described in this report.

AGENCY STRUCTURE

During fiscal year 2011, OPD's fourteen agency staff included managing attorneys, accountants, a social services manager, and assistants. The staff develops and implements procedures to improve provision of defense services to indigent defendants in trial-level criminal proceedings and to indigent parents in dependency and termination proceedings, as well as appellate representation for indigent parties. This responsibility involves developing and implementing policies to ensure that the state's constitutionally mandated representation services are adequately overseen, are effective, and are efficient. The state's direct services for constitutionally mandated representation services are primarily handled through some 200 OPD contracts with private attorneys, social workers and 55 contracts with local jurisdictions. In addition, OPD contracts with the Administrative Office of the Courts (AOC) for varied fiscal and budget support services.

In fiscal year 2011, OPD reorganized its operation to absorb budget reductions.

As a result of the continuing state budget crisis, OPD's funding was reduced about \$300,000 in fiscal year 2011. Since the beginning of the recession, OPD has striven to apply budget cuts to services and agency activities that are not directly required by the state or federal constitution. In the fall of fiscal year 2011, the Washington Supreme Court determined that about 85 percent of OPD's state appropriation pays for direct representation services that are constitutionally mandated. Consequently, OPD applied all reductions to the remaining services determined not to be directly constitutionally mandated. These activities have been cut by 21 percent over the last three years.

During fiscal year 2011, OPD reduced operating expenses by continuing reduced travel reimbursement rates for staff, not allowing paid out of state travel, maintaining staff furlough practices begun in 2008, declining to fill a position and laying off another staff member, deferring technology upkeep, cutting almost all office supplies purchases and employee training, reducing a small portion of public defense improvement funds, and imposing a 12 percent reduction to Washington Defender Association (WDA) and Death Penalty Assistant Center (DPAC), the nonprofit public defender resource agencies.

OPD maintained quality indigent appellate services and proposed a change to the Rules of Appellate Procedures for parents in termination appeal cases.

Appellate Appointments. During fiscal year 2011, OPD's Appellate Program Manager worked with the Courts of Appeal to maintain the agency's indigent appellate program, including the electronic Appellate Appointment Program, which designates appellate attorneys for appointment in appellate cases. This system allows rotating case appointments to OPD contract attorneys for about 1,400 appeals annually, and allows OPD to monitor appointments to ensure that the courts are provided qualified attorneys in a timely manner.

Tools for Attorneys. OPD continued to encourage its contracted attorneys to use a variety of electronic resources during fiscal year 2011. The agency's on-line brief bank was increased to more than 13,650 briefs. This searchable collection allows attorneys to save time and improve the quality of their research. OPD contracts also provide attorneys with access to Westlaw for online legal research for legal and law-related materials as well as technical support and training updates on the use of the research service. The state's Judicial Information System (JIS) is available to public defense attorneys, including appellate attorneys, at no cost through the Administrative Office of the Courts, allowing access to superior court and appellate court dockets. In 2011, the agency also offered a continuing legal education (CLE) course on legislative changes and ethic issues, which was located in Ellensburg and was attended by most appellate attorneys statewide.

Appellate Rule Change. During fiscal year 2011, OPD proposed a rule change to the Rules of Appellate Procedure (RAP) 18.13 and 18.13A, which is under consideration by the Supreme Court. The proposed rule change would ensure parents the opportunity to request a stay during the appeal of a termination order so as to prevent a final adoption order before completion of the appeal. This rule was proposed to prevent the premature adoption of children in a trial court where the judge is unaware of the pending appeal.

The Parents Representation Program continued to provide effective and efficient representation and continued to improve case outcomes.

Program Overview. The Parents Representation Program provides attorney representation for indigent parents in dependency and termination cases, as required by state statutes and the Washington Constitution. Originally begun as a pilot program, the Legislature gradually expanded the program to a total of 25 counties – two-thirds of the

state.¹ State budget limitations have slowed the expansion, 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 their clients' ability to access services ordered by the court. Through additional contracts with social workers, OPD makes limited social worker services available to attorneys. The social worker component of the program provides access to social work theory and resources that are available to attorneys in the various communities.

The Parents Representation Program is managed by three experienced OPD staff attorneys who develop formal and informal trainings for attorneys throughout the state 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.

In fiscal year 2011, OPD managing attorneys conducted individual evaluations of 120 contract attorneys across the state before renewing their contracts. Attorneys who were not found to be meeting contract requirements were not offered new contracts.

A significant statewide dependency case filing increase by the Department of Social and Health Services (DSHS) impacted caseloads in fiscal year 2011. OPD responded by undergoing a caseload correction process. Some attorneys were offered contracts in different counties, and caseload sizes for other attorneys were increased or decreased. In this way, OPD was able to maintain caseload standards without additional funding.

Quality Management. During fiscal year 2011, OPD conducted Parents Representation Program trainings on *Effective Advocacy for Parents in Tough Budgetary Times* in three regions in September and December 2010 and January 2011. In addition, OPD staff participated in many child welfare policy committees during fiscal year 2011, including Catalyst for Kids, the Birth Parent Advocacy Group, and the state Supreme Court Commission on Children in Foster Care, the Court Improvement Program Committee, and the American Bar Association Parents Representation Committee, among others.

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

Program Evaluations: During fiscal year 2011, a major new study of the Parents Representation Program by premier national evaluators was published. Dr. Mark Courtney and Dr. Jen Hooks at the University of Washington's Partners for Our Children conducted the study. They utilized DSHS and court records to track the timing impacts of the Parents Representation Program as it was expanded to various counties in order to test whether improved parents' representation slows case resolution. To the contrary, the 12,000-plus case study showed a significant decrease in children's time to permanency when parents were represented by OPD attorneys. Children who were reunified achieved permanency one month sooner, and children who were adopted or entered guardianships achieved permanency one year sooner. The study is available at <http://www.partnersforourchildren.org/pocweb/userfiles/PRP%20Issue%20Brief.pdf>

In addition, OPD updated its 2009 reunification report. This study tracks case outcomes in program and non-program counties. The updated study found a continuing increase in reunifications, with a 36 percent increase in the rate of reunifications in the program counties by fiscal year 2011, in contrast to reunifications in non-program counties, which decreased. The 2011 study is available at http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/2011_Followup-CaseResolutionStudy.pdf; the 2010 study is available at http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/100325_ReunificationOutcomes.pdf

OPD distributed public defense improvement funds under chapter 10.101 RCW and worked on standards for certification of public defense attorneys with the Washington State Bar Association (WSBA).

In recognition of Washington's progress in addressing public defense deficiencies, the OPD director was invited twice during fiscal year 2011 to the U.S. Department of Justice's new Access to Justice Initiative in Washington, D.C. in order to participate in meetings on effective methods for implementing public defense improvements (at no expense to the state).

Since 2006, OPD has managed Washington's public defense improvement funds program. This program was authorized by the Legislature to address the state's constitutional obligation to provide effective representation to indigent criminal defendants.

OPD conducted the fifth annual application process in fiscal year 2011, 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 in a separate OPD application process. Forty-six cities applied and 14 were awarded grants.

In fiscal year 2011, OPD published the “2010 Status Report on Public Defense in Washington State.” The report is available at http://www.opd.wa.gov/Reports/TrialLevelServices/2010_PublicDefenseStatusReport.pdf This annual report compiles information reported by counties and cities in their chapter 10.101 RCW state funding applications, including local ordinances and contracts, to provide an up-to-date detailed description of changes to Washington’s public defense systems.

Trial Level Public Defense Services. Two OPD managing attorneys provide consultation services regarding public defense issues to local jurisdictions, among other responsibilities. 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 receiving state grant funding as well as to more than 20 counties, focusing first on counties that were not visited the previous year.

Training Program. OPD’s regional training curriculum for trial-level public defense attorneys was continued during fiscal year 2011. Many Washington public defense attorneys do not work among colleagues in public defender agencies, but rather contract directly with counties and cities to provide public defense, often practicing in remote geographic areas without professional supervision or access to relevant Continuing Legal Education (CLE) programs.

During fiscal year 2011 the agency presented four all-day comprehensive CLEs in Port Townsend, Vancouver, Spokane and Olympia on Drug Offender Sentencing Alternative (DOSA), the *State of Washington v. A.N.J., No. 81236-5 [168 Wash.2d 91, 225 P.3d 956]* case, updates on search and seizure issues, immigration issues, and appeal issues.

More than 500 local public defense practitioners attended the programs, evaluating them as being high-quality and unique due to their local nature. These regional seminars help raise the quality of public defense practice and encourage professional networking among otherwise isolated public defense practitioners.

New Public Defense Certification Rules. The Washington State Bar Association (WSBA) Council on Public Defense proposed, for Supreme Court adoption, a resolution recommending standards for a new certification requirement for public defense attorneys in accordance with recent changes to court rules CrR 3.1, CrRLJ 3.1 and JuCR 9.2. When these rules go into effect, the trial courts will require public defense attorneys to certify they are following Standards adopted by the Supreme Court before they are appointed to represent an indigent defendant. As an active participant on the Council on Public Defense (CPD), OPD worked with the CPD to develop a set of six recommended Standards for adoption by the Supreme Court. Through the spring and summer of 2011,

presentations were made to the WSBA Board of Governors, which recommended the Court adopt the six Standards. Discussion continues between the many parties and courts involved, and the Court's comment period for the Standards is ongoing until April 30, 2012.

Washington Defender Association. OPD continued to contract with the Washington Defender Association (WDA) for training, publications, and high-quality, readily available consultation with attorneys engaged in public defense work throughout Washington State during fiscal year 2011. Services provided by WDA's felony and misdemeanor resource attorneys include technical assistance, case consultation and research, as well as technical assistance on immigration consequences impacting criminal cases, education and training programs, legal research, a brief bank, case law updates, an expert bank, and website resources.

Death Penalty Assistance Center. In fiscal year 2011, OPD continued to contract with The Defender Association's Death Penalty Assistance Center (DPAC) for unique expertise in handling death penalty cases and assisting death penalty defense attorneys. Initiated by the Legislature in 2001, the services provided by DPAC include technical case assistance for defense attorneys in aggravated murder cases where the death penalty may be imposed, information on the practicalities of capital case defense, briefing on legal issues, mitigation investigation, expert consultants and witnesses, and the development and presentation of education and training programs.

OPD developed and submitted the 2010 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 2010 Benton, Clallam, Franklin, Jefferson, King, Okanogan, Spokane, Skagit, Spokane, and Yakima counties filed petitions seeking a total reimbursement of \$6,725,878. 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. OPD prepared a priorities 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. In April 2011 the Legislature granted partial reimbursement to Franklin, Jefferson and Okanogan counties from a total state appropriation of \$591,000.

OPD continued to work with various jurisdictions to improve indigency determinations.

The appointment of attorneys to public defense cases is not required unless the client is low-income pursuant to established standards. OPD continuously reviews indigency screening standards and in 2011 consulted with a number of courts regarding screening issues. OPD's website includes information on indigency requirements, standards, and forms, and was updated in fiscal year 2011.

The agency timely processed 14,050 invoices in fiscal year 2011 and supported the appellate cost recovery system through rapid processing to cost summary requests.

During fiscal year 2011 OPD staff processed 14,050 invoices from attorneys, court reporters and county clerks, as well as invoices for appellate court photocopying of briefs for the preparation of pro se transcripts, and agency administrative invoices. During routine operation, the agency in fiscal year 2011 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 responded to prosecutors' requests for cost summaries in 503 cases. 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.

CONCLUSION

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 proposed a rule change to the Rules of Appellate Procedure to ensure parents the opportunity to request a stay during the appeal of a termination order, and conducted a Continuing Legal Education conference.

In the area of parents' representation, OPD maintained and oversaw program services as authorized in two-thirds of the counties, conducted 120 contract evaluations, established caseload adjustments for fiscal year 2012 contractors, received an independent study on the program's positive outcomes, and conducted regional trainings throughout the state.

In the area of trial level public defense, OPD addressed standards for certification of public defense attorneys in accordance with recent amendments to court rules, provided resource attorney services, advised counties and cities regarding public defense contracting, conducted regional trainings for attorneys throughout the state, and distributed state funding to counties and cities to improve the local delivery of public defense services.

Throughout fiscal year 2011, OPD worked with the legal community, the courts, stakeholders, 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.