

September 16, 2026

Washington State Office of Public Defense  
711 Capitol Way S.  
Olympia WA 98501

Re: Concerns with Proposed Appellate Contract Structure

To Office of Public Defense Advisory Board:

This letter is a follow-up to the Washington Defender Association (WDA)'s June 2026 letter expressing the Washington Defender Association's grave concerns relating to the Office of Public Defense (OPD)'s contract dispute with the Washington Appellate Project (WAP). The consequences of this dispute extend far beyond OPD and one contractor. WAP is a longstanding nonprofit institution that employs more than two dozen appellate attorneys and handles approximately 40 percent of Washington's indigent appeals. Its closure would eliminate a major part of the state's appellate defense infrastructure and directly affect hundreds of current WAP clients, including many of their current and former clients whose constitutional rights depend upon the availability of qualified and adequately resourced appellate counsel.

***Unless this dispute is resolved expeditiously, OPD's contractual dispute imperils a cornerstone of the public defense system in our state.*** We ask that OPD reconsider its appellate contract terms. WAP is the only non-profit provider of appellate public defense in the State. It is well known for its zealous advocacy and fight for racial justice in the criminal legal system that has produced impactful developments in case law, including, for example, ending the death penalty in *State v. Gregory*, establishing new frameworks for addressing race-based prosecutor misconduct in cases like *State v. Monday*, and invalidating the possession of a controlled substance offenses in *State v. Blake*. The precedential force of these decisions has meaningfully affected the lives of thousands of people, particularly members of marginalized communities and communities of color and their families.

A sudden and large influx of WAP's backlogged cases will tax an already fragile public defense system. This is particularly concerning due to the existing backlog that resulted from OPD's recent miscount of appellate cases that severely overloaded existing contractors. In Washington State and nationally, trial level public defense offices have had capacity constraints that limit their ability to assign attorneys to represent clients. If this happens on the on the appellate level, it will lead to ballooning costs both for client representation as well as additional litigation expenses, settlement agreements, and judgments.

**OPD's proposed weighted credit, payment-per-case contracting model threatens the quality of appellate public defense services state-wide.** WDA is especially concerned about OPD's adoption of an assigned-credit structure. OPD fundamentally shifted its model for appellate contractors this year from funding FTE positions to paying contractors by the case. This form of flat-fee contracting is concerning and has been widely recognized as the worst model for the provision of public because it incentivizes the minimum amount of work on a case. Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 Mich. L. Rev. 207, 210 (2023) ("flat-fee" contracts occur when: "defense attorneys are paid a set fee to handle all or a portion of a jurisdiction's indigent defense cases, **or they are paid by the case** or by the event (for example, \$200 for a plea or \$500 for a trial)"). *Id.*

OPD's pay-per-case model also cannot sustain a public defense office. As stated in its RFQ, OPD conditions payment on completing the assigned cases: "[i]f a contractor is unable to receive an assignment or assignments in a specific month, assignments will not be made that month. Attorney compensation will be decreased at a proportionate rate over the number of months remaining in the period of performance." To survive financially under OPD's proposed terms, an attorney would need to continually accept to be paid every month, regardless of whether their existing cases require more time to complete than an average case. This contracting model makes an organizational model of public defense practically impossible if every month the office's ongoing financial viability turns on how many cases were accepted. Moreover, this model disincentivizes attorneys from taking the time needed in an individual case for each client.

**WDA urges OPD to recognize the value that comes from a supported non-profit public defense office.** Public defense offices are well-positioned to identify systemic injustices and develop novel ways to challenge them, improving the law for not just individual clients, but the system as a whole. These offices are comprised of lawyers and staff of varying experience levels where collaboration, mentorship, supervision, a shared mission and commitment to public defense benefits all clients. In this model, the organization's workload is spread among the attorney's caseload and supported by other attorneys in the office. Attorneys and staff share their collective knowledge to develop arguments and novel litigation independent of whether they can complete a brief and be paid that month.

As the sole non-profit appellate public defense agency in Washington, WAP advocates for the improvement of appellate public defense delivery state-wide in a way that individual for-profit firms are simply not structured to do. Additionally, WAP's structure as a non-profit public defense office enables its attorneys to provide valuable support to the public defense community throughout the State, including through regularly providing training, consulting with trial attorneys about preserving issues for appeal, and amicus brief writing.

WAP's role as an integral part of defense community with institutional knowledge and experience that it shares with attorneys throughout the State would be lost through OPD's

current plan to replace WAP by contracting with 65 different contractors through recruiting and training new attorneys.<sup>1</sup>

***WAP's closure will have long term harmful consequences for the delivery of appellate public defense in Washington and the impact would fall most heavily on indigent clients.*** The closure of WAP would end a mature nonprofit public defense institution, displace a large group of highly experienced appellate attorneys, and disperse decades of accumulated expertise, supervision, training, and institutional knowledge. Once WAP's attorneys disperse and its organizational infrastructure is dismantled, restoring that capacity would require far more than issuing new contracts. The State would lose an experienced, coordinated appellate office precisely when the Supreme Court has directed that workloads be reduced and OPD's own study has demonstrated the need for substantial additional staffing.

That capacity could not be quickly recreated by distributing WAP's cases among individual contractors. Hundreds of pending matters could require reassignment. Replacement attorneys would need to review records that may span thousands of pages, identify and preserve legal issues, establish relationships with clients, and reconstruct cases already in progress. Appeals would likely be delayed, existing backlogs would deepen, and the remaining appellate providers would be asked to absorb a volume of work that the statewide system is already understaffed to perform.

Indigent clients will be harmed. They did not choose their appointed attorney, cannot purchase replacement representation, and in many cases remain incarcerated while their appeals are pending. Even under the best transition scenario, hundreds could experience disruptive changes in counsel and substantial delay. In a system already facing a documented staffing shortage, there is also a serious risk that some clients would wait extended periods for qualified replacement counsel.

The WDA Board urges OPD to work with WAP as an ally rather than an adversary to build a sustainable, vigorous, quality appellate public defense model in Washington State.

Sincerely,



Patrick O'Connor  
President



Christie Hedman  
Executive Director

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<sup>1</sup> <https://www.seattletimes.com/seattle-news/law-justice/storied-law-firm-says-it-could-go-under-if-wa-doesnt-change-pay-model/>