

Yakima County Department of Assigned Counsel

POLICY AND PROCEDURE

Short Title:	Expert and Other Indigent Defense Support Services
Effective Date:	November 17, 2015

1.0 PURPOSE:

The purpose of this policy is to establish policy and procedure for requests for expert and other support services in indigent cases.

2.0 BACKGROUND:

2.1 Effective January 1, 2010, the Yakima County Superior Court and District Court determined that they would no longer have the primary role in providing, approving, reviewing, paying for experts, investigators and other support services necessary for an adequate defense in indigent cases. The court determined to transfer and/or delegate its authority and function under CrR 3.1 and CrRLJ 3.1 to the county indigent defense program. The Board of Yakima County Commissioners thereafter agreed to the transfer of such function to the county indigent defense program and specifically to the Yakima County Department of Assigned Counsel (hereafter "Department").

2.2 Effective January 1, 2010, the Yakima County Department of Assigned Counsel, by and through its Director or designee, may authorize expenditures of public funds in indigent defense cases in Yakima County Superior Court, Juvenile Court, and District Court for the following indigent defense support services when determined to be reasonable and necessary for an adequate defense:

- Experts
- Investigators
- Interpreters (out of court)
- Court reporting and/or transcript costs
- Other reasonable and necessary support services

2.3 All requests for expert services made on or after January 1, 2010 must be made through DAC under this policy regardless of prior order or contract appointing counsel.

2.4 Orders authorizing expert and support services entered before December 31, 2009 will generally be honored. Such orders will be administered solely by the Department by and through its Director or designee. Requests for payment are subject to the policies and procedures herein.

3.0 REFERENCES:

- 3.1 United States Constitution, Amendment 6; Washington State Constitution, Article I, Section 22
- 3.2 Revised Code of Washington (RCW), Chapter 10.101
- 3.3 Criminal Rules (CrR) 3.1(f) and CrRLJ 3.1(f)
- 3.4 Local Court Rule: None as of April 15, 2015
- 3.5 Yakima County Code (YCC) 2.124
- 3.6 Board of Yakima County Commissioners Resolutions #415-1989 and #50-2010

4.0 APPLICABILITY:

- 4.1 Experts and Other Support Services – General Application.** This policy applies to requests for expert or other support services for indigent clients in the following cases: criminal and juvenile offender cases, mental health and substance abuse civil commitment proceedings, contempt proceedings, and other case types in which an indigent defendant or respondent is entitled by law to representation by appointed counsel.
- 4.2 Privately Retained Attorneys with Indigent Clients.** Pursuant to *State v. Punsalan*, 156 Wn.2d 875 (2006), private counsel may seek funding for expert services for an otherwise indigent defendant. In such cases, counsel must follow the procedures outlined herein. In addition, counsel must submit a court order finding the defendant indigent for purposes of expert or support services based on a signed financial declaration of the client and a signed declaration of the attorney that no funds for such services are available under the retainer agreement from funds in trust or from third party guarantors of the retainer agreement. DAC may also require proof of indigency and screening by DAC.
- 4.3 Sexually Violent Predator:** Expert and other support services for indigent respondents in SVP cases are provided directly by the Washington State Office of Public Defense. This policy and procedure are not applicable to such cases.
- 4.4 Child Dependency:** Experts and other support services for indigent respondents in child dependency cases are provided directly by the Washington State Office of Public Defense. This policy and procedure are not applicable to such cases.

4.5 **Guardian ad litem:** This policy does not apply to *guardian ad litem* appointments or expenses, except those requested by the respondent in civil commitment proceedings under RCW Chapter 71.05, RCW Chapter 71.34, and RCW Chapter 70.96A. Requests for *guardian ad litem* by defense counsel in Involuntary Treatment Act (ITA) cases will be by motion and order to the ITA judge or court commissioner. Requests for payment are submitted to DAC for payment.

4.6 **Material or general witness fees:** This policy does not apply to general or material witness fees, travel costs, or reimbursement for incarceration. RCW Chapter 2.40 provides for the expenses of witnesses at the uniform rate established for jurors in the county. In addition, RCW 10.52.040 provides for the costs of incarceration for material witnesses in addition to their normal witness fee. RCW 10.55.060 provides for out of state witnesses. All of these costs are payable by the applicable court and not DAC. Advance travel funds and expenses for general and material witnesses are by motion and order of the court and are paid by the court as witness fees.

4.7 **Prosecution Witness:** This policy applies to costs charged by a prosecution expert witness for defense interviews, but only if such costs are made known to the attorney before the interview and an authorization obtained in advance.

4.0 DEFINITIONS:

4.1 “Authorization” means a written approval by the DAC authorizing Expert or other support services. This is the functional equivalent of a court order issued under the applicable court rule, statute, or WAC.

4.2 “DAC” or “Department” means the Yakima County Department of Assigned Counsel.

5.0 GENERAL POLICIES:

5.1 Prior Authorization Required:

Requests must be submitted to DAC prior to the expenditure of funds. Payment for services provided in advance of authorization will be presumptively disallowed.

5.2 Vendor Certificates Required

All experts and other professionals authorized under this policy must complete and send to the Department an approved vendor certificate before any work is performed. “Vendor Certificate” is a form issued by DAC by which vendor certifies that it is an independent contractor and has its own Federal Tax ID number and Uniform Business Identifier.

5.3 Known Providers Preferred

Attorneys are encouraged to use experts and other providers with a known history of use in Yakima County. DAC may provide a list of preferred providers for reference only. If a listed known provider is used, the credentials or *curriculum vitae* of the expert need not be submitted with the request.

5.4 Out of State Experts

If Attorneys are requesting an out-of-state service provider, they must explain which in-state experts/providers they have contacted and why those providers could not be used. If an out of state provider is requested, counsel must demonstrate that providers in neighboring states or provinces have been contacted before seeking an out-of-area provider.

5.5 Sealing Orders

- 5.5.1 Unless protected by a sealing order issued by the court, all requests, supporting documents, and authorizations/denials filed with the Clerk under this Policy and Procedure are open public court records.
- 5.5.2 All requests, supporting documents, and authorizations/denials filed with the Clerk but sealed by the court order will remain under seal pending further court order under GR 15.
- 5.5.3 Attorneys must expressly state in the request whether a sealing order is requested. .
- 5.5.4 At DAC's discretion, any request submitted without an affirmative statement regarding sealing or protecting records will be clarified, treated as an open request, or returned to the attorney without processing.
- 5.5.5 If sealing order is requested, the Attorney must include with the request a separate motion and proposed order sealing (in the form required by DAC).

5.6 DAC Functional Confidentiality:

- 5.6.1 All requests, action thereon, billings, payments, and associated records are considered by the Department as being confidential and/or privileged records relating to the representation of individuals by attorneys. Such records are, therefore, not subject to the Open Records Act, RCW 42.56 except as otherwise provided by law, the Rules of Professional Conduct for attorneys, or this Policy and Procedure. This includes communication between the attorney and DAC, names of clients and cases, names of vendors, invoices, and detailed time statements.

- 5.6.2 To preserve confidentiality Payments will be vouchered to the county auditor using invoices and DAC reference numbers.
- 5.6.3 DAC will keep all requests and records concerning them in a separate secure area and only the Director and specifically designated administrative staff will have access to them.
- 5.6.4 Notwithstanding the nature of the records, Authorizations on informal requests for interpreters, transcripts, and investigators will normally be filed with the clerk of the court and be open court records. See Section 5.5.
- 5.6.5 Notwithstanding the nature of the records, the policy of the Department is to release certain information about the type and total expenses and payments once a case is completed as follows:
 - 5.6.5.1 After judgment but before final judgment, a general summary of the expenses and costs paid by type of expense will be made available to the public on request. However, invoices, detailed billings, vendor names and other administrative records will continue to be treated as protected attorney records relating to the representation of individuals unless otherwise ordered by a court of competent jurisdiction.
 - 5.6.5.2 Once final judgment is entered in a case, then invoices, detailed billing statements, and payments may be made available for public inspection and copying on request.

6.0 GENERAL PROCEDURES

- 6.1 **General:** Requests for investigators, interpreters, and court reporter/transcript services may be made by informal means otherwise detailed in this Policy and Procedure. All other requests are made under this section. This is also the default method of applying for any services, including those otherwise allowed by informal process, when a sealing order is sought.
- 6.2 **Special Provisions by Type of Services Request:** Additional procedures and requirements are referenced below:
 - Investigators – Section 8
 - Interpreters – Section 9
 - Court Reporting and Transcripts – Section 10
 - Experts and other services – Section 11
- 6.3 **Requests Must Be Written / Physical Delivery Required**
 - 6.3.1 Requests must be in writing.

6.3.2 Requests may not be made by phone, e-mail, or in person except as otherwise expressly allowed elsewhere in this Policy and Procedure for interpreters and investigators.

6.3.3 Written requests must be physically delivered, faxed, or mailed to the main DAC Office at:

Yakima County Department of Assigned Counsel
Attention: Expert and Support Services
104 North 1st Street
Yakima, WA 98901
FAX: (509) 574-1161

6.4 Form of Request: The general form of request is by a motion and declaration in pleading format. No specific form is required. However, the request and declaration must contain:

- A copy of the charging Information or Citation;
- A copy of the certificate of probable cause;
- A statement as to whether previous requests have been made;
- A detailed explanation to justify the necessity for use of an expert under the circumstances and facts of the case;
- The legal issue or defense to be addressed and how the issue arises in the context of the facts of the case;
- A description of the proposed scope of work, including any travel before trial;
- The credentials of any specialist or expert unless known to DAC;
- The hourly rate for the requested professional's services;
- If different, the requested professional's hourly rate for travel and testimony;
- An estimate of the number of hours needed for the scope of work outlined and the cost; and
- The proposed maximum expenditure.

6.5 Other Forms Required:

Attorneys must include the following completed forms with the request:

- DAC approved "Authorization for Expert/Support Services at Public Expense"

6.6 Intent Regarding Sealing Must Be Stated:

- 6.6.1 Attorneys must expressly state whether requests and authorizations should be sealed or not when filed in the court file by DAC.
- 6.6.2 If sealing is requested, the Attorney must include a separate Motion and Order Sealing (in a form approved by DAC) at the time the request is submitted.
- 6.6.3 At DAC's discretion, any request submitted without an affirmative statement regarding sealing or protecting administrative records will be clarified, treated as an open request, or returned to the attorney without processing.

6.7 Time for Review by DAC: DAC will review Attorneys' requests as soon as possible. However, allow at least seven working days for DAC to approve the request.

6.8 Additional Information: DAC may request additional information by phone or email. Attorneys' timely response is required to allow processing of the request to be completed.

6.9 Direct Referral to Court: The Director may refer a request directly to the court if it involves a case in which a Department attorney is currently representing an active and adverse co-defendant in the same case or in any other circumstance the Director believes appropriate.

6.10 Notification of the Approval or Denial

DAC may approve or deny the request in whole or in part and may modify the Authorization. Modifications will be clearly marked on the Authorization. DAC will transmit a notification and a copy of the Authorization to the Attorney. DAC will not send Attorneys any copy of the request or supporting documents. Attorneys must retain their own copy of those documents.

6.11 Filing Original Pleadings/Sealing.

DAC will file the formal requests by pleading, supporting documents, and its written action with the Clerk of the court. If sealing is requested, DAC will forward the documents to the court with the proposed sealing order submitted by the attorney.

6.12 Attorneys to Provide Copy to Professional: Attorneys are responsible for providing a copy of the Authorization for services, pleadings, and discovery to the approved professional.

6.13 Exceeding Prior Authorization. If it is subsequently anticipated that any services may or will exceed the amount authorized, a second request following these same procedures must be submitted and approved in advance before they are provided.

7.0 REVIEW OF DAC DECISION.

7.1 **Re-submission or additional information:** If a request has been modified or denied, requests can be re-submitted to DAC by hardcopy with additional information for reconsideration. Such second requests must include all the information to be considered by DAC.

7.2 **Review by the Court**

7.2.1 The court may review denials/modifications of requests by DAC through a judge designated by the court for that purposes. Such reviews shall be initiated by written motion and will be on the written record to date unless the court sets the matter for hearing after initial review.

7.2.2 The policies of the Department will be considered in the review and the prior decision of DAC will be given deference as the agency with expertise. If the judge approves the request, the attorney must furnish a copy of a written order to DAC.

7.2.3 The determination of reasonable and appropriate services and whether they are included within the original order or authorization will be made exclusively by DAC. There is no court review of decisions regarding payment for authorized services.

8.0 SPECIAL PROVISIONS - INVESTIGATORS:

8.1 Requests for investigator services may be submitted by e-mail, fax, or in writing to the DAC lead investigator and must include:

- The client name and cause number and charge.
- A copy of the probable cause statement.
- A description and location of the work to be done.
- The reasons such work is required, including the defense issues involved.
- An estimate of the number of hours involved.
- Any anticipated travel required.
- A summary or any prior authorizations and approvals.
- The name of any suggested investigator.

8.2 Investigators will be paid at a rate not to exceed \$55/hour plus mileage, not to exceed the amount authorized in writing.

8.3 Except in extraordinary situations, only investigators licensed in the State of Washington will be used. The attorney must provide DAC with a copy of the investigator's license if not on file. This does not apply to mitigation

specialists in death penalty cases, paralegal staff within a law office, or social workers.

- 8.4 Investigators under contract with DAC for contractor or panel work or on DAC's list of known providers will be given preference. DAC has the final choice of which investigator is assigned.
- 8.5 When requesting investigator services in cases involving anticipated substantial amount of investigation, requests should be made for no more than 50 hours at a maximum per request. For such cases a supplemental request must be made upon or close to exhaustion of the previous request, identifying what investigation services are left to be done and the number of hours needed.
- 8.6 It is the policy of the Department to emphasize an objective "fact" or "field investigator" model towards investigations.
 - 8.6.1 Investigators will not be compensated for services not reasonably within the scope of the written request supporting the Authorization.
 - 8.6.2 Investigators will not be compensated for work that is paralegal or office support work, including delegated case work by the attorney that is not a fact based investigation.
 - 8.6.3 Investigators will not be compensated for delivery of documents to the court, prosecutor, or other parties where an alternative means of delivery is available. Service of subpoenas will be compensated.
 - 8.6.4 Investigators will not be compensated for jail visits to clients unless done for the purpose of taking photographs of injury or body features or unless there is specific information to be obtained to further the investigation.
 - 8.6.5 Investigators will not be compensated to attend *voir dire* or trials with the supervising attorney unless a special request is made and approved in advance.
 - 8.6.6 Investigators will not be compensated for transcription of taped or electronic audio materials.

9.0 SPECIAL PROVISIONS - INTERPRETERS

9.1 Spanish Language Interpreters:

- 9.1.1 Appointed attorneys and appointed investigators may directly contact Spanish language interpreters on the list of interpreters contracted with DAC or Yakima County for such purposes. Such interpreters will bill DAC directly.

- 9.1.2 If available, attorneys are encouraged to use a Spanish language interpreter on staff at DAC.
- 9.2 Requests for use of other interpreters may be made informally to designated staff at DAC by phone, e-mail, or fax. Use is subject to advance approval by DAC staff, who will prepare and issue an Authorization. The authorized interpreter may directly bill DAC.
- 9.3 Interpreters will be paid at the rate authorized in their county or DAC contract or as otherwise specified in the Authorization for services. Mileage for interpreters will be paid for travel outside a 20-mile radius of their primary business location.
- 9.4 Certified transcription of witness statements or interviews in another language is considered an expert service and must be made as a request for expert services under this policy.

10.0 SPECIAL PROVISIONS - COURT REPORTERS / TRANSCRIPTS

- 10.1 Requests for court reporting of witness interviews and transcripts of witness interviews may be made by informal means on short forms provided by DAC for such purposes.
- 10.2 Transcription of recorded witness interviews will generally be paid only if the attorney demonstrates clear necessity for such transcripts under one or more of the following criteria:
 - There is no other realistic alternative for trial preparation and impeachment, such as use of the original recording;
 - The interview is lengthy (over 20 minutes);
 - The witness is key to the case;
 - There are significant discrepancies within the interview, or between it and prior statements or anticipated testimony;
 - The case is confirmed for trial and likely to be called out within three weeks.
- 10.3 Requests for services of a court reporter for purposes of a formal deposition authorized by the court must be made as a request for expert services.
- 10.4 Transcripts of proceedings in the trial court are subject to prior approval and may be authorized only when reasonable and necessary. Requests for such transcripts must be made as a request for expert services.
- 10.5 Transcripts for RALJ appeals from the Yakima County District Court to Yakima County Superior Court will be authorized in the order of appointment of counsel. Requests that exceed that amount are subject to advance approval under this policy as an expert expense.

11.0 SPECIAL PROVISIONS - EXPERTS

- 11.1 **General.** Requests for experts must be made using the formal processes in Section 6 of this Policy and Procedures.
- 11.2 **Expert Cost Limitations:** Expert payments are subject to the following guidelines, which can be exceeded only in extraordinary circumstances. Requests must provide the justification to exceed these limits.
 - 11.2.1 Evaluations regarding competency or insanity: RESERVED.
 - 11.2.2 Psychological or psychiatric evaluations (e.g. diminished capacity, sentencing, fetal alcohol): RESERVED.
 - 11.2.3 Physical evidence forensic evaluations (e.g. chemical testing, blood or DNA testing, trace evidence, pathology, medical, firearms and explosives, crime scene, and other forensic experts): RESERVED.
 - 11.2.4 Other forensic psychological or medical experts (e.g. eyewitness reliability, false confessions, pharmacology, etc.): RESERVED.

12.0 TRAVEL EXPENSES

- 12.1 **Reduced Travel Rates Preferred.** Prior to any request, attorneys are strongly encouraged to discuss with the expert their willingness to accept a reduced rate for travel time. Experts who agree to do so will be preferred. Any agreed reduced travel rate should be noted in the request.
- 12.2 **Travel in State:** Reasonable and necessary expense for travel by vehicle in the State of Washington will be compensated at the hourly rate authorized.
- 12.3 **Travel Out of State or Between States.** Except for travel between the professional's principal business location and Yakima County, travel out of state or between states is subject to advance authorization.
- 12.4 **Travel for Court Proceedings.** Travel for attendance at depositions, pre-trial hearings, and trial requires a separate advance authorization.
- 12.5 **Mileage.** Travel by personal or business vehicle within 20 miles of the expert or professional's primary place of business will be considered as included in the general overhead in the professional's rate of compensation and will not be reimbursed. However, mileage for use of a personal or business vehicle to travel to locations more than 20 miles from the professional's primary business location will be paid at the then current rate allowed by Yakima County travel policy.
- 12.6 **Meals.** Reasonable and necessary cost of meals while traveling will be allowed only when the professional is outside the county of his/her primary place of business or 50 miles from such location, whichever is greater. DAC does not reimburse for interest or late charges. Actual meal costs will be

reimbursed so long as they are less than or equal to the *per diem* allowed by the State of Washington for state employees. Each person must submit their own meal expenses. An itemized meal receipt and proof of payment is required for each individual. Credit card slips or statements without an itemization of the meal are not sufficient.

- 12.7 Lodging.** Reasonable and necessary costs of overnight accommodations are allowed when the professional is more than 50 miles from his/her primary place of business while traveling, subject to the current Yakima County "Travel Expense Policy". NOTE: This policy currently requires the original invoice as well as proof of payment and requires reasonableness in the choice of economical lodging.
- 12.8 Travel by Air or Commercial Carrier.** Travel by air or other commercial carrier will only be reimbursed at a reasonable fare for coach or other economy class. Reimbursement requires the original invoice as well as proof of payment and requires reasonableness in the choice of economical travel. NOTE: Rental car insurance is not reimbursed.
- 12.9 Personal Expenses Not Allowed.** Miscellaneous personal expenses will not be reimbursed, including but not limited to costs for pets, alcoholic beverages, personal entertainment, internet or wireless connection fees, long distance calls, or charges for additional persons.

13.0 OUT OF POCKET EXPENSES

- 13.1 General.** All normal office expenses and general overhead expenses are included in the professional's hourly rate or contracted compensation. Reasonable and necessary out of pocket expenses will be paid upon proof of the cost accrued or expended. All significant or extraordinary expenses must be requested in writing and approved in advance.
- 13.2 Small expenditures authorized.** Reasonable and necessary out of pocket expenses not to exceed \$50 per case for medical reports, public documents and other direct costs will be reimbursed upon proof of the cost accrued or expended. This does not include transcripts or court reporting services. All significant or extraordinary expenses must be requested in writing and approved in advance under this policy. This provision also expressly applies to attorneys under DAC contract or order of appointment.
- 13.3 Subordinate laboratory costs:** If commonly accepted and relied on as the basis of opinion in the professional community of an appointed expert and if it would result in less expense than if the expert did the work himself, an expert may refer detailed and/or subordinate laboratory work or specialty examination to another agency or expert to perform, not to exceed \$250. If reasonable, such work will be allowed without special authorization and will be paid as an out of pocket expense of the expert on proof of expenditure.

However, such expense counts towards the limitation allowed by the Authorization for the expert. This policy does not apply for consultations or any other work which would require independent testimony.

14.0 PAYMENT: Payment of experts and other support services by DAC is as follows:

- 14.1** Requests for payment may be made during the pendency of the case or at the completion of the case (but no later than ninety (90) days from the completion of the case) to the Yakima County Department of Assigned Counsel on forms or in a format approved by the DAC.
- 14.2** *The Department may require interim billing at any time.*
- 14.3** Vendors must submit a summary invoice and a separate detailed statement that adequately describes services and time records but which avoids overly detailed descriptions, specific identifiers, client communications, or other highly sensitive confidential information. The Department may request additional information if needed. Alternatively, the Department may, at its option, return billings to the provider that it considers overly detailed.
- 14.4** At a minimum, billing must include: a numbered invoice, a separate detailed statement of hours kept to the nearest tenth of an hour with a description of services in sufficient detail to allow review, a certification or attestation of the professional, and proof of any claimed out of pocket expenses accrued or expended.
- 14.5** If the vendor submits their billing and invoice to the attorney, the attorney is responsible for submitting the billing, invoice, and a copy of the Authorization for services to DAC.
- 14.6** DAC may refer any billing to the attorney for certification that the services were provided.
- 14.7** DAC will confirm that the request conforms to this policy and/or any Authorization and pay on the approved expenses.

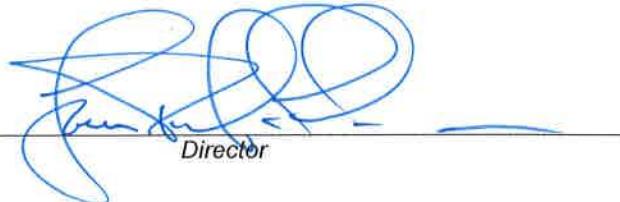
15.0 INSUFFICIENT FUNDS AUTHORIZED

- 15.1** The Director may allow additional compensation when it is determined that further compensation is reasonable and necessary under the circumstances of the case.

Adopted:

11-17-15

Date



A handwritten signature in blue ink, appearing to read "Brenda" followed by a date, is placed over a blue ink signature. Below the blue ink signature, the word "Director" is printed in a small, sans-serif font.