

WASHINGTON STATE BAR ASSOCIATION

BOG Legislative Committee

October 24, 2024 – 9:00 AM

Attendance

Governors: Francis Adewale, Tom Ahearne, Sunitha Anjilvel, Todd Bloom, Matthew Dresden, Kevin Fay, Parvin Price

Staff: Terra Nevitt, Sara Niegowski, Laurie Powers, Sanjay Walvekar

Meeting Minutes

The Committee discussed a [proclamation](#) to study the inefficiencies and inequities created by local court rules, funding, and technology, to be included in the draft 2025 WSBA Legislative Priorities.

Governor Fay moved to adopt the proclamation (seconded by President Anjilvel). The motion passed unanimously (7-0).

The Committee set meeting times for the 2025 legislative session: the Committee will meet weekly on Fridays from 1:00-2:00 PM from January 17th through April 25th, 2025.

The meeting was adjourned at 9:59 am.



**WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE**
Larry Jefferson, Director

Email: opd@opd.wa.gov

(360) 586-3164
FAX (360) 586-8165

Office of Public Defense Budget Requests for the 2025 Supplemental and 2025-2027 Biennial Budgets

To promote justice, protect due process, and ensure constitutional and statutory rights to effective counsel, OPD asks the Legislature to fund the following:

2025 Supplemental

- Respond to appellate case assignment backlog & workload \$2.19M
- Cover fees for experts & litigation services \$1.5M

Biennial Growing the Defender Workforce

- Adjust OPD vendor rate to recruit/retain contractors \$14.1M
- Expand Criminal Defense Training Academy (SB 5780) \$1.07M
- Establish law school family defense practicum \$1.5M
- Reflective Practice training for high-stress professions \$458,000

Biennial Sustaining Right-to-Counsel Services

- Continue *Blake* response – resentencing, vacating, OPD triage \$8.6M
- Maintain Simple Possession Advocacy Representation (SB 5536) \$15.7 M
- Respond to appellate case assignment backlog & workload \$5.4M
- Cover fees for experts, investigators & litigation services \$4.8M
- Implement WSBA caseload standards for indigent appeals \$7.8M
- Engage a statewide evaluation of criminal defense structure \$420,000

Biennial Maintaining OPD Operations

- Retain CIO position and implement modern IT systems & practices \$1.7M
- Cover lease increase for Olympia office space \$140,000
- Continue emergency funds for Parent Representation clients \$100,000
- Add agency-wide communications and contracts staff \$1.03M

Biennial Supporting Justice Partners

- Significantly increase state grant funding for counties & cities \$40.4M
- Akin – Invest in *Parent for Parent* peer mentoring \$2.5M
- WDA – Add paralegal for the *Incarcerated Parents Project* \$220,000
- WDA – Sustain the *Redemption Project* for second-look resentencing \$1.1M
- WDA – Add investigator training and support statewide operations \$810,000

Full Decision Packages available at: [Budget Information | Office of Public Defense](#)

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What is the Office of Public Defense?

State law directs the Office of Public Defense (OPD) *"to implement the constitutional and statutory guarantees of counsel and to ensure the effective and efficient delivery of indigent defense services funded by the state of Washington."* RCW 2.70.005. Established in 1996, OPD is an independent judicial branch agency. The Washington Supreme Court appoints the Director, who works with a 13-member Advisory Committee.

OPD is responsible for indigent defense in a variety of statewide program areas, and administers services through contracts with more than 300 attorneys and social work professionals across Washington. OPD also disburses grant funding for locally administered trial-level criminal public defense programs. Details are available at www.opd.wa.gov.

➤ Parent Representation

OPD's nationally recognized Parent Representation Program provides family defense services in every county to indigent parents involved in dependency and termination of parental rights proceedings. OPD implements practice standards and provides access to independent social workers and experts to help clients successfully reunify their families. OPD provides legal consultation for parents considering a pre-filing voluntary placement agreement for their children.

➤ Appeals and Post-Conviction

OPD contracts with attorneys to represent indigent appellants in cases where federal and state constitutions and state statutes guarantee the right to counsel. These include criminal appeals as well as other appeals involving basic rights such as dependency proceedings, parental rights terminations, and involuntary civil commitments. In some instances, OPD also provides representation to file a first, timely Personal Restraint Petition for claims following an appeal.

➤ Forensic Civil Commitment

OPD-contracted attorneys represent respondents in complex sex offender civil commitment cases under Chapter 71.09 RCW, as well as persons civilly committed under Chapter 10.77 RCW following acquittal as not guilty by reason of insanity. OPD provides access to expert witnesses, investigators, and independent social workers to help clients succeed in treatment and safely exit civil commitment.

➤ Public Defense Improvement

OPD administers \$6.9 million annually in grant funding to counties and cities to improve trial-level defense as provided by Chapter 10.101 RCW. OPD conducts criminal defense training throughout the state and consults with local officials on standards, contracting, and public defense quality issues. OPD assists with local defender recruitment and funds legal internships in rural areas.

➤ Response to *State v. Blake*

OPD provides case triaging, administers funding and attorney contracts, and collaborates with other county and state partners to ensure effective representation for thousands of people eligible to vacate convictions or be resentenced under the *State v. Blake* decision, which held that the state's felony drug possession statute was unconstitutional. OPD helps counties and cities provide public defense for drug possession cases charged under a new law as gross misdemeanors.

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OPD provides youth statewide with access to an attorney consultation prior to custodial interrogation or search by law enforcement, as required by RCW 13.40.740. Consulting attorneys respond to calls 24 hours a day to ensure that young people know their rights and obligations when interacting with police.



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December 3, 2024

Representative Timm Ormsby, Chair
House Appropriations Committee
John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

Senator June Robinson, Chair
Senate Ways & Means Committee
John A. Cherberg Building
PO Box 40466
Olympia, WA 98504-0466

Re: Budget Reductions and the Constitutional Right to Counsel

Dear Chairs Ormsby and Robinson:

I am writing regarding the State's projected budget shortfall and the need to examine agency spending. First, thank you for the progress you've supported at the Office of Public Defense (OPD) in recent years, and thank you for your leadership as we head into a difficult budget process.

As a matter of separation of powers, OPD, like other Judicial Branch agencies, is not participating in the current budget-cutting exercise among Executive Branch agencies. However, OPD is carefully examining its budget for potential under-expenditures in the current fiscal year as well as other efficiencies and savings that will not impact the constitutionally required right-to-counsel services, which comprise most of OPD's budget. We have already sent your staff information about projected savings for Fiscal Year 2025 and will continue to provide updates as new information becomes available.

Just as it has a constitutional obligation to fund basic education, the State also has a constitutional obligation to ensure the right to effective defense counsel for indigent persons charged with a crime, confronting removal of their children, facing civil commitment, or pursuing direct appeals in these types of matters. In addition to representation by a defense attorney, the right to counsel includes experts, investigators, access to court records, interpreters or translators, and related administrative services, which OPD must provide. The vast majority of OPD's budget is spent on client-services contracts and related obligations to ensure these services.

For example, OPD is responsible for ensuring the right to counsel in the following case types:

- **General/criminal:** Washington State helps provide adequate indigent defense counsel through OPD's Public Defense Improvement Program, which awards grants to counties and cities pursuant to Chapter 10.101 RCW. In addition, OPD provides funding assistance to help local governments resentencing and vacate unconstitutional convictions in response to *State v. Blake*, and to ensure public defense for new misdemeanor drug charges authorized in SB 5536.

Both the Washington State and U.S. constitutions require the State to guarantee adequate counsel to indigent defendants. U.S. Const. amend. VI; Wash. Const. art. I, § 22. In *State v. A.N.J.*, 168 Wn.2d 91 (2010), the Washington Supreme Court found that "Public funds for appointed counsel are sometimes woefully inadequate...[s]uch public contracts for public defenders discourage appropriate investigation...and trial preparation, and literally reward the public defender financially for every guilty plea the defender delivers." *Id.* at 98.

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Even with the existing level of state investment to improve public defense, the Washington State Association of Counties is suing, alleging that the State is not doing enough to ensure constitutionally mandated adequate public defense in criminal cases. The American Civil Liberties Union is separately suing Yakima County for delayed appointment of counsel.

- **Parent representation in dependency and termination cases:** OPD's Parents Representation Program -- the sole provider of parent representation statewide -- satisfies the right to counsel and reduces the need for foster care. Indigent parents have a constitutional right to appointed counsel of adequate quality in cases that remove children to foster care or permanently terminate parental rights. *See In re Luscier*, 84 Wn.2d 135, 137 (1974); *In re Myricks*, 85 Wn.2d 252 (1975); *In re J.D.*, 112 Wn.2d 164, 168 (1989). OPD also must provide forensic and other experts as appropriate to a specific case. An attorney may be found ineffective partially due to their inability to obtain an expert. *Dependency of V.R.R. v. DSHS*, 134 Wn. App. 573 (2006).

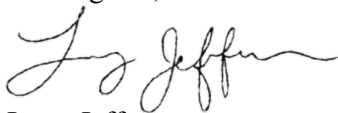
Beginning in Fiscal Year 2020, about 18 percent of the amount the State spends on the Parents Representation Program is reimbursed by the federal government, on an ongoing basis. If reductions were to be imposed on the OPD program, the loss would equal \$1.18 for every \$1 of State General Funds cut.

- **Persons facing sex offender civil commitment under Chapter 71.09 RCW:** Respondents have a right to counsel in all phases the civil commitment process because they face a total loss of liberty for an indefinite period of time, often decades. *In re Young*, 122 Wn.2d 1 (1993) and *State v. McCuiston*, 174 Wn.2d 369 (May 3, 2012). In addition to providing counsel for these cases statewide, OPD also must pay for specialized defense experts, who provide constitutionally mandated representation services as provided by RCW 71.07.055. *In re Smith*, 117 Wn. App. 611 (2003); and *In re T.A.H.-L.*, 123 Wn. App. 172 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1084, 84 L. Ed. 2d 53 (1985).
- **Persons civilly committed as “not guilty by reason of insanity” (NGRI):** The 2023 Legislature directed OPD to provide counsel for all post-commitment NGRI respondents, who have a right to counsel to file a petition for release. *State v. Fletcher*, 190 Wn.2d 219 (2018). Washington statutes extend this right for the duration of the term of NGRI commitment.
- **Right to counsel on direct appeal:** The U.S. and Washington constitutions and statutes guarantee the right to appeal a criminal conviction, as well as the right to appeal in other case types involving fundamental interests, such as dependencies and civil commitments. *Hendrix v. Rhay*, 56 Wn. 2d 420 (1960). The Legislature for decades has acknowledged the State's obligation (*See* RCW 10.73.150 Finding 1995), which is satisfied through the Appellate Program.

Because of its central role in guaranteeing the right to counsel, OPD requests that it be held largely exempt from budget cuts. Substantial reductions would require OPD to cut constitutionally required services and potentially expose the state to liability.

As noted above, I have instructed my staff to pursue savings and efficiencies wherever possible, and we already have identified savings for the current fiscal year. I look forward to collaborating further with you and your staff during the upcoming session.

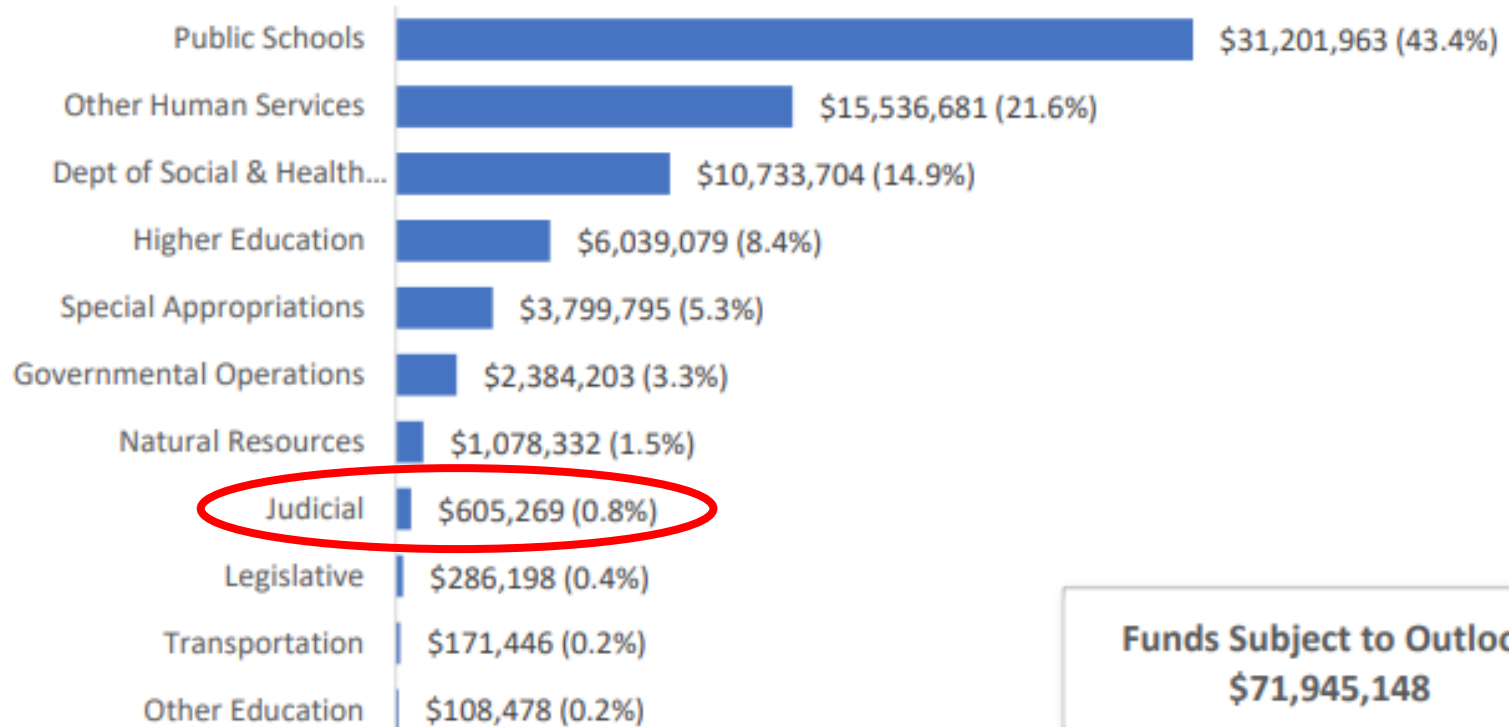
Best regards,



Larry Jefferson
Director

cc: Vice Chairs, Ranking Members, and Committee Staff

Judicial Branch Share of 2023-25 Operating Budget

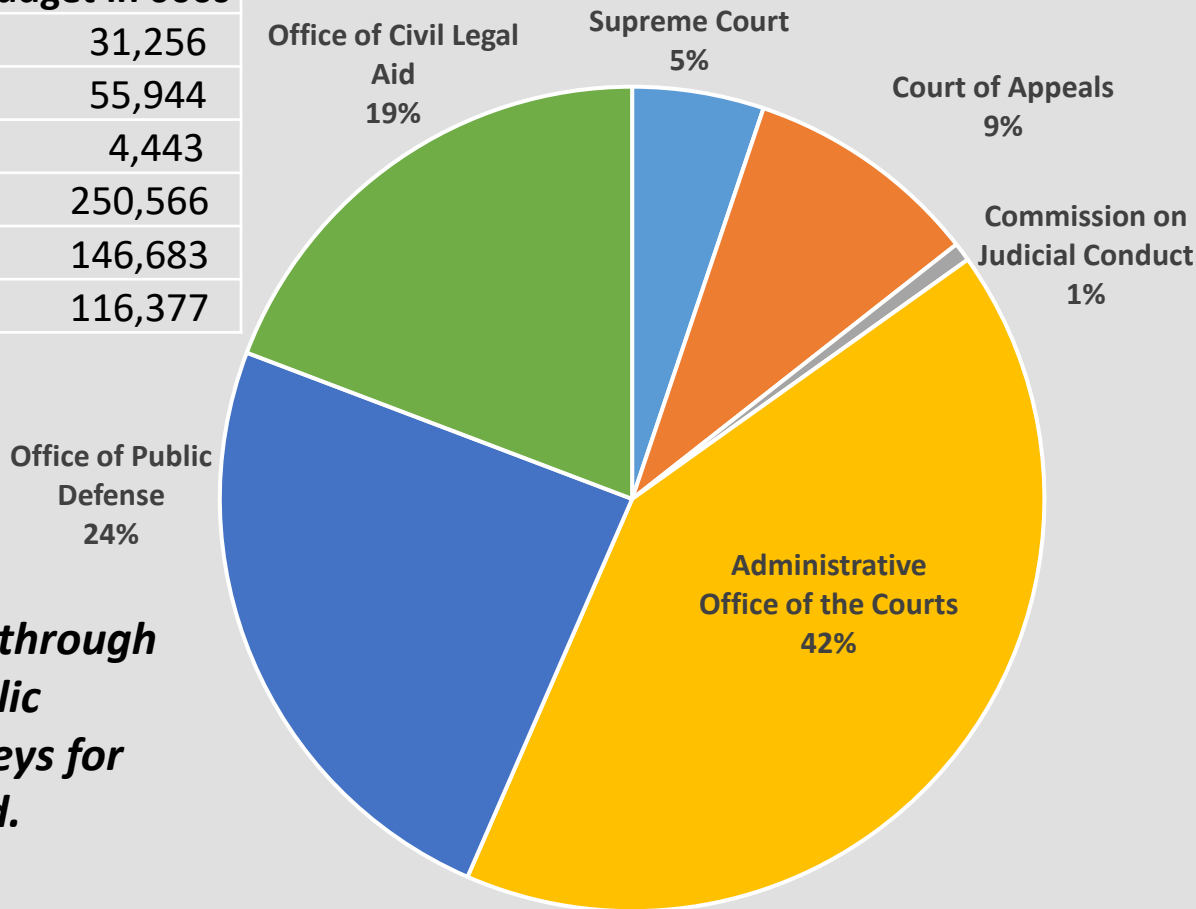


**Source: Page O-10 of Legislative Budget Notes for the 2024 Supplemental Budget*

Judicial Branch Funding Overview



Judicial Branch Entity	Budget in 000s
Supreme Court	\$ 31,256
Court of Appeals	\$ 55,944
Commission on Judicial Conduct	\$ 4,443
Administrative Office of the Courts	\$ 250,566
Office of Public Defense	\$ 146,683
Office of Civil Legal Aid	\$ 116,377



Most of these funds are passed through directly to local trial courts, public defenders, or contracted attorneys for public defense and civil legal aid.

**Data reflects funds subject to the budget outlook for the 2023-25 biennium as of the 2024 supplemental budget.*

Administrative Office of the Courts

2025 Agency Request Legislation

Proposal 1 – Request for an Additional Skagit County Superior Court Judge

This proposal requests an additional superior court judicial position in Skagit County Superior Court. This will increase the current four judges to five (RCW 2.08.063). This request is supported by the most recent Judicial Needs Estimate (JNE).

Proposal 2 – Including Appellate Commissioners in PERS Judicial Benefit Multiplier

This proposal requests that appellate commissioners be added to the PERS Judicial Benefit Multiplier (JBM) Program. The JBM is the percentage used, along with service credit years and Average Final Compensation (AFC), to set the retirement benefit. At a minimal expense, this will increase the desirability of serving as a commissioner or deputy commissioner in the appellate court. The JBM Program does require that judicial officers contribute to their retirement at an increased rate.

Proposal 3 – Judicial Officer Personal Information Confidentiality

This proposal requests amendments to the Address Confidentiality Program, seeking to proactively enroll judicial officers and providing a definition for “judicial officer” that encompasses judicial officers from all court levels. The Address Confidentiality Program provides the only route for consistently protecting personal information on government-run websites such as County Assessor and Voter Records. The current RCWs require a threat to be received first before a Criminal Justice Affiliate can apply for the program. Since attacks on judicial officers can come without a direct threat being made first, proactive measures are essential to reducing vulnerabilities.

Proposal 4 – Caregiver Status as a Mitigating Factor

This proposal is requesting revision to the statute (RCW 9.94A.535) to recognize caregiver status as a mitigating factor for the court to consider in sentencing. This is believed to be a mitigating factor because the family structure can provide support in rehabilitation for offenders. Failing to recognize ‘caregiver status’ as a mitigating factor adversely impacts those who generally carry the burden of caregiving, predominately women and families without resources.

Proposal 5 – Court Interpreter Statute Revisions (RCW 2.43)

This proposal requests changes to Washington statute RCW 2.43, to be compliant with Federal Department of Justice policy interpretation of Title VI prohibiting a court from imposing interpreter costs on parties in all court proceedings and court-managed programs. It updates statutory verbiage in order to align with the operations conducted by AOCs Court Interpreter Program and industry best practices; and to provide better access to the courts and court services for individuals regardless of their ability to communicate in English.

WASHINGTON STATE BAR ASSOCIATION

TO: WSBA Board of Governors
CC: Terra Nevitt, Executive Director
FROM: Maialisa Vanyo, Chair, Council on Public Defense (CPD)
DATE: November 1, 2024
RE: **CPD Letter to Legislature in Support of the Office of Public Defense (OPD)'s Biennial Budget Request**

ACTION: The CPD requests BOG approval to send a letter to Senator June Robinson, Chair of the Senate Ways and Means Committee, and Representative Timm Ormsby, Chair of the House Appropriations Committee, supporting OPD's biennial budget request and requesting further appropriation to OPD to implement caseload standards and remedy the ongoing shortage of public defense attorneys.

Background

The OPD Director is a core member of the CPD. The CPD regularly receives updates about OPD agency operations and activities, including updates on OPD's budget requests to the Washington Legislature.

In establishing the CPD, the WSBA directed it to, among other duties, "... address current issues relating to the provision of constitutional public defense services in Washington, including efforts to ensure adequate support." Consistent with this directive, the BOG historically has approved letters in support of OPD budget requests.

Procedurally, the CPD followed the WSBA Legislative and Court Rule Comment Policy guidelines prior to requesting this approval. On November 1, 2024, the CPD voted by supermajority to support the OPD budget request to the 2025 Legislature and requests additional appropriations to OPD's supplemental and biennial budgets to fund implementation of the WSBA Standards on Indigent Defense for trial-level criminal defense as well as the appellate and family defense standards. The CPD's letter urges the Legislature to appropriate \$118 for the biennium for OPD: \$40 million in OPD's current 2025 decision package, and \$78 million for year two for RCW 10.101 grants for local public defense. The letter also recommends that OPD be granted \$17.5 million they estimate to implement the family defense caseload standards: \$4.5 million in year one and \$13 million in year two. And, the letter recommends that \$4.5 million be appropriated to OPD for the supplemental budget and \$9 million for the biennium to meet their estimates for implementing the appellate standards: \$4.5 million for each year.

The Board of Governors has routinely received and approved similar requests from the CPD in previously legislative sessions and we appreciate your continued support for public defense funding.

Information for Fiscal Analysis

The requested action presents no fiscal impact to the WSBA. The WSBA staff liaison time needed to coordinate the requested action is already accounted for under typical job duties. No other costs are anticipated.

Information for Equity Analysis

The purpose of the equity assessments is to understand entities incorporated an equity lens into the action items presented to the Board of Governors. Equity is meeting impacted parties according to their needs to produce fair and equal outcomes for all. Please answer all questions completely in order to receive a comprehensive equity assessment.

- **IMPACTED GROUPS:**
Marginalized and BIPOC communities are disproportionately represented among public defense clients, who, by definition, are indigent. The Washington State Office of Public Defense administers legal services exclusively for indigent persons. OPD's budget requests include funding to help recruit and retain public defense attorneys in underserved regions in order to ensure timely access to effective counsel for accused people throughout the state.
- **PROCESS:**
The Council on Public Defense membership includes general public representatives as well as current and former defense attorneys, academics, and judges from communities across Washington. The Council draws on members' experience to inform its decision-making.
- **OUTCOMES:**
This action is intended to prompt legislative support for OPD's budget request and to urge additional appropriations necessary to implement caseload standards and remedy the ongoing shortage of public defense attorneys. Legislative approval will help ensure effective public defense services for indigent people throughout the state.
- **EVALUATION:**
Impact will be measured by whether the Legislature approves OPD's budget request and the additional funding urged by the CPD, as well as by OPD's follow-through to implement the services funded.
- **FUTURE LEARNING:**
The CPD and the OPD could choose to solicit broader client input into the OPD's budget development process.

WSBA RISK ANALYSIS: *This section is to be completed by the Office of General Counsel, with input from the proposing entity or individual.*

Provided separately as confidential materials.

WSBA FISCAL ANALYSIS: *This section is to be completed by the Finance Department, with input from the proposing entity or individual.*

The fiscal impact to WSBA resulting from the requested action are limited to the amount of staff time used to support bringing the letter forward to the Board of Governors (BOG) and any remaining work to support the process after BOG action. The staff time that would be allocated to this work is included in the overall duties of existing WSBA staff and would not require additional staff or allocation of resources from other internal sources.

WSBA EQUITY ANALYSIS: *This section is to be completed by the Equity and Justice Team, with input from the proposing entity or individual.*

The purpose of the equity analyses is to understand how entities incorporated an equity lens into the action items presented to the Board of Governors. Applying an equity lens includes 1) identifying and centering people and communities most impacted decisions and/or 2) meeting people and communities according to their specific needs to produce fair and equal outcomes for all. Based on our review, there do not appear to be any concerns about inequitable outcomes.

Attachments

- Draft letter to chairs of the Senate Ways and Means Committee and House Appropriations Committee
- OPD supplemental budget requests at <https://opd.wa.gov/about-us/budget-information>
- FY '25 OPD Fact Sheet

DRAFT

WSBA LETTERHEAD

January X, 2025

Need to double-check chairs after December Committee re-org

Senator June Robinson, Chair
Senate Ways and Means Committee
303 J.A. Cherberg Bldg.
P.O. Box 40423
Olympia, WA 98504

Representative Timm Ormsby, Chair
House Appropriations Committee
315 John L. O'Brien Bldg.
P.O. Box 40600
Olympia, WA 98504

Dear Chair Robinson and Chair Ormsby:

The Washington State Bar Association's Council on Public Defense writes in support of the Office of Public Defense's (OPD) 2025-2027 biennial budget request. In addition, the Council requests further appropriation to OPD to implement caseload standards and remedy the ongoing shortage of public defense attorneys.

The Council encourages the Legislature to fund OPD's requests for the following:

- **Provide a vendor rate adjustment for OPD contractors**, who represent indigent clients in dependencies, appeals, and forensic civil commitment matters. Washington state currently provides substantially lower compensation for OPD-contracted defenders than for state-employed assistant attorneys general. A vendor rate adjustment will bring defense closer to parity with prosecution resources in these cases, and is critically important to recruit and retain OPD contractors.
- **Cover defense experts, investigators, and litigation costs**, which are increasing due to inflation and case complexity. OPD must pay these costs as part of its obligation to provide statewide public defense in dependencies, appeals, and forensic civil commitment cases.
- **Respond to appellate workload issues**, by hiring contractors immediately to resolve a backlog of case assignments and adding resources in the biennial budget to further address attorney caseloads.
- **Continue the response to *State v. Blake*** to remedy unconstitutional drug convictions. Thousands of persons remain eligible to vacate convictions and many incarcerated people still must be resentenced. Funding OPD's request ensures that individuals' due process rights are upheld and that counties are sufficiently resourced to respond to *Blake*.
- **Sustain the Simple Possession Advocacy & Representation (SPAR) program**, which the Legislature created in SB 5536 to provide public defense services in newly authorized misdemeanor drug possession cases. The statute allows OPD to assist local jurisdictions by providing funding or by contracting directly with attorneys.

- **Build a pipeline to public defense practice** by expanding OPD's criminal defense training for existing lawyers and by funding an OPD partnership with Washington law schools to attract new family defense practitioners.
- **Conduct a statewide public defense needs study** to analyze our current county-by-county model for criminal defense, identify quality gaps, and recommend reforms. The Council is familiar with similar state studies by the nonpartisan Sixth Amendment Center. Funding an independent study will help identify structural efficiencies and best practices.
- **Support nonprofit partners with pass-through funding** for the Washington Defender Association's programs and for Akin, which administers Parent for Parent peer support services to families involved in dependency cases.
- **Increase state funding for counties and cities through RCW 10.101 grants**, which have remained substantially the same for nearly two decades. State funding covers less than 5 percent of public defense costs for criminal cases in county and city trial courts, putting Washington among states that provide the least support for trial-level criminal public defense.

While the Council supports OPD's proposals, we find the agency's \$40 million annual request for RCW 10.101 grant funding to be inadequate as Washington nears a constitutional emergency. Public defense is in crisis, and the crisis grows each time an attorney is so overwhelmed by workload they leave the practice and each time a person facing criminal charges can't effectuate their most basic right to have a lawyer appointed. These events occur daily all across the state. To keep defenders in the practice and ensure timely appointment of counsel, Washington State should provide funding sufficient to implement caseload standards adopted by the WSBA and pending now before the Supreme Court.

The Washington State Association of Counties estimates that the current caseload standards for trial-level criminal defense will require \$78 million in year two of implementation. To that end, the Council urges the Legislature to appropriate \$118 for the biennium for OPD: \$40 million in OPD's current 2025 decision package, and \$78 million for year two for RCW 10.101 grants for local public defense.

Further, the Council recommends the Legislature grant two additional increases to OPD budget line items affecting family and appellate defense. First, the Council recommends that OPD be granted the \$17.5 million they estimate will be required to implement the family defense caseload standards: \$4.5 million in year one and \$13 million in year two. Second, the Council recommends that \$4.5 million be appropriated to OPD for the supplemental budget and \$9 million for the biennium to meet their estimates for implementing the appellate standards: \$4.5 million for each year.

The WSBA Council on Public Defense unites members of the bar, the bench, and the public to address new and recurring issues that impact public defense services throughout Washington State. The Council believes quality public defense is essential to a fair legal system and is critical in the fight to reduce racial disparity. This Council's statement has been approved through the WSBA's legislative and court rule comment policy and the position I solely that of the Council on Public Defense.

Please fund the Office of Public Defense's budget request in the upcoming 2025 legislative session, and please provide the additional funding necessary for RCW 10.101 grants to counties and cities and the implementation of the family and appellate defense standards.

Sincerely,

Terra Nevitt
Executive Director

Need to double-check Committee members and their roles after December Committee re-org.

Cc: Sunitha Anjilvel, President, Washington State Bar Association
Senator Joe Nguyen, Vice Chair, Senate Ways and Means Committee
Senator, Ranking Minority Member, Senate Ways and Means Committee
Representative Steve Bergquist, Vice Chair, House Appropriations Committee
Representative Drew Stokesbary, Ranking Member, House Appropriations Committee
Larry Jefferson, Director, Washington State Office of Public Defense



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WASHINGTON STATE BAR ASSOCIATION

TO: WSBA Board of Governors
CC: Terra Nevitt, Executive Director
FROM: Maialisa Vanyo, Chair, Council on Public Defense
DATE: November 2, 2024
RE: Proposal to exempt attorneys and other employees of law school clinics from mandated reporting requirement as it relates to information related to the representation of a client

[ACTION]: Support a legislative amendment to RCW 26.44.030(1)(f) that exempts law school clinic employees from mandatory reporting obligations related to client representation, ensuring alignment with RPC 1.6 and enabling law school clinics to operate under the same ethical framework as other Washington law offices.

The Council on Public Defense (CPD) requests that the Board of Governors approve the attached letter supporting a request to the Legislature to pass a bill excluding employees of law schools from the mandated reporting obligation as pertaining to information related to the representation of a client. As amended after the Penn State child abuse scandal, RCW 26.44.030(1)(f) requires all employees of institutions of higher education to report to law enforcement or the appropriate child protective agency whenever they have “reasonable cause to believe that a child has suffered abuse or neglect.” This obligation extends to attorneys and staff working in law school clinics Washington’s three law schools and does not exempt information related to client representation. Thus, the statute compels these attorneys to violate their obligation under RPC 1.6 to preserve client confidences.

As a result of these restrictions, law school clinical programs have had to reduce their operations to avoid conflicts between the statute and RPC requirements. In addition, law students are being trained in an environment that distorts the ethical framework that will govern them upon licensure. The proposal would expressly exempt these employees from the reporting obligation with respect to client representation, eliminating the problem entirely.

Representative Pollett has agreed to champion this effort, and we hope the BOG will support him. This issue was raised with the Council by two members who teach in law school clinics, one in public defense-related matters. This matter has not previously been brought before the Board. After the amendment, clinical faculty at one state law school spoke with legislative leaders who confirmed that the Legislature did not recognize the tension between the RPC and the statute. This broad solution was imposed on all higher education institutions without considering the unique role of the state’s law schools, which must address this irreconcilable conflict.

As noted, Council members brought this issue forward because the statute has restricted their ability to serve clients and properly train students in ethical practice. Clinical faculty have had to modify their intake processes, reducing practice opportunities for students to minimize situations where faculty, staff, or students might be compelled to violate ethical rules by disclosing confidential information.

The existence of this requirement has obvious equity concerns. Law school clinical programs are dedicated to serving clients who are indigent and/or otherwise marginalized. Constraining their ability to do so directly affects the clients the clinic can no longer represent. Moreover, the clinical experience inspires many students to pursue careers serving these clients, either full-time or pro bono. If they do not have the same rich experience in school due to this statutory constraint, they will be less likely to experience the same inspiration.

Procedurally, the CPD followed the WSBA Legislative and Court Rule Comment Policy guidelines prior to requesting this approval. On November 1, 2024, the CPD voted by supermajority to support this legislative amendment and to forward this request to the Board of Governors.

Information for Fiscal Analysis

Provide information to help inform the Fiscal Analysis.

- There are no fiscal implication to this proposal.

Information for Equity Analysis

The purpose of the equity assessments is to understand entities incorporated an equity lens into the action items presented to the Board of Governors. Equity is meeting impacted parties according to their needs to produce fair and equal outcomes for all. Please answer all questions completely in order to receive a comprehensive equity assessment.

- *IMPACTED GROUPS: Please describe the direct and indirect impacts of 1) the overall work of your entity and 2) this specific action on the categories below. If you do not believe the action has a direct or indirect impact on any of these categories, please explain why.*
 - *The general WSBA membership*

We do not anticipate any impact on current WSBA members. Rather, this proposal is intended to enhance the education of students at the three state law schools, thereby improving their paths to becoming members.

- *WSBA staff*

The proposal should not have any impact on WSBA staff.

- *A subgroup of WSBA membership (e.g. LLLTs, family law practitioners, Minority Bar Association members, legal professionals from specific marginalized and underrepresented communities)*

We do not anticipate impact on these groups.

- *Members of the public in need of legal services (if applicable, please include specific client communities)*

The communities who rely on the services of law school clinics will benefit from having a legal team that is not subject to constraints on their practice that are not generally applicable to lawyers.

The communities that rely on the services of public defenders will benefit from having more students having the opportunity to engage in clinical opportunities that mirror those of real practice, enabling these students to enter the profession eager and prepared for this essential work.

- **PROCESS:** As noted above, this issue has been identified by law school faculty who operate these clinics and who brought the request to the CPD for support.
- **OUTCOMES:** The intended outcome of this action is that the Legislature will pass a bill excluding employees of law schools from the mandated reporting obligation as pertaining to information related to the representation of a client. As a result, law school clinical faculty can design their programs with the goals of maximizing the educational opportunity for their students and providing service to under-represented clients, free of a legal constraint that does not apply to lawyers in other practice.
- **EVALUATION:** The proposal's outcome will be represented in whatever action the Legislature takes.
- **FUTURE LEARNING:** The Council on Public Defense regularly seeks input on how its work affects others, especially the community that relies on public defense services. We can always do more in this regard, although this particular proposal does not raise many concerns regarding any limits of our knowledge on its likely impacts.

WSBA RISK ANALYSIS: *This section is to be completed by the Office of General Counsel, with input from the proposing entity or individual.*

Provided separately as confidential materials.

WSBA FISCAL ANALYSIS: *This section is to be completed by the Finance Department, with input from the proposing entity or individual.*

The fiscal impact to WSBA resulting from the proposal are limited to the amount of staff time used to support bringing the proposal forward to the Board of Governors (BOG) and any remaining work to support the process after BOG action. The staff time that would be allocated to this work is included in the overall duties of existing WSBA staff and would not require additional staff or allocation of resources from other internal sources.

WSBA EQUITY ANALYSIS: *This section is to be completed by the Equity and Justice Team, with input from the proposing entity or individual.*

The purpose of the equity analyses is to understand how entities incorporated an equity lens into the action items presented to the Board of Governors. Applying an equity lens includes 1) identifying and centering people and communities most impacted decisions and/or 2) meeting people and communities according to their specific needs to produce fair and equal outcomes for all. Based on our review, there do not appear to be any concerns about inequitable outcomes.

Attachments

Letter to the Board of Governors

Re: Support for legislation to remove mandated reporting obligation from attorneys and staff working in law school clinics

Dear Members of the Board of Governors:

The Council on Public Defense urges the Board of Governors to support legislation that would relieve attorneys and other staff working in law school clinics from the statutory obligation currently imposed upon them to serve as mandated reporters of suspected child abuse or neglect.

In the aftermath of the Penn State child abuse scandal, the Washington Legislature included “administrative and academic or athletic department employees, including student employees, of institutions of higher education” within the class of mandated reporters of child abuse and neglect. See, RCW 26.44.030(1)(f). In light of this legislation, law school faculty and staff who work in law school clinics confront a tension between the apparent command of the statute and the long-standing and fundamental professional ethical obligation under Rule 1.6 of the Rules of Professional Conduct, which prohibits an attorney from disclosing information related to the representation of a client. These faculty and staff are not even afforded the exemption from disclosing privileged information extended to supervisors who learn of abuse by those whom they supervise under RCW 26.44.030(1)(b). Based on conversations between clinical law faculty at Washington law schools and legislative leaders at the time of this amendment, there was no specific consideration – or even general awareness—within the Legislature of the fact that the three Washington law schools house legal clinics providing representation to clients as part of students’ educational program and that these programs would be adversely affected by this amendment.

This reporting requirement distorts the relationship between law school clinics and their clients in ways that hamper the schools’ efforts to provide legal services to those unable to afford them and to prepare the next generation of lawyers to serve clients in Washington and beyond. If the Legislature had tried to impose a similar reporting requirement on attorneys generally, we are confident the bar would have quickly and firmly raised objections that would likely have stopped any such effort instantly. Students and faculty in law school clinics are doing the same work that attorneys do in other settings, and they are fully subject to the Rules of Professional Conduct when they do so. It makes no sense to force them to do this work in a way that compromises one of the cornerstones of effective representation, the confidentiality obligation. It does not make any sense, from a policy standpoint, to require faculty working in a law school clinic representing youths charged with crimes, survivors of domestic violence, or any other clients to make such reports when lawyers working for non-profit or government entities performing the same type of representation and privy to the same sort of information are not obligated and, per RPC 1.6, not permitted, to report.

It is our understanding that a bill is being drafted that would contain the following language:

The reporting requirement in (a) of this subsection does not apply to an attorney who is employed by an institution of higher education, as defined in RCW 28B.10.016, or private institution of higher education – or to any employee working under the supervision of such an attorney-- as it relates to information related to the legal representation to a client.

The Council supports this proposed revision of the statute, which is similar to that adopted in Oregon, but even more squarely aligned with Rule 1.6. Oregon’s mandated reporting statute reads:

An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client. [ORS 419B.010](#).

Because it covers only information “communicated to the attorney”, this Oregon statute might not reach information the attorney observes on their own, which is plainly still “related to the representation” for purposes of Rule 1.6.

Action on this matter is more important now than ever. It is widely expected that hours representing clients under supervision as a limited license intern under Rule 9 are going to count toward one of the alternate pathways to a full license to practice. Accordingly, it is essential that students be able to get the same experience in a law school clinic as they would working in a public defense office. If we are hoping to produce the new wave of public defenders we need, we need them properly trained from the beginning, which starts with this fundamental orientation toward serving the client with full loyalty and confidentiality.