

The Unfulfilled Promise of Gideon

Washington's Flawed System of
Defense for the Poor

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I. Executive Summary

Fundamental to a criminal justice system that is fair to all is the right of a person accused of a crime to be assisted by a competent attorney. Embodied in the Bill of Rights, this principle was affirmed 40 years ago in the landmark case *Gideon v. Wainwright*. The Supreme Court ruled that criminal defendants who are too poor to afford an attorney must be provided one by the state – a ruling celebrated by author Anthony Lewis in his classic book *Gideon's Trumpet*. Each state eventually established a system to provide attorneys to indigent persons accused of a crime. Later, the Supreme Court went one step further when it ruled in *Strickland v. Washington* that the Sixth Amendment right to counsel required more than simply appointing an attorney. The Court found that the safeguards guaranteed by the Sixth Amendment require that the state provide poor defendants with *effective assistance* of counsel.

Criminal defense lawyers play a crucial and honored role in our justice system by ensuring that every person – rich or poor, guilty or innocent – receives the full protection of the law before being convicted of a crime. Unfortunately, across the country and in Washington, persons who are indigent and who are accused of a crime are frequently deprived of effective representation.

In Washington, public defense services are handled at the city and county level, but the State of Washington is obligated to ensure that these legal services meet basic constitutional standards. In 1989, the Washington legislature passed legislation requiring local governments to adopt standards for the delivery of indigent defense services. Fifteen years later, however, a majority of counties still have not adopted them.

The lack of meaningful standards and the failure of the State to monitor indigent defense services has resulted in a checkered system of legal defense with no guarantee that a person who is both poor and accused will get a fair trial. Although indigent defense services are publicly supported with tax dollars, they are not held to the standards of accountability that are generally expected of government programs. Around the state, Gideon's trumpet, which at one time heralded the right of poor people to be assisted by counsel if charged with a crime, now blows mostly sour notes.

In Grant County, state and federal courts have issued rulings in several cases that include findings of ineffective assistance of counsel. Notably, even the state bar association has taken the unusual step of recommending disbarment of two attorneys who provide the majority of indigent defense services in the county.

Growing concern about the quality of indigent defense services in Washington prompted the ACLU to review county indigent defense contracts throughout the state to determine whether they incorporated the standards adopted by the Washington State Bar Association and referenced in state statute. Using the state public records law, the ACLU collected each county contract covering adult felony indigent defense services.¹ The ACLU also requested any county ordinances or resolutions adopted by the county government addressing indigent defense standards as required under RCW 10.101.030.

A review of the contracts and the relevant authorizing ordinances and resolutions confirmed that a majority of counties have not established comprehensive standards for the delivery of indigent defense services. They have failed to set up objective performance standards and meaningful oversight. By allowing this to happen, the State has failed to meet its constitutional responsibility to ensure that indigent defendants receive effective assistance of counsel.

The ACLU offers the following recommendations to remedy the deficiencies in indigent defense services in Washington.

1. The State should require counties to adopt minimum standards for the delivery of indigent defense services. The following provisions should be required in all indigent defense contracts:
 - a. Caseload Limits: Each county must establish caseload limits that are consistent with the standards adopted by the Washington State Bar Association.
 - b. Payment for Experts and Conflict Counsel: Each county must make provision for the payment of experts and conflict attorneys separate from the fees paid to defense attorneys.
2. The State should exercise its responsibility for overseeing the delivery of indigent defense services. The State should assign to the Office of Public Defense general oversight of county indigent defense services.
3. The State should bar renewal of indigent defense contracts with attorneys who have repeatedly failed to meet the standards adopted by the Washington State Bar Association.

II. Effective Assistance of Counsel for the Accused is Basic to American Justice

The founders of this nation placed special importance on the prompt and effective delivery of justice. They realized that were the state to deprive citizens of life or liberty without a fair trial, the American ideals of freedom and equality would quickly fall prey to the inequities that plagued the monarchies of eighteenth-century Europe. Their belief that the power of government to take life or liberty had to be restrained was the genesis of the Sixth Amendment. They recognized the individual was no match against the power of the state. So in order to level the playing field, the Sixth Amendment guarantees the right of the accused to have the assistance of counsel for his defense.

The Supreme Court has resoundingly affirmed this right. In *Gideon v. Wainwright*,² the Court proclaimed that all accused persons, regardless of wealth or education, are entitled to qualified legal counsel to assist in their defense. Twenty years later, in *Strickland v. Washington*,³ the Court expanded on this principle when it ruled that the Sixth Amendment right to counsel guarantees more than just the appointment of an attorney, but it also guarantees the defendant “*effective assistance of counsel*.” [emphasis added].

In addition to the State’s obligations to promote basic principles of fairness, both state and local government are charged with the proper use of public funds. Creation of oversight mechanisms is standard practice in government management of public services. For example, government establishes performance standards and contract compliance mechanisms for countless government projects, such as the construction of public buildings and highways. But when it comes to the delivery of indigent defense services – a government service that literally can make or break people’s lives – most counties have failed to develop similar quality assurance measures.

Washington State has an obligation to establish performance standards and an effective system for oversight.

III. Current System for the Delivery of Indigent Defense Services in Washington

The state has delegated the responsibility for the design and administration of indigent defense programs to the counties. To guide counties in meeting this responsibility, the state passed legislation in 1989 requiring local governments to adopt minimum standards for the delivery of indigent defense services.

Each county or city under this chapter *shall* adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards *shall* include the following: Compensation of counsel, duties and responsibilities of counsel, caseload limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination. The standards endorsed by the Washington State Bar Association for the provision of public defense services may serve as guidelines to contracting authorities. [Emphasis added] RCW 10.101.030

In adopting the statute, Washington followed the lead of national and state professional organizations and agencies that have long recognized the need for minimum indigent defense standards.⁴ The statute looks to standards endorsed by the Washington State Bar Association to serve as guidelines for local government. The standards endorsed by the bar association were recommended by the Washington Defender Association (WDA).⁵

The 1989 legislation was passed in response to widespread concerns about the quality of Washington's indigent defense system. Those concerns remain. In the 1980s, the legislature commissioned the Spangenberg Group, national experts on indigent defense programs, to undertake a comprehensive review of Washington's public defense system. One of the major findings by the Spangenberg Group was that contract indigent defense attorneys carried excessive caseloads, substantially above the caseload limits recommended by the WDA.⁶ The Spangenberg report noted in particular the absence of any reliable system for collecting data on attorney caseloads, a fact that unfortunately remains true today.

Other findings that ring true today are the lack of adequate training, the use of lump sum and flat fee contracts without establishing caseload limits, and the failure to provide for separate payment of experts and conflict counsel.

When it adopted RCW 10.101.030, the legislature recognized the importance of standards in ensuring quality indigent defense services. Although the statute requires counties to adopt standards, it does not include specific enforcement powers or sanctions for noncompliance. Today, as in 1989, a majority of counties are not held accountable for the quality of trial court indigent defense services.

A majority of counties in Washington employ a contract system for the delivery of indigent defense services.⁷ Most counties award one or more contract to individual lawyers or law firms. The majority of these contracts are awarded to attorneys who also maintain a private practice. In a small minority of counties, indigent defense services are integrated into the county government.

The concerns expressed in the 1980s are even more significant today since use of the contract system has increased dramatically in the last 20 years. The percentage of counties that employ a contract system increased from 56% in 1989 to 72% in 2001.⁸ The most common fee arrangement involves lump sum payments on an annual or monthly basis.⁹ Attorney compensation is generally based on factors other than the amount of time spent on a case. This type of contract system can easily result in ineffective assistance of counsel if meaningful standards and oversight are not in place.

IV. Problems and Recommendations

A majority of counties continue to award indigent defense contracts without establishing performance standards or an auditing system to monitor contract compliance. Without standards or meaningful oversight, neither the State nor the county can reasonably ensure that public dollars spent on indigent defense services meet minimum constitutional and professional standards. What other publicly funded government service is administered in this manner?

The indigent defense systems in Chelan and Grant County highlight some of the deficiencies in Washington.

In 1994, Chelan County drew national attention when 43 adults in the Wenatchee area were accused and prosecuted for child sexual abuse. Later investigations revealed that overzealous police and prosecutors pursued a number of questionable prosecutions. Twenty-one of the defendants who were convicted of sexual abuse – many as a result of guilty pleas recommended by their defense attorney – were later exonerated. The defendants complained about the poor quality of representation provided by their defense attorneys, including the failure to properly investigate the abuse allegations or otherwise prepare an adequate defense. For example, in one case, the defense attorney failed to interview witnesses, failed to prepare for key hearings, failed to prepare defendants to testify and coerced a defendant to plead guilty to 23 counts of incest and child rape. When the defendant later obtained new counsel to challenge his guilty pleas, the prosecutor promptly conceded that the defendant had been deprived of effective assistance of counsel.

In Grant County, courts have reversed several felony convictions based on findings of ineffective assistance of counsel. In 1996, a state appeals court overturned a conviction in a case where the defense attorney failed to return phone calls from witnesses and overlooked important exculpatory evidence. In 2001, a state appeals court overturned a conviction based on the defense attorney's failure to file a critical suppression motion. Several months later, the county prosecutor agreed to release a Grant County defendant who had served 36 months of a 93-month prison term. The release occurred shortly before a state court evidentiary hearing was scheduled to begin consideration of conflict of interest allegations brought against the defense attorney. The defendant claimed his attorney had failed to "do anything" to prepare a defense.

A federal judge overturned another Grant County conviction involving the same defense attorney, citing the attorney's failure to prepare for trial. The attorney did

not investigate the State's primary witnesses, did not contact potential defense witnesses, did not communicate with his client, and did not visit the crime scene. In 2003, a federal judge overturned yet another Grant County conviction, again citing ineffective assistance of counsel. Two Grant County attorneys who provided the majority of the county's felony indigent defense services have been recommended for disbarment by the state bar association.

Unfortunately, these cases are not isolated instances or aberrations. They reflect statewide problems in a system that is failing its mandate to provide indigent defense services that meet constitutional standards. The problems in Chelan and Grant County could occur almost anywhere in the state.

A Majority of Counties Have Not Adopted Standards for the Delivery of Indigent Defense Services.

Almost 15 years after passage of RCW 10.101.030, a majority of counties in Washington still have not adopted standards for the delivery of indigent defense services.¹⁰ Only one county has adopted comprehensive indigent defense standards, including numerical limits on individual attorney caseloads. While ten counties have adopted one or more of the standards, they still fall short of the statute's mandate requiring the adoption of comprehensive standards. The importance of standards in the delivery of indigent defense services is recognized nationally. As a report issued by the Department of Justice in 2000 noted:

Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought. The quality of justice that an innocent person receives should not vary unpredictably among neighboring counties.¹¹

The need for quality assurance standards has been exhaustively studied in Washington. In the mid-1980s, the state legislature created an Indigent Defense Task Force to recommend standards for indigent defense services. The efforts of the task force, along with the work of WDA, led eventually to the passage of RCW 10.101.030. The standards developed by WDA were based on research conducted by the American Bar Association and the National Legal Aid and Defender Association. In 1990, the Washington State Bar Association endorsed the standards developed by WDA.

King County is the only county in Washington to adopt comprehensive standards for the delivery of indigent defense services, including numerical limits on individual attorney caseloads. While several counties purport to have standards, a careful review of those standards found they were so vaguely worded they would be difficult, if not impossible, to apply. For the standard on caseload limits, the language in one defense contract relied on open-ended terms such as “reasonable effort” and “excessive size” – terms that essentially set no limits.

In light of the importance of attorney caseload limits to the delivery of quality legal services, the ACLU focused its review primarily on caseload standards. A secondary focus was to determine whether the county paid for the cost of experts and conflict counsel, or whether the costs were borne by the defense attorney.

Caseload Limits

Few counties have established numerical limits on individual attorney caseloads.¹² Though the Spangenberg Group in 1989 identified this as the most critical problem in Washington’s system for the delivery of indigent defense services, it appears little has changed since then.

An excessive caseload significantly undermines the quality of indigent defense services. If attorneys are assigned excessive caseloads, they don’t have adequate time to communicate with their clients, to interview witnesses, or to otherwise prepare adequately for trial. WDA standards limit attorney caseloads to no more than 150 felony cases per year. Yet in Grant County, an attorney who represented nearly 40% percent of all adults charged with a felony in the county handled nearly 350 felony cases a year.

Attorneys with excessive caseloads cannot provide quality representation. The WDA standards emphasize that reasonable caseloads are vital:

Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their workloads are unmanageable. A warm body with a law degree, able to affix his or her name to a plea agreement, is not an acceptable substitute for the effective advocate envisioned when the Supreme Court extended the right to counsel to all persons facing incarceration.¹³

Most counties in Washington have not addressed or even acknowledged the critical role caseload limits play in ensuring quality representation.¹⁴ While several counties

purport to have caseload limits, the language employed in the contract or resolution is often vaguely worded and does not establish numerical limits. For example, a county might state that defense attorneys should not accept workloads that are excessive if doing so would interfere with the attorney's ability to provide quality legal services. However, the term "excessive" is not defined, nor is there any reference to the WDA standards.

Use of Experts

The testimony provided by experts can be critical to the outcome of a case. Just as defense attorneys and prosecutors require compensation for their services, experts and investigators also must be paid. In several counties, the indigent defense contract is silent as to how experts will be paid.¹⁵ In those situations, the attorney often assumes the cost of experts will have to be borne by the attorney. In some counties, the contract specifically states that the defense attorney is responsible for these costs. This creates an inherent conflict of interest between the client and the defense attorney since any fees paid to experts decreases the attorney's fees. For example, in a capital case filed in Clark County, the defense attorney chose not to use a psychiatric expert, even though the testimony of a psychiatrist could have established the defendant's mental instability. The attorney's omission, along with several other deficiencies in the legal representation, resulted in reversal of the death sentence.

Compensation for Conflict Attorneys

Conflicts sometimes arise when defense attorneys are assigned to cases. A conflict can occur because the attorney represents two opposing parties at the same time, or because the case involves people with whom the attorney may have had a prior relationship. Professional ethics and simple practicality dictate that such cases should be reassigned to "conflict counsel."

Three counties in Washington actually require the defense attorney to pay for the cost of conflict counsel.¹⁶ In five counties, the contract language is so vaguely worded it was not possible to determine who is responsible for paying the cost of conflict counsel. In another county, the contract was silent as to who was responsible for paying these costs.

Recommendation #1: The State Should Require Counties to Adopt Minimum Standards for the Delivery of Indigent Defense Services.

The following provisions should be required in all indigent defense contracts:

- ◆ Caseload Limits: Each county must establish caseload limits that are consistent with the standards adopted by the Washington State Bar Association. The current standard limits each attorney to no more than 150 felony cases per year. Only King, Island, San Juan, and Snohomish counties follow the WDA-recommended caseload standard.
- ◆ Costs of Experts and Conflict Counsel: Each county must make provision for the payment of experts and conflict attorneys separate from the fees paid to defense attorneys. In 2003, Clark County adopted new standards for the delivery of indigent defense services. The provision regarding payment of expert recognizes the importance of paying separately for such services rather than requiring the defense attorney to compensate the expert out of the attorney's fees.¹⁷ The indigent defense contracts used by Island County provide a good example of a contract provision regarding payment for conflict counsel.¹⁸

Recommendation #2: The State Should Exercise its Responsibility for Overseeing the Delivery of Indigent Defense Services. The State Should Assign to the Office of Public Defense General Oversight of County Indigent Defense Services.

While adopting standards is a necessary first step in ensuring that indigent defendants have access to effective assistance of counsel, it is not enough. The State should exercise its oversight responsibility for the delivery of indigent defense services. The failure of a majority of counties in Washington to adopt local standards, or to otherwise exercise any meaningful oversight of indigent defense services, underscores the need for a state-level response.

The consequences of governmental inaction are serious. The law firm awarded the adult felony indigent defense contract in Grant County over the last several years is at the center of a firestorm of criticism. A long list of complaints includes allegations that attorneys demanded separate payment from the defendant's family. In fact, two of the attorneys who provide representation under the contract have been recommended for disbarment by the state bar association.

The state currently operates an Office of Public Defense (OPD) responsible for oversight of appellate indigent defense services. The role of the OPD should be expanded to include oversight of county indigent defense programs. The OPD would be charged with conducting periodic audits of county programs to ensure compliance with minimum standards. The OPD would review county indigent defense programs to determine whether they meet the minimum standards adopted by the Washington State Bar Association and issue periodic reports detailing its findings. This objective perspective has been sorely missing.

The functions served by OPD would be similar to those performed by outside consultants like the Spangenberg Group, which most recently issued a report on Clark County's indigent defense system as well as conducting the last comprehensive review of indigent defense services in Washington. Because the OPD is more familiar with indigent defense programs in Washington, it would be more cost-effective than retaining outside consultants. The OPD is also in a better position to identify indigent defense attorneys in particular counties who may benefit from additional training.

Other states provide useful guidance in creating effective oversight models. In 1994, the Indiana Public Defender Commission¹⁹ began a program to phase in compliance with new standards on a court-by-court basis. Counties were required to bring all indigent defense services into compliance with the standards within a reasonable period of time. The state partially reimburses counties for their indigent defense costs if they adopt a comprehensive plan detailing how they intend to comply with the standards. A staff attorney assists the Commission in implementing the program.

In 2001, Texas adopted a new oversight system that requires data collection and monitoring at the state level.²⁰ Experts credit the new system with bringing about significant improvements in the quality of indigent defense services in Texas. Similarly, in Minnesota, the state Board of Public Defense²¹ establishes standards for indigent defense services and is authorized to require reports from the counties to determine whether they are in compliance.

Recommendation #3: The State Should Bar Renewal of Indigent Defense Contracts with Attorneys Who Have Repeatedly Failed To Meet the Standards Adopted by the Washington State Bar Association.

Although standards and oversight are critical in ensuring the basic quality of indigent defense services, they won't accomplish much without specific consequences for non-compliance. For example, the state bar association recently recommended

for disbarment two attorneys in the Grant County law firm awarded the county's largest indigent defense contract for the last several years. Despite numerous complaints over the years and bar association findings against them reflecting a pattern of misconduct, the county continued to renew its contract with the firm.

Chelan County also illustrates the difficulty of relying on local monitoring and oversight to ensure quality representation. The county conceded ineffective assistance of counsel in a case involving an indigent defendant who was convicted of incest and child rape. The ineffective attorney held the county's primary indigent defense contract. Despite clear indications of deficient representation, the county renewed its contract with the attorney.

The State should bar renewal of indigent defense contracts with attorneys who have consistently failed to comply with state standards. Only three counties in Washington include specific remedies for attorney noncompliance with contract terms.

King County is the only county in Washington to comprehensively address each of the standards endorsed by the Washington State Bar Association, including numerical caseload limits for individual attorneys. The county includes a provision in its contract specifying that failure to comply with the standards will be considered a breach of contract and that such failure will trigger contractual remedies. Island and San Juan counties similarly mandate compliance with county standards as well as including remedies for breaches of contract based on violation of the standards.

Oregon and Wisconsin have both established state standards for indigent defense contracts. In Oregon, the majority of indigent defense services are provided through contracts with private firms. The attorneys' bids are evaluated under the terms of a model contract that includes anticipated costs, caseload limits, staffing plans, and the attorney's experience and qualifications.²² After consultation with members of the local judiciary, the agency decides whether the bid should be accepted.

Wisconsin has a similar system in place. State law requires the state public defender to consider several factors when awarding a contract for indigent defense services, including an attorney's qualifications, experience, and ability to handle the projected number of cases.²³ It is important to note, however, that funding problems have undermined the systems in Oregon and Wisconsin. Washington should take steps to avoid similar problems.

V. Benefits of Recommendations and Dangers of Not Adopting Them

It is a gross miscarriage of justice whenever people are convicted of a crime because they did not receive effective assistance of counsel. Defendants should be convicted and sentenced based on proven misdeeds, not because they are too poor to afford an attorney. Public confidence in the criminal justice system is compromised whenever a prosecution results in a wrongful conviction.

Improving indigent defense services will save money in the long run.²⁴ Indigent defense experts have pointed out the negative effects that even a few cases of ineffective assistance of counsel can generate. The cost of retrials alone may be sufficient justification for minimum standards. Establishment of minimum standards and accountability allow problems to be identified early and to be remedied more quickly than relying on reported post-conviction proceedings, or the filing of a costly lawsuit.

When an indigent defense system breaks down and the state legislature fails to act, the courts have stepped in to impose broad remedies, as they did in Arizona and Louisiana. Challenges to indigent defense programs in Connecticut and Pennsylvania have also succeeded, while litigation is currently pending in Montana. In a recent case from Nevada, the Ninth Circuit Court of Appeals ruled that plaintiffs could sue a county and the director of its public defense agency for policies which were “deliberately indifferent” to the constitutional rights of the indigent defendants.²⁵ In Washington, in the aftermath of the infamous Wenatchee sex abuse prosecutions, Chelan County is facing a number of lawsuits alleging ineffective assistance of counsel. The crisis in indigent defense services in Grant County deepens as problems continue to grow. We urge the State to adopt the recommendations offered in this report, and not wait for the courts to impose a solution.

The Georgia Blue Ribbon Commission Report in 2002 concluded after a lengthy study and numerous fact-finding hearings that, “carefully considered reform . . . by the appropriate legislative and executive policy makers is far preferable to reform by litigation in the state and federal courts.” The Georgia report is particularly noteworthy since, like Georgia, Washington has a fragmented system of county-operated and largely county-financed indigent defense services. Also, both states have statutes that require local governments to adopt indigent defense standards. However, the absence of oversight at either the county or state level failed to prevent recurring problems and perpetuates a system that lacks accountability and fairness. Washington can and should do better.

Notes

- ¹ The ACLU is aware of serious deficiencies in the delivery of indigent defense services in district and municipal courts, in particular, the failure to provide appointed counsel at arraignment and the entry of guilty pleas by unrepresented defendants. The scope of this report is limited to adult felony cases filed in county superior courts.
- ² 372 U.S. 335 (1963).
- ³ 466 U.S. 668 (1984).
- ⁴ See, United States, President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society, 1967; 1973 standards for public defender performance issued by the National Advisory Commission on Criminal Justice (NAC); 1976 National Legal Aid and Defender Association (NLADA) and National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States; 1980 – 1984, NLADA comprehensive study of competitive bid contracts for public defender services, resulting in the publication of its Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (Contract Guidelines); 1985 American Bar Association adoption of the NLADA Contract Guidelines and recommendation that all jurisdictions do the same; 1995 NLADA Performance Guidelines for Criminal Defense Representation; 1999 NLADA Model Contract for Public Defense Services. The ABA has also distilled all of the foregoing publications into its “Ten Principles of a Public Defense Delivery System,” issued in February 2002.
- ⁵ The Washington Defender Association is a non-profit organization that represents more than 400 public defenders and assigned counsel in 30 Washington counties
- ⁶ The Spangenberg Group, Indigent Defense Services in Washington, 1989, p. 55-56.
- ⁷ See appendix A.
- ⁸ The Spangenberg Group, Indigent Defense Services in Washington, 1989, p. 19-21; Jones and Richey, Washington State Department of Community, Trade and Economic Development Local Government Fiscal Note Program, A Study of County Indigent Defense Contracts in Washington State (2002).
- ⁹ See appendix F.
- ¹⁰ See appendix B.
- ¹¹ Department of Justice, National Symposium on Indigent Defense 2000, Conference Report, p.14.
- ¹² See appendix C.

- ¹³ WDA, Standards for Public Defense Services (1989), page 11.
- ¹⁴ See appendix C.
- ¹⁵ See appendix D.
- ¹⁶ See appendix E.
- ¹⁷ The 2003 Clark County standard on experts provides: “Reasonable compensation for expert witnesses necessary for 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. ... The defense should be free to request the expert of its choosing and in no cases should be forced to select experts from a list preapproved by either the court or the prosecution....”
- ¹⁸ The contract states: “In the event Contractor determines that a potential conflict of interest exists in the representation of a particular assigned client it will immediately be brought to the attention of the appropriate County authority and the Court having jurisdiction of the case. If a conflict exists as a result of public defense representation being provided by the Contractor, the County or Court will provide, at County expense, for alternate counsel for the person(s) Contractor cannot represent. The County will provide funding for such alternate counsel through its budgeting process in a separate appropriation.”
- ¹⁹ See http://www.state.in.us/judiciary/admin/pub_def/acts.html
- ²⁰ Burnett, Catherine Greene, Michael K. Moore, and Allan K. Butcher, In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas, 42 S. Texas L.R. 595 (2001).
- ²¹ Rights of the Accused, Minnesota Statutes 611, Sec. 215 (1981).
- ²² See <http://www.nlada.org/Defender/States>
- ²³ Department of Justice, Contracting for Indigent Defense Services, The Spangenberg Group, April 2000, p. 7.
- ²⁴ “New Program Helps Keep Families Together and Reduces State Dollars Spent on Out of Home Care: Press Release” Washington Office of Public Defense, January 16, 2003.
- ²⁵ *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003).

Appendix A

INDIGENT DEFENSE SYSTEMS IN WASHINGTON¹

Private Contractors	Public Defender Contractors (Work Limited to Public Defense)	Public Defender is Department of County Government	No Indigent Defense Contracts ²
Adams	Clallam ³	Pierce	Kittitas
Asotin	Jefferson ³	Skagit	Lincoln
Benton	King ⁴	Spokane	Stevens
Chelan	Lewis	Thurston	Wahkiakum
Clark	Snohomish	Whatcom	
Columbia		Yakima	
Cowlitz			
Douglas			
Ferry			
Franklin			
Garfield			
Grant			
Grays Harbor			
Island			
Kitsap			
Klickitat			
Mason			
Okanogan			
Pacific			
Pend Oreille			
San Juan			
Skamania			
Walla Walla			
Whitman			

¹ Limited to adult felony cases

² Counties rely on appointed counsel list. Do not enter into contracts.

³ The same firm handles indigent defense cases for both Clallam and Jefferson counties.

⁴ King county employs several contracting agencies.

Appendix B
COUNTY INDIGENT DEFENSE STANDARDS PURSUANT TO
RCW 10.101.030

Counties That Have Adopted All Statutorily Mandated Standards	Counties That Have Adopted Several Statutorily Mandated Standards	Counties That Have Not Adopted Any Statutorily Mandated Standards	
King ¹	Adams ² Benton Chelan ² Clark ³ Franklin Grant ² Island Jefferson Kitsap ² Pacific Pierce San Juan Snohomish	Asotin Clallam Columbia Cowlitz Douglas Ferry Garfield Grays Harbor Kittitas Klickitat Lewis Lincoln Mason	Okanogan Pend Oreille Skagit Skamania Spokane Stevens Thurston Wahkiakum Walla Walla Whatcom Whitman Yakima

¹ Only King County has standards on all statutorily mandated topics, including a numerical limit on each attorney's caseload.

² Counties with standards on each statutorily mandated topic, except for a numerical limit on each attorney's caseload.

³ County revised standards in 2003.

Appendix C

NUMERICAL LIMITS ON ATTORNEY CASELOADS¹

Counties with Numerical Caseload Limits	Counties without Numerical Caseload Limits	
Benton	Adams	Klickitat
Clark	Asotin	Lewis
Island	Chelan	Mason ³
King	Clallam	Okanogan
San Juan	Columbia	Pacific
Snohomish	Cowlitz ²	Pend Oreille
	Douglas	Pierce
	Ferry	Skagit
	Franklin ²	Skamania
	Garfield	Spokane
	Grant	Thurston
	Grays Harbor	Walla Walla ²
	Jefferson ²	Whatcom
	Kitsap ²	Whitman
		Yakima

¹ Kittitas, Lincoln, Stevens, and Wahkiakum Counties are not listed because they rely on an appointed counsel list and do not enter into contracts.

² Specifies a maximum number of cases for the contracting firm, but not for individual attorneys.

³ Superior Court monitors caseloads.

Appendix D

COMPENSATION ARRANGEMENTS FOR EXPERTS IN INDIGENT DEFENSE CONTRACTS¹

Counties that Provide Compensation for Experts ²	Counties that Require Attorneys to Provide Compensation ³	Counties with Unclear Provisions	Counties with Contracts that Do Not Specify
Adams Klickitat Asotin Lewis Benton Okanogan Chelan Pacific Clallam Pend Oreille Clark Pierce Columbia San Juan Cowlitz Snohomish Franklin Thurston Garfield Walla Walla Island Whatcom Jefferson Whitman King Yakima Kitsap	Grant	Grays Harbor Skagit Spokane	Douglas Ferry Mason Skamania

¹ Kittitas, Lincoln, Stevens, and Wahkiakum Counties are not listed because they rely on an appointed counsel list and do not enter into contracts.

² These counties provide compensation for experts separately from payment of attorney fees.

³ These counties require the defense attorney to compensate experts from the attorney's own fees.

Appendix E

COMPENSATION ARRANGEMENTS FOR CONFLICTS OF INTEREST IN INDIGENT DEFENSE CONTRACTS¹

Counties that Provide Compensation for Conflict Counsel ²		Counties that Require Attorneys to Provide Compensation ³	Counties with Unclear Provisions	Counties with Contracts that Do Not Specify
Adams	Kitsap	Chelan ⁶	Benton	Walla Walla
Asotin	Klickitat	Douglas ⁷	Cowlitz	
Clallam	Okanogan ⁴	Grant ⁸	Grays Harbor	
Clark	Pend		Lewis	
Columbia	Oreille		Pacific	
Ferry	San Juan		Pierce	
Franklin	Skagit		Thurston	
Garfield	Skamania		Whatcom	
Island ⁴	Snohomish		Yakima	
Jefferson	Spokane			
King	Whitman ⁵			

- ¹ Kittitas, Lincoln, Stevens, and Wahkiakum Counties are not listed because they rely on an appointed counsel list and do not enter into contracts.
- ² These counties provide compensation for conflict counsel separately from payment of attorney fees.
- ³ These counties require the defense attorney to compensate conflict counsel from the attorney's own fees.
- ⁴ Unless the conflict is with a private case.
- ⁵ Contract limits use of conflict counsel to cases where "actual or apparent conflict of interest exists."
- ⁶ Attorney is responsible for compensation of conflict counsel for up to 4 cases per contract period.
- ⁷ Attorney is responsible for compensation of conflict counsel for up to 3 cases per contract period.
- ⁸ Attorney is responsible for compensation of conflict counsel for up to 5 cases per contract

Appendix F

CONTRACT COMPENSATION STRUCTURES FOR INDIGENT DEFENSE¹

Lump Sum Paid Annually or Monthly		Flat Fee Per Case
Adams	Jefferson	Clark ⁹
Asotin ²	King	Cowlitz ¹⁰
Benton	Kitsap	Grays Harbor
Chelan	Klickitat	Lewis
Clallam ³	Mason ⁶	Snohomish
Columbia ⁴	Okanogan	
Douglas	Pacific	
Ferry	Pend Oreille	
Franklin	San Juan ⁷	
Garfield ⁵	Skamania	
Grant	Walla Walla ⁸	
Island	Whitman	

¹ Kittitas, Lincoln, Stevens, and Wahkiakum Counties are not listed because they rely on an appointed counsel list and do not enter into contracts. Pierce, Skagit, Spokane, Thurston, Whatcom and Yakima Counties are not listed because they use county agencies to provide indigent defense services.

² Exception for Class A felonies requiring more than 20 hours of work: attorney paid on hourly basis.

³ Contract is renegotiated if contract caseload limit is exceeded.

⁴ Exception for jury trial: attorney paid on hourly basis.

⁵ Exception for “major” cases: attorney paid on hourly basis.

⁶ Exception for certain specified cases: attorney paid on hourly basis.

⁷ Exception for murder cases: attorney paid on hourly basis. Non-contract attorneys are paid a flat fee per case.

⁸ Exception for cases exceeding contract caseload: attorney paid flat fee per case. Attorney paid on a hourly basis for offenses committed at the Washington State Penitentiary

⁹ Exception for certain specified cases: attorney paid on per diem basis.

¹⁰ Exception for trials: attorney paid on per diem basis

The American Civil Liberties Union is a non-profit, non-partisan membership organization devoted to protecting the individual freedoms of all people in America and extending them to groups that have traditionally been denied their rights



705 Second Avenue, Suite 300
Seattle, WA 98104
(206) 624-2184
www.aclu-wa.org