August 13, 2026

Larry Jefferson, Director *via e-mail only*
Katrin Johnson, Deputy Director for Operations
WA State Office of Public Defense
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Dear OPD Administrators,

We write to you to express our ethical concerns about the Office of Public Defense's proposed approach to funding public appellate attorneys. The undersigned are law professors in Washington State's three law schools who all teach courses in legal ethics. We endeavor to teach our students to understand, respect, and comply with the Rules of Professional Conduct. We write to you because we are concerned that OPD's proposed funding model for public appellate defense would lead to serious ethical violations and imperil the right to effective assistance of counsel in appellate matters. This impacts some of our state's most vulnerable users of legal services; the indigent people who rely on public appellate attorneys to defend their most basic interests.

Our understanding of OPD's funding proposal is that it would deviate from the funding practices that have been in place since 2014, and return appellate public defense to a pay-per-case contract, where OPD only makes a single payment when a case is first assigned. OPD abandoned this model over ten years ago, most likely in response to the 2013 court cases that addressed the ethical flaws of such a funding model.

In addition to our concerns about the pay-per-case model, we write to express serious concerns with the calculations OPD is using to assign credits to each case. OPD itself commissioned an Appellate Workload Study from the WSBA. This extensive study concluded that, for example, a criminal or juvenile case with a record length of 1,000 pages takes between 85.5 and 126.5 hours of attorney time on average. Our understanding is that OPD's proposed funding scheme would only reimburse for 66 hours of attorney time for that length of case record.

Coupled with the switch to the pay-per-case model, this creates an unacceptable risk for the clients who rely on assigned counsel for their appellate defense. As the Court stated in Wilbur v. Mount Vernon, "Where an attorney's compensation is tied to the number of cases they handle, there is direct incentive to minimize work on every case in order to maximize compensation."

The pay-per-case model, coupled with OPD's proposed case-credit calculation, raises several ethical issues:

- RPC 1.1 (Competence) and RPC 1.3 (Diligence). Last year, the Washington Supreme Court reduced caseload standards for appellate attorneys and amended CrR 3.1 to reiterate that the new caseloads shall allow each lawyer to give the time necessary to

ensure effective representation for indigent clients. This requires "the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system." Under a pay-per-case model, however, attorneys are incentivized to clear cases rapidly, creating unresolvable tension with the requirement for competent and diligent representation. Attorneys would have no incentive to file a reply brief or to file a petition for review to the WA State Supreme Court - briefs clearly contemplated under RAP 10.1 - given that these filings do not result in extra payment. Meanwhile, attorneys would have an incentive to waive oral arguments or withdraw appeals. Flat-free contracts risk systematically denying the right to effective and ethical counsel because an attorney cannot thoroughly prepare or handle matters with reasonable diligence when faced with the pressure of clearing cases as cheaply as possible.

- RPC 1.7(a)(2) (Conflicts). Because an attorney is only paid for filing an opening brief, the pay-by-case model is likely to create a free-standing conflict of interest between the attorney and their client. Attorneys are incentivized to forgo filing reply briefs, petitions for review, or visiting clients and instead take on new cases to maximize profit or meet overhead costs.

- RPC 1.2 (Scope of Representation) and RPC 1.4 (Communication). The pay-per-case model disincentivizes the time-consuming process of keeping an appellate client informed of their case, including the requirement that attorneys consult with clients about the means by which their objectives are to be accomplished, promptly comply with the client's reasonable requests for information, and explain the matter to the extent reasonably necessary to permit the client to make informed decisions. It hinders the attorney's responsibility to abide by a client's decisions concerning the objectives of the representation and the means to pursue those objections. Incarcerated clients are often located hundreds of miles away and have limited phone and mail access. Indigent clients also experience obstacles due to struggles with mental health, chemical dependency, or language barriers, requiring in-person meetings for effective collaboration. The stakes for indigent clients entitled to appellate defense are enormous, and a flat-rate contract structure imperils the attorney's ability to meet the requirements of RPC 1.2 and RPC 1.4.

- RPC 1.14 (Client with Diminished Capacity). Individuals who struggle with mental illness and substance abuse are overrepresented in the Washington prison system compared to the general public. Where Washington prisons are often in remote locations spread around the state, the pay-per-case model disincentivizes attorneys from taking the necessary time to meet with and advise clients with unique needs.

- RPC 2.1 and RPC 5.4(c) (Exercising Independent Professional Judgment). The pay-per-case model implicates the requirement that attorneys exercise independent professional judgement in advising clients. An outside agency pays the contracting attorney to render legal services while also directly correlating the attorney's income with resolving cases as quickly as possible. This gives the outside agency undue influence over the attorney's responsibility to provide independent, candid advice.

- RPC 5.1 (Responsibilities of Supervisor). The pay-per-case model disincentivizes the intensive supervision of newer attorneys that is necessary before they can handle serious felonies, cases with indeterminate sentences, or cases where an individual has been sentenced to life without the possibility of parole. Again, the stakes are unbelievably high, and only properly supervised attorneys should be representing clients facing the loss of liberty for much, if not the remainder, of their lives. Additionally, the pay-per-case model makes it difficult, if not impossible, for a supervisor to give "reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct."

- Preamble (A Lawyer's Responsibilities). The pay-per-case model undermines the basic duties of an attorney to be an advisor providing a client with an informed understanding of their rights, an advocate zealously asserting the client's position, and an evaluator who effectively considers the implications of a particular legal avenue. Indigent individuals are no less deserving of the quality of representation demanded under the RPCs.

Thank you for reading through our concerns. We respectfully request that you take them into account and offer Washington's publicly funded appellate attorneys a funding proposal that allows them to offer effective and ethical legal representation.

Sincerely,

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