

October 31, 2024
Washington State Supreme Court
415 12th Ave SW W
Olympia, WA 98504

Dear Justices of the Washington State Supreme Court:

I write supporting the proposed amendments to the Court's Standards for Indigent Defense. I practice in Clark County, focusing on indigent and retained criminal defense. I graduated law school and passed the bar in 2009 – the depths of the Great Recession. Few were hiring, so I hung out a shingle and worked to get a contract as Clark County was long the largest county in the Pacific Northwest without a formalized system of Indigent Defense.

When I earned one, I learned how little the contracts actually paid, particularly after expenses. But that has always been where my heart lies. In the 13 or 14 years since I started as a contractor, I first worked up to taking Class A's and then homicides and then murders. In the last 13 months, I have resolved two aggravated murders, one as lead counsel and one as part of a team, while maintaining felony and juvenile contracts while also taking retained cases.

I was not planning on writing a letter to the Court as the arguments I had were already out there. Then, two things happened.

First, the City of Vancouver reached out to see if I would consider a contract in District Court. 13 or 14 years ago I was offered either \$325 or \$350 per District Court Case as an alternate, and I had recently taken a contract for similar amounts that I stopped because the rate had not increased in any measurable amount.

The City of Vancouver is prepared to contract 111 cases in District Court for \$50,000, with or without trial, or \$450 per case if there is not a trial. Please see the attached email chain. While a trial per diem is offered, that amount is only offered if it comes in under the \$50,000 sum.

Second, I saw the attached letter from the Clark County Councilors recommending the Court mandate pro bono work rather than meaningfully address the issue of meaningful compensation and the disparity between Prosecution and Defense resources.

In other words, the two largest political entities in Southwest Washington have watched the Oregon public defense system implode without making any meaningful plans to address the constitutional crisis that was clearly coming our way. This political inaction has created the crisis, and now the proposed solutions are \$450 per gross misdemeanor or mandatory pro bono amidst the increasingly complex world of criminal defense.

Yet, the increasingly complex world of criminal defense is also increasingly serious. The result of criminal convictions today are far different than those of the past. Computers, databases, statutes and fully funded prosecution offices mean criminal convictions rarely go away. And since the sentencing guidelines grant discretion to elected prosecutors with inherent incarceration

incentives, there are few checks to protect those most in need except the indigent defense attorney.

In my own life, I remember the stories from my father. I understand he was a challenging teenager to local law enforcement. His number came up in the draft when he turned 18 in 1970 when he last stood in front of a Missoula County Judge in coveralls and handcuffs. He had been joyriding, or taking motor vehicles without permission in the second degree in Washington terms. The Judge knew his name, and that is never a good thing.

The Judge told him that he could go to prison or go to the military, or so the story goes. Well, given that his number had already come up, he took the opportunity to try and enlist in the Navy, but a jeep wreck (likely related to an attempt to elude) had weakened his back and he was a 4f.

But, it was western Montana and a bad back is not a bone spur, so he bucked bails for the summer, drove to Spokane, lied about the back (fraudulent enlistment) and then had a great career and great life. He qualified on a diesel submarine, got depth charged, became a diver, served on a Deep Submergence Rescue Vehicle, volunteered with kids and ultimately worked as a custody officer in Mineral County Montana after retiring from the Navy in 1996, which was when I followed him to the submarine service.

His second chance was born out of felonious behavior over three states, but that felonious behavior was born out of a developing brain that wanted to do right. When he got that second chance, he did right. That second chance begat the life I have had, including my own second chance. Today though, young people facing serious charges have far fewer options and higher likelihoods of convictions that often close off avenues for education or employment.

Those of us able to do this work get to try and be that chance for people without means to defend themselves, just like him. And, truthfully, almost every one of us who has taken the Oath of Attorney has gotten such a second chance if we are honest with ourselves. I have.

I will let others make the policy and money arguments. We know about burnout. We know how few of us stay in the trenches. We know there are fewer women and minorities in the trenches, and we know that representation matters.

To me, it is simply about who we are as a legal community, a particularly relevant concern in 2024.

We as a legal community recognize the result of over policing and over prosecution of the poor, of the Black, of the Brown, of other minorities and of anyone without political power. Are we going to leave the futures of so many children and young people to chance against a system tilted in favor of those with badges and power and guns and political incentives to make more young people felons?

Or do we want to ensure that an attorney has time to see their clients, that an attorney has staff to prepare cases consistent with court rules, that due process stands, that an accusation does not equate to a felony conviction with generational consequences, and that the words written in the two historical Clark County Courtrooms have meaning?

That no person shall be deprived without due process of law – above the bench of the Honorable John Fairgrieve.

The impartial administration of justice is the foundation of liberty – above the bench of the Honorable Derek Vanderwood.

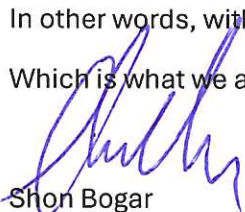
The proposals from Clark County and the City of Vancouver demonstrate that continued inaction from the Court will incentivize further inaction from the local political entities. At some point, political inaction becomes a conscious choice, and I submit the proposals from the City of Vancouver and Clark County indicate conscious choices in their inaction.

I support implementation of the proposed WSBA standards because there are a host of political choices that go into making young people felons and sending them to prison. Providing comparable resources does not mean less justice, but it will mean there will have to be political choices about how to more efficiently resolve more cases.

With programs like diversion, with increased probation services that are cheaper for the counties than automatic incarceration, with increased access to mental health resources that are more effective (cost and otherwise) than a jail cell, and with greater access to time with attorneys who have time to know, to understand and to represent their clients as people.

In other words, with greater access to Justice.

Which is what we are supposed to do, right?



Shon Bogar
WSBA 41764

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Shon Bogar

From: Small, Rebecca <Rebecca.Small@cityofvancouver.us>
Sent: Thursday, October 24, 2024 4:52 PM
To: Shon Bogar
Cc: Peck, Kerry
Subject: RE: City Indigent Defense Cases – Direct-Award Contract Inquiry

Thank you for your candid feedback regarding the City's current public defense situation and the proposed compensation structure. I appreciate your commitment to indigent defense services and the concerns you've raised about the emotional, financial, and professional realities of the work are points well taken.

To clarify, the intent of our proposal was to allow firms to take on as many or as few cases as their capacity allows, within the \$50,000 contract limit. If your firm or another were in a position to take on up to 111 cases, we would be grateful for that assistance, but the offer was flexible and meant to accommodate whatever caseload could be comfortably managed. We fully recognize that attorneys are likely approaching their capacity as the year comes to a close, and it was not our intention to suggest anyone should take on an unreasonable or unconstitutional number of cases.

Additionally, your point about trial preparation is a reasonable concern, and it's something we will take into consideration for future adjustments to our approach. We understand the significant time and effort required to prepare for a trial, even if it is ultimately dismissed, and we recognize the need to fairly compensate that preparation. And, we're open to discussion as to what a practicing firm in our area would consider to be a reasonable fee structure.

Thank you again for your time and consideration. I won't trouble you with another request, but continue to appreciate the important work you and your colleagues do for indigent defense in our community.

Best regards,

Rebecca Small | Senior Policy Analyst
She/her
City of Vancouver
City Manager's Office
Phone: 360-839-6128
cityofvancouver.us



From: Shon Bogar <shon@greenandritchie.com>
Sent: Thursday, October 24, 2024 4:27 PM
To: Small, Rebecca <Rebecca.Small@cityofvancouver.us>

Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>

Subject: RE: City Indigent Defense Cases – Direct-Award Contract Inquiry

Hi Ms. Small and Ms. Peck:

Respectfully, those of us committed to providing indigent defense services should be paid commensurate with what those prosecuting our clients are paid.

We fund our own retirements, our own offices, supplies, parking, assistants and more. We spend time in the jail, on dockets, and meeting with clients and witnesses. We explain to our client's parents and kids what is going to happen to their loved ones, and absorb a tremendous emotional load in representing citizens accused of crimes.

Accusations that often come with little to no investigation by the government, and that are often dismissed on the eve of trial – a choice entirely in the hands of those with power and appropriate compensation. The proposed plan would mean my substantial preparation to try a case (that should never have been filed or "called ready") would go uncompensated, discouraging the preparation and zeal needed to try cases.

The proposed rate of compensation does not recognize that work, that emotional load, the realities of what we do or why we do it, or the fact that so many cases should not be filed or pursued.

The proposed rate of compensation is subconstitutional. 111 cases in two months is necessarily unconstitutional.

City Attorneys make a handsome living, with retirement and benefits and the respect of being paid a living wage. \$50,000 is a great deal of money, but not for 111 cases. And, respectfully, no attorney should consider taking on that kind of load at the point in the year when everyone is over our contracted amounts.

We did not create this predicament, but the train has been coming down the tracks the City and County are now on for years. We have all seen it coming, that headlight getting closer and closer what with Oregon going through its shortages and Clark County growing in size. And while that train has been coming, the City Attorneys have seen their compensation increase. So have the Judges. And the County Prosecutors. Heck, the Custody officers just got massage chairs.

Everyone except those the government now expects to lay on the tracks and absorb what is coming.

Respectfully, we decline.

Shon

From: Small, Rebecca <Rebecca.Small@cityofvancouver.us>

Sent: Thursday, October 24, 2024 3:59 PM

To: Shon Bogar <shon@greenandritchie.com>

Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>

Subject: RE: City Indigent Defense Cases – Direct-Award Contract Inquiry

Not a problem, I appreciate you considering the offer. It's a good thing to be busy, and I'm glad to hear that your firm has a strong portfolio. It's a testament to the quality of work that you do for your clients.

If your availability should change in the coming year, or if there are different circumstances under which working with the City on indigent defense would suit your firm's interest, please don't hesitate to contact me. My guess is that this past year's high case filing rates will continue into 2025.

And, if you happen to know of another firm or attorney who might be interested in picking up some additional work for the end of this year, I'd greatly appreciate any referrals. Any amount of caseload support, from 1 to 100 cases, helps us ensure our citizen's right to representation.

Best wishes,
Rebecca

Rebecca Small | Senior Policy Analyst
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Phone: 360-839-6128
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From: Shon Bogar <shon@greenandritchie.com>
Sent: Thursday, October 24, 2024 3:44 PM
To: Small, Rebecca <Rebecca.Small@cityofvancouver.us>
Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>
Subject: RE: City Indigent Defense Cases – Direct-Award Contract Inquiry

I have to respectfully decline. Thank you for thinking of us. And I already have substantial indigent defense contracts including a full juvenile case load, a large adult felony case load, and homicides/3 strike cases when they come in too.

Shon

From: Small, Rebecca <Rebecca.Small@cityofvancouver.us>
Sent: Thursday, October 24, 2024 3:42 PM
To: Shon Bogar <shon@greenandritchie.com>
Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>
Subject: RE: City Indigent Defense Cases – Direct-Award Contract Inquiry

No, that would work out to be \$64,000, which unfortunately is more than we can award per our Procurement contract limits.

\$450/case * 120 cases = \$54,000
\$1,000/trial * 10 trials = \$10,000
Total: \$64,000

I mean, if you would *like* to do 120 cases with 10 trials for \$50K total, that would be very nice of you! The City wouldn't say no. But that would work out to only be about \$333/case for you, and we think this work is worth a bit more.

From: Shon Bogar <shon@greenandritchie.com>
Sent: Thursday, October 24, 2024 3:35 PM
To: Small, Rebecca <Rebecca.Small@cityofvancouver.us>
Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>
Subject: RE: City Indigent Defense Cases – Direct-Award Contract Inquiry

Or ... 120 cases with 10 trials for \$50,000?

From: Small, Rebecca <Rebecca.Small@cityofvancouver.us>
Sent: Thursday, October 24, 2024 3:32 PM
To: Shon Bogar <shon@greenandritchie.com>
Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>
Subject: RE: City Indigent Defense Cases – Direct-Award Contract Inquiry

Not quite - \$50K is the total amount for all cases and trial expenses combined, as that is the max amount that the City is allowed for a direct-award contract. So it might look like:

111 cases with no trials (\$50,000)
100 cases with 5 trials (\$50,000)
90 cases with 9 trials (\$49,500)

Basically, the maximum number of cases and cases + trials that can fit under the \$50K ceiling.

(To make sure we're on the same page - the \$1,000 trial bonus is intended to compensate for the time spent in court if the case proceeds to a full trial. If the case is dismissed on the day of the trial, the bonus would not apply.)

From: Shon Bogar <shon@greenandritchie.com>
Sent: Thursday, October 24, 2024 3:14 PM
To: Small, Rebecca <Rebecca.Small@cityofvancouver.us>
Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>
Subject: RE: City Indigent Defense Cases – Direct-Award Contract Inquiry

Hi Ms. Small:

Am I correct in reading this proposal as approximately 111 cases in two months for \$50,000, plus the \$1000 per day for trial?

shon

From: Small, Rebecca <Rebecca.Small@cityofvancouver.us>
Sent: Thursday, October 24, 2024 3:01 PM
To: Shon Bogar <shon@greenandritchie.com>
Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>
Subject: City Indigent Defense Cases – Direct-Award Contract Inquiry

Hi Shon,

Hope all is well on your end. I'm reaching out to see if your firm might be interested and available to take on some indigent defense cases through the end of this year. The City has seen a surge in misdemeanor filings, and we are on track to exceed the capacity of our contracted Primary firm before year's end.

In a previous conversation, you mentioned that the small number of cases and low pay per case made public defense less appealing for your firm—but that you might be interested on behalf of a new associate. We're currently anticipating enough cases to max out a direct-award contract of \$50K, at \$450 per case plus a \$1,000 bonus for cases that proceed to trial. These would be primary cases, so they'd likely be less complex than typical conflict cases.

Please let me know if this is something you'd be interested in discussing further. We would greatly value your help in addressing this need.

Best regards,

Rebecca Small | Senior Policy Analyst
She/her
City of Vancouver
City Manager's Office
Phone: 360-839-6128
cityofvancouver.us



From: Small, Rebecca
Sent: Monday, July 31, 2023 4:33 PM
To: Shon Bogar <shon@greenandritchie.com>
Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>
Subject: RE: public defense contract - City of Vancouver

Hi Shon,

Thanks so much for the feedback, that's really helpful to know and makes a lot of sense.

A copy of our most recent RFP is attached. We'll be going back out with this contract in the near future, so if you do bring on an associate and have increased capacity we'd encourage you to apply. The caseload for this contract averages around 5-15 cases per year, but that number seems to be increasing every year.

Kind regards,

Rebecca Small | Senior Policy Analyst



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P.S. My apologies for the delayed response – I had some PTO that I needed to take and didn't get this email out the door before I left!

From: Shon Bogar <shon@greenandritchie.com>

Sent: Tuesday, July 25, 2023 11:16 AM

To: Small, Rebecca <Rebecca.Small@cityofvancouver.us>

Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>

Subject: Re: public defense contract - City of Vancouver

CAUTION: This email originated from outside of the City of Vancouver. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi!

The challenge from my perspective is the amount of time I end up in court for a small number of cases that don't end up paying off financially.

5 or 6 cases a year at (what's the compensation rate?) comes out to not much. My primary practice is felonies. I agreed to a similar contract with the county and spend hours in court when I can't get out to do what I need to do.

I'm looking to hire an associate and would reconsider if you send me the rfq.

Shon Bogar
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Please pardon any t4p0s. This was sent from my mobile device and my thumbs often get their own ideas. Please delete and let me know if you are an unintended recipient.

To clients, do not share this email with anyone, and remember to exercise your right to remain silent.

From: Small, Rebecca <Rebecca.Small@cityofvancouver.us>
Sent: Tuesday, July 25, 2023 10:50:19 AM
To: Shon Bogar <shon@greenandritchie.com>
Cc: Peck, Kerry <Kerry.Peck@cityofvancouver.us>
Subject: public defense contract - City of Vancouver

Hello, Shon –

My name is Rebecca Small and I help coordinate public defense contracts for the City of Vancouver. I noticed that you had been cc'd in an email chain regarding a conflict case for which we are trying to coordinate counsel and was wondering if you might be able to help me with a question.

Our office has issued two RFPs for conflict public defense services this year, and we received no local responses to our search. A firm such as yours would have been an ideal candidate to respond to that solicitation. I was wondering if you might be able to tell me – did your firm hear about the City's search? If not, that's a great indication that we need to adjust our advertising.

Thanks,

Rebecca Small | Senior Policy Analyst



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CLARK COUNTY WASHINGTON

clark.wa.gov

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October 24, 2024
Washington State Supreme Court
415 12th Ave SW W
Olympia, WA 98504

Justices of the Washington State Supreme Court,

The Clark County Council is sharing this letter with you to express deep concern about impacts related to the proposal to change indigent defense case load standards and limits in Washington State. The county recognizes the need to improve Washington's current indigent defense system, but the proposed changes would place unmanageable financial and capacity burdens on Clark County given the lack of state funding for the state's legal system. The Clark County Council requests that adoption of new caseload standards be delayed until the legislature acts to address the financial and capacity challenges that these new standards will create.

In 2023, Clark County spent over \$7 million for indigent defense services. The Washington State Association of Counties projects that proposed standards, if adopted, would quadruple the county's indigent defense costs—in Clark County that would mean costs increasing \$20 million or more for indigent defense alone, even before accounting for other investments in the law and justice system that would be needed to adjust to the changes to indigent defense. Above and beyond the direct attorney and support staff costs that Clark County would need to absorb, local courts, law enforcement, and the prosecuting attorney's office will see additional financial and workload impacts. Because the bulk of local law and justice is funded via county general funds, if unfunded these changes will strain the county's ability to provide other necessary community services. Any mandates from the state should provide the tools and resources to enable local governments to provide these services effectively.

Funding is only one piece of the challenge, as Clark County will struggle to find the over 300 qualified personnel (to increase their staff by 5x in less than three years) that will be required if the standards as proposed are moved forward. The currently projected phase in timeline for these standards is unrealistic. From an administrative standpoint, almost no organization can successfully grow at the pace contemplated under the proposed standards.

As you contemplate the proposed indigent defense caseload standards and limits, we urge you to:

- Acknowledge the Washington public defense system's critical state;
- Recognize that the current state of the Washington's public defense system is due in large part to the State's failure to meet its constitutional obligation for indigent defense, with the state contributing less than 3% of the total cost of local trial court public defense expenses;
- Hold the State accountable for its financial responsibility, and commit to not further burdening underfunded counties;
- Commit to advocating that the State provide necessary funding to implement any changes to the indigent defense case load standards;
- Remain mindful that there is a shortage of both public defenders and prosecutors in Washington and across the United States that funding alone will not improve. Addressing this shortage will require efforts to initiate new programs, incentives, and other tools to ensure proper staffing of the entire civil and criminal justice system. Proposed standards on paper are one thing, but building the capacity and technical expertise across county and municipal courts will require planning, investment, and creativity over a longer period of time than three years;
- Consider other systemic changes to support indigent defense and the broader law and justice system in Washington, including practices that have proven effective in other states such as requirements for mandatory pro bono assistance, adding capacity for the Office of Public Defense in providing meaningful

support to local jurisdictions in supplying indigent defense services to local courts, or other creative approaches that fully consider the limited capacity of the current and/or proposed systems to handle the number of cases requiring a public defender.

Thank you for considering our request to delay these standards until the funding and support is in place to implement them. Please let us know if we can offer further information or answer any questions.

Sincerely,



Gary Medvigy
County Chair, District 4



Glen Yung
Councilor, District 1



Michelle Belkot
Councilor, District 2



Karen Dill Bowerman
Councilor, District 3



Sue Marshall
Councilor, District 5