

Benton & Franklin Counties Office of Public Defense

Annual Report
Benton County
Operations

2012

As the Indigent Defense Coordinator for Benton and Franklin Counties, I am proud to present the 2012 Annual report for our Benton County operations. This report recaps many of the highlights of our operations in 2012 including a year-end financial snapshot, and also summarizes our key achievements including achievements that fulfilled strategic goals set at the beginning of 2012.

A Strategic Plan for 2013 is being published simultaneously to this report. I encourage you to review that plan if you are interested in what this office plans to accomplish in 2013 and how these goals align with our stated Mission and Values.

In 2012, we made great strides in advancing our Mission and Values, which are stated below, and we will continue to do the same in 2013.

Very truly yours,

Eric Hsu

Eric Hsu, Attorney at Law
Indigent Defense Coordinator

MISSION STATEMENT

The Mission of the Benton & Franklin Counties Office of Public Defense is to provide quality, cost-effective, legal representation to indigent and other qualified persons charged with criminal offenses, or otherwise facing incarceration or loss of liberty interest, so as to protect their Constitutional and other legal rights, educate them about the criminal justice system, and champion the interests of justice. The Benton & Franklin Counties Office of Public Defense will always be mindful of the fact that the resources that enable it to advance its Mission are entrusted to it by the taxpayers of Benton & Franklin Counties, and as such it will constantly strive to improve the efficiency and effectiveness of its team, of system which it manages, and of systems of which it is a part of, so as to always be a good steward of such resources.

VALUES

In order to advance its Mission, all Benton & Franklin Counties Office of Public Defense staff and contractors share the following Values.

A	Teamwork	We are constantly seeking out and developing inter-office and intra-office synergistic relationships through which to accomplish shared goals and create win-win outcomes.
B	Effectiveness & Efficiency	We are always choice-driven and introspective so as to maximize effectiveness (do that which has the most effect on advancing the Mission) and efficiency (while consuming the least amount of resources)
C	Quality	We take pride in quality work product in all aspects of what we do.
D	Cost-Effectiveness	We recognize the fiduciary duty we owe to the taxpayers who provide the resources by which we can advance our Mission and always strive to maximize cost-effectiveness without jeopardizing quality.
E	Compassion & Fairness	We recognize that all members of the public with whom we interact and for whom we provide services are fellow community members and citizens and we will treat them with respect, compassion, and fairness.
F	Effective Risk Management	We will always be mindful of the liability related interests of Benton & Franklin Counties and constantly seek to minimize the exposure of the Counties to liability risk.
G	Continuous Improvement	We recognize and embrace the dynamic nature of many factors that affect our ability to advance our Mission and as such, constantly seek out, and take action on, ways to improve every aspect of our operations. We will never settle for “good enough” or accept that the “way it has always been done” is necessarily the best way to continue to do it.

District Court Operations

Summary

Benton County provides public defense services for all criminal cases that are pending in Benton County District Court. As of the end of 2012, the defender staffing in District Court was as follows:

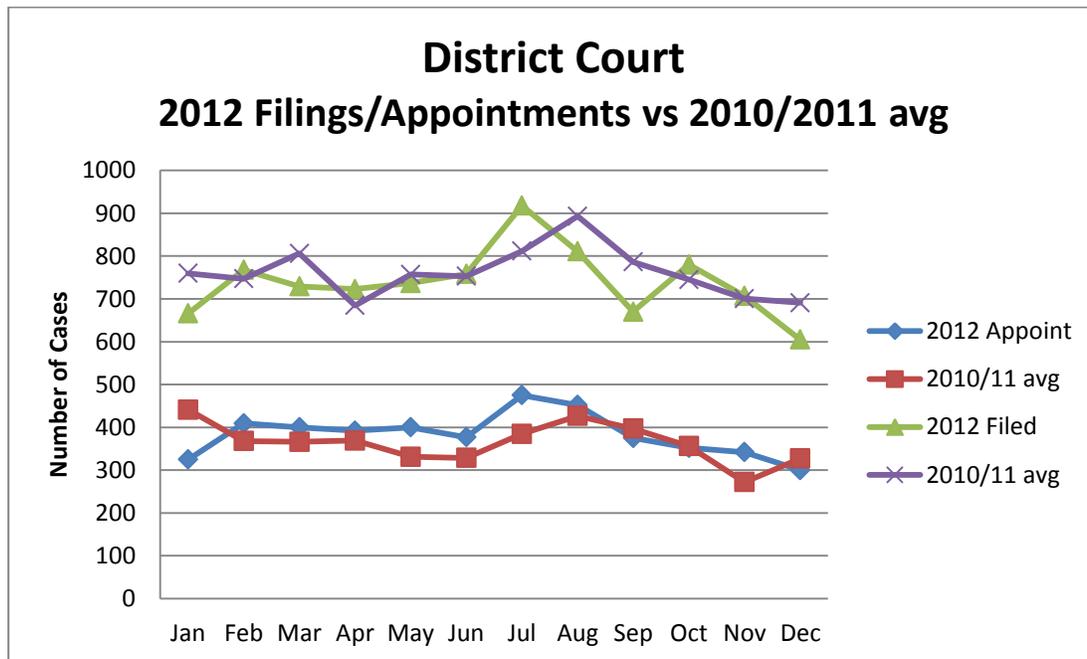
- **3 attorneys (contractors)** – provisional representation at all in-custody initial appearances including felony “72 hour hold” matters on for initial appearance in District Court¹.

¹ Because of the felony related responsibilities of these attorneys, 33% of their funding is provided out of a

- **1 attorney (contractor)** – all probation violation and fail to pay fine dockets.
- **8 contract attorneys and 2 staff attorneys** – all pre-trial criminal cases with criminal charges.
- **2 attorneys (contractors)** – conflict cases and cases in excess of cumulative system caseload caps (these 2 contract attorneys are only paid by the case with no minimum compensation level)

2012 Operational Highlights

- As shown in the following caseload chart, 2012 exhibited a split in trends with case filings staying roughly the same as the 2010/2011 avg levels, and case appointments consistently above 2010/2011 avg levels². **Overall, filings were -2.8% (below 2010/2011 avg levels); Appointments were +5.3% (above 2010/2011 avg levels).**



- A total capacity coverage of **599 cases** was realized for 2012.
- The walk-in arraignment docket program continues to work well and cases are continuing to be resolved during this docket, but with much better risk management safeguards. Specifically, during 2012, an average of 51.8% of the cases filed were appointed to public defenders (meaning, of course, that 48.2% of cases were either

budget line item dedicated to Superior Court defense services.

² For reference purposes, the term “filing” refers to the sum total of all cases filed in court (in this case, District Court). In comparison, the term “appointments” refers only to those filed cases that are actually appointed to public defenders. The ineligibility of a given defendant for public defense services or the resolution of the case at arraignment before a public defender is requested or assigned.

resolved before needing a public defender, or were defended by private counsel. It is our experience that the majority of the cases filed and not appointed to public defenders are not appointed to public defenders because they are resolved at initial arraignment.

- **Staffing report**

- Staff Attorney Staci Kichler, hired in 2011 to replace Staff Attorney Megan Giske, left the office in the first part of 2012. After a hiring process, it was determined that Danielle Purcell, this office's Rule 9 Intern in 2011, was the best candidate, and the slot was left vacant to wait for her to complete law school and pass the bar. Ms. Purcell passed the bar in October, 2012 and has now been hired on as a full time Staff Public Defender assigned to the District Court Unit
- Staff Attorney Alexandria Sheridan, who has been with the office over four years now, and has been gaining substantial experience in Superior Court cases, has been promoted to Public Defense Attorney 2, has been transferred full-time to Superior Court, and has been given supervisory duties over Staff District Court operations.
- At the end of the year, authorization was granted to hire an additional Staff Attorney for the District Court Unit. After a hiring process, attorney Michael Vander Sys was hired to join the District Court Unit.
- As a result of the resignation of a number of Benton County Superior Court public defenders in September, 2012 (see full details in Superior Court Unit report below) a Request for Qualifications process was held and a number of District Court Unit contract defenders were awarded Superior Court contracts. Specifically, contract defenders Ryan Swinburnson, Catherine Harkins, and Peyman Younesi relinquished their District Court contracts in favor of Superior Court contracts. Furthermore, contract defender Luke Swinney resigned his contract because of geographic relocation.
- Three attorneys were awarded "monthly compensation" defender contracts to replace the outgoing attorneys:
 - Mark Cano
 - Caleb DiPeso
 - Gary Metro
- In anticipation of a continuation of the increased case appointment loads of 2012, three attorneys were also awarded "by the case compensation" defender contracts³:
 - Thomas Brooks
 - Jenny Johnson

³ As opposed to "monthly compensation" contracts where contract holders are paid a consistent monthly compensation amount in return for being appointed "up to" a number of cases per year, "by the case compensation" contracts compensate contract holders **only** for cases they are assigned, with a set flat rate per case.

- Jeff Briggs

Upcoming Developments

- **Case Weighting System** – One of the first orders of business for District Court operations in 2013 is the development and approval of a Case Weighting System in order to comply with the new Supreme Court public defense standards that were promulgated in the summer of 2012. Much of the ground work for this system has already been laid (much of it with the assistance of this office's law school intern in the summer of 2012) and the finalized system will be presented to the Commissioners for approval in the first half of 2013.

District Court Financial Update

Because of the numerous year end line item transfers necessitated by line-item budgeting, it is not possible to provide an accurate year-end snapshot of the District Court budget. However, OPD was able to finish out the year without a need for any need for supplemental funding.

Superior Court Operations

Summary

This office provides public defense services for all Superior Court criminal cases as well as contempt cases that may result in incarceration. As of the end of 2012, the defender staffing in Benton County Superior Court was as follows:

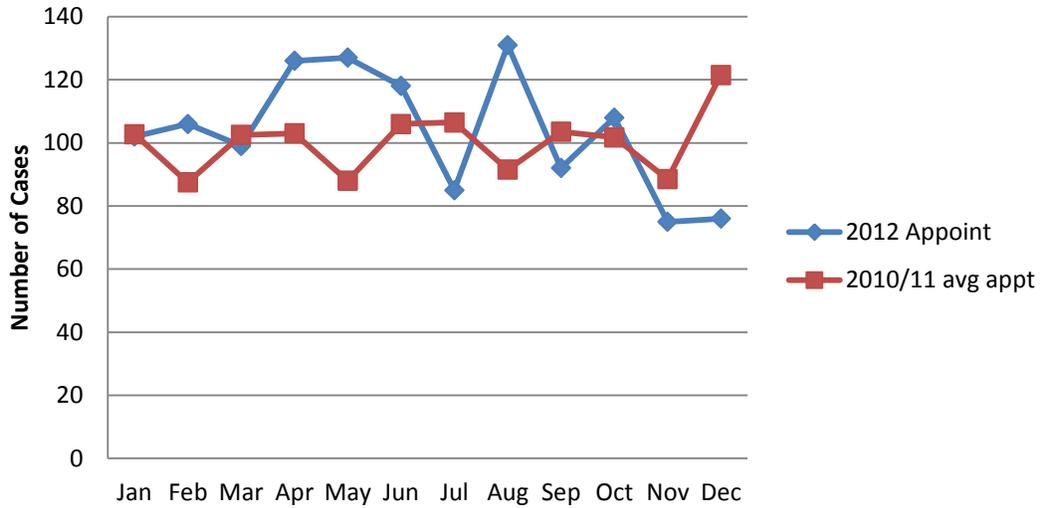
- **8 contract attorneys and 1 staff attorney-** all pre-trial criminal cases pertaining to new criminal charges
- **1 contract attorney (reduced rate)** – Benton/Franklin Drug Court
- **1 contract attorney (reduced rate)** – Child support contempt cases
- **1 contract attorney (reduced rate)** – Legal financial obligation contempt cases
- **1 contract attorney (reduced rate)** – Involuntary Treatment Act (“ITA”) defense – shared between Benton and Franklin Counties

2012 Operational Highlights

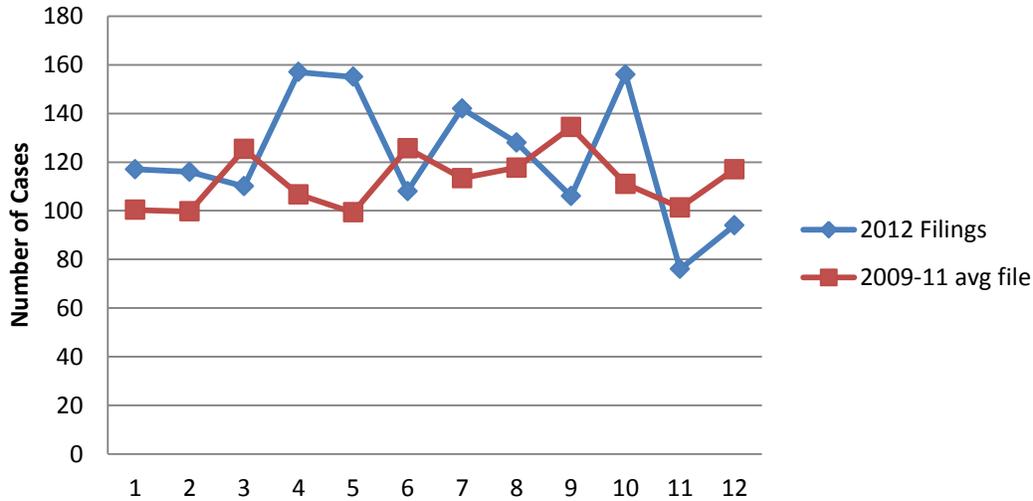
CASELOAD:

- 2012 saw an interesting divergence in caseload trends. As compared to 2010/2011 averages, the 2012 total filings increased by 8.4% while total appointments only increased by 3.5%. This is, of course, a marked contrast with District Court, where the increase in appointments outpaced the increase in filings.

Benton County Superior Court Appointments 2012 vs 2010/2011 avg



Benton County Superior Court Filings 2012 vs 2010/2011 avg



- **Hourly case report⁴**
 - *State v. Jacobsen* (Manslaughter) – pending
 - *State v. Williams* (Murder in the First Degree) - pending
 - **All hourly cases are presently compensated at the rate of \$75 per hour.** Staff attorney Alexandria Sheridan is assisting as Second Chair in the *State v. Williams* case both for purposes of gaining the experience necessary to defend homicide cases on her own in the future, and because it is good to have extra assistance on this matter without any associated cost.
- **Staffing report**
 - Departure of 6 contract public defenders. 2012 was a year of extreme staffing upheaval. Following the Washington Supreme Court's adoption of new public defense standards that placed limits on the private practices of contract public defenders, the entire Superior Court panel requested that consideration be given to increase their compensation. In response to panel members' request for a compensation level that was roughly triple what it was, and statements by many that they would need to substantially cut back on their public defense caseloads, a Request for Qualifications was publicized for what was anticipated to be more public defense contract needs starting in 2013. Responding, it seemed, to this RFQ, 6 contract public defenders from the Superior Court panel resigned in September, 2012.
 - RFQ and new contractors. Throughout the fall of 2012, interviews were held for contractors to replace the 6 contractors that left. Eventually, in the last months of the year, contracts were awarded to 5 Superior Court public defense contractors, and staff attorney Alexandria Sheridan was promoted to Superior Court defender on a full time basis. The new contractors on this defense panel are:
 - Ryan Swinburnson
 - Catherine Harkins
 - Dennis Hanson
 - Karla Kane
 - Shelley Ajax

Superior Court Financial Update

As with District Court, because of the numerous year end line item transfers necessitated by line-item budgeting, it is not possible to provide an accurate year-end snapshot of the Superior Court budget. However, OPD was able to finish out the year without a need for any need for supplemental funding.

Sexually Violent Predator Cases

- This function has been completely taken on by the State Office of Public Defense and this office will no longer be responsible for funding or providing for counsel or experts

4 Only homicide cases (defined as only including Aggravated Murder, Murder in the First or Second Degree, Manslaughter, Homicide by Abuse, Homicide by Controlled Substance, and vehicular homicide) and persistent offender crimes (three strike violent felony and 2 strike sexual abuse felony cases that are qualified for a life sentence without parole) qualify for hourly billing.

on these cases. *This section will be eliminated from future Annual Reports.*

Juvenile Justice Center

- This office continues to assist with contract compliance only when requested and when a formal contract noncompliance letters are needed. In the last few months, two such letters have been necessary, both to the same attorney.

2010 Strategic Improvement Initiatives

Part A: Improvements in Effectiveness.

The Benton County Office of Public Defense recognizes that unless it is *effective* at what it does, the reason for its existence is limited. As such, we constantly strive to improve *how* we go about advancing our Mission. Here is a summary of ways in which we have increased our effectiveness in 2012:

1. Implement Community-Centric Communication Strategy encompassing multiple communication channels (Listed Strategic Goal for 2011)

This strategic goal sought to improve the communication channels with clients and with the community. The eventual purpose of this was to not only make it easier for clients to get answers to commonly asked questions and for the office's operations to be more transparent to public inquiry, but also to free up staff resources that were being weighed down by the need to routinely and regularly respond to these client questions or public inquiries. As planned, this Strategic Goal had two steps: 1) a survey of staff and contractors to determine frequently asked (and answered) questions that could better be communicated to clients, family members or community members in writing or through other channels; 2) a redesign of the office's website to be more navigation-friendly, to provide answers to frequently asked questions, and to link visitors to commonly requested resources. As the year progressed, it was determined that a third step, a community survey to learn about what the community (including clients and interested members of the public) expected of this office, would also be useful.

Some portions of this Strategic Goal were placed on hold when the resignation of Superior Court attorneys, a subsequent contract dispute related to the resignation, and the replacement of these contracts with a long-drawn RFQ process took up much of the year from August onward. However, even so, two of the three steps were still completed in time.

Goal:

Survey of staff and contractors, overhaul of website, before end of the year.

Achieved:

Survey of staff and contractors completed before December 31, 2012. Additional component of community survey developed (but not distributed) before end of summer, 2012. Overhaul of website postponed until Q1 2013 (and currently in progress).

2. Leadership Training for Staff

While OPD doesn't have a very large staff, staff responsibilities are complex, mission-essential and varied, and furthermore, much of their work is accomplished in environments with minimal supervision. As such, personal and team leadership is of utmost importance in the ability of staff to make good decisions that advance the mission and values of this office under stress, within small time windows, and with minimal guidance.

Goal:

Implement leadership training and professional growth plans for all staff

Achieved:

Incorporated leadership training materials into staff meetings, 1:1 meetings and professional growth plans for all staff.

4. In-House Training Program (Listed Strategic Goal for 2012)

In an effort to improve the quality of public defense representation as well as facilitate attorney compliance with the statutorily and contractually mandated requirement of seven continuing legal education ("CLE") credits per year, an in-house training program was started in 2010. We applied to the state bar association for a fee waiver for sponsoring CLEs and also applied for recognition of the CLEs from the State Office of Public Defense. Furthermore, we were able to recruit local speakers and trainers who were all willing to donate their time to training opportunities for our defenders. In 2012, the Strategic Goal was to continue this program and offer at least 9 hours of CLE training.

Goal:

At least **9 hours** of training opportunities by **December 31, 2012**.

Achieved:

9.5 hours of training opportunities offered (including one jointly with Washington State OPD) **before December 31, 2012**.

5. Mental Health Case and Resource Coordination and Tracking (Listed Strategic Goal for 2012)

Recognizing that people suffering from mental health problems are often involved in the criminal justice as a result of those mental health problems *and* that the fact that they are so suffering often results in unpredictable and unnecessary delays and other obstacles to justice and treatment, the start of work toward solutions was set as a Strategic Goal for 2012.

Much of the problem in these types of cases results from a difficulty in tracking them, resulting in the proverbial "slipping into the cracks." A better tracking system was one component of this Strategic Goal.

Other aspects of the problem stem from a lack of coordination between the many different aspects of criminal justice (prosecutor, judge, Clerk's Office, public defender, just to name a few) and including mental health care providers that work both in conjunction with these

criminal justice stakeholders (such as Eastern State Hospital⁵ and Lourdes Health Network mental health services⁶). Therefore more collaboration between these various agencies and stakeholders was another component of this Strategic Goal.

Finally, it was noted that public defenders are woefully undertrained when it comes to identifying and dealing with mental illness amongst their clientele. Therefore training was the final component of this Strategic Goal.

Goal

Statistical tracking of cases and development of mental health work-group by **April 1, 2012**; Training opportunities for public defenders; Better coordination of various stakeholders in mental health/criminal justice cross-over by **April 30, 2012**.

Achieved

Statistics tracked but only for cases worked for staff attorneys (starting beginning of 2012). Coordination between Lourdes Mental Health (working in the jail), Crisis Response, public defenders, Chaplains working in the jail, Prosecuting Attorney's Office and Benton County Jail, much better now with substantially reduced backlog of cases with delays while waiting for Eastern State Hospital evaluations or other mental health processes. Key contacts with each stakeholder agency now established and many cases staffed with team approach.

As of beginning of 2013, same coordination group working together on possible planning grant to work on improving intersection of mental health and criminal justice.

6. Veteran's case and Resource Coordination

Local anecdotal observations align with national statistics regarding the fact that upwards of 9% of jail and prison inmates are veterans (defined as anyone with prior service with a branch of the US Military)⁷. It is apparent that the interests of public safety and resource conservation would be well served if resources (including substance abuse, worker training and housing) are coordinated and made available to justice-involved veterans.

Goal: Establish partnership with Veteran's Administration Justice Outreach Specialist from Walla Walla by **April 30, 2012**; Referral and coordination of veteran cases by **June 30, 2012**.

Achieved: Partnership, including training presented to public defenders, established by **April 30, 2012**. All staff attorneys now screen for veteran status and actively refer, especially in the case of in-custody clients, to VA services through their Justice Outreach Specialist.

5. Review of Contract Terms in light of *Dolan v. King County* and Supreme Court standards for public defense. (Listed strategic goal for 2012)

⁵ Eastern State Hospital is responsible for evaluating mentally ill offenders to determine whether or not they are fit to stand trial (ie able to aid and assist in their own defense).

⁶ Lourdes Health Network contractually provides statutorily required limited mental health services in the Benton and Franklin County Jails.

⁷ See <http://www.justiceforvets.org/sites/default/files/files/VJO%20White%20Paper.pdf>

Two recent Washington State Supreme Court decisions made it necessary to review our public defense contracts. The first decision was *State v. A.N.J.*, decided in 2010. In *A.N.J.*, the Supreme Court found the actions of a Grant County public defender to be grossly inadequate in the representation of a minor who had been charged with a sex offense. Not content with simply ruling in this case, the Supreme Court decided that it would adopt public defense standards with which public defenders throughout the state would need to comply⁸. Finally, after two years of discussion, the Supreme Court a set of standards in July, 2012. Many of these standards, including stricter limits on caseload maximums, standards about public defender office space, and limitations on contract public defender private practices, required changes to be made in the public defense contract.

The other State Supreme Court decision affecting Benton County's public defense contracts was its opinion in *Dolan v. King County*. Decided in 2011, *Dolan v. King County* was a Class Action lawsuit filed by public defenders in King County (who were technically contractors) claiming that by virtue of the control King County exercised over them, regardless of their technical title as being "contractors," they were *de facto* employees and were therefore entitled to Public Employee Retirement Services ("PERS") benefits. The Supreme Court sided with the plaintiffs in the *Dolan* case and agreed that King County's conduct and control of them made them, for the purposes of PERS benefits, employees. What the Supreme Court *did not* do, however, was state, in any detail, which of the many factors or instances of control mattered for the determination. It simply stated that the combination of the factors resulted in the "employee status." This case also spurred many changes in Benton County's public defense contract.

Ultimately, extensive time was devoted to a restructuring of Benton County's Superior Court public defense contract in light of the Supreme Court's post-*A.N.J.* standards and the decision in *Dolan v. King County*, and a new contract that appears to strike a good balance between these two cases and Benton County's need to have some control over contractor actions was crafted. For the time being, this contract has only been used for the new Superior Court contracts that were awarded in December, 2012 to replace the 6 public defense contractors who resigned. Once the other existing Superior Court contracts and all District Court contracts expire at the end of 2013, the plan is to replace them with this new contract as well.

Goal: Review existing contract terms in light of decision in *Dolan v. King County* and anticipated Supreme Court public defense standards by **July 31, 2012**.

Achieved: (Delayed somewhat since public defense standards were not announced until July, 2012) existing contract terms reviewed, substantial modifications made in light of both *Dolan* and new public defense standards, finalized contract utilized for new contracts starting with contracts awarded in **December, 2012**.

6. Case Cap Accountability to Stay Within WSBA Recommended Standards

⁸ Prior to the Court's ruling in this case, while the Washington State Bar Association had published comprehensive standards for public defense, the standards only served as guidelines instead of as a strict compliance requirement.

Contract public defenders in District and Superior Courts are mandated by their contracts (and now required by Supreme Court Standards) to maintain their caseloads within certain numerical caps. These caps are 390 cases per year per attorney in District Court⁹ and 150 cases per year per attorney in Superior Court. Each year, especially in District Court, there is a fine balance between making sure that attorneys reach their caps (and don't finish the year getting paid to take 390 cases per year but receiving fewer than 390 cases) and making sure they do not exceed the formerly recommended and now soon to be mandated 400 case cap. The goal set for 2012 was to ensure that there was sufficient "by the case" contract defenders to supplement the "monthly compensation" contract defenders and ensure that none of them exceeded 400 cases in the year.

Goal: Provide strict guidance to "monthly compensation" contract defenders in District Court that they were not to exceed 400 cases per year and that they wouldn't be paid for any cases in excess of 400. Contract with sufficient numbers of "by the case" defenders to ensure that the excess cases of "monthly compensation" defenders can be covered by them.

Achieved: Sufficient "by the case" contract defenders were retained for 2012 to cover actual overages. A combination of individual defender accountability and intense OPD audit and verification ensured that none of them exceeded 400 cases for 2012.

Part B – Improvements in Efficiency

The Benton County Office of Public Defense recognizes that the resources by which it advances its Mission are limited, and perhaps more importantly, entrusted to it by the taxpayers of this County. As such, it always strives to improve the *efficiency* by which it advances its Mission. Here is a summary of ways we have improved our *efficiency* in 2011:

1. Restructuring of Compensation Structure in Superior Court Contracts

At the same time as when the Superior Court defense contracts were reviewed and modified for legal reasons (see 5 above in **Part A**), a significant change was also made in the compensation structure both in response to requests by defenders to take less than a "full" caseload and for better cost accountability.

Previously, the Superior Court defense contracts were structured in such a way that the defenders were paid a certain sum (roughly \$82,000 in 2012) per year, payable in equal monthly installments, in return for being appointed "up to" 150 cases per year. In practice, however, for many years, individual Superior Court public defenders received far fewer than 150 cases per year. In fact some received as little as 110 cases in recent years.

The 2012 overhaul of the Superior Court public defense contracts made a pivotal change to this compensation structure. Instead of being paid a flat fee for "up to" a number of cases, contractors are now paid strictly on a per-case basis. This ensures that the County only pays

⁹ The maximum caseload cap pursuant to their contracts is actually 390 cases, lower than the 400 allowed by Supreme Court standard, so that the attorney cannot be regarded as devoting 100% of their practice to public defense cases, thereby possibly bolstering any claim they may have pursuant to the decision in *Dolan v. King County* that they are *de facto* "employees" of Benton County.

for cases that are actually appointed to public defense contractors, and in turn, public defense contractors know exactly how much they will be paid per case they work.

Goal: this was not a listed goal for 2012

Achieved: Superior Court defense contract compensation restructured to be “by the case.” This provides greater compensation accountability (attorneys are only paid for cases they are actually appointed) and needed flexibility (in light of new Supreme Court rule limiting private practice cases for contract public defenders, attorneys are now free to take on a lower maximum public defense caseload if they so choose.

2. Review of Options to Stabilize Expenditures needed to fund investigative services and hourly attorney fee cases. (Listed Strategic Goal for 2012)

This Strategic Goal recognized the need to explore different options for stabilizing and controlling costs necessitated by hourly fee defense and investigative services in homicide case defense. Planned for 2012 was an exploration of the feasibility of expanding the staff attorney program and/or implementing a staff investigator program.

Goal:

Cost-benefit analysis and exploration of expansion of staff attorney program and/or implementation of staff investigator program by June 30, 2012.

Achieved:

The benefit of expanding the staff attorney program proved itself in the wake of 6 contract defenders deciding to terminate their contracts all at once in the fall of 2012. Authorization was granted to expand the existing staff attorney program and to promote an existing staff attorney to Superior Court with on-going homicide case training that will enable to her defend homicide cases on her own in the future. The exploration of a staff investigator program was tabled and may be revisited in the future.

3. Direct Billing of RCW 10.77 Competency Evaluation Costs to State

In 2009, this office started the practice of direct billing (to the State) the costs associated with “second opinion” competency evaluation of defendants whose competency is being questioned¹⁰.

In 2012, a total of \$8,764 in fees for competency evaluations were either direct-billed to, or reimbursed by, State DSHS. These expenditures are ones that would have otherwise come out of OPD’s budget.

¹⁰ By law (RCW 10.77) defendants who are thought to be incompetent to stand trial are evaluated first by Eastern State Hospital (at State expense). If, following that evaluation, the defendant wishes to challenge Eastern State Hospital’s findings, then a second evaluation, done with a private psychiatrist, is performed. Historically, the Office of Public Defense has paid for the full cost of this second evaluation. As stated, starting in 2009, recognizing that there was statutory authorization for the full cost of the second evaluation to be paid by State DSHS, the direct-billing (or reimbursement) process was started.

This concludes the 2012 Annual Report for the Benton County Office of Public Defense. As stated at the beginning, I encourage you to also read this office's Strategic Plan if you are interested in learning about this office's new strategic initiatives for 2013.

Very truly yours,

Eric Hsu

Eric Hsu, Attorney at Law
Indigent Defense Coordinator