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SUPREME COURT
STATE OF WASHINGTON

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NO. 82842-3

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CLERK

SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN DOLAN and a class of similarly
situated individuals,

Respondents,

v.

KING COUNTY, a political subdivision
of the State of Washington,

Appellant.

REPLY IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW

Philip A. Talmadge
WSBA #6973
Emmelyn Hart-Biberfeld
WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Michael Reiss
WSBA #10707
Roger Leishman,
WSBA #19971
Amy Pannoni
WSBA #31824
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 757-8310

Attorneys for Appellant King County

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

King County has received the answer to its motion for discretionary review and the answer to its statement of grounds for direct review from the respondent class (hereinafter "the class"). While the answer to the motion for discretionary review and answer to the statement of grounds for direct review contain numerous misstatements of the facts in the case, misleading assertions regarding the law, and even presumptuous statements about which justices the class contends should sit on this case,¹ nothing in the answer to the motion for discretionary review or the answer to the statement of grounds for direct review should dissuade this Court from granting direct discretionary review. RAP 2.3(b)(4); RAP 4.2(a).

A. STATEMENT OF THE CASE

The class does not take issue with any of the facts or procedures set forth in the County's motion for discretionary review at 3-5. However, the class does assert that the present case is "heavily fact-based" and recounts at great length the alleged control exerted by the County over the four private nonprofit public defender corporations whose employees are

¹ The answer to the statement of grounds for direct review asserts at 1 n.1, that Justice Madsen is disqualified from participating in the case. This mirrors a statement made in the letter sent by attorney David Stobaugh to the Clerk on June 5, 2008 in which Mr. Stobaugh also argues the contents of the class's answer to the motion for discretionary review. It is presumptuous for counsel to state that a justice of the Washington Supreme Court is disqualified from deciding a particular case. King County has confidence that Justice Madsen will make an appropriate recusal decision on her own without the prompting of the class's counsel.

the subject of the present class action. Answer to motion for discretionary review at 5. The class misleads this Court regarding the facts and procedure in this case.

The class takes great consolation from the fact that the trial court, in addition to its written decision that was provided to this Court as an appendix to the County's motion for discretionary review, entered findings of fact and conclusions of law. *See, e.g.*, answer to statement of grounds for direct review at 6-10. The class does not deny, however, that on April 17, 2009 the trial court *declined* to enter its overreaching proposed findings of fact and conclusions of law, nor does not deny that the trial court entered a narrow injunction order on April 17, 2009 and an order certifying its written decision for discretionary review pursuant to RAP 2.3(b)(4). Motion for discretionary review at 5.

The class neglects to reveal that on May 22, 2009 it again presented to the trial court a set of proposed findings of fact and conclusions of law. King County again objected to the scope of those proposed findings and conclusions. The trial court took the class's proposed findings and conclusions and King County's objections under advisement, and ultimately entered findings of fact and conclusions of law on June 1, 2009. The trial court excised large portions of the class's

proposed findings because they far exceeded the scope of the court's written decision.

B. ARGUMENT WHY DIRECT DISCRETIONARY REVIEW SHOULD BE GRANTED

(1) Class Agrees that Review Is Appropriate

In response to the County's motion for discretionary review pursuant to RAP 2.3(b)(4), the class makes an odd argument regarding the April 17, 2009 injunction order entered by the trial court. It asserts that the County is entitled to appeal from that order as of right, citing a pre-RAP case, *Greyhound Lines v. City of Tacoma*, 81 Wn.2d 525, 503 P.2d 117 (1972) in support of its position. The County is happy to accept the class's concession that appellate review is proper in connection the trial court's written decision, the April 17, 2009 injunctive order, and the trial court's findings and conclusions.²

² The class's insistence on appeal as of right from the injunction order seems to be much ado about nothing, however. The scope of the review, whether of the April 17, 2009 injunction order, or the Court's written decision certified under RAP 2.3(b)(4), is absolutely identical.

Review under RAP 2.3(b)(4) is the better approach here because the injunction order is, at best, a partial decision. The parties below agreed to consideration of remedy-related matters in later proceedings. Questions abound as to whether the contributions on behalf of the class members must be made retroactively from the date of the entry of the injunction, April 17, 2009, and exactly how far back, if retroactive, those payments must be. Such damage-related questions will be addressed in any final decision in this case.

There is an additional irony in the class's present position on appeal as of right because King County asked the trial court certify its written decision pursuant to CR 54(b), which would render that decision appealable as of right. RAP 2.2(d). *The class opposed such an effort.*

Regardless of whether this Court determines appeal as of right is merited, the trial court properly certified its written decision pursuant to RAP 2.3(b)(4) permitting review. The class does not have any significant answers to the County's arguments as to why review should be accepted under RAP 2.3(b)(4). Motion for discretionary review at 6-9.

Strangely, the class argues that there is no "controlling question of law" and disagrees that there are substantial grounds for disagreement about the law as contemplated by RAP 2.3(b)(4). Answer to motion for discretionary review at 5. *This position is contrary to the class's own argument to the trial court.* In its opposition to King County's motion for entry of judgment pursuant to CR 54(b), motion for certification under RAP 2.3(b)(4), and motion for stay pending appeal, the class stated at 10, n.5 as follows:

Plaintiffs will agree that the permanent injunction should be stayed until review is terminated. A proposed order is attached. The plaintiffs also agree that the Court could also certify its findings of fact, conclusions of law, and permanent injunction for review under RAP 2.3(b)(4) in the unlikely event that the appellate court did not consider the permanent injunction to be an appealable order despite the Supreme Court's *Greyhound Lines* case. A proposed order is attached.

Attached hereto is the order proposed by the class for certification under RAP 2.3(b)(4). The class is estopped from now arguing to this Court that

review under RAP 2.3(b)(4) is inappropriate when it stated to the trial court that review was merited under that rule.

Whether under RAP 2.2 or under RAP 2.3(b)(4), this Court should allow review of the trial court's written decision, its findings of fact and conclusions of law, and its injunction order.

(2) Direct Review under RAP 4.2(a)

The principal rationale for the class's pretzel-like contortions in its argument on review appears to be its hope to avoid direct review by this Court pursuant to RAP 4.2(a). Answer to motion for discretionary review at 5-6; answer to statement of grounds for direct review. The essence of its argument is that the trial court's decision is "fact-based," does not involve issues of first impression, and has no ramifications for any other government in Washington except King County. Answer to motion for discretionary review at 5-6. The class's arguments are baseless.

(a) This Case Presents Legal Issues of First Impression

First, this *is* a case of first impression. No appellate court in Washington has ever construed the provisions of RCW 41.40.010(4)(a), RCW 41.40.010(22), or WAC 415-02-110 that govern the issues in this case. The class has not, and cannot, cite a single Washington appellate court decision definitively interpreting any of these statutory or regulatory provisions. The extensive interpretive guidelines of WAC 415-02-110

have never been construed. *See* Appendix. While the class offers an AGO from 1955-57 addressing PERS eligibility issues, an AGO is not controlling authority. *City of Seattle v. State, Dep't of Labor & Indus.*, 136 Wn.2d 693, 703, 965 P.2d 619 (1998); *Wash. Fed'n of State Employees v. Office of Financial Mgmt.*, 121 Wn.2d 152, 164, 849 P.2d 1201 (1993) (while AGOs are entitled to some deference, they are not controlling, and are entitled to even less deference when interpreting a statute). The class also cites a DRS "eligibility decision" for the same proposition. A DRS "eligibility decision" is certainly not a controlling authority. The statutes here control. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846 (2007) (agency regulation in place for 18 years was void as it contravened Washington's overtime wage statute).

The trial court concluded that King County is a PERS employer in conclusion of law number 2 and also that the four private nonprofit public defender corporations are the functional equivalents (alter egos) of King County, constituting an arm of King County government. Both of the trial court's conclusions were erroneous.

The class members are not PERS-eligible employees under RCW 41.40.010(22) and WAC 415-02-110 because RCW 41.40.010(22) and WAC 415-02-110(2)(a) require that employer direct and control the performance of *that employee's work* (control over the means and methods

by which services are delivered). General contractual or budget oversight of an organization is not enough. This is consistent with case law of this Court. In *DeWater v. State*, 130 Wn.2d 128, 140-41, 921 P.2d 1059 (1996), this Court held that a foster parent was not a state employee even though the State set standards for licensure of foster parents and required compliance with standards by contract. Because the State did not control the foster parent's day-to-day interaction with those in the foster home, the foster parent was an independent contractor.

In this case, it is undisputed that the parties' contract specifically provided that King County was not the employer of the attorneys and staff working for the four independent nonprofit public defender corporations. Moreover, the County does not hire, discipline, or fire the attorneys or staff of the four private nonprofit public defender corporations. It does not set their hours of service. It does not train or otherwise supervise the defender organizations' employees in the provision of legal services to their clients.³ The application of RCW 41.40.010(22) and WAC 415-02-110 is a significant legal issue that should properly be resolved by the State's high court.

³ The oversight exerted by the County over the four private nonprofit public defender corporations is actually mandated by RCW 10.101.060. The County's contracts with those corporations were *required* by state law to address various issues. *See* Appendix.

Similarly, the application of RCW 41.40.010(4)(a) to private nonprofit corporations is also a question of first impression. In effect, the trial court concluded that the four private nonprofit corporations were essentially divisions, agencies or departments of King County. Such a determination is contrary to Article 2, § 220.20 of the King County Charter which provides that *only* the King County Council has the power to establish such agencies or departments. The Council has not made the four private nonprofit public defender corporations agencies of County government. The trial court's decision is also contrary to Washington law regarding the existence of a de facto municipal corporation or a de facto public officer. Washington law rarely recognizes de facto offices or agencies. *See generally, State v. Canady*, 116 Wn.2d 853, 856-57, 809 P.2d 203 (1991). The application of RCW 41.40.010(4)(a) is a significant question of law for this Court.

In addition to whether the employees of the four private nonprofit public defender corporations are PERS-eligible, the County has advanced a significant estoppel/preemption legal question. Whether the employees of the four private nonprofit public defender corporations are County employees has been litigated. In *White v. Northwest Defenders Association*, the court concluded that the County was *not* an employer of a staff attorney for one of the corporations. That decision carries preclusive

effect in the present litigation. Similarly, by organizing in labor unions subject to the jurisdiction of the National Labor Relations Board (“NLRB”), the class members are estopped to claim they are public employees. The NLRB has conclusively determined that the public defender organizations in King County are private, not public, entities. Prior to asserting jurisdiction, the NLRB must determine whether an employee meets the particular definition of “employer” under 26 U.S.C. § 152(2). Simply put, public employers are not subject to the National Labor Relations Act. 29 U.S.C. § 152(2) (“when used in this subchapter . . . the term “employer” . . . shall not include . . . any state or political subdivision thereof.”). This legal question is also one for Washington’s Supreme Court.

(3) The Trial Court’s Decision Is Far From “Narrow” and Affects Governments Across Washington

The class asserts that the present decision is “narrow” and will have no impact on any other government in Washington. Answer to statement of grounds for direct review at 10-11. Counsel for the class appears to have consulted a crystal ball into the future, but its self-serving speculation is amazingly wrong. As the key statutes and regulation on PERS eligibility have never been construed by any appellate court, and because virtually *all* governments in Washington contract for services,

governments across Washington will have concerns about the *profound* fiscal implications of this case. The class has not limited the relief it seeks to the April 17, 2009 injunction order directing the County to enroll the attorneys and staff of the four private nonprofit public defender corporations in PERS for the future. It will seek a judgment directing the County to pay premiums for such employees for some as yet unspecified period in the past.

The trial court's decision is far from "narrow." It implies that anytime a government employs an independent contractor and exercises budget and contractual oversight over that contractor, the contractor's employees are PERS-eligible. The only limits on the trial court's decision are that the services addressed must be governmental in nature and the contractor must derive a significant component of its funding from public sources. Such "limitations" still make virtually any government contractor's employees PERS-eligible. King County fully expects that numerous individual governments and governmental associations will seek amicus status before this Court on the scope of PERS eligibility for employees of independent contractors.

In sum, nothing offered by the class in this case should dissuade this Court from granting direct discretionary review, RAP 2.3(b)(4); RAP 4.2(a).

Dated this 15th day of June, 2009.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Michael Reiss, WSBA #10707
Roger Leishman, WSBA #19971
Amy Pannoni, WSBA #31824
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 757-8310
Attorneys for Appellant King County

APPENDIX

Westlaw

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WASHINGTON ADMINISTRATIVE CODE
TITLE 415. RETIREMENT SYSTEMS, DEPARTMENT OF
CHAPTER 415-02. GENERAL PROVISIONS
GENERAL RULES AFFECTING MULTIPLE PLANS AND SYSTEMS

Current with amendments adopted through January 7, 2009.

415-02-110. Determination of employee status.

(1) An employee of a retirement system employer, other than a teachers' retirement system plan I retiree, who otherwise meets the eligibility criteria to participate in a state-administered retirement system is required to establish or continue membership in that system. An independent contractor is not eligible for active membership in any state-administered retirement system.

(2)(a) The department will review the entire relationship between the worker and the retirement system employer in order to determine whether a worker is an independent contractor or an employee. Generally, a worker is an employee if the employing individual or entity has the right to control and direct the work of the worker, not only as to the result to be accomplished, but also as to the means or methods by which the result is accomplished.

(b) Generally, a worker is an independent contractor if the employing entity has the right to control or direct only the result of the labor or services and not the means and methods accomplishing the labor or services.

(c) Whether or not the parties intend to establish an employer-employee relationship, or whether the parties regard the worker as being an independent contractor is not controlling. When the elements of direction and control are present in determining the means and methods of performing the worker's labor or service, any disclaimers to the contrary are not binding on the department for the purpose of determining employer-employee status. The terms of the contract and the actual arrangement under which the labor or services are performed will determine whether a worker is an employee or independent contractor.

(d) In evaluating whether the retirement system employer has direction or control over the means and methods of performing the worker's labor or services, no one factor is determinative. The department will apply several factors, including but not limited to the following:

(i) Is the worker required to comply with detailed work instructions or procedures about when, where and how the worker must perform services? An employer has control if the employer requires or has the right to require the worker to comply with instructions about the manner in which services must be performed.

(ii) Does the employing individual or entity provide free training for the worker, or have the right to train the worker? Typically, an employer would have the right to train an employee but not an independent contractor.

(iii) Are the worker's services an integral part of the employing individual's or entity's business operation? Usually the regular administrative work of a business is performed by employees rather than independent contractors. Services outside the usual course of the employer's business may imply independ-

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ent contractor status.

(iv) Is the worker required to perform the labor or services personally? While employees are typically required to personally perform labor or services, independent contractors are not necessarily required to perform personally, but may subcontract part or all of the required labor or services to another party.

(v) Does the employer hire, supervise or pay others to perform the same job as the worker? Usually a person who works the same job or performs the same function as performed by employees of the employer is an employee rather than an independent contractor.

(vi) Does the worker hire, supervise and pay others on the job under a contract to furnish labor and materials? Independent contractors may or may not be responsible for performing the contracted labor or services themselves, and usually have the right to hire and terminate their own employees who perform the contracted labor or services.

(vii) Does the worker perform continuing services for the retirement system employer? Independent contractors are typically hired for a job of relatively short-term or temporary duration and do not have a continuous relationship with or perform continuing services for the employing entity.

(viii) Are the worker's hours, routine or schedule set by the employing entity? The establishment of a set routine or schedule for the worker by the employer indicates employee status. Independent contractors are typically free to set their own hours of work.

(ix) Is the worker required to devote his or her full time to the business of a single employing individual or entity? A worker who is required to work full time for a single employer is likely to be an employee. Independent contractors are usually free to provide labor or services for two or more employing entities concurrently.

(x) Does the employing individual or entity require the worker to perform labor or services on the employer's premises? The employing entity is likely to have the right of control over the worker's method of work if the work is performed solely on the employer's premises, particularly if the worker could perform the required labor or services elsewhere.

(xi) Does the employing individual or entity require the worker to perform labor or services in a set sequence? A worker is likely to be an employee if the worker must perform work in an order or sequence set by the employer.

(xii) Is the worker required to provide regular, oral or written reports to the employer? Regular reports, for example weekly time sheets, are usually required of employees as opposed to independent contractors.

(xiii) Is the worker paid by unit of time (hour, week or month)? Employees are typically paid by unit of time while independent contractors are typically paid by the job (commission, bid, piecework or lump sum). Payment for labor or services upon completion of the performance of specific portions of a project or on the basis of an annual or periodic retainer usually indicates independent contractor status.

(xiv) Does the employing individual or entity reimburse the worker for the worker's job-related expenses? Independent contractors typically pay their own business or travel expenses; the regular ex-

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penses they incur as part of providing labor or services are generally included in the stipulated contract payment and are not reimbursed by the employing entity.

(xv) Does the worker providing labor or services furnish the tools and supplies necessary for the performance of the contracted labor or service? Generally, an employer furnishes tools and supplies for their employees while independent contractors furnish their own.

(xvi) Has the worker invested in the equipment or facilities used in performing the labor or services? A significant investment by the worker in the equipment or facilities used in performing the labor or services usually indicates independent contractor status.

(xvii) Does the worker have a right to realize a profit or have a significant risk of loss as a result of the worker's services? Having the right to a profit or the risk of loss arising from the worker's services implies independent contractor status. The worker may be presumed to have assumed the risk of loss if the worker assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of a performance bond, warranties, errors, and omissions insurance or liability insurance relating to the labor or services provided.

(xviii) Does the worker perform services for several persons or firms concurrently? Performance of services for a number of different unrelated clients indicates independent contractor status.

(xix) Does the worker offer services to the general public on a regular or consistent basis? An individual actively advertising services to the general public and representing to the public that the labor and services are to be provided by an independently established business is typically an independent contractor. The following are evidence of 'actively advertising':

(A) The worker uses commercial advertising or business cards as is customary in operating a similar business, or is a member of a trade association;

(B) The worker uses a telephone listing and service for the business that is separate from the worker's personal residence listing and service.

(xx) Does the employer have the right to discharge the worker at will? An employee is typically subject to discharge or layoff at the will of the employer.

(xxi) Does the worker have the right to terminate the employment relationship without incurring liability? The right to terminate the work relationship at will usually indicates employee status.

(3) Typically, an independent contractor works for an employing individual or entity as a specialist in an independently established occupation, profession, trade or business. While the right of control over the method or means of work is determinative, the department shall also consider the following factors in evaluating independent contractor status. The degree of importance of each factor varies depending on the labor or services to be performed and the context in which the labor or services are performed.

(a) Does the worker perform labor or services only pursuant to written contracts?

(b) Has the worker providing labor or services attained business registrations, professional occupation licenses or certificates required by state law or local government ordinances to perform the contracted labor

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or services?

(c) Has the worker providing labor or services:

(i) Purchased worker's compensation insurance and paid taxes required for an independent business;

(ii) Filed income tax returns in the name of an independent business; or

(iii) Filed a Schedule of Expenses for the type of business conducted, or a Business Schedule C or Farm Schedule F as part of the personal income tax return for the previous year if the worker performed the labor or services as an independent contractor in previous years?

(d) Does the worker providing labor or services maintain a separate set of books or records that reflect all items of business income and expenses as an independently established business?

(e) Has the worker assumed financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of a performance bond, warranties, errors and omissions insurance, or liability insurance relating to the labor or services to be provided?

(4) The burden of persuasion in claiming that a worker is an independent contractor or an employee is on the worker or employer making the claim.

Statutory Authority: RCW 41.50.050, 94-09-039, S 415-02-110, filed 4/19/94, effective 5/20/94.

<General Materials (GM) - References, Annotations, or Tables>

WAC 415-02-110, WA ADC 415-02-110

WA ADC 415-02-110
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The Honorable John R. Hickman
Hearing: April 8, 2009, 3:30 pm
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

KEVIN DOLAN and a class of similarly situated individuals,)	
)	NO. 06-2-04611-6
Plaintiffs,)	
v.)	[PROPOSED] ORDER GRANTING
KING COUNTY, a political subdivision of the State of Washington,)	CERTIFICATION UNDER RAP 2.3 (b)(4)
)	
Defendant.)	

The parties agreed and the Court so ordered that this class action would be addressed in phases, first liability and later, if liability was found for Dolan and the class, relief would be addressed in the second phase of the case. The Court, after denying both parties' motions for summary judgment on liability, conducted a trial on the record for the liability phase of the case. The claim tried by the Court is whether Dolan and the class members are King County public employees within the meaning of the PERS statute.

The Court has issued its Findings of Fact, Conclusions of Law and Permanent Injunction requiring the County to enroll its currently employed class members in PERS. The parties and Court believe that appellate review of the Court's Findings of Fact, Conclusions of Law and Permanent Injunction is in the best interest of the parties and the judicial system and that immediate review may materially advance the ultimate termination of the litigation.

1 The parties disagree on the proper legal standard that the Court should apply. The
2 Court agreed with plaintiffs, but the County believes that it has substantial grounds for its
3 difference of opinion. Accordingly, the Court certifies the Findings of Fact, Conclusions of
4 Law and Permanent Injunction, pursuant to RAP 2.3 (b)(4) in the event that its Permanent
5 Injunction is not an appealable order.

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DATED this ____ day of _____, 2009.

JOHN R. HICKMAN
SUPERIOR COURT JUDGE

Presented by:

BENDICH STOBAUGH & STRONG, P.C.

David F. Stobaugh, WSBA #6376
Attorneys for Plaintiffs

Approved for entry:

DAVIS WRIGHT TREMAINE LLP

Michael Reiss, WSBA #10707
Amy H. Pannoni, WSBA #31824
Attorneys for Defendant



Internet Email: opd@opd.wa.gov

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

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

MEMORANDUM

May 29, 2009

TO: County and City Elected Officials;
County and City Administrators;
Superior, District and Municipal Court Judges

FROM: Joanne Moore, Director, Washington State Office of Public Defense

RE: Indigent Defense Services Contract Issues

The Washington State Office of Public Defense (OPD) has a program to assist county officials, city officials, judicial officers, and public defense attorneys across the state regarding indigent defense issues, including local contracts. Indigent defense contract issues have recently been in the news, and as part of OPD's statewide outreach we have heard concerns regarding certain indigent defense contract provisions and practices.

This memo is intended as a tool to help counties and cities review existing indigent defense contracts, and, if necessary, prepare contract amendments. OPD encourages all contract administrators and attorneys to examine existing contracts for compliance with statute, court rules, Rules of Professional Conduct, and adopted local public defense plans.

The Rules of Professional Conduct (RPCs), commonly known as attorney "ethics rules," are adopted by the Washington Supreme Court and govern the professional conduct of attorneys licensed in the state. The violation of an RPC can have serious negative consequences for the attorney involved. In particular, RPC 1.8 (m) prohibits attorneys from entering into three types of contract provisions as explained below. **Attorney compliance with the RPCs is mandatory.**

RCW 10.101.060 requires counties and cities that receive state funding for criminal indigent defense address a number of issues in indigent defense contracts. **RCW 10.101.030** mandates that local governments adopt standards for indigent defense services, and recommends the Washington State Bar Association (WSBA) Standards for Indigent Defense Services as guidelines for local standards. The **WSBA Standards, while not mandatory, reflect "best practices."**

The following list of potential contract issues is based on recent concerns identified by OPD. The list does not attempt to represent all possible issues that could be associated with a particular indigent defense contract. Identifying and remedying specific contract deficiencies is the responsibility of the contracting authority and its contractors.

I. **RPC 1.8(m) Mandatory Requirements for Attorneys:**

- a. **Costs of Providing Conflict Counsel** – An attorney shall not make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting attorney or law firm to bear the cost of providing conflict counsel. (See also RCW 10.101.060.)
- b. **Costs of Providing Investigation or Expert Services** – Costs for providing investigation or expert services shall not be paid by the contracting attorney or law firm, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the attorney, law firm, or law firm personnel. (See also RCW 10.101.060.)
- c. **Sub-Contracting Attorney** – An attorney shall not knowingly accept compensation for the delivery of indigent defense services from an attorney who has entered into a current agreement in violation of paragraphs I.a. or I.b. above.

II. **Chapter 10.101 RCW Mandatory Requirements for Counties and Cities that Receive Chapter 10.101 RCW Funds:**

- a. **Compensation for Extraordinary Cases** – Indigent defense contracts should address the subject of compensation for extraordinary cases. (See RCW 10.101.060.)
- b. **Reports on Attorney Activity** – Each attorney or law firm that contracts to perform indigent defense services for a county or city shall report to the county or city hours billed for nonpublic defense legal services in the previous calendar year, including number and types of private cases. (See RCW 10.101.050.)
- c. **Training** – Each Chapter 10.101 RCW applying county and city must require that attorneys providing indigent defense services attend training approved by the Office of Public Defense at least once per calendar year. (See RCW 10.101.050 and RCW 10.101.060.)
- d. **Qualifications of Attorneys** – Each county receiving Chapter 10.101 RCW must require attorneys who handle the most serious cases (includes all cases of murder in the first or second degree, persistent offender cases, and class A felonies) to meet specified qualifications as set forth in the Washington State Bar Association endorsed standards for public defense services or participate in at least one case consultation per case with Office of Public Defense resource attorneys who are so qualified (See RCW 10.101.060.)

III. **WSBA Indigent Defense Standards Recommendations (mandatory if WSBA Indigent Defense Standards are incorporated in local ordinance, resolution, or court rule)**

- a. **Caseload Limits and Types of Cases** – Indigent defense contracts should specify the types of cases for which representation is being provided and the maximum number of cases each attorney is expected to handle. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. (See WSBA Standards for Indigent Defense Services, Standard Three: Caseloads Limits and Types of Cases.)
- b. **Administrative Costs** – Indigent defense contracts should provide for or include support and administrative costs associated with providing legal representation. Public defense attorneys should have an office that accommodates confidential meetings with clients and

receipt of mail, and adequate telephone services to ensure prompt responses to client contact. (See *WSBA Standards for Indigent Defense Services, Standard Five: Administrative Costs and WSBA Standards for Indigent Defense Services, Standard Seven: Support Services.*)

- c. **Reports on Attorney Activity** – It is recommended that the contracting defense attorney or law firm maintain a case-reporting and management information system that includes number and types of cases, attorney hours, and disposition. This information should be provided regularly to the county or city. (See *WSBA Standards for Indigent Defense Services, Standard Eight: Reports of Attorney Activity.*)
- d. **Sub-contracting** – The contracting defense attorney or law firm should not sub-contract with another attorney or law firm to provide legal representation and should remain directly involved in the provision of representation. (See *WSBA Standards for Indigent Defense Services, Standard Twelve: Substitution of Counsel.*)
- e. **Limitations on Private Practice of Contract Attorneys** – Contracts for indigent defense representation with private attorneys or law firms should set limits on the amount of privately retained work that can be accepted by the contracting attorney. These limits should be based on the percentage of a full-time caseload which the public defense cases represent. (See *WSBA Standards for Indigent Defense Services, Standard Thirteen: Limitations on Private Practice of Contract Attorneys.*)
- f. **Cause for Termination of Services** – Indigent defense contracts should include the grounds for termination of the contract by the parties. (See *WSBA Standards for Indigent Defense Services, Standard Sixteen: Cause of Termination of Defender Services and Removal of Attorney.*)
- g. **Non-Discrimination** – Indigent defense contracts should require the contracting attorney or law firm to comply with all federal, state, and local non-discrimination requirements. (See *WSBA Standards for Indigent Defense Services, Standard Seventeen: Non-Discrimination.*)

If you have any questions, please contact an OPD Public Defense Services Manager. Kathy Kuriyama is at 360 586-3164 ext. 114 or kathy.kuriyama@opd.wa.gov . David DeLong is at 360 586-3164 ext. 110 or david.delong@opd.wa.gov.

RESOURCES (verified as of 5/29/09)

Washington Rules of Professional Conduct:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC

WSBA Standards for Indigent Defense Services:

<http://www.opd.wa.gov/TrialDefense/TDCriminalDefense.htm>

Washington Indigent Defense Services Act (Chapter 10.101 RCW)

<http://apps.leg.wa.gov/RCW/default.aspx?cite=10.101>

Washington State Office of Public Defense: www.opd.wa.gov

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DECLARATION OF SERVICE

BY RONALD R. CARPENTER

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Reply in Support of Motion ~~Clerk~~ for Discretionary Review in Supreme Court Cause No. 82842-3 to the following:

Charles K. Wiggins
Wiggins & Masters, P.L.L.C.
241 Madison Avenue N.
Bainbridge Island, WA 98110

Michael Reiss
Davis Wright Tremaine LLP
1201 3rd Avenue, Suite 2200
Seattle, WA 98101-3045

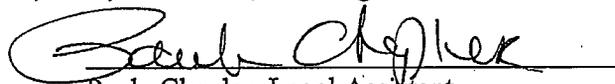
David F. Stobaugh
Bendich, Stobaugh & Strong
701 5th Avenue, Suite 6550
Seattle, WA 98104

Original sent email for filing with:

Clerk's Office
Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 15, 2009, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

ORIGINAL

DECLARATION

FILED AS
ATTACHMENT TO EMAIL