

An Assessment of Kitsap County’s Public Defense System

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I. INTRODUCTION

For at least two decades Kitsap County has provided public defense professional services through an evolving contract system. The contracts are administered through the Office of the Kitsap County Clerk. An elected official heads the Clerk's office. Kitsap's contract budget expenditures for indigent defense are reflected in the Clerk's County budget program. During the first half of 2007 a confluence of events pertaining to indigent defense in Kitsap County caused the elected County Clerk, together with the approval of the Public Defense Advisory Committee, to obtain a current assessment of indigent defense systems operating in Kitsap County.

The contract between Kitsap County and the author of this assessment sets forth the concerns of the County to be addressed. They are:

1. Provide a description and analysis of current legal mandates and expectations affecting the minimum requirements in the provision of indigent defense in Washington State.
2. Provide a description and analysis of Kitsap County's indigent defense delivery system for felonies, misdemeanors, and juvenile delinquency proceedings.
3. Provide a description of alternative methods of providing public defense services available to Kitsap County for consideration.

In preparing this report, much time was spent interviewing current 'stakeholders' and others knowledgeable of Kitsap's public defense systems and justice systems. Examples of this are: attorneys who contract with Kitsap County to provide public defense services; former attorney contractor staff; members active in Kitsap County's local bar

association; limited contact with judges; judicial administrators; and various other Kitsap County officials involved in the responsibilities of providing and funding of legal representation to indigents in certain legal proceedings.

This report is also intended to provide a resource of reference materials pertaining to indigent defense issues by way of the report's separately bound Appendices II. Hopefully, the appendices will serve as a convenient collection of relevant and up-to-date information necessary for Kitsap County's continuing responsibilities and commitment to the provision of indigent defense and justice.

Various agencies and persons throughout Kitsap County have provided their cooperation and time to this effort. The County Clerk's Office through the Clerk's Public Defense Coordinator, Susan Taylor, provided extraordinary cooperation and indispensable information, documentation, and support.

II. SCOPE AND OVERVIEW OF THE RIGHT TO COUNSEL— THE MANDATE

“In all criminal prosecutions, the accused shall...
have the assistance of counsel for his defense.”
U.S. Constitution, Sixth Amendment

“In criminal prosecutions the accused shall have
the right to appear and defense in person, or by
counsel...”
Washington Constitution, Article I, § 22

“An accused's right to be represented by counsel is
a fundamental component of our criminal justice
system. Lawyers in criminal cases are necessities,
not luxuries.”
U.S. v. Cronin, 466 U.S. 648, 653 (1984)
(quoting Gideon v. Wainwright, 372 U.S. 335,
334 (1963))

In 1932, the U.S. Supreme Court held that the right to counsel applies through the Fourteenth Amendment to indigent defendants charged with capital crimes in state court. Powell v. Alabama, 287 U.S. 45. In 1963, the landmark case of Gideon v. Wainwright, 372 U.S. 335, extended this right to all state court defendants charged with felonies. The right to counsel was further extended to all cases (e.g., misdemeanors) involving imprisonment, Argersinger v. Hamlin, 407 U.S. 25 (1972), and to all juveniles charged with delinquent acts, In re Gault, 387 U.S. 359 (1970). In 2002, the U. S. Supreme Court held that an indigent defendant may not be incarcerated as a result of a conviction and a suspended sentence violation for which he did not receive counsel. Alabama v. Shelton.

Washington State law further expands and clarifies this right to counsel through its constitution, through legislative enactments, through judicial decisions and rulings, and formal rules of court governing court proceedings involving indigent parties. The legislative and judicial mandates can be seen as implementation of both federal (Sixth Amendment right to counsel and Fourteenth Amendment due process/equal protection clauses) and state (Article 1, Section 22 cited above) constitutional provisions. A general summary of the broad state mandates compelling the provision of ‘effective assistance of counsel’ to indigents in Kitsap County’s legal processes for felony (Superior Court), misdemeanors (District Court), and Juvenile Court offender proceedings follows.

A. Superior Court Felony Criminal Rules

The Kitsap County Superior Court is the court of general jurisdiction in Kitsap, County, Washington. It is the trial court for felonies. The Superior Court hears all appeals from District Court decisions.

The Supreme Court of Washington has rulemaking authority to ‘provide necessary governance of court procedure and practice to promote justice...’¹ In this capacity the Supreme Court promulgates, adapts and publishes Washington Court Rules. Encompassed within these rules are the Supreme Court Rules for Superior Court, Criminal Rules (CrR).

Rights of defendants in Superior Court proceedings are addressed in CrR 3, and right to counsel issues are outlined in CrR 3.1 (See, Appendices II, No. 1). This rule addresses several issues pertaining to the right to counsel and promulgates several mandates regarding Superior Court proceedings. *The type of proceeding* in Superior Court that the right to a lawyer attaches to are “all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise.” Italics added. CrR 3.1(a). *The stage of proceedings* in which the right to a lawyer accrues is ‘as soon as feasible after a defendant is taken into custody, appears before a community magistrate, or is formally charged, whichever occurs earliest,’ and further must be ‘provided at every stage of the proceedings...’. CrR 3.1(b). The Supreme Court’s rules further require that when a person is taken into custody that person ‘shall immediately be advised of the right to a lawyer...and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge’ and that ‘at the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place a person in communication with a lawyer.’ CrR 3.1(c).

¹ See Washington Court Rules GR 9

Eligibility for appointment of a lawyer at public expense is defined in CrR 3.1(d) as being mandatory for ‘any person who is financially unable to obtain one without causing substantial hardship to the person or to the person’s family’ and cannot be denied ‘merely because the person’s friends or relatives have the resources adequate to retain a lawyer or because the person has posted or is capable of posting bond.’ This provision is supplemented by the legislature in RCW 10.101 addressed below.

Finally, the Supreme Court in recognition of applicable judicial decisions addresses the right to counsel’s *services other than a lawyer* in CrR 3.1(f). This recognizes that the ‘right to counsel’ is meaningless without support services necessary to provide ‘effective assistance of counsel’—a broadly accepted legal term of art encompassing all aspects necessary for meaningful implementation of legal representation. Thus the Supreme Court rule provides for indigents in Superior Court proceedings to be provided ‘investigative, expert, or other services necessary to an adequate defense.’ CrR 3.1 (f) (1)/(2) The rule further requires ‘reasonable compensation’ for ‘the time expended and the services and expenses incurred on behalf of the defendant.’ CrR 3.1 (f)(3).

The right to counsel at Superior court probation revocation proceedings is specifically addressed in CrR 7.6 (b) requiring that ‘counsel shall be appointed for a defendant financially unable to obtain counsel.’

The right to counsel in post conviction collateral attack relief proceedings (versus appeal)² pertaining to a Superior Court judgment and sentence that occur in the Superior Court (versus appellate courts) is somewhat murky in Washington. It is not a common

² The right to counsel for direct appeals to the Courts of Appeal and Supreme Court is not addressed in this report. Direct appeal expenses are paid by the State of Washington.

occurrence, but when it does occur it is generally accepted that the dollar consequences of a court order appointing counsel etc. in such trial court proceedings actually occurring in the Superior Court are the financial responsibility of Counties versus State authorities.

- Legislative Mandates:

Washington's Court Rules are generally regarded to have superceded old legislative provisions regarding the rights pertaining to appointed counsel in Superior Court felony matters. In some cases the Court rules specifically so provide. (See, comments to CrR 3.1). Accordingly said statutes pertaining to felonies have generally been repealed,³ with the exception of RCW 10.101 as recently supplemented and amended. See, Appendices II, No. 2. RCW 10.101 provides that 'effective legal representation must be provided for indigent persons...consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.' This appears to codify constitutional law established by judicial decisions.

- Supreme Court of Washington Decisions:

The Supreme Court of Washington has held that all indigent defendants in criminal proceedings where a conviction might lead to the loss of liberty are entitled to appointed counsel. McInturf v. Horton, 85 Wn.2d 704 (1975).

B. District Court—Misdemeanor Proceedings

- Rules of Court

³ Oddly, RCW 10.01.110 which pertained not only to appointment of counsel, but which also set forth the counties versus state government financial responsibility therefore was repealed in its entirety.

The Supreme Court of Washington has promulgated rules applicable to the state's District Courts in its Rules for Courts of Limited Jurisdiction (CrRLJ). For all practical purposes CrRLJ 3.1 and 7.6 provides the same mandates and procedures regarding types of proceedings, stages of proceedings, explaining the availability of a lawyer, eligibility of a lawyer, and other services necessary for 'effective assistance of counsel' as CrR 3.1 and 7.6 provides for the Superior Courts. (See above).

- Supreme Court of Washington Decisions—District Court

Washington's high court has unanimously ruled that the right to counsel extends to all proceedings punishable by loss of liberty, and that an indigent defendant in misdemeanor proceedings are entitled to appointment of counsel whenever loss of liberty is a possible punishment. The fact that loss of liberty is not probable because of a court's pretrial determination, or otherwise, does not affect a misdemeanant indigent defendant's right to effective assistance of counsel in Washington. McInturf v. Horton, 85 Wn.2d 704 (1975). This appears to be an extension of federal constitutional interpretations and is an interpretation of Washington law, and has become well-settled law applicable to Washington's misdemeanor courts.

C. Juvenile Delinquency Proceedings

- Juvenile Court Rule Established by the Supreme Court

Washington's Supreme Court has set forth rules governing the right to counsel in Juvenile Court Rules (JuCR). JrCR 9.2 (d) requires that juvenile courts shall provide a lawyer at public expense in a juvenile offense proceeding when required by RCW 13.40.080 (10), RCW 13.40.140 (2). The Rules provide for 'investigative, expert, or

other services necessary to an adequate defense’ in an almost identical manner to the rules pertaining to felonies and misdemeanors, with the express requirement that ‘a juvenile shall not be deprived of necessary services because a parent, guardian, or custodian refuses to pay for these services.’

●Legislative Mandates in Juvenile Court Proceedings

RCW 13.40.080 (11) mandates that a juvenile’s right to counsel in Washington applies to diversion agreements/processes. The legislative mandates the right ‘shall inure prior to the initial interview for purposes of addressing the juveniles as to whether he or she desires to participate in the diversion process or to appear in the juvenile court’ and that ‘the juvenile shall be fully advised at the intake of his or her right to an attorney and of the relevant services an attorney can provide...’

RCW 13.40.140 (2) (3) and (4) provides an explicit and broad legislative mandate for appointed counsel in juvenile offender proceedings, including necessary support services.

(2) A juvenile and his or her parent, guardian, or custodian shall be advised by the court or its representative that the juvenile has a right to be represented by counsel at all critical stages of the proceedings. Unless waived, counsel shall be provided to a juvenile who is financially unable to obtain counsel without causing substantial hardship to himself or herself or the juvenile's family, in any proceeding where the juvenile may be subject to transfer for criminal prosecution, or in any proceeding where the juvenile may be in danger of confinement. The ability to pay part of the cost of counsel does not preclude assignment. In no case may a juvenile be deprived of counsel because of a parent, guardian, or custodian refusing to pay therefore. The juvenile shall be fully advised of his or her right to an attorney and of the relevant services an attorney can provide.

(3) The right to counsel includes the right to the appointment of experts necessary, and the experts shall be required pursuant to the procedures and requirements established by the Supreme Court.

(4) Upon application of a party, the clerk of the court shall issue, and the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents, or other tangible objects at any hearing, or such subpoenas may be issued by an attorney of record.

RCW 13.40.140 (2) (3) (4)

● Supreme Court Decisions in Juvenile Offense Cases

Washington's Court of Appeals has clarified a juvenile's right to counsel in offense proceedings applies to any proceeding where confinement could be imposed on a child regardless of whether confinement actually occurs. State v. Trull, 56 Wn. App. 745, 784 (1990).

D. Miscellaneous Provision Pertaining to the Right to Counsel

● Involuntary Commitment Proceedings—Right to counsel mandated by

RCW 71.05.360, 2005.

● Dependency and Termination of Parental Rights Proceedings

--See JuCr regarding appointment of counsel for juveniles and/or parents in said proceedings.

--See RCW 13.34.100 (6) regarding appointment of counsel for a child.

--And, see In re Grove, 127 Wn.2d 164 (1995); Matter of Welfare of J.D. 112 Wash 2d 165 (1989); In re Luscier and In re Myrick.

--Dependency and Termination proceedings are not part of the study as most if not all costs of indigent defense in Kitsap County are paid for by the State of Washington.

● Recoupment for Costs of Indigent Defense

--See RCW 10.01.160 (Superior Court); RCW 3.62.020,040 (Courts of Limited Jurisdiction); RCW 10.73.160 (Appeals for Superior Court, Courts

of Limited Jurisdiction and Juvenile Court; RCW 13.40.145 (Payment of fees for publicly funded counsel against juvenile, parent, or other person legally obligated to support juvenile). And, see State v. Blank, 131 Wn.2d 230 (1997).

● RCW 10.101—State Requirement for Counties to Adopt Indigent Defense Standards

Washington State is unique in that it goes beyond addressing the right to counsel and requires its counties to adopt standards for the delivery of public defense services. (RCW 10.101.030). Appendices II, No. 2 sets forth RCW 10.101 in its entirety. By law, the Counties are required to adopt standards, which cover a range of issues, including compensation of counsel, duties and responsibilities of counsel, caseload limits, training, supervision, monitoring, and evaluation. In Kitsap County, County Resolution 104-1997 addresses this statutory mandate by County Resolution. See Appendices II, No. 3, setting forth Resolution 104-1997 in full.

The final sentence of RCW 10.101.030 as amended in 2005 further directs county and city legislative authorities as follows:

The standards endorsed by the Washington State Bar Association for the provision of public defense services ~~((may))~~ should serve as guidelines to ~~((contracting))~~ local legislative authorities in adopting standards.

See, Appendices II, No. 2

The Washington State Bar Association (WSBA) has recently adopted standards in March and September of 2007. The WSBA standards are set forth in full at Appendices II, No. 4, WSBA Standards for Public Defense Services.

Further Kitsap County addresses the issue of service standards in its contracts with attorneys. The language is the same in all contracts. Sample language from a contract is as follows:

REPRESENTATION OF CLIENTS

Standards of Practice. To the best of the Attorney's ability, Attorney will render the services described herein in accordance with the Standards for Public Defense Services (Standards) adopted by the Washington Defender Association, which Standards have been adopted by County as Resolution No. 104-1997.

See, Appendices II, No. 5

● Standards of Indigency

State law requires that the court or its designees make a determination of indigency for all persons desiring the appointment of counsel. A determination of indigency must be made upon a defendant's first contact with the court or at the earliest stage possible in a case. RCW 10.101.020 (See, Appendices II, No. 2).

By statute, indigent means a person who at any stage of a current proceedings is receiving some form of public assistance; is involuntarily committed to a public mental health facility; is receiving an annual income after taxes of 125% or less of the currently federally established poverty level; or is unable to pay the anticipated cost of counsel for the matter before the court because his or her "available funds" (liquid assets and disposable monthly net income) are insufficient to pay any amount for the retention of counsel.

The Washington State Office of Public Defense has recently published an informative report on indigency determination in Washington State—See, Appendices II, No. 6, Update on Criteria and Standards for Determining and Verifying Indigency,

October 2007. The report discusses indigency determination in trial courts, trial level criteria and standards, verification of indigency, indigency rates, state and federal statutes affecting indigency, and conclusions.

- Remedies for Failing to Protect the Right to Counsel

A judge may be disciplined for failing to protect the right to effective assistance of counsel. In re Disciplinary Proceedings Against Michels, 150 Wn.2d 159 (2003).

Governmental actions systemically causing denial of counsel or ineffective assistance of counsel can result in injunctive and monetary class action relief against a Washington County. Best v. Grant County, Kittitas County Superior Court Cause No. 04-2-00189-0.

See Section III herein. Disciplinary actions by the Washington State Bar Association can be initiated against prosecutors and appointed counsel in certain circumstances.

Violation of constitutional rights can also be actionable in federal courts.

Finally, failure to provide an accused effective assistance of counsel can and does result in reversals and/or vacation of convictions, judgments and sentences.

III. RECENT EVENTS AFFECTING RESPONSIBILITY OF COUNTIES PROVIDING INDIGENT DEFENSE SYSTEMS

As we have seen, the judiciary and legislature have declared that indigent persons have rights in certain cases to be effectively represented by an attorney at state expense. In Washington, the responsibility for the funding and developing systems for the delivery of indigent defense has largely fallen to local governments. Washington's counties and cities have varied widely in how they have responded to this responsibility.

In 2004, the inadequacies of how Washington and its Counties were implementing indigent defense systems were revealed in dramatic fashion by several institutions. The Washington State Bar Association established a Blue Ribbon Task Force on Indigent Defense. The Task Force reported on the many and well-documented problems it found throughout the State in public defense representation. Further, the state's largest newspaper, the Seattle Times⁴ published a series of front-page articles revealing the obvious inadequacies openly observed in several of the State's counties. During a similar time frame, the Supreme Court's Justice in Jeopardy Task Force revealed that funding for indigent defense (a responsibility of local government) was inadequate. Finally, a class action lawsuit was filed against an Eastern Washington County (utilizing a contract system) alleging that the county's indigent defense processes systematically created a likelihood of providing ineffective assistance of counsel for indigent defendants. Since 2004, these catalyst events have determined the parameters of how Counties must implement indigent defense responsibilities.

⁴ An Unequal Defense: The failed promise of justice for the poor, The Seattle Times (April 4, 2004-April 6, 2004) <http://seattletimes.nwsourc.com/new/local/unequaldefense>

A. Washington Court Decisions in Best v. Grant County, Kittitas County Superior Court No. 04-2-00189-0.

The recent court decision in Best v. Grant County provides guidance to Washington Counties interested in understanding their constitutional duties to provide an effective defense.⁵

Two defense attorneys from Grant County, one of whom was the lead attorney contracted for public defense services with Grant County, were disbarred in professional disciplinary proceedings the year before the lawsuit was filed. State and federal courts reversed criminal convictions because Grant County contractors failed to provide effective assistance of counsel.

Plaintiffs filed a lawsuit alleging that the county had systematically deprived indigent felony defendants of effective assistance of counsel in violation of both Washington and United States Constitutions. Plaintiffs asked the court to certify a class of current and future indigent defendants and sought injunctive and declaratory relief reforming Grant County's public defense system. The court certified the class in September 2004—over the county's objections.

Consistent with precedent from other jurisdictions, the court recognized that class recognition did not depend on the specific circumstances of each felony defender's performance. Nor did the court accept the county's argument that problems with its

⁵ See, Making Gideon Real, Washington Counties and the Duty to Provide Effective Assistance of Counsel, Washington State Bar News, February 2007, David F. Taylor, Don Scaramastra, and Beth Colgan. The authors were among the attorneys representing the plaintiffs in Best v. Grant County. The article provides an in depth view of what is restated here.

system were solely the responsibility of a few lawyers with whom it had contracted as ‘independent contractors.’

In making summary judgment, the court noted that most of the material facts concerning the design and operation of Grant County’s public defense system were uncontested. The court then went on to conclude that said facts created deficiencies justifying someone represented by a Grant County contracted defender to have “a well-grounded fear of immediate invasion of the right to effective assistance of counsel.” Changes by the county in response to the lawsuit were found by the court to be insufficient to alleviate that fear.

Again, based on precedent from other jurisdictions, the court found there was enough to grant injunctive relief against Grant County and held it was unnecessary for plaintiffs to prove that the defense of specific individuals was in fact prejudiced by actual ineffective assistance of counsel as other case law would require to vacate a conviction. The critical lesson for Washington counties is summarized by plaintiff’s attorneys as follows:

...Plaintiff’s seeking systemic reform of a public defense system need only show a well-grounded fear that deficiencies in the system will deprive them of effective assistance of counsel.

The import of this decision is clear: County governments have an obligation to see that their public defense systems deliver effective assistance of counsel. Anything less can give rise to a well

.....GROUNDED FEAR THAT THE CONSTITUTIONAL RIGHTS OF INDIGENT

defendants will be violated, warranting injunctive relief.

Emphasis added.

The Settlement

Based on the ruling a settlement was reached. Grant County was allowed to continue to operate a contract type public defense system or to adopt a new form of system. Either way, the county was required to comply with requirements derived from standards adopted or endorsed by the Washington State Bar Association, the American Bar Association, and other public defense organizations. See, Appendices II, No.7, setting forth a copy of the settlement in full. Copies of the settlement are also available at www.aclu-wa.org/issues/index.cfm?ossie_if=1.

The most significant settlement provisions the County agreed to are:

- Limitation of public defender felony caseloads to 150 or less with some felony cases accorded extra weight and requiring some other matters (such as probation violation proceedings) also credited against caseloads.
- Assign cases only to lawyers qualified to handle them under objective standards endorsed by the Washington State Bar Association.
- Pay compensation that more closely correlates to salaries paid to prosecuting attorneys and that rewards tenure and experience.
- Pay additional fees for cases that are taken to trial to remove financial disincentives to trial (the settlement initially imposes a \$350 fee per day or partial day of trial).
- Require one investigator for every four defenders, per WSBA endorsed standards.
- Provide funding for experts outside the budget for attorneys, and allow attorneys to hire experts without notice to prosecution.

- Require each defender to retain objectively minimum amount staff support corresponding to WSBA endorsed standards.
- Hire a full-time lawyer whose job it is to supervise the other defenders—one who is qualified by WSBA standards.
- Hire investigators who don't work for the court or other county departments.
- Establish an '800' number for indigent defendant's to call with complaints/problems.
- Require each defender to satisfy standards for training set by the National Legal Aid and Defender Association.
- Require adequate conflicts check processes approved by an outside monitor.
- Build an adequate supply of qualified and adequately paid counsel to handle cases when the regular public defenders are conflicted out.
- Completely remove the prosecuting attorney from all matters pertaining to the operation of the county's public defense system—including funding, compensation, and contract issues.

The settlement also requires the county to pay \$1,100,00 in attorney fees—but \$100,000 for six consecutive years are to be forgiven for each year of full compliance by the county.

B. Recent Washington State Legislative Actions

Landmark decisions by the United State Supreme Court and Washington Supreme Courts make the constitutional right of criminal defendants to effective assistance of counsel a 'state' obligation. But the high courts have not said how states are to

implement that right, and in Washington the duties and responsibilities have been delegated by the state to its entities of local government—cities and counties. Each city and county has implemented a public defense system having its own unique operation and features. While there may be broad similarities in some of the systems implemented (i.e., contracts; ad hoc assigned counsel appointments; non profit public defense organization; and, mixed systems) a manager from the State Office of Public Defense recently concluded that “...Washington jurisdictions have a myriad of public defense systems—virtually none of which meet state standards developed by the Washington Defender Association and adopted by the Washington State Bar Association in 1990.” Gonzales, Effective Public Defense—Benefits to the Bottom Line, Washington State Bar News, Feb. 2007, pp. 34. And see, generally Appendix No. 7, 2004.

The state legislature responded in 2006 by appropriating, for the first time, state funds for the improvement of indigent defense systems being implemented by its counties and cities, Appendix II, No. 2—RCW 10.101.050. Further and perhaps most remarkably the State expressly recognizes its own responsibilities for assuring effective assistance of counsel in SB 5454.

NEW SECTION. **Sec. 1.** The legislature recognizes the state’s obligation to provide adequate representation to criminal indigent defendants and to parents in dependency and termination cases. The legislature also recognizes that trial courts are critical to maintaining the rule of law in a free society and that they are essential to the protection of the rights and enforcement of obligations for all. Therefore, the legislature intends to create a dedicated revenue source for the purposes of meeting the state’s commitment to improving trial courts in the state, providing adequate representation to criminal indigent defendants, providing for civil legal services for indigent persons, and ensuring equal justice for all citizens of the state.

See, Appendices II, No. 8, SB 5454

Passed in 2005, HB 1542 establishes that the Washington State Office of Public Defense (OPD) distribute appropriated funds to county and city jurisdictions to improve their public defense systems. These funds have been used by jurisdictions in a wide variety of ways—e.g., hiring attorneys to lower caseloads, providing attorneys at initial court appearances/arraignments, increasing pay for public defense attorneys, purchasing of needed technology, and generally establishing improvements/change to existing public defense systems generally in conformance with service level standards established by RCW 10.101.030 and WSBA Standards for Public Defense Services. This has included establishing personnel to oversee, monitor, and improve a county's public defense system, etc.

For 2007, Kitsap County applied for and received \$102,729 through OPD and HB 1542, and is anticipated to receive \$207,727 for improvements implemented by Kitsap County to its public defense system.

Caseload issues present the most determinative problems in providing effective assistance of counsel throughout Washington State. Pursuant to the Washington Supreme Court's Justice in Jeopardy efforts, together with support from many others, SB 5454 also passed in 2005. This legislation includes provisions for the development of pilot programs to implement compliance with indigent defense caseload standards and adequate public defense case resources. As a result three programs have initiated partnerships between local jurisdictions and state OPD to demonstrate the need for and effort of adequately funding and implementing the right to effective counsel in trial court proceedings. These are occurring in Bellingham Municipal Court (featuring the addition

of two state funded attorneys, an investigator, social worker and paralegal services) resulting in lower caseloads and attorneys at first court appearances; Grant County (featuring additional attorneys to lower caseloads in Juvenile Court, investigative services, and a part-time social worker); and a program in Thurston County District Court adding attorneys to affect the appearance of severe caseload issues and lack of attorney services at first appearances. An evaluation measuring the results of state funding of these pilot projects on juvenile, misdemeanor (Municipal and District Court) is anticipated soon.

Parent Representation

Another major state funded effort being conducted in indigent defense is OPD's state funded Parent's Representation Program. Initiated as a pilot in Benton-Franklin and Pierce County juvenile courts, the program provides a dramatically needed infusion of resources to provide indigent parents the right to effective assistance of counsel in family dependency and termination of parental rights proceedings. These efforts have demonstrated in three independent evaluations long needed outcome improvements (e.g., reunification of families versus long term foster care) in these important proceedings. New funding (approximately 8.5 million) has resulted in state funding of indigent defense in dependency/termination of parental rights proceedings to about one half of Washington's counties—including provision of all such funding in Kitsap County that had been previously shouldered in total by the county. Efforts to expand this effort are continuing. Kitsap County is reported to have received \$700,000 in state funds for this purpose in 2007. See, Appendices II, No. 9.⁶

⁶ Because right to counsel expenses in dependency proceedings have been provided for with state funds they are not the focus of this report.

● Adoption of Indigent Defense Standards by the WSBA, State Legislature, and Others.

The state legislature has required each county or city to adopt standards for the delivery of public defense services whether these services are to be provided by contract, assigned counsel, or a public defender office. RCW 10.101.030. See, Appendices II, No. 2. With slight modification in 2005 this has been the law since 1989. The list of standards to be addressed are mandatory—i.e., ‘Standards shall include the following...’ (emphasis added). The list of standards is lengthy and includes such matters as compensation of counsel, duties and responsibilities of counsel, caseload limits and types of cases, responsibility for expert and other associated costs of representation, training, supervision, evaluation of attorneys, limitations of private practice for contract attorneys, qualification of attorneys, etc.

Of significant note, RCW 10.101.030 provides that “...The standards endorsed by the Washington State Bar Association for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards.” (Emphasis added). The word “should” was substituted for the word “may” in 2005, thereby giving nearly mandated force to indigent defense standards adopted by the WSBA.

In 2004 the WSBA’s Blue Ribbon Task Force on Public Defense issued a report outlining the deficiencies of public defense in Washington citing many concurring studies, reports, and court decisions made over a period of years. Following the Blue Ribbon report, the WSBA appointed the Committee on Public Defense to develop action recommendations for consideration by the WSBA Board of Governors. During 2007 the Committee delivered its recommendations regarding the adoption of indigent defense

standards among other actions. The Board of Governors has formally acted on the recommendations by adopting indigent defense standards. See, Appendices II, No. 4, Standards for Public Defense Services adopted by the WSBA Board of Governors.

The WSBA standards very closely follow recently updated standards adopted by the Washington Defender Association. See, Appendices II, No. 10. A summary of the current status of these standards across Washington State is contained in Appendices II, No. 17, at page 3. Status Report on Public Defense in Washington State, January 2007. The report provides the best insight to and information currently available in print regarding Washington county efforts to respond to the standards.

The importance of the WDA/WSBA standards for public defense services cannot be overstated in that they clearly establish the legal parameters and expectations for counties in implementing their public defense responsibilities. Any conflict or dispute pertaining to a county's responsibility to deliver indigent defense services being determined by Washington's major executive, legislative, judicial, or administrative institutions will be guided and largely determined by the standards.

● Other Professional Ethics and Disciplinary Proceedings

In many Washington misdemeanor courts, prosecutors negotiate plea deals with unrepresented defendants at first appearances/proceedings. The ethics of this conduct for both prosecutors and judges ratifying this process has become controversial. Fortunately, state funding and increasing caution on the part of judges and prosecutors are fast reducing this issue. Kitsap County District Court was at the forefront of eliminating this problem by assuring counsel is provided to defendants at initial hearings. This proactive leadership is commendable. The provision of counsel early in the District Court process

to enhances court efficiency as well as the court proceedings. The Juvenile Court has moved in the same direction.

Finally, the American Bar Association has taken an aggressive stand in adopting ethics opinion 06-441, “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” The opinion states, “If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients.” (See, www.abanet.org/cpr/pubs/ethicsopinions.html)

A Washington lawyer was recently disbarred after a disciplinary proceeding in which he was charged among other things with ‘voluntarily maintaining an excessive caseload while one of the lawyers under contract to provide indigent defense.’ See, http://pro.wsba.org/PublicView-Discipline.asp?Usr_Discipline-ID=594.

IV. KITSAP COUNTY INDIGENT DEFENSE DELIVERY SYSTEMS—Superior Court (felony); District Court (misdemeanor); and, Juvenile Court (offender)

This section will describe how Kitsap County has implemented legally mandated services to accused indigents in the Kitsap County Superior, District, and Juvenile court systems.

The exclusive means authorized by Kitsap County Commissioners for public defense in Kitsap County is set forth in County Resolution No. 104-1997. (See Appendices II, No. 3). This is a resolution passed in compliance with RCW 10.101 requiring counties to address specific standards pertaining to indigent defense. The resolution begins:

BE IT RESOLVED by the Kitsap Board of County Commissioners:

1. Contract. All public defense services shall be pursuant to a written contract between the public defense attorneys and Kitsap County.

Resolution No. 104-1997 (1)

All other issues pertaining to development of an indigent defense plan or system are left to be resolved on an ad hoc basis. For historical reasons that have not been memorialized or formally enabled by Kitsap County, the weighty responsibilities for the initiation, administration, coordination, and substantive monitoring of this contract system at some point fell to Kitsap County's elected County Clerk. Appendices II, No. 11 sets forth a summary of a County Clerk's legislatively required duties and responsibilities. The placement of indigent defense responsibilities in the Clerk's office appears unique in Washington's thirty-nine counties.

Within the County Clerk's office is an employee having the title of 'Program Specialist—Public Defense.' The position's class specification provides a general job description as follows:

An incumbent is responsible for the administering, monitoring and coordinating contracts that provide legal representation for indigent persons in County court. This position has substantial contact with all parties in the Criminal Justice system, including defendants, judges, lawyers, correction staff and the public.

Work is performed under managerial direction and the incumbent has considerable latitude for exercising independent judgment in the selection of courses of action and procedures within established departmental policies and objectives. Work is reviewed periodically...

See, Appendices II, No. 18, Job Description for Program Specialist—Public Defense

Qualifications for this central position requires "four years progressively responsible experience in the area of office administration, research, or analysis, or

related field...or any equivalent combination of related education, training or experience which provides the applicant with the desired skills...Must type 50 w.p.m.” No professional license etc. is required. The position (PDPS) works an eight (8) hour day at an hourly rate less than that of an Office Supervisor I employee or the prosecuting attorney’s victim witness coordinator.

One person held the former PDPS position from 1983 to her retirement in 2006. Her actions over the years provided definition to the ‘...administering, monitoring, and coordinating’ of Kitsap’s indigent defense contracts, which effectively became accepted as forming Kitsap’s ‘system.’ Kitsap’s legal community and courts provided the rest. People came to understandings, contracts were administered efficiently through the County’s bureaucracy, and quality of service rested on the integrity of the various contractors. A contract for each system (Superior, Juvenile, District) established what came to be understood as being the ‘primary provider’ and an informal ‘tier’ system developed for distribution to other contractors having only minimum caseload contracts with no maximum caseload. Actual minimum caseload ‘expectations’ of the various contractors, differing from the terms of the contracts, were informally known and prioritized at the discretion of the PDPS. Case assignments frequently exceeded contract requirements. As the contract system matured, the flat fee schedule became broader, and attorneys were paid not only for contracted caseloads but for supplemental ‘overage’ assignments, as well as additional categories of work being provided, e.g., probation violation, arraignments, drug court, specials, etc., etc.

Projected 2008 public defense contract budget expenditures projected through the County Clerk’s office are \$3,475,289. Other professional services expenditures

authorized by each court necessary for providing effective assistance of counsel substantially raise the total expenditure for indigents to \$4,206,882. See, Appendices II, No. 12, Public Defense Summary 2008. Other professional services expenditures are authorized and administered by each court (felony, juvenile and misdemeanor) and they are budgeted by each court's administrator and paid out of said court's annual budget. Authorization for other professional services is made on a case-by-case basis pursuant to a formal motion brought by a defendant's appointed counsel. Washington's court rules authorize the establishment of a process outside the judiciary for authorization and payment of such professional services. Currently, there is very little if any evidence that the court processes for obtaining supplemental services necessary to provide effective assistance of counsel in Kitsap County is not working satisfactorily. However, formal motion process can be time consuming for the courts and appointed counsel and the court's administrators have expressed some judicial concerns for the awkward appearance of the court having to rule on defense requests for professional investigative, medical, psychiatric, or other forensic services central to the defense's theory of the case. Centralizing this function in an agency responsible for indigent defense pursuant to the court rule would accomplish a better appearance of defense independence and could also move budget expenditures for indigent defense out of court budgets to be reflected in public defense budgets.

The Washington State Office of Public Defense published a first of its kind State's Report on Public Defense in Washington State in January 2007. See, Appendices II, No. 6. This report provides a county-by-county summary of how Washington State's counties are meeting public defense standards and also provides a brief summary of each

county's public defense system. Differences in each county's reporting systems and differing defense systems make some comparisons 'tentative' as explained in the report's introduction. Nevertheless the report provides useful and interesting information for comparing and assessing Kitsap's public defense system and expenditures.

The Contracts

Kitsap County has utilized contracts for providing indigent defense for close to twenty years. Over that time the legal demands, expectations, and complexities of indigent defense have changed dramatically and so have the contracts.

The essence of Kitsap's contract system is based on a flat fee schedule for events occurring in the various court systems (felony, misdemeanor, juvenile). Some appointments are paid on a hourly basis. The fee schedule for 2007 is set forth in Appendices I, No. 12. The adoption of a fee schedule applicable to the Kitsap's contract system is required by Resolution No. 104-1997 (2) Compensation—"Public defense attorneys in Kitsap County shall be compensated in accordance with a fee schedule adopted by the County." The fee schedule is incorporated into Kitsap's various public defense contracts. See, Appendices II, No. 5.

The large majority of newly assigned cases and case events for which counsel is appointed are paid by a flat fee as set forth in the fee schedule. All appointments are paid pursuant to the same fee schedule. As stated earlier, the contract system being utilized in each court system contemplates 1) the issuance of one 'primary' contract (i.e., a contract providing a minimum number of new case assignments that will assure the primary

contractor enough funding for projected staffing (not specified in the contract) and overhead and will also assure the County of a service provider obligated to take a material percentage of services required to be provided by the court); 2) the issuance of enough other contracts that have a specified minimum of guaranteed appointments to assure provision of services to the remaining caseload. This later category of contractors have come informally to be known as ‘tier’ providers for caseloads exceeding the primary provider’s contract. The ‘tier’ providers are assured minimum numbers by written contract, but in some cases are verbally assured additional cases as caseloads and contracts allow. Thus, by informal understanding, there have come to be known ‘tier one’ providers—those getting additional ‘overflow’ cases in priority to tier two, three providers. Tier two providers get overflow cases in priority to tier three providers—and so on. As indicated, the tier system is entirely by verbal understanding and seems based on anecdotal and ad hoc reasons of longevity, history of service, bundling of less desired contracts, and/or needs of particular contractors in planning staffing necessary to provide the county reliable and proven services to meet the county’s projected but uncertain needs. See, Appendices I, No. 2, Explanation of ‘Tiered Attorneys’ provided by the Program Specialist—Public Defense’s supervisor. Each of the ‘primary’ and ‘tier’ contracts is paid for the minimum numbers of cases to be assigned monthly pursuant to the flat fee schedule as a ‘retainer’ for services. Overage cases assigned in addition to the retainer cases are also paid to contractor upon monthly billings.

All of the primary and tier contracts are also referred to as ‘retainer’ contracts in that they are paid a flat fee pursuant to the fee schedule for the minimum amount of cases their contract specifies they will be assigned each month.

Kitsap County lets out six (6) retainer contracts for Superior Court (felony), eight (8) for District Court, and two (2) for Juvenile Court. The contractors minimum ‘retainer’ number of cases specified in contract, and termination dates of said contracts are set forth in Exhibit A.

Contrary to the requirements of Resolution No. 104-1997 (5) “All public defense contracts involving the representation of more than one indigent defendant shall specify the types of cases for which representation will be provided and the maximum number of cases expected to be handled...” none of the contracts specify a maximum caseload. Contracts are provided without assurance or agreements from law firms regarding staffing levels or other public or private workloads of the law firm. Without knowing the number of attorneys who will be performing services on cases assigned and the maximum number of cases that should be assigned, it is impossible for personnel assigning cases to know if they are assigning cases in conformance to contract standards. In terms of contract language, the contracts are flat fee, ‘open-ended’ contracts creating financial incentive for the contractor to take additional cases without hiring of staffing to meet standards based on flat fee payments. Many of the contracting firms hire associates paid on a salary to perform the services. The more cases an associate handles, the more profit for the law firm. The profit incentive is more complex for a sole practitioner or a firm where all attorneys are participating in services and caseloads for both can be dramatically affected by other factors—e.g., adherence to standards, contract provisions for enforcement of caseload standards, outside work, and contract enforcement provisions pertaining to outside work, firm staffing levels, experience levels, types of cases assigned.

Because the contracts are ‘open-ended’ the contracts do not accurately reveal or project either the number of cases that will be assigned or the total amounts that will be paid. Attachment 1, No. 3, Types, Numbers of Cases Assigned to Contractors and Corresponding Payments, is attached to the body of this report. This attachment is most important because it reveals for 2006 and January-October 2007, 1) the numbers and types of cases assigned to each ‘retainer’ attorney firm; 2) the amounts paid for services provided in each category and the corresponding yearly total amounts paid, and 3) the number of trials conducted.⁷ This attachment is important because it provides information necessary and relevant to determining actual attorney caseloads if the attorney staffing level of the contract for a particular court is known (typically this is not known by Kitsap) and not just for a particular type of case. Finally the attachment reveals the effects of an open-ended contract system based on flat fees for varying services—such contracts often result in escalating and complex provisions allowing contractors to bill individually for every process they become involved in. While there are pros and cons to any public defense system—a ‘con’ of private contract systems with for profit law firms is that they often evolve more and more complex ways to reflect individual work performed versus compensation for a specified salary for work assigned/performed by a county employee. Hence the exhibit and contract fee structure authorize flat fee payments for such categories as PV’s with orders, PV’s without orders, specials, diversions, prelims, Compulsory school/Contempt, Offender/Special, Trial days, Special Appointments, Violations/Probation/Deferred, Other, etc., etc. Some of these are

⁷ Numbers of trials for the felony primary provider are not included, as they did not bill for trial per diems in 2006 and part of 2007. Anecdotally, most persons asked felt that the firm conducted trials on a regular basis in a competent, professional manner.

billed by arraignment contractors for non-arraignment proceedings handled at the ‘arraignment’ docket. Such is the hallmark and nature of contract for flat fee systems.

How Cases are Assigned to Contractors

How cases are assigned is a critical component of a County’s public defense system. In Kitsap County’s system, it is a major factor in the County’s ability to oversee, monitor, and coordinate the system’s capacity to deliver ‘effective assistance of counsel.’ The assignment system enables, or stymies, this ability to effectively distribute caseload, assure that cases are appropriately assigned to law firms with appropriate staffing levels, experience, supervision, and training, and it can assure that the public defense system’s contractors are independent from the appearance of judicial influence. The assignment process can be and often times is determinative of a county’s ability to meet its responsibilities to provide effective assistance of counsel.

For Superior court felonies, the assignment process is closely coordinated on a daily basis between the Clerk’s Public Defense Program Specialist (PDPS) and the Court. The PDPS reviews the Superior Court’s dockets each day for cases that will potentially require appointment of counsel and completes the form used by the court to appoint counsel upon determination of indigency. In this way, the County agency having initial responsibility for assuring a system that delivers effective assistance of counsel can (if they have necessary contractor staffing and other case information) retain necessary involvement in caseload and administrative issues—without impeding court process.

In the District Court the decision regarding assignment is for all practical purposes determined by the Court's administrative staff, both at District Court South and North locations. The system is efficient in all regards in that it provides responsible and timely indigency screening, provides cost recovery from defendants who are appointed counsel in the initial court order (later coordinated with recoupment at any sentencing that might occur) and assures the appointment of counsel happens for defendant's desirous of appointment at the first court appearance. What it does not assure, because it has not been its focus and/or seen as its responsibility, is that the appointment of counsel is mindful of the County's responsibility to assure appointments that do not systematically result in caseloads or workloads, which affect the ability to comply with contract standards and therefore provide effective assistance. In this regard there has not been adequate communication or coordination with the Clerk's PDPS, which results in the appearance of serious and unnecessary caseload, burn out, and personnel turnover issues. These issues can best be monitored, coordinated, and controlled by more closely involving and placing responsibility on a County agency ultimately bearing the responsibility to provide the mandate of effective assistance of counsel.

The same problem is presented by how Juvenile cases are assigned. The Juvenile Court's case coordinator does a remarkable job to the envy of every other Juvenile Court in this state of determining conflicts and background issues that bear on the appointment of counsel. Appointments are presented in a timely and effective way coordinated with the court's well-considered juvenile processes and decision-making. But, again the appointment process is made with a cursory knowledge of the County's obligations, risks, and responsibilities to assure consideration of workload standards and, therefore,

effective assistance of counsel. The Juvenile Court and District Court’s involvement of staff in this process has been and will remain valuable. But the fair distribution amongst contractors of assignments after determining conflict and defendant history, does not address or take into consideration the other responsibilities incumbent on Kitsap County to provide a public defense system that can meet constitutional standards. This ‘open ended contract’ appointment process presents what could be argued as a ‘systemic’ problem for Kitsap’s public defense system. Hence, the appearance of unacceptably high caseload concerns for District Court North’s primary provider consisting of one attorney. See, Appendix I, No. 3, at page 13. Concerns are also apparent for the Juvenile Court’s primary indigent offender contractor (appearing through a competent, experienced, and highly regarded attorney) who is assigned new cases exceeding applicable standards, plus a large number of probation violations, plus all drug court cases, as well as a caseload of school contempt proceedings. See generally, Appendix I, No. 3 at page 13.

Contract Provisions

Several contract provisions, or lack of provisions merit discussion because of their financial implications or because of their impact on the County’s obligations to provide effective assistance of counsel.

a. Withdrawals—Conflict Provision/Retainer of Private Counsel

A typical example of the current conflict of interest provision contained in current contracts is the following from a felony contract:

Conflicts. Attorney shall not be required to accept appointments or continue representation in cases in which a

conflict exists. Attorney and/or the Court will decide whether a conflict exists and will immediately inform the County's Public Defense Program Specialist when and if a conflict arises or becomes known to Attorney and/or the Court.

In felony criminal cases assigned in the Kitsap County Superior Court when the defendant is in custody at the time of trial setting in which Attorney and/or the Court decides a conflict exists shall not be considered as a billable case if the conflict is based on information received by Attorney either within three weeks following the date of assignment or within one week following the filing of the state's witness list, whichever is later. Such cases shall be paid at the rate paid for preliminary appearances. Cases assigned in the Kitsap County Superior Court when the defendant is not in custody at the time of trial setting in which Attorney and/or the Court decides a conflict exists shall not be considered as a billable case if the conflict is based on information received by Attorney either within four weeks following the date of assignment or within one week following the filing of the state's witness list, whichever is later. Such cases shall be paid at the rate paid for preliminary appearances.

Employment of Private Counsel. Adult cases assigned in the Kitsap County Superior Court in which the defendant retains private counsel shall not be considered as a billable case if counsel is retained within two weeks following the date of assignment. Such cases shall be paid at the rate paid for preliminary appearances.

This language is important because of the fee schedule's flat fee feature in most felony cases assigned (currently \$1,069, See, Exhibit 3, 2007 Fee Schedule).

Withdrawals are a financial problem in any system, but flat fee provisions invite abuse.

It is not uncommon for withdrawals to occur in ten (10) percent of cases assigned.

Paying ten (10) percent of a felony caseload twice is a significant financial issue. The Public Defense Advisory Committee (a committee that was re-established by the Clerk in 2003) recently reviewed this language and recommended substantial changes to be coordinated with any other changes that may result from the County's review of its

indigent defense system. It is suggested that withdrawals only be allowed by court order with prior notice of hearing/presentation to include the County agency responsible for indigent defense, and that payment be conditioned on presentation of a court order allowing withdrawal and be made on an hourly basis not exceeding the flat fee upon submission of an affidavit outlining actual time and efforts provided.

It is believed that most contractors will be cooperative in implementing change to these provisions.

b. Telephone/Investigation

The law firm of Crawford, McGilliard, Peterson, Yelish and Dixon is the primary provider of indigent defense services in the Superior and District Courts. Pursuant to information provided by the current PDPS, and the supervising attorney from Crawford, McGilliard, Peterson, Yelish and Dixon, contract negotiations since the 1980s have resulted in an agreement that the law firm would supply its own investigative needs in return for certain telephone services provided by Kitsap County through Kitsap County's Northern Telecom (PBX) system. While the County's obligation to provide PBX services is expressly provided for in current contracts, the law firm's responsibility to pay for its investigation expenses is not. In actual practice, the Crawford firm provides its own investigative services which is probably a good 'deal' for the County. All other contractors seek investigative services by motion to the Superior or District Courts. The Crawford law firm retains the services of a staff investigator serving not only those associates providing work for Kitsap's public defense, but in addition provides services to the firm's partners, as well as a limited outside practice. The firm utilizes one investigator for all its work. The investigator working at the Crawford firm is held in

high regard for competency and efficiency, but it is clear that she is providing services to a materially larger number of attorneys than practice standards allow for, and it was reported that at times access to investigator services was sometimes compromised. Most attorney interviews from the Crawford firm reported satisfaction and praise for investigative work conducted, but some felt lower level cases and entry level attorneys could be left either without investigative services or intimidated to pursue them.

c. Standards of Practice

All contracts contain the following language regarding Representation of Clients—Standards of Practice:

To the best of the Attorney’s ability, attorney will render the services described herein in accordance with the Standards for Public Defense Services (Standards) adopted by the Washington Defender Association, which standards have been adopted by County Resolution No. 104-1997.

Language contained in all Kitsap County public defense contracts. See, Appendices I, No. 4, page 3.

One of the lessons learned from the recent events in Grant County is that Washington counties cannot evade their responsibility for providing indigents effective assistance of counsel merely by adopting a contract system for ‘independent indigent contractors’ and referencing professional standards. The adoption of County Resolution No. 104-1997 incorporating most of the Washington Defender Association (WDA) Standards for Public Defense Services⁸ is admirable as is the requirement in Kitsap County’s contracts that contractor’s perform public defense services in accordance with said standards. However, Kitsap County does not adequately consider ability to comply

⁸ As noted earlier, the WDA standards have very recently been updated, as have standards adopted by the Washington State Bar Association. (See, Appendices II, No. 4 and No. 10).

with standards in awarding contracts, takes no steps to determine if they are complied with, and can be accused of being part of a process that will not result in compliance with its own standards. Kitsap County has contracted with knowledgeable and ethical attorneys and law firms to provide indigent defense services. Further, the County has a highly regarded judiciary with vigilant and competent administrative staffing. But even with these facts and some luck, relying indefinitely on a deficient public defense contract system (i.e., open ended, profit based, and standards that are not enforced) can eventually lead to unacceptable financial risks and disaster to Kitsap County's justice systems. This is particularly true in view of the recent emphasis on standards of service by the legislature, WSBA, and judiciary.

The current contract system does not require and there are not procedures in place to assure Kitsap County that Resolution 104-1997 is being taken seriously or that WDA standards are being complied with. This is not to say that Kitsap's contractors do not take standards for public defense seriously or strive to comply with them—there is insufficient evidence to conclude that contractors are in fact providing ineffective services. And it is also clear that the large majority of contractors are well regarded for their competence and maintain excellent reputations. But as we have seen, that is not the test for protecting a county from legal attack on its public defense system. The purpose of this report is not to point fingers at contractors (except where a situation is arguably acute and putting Kitsap at risk) but to inform the County of what it can or should do to put a public defense system in place that assures the County is meeting its constitutional and statutory obligations.

The current contract requirement that “To the best of the Attorney’s ability...” the attorney must render public defense services in accordance with WDA and County Resolution 104-1997 standards is a central reference guide establishing what the level of practice expectations are and must be for the County to deliver effective assistance of counsel. The standards referenced are comprehensive and provide a blueprint for providing effective assistance of counsel. But the current contract and system of practice is missing features that an effective contract system must have to assure Kitsap County that its system is in fact reasonably addressing standards of practice versus merely mentioning the standards of representation necessary to constitutional compliance. See, Appendices II, No. 15--Contracting for Indigent Defense Services—A Special Report, Bureau of Justice Assistance, 2000.

Features missing to assure Kitsap County’s contract system will meet current expectations in Washington are:

- Establish in each contract attorney staffing levels, the types of cases to be provided, and the maximum number of cases expected to be handled absent documented staffing changes and contract amendment. If mixed types of proceedings are anticipated (e.g., new cases, plus probation revocations, plus drug court, specials, etc.) that should be addressed in the calculating of the maximum caseload. This concept is specifically required by County Resolution 104-1997 (5) for implementation of Kitsap’s contracting system but is conspicuously absent in its contracts. This would provide the appointing authority guides for appropriately distributing daily case assignments to contractors.

● Establish in each contract a mechanism for regularly scheduled monitoring, evaluation, and oversight of the system's compliance with core standards affecting the quality and constitutionality of Kitsap's public defense system, to wit:

- 1) compliance with limitations on practice of law outside the contract.
- 2) compliance with workload and caseload caps/standards
- 3) compliance with expectations/standards pertaining to attorney qualifications and training.

A model contract incorporating American Bar Association guidelines for contracting is available from the National Legal Aid and Defender Association (NLADA), 1625 K Street NW, Suite 800, Washington D.D. 20006-1604; Telephone (202) 872-1031; E-mail www.nlada.org.

Finding a way for Kitsap County to effectively integrate the newly adopted WSBA standards for public defense into its public defense system is definitive of whether or not the County will continue to meet legal requirements. All legislative, judicial, and WSBA actions resulting from Washington's recent events are based on meaningfully integrating WSBA standards for public defense into a Washington county's public defense system.

The amendments to RCW 10.101 (i.e., state funding based on adherence to service level standards) and the acceptance of state funding by Kitsap County create new challenges, opportunities, and obligations. The County's current public defense system does not provide independent record keeping of individual attorney caseloads of its various contractors. Obtaining reliable independent caseload records will require material changes in case assignment, tracking and record keeping. Yearly training

attendance is not required by the contracts and has never been provided (although resolution 104-1997 (9), See, Appendix No. 3, page 9, requires training report forms to be submitted to the ‘Assigned Counsel Coordinator prior to January 31 of each year). Finally, although resolution 104-1997 (13) allows contracts to establish limits on the number of private cases that can be accepted by contract attorneys—no specific limitations are currently set by the contracts or considered in granting of contracts or the assigning of new cases to contractors, and there is no monitoring mechanism in effect to determine the hours, number or types of outside work (if any) Kitsap contractors are engaging in.

Kitsap County is anticipated to receive \$207, 727 pursuant to RCW 10.101 amendments for 2008 and received \$102,729 in 2007.

These recent legislative requirements, together with the very recent updating and adoption of new standards by the Washington Defender Association and Washington State Bar Association provide an unusual opportunity for Kitsap County. Specifically, state funding provided in 2008 can be used for “(i) adopting by ordinance of a legal representation plan that addresses the factors in RCW 10.101.030. The plan must apply to any contract or agency providing indigent defense services for the county or city.”

Changes in the parameters of Kitsap County’s administrative and legal obligations regarding the provision of public defense services, together with continuing state funding provide an opportunity for Kitsap County to re-examine its public defense system and consider enabling legislation that establishes a more diverse, effective, and efficient plan/system for the provision and administration of indigent defense services.

V. SYSTEM OPTIONS

The law does not mandate what indigent defense delivery system counties must or can adopt—but it has become clear that counties must adopt systems which assure that certain standards levels of service are likely to be provided or counties will be subject to class action relief in the courts. The Washington State Office of Public Defense Status Report on Public Defense in Washington State provides a ‘snapshot’ of how each county is delivering public defense services. See, Appendices II, No. 17. There are wide discrepancies in the 39 counties. Seven counties have public defender offices or are beginning them as part of county government. Most have a primary type of delivery system and allow for appointment of other attorneys for conflict cases. Five counties are reported to have or are starting non-profit public defender offices. Three counties appoint from a list (assigned counsel) and pay pursuant to a fee schedule. Twenty-four counties contract with independent private attorneys or firms or have a combination system or ‘mixed’ system of contracts and list appointments. Some jurisdictions operate mixed system utilizing a public defense office (sometimes a county office), contracts, and attorneys appointed from qualified lists.

In summary, there are almost as many individual indigent systems as there are jurisdictions in the United States. That having been said, these individual systems can be categorized and then subcategorized. The broadest categories are:

- Contract Systems
 - Fixed fee cases
 - Sets a total amount attorney or firm will receive during a specific contract period—expected to handle all cases arising in a particular court or jurisdiction except conflict cases.
 - Fixed fee—Specific Cases

- Establishes total amount to be received but specifies the type of cases—e.g., all misdemeanors. No caps.
- Flat fee—Specific Number of Cases
 - Pays a flat fee for all work completed based on a specific number of cases.
- Flat fee—Per Case
 - Establishes a fee by case type (i.e., \$150 per misdemeanor) can be with or without caps on numbers of cases.
- Hourly Fee With Caps
 - Establishes hourly fee but includes a cap on the total of compensation.
- Hourly Fee Without Caps
 - Pays an hourly fee established in the contracts
- Public Defender Systems
 - Public Agencies
 - Staff attorneys employed by counties to provide specified public defense services
 - Contracts with non-profit agencies or law firms to provide large blocks of public defense services
- Conflicts/List Appointments
 - Individual attorneys who have contracted to take individual cases or conflict of interest cases for an established fee—hourly, hourly with caps, flat fee, etc.

The Washington State Office of Public Defense reports that as a result of the revisions to RCW 10.101.050 in 2005 providing state funding to improve indigent defense systems, all counties who applied for funding but had not yet passed an ordinance adopting public defense standards said that they would adopt such an ordinance in 2007. This implies that many of Washington counties are in a process of changing their indigent defense systems.

An underlying issue for all counties is the fact that the counties do not and cannot control crime workloads. Indigent defense costs are responsive to law enforcement

arrests and prosecutor filings. Once filed, defense systems cannot defer or postpone its workload.

There are pros and cons to any public defense system. Kitsap's contract system has served it well but new demands for adherence to standards will result in costly changes that almost surely will result in increased costs to the current private for profit law firms providing services. Enforcement of caseload standards that take into account not only new cases of a particular type being assigned to attorneys within a firm but also private case work and other public cases/workload being performed⁹ will increase personnel requirements and may make contracts less attractive to private law firms. The requirement that law firms report hours and other services performed outside public defense may also make public defense work less appealing to private for profit law firms. Enforcement of other standards pertaining to secretarial support staff, supervision, training, experience requirements, etc., all must be taken into consideration as supplemental overhead expenses that may not have previously been experienced by private contractors. All of these factors may either diminish interest of private law firm contractors or create need for a materially increased compensation in the contracts.

From the County's perspective, emphasis on contracts may be less appealing in that simply contracting with an 'independent contractor' does not diminish the County's responsibility to deliver an indigent defense system that reliably provides constitutionally acceptable services—i.e., one that meets state approved standards.

⁹ For example, the Crawford firm has two attorneys assigned to do District Court work. In 2006 they were assigned 714 new cases (\$130,371); conducted 200 additional 'special' pleas on a retainer (\$9,200)); appeared at arraignment calendars daily (\$36,863.80); conducted 242 probation violation proceedings (\$18,940); and 934 additional 'special' pleas at the arraignment calendars (\$37,306); and 30 additional 'diversion cases' (\$8,582). Their private caseload is not reported or known to the County but is likely de minimus although the firm pays each attorney a significant percentage of any case they bring into their firm. Question: What is their 'caseload' and is it over the WSBA and WDA standard of 300/up to 400 in some circumstances?

In any event, it is clear that counties must have an administrative system in place that addresses issues pertaining to indigent defense—i.e., assignment of cases, processing contract billings for large sums of public monies; substantive review of contract provisions; the oversight, monitoring and substantive implementation of constitutionally required level of services; etc.

Given any county's administrative responsibilities and the increasing reality that their responsibilities to indigent defense cannot be entirely 'outsourced' to the private sector, a mixed delivery system utilizing a county public defense component that is responsible for both administrating the system and has a substantive role in partnership with the private sector becomes desirable. Such a mixed delivery system is now formally recognized in the widely acclaimed ABA Ten Principles of a Public Defense Delivery System, 2002. See, Appendices No. II, No. 13—Principal No. 2

No. 2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

This is recognition by the American Bar Association that a mixed delivery system utilizing the advantages of both a public defender staff and the private sector through contracts provides the best overall system of delivering public defense services. The degree of involvement for each will of course vary from jurisdiction to jurisdiction and from time to time depending on constantly changing factors specific to a particular jurisdiction.

The modification of Kitsap's complete dependence on contracts could include a public defense component having responsibility not only for administration of an indigent defense system (i.e., contracts, administration, quality assurance of the system,

enforcement of contracts, assignment of cases, obtaining state funding, implementation of County approved public defense plan, coordination and oversight of indigent defense issues) but also to oversee a public defender component assigned caseloads, etc., where it is more advantageous and effective than a contract system. There are several opportunities to incorporate this into Kitsap's current system which can work to the economic advantage of Kitsap County, provide predictable services to court dockets, and provide a recognized focal point and partner for the administration and coordinated delivery of constitutional public defense service in Kitsap County's justice systems.

Opportunities for this improvement exist in each court system. However, current contract termination dates (see Appendices II, No. 14 for current expiration dates) as well as the need for planning and the prudence of pacing an accepted transition including a small County component probably calls for forming the beginnings of such an office during the early portion of 2008 with state approved funding pursuant to RCW 10.101.050.

The basic parameters of developing a 'mixed delivery' system include an enabling ordinance addressing 1) the establishment of a county public defense component having administrative accountability to Kitsap County, 2) responsibility to administer and implement constitutional delivery of public defense services utilizing a mixed system of public and private sector components, 3) establishing said office's substantive independence, 4) establishing an Advisory Board and its membership, and 5) addressing the issues of standards as required in RCW 10.101.

VI. FINDINGS

1. Kitsap County’s Indigent Defense System Participants Believe the System’s Contract Attorneys are Providing Acceptable Levels of Service to Indigents and Courts.

This sentiment was voiced throughout Kitsap County’s justice systems—by the judiciary, the judicial administration staffing, by County Clerk supervisors and staff, by attorney firms and individual practitioners, and by prosecution attorneys. There were few exceptions and they were limited to specific circumstances or examples—e.g., concern was often expressed regarding low salaries paid to law firm associates leading to high attorney turnover rates in the District Court and replacement by inexperienced attorneys; assignment of serious, complex level but flat fee felony cases to attorneys with questioned experience levels or demonstrated ability for such cases.

Kitsap County’s public defense system is not in the midst of breakdown, collapse, relentless criticism, investigation for legal action, or broadly held low morale or disdain in the local legal community.

2. Kitsap County Lacks a Formal Indigent Defense Plan Directed by a Full-Time Administrative Representative Who is Responsible for Kitsap County’s Public Defense Delivery System.

Kitsap County’s lack of a coordinated plan for the delivery of indigent defense impedes the County’s ability to meet changing circumstances and responsibilities. While the courts and prosecution functions have continued to improve their administration, training, experience levels, and career paths, indigent defense has been left solely to an unspecified ad hoc means of how the County should administer a public defense system

totally reliant on contracts. As the responsibilities, volume and costs of indigent defense have materially increased, Kitsap's nonspecific 'contract' system is failing to implement established and recognized principles known to determine the success or failure of providing indigent defense through contracting.

The system lacks a focal point looked to by judges, court administration, prosecutors, the local bar association, law enforcement, jail officials, and indigent defense service providers as having authority and responsibility for implementing a comprehensive plan adopted by Kitsap County for providing public indigent defense services. There is no county plan other than the statement in County Resolution 104-1997 that indigent defense services should be by contract. Everything else pertaining to indigent defense 'contract' services is left unspecified and as a result has largely been dealt with through ad hoc improvisation by the various courts and Office of the County Clerk. County monitoring and coordinating of essential quality of service features has not and is not being done. This may have been acceptable practice five years ago, but recent events in Washington emphasizing indigent defense quality standards do not allow this to continue. Kitsap County has no oversight or contract accountability procedure in place to assure minimal compliance by private contractors with service standards ensuring the County system provides effective assistance of counsel. That quality services are provided in Kitsap County has largely faith based on the individual practices of each for profit contractor and or their associates who actually do the work. This is a formula that can and has led other contract systems to disaster in many jurisdictions across the United States. See, Appendices II, No. 15, Contracting for Indigent Defense Services—A Special Report, BJA, 2000.

The ABA's Ten Principles of a Public Defense Delivery System (see, Appendices II, No. 13), which synthesize ABA indigent defense policy, states as one of its principles:

2. Where the caseload is sufficiently high the public defense delivery system consist of both a defender office and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contract services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney with the varied requirements of practice in the jurisdiction...
(Emphasis added)

The commentary to ABA Standard 5-1.2, from which the preceding principles were drawn:

[T]he overall program for providing defense services should be embodied in a written plan. For example, the resources of a defender program and the extent to which it plans to provide representation should be clearly defined. Furthermore, ...the plan should explain the system to be used in distributing assignments to private attorneys through the panel and contracts for services.

Kitsap County lacks a comprehensive and coordinated plan and accountability for the delivery of indigent defense. Ad hoc responses, procedure and implementation will move the system further away from judicial, legislative, and bar association goals and proven standards. Recent legislative and judicial developments in Washington call for Washington counties to develop an indigent defense plan that is WSBA standards based. The plan should also include provisions for its administration and accountability.

The plan could address many of the issues addressed in this report by placing responsibility on the Director for assuring reasonable compliance with state standards, assessing workload capacity in awarding contracts, monitoring contract/fee structures,

assurance of adequate support systems, providing oversight, providing a unified voice for indigent defense, establishing a data gathering system, and generally serving as the focal point for addressing Kitsap County's public defense responsibilities.

3. Several Key Components of Implementing, Coordinating and Overseeing Kitsap County's Indigent Defense System Are Either Split Between the Judiciary, Clerk's Office and Contractors, Or Are Undefined Resulting In Lack of Adherence to Quality Commitment and Accountability.

Key Responsibilities for administering Kitsap's indigent defense system are split between the judicial systems and the Office of the County Clerk. Contracts for attorney services are made and administratively processed through the County Clerk. But, in the Juvenile and District Court actual workloads/caseloads are determined and administered by judicial administration support staff making individual attorney case assignment recommendations to the court. So the central feature of determining quality of public defense services—i.e., attorney caseloads—are largely determined by court staff assistants having knowledge of minimum caseload contract requirements and unwritten 'tier' agreements, but not of maximum limitations or of state and WSBA adopted standards for public defense, or their impact on the County's obligations. Neither the Clerk's office nor the judicial administration system monitors total caseload assignments or compliance with state caseload standards.

This lack of central responsibility for caseload assignment and general administration of indigent defense responsibility has resulted in instances of unacceptable caseloads/workload assignments to contractors. It also impedes the ability of the county to effectively implement and monitor its public defense contracts for compliance.

Additionally, those portions of indigent defense budgeting relating to all professional services other than attorney services (psychiatric, investigative, forensic testing, etc.) are budgeted and decided in judicial and judicial administrative processes. Centralizing all budgeting and administrative accountability for indigent defense expenditures in one place better enables coordinating the effective administration, decision-making and accountability.

4. Kitsap County's Indigent Defense System Lacks Necessary Independence of Judicial Involvement and Administration.

Kitsap County's judicial administration systems for Superior, District and Juvenile Courts provide a remarkably effective and efficient job for Kitsap County of providing indigency screening and cost recovery processes. These functions are best left in place.

However, judicial administration of substantive indigent defense support services budgets (i.e., investigation, psychiatric reports, forensic testing, necessary to adversarial litigation, etc.); or judicial staff determination and appointment of indigent defense contractors in individual cases; and, judges' decision-making on motions/requests for indigent defense support services, provide concern regarding the appearance of sufficient independence of indigent defense from the judiciary.

Taken together, case assignments, budgetary and decision-making for indigent defense support services, results in judicial involvement that is an obstacle to Kitsap County's ability to coordinate effective administration of all indigent defense delivery

system expenditures and provides, even if only in appearance¹⁰, a lack of necessary independence.

Standard 5-1.3 of the ABA Standards for Criminal Justice Providing Defense Services recommends that,

The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving it should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by administrators of the defender, assigned counsel and contract-for-service programs.
(Emphasis added)

Many public defense systems utilize a board of trustees or advisory board to secure professional independence for defender organizations. Assigned counsel or contract-for-service components of defender systems are often governed or advised by such a board. The current advisory committee's composition does not allow it to perform in this capacity. The primary function of such boards is to assure independence and consideration of operation policies. Generally such boards consist of members of the bar admitted to practice in the jurisdiction and assure adherence to standards of practice and professionalism. See, ABA Standard 5-1.3. Composition and duties of such a board could be established by County Ordinance setting forth Kitsap's public defender delivery system.

5. Kitsap's Public Defense Contract System Appears Closed, Non Transparent, and Discourages Broader Participation by Local Practitioners.

¹⁰ Only one contractor interviewed complained of the current system. The larger majority felt obtaining necessary support services was fair and provided necessary funding.

Public defense contracts do not go out to open bid processes. The ‘tier’ method of prioritizing which contractors get coveted flat fee felony appointments for case filings exceeding the ‘primary’ provider assignments are not written or formalized.

Thus, the contract system for determining who gets what and how many is somewhat misunderstood and mistrusted by outside attorneys desirous of receiving more flat fee case assignments.

In the gathering of information for this report it became obvious that there are many more attorneys throughout Kitsap County who might be available and willing to participate in an indigent defense delivery system. It is also clear that attorneys new to the contract system are easily discouraged by a system that can be seen as not currently open to additional participation. For outside attorneys unfamiliar with the system’s operation, becoming involved and actually receiving cases can be difficult. This limits Kitsap’s options for delivering public defense services.

6. Kitsap County Does Not Adequately Assess the Workload Capacity of Bidding Attorneys in Awarding Contracts, Assigning Cases, or Monitoring Contracts. Kitsap County Does Not Provide Oversight or Require Accountability for Adherence to Quality of Service Standards Expected by State Law.

Heavy caseloads are probably the central factor affecting quality of representation, affecting timely appearances in court, case preparation, and contact with clients, etc. Kitsap’s contract system makes it difficult to determine actual attorney caseloads because several unknowns are often present. The unknowns are factors such as how much outside (private or public) work is being done in addition to the contract

caseload; what and how many attorneys in the firm are being assigned to contract type of case assignments; and what level and kind of case is in fact being assigned pursuant to the contract and to whom. None of this is effectively known by the County either at the time of contracting or during the term of the contract. It is true that individual law firm/contractors may, or may not, keep this information.¹¹ The point is that the determination of an attorney's caseload can be calculated in many different ways, and an agreed to means of determining caseloads should be set forth in the contract. In any event, no meaningful individual caseload figures are routinely being provided to Kitsap County or reviewed by Kitsap County. Kitsap County does not monitor contractor caseloads and does not know how many cases have been assigned until the firm bills for the cases. Further, Kitsap County has no ability to monitor individual attorney caseloads, i.e., associates, within a contractor firm.

As a result, Kitsap Clerk reports show that in 2006 an associate of a law firm providing services to District Court North provided services to 562 new misdemeanor case assignments, plus 275 probation revocation proceedings, plus 97 pleas at arraignment, plus appearance at arraignment dockets. The law firm billed for all these services. Obtaining information for these reports was time consuming and difficult for the Clerk's staff. It took separate inquiry unavailable to the Clerk to know that all such services were provided by one attorney. The WSBA standard adopted for misdemeanors in September 2007 is 300 (up to 400 in special circumstances). Further, no trials were reported or billed by said attorney for 2006. See, Appendices I, No. 3.

¹¹ In particular, it should be noted that the County's primary contractor for Superior Court felonies and District Court South, did keep records regarding caseloads and was active in monitoring them. The Crawford firm further showed monitoring and concern for standard's compliance pertaining to supervision, training, and attorney experience levels.

Generally, contractor staffing levels, experience levels, training levels, numbers of private cases anticipated, etc., are not specifically considered by or contracted for in the contract process by Kitsap County. The contracts do contain a clause requiring “to the best of Attorney’s ability the attorney firm will render services in accordance to Standards for Public Defense Services (Standards) adopted by the Washington Defender Association...”. However, attorneys applying for contracts are not held to specific attorney or support staffing levels in the County’s contract award process and the county does not request or consider information relevant to these important issues. Hence there are systemic problem encountered in assigning appropriate cases/caseloads to some contractors.

Adherence to ‘Standards’ has been completely left to the contractor’s interpretation. Kitsap County’s public defense system has never taken steps to monitor or enforce public defense service standards compliance. Some of the contractors gave this more serious consideration and monitoring on their own than others. Some firms interpret the standards different than others, and some are more conversant with the standards than others. Some consider caseload standards to include only new case assignments for one contract, ignoring other contract workloads to the same attorney(s). Some do not factor in supplemental caseloads/workloads such as probation violations, arraignment contracts, special pleas, drug court contracts, arraignment docket contracts, etc., which all add to caseload.

Changes, deletions, or additions to a contractor/law firm’s personnel affecting workload are generally not reported to the County during the term of the contract. Nor is an attorney’s outside workload of private or other public contract cases.

The contracts do not have mandatory enforcement or reporting provisions pertaining to adherence to ‘Standards.’ There are no quarterly or regular standardized reports made to the County regarding the key standard components that assure effective assistance of counsel is being provided by an attorney—caseloads, training, supervision, numbers of trials, experience level.

7. There is No Unified Voice for Public Defense in Kitsap County.

Unlike the justice system’s prosecutor component, there is no organized voice that can or does speak on behalf of Kitsap County’s indigent defense system. There is no consensus or any means of obtaining consensus in speaking for the many contractors regarding the issues of indigent defense. Because there is no public defense plan adopted by Kitsap or placement of responsibility, the system lacks the ability to make strategic planning or be an equal participant in justice system decisions.

VII. RECOMMENDATIONS

- 1. Adoption by Ordinance of a Comprehensive Plan for the Delivery of Indigent Defense Services Consisting of Both County Defender Office and the Active Participation of the Private Bar. The Plan Should Establish Responsibility in a Director for the Plan’s Administration and Substantive Implementation. The Plan Should Generally Incorporate and Adopt With Appropriate Modifications the American Bar Association’s Ten Principles of a Public Defense Delivery System and Standards for the Delivery of Public Defense Services Adopted by the Washington State Bar Association Pursuant to RCW 10.101.030.**

Adoption of this recommendation will allow Kitsap County to incorporate an indigent defense delivery system that is durable, effective, efficient, and high quality. It

is the single most important thing Kitsap County can do to assure the ability to meet its changing obligations for delivery of public defense services.

It is believed this can be developed in a cost-effective manner regarding use of county funds at similar levels that are currently being expended. This can be accomplished by utilizing state funds provided through RCW 10.101.050 and by implementing the differing efficiencies and cost advantages offered by public defense system in addition to private contracts/assignments. It should be noted that this recommendation contemplates a plan that implements Principle Two of the ABA's Ten Principles of a Public Defense System (see, Appendices II, No. 13) i.e., the utilization of both a public defender system (headed by a Director employed by Kitsap County) as well as the continuing active participation of Kitsap's private bar members/contractors. The Director would have overall responsibility for budgeting, administration and substantive implementation of the plan—including accountability for the plan's service level standards and contracting system.

This recommendation contemplates the transfer of existing funding directly related to indigent services being provided to the Office of the Clerk, Superior Court, and Juvenile Court—other than administrative budget for indigency determination and cost recovery. Ultimately, this would separate indigent defense from the courts as well as from the Office of the Clerk whose statutory duties appear inconsistent with implementation of a substantive defender office. (See, Appendices II, No. 11)

It is believed that an experienced director for indigent defense services can both address new State legal parameters and expectations and serve as an accountable administrator responsible for resolving all aspects of indigent defense services within the

parameter of the delivery plan adopted by County Ordinance. She/he should be able to improve the integrity of services by providing an office to better coordinate support services, provide quality control verification, identify billing processes that can be improved, allocate efficiencies best provided by private versus public defender components, perform monitoring of caseloads/standards, modifying contracts as needed, and serve as an oversight administrator for other components of the system (e.g., substance abuse problems of a contractor, more meaningful resolution of client complaints, and rotation of attorney staff).

Importantly, Kitsap County must establish a mechanism to monitor reasonable compliance with standards. Kitsap's utilization of contract services has served it well for over twenty years—but the law has changed toward clear expectations in Washington that its counties are responsible to implement systems that effectively assure minimum quality of service.

It is meaningless to adopt standards and not assure they are effectively monitored and reasonably addressed in daily practice. This contemplates an office documenting screening qualifications of contractors, assuring that abilities of defense counsel match the complexity of cases to which they are assigned (not just the next attorney on the list), monitoring of individual attorney (private and public) indigent workloads, monitoring and providing training, and knowing when and how to intervene when quality of services are unacceptable.

2. Develop a Data and Information System Specific to Indigent Defense.

The responsibility to coordinate indigent defense components requires information and data that is up to date and readily retrievable in a useable format. Currently the County does not have adequate information to monitor the caseloads of all contractors and must rely almost exclusively on the law firms to determine compliance. This is true for almost all aspects of compliance with standards. If Kitsap County agrees to implement the first recommendation it will also be necessary to develop procedures to gather and organize data in formats that can be easily analyzed.

The ability to gather and analyze indigent defense data should be part of costs necessary to establish a public defender component of an indigent defense plan. Ideally, this would be done in coordination with the Prosecuting Attorney, Superior Court, and District Court data system to avoid duplication.

3. The Assignment and Compensation Rate for Felony and Juvenile Appointments Should be modified to reflect the Greater Responsibilities, Experience Level, and Time Commitment Required by Differing Appointments.

Providing legal representation to a defendant charged with unlawful possession of marijuana is very different from providing legal representation to a defendant charged with Rape of a Child in the First Degree where an exceptional sentence is being requested based on volumes of personal computer forensics, child-victim witness statements made in the context of divorce and circumstances putting reliability of hearsay statements into question. The large majority of felony cases assigned to contractors in Kitsap County are class B and C felonies, which are generally paid less in assigned counsel systems—both individually and on an average—than fees paid in complex serious violent class A crimes

(Rape First Degree, Robbery First Degree, Kidnapping First Degree, Assault First Degree, etc.)

Cases should be assigned to attorneys with corresponding qualifications. Currently cases are assigned to law firms with the hope they will assign the case to an attorney of corresponding experience level. While this generally does in fact happen, it should be a matter controlled and determined by the appointing authority. This not only assures quality in appointment, it also assures awareness on the part of the County that a particular law firm/attorney has responsibility for a particularly time consuming case so that further appointments can be made accordingly or at least inquired about to determine the firm's ability to take additional cases.

The same is true of fee structure. See, Appendices II, No. 16, Rate of Compensation for Court Appointed Counsel—A State by State Overview, 2007. The current flat fee system should have adequate latitude in recognizing a more equitable fee structure in individual cases. In the long run, this will work better for all involved, but most importantly for defendants who know their attorney is receiving fair compensation and incentive for cases requiring extraordinary time and effort.

4. Make Annual Training Specific to Contracts/Criminal Law Mandatory.

Currently most contractors have a system established for associates to attend annual CLE training and to join defense attorney associations (e.g., Washington Defender Association, Washington Association of Criminal Defense Lawyers). That training is important is not in dispute. It is important for any system to document the training received by attorneys on an annual basis and verify compliance with agreed to standards.

- 5. Modify Existing Contract Clauses Pertaining to Withdrawals to Require Court Orders Allowing Withdrawal and Submission of Hourly Based Petition for Fees Capped by the Otherwise applicable Flat Fee.**

- 6. Contracts Should Include Reporting Requirements by Contractors of Information Necessary to Monitor Service Levels Reasonably Compliant with WSBA Standards for Public Defense and RCW 10.101 State Funding.**