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## The Right to Counsel

The right to counsel is guaranteed by the U.S. Constitution, the Washington State Constitution, Statutes, and Court Rules in a variety of case types. When an individual has a right to counsel but is indigent, the government is required to provide a competent public defense attorney to represent that person.

Right to Counsel – Case Types	Legal Authority
<b>Custodial questioning by law enforcement officers:</b> Its purpose is to prevent a violation of the right to remain silent in custodial interrogations.	U.S Constitution 5 <sup>th</sup> Amendment, <i>Miranda v. Arizona</i> 384 U.S. 436 (1966)
<b>Criminal proceedings:</b> Defendants in felony, gross misdemeanor, and misdemeanor cases are entitled to counsel in all criminal proceedings.	U.S. Constitution 6 <sup>th</sup> Amendment, <a href="#">Sup Ct Crim Rule 3.1</a> and <a href="#">Crim Rule for Cts of Limited Jurisdiction 3.1</a>
<b>Capital Cases:</b> In all capital cases the court must appoint two lawyers - at least one of whom is deemed <a href="#">qualified</a> for death penalty litigation.	<a href="#">Sup Ct Spec. Proceedings Rule 2</a>
<b>Juvenile Offender Cases:</b> Juveniles have the right to counsel at all critical stages of offender proceedings.	U.S. Constitution 6 <sup>th</sup> Amendment, <a href="#">RCW 13.40.140</a> , <a href="#">Juv Ct Rule 9.2</a>
<b>Juvenile Diversion:</b> Youth eligible for diversion must be advised of the right to counsel prior to initial interviews with the diversion unit.	<a href="#">RCW 13.40.080</a> , <a href="#">Juv Ct Rule 6.2</a>
<b>Truancy, At Risk Youth and CHINS (Child in Need of Services) Cases:</b> At certain proceedings within these case types, youth are provided the right to counsel.	<a href="#">RCW 13.32A.160</a> , <a href="#">RCW 13.32A.192</a> , <a href="#">RCW 28A.225.035</a> , Juv Ct Rules <a href="#">9.1</a> and <a href="#">9.2</a>
<b>Involuntary Civil Commitment – Mental Health/Alcohol</b>	<a href="#">RCW 71.05.300</a> and <a href="#">70.96A.140</a>
<b>Involuntary Civil Commitment – RCW 71.09 Sexual Violent Predator*</b>	<a href="#">RCW 71.09.040</a>
<b>Criminally Insane:</b> Persons acquitted by reason of insanity and kept under security due to public safety, are entitled to counsel at all proceedings.	<a href="#">RCW 10.77.020</a>
<b>Juvenile Dependency and Termination of Parental Rights:*</b> Parents in child dependency and termination proceedings have a right to representation.	<a href="#">RCW 13.34.090-092</a> , Juv Ct Rules <a href="#">2.3</a> and <a href="#">9.2</a>
<b>Appeals from Superior Court</b> in the Aforementioned Areas*	<a href="#">RCW 10.73.150</a>
<b>Criminal Appeals from Courts of Limited Jurisdiction</b>	<a href="#">RCW 10.73.150</a>

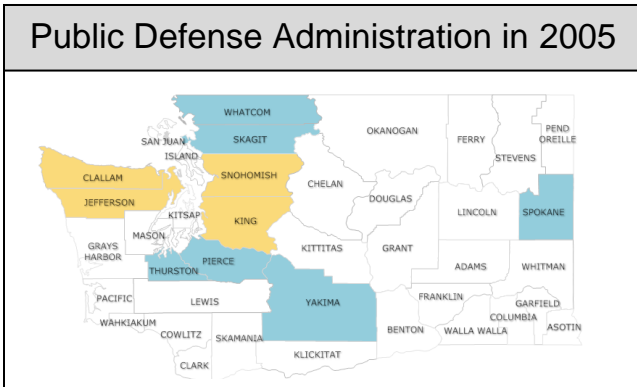
\*The Washington State Office of Public Defense (OPD) contracts with attorneys to represent indigent persons in Appeals from Superior Court and Civil Commitment cases under RCW 71.09. OPD also contracts with counsel for representing parents in Dependency and Termination proceedings for 31 counties.

## Indigency Screening

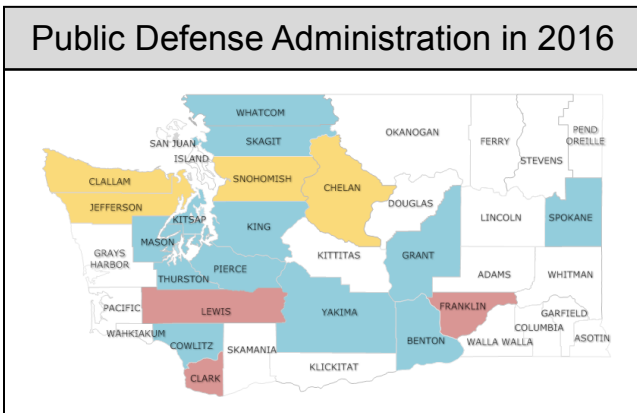
Courts or their designees must conduct indigency screening for persons wishing the appointment of counsel in cases where the right attaches. Persons are indigent if they receive certain types of public assistance, are involuntarily committed to a public mental health facility, or have a net income of 125% or less of the federal poverty level. Others may be deemed *indigent and able to contribute* because they do not meet the indigency definition, but are deemed unable to pay the full anticipated cost of counsel. [RCW 10.101.010](#) - [.020](#)

# Structuring Public Defense Services

Each county and city is responsible public defense services. Public defense structures tend to fall into one of four categories: (1) government-based public defense agencies; (2) contracts with non-profit agencies dedicated exclusively to public defense services; (3) contracts with attorneys and/or law firms, monitored by government employees or contractors specialized in public defense; and (4) contracts with attorneys and/or law firms without specialized oversight. Substantial changes have been made in counties statewide since 2005 with the development of additional public defense agencies and public defense coordinators.



- Public defender agencies** within county government structure
- Nonprofit agencies** organized exclusively for public defense services, contract with counties to represent indigent defendants
- Public defense coordinators** are county employees or contractors hired to provide varying degrees of oversight and accountability for public defense contracts with individual private attorneys or firms.
- Contract public defense systems**, also known as assigned counsel systems, are utilized in counties that enter into contracts with one or more private attorneys or firms to provide all indigent defense services



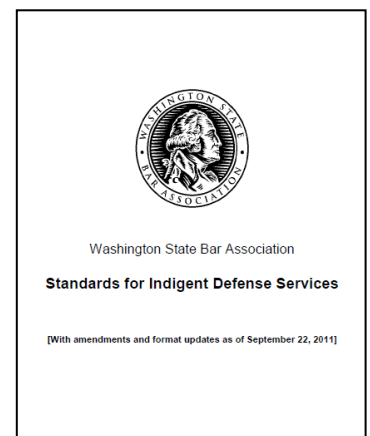
In most cities attorneys bid for public defense contracts, and the resulting contracts are overseen by city managers or their designees. However, in many cities that do not operate Municipal Courts but instead contract with the county for court services, they also contract with the county to provide public defense. A small number of cities operate public defense agencies that employ attorneys and support staff.

# Local Standards for Administration of Public Defense

[RCW 10.101.030](#) requires all cities and counties to adopt local standards for public defense services. Most jurisdictions adopt local standards by ordinance or resolution. The local standards must include, at a minimum, specific topics identified in [RCW](#)

[10.101.030](#) such as: compensation, case load limits, responsibility for expert witness fees, reports of attorney activity, supervision, and disposition of client complaints.

The Washington State Bar Association developed a document to assist cities and counties with developing local public defense standards. The [WSBA Standards for Indigent Defense Services](#) provides guidelines on industry standards for each of the topics identified in RCW 10.101.030. Further, the statute states that this publication “should serve as guidelines to local legislative authorities in adopting standards.”



## Mandatory Standards for Public Defense Attorneys

Under Washington Court Rules ([CrR 3.1](#), [CrRLJ 3.1.d\(4\)](#) and [JuCR 9.2](#)), when a trial court appoints public defense counsel, it must ensure that the lawyer has certified to the court that he/she complies with [Washington Supreme Court's Standards for Indigent Defense Services](#). The purpose of these Standards is to guarantee that indigent defendants across all jurisdictions are represented by attorneys meeting certain basic professional standards. Requirements include:

### Caseload Limits:

- Annual per-attorney limits are 150 felonies, 400 misdemeanors (or 300 if case-weighted), 250 juvenile offender cases, or 250 civil commitments. In juvenile dependencies, the maximum limit is 80 open cases.
- Limits assume that (1) attorneys are full-time and fully-supported; (2) cases are of average complexity; and (3) cases are distributed evenly throughout the year.
- If an attorney's caseload includes mixed case types, the caseload limits should be applied proportionately.
- If an attorney has other duties, works part-time and/or maintains a private law practice, the public defense caseload should reflect the percentage of time devoted to public defense cases.
- Contracts and employment agreements should specify case types and maximum number of case assignments.

**Case Weighting:** Attorneys may use case weighting (assigning different caseload values to varying case types) if done by a written policy adopted the local government. A case weighting policy must be based on a documented assessment of the workload involved in different case types.

**Resources:** Contract compensation should provide for costs such as travel, telephones, case management, technology – software and equipment, office space, supplies, and training. Attorneys must have access to an office for confidential meetings, a postal address, and telephone service.

**Investigators:** Public defense attorneys shall use investigation services as appropriate.

**Attorney Qualifications:** Public defense attorneys must meet listed requirements before representing defendants on specific case types. Requirements include years of experience, trial work, experience with specific subject matters, and training.

## The Roles and Responsibilities of Public Defense Attorneys

Effective public defense services require skilled professionals and resources. Representing indigent clients requires an advanced understanding and application of substantive and procedural law - statutes, local ordinances, court rules, Constitutional principles, evolving case law and sentencing guidelines. Public defense often encompasses a myriad of other factors that are woven into clients' cases such as poverty, chemical addiction, mental illness, trauma history, illiteracy, and immigration status. Additionally, attorneys must adhere to the [Rules of Professional Conduct](#) by being competent, communicating with clients, abiding by clients' decisions, avoiding conflicts of interest, and maintaining confidentiality. And at the core of any public defense case lie allegations by a complaining witness, which requires the use of investigative services to ensure the completeness and accuracy of facts that are presented to the courts.

# Resources to Help Public Defense Attorneys Identify and Carry Out Roles and Responsibilities:

- [WSBA Performance Guidelines for Criminal Defense Representation](#): This document summarizes the specific tasks that public and private criminal defense attorneys must engage in at each stage of a criminal case.
- [Washington Defender Association – Technical Assistance Program](#): This publically-funded program employs two full-time attorneys that provide individualized case consultation to any attorney representing indigent defendants in felony and misdemeanor cases.
- [Washington Defender Association – Immigration Project](#): In light of the severity of deportation and immigration consequences of criminal convictions, the U.S. Supreme Court stated that the Sixth Amendment requires defense counsel to advise a noncitizen defendants regarding the immigration consequences criminal convictions. Failure to do so may be ineffective assistance of counsel. To ensure that defense attorneys statewide have access to immigration expertise, the publically-funded WDA Immigration Project provides individualized technical assistance to criminal defense counsel representing noncitizens in criminal and juvenile proceedings.
- **Professional organizations** provide training and resources to member attorneys which improve legal representation and advocacy skills. These organizations often provide discounts to public defense attorneys. Such organizations include: [Washington Defender Association](#); [Washington Association of Criminal Defense Lawyers](#); [National Association for Public Defense](#); [National Association for Criminal Defense Lawyers](#); and [National Legal Aid & Defender Association](#).

## Key Litigation on the Quality of Public Defense Services

- [Best v. Grant County](#), No. 04-2-00189-1 (2005): The plaintiff class sued Grant County for deficiencies in their public defense system. After finding for the plaintiffs in a summary judgement motion, the parties reached a settlement that required a full-time supervising attorney to oversee the county’s contract public defense system. Supervision duties included selecting attorneys, drafting contracts, establishing policies and procedures, assigning cases, training and mentoring attorneys, tracking caseloads, and responding to complaints. The settlement also established minimum compensation levels for contract attorneys, funds for investigation and experts, representation at initial appearances, and payment of a monitor to oversee compliance.
- [State v. A.N.J.](#), 168 Wn.2d 91 (2010): The Washington Supreme Court held that court-appointed counsel’s representation fell below the objective standard guaranteed by the Constitution for effective counsel, that A.N.J. was prejudiced, and that he must be allowed to withdraw his guilty plea. Factors discussed that contributed to the decision were: statistically impossible caseloads; financial disincentive to hire investigators and experts; improper evaluation of the merits of the plea offer; and not assisting A.N.J. make an informed decision as to whether to plead guilty or proceed to trial.
- [Wilbur, et al., v. City of Mount Vernon, et al.](#), No. C11-1100RSL (W.D. Wash 2013): The U.S. District Court of the Western District of Washington held that the named cities were liable under 42 U.S.C. §1983 for systemic flaws that deprived indigent defendants their Sixth Amendment right to assistance of counsel. In addition to paying fees and costs and implementing other reforms, the cities were ordered to hire a Public Defense Supervisor to oversee, document and report progress on required improvements.

“If an actual, individualized representation occurs – as opposed to a meet and plead system – the systemic result is likely to be more adversarial testing of the prosecutor’s case throughout the proceeding and a healthier criminal justice system overall.”

-*Wilbur, et al., v. City of Mount Vernon, et al.*, No. C11-1100RSL (W.D. Wash. 2013).