



T H E S P A N G E N B E R G G R O U P

Robert L. Spangenberg  
President  
Patricia A. Smith  
Vice President  
William J. Rose  
Senior Associate  
Amy Salomon  
Senior Associate

Laura E. Walker  
Research Assistant  
Robert M. Weidman  
Research Assistant  
of Counsel  
Prof. Richard J. Wilson  
R. Susan Dillard

APPELLATE INDIGENT DEFENSE SYSTEM REVIEW

December 22, 1989

1-20-91  
MFI

TO:

DEFENSE TASK FORCE  
THE ADMINISTRATOR  
COURTS OF WASHINGTON

Prepared by:

THE SPANGENBERG GROUP, INC.  
1001 Watertown Street  
West Newton, MA 02165  
(617)969-3820

Robert L. Spangenberg  
William J. Rose  
Judith T. Menton

131847

Copyright © 1989 State of Washington  
Office of the Administrator for the Courts  
All Rights Reserved

131847

U.S. Department of Justice  
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by

Office of the Administrator  
for the Courts of Washington

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

TABLE OF CONTENTS

I.	Introduction . . . . .	1
	Funding of Appellate Systems . . . . .	5
II.	Summary of the Appellate Indigent Defense System in Washington . . . . .	7
III.	Appellate System in Five Comparable States . . . . .	20
	California . . . . .	21
	Colorado . . . . .	27
	Illinois . . . . .	29
	Minnesota . . . . .	37
	Michigan . . . . .	38
IV.	Recommendations for Alternative Appellate Defense Programs in Washington . . . . .	46
	Recommendation 1 . . . . .	48
	Recommendation 2 . . . . .	49
V.	Cost Projections for Recommended Alternative Systems	51
	Cost of Recommendation 1 . . . . .	51
	Cost of Recommendation 2 . . . . .	57
VI.	Minimum Qualifications For Assigned Counsel . . . . .	62
VII.	Conclusion . . . . .	64

## WASHINGTON APPELLATE REPORT

### I. Introduction

The Indigent Defense Task Force in Washington was mandated to conduct a series of studies in accordance with Chapter 409, Laws of 1989. Among the responsibilities was to "examine the current methods of delivering appellate indigent defense services in the state" and "to make recommendations to the 1990 legislature regarding alternative methods of delivering appellate services."

In an effort to fulfill this responsibility, the Task Force entered into a contract with The Spangenberg Group of West Newton, Massachusetts. This organization had previously conducted a study for the Task Force in 1988 of the trial court system for indigent defense in Washington, entitled, Indigent Defense Services in Washington.

There were three major tasks under the current contract. The first was to examine current cost-recovery methods for defendants in the appellate process and "to determine the feasibility of implementing an indigent defense cost-recovery program in order to recover state expenses for the indigent appeals program." On November 20, 1989, The Spangenberg Group presented to the Task Force the report, "Indigent Defense Delivery System Study: Assessment of Feasibility of Appellate Cost Recovery."

The other two major tasks under the contract with the Task Force were first to examine in detail the current indigent defense system at the appellate level in Washington and to compare it with at least four other comparable states and second to recommend at least two alternative models for providing appellate indigent defense services in Washington. This memorandum is intended to provide necessary information to the Task Force on these two issues. The states selected by the Task Force for comparison are California, Colorado, Illinois, Michigan and Minnesota.

The right to counsel on first appeal was mandated by the United States Supreme Court as a matter of right in Douglas v. California 372 US 353 (1963). The type of system to be employed providing representation to indigents on appeal and the method of funding, however, has been left for the states to decide.

There are three basic types of systems used by the states to provide indigent representation at the appellate level: (1) an ad hoc assignment system of court-appointed private counsel; (2) an appellate unit of a state public defender organization (unified public defender); or (3) a separate state appellate defender organization.

Some states use a combination of these basic models. Such combinations may also include a mix of the unified or appellate public defender models, typically county-wide in scope or covering a judicial district.

Counsel on direct appeal is provided primarily by the ad hoc method of appointing private counsel in 18 states. The method of appointment varies. In some states, all appellate level appointments are made by the state supreme court or intermediate appellate court. In other states, trial court judges make the appointment on appeal. The method of compensation varies also, although in these states the counties are typically responsible for payment. In some states compensation may be specifically set forth by statute or court rule. In other states, individual judges have broad discretion to set fees.

Seventeen states have established a unified statewide public defender system which includes within it an appellate division. The actual operation and range of case responsibility of each appellate division varies. For example, in some states, the appellate division provides representation in all appellate cases on direct appeal, except in conflict cases. In other states, the appellate division handles a certain percentage of the cases focusing in some instances on the most costly or complex cases, and the remainder are referred to private court-appointed counsel.

There is also wide variation in the percentage of cases referred to the private bar among these states.

Twelve states have established a separate state appellate defender organization, funded exclusively through state funds. A review of the statutory authority for these programs also shows a wide variety of operations. In some states, a board or commission assists the State Appellate Defender and makes general policy for the organization. Typically, these programs are characterized by the fact that as in Washington the trial-level system is funded almost entirely by the counties. There also is wide variation in the percentage and type of appellate cases handled by these organizations.

There are also several other methods for providing appellate defender services, some involving mixes or variants of the methods described above. Florida, for example, has five regional appellate defender offices providing defense services at the first appeal. There is also a state appellate defender office which provides post-conviction appellate representation exclusively in death penalty cases.

In Ohio, a state public defender program is charged primarily with designing standards for county-wide indigent defense programs at the trial level. However, the state public defender also has an appellate office that handles a large number of appeals.

In Nevada, there are two large county public defender programs, in Washoe County (Reno) and Clark County (Las Vegas) that handle most of the appeals. Appellate representation in the remainder of the state is provided by the appellate division of a statewide public defender system.

While methods of delivering appellate defense services may vary, a trend has developed over the last several years away from the ad hoc method of providing representation towards more organized, comprehensive appellate defender programs.

The following table summarizes the organization of appellate public defender systems in each state, and where a statewide

programs exists, designates the agency in government where the system is placed.

ORGANIZATION OF STATE APPELLATE SYSTEMS

<u>State</u>	<u>Ad Hoc</u>	<u>Other</u>	<u>State P.D. System</u>	<u>Appell. P.D. System</u>	<u>Agency of Government</u>
Alabama	X				
Alaska			X		Executive
Arizona	X				
Arkansas	X				
California				X	Executive
Colorado			X		Judicial
Connecticut			X		Independent
Delaware			X		Executive
Florida		X			
Georgia	X				
Hawaii			X		Executive
Idaho	X				
Illinois				X	Independent
Indiana				X	Judicial
Iowa				X	Executive
Kansas				X	Executive
Kentucky			X		Independent
Louisiana	X				
Maine	X				
Maryland			X		Executive
Massachusetts			X		Independent
Michigan				X	Judicial
Minnesota			X		Independent
Mississippi	X				
Missouri			X		Independent
Montana	X				
Nebraska	X				
Nevada		X			
New Hampshire			X		Independent
New Jersey			X		Executive
New Mexico			X		Executive
New York	X				
North Carolina				X	Judicial
North Dakota	X				
Ohio		X			
Oklahoma				X	Independent
Oregon				X	Judicial
Pennsylvania	X				
Rhode Island			X		Executive
South Carolina				X	Independent

Table continued

<u>State</u>	<u>Ad Hoc</u>	<u>Other</u>	<u>State P.D. System</u>	<u>Appell. P.D. System</u>	<u>Agency of Government</u>
South Dakota	X				
Tennessee	X				
Texas	X				
Utah	X				
Vermont			X		Executive
Virginia	X				
Washington		X		X	Independent
West Virginia			X		Independent
Wisconsin			X		Independent
Wyoming			X		Executive
<b>TOTAL</b>	<b>18</b>	<b>4</b>	<b>18</b>	<b>11</b>	

The above table shows that four of the 11 appellate public defender organizations are housed in the judicial branch, four in the executive, and five are independent agencies. Of the 18 statewide public defender systems, one is in the judicial branch, nine in the executive branch, and eight are independent agencies.

Funding of Appellate Systems

There has also been a trend over the last several years to fund appellate defense services at the state rather than the local level, although in a significant number of states, funding for appellate services is still provided by the county in which the appeal was taken. On page 90 of our 1988 report, Indigent Defense Services in Washington, we provided a table detailing the source of appellate funding in each state. That table is reproduced below.



SOURCE OF FUNDING FOR APPOINTED COUNSEL IN APPELLATE CASES

<u>State</u>	<u>State Funds</u>	<u>County Funds</u>	<u>State/ County Funds</u>
Alabama	X		
Alaska	X		
Arizona		X	
Arkansas		X	
California	X		
Colorado	X		
Connecticut	X		
Delaware	X		
Florida	X		
Georgia		X	
Hawaii	X		
Idaho		X	
Illinois	X		
Indiana			X
Iowa	X		
Kansas	X		
Kentucky			X
Louisiana		X	
Maine	X		
Maryland	X		
Massachusetts	X		
Michigan			X
Minnesota	X		
Mississippi		X	
Missouri	X		
Montana		X	
Nebraska		X	
Nevada			X
New Hampshire	X		
New Jersey	X		
New Mexico	X		
New York		X	
North Carolina	X		
North Dakota		X	
Ohio			X
Oklahoma			X
Oregon	X		
Pennsylvania		X	
Rhode Island	X		
South Carolina	X		
South Dakota		X	
Tennessee		X	
Texas		X	
Utah		X	
Vermont	X		
Virginia	X		
Washington	X		
West Virginia	X		

Table continued

<u>State</u>	<u>State Funds</u>	<u>County Funds</u>	<u>State/ County Funds</u>
Wisconsin	X		
Wyoming	X		
TOTALS	<u>29</u>	<u>15</u>	<u>6</u>

This table shows that the state provides funds exclusively in appellate cases in 29 states. The counties provide total funding for appeals in 15 states. In six states, the cost of appeals is shared by the state and the counties. In Indiana, the state pays for post-conviction representation and the counties for direct appeals. In Nevada, the state pays for appeals undertaken by the Nevada State Public Defender and the counties for cases on appeal in Reno and Las Vegas. And in Oklahoma, the state pays for appeals undertaken by the Oklahoma Appellate Public Defender Program and the counties pay for appeals brought by private court-appointed counsel.

In addition to examining the appellate systems in the five states selected by the Indigent Defense Task Force, as noted earlier: California, Colorado, Illinois, Michigan and Minnesota, we also conducted an in-depth review of the system for providing appellate defense services to indigents in Washington.

The next section of this memorandum presents the results of our inquiries in Washington and Section III on the five other states.

II. Summary of the Appellate Indigent Defense System in Washington

In our 1988 report, Indigent Defense Services in Washington, we outlined the current system for providing indigent defense services at the appellate level in Washington and provided estimates of the aggregate cost and caseloads. This section will review the information reported previously and present the results

of our updated inquiries pursuant to our current contract.

Indigent representation at the appellate level in Washington is provided primarily by a non-profit appellate defender organization, the Washington Appellate Defender Association (WADA) in Division I, and by private counsel appointed on a case by case basis at the trial court level in Divisions II and III. Appellate representation is also provided on occasion by local public defender attorneys who have represented a defendant at trial and continue with the appeal.

The highest court in the state of Washington is the Supreme Court. The Supreme Court has original jurisdiction in matters of habeas corpus, quo warranto and mandamus directed to state officials, and the issuance of writs. The Supreme Court has authority to review decisions of the Court of Appeals and the Superior Court. Direct appeal may be made from the Superior Court when: such a review is authorized by statute; an issue of constitutionality is involved; conflicting appellate decisions are at issue; questions of public importance are raised. There is a mandatory review required when the death penalty has been imposed. The Court has discretionary authority to review interlocutory orders of the Superior Court under similar conditions as direct appeals. The Supreme Court also has discretion to review matters brought originally before the Court of Appeals. These include matters denied review by the Court of Appeals, interlocutory decisions and personal restraint petitions filed as a discretionary review to exhaust all state remedies. In addition to its case-related responsibilities, the Supreme Court also has general administrative responsibility for the entire court system, accounting for approximately one-third of the court's workload. There are nine Supreme Court justices, each elected at large in a general nonpartisan election for a term of six years.

The Court of Appeals is an intermediate appellate court with three divisions located in Seattle, Spokane and Tacoma. It has no original jurisdiction. It does have exclusive appellate

jurisdiction in all criminal cases appealed from the Superior Court except where the sentence is death. There are 16 justices in the Court of Appeals elected within their respective divisions in the same manner and for the same term as the Supreme Court.

The most recent statistics available from the Supreme Court for 1988, show the filing of 284 criminal petitions for review and 23 accepted and 14 direct appeals. Of this number, WADA reports providing representation in 16 cases. According to the office of the Clerk of the Supreme Court, all but a handful of the remaining cases were represented by court-appointed counsel.

The Court of Appeals in Washington is divided into three divisions with 16 judges. Division I sitting in Seattle has eight judges with 53 support staff; Division II in Tacoma has four judges and 23 support staff; and Division III in Spokane has four judges and 26 support staff. Approximately 50% of the support staff are law clerks or staff attorneys.

The following table, reported in the 1988 Annual Report of the Courts of Washington, details the jurisdiction by county plus the number of judges of each of the three divisions.

DIVISION I

District 1	King County: six judges
District 2	Snohomish County: one judge
District 3	Island, San Juan, Skagit & Whatcom Counties: one judge

DIVISION II

District 1	Pierce County: two judges
District 2	Clallam, Grays Harbor, Jefferson, Kitsap, Mason & Thurston Counties: one judge
District 3	Clark, Cowitz, Lewis, Pacific, Skamania & Wahkiakum Counties: one judge

DIVISION III

- District 1      Ferry, Lincoln, Okanogan, Pend Oreille, Spokane & Stevens Counties: two judges
- District 2      Adams, Asotin, Benton, Columbia, Franklin, Garfield, Grant, Walla Walla & Whitman Counties: one judge
- District 3      Chelan, Douglas, Kittitas, Klickitat & Yakima Counties: one judge

The primary source of indigent representation for criminal appeals in Division I is WADA. WADA is a non-profit corporation which serves the Supreme Court and Division I of the Court of Appeals under contract with the Supreme Court. It has a 12-member board of directors appointed by a variety of public entities including the Supreme Court, the Court of Appeals, Division I, the state bar association, county bar associations in Division I and the University of Washington Law School. The program director of WADA, appointed by the board, also appoints one board member. WADA also accepts appointment on direct appeal to the Supreme Court in cases arising in the other divisions when, on occasion, they arrive in the Supreme Court without counsel.

WADA has 14 staff attorneys plus the program's director. The salary range for a staff attorney is from \$22,000 for an entry level position to \$33,400 for a senior attorney. The current range of staff experience in appellate work ranges up to eight years. According to the program director, the average level of appellate experience is from three to four years.

WADA is funded on a per case basis according to a specific schedule of "Billable Services" included in its contract with the Office of the Administrator for the Courts on behalf of the Supreme Court. The following table sets out the basic fee schedule as reflected in WADA's current contract. It includes rates for work invoiced beginning July 1, 1989 and increased rates which go into effect after June 30, 1990.

<u>Billable Services</u>	<u>Invoice Date beginning July 1, 1989 Fee</u>	<u>Invoice Date After June 30, 1990 Fee</u>
Appointment and initial consultation	\$882.00	\$923.00
Case submitted to Court of Appeals for decision	\$323.00	\$338.00
All work completed on case at Court of Appeals level	\$215.00	\$225.00
Review of case granted by the Supreme Court	\$882.00	\$923.00
Review limited by Notice of Appeal [total fee per case]	\$882.00	\$923.00
Review limited by Juvenile Manifest Injustice Disposition [total fee per case]	\$882.00	\$923.00
Review of sentence under the 1981 Sentencing Reform Act [total fee per case]	\$882.00	\$923.00
Aggravated first degree murder case base fee on assignment	\$2,839.00	\$2,970.00

The WADA contract also enables submission of invoices to the Supreme Court for additional payment on an hourly basis in cases involving more than 80 hours of attorney time. The contract stipulates that payment is at the sole discretion of the Supreme Court Clerk and shall be paid at the "prevailing rate for such services." The Clerk of the Supreme Court is currently applying a rate of \$50 per hour as the compensation standard. In the 1987-89 biennium, WADA submitted an "over-80 hours" voucher in 12 cases totalling \$19,250 in billings.

The funding method for the WADA program is unique among all appellate public defender programs that we are aware of around the country. We were told that the Washington Constitution presents

problems in terms of denying payment in some instances until the work is performed. WADA submits a monthly invoice to the Supreme Court seeking reimbursement for the individual cases assigned or work performed during the previous month.

This process makes workload and staff planning a major problem for WADA. They are subject to changes in appellate assignments from month to month and are unable to plan in a way that would be available if they received an annual budget (like all other appellate public defenders) based upon an agreed upon projected caseload.

WADA's caseload consists primarily of criminal appeals although they do handle a range of non-criminal appeals including juvenile offender cases, juvenile dependency cases, mental health commitment, probation revocation and contempt cases. In FY 1988-89, WADA handled 666 cases. Approximately 75% of these were regular felony appeals. The office also handled six aggravated murder cases in 1988 and four to date in 1989. The FY 88-89 WADA caseload involved 568 individual filings. Of total filings, 357 or 62.9% were opening briefs on the merits, 75 or 13.2% were "Anders" briefs and 77 or 13.6% were voluntary withdrawals. WADA has no formal written workload or weighted caseload standards. The director who assigns cases indicated, however, that the objective was 36 to 40 cases per attorney per year, although currently she estimated that assignments are averaging 45-50 cases per attorney per year (47.57 according to the above statistics). The director also handles a full caseload.

The caseload includes a variety of cases including aggravated murder cases, adult felonies, adult sentencing cases, juvenile felonies, juvenile manifest injustice cases, motions for discretionary review and dependency/termination cases.

In addition to the director and the 14 staff attorneys, WADA also employs a bookkeeper/administrator, a full-time word processor, a part-time word processor and two clerks.

The Supreme Court has provided several computer stations, a laser printer and a network system on loan. They have agreed, we were told, to provide additional computers in the near future. WADA has also developed a brief bank which is also made available to local trial public defenders.

It is estimated that WADA provides representation in 85-90% of the Division I criminal appeals, but is unavailable in 10-15% of the cases due to conflict of interest or for other reasons. In these cases, representation is provided by private counsel or, occasionally, by a public defender office continuing to represent a trial client on appeal.

Specific data showing the number and breakdown of non-WADA cases in Division I was not available. This number can be estimated, however, by applying a 90% indigency rate, which is consistent with national data and information provided by several individuals in Washington, to the 717 criminal appeals reported by Division I which yields a figure of 645 estimated indigent appeals; and multiplying this number by 10-15%. This yields an estimated non-WADA caseload in Division I of between 65-97 cases. This is consistent with the figure reported in our earlier report Indigent Defense Services in Washington where we estimated the non-WADA caseload in Division I during 1987 to be 65 cases. WADA's overall caseload increased from a reported 517 in 1987 to 666 in 1988, an increase of 29%. A similar increase in the non-WADA caseload using our 1987 estimate of 65 cases as a baseline would put that figure for 1988 at 84 cases or 12.6% of the WADA caseload.

Indigent appellate representation in Divisions II and III is provided by private assigned counsel appointed by the trial court and compensated by the Supreme Court pursuant to a schedule of fees established by order of the Court. The schedule, recently revised upward effective November 30, 1989, authorizes payment to private counsel on a flat fee basis for four categories of appellate cases. The case categories and authorized payment are as follows:



## Appointed Attorney's Fee Schedule

### Category A:

For the following categories of cases, the fee is \$1,420.

1. Direct Appeals
2. Motion for Discretionary review granted in the Court of Appeals
3. Civil in forma pauperis motions granted by the Supreme Court.
4. Personal Restraint Petitions only where an attorney is appointed.
5. Notice of Appeal and direct review concluding with an opinion or a decision pursuant to a motion on the merits.
6. Motion for Discretionary Review granted in the Supreme Court.

### Category B:

For the following categories of cases, the fee is \$882.00.

1. Petitions for review granted.
2. Appeals from probation revocation hearings.
3. Appeals from guilty pleas
4. Sentencing appeals
5. Accelerated review of a disposition in a juvenile offense matter.
6. Motions for Discretionary Review denied in the Court of Appeals.
7. Motions for Discretionary Review denied in the Supreme Court.

### Category C:

For the following categories of appellate cases, the fee is \$946.00.

1. Notice of Appeal and filing an Anders brief concluding in a ruling/order of dismissal.

### Category D:

For the representation in a review of an aggravated first degree murder case, the base fee is \$2,839.

In addition to these flat fees, additional compensation at the discretion of the Clerk of the Supreme Court, is also authorized on an hourly basis for attorney time in excess of 80 hours in accordance with prevailing standards of payment. In extraordinary cases, an appointed attorney may petition the Supreme Court for additional compensation reflecting unusual work required beyond basic services. An attorney seeking extraordinary compensation must submit an affidavit and supporting materials necessary to a review of the request (see RAP 15.4 and 15.5).

The schedule lists the following factors as among those which may entitle an attorney to extraordinary compensation:

1. Death penalty cases
2. Complex or unusual legal issues requiring unusual research or costs
3. Issues of first impression under the law of Washington without stare decisis requiring unusual research
4. Complex and lengthy trial record relevant to issues raised on appeal
5. Supplemental briefing requested or authorized by the Supreme Court.
6. Cases creating an unusual financial hardship upon the attorney.
7. A certification of extraordinary status by the Court hearing the case.

In all instances where an attorney seeks compensation for court-appointed appellate representation, the Supreme Court requires the attorney to submit a standard invoice designed by the Supreme Court documenting the number of hours spent on various tasks and including an itemized list of out-of-pocket expenses. The Supreme Court has explained the purpose of the invoice as follows:

The Invoice of Counsel is designed to collect statistics concerning the hours usually spent on each aspect of an appeal. This information is being collected in order to provide the Supreme Court with the documentation necessary to seek future adequate funding for appointed attorneys. The statistics may also be used to refine the fee schedule after sufficient information is collected.

Neither the Courts of Appeal in Divisions II, III or the Supreme Court, which approves all bills for compensation, maintain aggregate records of the number of indigent appointments assigned to private counsel on appeal in the state of Washington. Statistics concerning the number of private counsel appointed on appeal are not maintained at the trial court level either in Washington.

Data was also unavailable concerning 1) the number of "over-80 hour" or "extraordinary" payment requests made by court-appointed counsel; 2) the aggregate amount paid in cases where "over-80 hour" and "extraordinary" payment was requested; and 3) the average amount requested in these two types of cases.

One of our additional problems in attempting to gather relevant data for this study was the fact that there is no program administrator for the assigned counsel system in Division II and III. We were able, however, to gather aggregate data from the Office of the Administrator for the Courts concerning total statewide expenditures on indigent defense at the appellate level in Washington. The following table shows the total cost broken down in four categories of expense for indigent appellate defense in the Supreme Court and in each of the three divisions of the Court of Appeals for the 1987-1989 biennium. The four categories are 1) court reporter, which includes the cost of records and transcripts; 2) clerks papers, which include miscellaneous expenditures of court clerks relating to appellate papers and documents, 3) private attorneys, which includes both fees and expenses of private assigned counsel and 4) WADA expenditures.

<u>Cost</u>	<u>Supreme Court</u>	<u>Division I</u>	<u>Division II</u>	<u>Division III</u>
Court Reporter	\$27,096	\$590,239	\$292,346	\$185,810
Clerk	57	38,512	13,048	10,727
Private Attorneys	276,789	113,209	500,917	324,537
WADA	-	1,463,020*	-	-
TOTAL	\$303,942	\$2,204,980	\$806,311	\$521,074

\*Includes cases in Supreme Court also.

Thus, the aggregate expenditure on indigent appeals for the four courts during the period was \$3,836,307. For the 1989-1991 biennium, a total of \$5,013,000 has been budgeted for the above categories statewide. This 30% increase, we were told, is primarily due to a projected increase of indigent cases on appeal in the next biennium. Broken down by court, the amounts budgeted are as follows:

<u>Court</u>	<u>Indigent Appeals Total Amount Budgeted 1989-91</u>
Supreme Court	\$451,170
Division I	2,857,410
Division II	1,052,730
Division III	<u>651,690</u>
	\$5,013,000

A breakdown of these expenditures into each of the four categories was not available. However, it should be noted that the above figure for Division I includes all WADA expenditures in the Appeals Court and the Supreme Court.

As we noted earlier here, and also in our 1988 report, data concerning the number of court appointments on appeal is not maintained in Washington. We are able to estimate the number of cases in which counsel is assigned in Divisions II and III as we did for Division I earlier, however, by applying an indigency rate

of 90% to the reported number of criminal appeals in each division. It should be noted that during our research, we talked with the clerk in each division. Each estimated an indigency rate of 90-95%. The following table reveals the estimated number of assignments to private counsel for each division of the Court of Appeals in 1988.

	<u>Total Criminal Appeals</u>	<u>Estimated Number Indigent Appeals</u>
Division I	717	645
Division II	338	304
Division III	<u>226</u>	<u>203</u>
TOTAL	1,281	1,152

In Division I, as we noted earlier, WADA is the primary source of indigent representation with an estimated 10-15% of the indigent caseload being handled by private counsel or public defenders on appeal. It should be emphasized also that the above figures apply only to criminal appeals and do not include civil cases in which private counsel may have been assigned on appeal. This data was not available nor were we able to calculate a figure representing the number of cases in which counsel was assigned from the total civil appeals reported by the appellate courts of Washington.

We were asked under the current contract to provide estimates of the cost per case for indigent appellate representation in the state of Washington. Unfortunately we are unable to comply with this request due to the lack of reliable data. The information reported above in this section of the report proved to be the best that we could obtain, but does not permit us to provide a reliable estimate of the cost per case.

Finally, we provide some information on the representation on appeal provided by programs that are primarily trial level public defender programs. In Division I in King County, the Defender Association (TDA) and Associated Counsel for the Accused (ACA) maintain misdemeanor appeals units, which are primarily responsible

for taking misdemeanor appeals from the District Courts to the Superior Court. As of January 1, 1990, Society for Representation of Accused Persons (SCRAP) will also have a misdemeanor appeals unit. Occasionally, we were told, a misdemeanor appeal will go directly from the District Court to the Supreme Court or will be appealed from the Superior Court to the Court of Appeals. In these cases, the public defender will typically remain with the case at the appellate level. ACA estimates this occurs five to six times per year. TDA estimates that eight misdemeanor cases per year are handled in the Court of Appeals and Supreme Court.

Also in each program, if an attorney expresses a strong interest in an issue presented by a felony appeal, he or she will be allowed to take the case on appeal. This, we were told, happens only on rare occasion estimated by the three programs at from "two to three times a year" to "once every few years."

In Spokane County, the policy of the Spokane Public Defender is to encourage trial attorneys to remain with cases on appeal if they wish to. The decision is wholly at the discretion of trial attorney. In such cases, the Public Defender is paid pursuant to the compensation schedule for private counsel discussed earlier. In fiscal years 1988 and 1989, no cases were taken on appeal by public defender attorneys in Spokane. In FY 1987, \$2,000 in fees were earned for an estimated two to three appeals.

In contrast, the Whatcom County Public Defender discourages his attorneys from taking cases up on appeal because he believes the extra work involved places an undue burden on an already overloaded staff. On rare occasion, the Public Defender reported to us, an attorney will be allowed to take an appeal if a single issue of particular interest to the attorney is involved. We were told that the program is involved "in one appeal every year or so at most."

In conclusion, it can be reported that public defenders occasionally represent indigent defendants on appeal. The number of cases in which public defender attorneys appear in appellate

level courts appear to be comparatively small, however, and not a significant component of the statewide scheme for providing appellate representation to the indigent.

### III. Appellate Systems in Five Comparable States

The following section provides information on appellate representation in the following five states selected by the Indigent Defense Task Force: California, Colorado, Illinois, Michigan and Minnesota. Although we offer this information for comparison purposes, as required by our contract, it is important to note that a comparison of detailed cost, caseload or workload comparisons with Washington is complicated by the significant differences that exist in appellate procedure, case types handled on appeal, and the percentage of cases represented from one state to another. As a result, the amount of work and the nature of specific tasks involved in handling appellate cases varies substantially and makes comparison exceedingly difficult.

The summary information we present below is most useful in our opinion, however, in providing an overview of the types of appellate systems that are employed elsewhere which may be adaptable to or suitable for the state of Washington.

Before presenting the results of our inquiries, a note is in order concerning standards of indigency.

Our contract requires us to document proposals for alternative standards and guidelines for determination of eligibility for receiving appellate indigent defense services. In each jurisdiction we surveyed, appointment of counsel on appeal was granted in virtually all cases upon the request of the defendant. We found no evidence, as a practical matter, of rigorous examination of a defendant's financial condition on appeal. In each state, when examination - usually cursory: e.g., "Do you have a job? Can you afford a lawyer?" - was conducted, the same standards used to determine eligibility for counsel at trial were

used on appeal. In our previous report to this Task Force on appellate level cost recovery, we indicated that the likelihood of a defendant having financial resources to retain an attorney on appeal is less than at trial due to a number of circumstances, including the employability of convicted defendants and the fact that a high percentage of appeals involve defendants who are incarcerated. Accordingly, we are of the opinion that standards of indigency on appeal in Washington ought to be no more stringent than those used to determine indigency at trial. Further, we recommend that the standards of indigency promulgated by this Task Force to determine eligibility for counsel at trial be applied to cases on appeal. As a practical matter in Washington, where appellate counsel is appointed by the trial judge, a finding of indigency has already been made with respect to trial level appointment of counsel. Thus, the determination of eligibility for counsel on appeal will involve only a determination whether the financial circumstances of the defendant have improved sufficiently. In cases where a defendant who retained private counsel at trial requests a court-appointed attorney on appeal, we find no compelling reason for applying a different standard than is used at the trial level.

### California

There are six appellate districts in California and indigent representation in the appellate courts are provided in several ways.

In January 1976, California established by statute (Government Code Section 15400-15425) a state-funded, statewide appellate defender office, called the Office of the State Public Defender (OSPD). The OSPD handles indigent appeals statewide from its three offices in Sacramento, San Francisco and Los Angeles. OSPD's mandate is to focus on the more serious and complex appellate cases, including death penalty cases. In 1987-1988, the majority



of OSPD cases (53.9%) were serious felonies carrying a sentence of 15 years to life.

For FY 1988-89, OSPD had 50 full-time attorneys. Of this number, 45 attorneys carried a full caseload. The salary range for OSPD attorneys is \$30,684 for an entry level position to a high of \$78,288. The average level of attorney experience is seven years. In FY 88-89, OSPD accepted 425 new cases, virtually all serious felony appeals. There were 43 active death penalty cases during that time and 72% of the attorney staff handled at least one capital case. The OSPD is currently applying weighted workload measures, designed by The Spangenberg Group under contract with OSPD, that give a death penalty case nine times the weight of a regular appellate brief for the purposes of measuring an attorney's annual workload. The current OSPD workload standard requires an attorney to handle 26 work units per year; provided, however, that attorneys with less than one year of experience should handle 22 work units per year. The following table shows the complete work unit schedule of the OSPD.

OSPD WORK UNITS

<u>Activity</u>	<u>Work Units</u>
(1) <u>Court of Appeal</u>	
(a) Appellant's Brief (Record up to 1,000 pages)	1.50
(b) Appellant's Brief (Guilty plea/ juvenile/or uncomplicated record under 300 pages)	.75
(c) Respondent's Brief	1.00
(d) Wende Brief	1.00
(e) Abandonment	1.00
(f) LWOP Brief (Record up to 1,000 pages)	2.00
(g) Supplemental Brief	.25
(h) Oral Argument	.25
(i) Rehearing Petition	.25

(j)	Reply Brief - LWOP	.50
(k)	Reply Brief - Other	.25
(l)	Each additional 1,000 pages of record for (a) - (f)	.25
(2)	<u>California Supreme Court</u>	
(a)	Petition for Review (per Supreme Court guidelines)	.25
(b)	Response to petition for review 2.(a)	.25
(c)	Brief - Non-capital/Appellant's/Appellee's	1.00
(d)	Appellant's Brief - Capital Case ([per attorney] up to 7,500 pages)	9.00
(e)	Reply Brief - Non-Capital	.50
(f)	Reply Brief - Capital Case	1.00
(g)	Supplemental Brief - Non-Capital	.25
(h)	Supplemental Brief - Capital Case	.50
(i)	Oral Argument - Non-Capital	.25
(j)	Oral Argument - Capital Case	.50
(k)	Rehearing Petition - Non-Capital	.25
(l)	Rehearing Petition - Capital Case	.50
(m)	Each additional 1,000 pages of record for 2.(c)	.25
(n)	Each additional 1,000 pages of record for 2.(d)	.50
(3)	<u>United States Supreme Court</u> <sup>1</sup>	
(a)	Petitions for Certiorari - Non-capital	.50
(b)	Petitions for Certiorari - Capital	.75
(c)	Response to Petition for Cert. - Non-capital 2.(a)	.25
(d)	Response to Petition for Cert. - Capital 2.(b)	.50

---

<sup>1</sup>Weighted work units for USSC assume representation on the case is by the same attorney as in the lower court. Assignment of a new attorney would require readjustment of the weights.

(e)	Appellant's Brief - Non-capital	1.00
(f)	Appellant's Brief - Capital	2.00
(g)	Reply Brief - Non-Capital	.50
(h)	Replay Brief - Capital	1.00
(i)	Oral Argument - Non-Capital	.25
(j)	Oral Argument - Capital	.50
(k)	Rehearing Petition - Non-Capital	.25
(l)	Rehearing Petition - Capital	.50
(4)	<u>Other Case Activity</u>	
(a)	Bond Motion	.25
(b)	Bond Hearing	.25
(c)	Habeas Writ - Non-Capital - State	.75
(d)	Habeas writ - Non-Capital - Federal	.75
(e)	Habeas Writ - Capital - State	6.00
(f)	Habeas Writ - Capital - Federal	6.00
(g)	Amicus Brief	.50
(h)	Client Visit (per day)	.10
(i)	Duty Day	.10
(j)	Motion to Augment	.10
(k)	Evidentiary Hearing	1.00
(5)	<u>Supervisory and Coordinating Duties</u>	<u>Work Units Per Year</u>
(a)	Office Supervision (Chief Assistant)	17.0 - 18.0
(b)	Death Penalty Coordinator (Statewide)	17.0 - 18.0
(c)	Death Penalty Supervisor (Offices)	8.0 - 9.0
(d)	Amicus Coordinator	2.0
(e)	Training Coordinator	2.0
(f)	Student Coordinator	2.0
(g)	Recruitment Coordinator	2.0

Work Units Per  
Attorney  
Supervised

- |   |           |
|---|-----------|
| (h) Team Leading - Of each experienced attorney | 1.0 - 2.0 |
| (i) Team Leading - Of each new attorney         | 4.0 - 5.0 |

A second statewide program providing appellate representation is the California Appellate Project (CAP). CAP is a non-profit corporation with offices in San Francisco which provides representation in the California Supreme Court for cases not handled by OSPD.

CAP performs several principal functions: First, it administers a list of private counsel from which justices in the Supreme Court make appointments. The list includes 93 attorneys who accept capital cases and 69 attorneys for non-capital cases. There are currently no written standards for attorney qualification although CAP reviews each attorney's history of experience and writing sample in evaluating whether they should be eligible to accept cases. They are currently working on developing written standards.

CAP maintains a staff of 12 attorneys, excluding the program director, who provide back-up services to attorneys accepting assignments in the Supreme Court. These services include research assistance, record review, draft pleading review, and consultation services generally. CAP also maintains an appellate brief bank. In FY 1988-89, CAP recommended attorneys for appointment in 24 capital appeals in the Supreme Court and provided back-up assistance in 129 other direct appeals. CAP also handles post-affirmance cases, called post-conviction cases in other appellate jurisdictions. In FY 88-89, CAP recommended attorneys for appointment in 12 new post-affirmance state or federal habeas

cases, and provided back-up assistance in 53 other post-affirmance cases.

CAP's administrative functions also include receiving and reviewing attorney bills for appellate services and recommending to the court the amount to be paid. Attorney time is billed at \$75/hour for death penalty cases and \$65/hour for all other cases. When the court enters the compensation award, it is forwarded to the Administrative Office of the Courts (AOC) who orders payment by the State Comptroller.

Finally, CAP also provides direct representation in death penalty cases. There are currently seven capital cases being handled by CAP staff attorneys.

In addition to these two statewide programs, the OSPD and CAP, there are also five non-profit District Appellate Projects. They serve the Courts of Appeal in California's six appellate districts in the same way CAP serves the Supreme Court. Each of the five projects maintains a staff of attorneys which ranges in size from approximately 9-21. One of the five projects serves two districts, the third district including Sacramento and the fifth district including Fresno. Also, the District Appellate Project serving the second appellate district (Los Angeles) has the same Board of Directors as the statewide California Appellate Project, but functions otherwise as a separate program.

Indigent Appeals in California are totally state funded and all cases are prosecuted by the Attorney General. The AOC maintains fiscal and caseload information for the entire state. According to AOC, the total indigent appellate caseload projected for the current fiscal year is 6,989. Of these, 6,701 are projected to go to private counsel. Based on these caseload figures, the AOC has projected a total of 8,000 appeals for its FY 1990-91 budget. The cost they project for indigent appellate representation in the coming fiscal year is \$34 million in the

court of appeals and \$4.49 million in the Supreme Court.

The AOC reports an average cost for a non-death penalty appeal handled by private counsel for the current year of approximately \$4,300. This assumes an average of 43.3 hours of attorney time at \$65 per hour or \$2,815 plus \$100.00 in expenses. The remainder or nearly 50% is for the administrative costs of the five appellate projects plus CAP.

A representative of the AOC told us that they considered their system expensive in terms of cost per case, but worthwhile overall. The appellate projects are considered extremely helpful both in screening out unqualified attorneys and in assisting those that accept assignments to improve the quality of their work. AOC also reported that appellate judges were very pleased with not having the responsibility of selecting attorneys for each case and reviewing fee claims.

### Colorado

Colorado also has an entirely state funded system of providing appellate representation for the indigent, and all appeals are prosecuted by the Attorney General. A state public defender program is established by statute in Colorado (CRS 21-1-101) and the Appellate Division of this office is the primary source of indigent representation on appeal. This division consists of 16 full-time staff attorneys who have from one to twenty years experience in appellate work. The salary range is from \$29,500 to \$63,000. The average appellate experience level in the unit is approximately seven years.

In FY 88-89, the Public Defender's Appellate Division closed 352 cases and opened 364 new appeals. In addition, one state Public Defender was assigned full-time to handle two death penalty cases. The Public Defender estimated that the Appellate Division

does 85% of all indigent appeals in the state.

In the remaining cases, where the Public Defender has either a conflict of interest or is unavailable for some other reason, cases are referred to private counsel on an appellate appointment list maintained by the trial court in each of Colorado's 22 judicial districts. Each court-appointed attorney submits a bill to the local judge who orders payment by the State Public Defender's Office. The State Public Defender has no responsibility for selecting or qualifying private counsel. They merely pay the bills approved by the local judge through their Conflicts Administrator. Appeals are currently paid at the rate of \$25 per hour. There is a \$2,000 maximum for non-death penalty cases and a \$5,000 maximum for capital cases. These rates will be raised gradually over the next year, and by January 1, 1991 the hourly rate will be \$40, while the maximum allowed will increase to \$3,500 and \$10,000 for non-capital and capital cases respectively.

The Public Defender's Office does not break out appellate overhead and administrative costs from trial level expenses. However, we were able to derive reasonable estimates for the total cost of appellate representation in Colorado.

The Conflicts Administrator for the Public Defender estimated that there were 58 indigent appeals handled by private counsel in FY 88-89 and that the average bill was \$1,500 per case for an estimated total of \$87,000 in court-appointed counsel fees at the appellate level during that year. The total expenditure on direct costs (including salaries and benefits, but excluding overhead) for the Appeals Unit of the Public Defender's Office was \$862,000 in FY 88-89. It is obvious that the average cost of an appeal in the Public Defender's Office is higher than that of the private bar, but this is due in large part to the low hourly fee of \$25/hour and the low maximum rate of \$2,000 in non-capital cases.

## Illinois

The Office of the State Appellate Defender (OSAD) is a state agency created by statute which states as follows:

The State Appellate Defender shall represent indigent persons on appeal in criminal cases other than misdemeanor cases not involving a sentence of imprisonment, when appointed to do so by the Supreme Court, the Appellate Court, or the Circuit Court or any branch thereof.

Ill. Rev. Stat. Ch. 38, Sec. 209-10

OSAD maintains an office in each of the five Appellate Court Districts in Illinois. The administrative office is in Springfield where the State Supreme Court is located. This office also has the responsibility of handling death penalty appeals which are taken directly from the Circuit Court to the Illinois Supreme Court.

There are a combined total of 73 attorneys handling appeals among the OSAD offices and nine supervising attorneys. In FY 1989, the agency received 1,447 appointments. These appointments required 1,970 briefs and petitions including 982 Appellate Court briefs and 509 reply briefs. The agency also filed 74 Anders briefs, 217 motions to withdraw or dismiss, and made 295 oral arguments, 266 in the Appellate Court and 27 in the Illinois Supreme Court. Two oral arguments were made in the federal court system. The 1,447 appointments handled by the office in FY 1989 were broken down into the following types of appeals:



Jury trial	525
Guilty plea	214
Bench trial	291
Collateral attack	168
State appeal	67
Probation revocation	99
Juvenile	76
Remands	7
TOTALS:	1,447

Of the 1,371 non-juvenile appeals reported above, the Public Defender estimates 75% were felony appeals and 25% misdemeanor appeals. The OSAD budget was \$5.4 million in FY 89 and is currently \$5.722 million for FY 90. Workload standards employed by the OSAD require each attorney to do 15 briefs and to earn 40 work units per year. The definition of brief includes an original brief, either appellant or appellee, filed in a reviewing court, or a brief in support of an "Anders" motion in non-capital cases. An original appellant's brief in the Illinois Supreme Court in a direct appeal from a sentence of death constitutes the equivalent of six (6) briefs; and an appellant or appellee brief in the Illinois Supreme Court in an appeal from the granting or denying of post-conviction relief in a capital case constitutes three (3) briefs.

Assistant public defenders who do not meet the minimum work standards are required to explain in writing the reasons for not meeting the standards. Work units are earned according to the following schedule:

WORK PERFORMEDWORK UNITS1. Appellate Court

(a) Appellant's Brief (trial)	1.50
(b) Appellant's Brief (other)	1.00
(c) Anders Brief	.80
(d) Appellee's Brief	1.00
(e) Reply Brief	.40
(f) Supplemental Brief	.20
(g) Oral Argument	.40
(h) Rehearing Petition	.20

2. Illinois Supreme Court

(a) Leave to Appeal Petition	.50
(b) Response to (a)	.20
(c) Petition for Extraordinary Relief	.60
(d) Response to (c)	.40
(e) Brief (Appellant or Appellee)	1.00
(f) Brief in Capital Case (direct appeal)	9.00
(g) Brief in Capital Case (post-conviction appeal)	4.50
(h) Reply Brief	.40
(i) Reply Brief in Capital Case	.80
(j) Supplemental Brief	.20
(k) Supplemental Brief in Capital Case	.40
(l) Oral Argument	.60
(m) Oral Argument in Capital Case	.80
(n) Rehearing Petition	.20
(o) Rehearing Petition in Capital Case	.40

3. United States Supreme Court

(a) Certiorari Petition	.60
(b) Certiorari Petition in Capital Case	1.00
(c) Response to Certiorari Petition	.40
(d) Brief	2.00

(e)	Brief in Capital Case	4.00
(f)	Reply Brief	.40
(g)	Reply Brief in Capital Case	.80
(h)	Oral Argument	1.00
(i)	Rehearing Petition	.40

4. Other Work

(a)	Preparation of Docketing Statement	.10
(b)	Motion to Dismiss Appeal	.20
(c)	Bond Motion	.10
(d)	Motion to Withdraw (non-Anders)	.10
(e)	Other Motions	.10
(f)	Post-Conviction Petition in Circuit Court	.40
(g)	Evidentiary and Sentencing Hearing	.40
(h)	Federal Habeas Petition	.40
(i)	Federal Habeas Petition in Capital Case	2.00
(j)	Federal Habeas Evidentiary Hearing	1.00
(k)	Federal Habeas Evidentiary Hearing in Capital Case	2.00
(l)	Federal Appeal Brief	.40
(m)	Federal Reply Brief	.20
(n)	Clemency Petition	.40
(o)	Memorandum in Support of Parole	.20
(p)	Client Visits (per day)	.10
(q)	Other assigned work (per day)	.10

In addition to the above, Assistant Public Defenders earn work units for the following miscellaneous tasks:

(a) When a lawyer who did not prepare the original brief, or was not the supervising lawyer thereon, is assigned to a case, the lawyer earns .40 additional work units upon filing initial documents in the case or upon making the oral argument.

(b) A lawyer earns an additional .001 work units for each page of the record read.

(c) A supervising lawyer earns one-quarter (1/4) of the work units earned by the lawyer supervised under sections 1 through 4 above. A supervising lawyer is one who reads the record, discusses the possible issues, and reads the drafts of the documents.

(d) A lawyer who reads the draft of certain documents and discusses it with its author earns .10 work units. Only one lawyer may earn work units for each document under this subsection; and

(e) A lawyer also earns work units for:

(1) active participation in legal association or committee activities which relate to criminal law, juvenile law, appellate practice or defender services;

(2) attendance at and necessary preparation for, a conference or seminar;

(3) the research and writing of articles which are published in law journals or other legal publications.

Provided that such participation, attendance, or work is approved by the lawyer's Deputy Defender and the State Appellate Defender.  
And;

(f) For work performed, other than that set out above, a lawyer earns .10 work units per day; provided that the work is approved by the lawyer's Deputy Defender.

The Office of the State Appellate Defender handles approximately 98% of the indigent appeals outside of Cook County (Chicago) in Illinois. The remaining 2% of the cases are assigned by the trial court to private counsel and paid by the county in which the appeal is taken. Fees are set by the appellate court, which orders payment by the county. There are no written standards governing the awarding of fees, however, a statutory maximum of \$1,500 has been established for non-capital cases.

In Cook County, the State Appellate Defender handles approximately 25% of the indigent appeals. It is estimated that

private counsel is appointed in an additional 10% of the Cook County appeals. The remainder of the appeals in Cook County, about 65% are handled by the Appeals Division of the Cook County Public Defender.

The Cook County Public Defender is a county agency with 464 attorneys and a \$25.5 million budget for FY 88-89. The Appeals Division budget is not broken out from the total figure, but that unit averaged 50 attorneys, five supervisors and one division chief in FY 88-89.

According to written workload standards maintained by the Cook County Public Defender, every assistant public defender in the Appeals Division is expected to prepare a minimum of 16 non-death penalty briefs per year. Assistants with less than one year's experience in the Appeals Division must, in addition, earn twenty-five (25) work units per year. Those with a year or more seniority in Appeals must earn a minimum of thirty (30) units.

The following table details the work unit schedule for the Cook County Public Defender. It is similar in many respects to the workload schedule for the OSAD although it is less rigorous. This is primarily because the Appeals Division contains a significant number of entry level positions and according to the Division head, about 50% of the attorneys leave after two years or less to do trial work. Thus the average attorney experience level in the Appeals Division is lower than in most other appellate public defender offices.

<u>WORK PERFORMED</u>	<u>WORK UNITS</u>
1. <u>Appellate Court</u>	
(a) Appellant's Brief (trial)	1.50
(b) Appellant's Brief (other)	1.00
(c) Anders Brief	.80
(d) Appellee's Brief	1.00
(e) Motion to Voluntarily Dismiss Appeal	.80
(f) Reply Brief	.50

- (g) Supplemental Brief .20
- (h) Oral Argument .80
- (i) Rehearing Petition .20

2. Illinois Supreme Court

- (a) Leave to Appeal Petition .50
- (b) Response to (a) .20
- (c) Petition for Extraordinary Relief .60
- (d) Response to (c) .40
- (e) Appellant or Appellee's Brief 1.50
- (f) Brief in Capital Case (direct appeal) 9.00
- (g) Brief in Capital Case - Appeal in  
post-conviction case (Appellant or Appellee's) 4.50
- (h) Reply Brief .50
- (i) Reply Brief in Capital Case .80
- (j) Supplemental Brief .20
- (k) Supplemental Brief in Capital Case .40
- (l) Oral Argument .80
- (m) Oral Argument in Capital Case 1.00
- (n) Rehearing Petition .20
- (o) Rehearing Petition in Capital Case .40

3. United States Supreme Court

- (a) Certiorari Petition .60
- (b) Response to (a) .40
- (c) Brief 3.00
- (d) Reply Brief .80
- (e) Oral Argument 2.00
- (f) Rehearing Petition .40

4. Other Work

- (a) Motion to Withdraw (PDW) and Other  
Substantial Motions .10
- (b) Bond Motion .10

(c) Post-Conviction Petition in Circuit Court	1.50
(d) Post-Conviction Petition in Circuit court in Death Penalty Case	7.50
(e) Evidentiary and Sentencing Hearing	.40
(f) Federal Habeas Petition	1.50
(g) Federal Appeal Brief	1.50
(h) Federal Reply Brief	.40
(i) Clemency Petition	.50
(j) Clemency Petition in Death Penalty Case	1.50
(k) Client Visits (per client)	.20
(l) Appearances Following Mandates (per day)	.10
(m) Participation in mock oral argument	.20
(n) Slip Sheets	.30/month
(o) Assigned Holiday Court	.20

In addition to the above credits, miscellaneous credits can be earned in similar fashion to the OSAD.

Appellate public defenders are paid according to an agency-wide salary schedule which applies to all lawyers in the Cook County Public Defender's Office. The entry level salary is \$24,897 and the highest staff salary is \$49,543.

In FY 88-89, approximately 1,000 new appeals were opened. Currently, the Appeals Division maintains an open caseload of 2,200 active cases.

The Illinois Attorney General prosecutes all appeals in the State Supreme Court and the federal court system. The Attorney General is also technically the attorney of record in all criminal actions in the Illinois Court of Appeals. However, each county also elects a State's Attorney to prosecute criminal cases. Typically in larger or wealthier counties such as Cook County or the suburban northern counties, the State's Attorney will prosecute the appeal as the designee of the Attorney General. In smaller, poorer counties, the Attorney General will assist the county prosecutor or in some instances prosecute the appeal independently.

## Minnesota

Pursuant to statute, felony and gross misdemeanor appeals are handled in Minnesota by the State Public Defender (Minn. Stat. 611.215, 611.23 and 24 et seq.). There are several exceptions, however. The Hennepin County Public Defender (Minneapolis) has its own appellate unit which handles a small number of appeals in that county, including appeals in status offender cases. In addition, there are a number of small non-profit organizations that pre-date the State Public Defender Enabling Act that continue to handle a small number of appeals typically involving minorities including, for example, the Legal Rights Center in Minneapolis, The Neighborhood Justice Center in St. Paul and several programs serving Native Americans in northern Minnesota.

The State Appellate Public Defender does not handle misdemeanor or juvenile appeals except in rare circumstances. However, we were told by the Deputy State Appellate Defender that there are very few misdemeanor appeals statewide. He estimated the figure to be less than 50. Procedural rules in Minnesota make it difficult to take an appeal from a misdemeanor conviction, allowing only 10 days from sentencing to file the notice of appeal. In felony and gross misdemeanor cases on the other hand, there is 90 days to file. We were told that most misdemeanor appeals are taken by privately retained counsel and involve convictions for driving while intoxicated. Those indigents wishing to appeal misdemeanors are provided counsel appointed by the trial court and paid by the county. There are 87 counties in Minnesota. Each has its own compensation schedule for misdemeanor appeals.

The State Appellate Defender maintains a main office in Minneapolis and a smaller office in St. Paul for conflict cases. In FY 1988-89, the legal staff included 17 full-time attorneys plus the Public Defender and up to six part-time attorneys serving under contract and handling conflict of interest cases.



Attorney salaries ranged from an entry level of \$30,000 to a high of \$55,000 for staff attorneys and \$69,500 for managing attorneys. The criminal caseload for the program, which also has a civil component handling prison disciplinary cases, in FY 88-89 consisted of 529 cases and included 172 opening briefs, 42 reply briefs, 113 petitions for discretionary review to the State Supreme Court and 45 post-conviction petitions to the trial court.

The State Public Defender is in the process of developing workload standards but they have yet to be formally adopted. In the interim, the following "advisory" guidelines are applied to each of three levels of attorneys as minimum workload requirements:

<u>Years of Experience</u>	<u>No. of Direct Appeals</u>
Zero to one	11-13
One to five	13-15
Five or more	15-20

In FY 1988-89, the budget for the State Appellate Defender was \$1.728 million including both its civil and criminal components. Of this figure, approximately \$68,000 was expended on contract attorneys in conflict of interest cases.

The Appeals Division of the Hennepin County Public Defender consists of two attorneys working 50% of their time on appellate cases. In FY 1989, they handled 36 cases. Each is a senior attorney with over ten years of experience and is paid approximately \$65,000. The program currently receives all of its funding from the county but will receive full state funding next year.

### Michigan

The Michigan Appellate Defender Commission is mandated by statute to develop a statewide indigent appellate defense system which includes the services of both the State Appellate Defender

Office (SADO) and private assigned counsel [MCL 780.712; MSA 28.1114(102)]. An administrative component of the Commission oversees the assignment of private counsel throughout the state and is known as the Michigan Appellate Assigned Counsel System (MAACS). SADO handles 25% of all criminal appeals in Michigan while the remaining 75% are handled by private counsel assigned under the MAACS program. SADO is funded by the state while private assigned counsel under MAACS are appointed by the trial court and paid by the county in which the appointment is made.

The State Appellate Defender's Office currently consists of 21 full-time staff attorneys ranging in experience from 2-16 years, two lawyers in training (attorneys with less than two years experience) and two managing attorneys. SADO also pays half the salary of the clinical director at the University of Michigan Law School, who in turn supervises law students doing appellate work.

The entry level salary for the attorney-in-training position is \$31,000. The highest staff attorney position is \$57,000. SADO also contracts for assistance with law students and part-time attorneys at rates ranging from \$8-16 per hour.

In FY 1988-89, the SADO budget was \$3.1 million. The program handled 856 cases. The budget for FY 1990 increased to \$3.3 million. The State Appellate Defender projects that the caseload for the current fiscal year will rise to approximately 1,100 cases. The amount budgeted for contract work by SADO during the current fiscal year is \$190,000.

SADO maintains two appellate units: a regular appeals court and a smaller "fast-track guilty plea" unit. The latter unit handles appeals that involve only the conditions of sentencing, for example, prisoners who have been given relatively short sentences. This unit typically handles 80-100 cases per year.

SADO employs a complex task weighting system in distributing the workload, however, no formal written guidelines appear to have been developed. According to the State Appellate Public Defender, a senior deputy analyzes each case before assigning it, giving the

case a certain weight based on the amount of work it is projected to involve. The weighting is discretionary and, according to the Public Defender, the success of the system depends largely on the experience and ability of the senior deputy to correctly evaluate each case. Approximately 60% of the appeals are from cases involving trials, and 40% from pleas. Each staff attorney is expected to handle from 28-30 work units per year. The case weighting system SADO uses applies 1.5 units to trial with records of over 1,500 pages or which generate high-publicity levels. Appeals in trials with records from 500-1,000 pages are worth 1 unit, and "short-record" trials of 500 pages or less are given a weight of .67. A case is given a second weighting usually one year or so after intake, or whenever subsequent developments in the case may arise requiring, for example, a petition of certiorari to the United States Supreme Court or for leave in the Michigan Supreme Court. Certiorari to the U.S. Supreme Court adds from 2-3 work units to the caseweight, while leave to the Michigan Supreme Court adds 1 work unit. For the purposes of calculating the workload of the "fast-track" plea unit, 2.5 guilty plea appeals are generally considered to equal 1 work unit.

SADO in addition to handling a caseload also maintains a Legal Resources Project (LRP) which serves as a back-up center providing support and assistance to private attorneys accepting indigent appeals throughout the state. The LRP also maintains a detailed brief bank which is indexed by issue on computer and is available to SADO staff attorneys. The Appellate Public Defender indicated that SADO was fully automated with over 50% of the staff attorneys having access to their own computer terminals. Also he indicated that a highly favorable support staff ratio of one secretary for every two attorneys plus the existence of two full-time staff investigators enabled the office to maintain a relatively high caseload.

As noted earlier, the remaining 75% of the indigent appeals in Michigan are assigned to private counsel at the trial court

level. The Appellate Defender Commission statute requires the Commission to compile and keep current a statewide roster of attorneys willing and eligible to accept appellate appointments. MAACS currently maintains a list of 345 attorneys statewide which it further breaks down into local lists for the 55 judicial circuits and the city of Detroit. MAACS distributes these list to local judges who then make the assignments. MAACS also provides training programs and resource materials to roster attorneys, and monitors compliance with the Minimum Standards for Indigent Criminal Appellate Defense Services approved by the Michigan Supreme Court effective February 1, 1982. A copy of these standards are appended to this report.

Despite the existence of a statewide administrative scheme in Michigan, appellate assigned counsel are still paid by the counties. This undermines the ability of MAACS to effectuate quality representation on a uniform basis largely because of the critical variance in compensation from one county to another. Private assigned counsel are paid either on an hourly or a fee per case basis. MAACS regulations prohibit counties from contracting out appellate work with local lawyers or firms.

According to the MAACS administrator, most counties use an hourly rate compensation scheme, although the rate varies from \$25 to \$65 per hour from one county to another. A number of these counties also place ceilings on the amount they will pay per case. The maximum amounts typically range from \$425-\$600 for a guilty plea appeal to \$800-\$1,200 for a trial appeal. Some counties use fixed fees for all appellate work. Typically the fixed fee for a guilty plea appeal will be from \$300-\$400 while the fixed fee for a trial appeal will range from \$600-\$950. Still other counties use a mix of fixed fees for guilty plea appeals and hourly rates for trial appeals. Lastly, a few counties make no distinction between types of appeals and pay a single flat rate which ranges from a low of \$450 to a high of \$570.

Michigan is currently undergoing an enormous expansion of its prison system, which has also resulted in an increase in appeals. In 1987, private counsel was assigned in 3,831 appeals. In 1988, the number increased to 4,230. For 1989, the total is projected at 5,353, an increase of another 25%.

Because appellate assigned counsel is compensated at the local level, aggregate data was not available concerning the cost of counsel. MAACS estimates, however, that if the state were to assume funding of assigned counsel appeals at the rate of \$65 per hour, the cost would be approximately \$6 million.

Appeals in Michigan are prosecuted by elected county prosecutors. The Attorney General's Office, however, also maintains a component called the Prosecuting Attorneys Appellate Service (PAAS). By statute, in counties with a population of 100,000 or less, the county prosecutor can request that PAAS prosecute appeals. PAAS prosecutes approximately 50% of the appeals statewide.

#### Summary of Appellate Defender Systems

The table that follows sets out a number of key elements for the six indigent appellate defense systems set out in this study.

<u>State Appellate Organization</u>	<u>Type of Agency</u>	<u>Bd. of Directors or Commission (# of members)</u>	<u>Public Defender/ Program Director Appointed by</u>	<u>No. of P.T. Staff Attys.</u>	<u>Staff Atty. Salary Range</u>	<u>Written Workload Standards</u>
<b>CALIFORNIA:</b>						
Office of State Public Defender	Executive	No	Governor	50	\$30,700-78,300	Yes. Weighted
California Appellate Project	Non-profit	Yes	Board	12	\$40,000-80,000	None
6 Appellate Districts						
District 1	Non-profit	Yes	Board	19	\$40,000-80,000	None
District 2	Non-profit	Yes	Board	21	\$40,000-80,000	None
District 3	Non-profit	Yes	Board	9	\$40,000-80,000	None
District 4	Non-profit	Yes	Board	19	\$40,000-80,000	None
District 5	Non-profit	Yes	Board	10	\$40,000-80,000	None
District 6	Non-profit	Yes	Board	6	\$40,000-80,000	None
<b>COLORADO:</b>						
Appeals Division of State Public Defender	Judicial	Yes (5)	Appointed by PD Commission	16	\$29,500-63,000	None
<b>ILLINOIS:</b>						
Office of State Appellate Defender	Judicial	Yes (7)	Supreme Court	73	\$23,000-57,900	Yes. Weighted
Appeals Division, Cook County Public Defender	County Judicial Agency	No	Chief Judge, Cir.Ct., Cook Co.	50	\$24,900-49,500	Yes. Weighted
<b>MICHIGAN:</b>						
State Appellate Defender Office	Judicial	Yes (7)	Commission	21	\$31,000-57,000	No. Informal
Michigan Appellate Assigned Counsel System (MAACS)	Judicial	Yes (7)	Commission	2 Admin. 345 AC on list	N/A	None
<b>MINNESOTA:</b>						
State Public Defender	Judicial for budget purposes only	Yes (7)	Board	17 (6 P.T.)	\$30,000-50,000	Advisory guide- lines. Non-weighted no. of appeals per year based on exper. levels.
<b>WASHINGTON:</b>						
WADA	Non-profit	Yes (12)	Board	14	\$22,000-33,400	None

<u>State Appellate Organization</u>	<u>Annual Budget FY 88-89</u>	<u>Annual Caseload (% of cases statewide)</u>	<u>Assigned Counsel Rates</u>	<u>Comments</u>
<b>CALIFORNIA:</b>				
Office of State Public Defender	\$7.2 million	425	N/A	CAP & Distr. Appellate Projects handle cases, refer cases to AC & provide back-up support services
California Appellate Project	Admin. budget = \$1.8 million	36 dir. repr. 182 referrals to AC	\$75/hr in cap. case	
6 Appellate Districts				
District 1	1,970,000	1,180	\$65/hr non-cap. case	
District 2	3,332,000	2,410		
District 3	1,027,000	879		
District 4	3,208,000	1,900		
District 5	1,205,000	1,019		
District 6	969,500	600		
<b>COLORADO:</b>				
Appeals Division of State Public Defender	\$862,000 in direct cost excludes overhead. Estimated \$87,000 pd. in AC fees	352 closed 364 opened (est. 85%)	\$25 hrly. rate incr. to \$40 by 1991 w/max. 2000 non-cap.; 5000 cap. incr. to \$3500 & \$10,000 (1991)	
<b>ILLINOIS:</b>				
Office of State Appellate Defender	\$5.4 million	1,447 (98% outside Cook Co; 25% inside)	Vary by county w/ statutory max. of \$1,500	
Appeals Division, Cook County Public Defender	Not available	1,000 est. (65% of Cook Co. caseload)		
<b>MICHIGAN:</b>				
State Appellate Defender Office	\$3.1 million	856 (18%)		State PD & assigned counsel progr. (MAACS) both overseen by statutory Appellate Def. Commission
Michigan Appellate Assigned Counsel System (MAACS)	Admin budget = AC fees pd. by county. Total NA	4,778 est. (82%)	Vary by county \$25-65/hr. \$425-600 guilty plea appeal \$800-1200 trial appeal	
<b>MINNESOTA:</b>				
State Public Defender	\$1.728 million	529 (90%)	Conflicts cases handled under contract w/St. PD @ \$25-30/hr. County rates for misdemeanor appeals vary.	Small no. of appeals done by Appeals Div. of Hennepin Co. PD & by small specialized programs. Misdemeanor appeals by AC paid @ varying rates by co. Less than 50 cases/yr. statewide
<b>WASHINGTON:</b>				
WADA	Calendar year 1988 \$773,000	666 (50% est.)	Flat fee sched. establ. by Supr. Ct. Provisions for addit. hrly. billing @ prevailing rate.	AC used as primary source of representation in Ct. Div. II & III

As the above table shows, each of the five states that were compared with Washington has a state-level public defender organization. The majority are located in the judicial branch, although in Minnesota it is only for the purpose of budget submission. Both CAP in California and WADA are private non-profit corporations, while OSPD in California is part of the judicial branch.

All of the state level organizations except OSPD and the Cook County Public Defender have a Board of Directors or Commission that makes policy for the state program. The Commission or Board appoints the Chief Public Defender in all cases except Illinois where the appointment is made by the state Supreme Court.

The number of full-time staff attorneys varies widely among the six states. This may be due to a number of different factors including the percentage of indigent appeals handled by the state level program, the number of cases handled by individual attorneys, available funds and the seriousness of the cases assigned, e.g., death penalty.

Among the various agencies surveyed, the starting salary for an entry level attorney ranged from \$22,000 at WADA to \$40,000 in California. The median salary was approximately \$30,000. The upper range of staff attorney salaries ran from a low of \$33,400 at WADA to \$49,500 in Cook County. These various salary levels are also consistent with those generally of public defender agencies around the country. It is important to observe how low the salaries are currently at WADA. We were informed that the pool of qualified candidates for vacant positions is getting smaller and smaller as time goes on.

Both OSPD and the two appellate programs in Illinois have written workload standards. Informal standards or guidelines exist in both Michigan and Minnesota. The clear trend across the country among appellate defender agencies is to develop caseload and workload standards both for budget purposes and to control the quality of work.



As we have repeatedly stated at several points in this report, it is not possible to reliably compare the cost per case from state to state. Thus, we would strongly discourage dividing the annual budget for any of the programs in the table by the annual caseload. Data in these two columns is provided for informational purposes alone. However, having stated this caveat, it is clear from this study and extensive work that we have performed with indigent appellate defender systems in the last ten years that WADA is clearly under-funded, particularly in comparison with similar programs in other parts of the country.

The next to last column in the table sets out private assigned counsel rates for the various programs in the six states. As can be seen, they vary substantially from \$25/hour in Colorado, Michigan and Minnesota to \$65 and \$75/hour in California. Based upon a recent national survey that we conducted, we found that the average hourly rate across the country has now reached \$50/hour with several states at the \$65-75/hour rate. Furthermore, there is a clear trend to remove the cap or maximum per case. This policy now exists in over one-half the states. This policy is extremely important since, for example, the hourly rate in Illinois has little meaning when the maximum amount allowed is \$1,500 compared to California and Minnesota where there is no maximum established.

#### IV. Recommendations for Alternative Appellate Defense Programs in Washington

Apart from the WADA program which provides representation in the Supreme Court and in Division I of the Court of Appeals, representation for indigents on appeal in Washington State is provided almost exclusively by the ad hoc appointment of counsel by Superior Court trial judges around the state. Other than a rather detailed schedule of fees established by the Supreme Court, there are no other standards or guidelines relating to the

qualification of counsel, experience requirements, method of appointment, method of selection, training, availability of support services or any other set of uniform procedures designed to assure quality representation in all cases across the state. Furthermore, there is a lack of important and reliable data on indigent appellate appointments, average costs per case and other necessary statistical data which would permit effective planning, cost control and accountability.

Whatever recommendations are made by the Task Force in terms of improving the indigent appellate system in Washington must in our judgement include a plan which will assure uniformity in practice, a high level of quality representation, cost effectiveness and accountability. We feel strongly that these goals can be best provided through some form of state oversight as is the clear trend across the country. With this statement in mind, we have two alternative state level systems to recommend.

Providing appellate representation is a complex area of legal practice requiring a range of skills and abilities which vary from those required in representing indigents at the trial level. For this reason it is our opinion that appellate representation is best provided by highly trained legal specialists, either full-time public defenders or experienced court-appointed private counsel. Accordingly, as a scheme for providing appellate representation on a statewide basis in Washington, we prefer a mixed system relying on full-time appellate public defenders as the primary source of representation in the majority of cases, with a substantial portion of the representation also provided by well trained, experienced, privately appointed attorneys. We believe, as stated in the American Bar Association Standards 5-1.2, "The Legal Representation plan for each jurisdiction should provide for the services of a full-time defender organization and substantial participation of the private bar." We would recommend that such a mixed system be designed to assure that at least one-third of the appellate appointments be made to the private bar.

Furthermore, following our detailed review of appellate systems in other states, we are also of the opinion that when an assigned counsel system is used exclusively to provide representation on appeal, the quality of work is likely to be unacceptably varied unless several components are built into the model including: adequate compensation for counsel, screening and monitoring attorney qualifications and performance, the provision of such back-up services as brief banks and consultation by an appellate defense support program, training and support services.

A system employing assigned private counsel inadequately paid and functioning independently without access to back-up and support, simply cannot insure that the quality of services delivered will be of a uniformly acceptable quality.

We were told by judges and court administrators in other jurisdictions that this circumstance can also result in substantially increased court and prosecutorial costs by 1) impeding the efficient flow of cases through the system; and 2) requiring additional work by the courts and prosecution protecting the rights of the accused and, in effect, shoring up the efforts of inexperienced or simply inadequate counsel.

Based upon the above statements, we submit the following two recommendations for alternative appellate defense programs in the state of Washington in the order of our priority.

Recommendation 1: We recommend the establishment of a statewide Appellate Public Defender program overseen by a State Appellate Public Commission consisting of seven to nine members broadly appointed. The Commission should be responsible for appointing a State Appellate Public Defender and for promulgating standards with respect to attorney qualifications, workload standards and performance standards. The appellate public defender program should be an independent agency of state government or a private non-profit organization serving under contract. The State Public Defender should maintain a central administrative office plus regional offices in each of the three divisions of the Court

of Appeals. The State Appellate Public Defender should be the preferred form of representation in approximately two-thirds of the cases. In the remaining cases, private counsel should be assigned by the Courts of Appeal or the Supreme Court from a list of qualified attorneys certified by the Private Counsel Coordinator of the State Appellate Public Defender's Office. The Private Counsel Coordinator should be responsible for developing and maintaining assigned counsel lists in accordance with standards promulgated by the Commission. The Private Counsel Coordinator should be responsible for reviewing and paying invoices submitted by private counsel and for maintaining accurate data concerning the number of indigent appointments on appeal and the amounts of compensation allowed.

The State Appellate Public Defender should conduct a caseload/workload study and the Commission should then establish caseload or work unit standards for all full-time attorneys.

The State Appellate Public Defender should also be responsible for establishing a brief bank and a comprehensive training program for both full-time attorneys and private court-appointed attorneys.

Recommendation 2: In the alternative, we recommend the establishment of a statewide Appellate Assigned Counsel Commission to oversee the provision of representation by private counsel in all cases in the Supreme Court and Division I not assigned to WADA; and in Divisions II and III of the Courts of Appeal.

The Commission should consist of seven to nine members broadly appointed and should have the responsibility of developing, implementing and monitoring compliance with standards for the qualification, assignment and compensation of assigned counsel.

The Commission should also have the responsibility of gathering and maintaining accurate data concerning the assignment and compensation of private appointed counsel. In addition, like the CAP model in California, the Commission should maintain a computerized brief bank and should be staffed by a sufficient number of staff attorneys to provide consultation and back-up

services to assigned counsel in need of assistance. The Commission should develop a list of qualified private counsel in each county willing and available to accept indigent cases on assignment; and should make this list available to the Courts of Appeal and the Supreme Court. Appellate judges in turn should be required to appoint from the approved list based upon the type of case on appeal. The judiciary should also be removed from the process of authorizing the payment of counsel. In our view, it is a conflict of interest for the judicial branch to both appoint and compensate lawyers who practice before it. Rather, the Commission should adopt an appropriate payment schedule, and should receive, review and approve for payment by the state, all vouchers from assigned counsel.

The daily responsibilities of the Commission should be performed by an Assigned Counsel Coordinator, appointed by the Commission, and with sufficient staff necessary to effectuate the Commission's purposes.

The following section of this report will discuss Recommendations I and II in more detail, focusing on the staffing and estimated cost of each system, and on the issues of attorney qualification and workload standards.

V. Cost Projections for the Recommended Alternative Systems

In our 1988 report, Indigent Defense Services in Washington, we projected the cost of a statewide public defender system using several different assumptions for case distribution. On page 124 et seq. of that report we also projected a cost for an appellate component of the statewide public defender, which stated as follows:

Determining the cost of appellate representation in a statewide public defender model may be approached in a similar manner to determining the cost of representation at the trial level.

The first step is to apportion the appellate caseload between staff public defender attorneys and the private bar.

These assertions apply to the cost of both statewide systems proposed in Recommendations 1 and 2 of this document. The remainder of this section will present our cost estimates for each recommendation. The method we use will be the same employed in our prior report as the techniques remain valid. We will, however, use updated cost and caseload data. Following the cost projections will be a final section concerning qualification standards for appellate counsel.

Cost of Recommendation 1

In Recommendation 1, we proposed a statewide appellate public defender appointed by a commission with four offices - one administrative and three regional offices - and handling two-thirds of the appellate cases on a statewide basis; the remaining cases to be handled by assigned counsel. It is our assumption that the Commission itself will consist of unsalaried members.

In 1988, the appellate courts in Washington reported 1,319 criminal appeals statewide (38 in the Supreme Court and 1,281 in

the Court of Appeals). We estimated that 90% of these appeals would involve indigent defendants, yielding an estimated 1,187 indigent criminal appeals for 1988. To the extent that representation is provided to indigents in non-criminal cases - e.g., mental commitment, contempt, extradition hearings, parental rights, juvenile dependency, etc. - the indigent caseload will be somewhat larger. The precise extent is unclear since these civil matters are not reported separately from other civil appeals. In 1989, WADA reported approximately 25-30% of its total caseload involved non-criminal appeals. While we are reluctant to use these percentages statewide, we feel it is not unreasonable to increase the indigent criminal appellate caseload by 20% to reflect civil cases statewide requiring appointment of counsel. Thus, using 1988 figures, a total indigent appellate caseload of 1,424 is established. This figure should be adjusted to reflect an increase in the number of appeals since 1988. In the 1987-88 biennium, the Office of the Administrator of the Courts reported that \$3.836 million was spent statewide on indigent appeals (see page 17 above). For the next biennium, 1990-1991, \$5.013 million was appropriated representing an increase of 30.7%. This figure included an inflationary increase of 4.7% per year and a caseload increase of 10% per year for each of the two years in the biennium (+29.4%).

Our experience is that indigent caseloads in other jurisdictions have been increasing generally at approximately 10% per year. Accordingly, we feel it is reasonable to increase the total caseload figure we derived for 1988 by 20% to represent the likely 1990 caseload. Thus, the figure we will use to reflect the total indigent appellate caseload in 1990 is 1,708 cases.

Accordingly, we have allocated two-thirds of this caseload to the State Appellate Public Defender (1,138 cases) and one-third to assigned counsel (570 cases).

We can derive the number of full-time staff attorneys needed to handle this allocation by applying an appropriate caseload

standard representing the number of cases each full-time attorney would be expected to handle on an annual basis.

As we noted earlier in this report, it is difficult to apply appellate caseload standards from one jurisdiction to another because appellate procedures and the specific nature of the workload varies significantly. Accordingly, we feel that over the long term, development of a detailed case weighting system specifically for the state of Washington is critical to the provision of quality appellate representation. The Washington Defender Association has, however, published caseload standards which have been approved by the Washington State Bar "as providing minimum requirements for providing legal representation to poor persons accused of crimes in Washington State." (WDA Standards, 1984). Standard I concerns attorney caseloads and states in relevant part:

The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

The caseload of a public defense attorney or assigned counsel should not exceed the following: 25 Appeals to appellate court hearing a case on the record and briefs per attorney per year.

(WDA, Standard I, 1984)

Applying this standard (which is similar to that of a number of other appellate public defender programs in the country) to the projected caseload of 1,138 results in the need for 45.5 staff attorneys statewide.

It is then necessary to determine a unit cost per attorney. We apply the same calculation and average salary levels we employed in our 1988 report, which are as follows:

Based upon consideration of staffing levels in appellate public defender offices in other jurisdictions...we



recommend the following ratios of staff constitute the appellate attorney unit:

1.00 Full time Appellate Defender  
.50 Secretary  
.10 Investigator

Using the same salaries, fringe and overhead for appellate level staff as we previously recommended for trial level staff, results in an attorney unit cost for the appellate statewide public defender office as follows:

1.00 Full time Appellate Defender	@ 33,000	= \$33,000	
.50 Secretary	@ 23,000	= 11,500	
.10 Investigator	@ 2,000	= <u>2,000</u>	
			46,500
	Fringe @ 21%		<u>9,765</u>
			56,265
	Overhead @ 25%		<u>14,066</u>
	Appellate Attorney Unit Cost		\$70,331

Multiplying the appellate attorney unit cost of \$70,331 by the required 45.5 staff attorneys yields a total cost for the appellate public defender staff of \$3,200,060 on an annual basis.

It is also necessary to calculate the cost for private counsel handling one-third of the appellate caseload statewide. This can be done by multiplying the estimated number of cases to be apportioned to the private bar, 570, by a figure representing the average cost per case. In our 1988 report we wrote as follows:

Under the current payment schedule in Washington...the maximum amount allowed for a non-capital appeal is \$1,320. The average cost per case for private attorneys during 1987 for appellate representation was approximately \$1,000 per case. The average WADA cost per case for the same year was \$1,085. We recommend that private attorneys be paid at least \$1,500 per case to reflect both the complexity of many appeals and the need to ensure high quality representation at this level.

(Indigent Defense Services in Washington, pg. 125)

Since that time, the fee schedule for appellate representation has been increased. (See Section II, pg. 11 above) Considering this increase and keeping in mind both the 9.4% inflationary increase allowed by the legislature for the next biennium and fee schedules in other jurisdictions, we recommend an average cost per case of \$1,650.

Multiplying the caseload of 570 by \$1,650 yields a total cost for private counsel at the appellate level under Recommendation 1 of \$940,500. Adding this sum to the projected cost of representation in appellate matters by staff attorneys of \$3,200,060 yields a total cost for appellate services of \$4,140,560. It is next necessary to add to this figure central administrative costs in order to project the full cost of the appellate system in Recommendation 1.

There are a number of specific functions that are needed at the statewide level to assure accountability and quality representation. They include data collection and reporting, training, budget review and planning, supervision and the development of standards and guidelines for program operation. These functions are performed at the state level in similar appellate public defenses around the country. The types of staff we feel are necessary are as follows: one state appellate public defender; three deputy public defenders, one to head each regional office; one financial officer; one training director and director of supervision; one assigned counsel coordinator; one management information director; plus additional support staff. We calculate

the cost of these positions plus overhead by using the same salary schedule we employed in our 1988 report which represented levels we believe are reasonably necessary to attract qualified personnel. Thus, our cost projections for the administrative component of the statewide appellate defender system are as follows:

<u>Position</u>	<u>Number</u>	<u>Salary</u>	<u>Cost</u>
Appellate Public Defender	1	\$60,000	\$60,000
Deputy Public Defender	3	55,000	165,000
Financial Officer	1	40,000	40,000
Training/Supervision Director	1	40,000	40,000
Management/Info. Director	1	30,000	30,000
Secretaries/AAssts.	8	20,000	20,000
Bookkeeper	1	15,000	15,000
Data Entry Clerk	2	15,000	<u>30,000</u>
	<b>TOTAL SALARIES</b>		\$400,000
		Fringe Benefits @ 21%	<u>84,000</u>
			\$484,000
		Overhead @ 25%	<u>121,000</u>
	<b><u>TOTAL COST</u></b>		\$605,000

The final expenditure which needs to be added to project a total cost for Recommendation 1 is litigation related expenses. In the 1987-89 biennium, statewide expenses for court reporters and clerk's expenses at the appellate level totalled \$1,157,835. Increasing this figure by 30% to \$1,505,186 approximates the current biennial appropriation on these items. It is thus not unreasonable to project an annual cost for litigation related expenses of \$752,592 per year based on the above figure. In our 1988 report, we used \$1,000,000 as the figure representing litigation related expenses on appeal. We use it again here assuming it includes such additional items as in-state travel and lodging.

The following chart shows the total projected cost of Recommendation 1 for 1990.

Public Defender Staff	\$3,200,060
Administrative Office	605,000
Private Assigned Counsel	940,500
Litigation Related Expenses	<u>1,000,000</u>
TOTAL COST	\$5,745,560

Thus, the projected total cost of the statewide Appellate Defender System in Recommendation 1 is \$5,745,560, including all staff salaries, fringe and overhead, administrative costs, private attorney fees and litigation related expenses. This figure is approximately \$2.6 million more than the \$3.1 million figure we projected in 1987. It was derived using greater caseload figures and higher cost per case.

The following section presents cost projections for Recommendation 2.

#### Cost of Recommendation 2

Our second recommendation proposes the establishment of a statewide Appellate Assigned Counsel Commission to oversee the provision of representation of assigned counsel in all non-WADA indigent appellate cases in Washington. As is the case in Recommendation 1, this cost projection assumes the Commission will consist of unsalaried members.

The projected cost of providing appellate representation under this model in 1990 would include the cost for WADA, the cost of assigned counsel services plus the cost of the administrative unit.

We assume under Recommendation 2 that WADA will provide representation in roughly 85% of the appeals arising in Division I; and that private counsel will handle the remaining Division I cases and all cases in Divisions II and III. Supreme Court cases

will be split evenly between the two.

In 1988, the Supreme Court reported handling 38 cases. Increasing this figure by 10% per year and allocating half of that total to WADA yields a projected Supreme Court caseload of 23 cases for WADA in 1990.

In Division I, we estimated 645 indigent appeals were taken in 1988. Increasing this figure by 20% to reflect the increase in cases plus 20% reflecting civil cases requiring court-appointed counsel on appeal yields a total Division I projected indigent caseload of approximately 929 cases in 1990. Of this, WADA's share is 85% or 789 cases. Adding this to the 23 projected Supreme Court cases yields a projected total caseload for WADA under Recommendation 2 of 812 cases.

WADA's caseload per attorney is currently 47 cases per attorney per year. This is unduly high in our judgment. For the purposes of cost comparison, we have chosen to project a cost for WADA based upon the caseload standards and other costs projected for the state appellate public defender system in Recommendation 1.

Thus applying the standard of 25 cases per attorney per year to the projected WADA caseload of 812 would require 32.5 full-time staff attorneys.

Applying the unit cost per attorney of \$70,331 yields a projected WADA staff cost of \$2,285,758. In addition, we would add the cost of a program director, training director, administrative assistant, secretary, bookkeeper/records manager and data entry clerk at the following salaries:

	<u>Salary</u>
Program Director	\$55,000
Training Director	40,000
Administrative Asst.	30,000
Secretary	20,000
Bookkeeper/Records Mgr.	20,000
Data entry clerk	<u>15,000</u>
TOTAL	\$180,00
Fringe Benefits @ 21%	<u>37,800</u>
	\$217,800
Overhead @ 25%	<u>54,450</u>
TOTAL	\$272,250

Thus, the total administrative cost for WADA is \$272,250. Adding this to the staff cost derived above yields a total annual WADA cost of \$2,558,008 under Recommendation 2.

Projecting the cost of a statewide appellate assigned counsel system to handle the remaining appellate caseload involves deriving a cost for assigned counsel fees and litigation related expenses, plus the cost of an administrative unit to oversee and manage the system.

Using the same assumptions as Recommendation 1 concerning increased caseload and civil cases requiring assigned counsel, the projected total caseload for assigned counsel under Recommendation 2 in 1990 would be as follows:

Supreme Court (50%)	23
Division I (15%)	140
Division II (100%)	439
Division III (100%)	<u>294</u>
	896

Applying the average cost per case of \$1,650 used in Recommendation 1 to the projected assigned counsel caseload of 896

appeals yields a total amount of \$1,478,400. We estimate litigation related expenses statewide at the same figure used in Recommendation 1, \$1 million.

In projecting a cost for the administrative component of the appellate assigned counsel system, we rely on staffing patterns employed in the appellate assigned counsel programs in California and Michigan discussed in Section III of this report.

As we noted in Recommendation 2, the duties and responsibilities of a statewide appellate assigned counsel program should include: monitoring compliance with standards for the qualification, assignment and compensation of assigned counsel developed by the Commission; gathering and maintaining accurate data concerning the assignment and compensation of private appointed counsel; maintaining a computerized brief bank; and providing back-up and consultation services to assigned counsel in need of assistance.

Accordingly, we recommend that the assigned counsel administrative component consist of the following positions: Assigned Counsel Coordinator, Administrative Assistant, Management Information Specialist, two Data Entry Clerks, Fiscal Officer, Bookkeeper, three Staff Attorneys and Clerical Support Staff. We project the cost of this unit as follows:

<u>Position</u>	<u>Number</u>	<u>Salary</u>	<u>Cost</u>
Assigned Counsel Coordinator	1	\$50,000	\$50,000
Fiscal Officer	1	40,000	40,000
Administrative Assistant	1	30,000	30,000
Management Information Specialist	1	30,000	30,000
Secretary	4	20,000	80,000
Bookkeeper	1	15,000	15,000
Data Entry Clerk	2	15,000	30,000
Staff Attorneys	4	33,000	<u>132,000</u>
TOTAL SALARIES			\$407,000
Fringe Benefits @ 21%			<u>85,470</u>
			\$492,470
Overhead @ 25%			<u>123,118</u>
<u>TOTAL COST</u>			\$615,588

Adding the above cost of the administrative unit to the \$2,272,511 in costs for attorneys fees and litigation expenses derived earlier, yields a total cost for the Assigned Counsel Component of \$2,887,738. Adding to this the projected cost of WADA yields a total projected cost for Recommendation 2 of \$5,651,996 as summarized in the following chart:

Total Cost of Recommendation 2

WADA	\$2,558,008
A.C. Fees	1,478,400
Litigation expenses	1,000,000
Assigned Counsel Administrative Unit	<u>615,588</u>
<u>TOTAL COST</u>	\$5,651,996

Thus the projected cost of Recommendation 2 is \$5,651,996 per year compared with an annual projected cost of \$5,745,560 for Recommendation 1.



The final section of this report provides our recommendations concerning minimum qualifications for assigned counsel.

## VI. Minimum Qualifications for Assigned Counsel

Each of our principal recommendations discussed above, recommends the creation of a commission to establish rules, regulations and standards for the functioning of the appellate defense system it is charged with overseeing. Pursuant to our contract we are required to "recommend appropriate levels of experience and caseload" for attorneys under the programs.

As we noted earlier, making caseload comparisons from one jurisdiction to another presents problems due to procedural and substantive differences in appellate practice from one state to another. We have said, however, that the current caseload of WADA at 47 cases per attorney per year is unduly high. For the purposes of costing out each recommendation presented in this report, we have used an annual caseload standard for staff attorneys of 25 appeals per attorney per year. We recommend, however, that a detailed case weighting system for full-time staff attorneys reflecting actual appellate practice in Washington be developed. Such a system offers the best method for setting caseload standards that are appropriate for appellate defenders in Washington.

We are able, however, to offer preliminary recommendations concerning the qualifications of assigned counsel to accept cases.

In this regard we propose a four level qualification system, each level enabling an attorney to handle cases of a greater degree of seriousness or complexity. The qualifications for each level are as follows:

### 1. Level I

A Level I attorney must complete an initial training and orientation program. A Level I attorney is eligible to accept cases where defendant was convicted at trial of an offense

carrying a maximum sentence of five years or less.

2. Level II

A Level II attorney must have conducted, through submission for decision on the merits, three felony appeals arising within the past five years. Of these appeals, at least one shall have arisen from a trial.

A Level II attorney is eligible to accept cases where defendant was convicted at trial of an offense carrying a maximum sentence of up to 15 years.

3. Level III

A Level III attorney must have conducted, through submission for decision on the merits, appeals in at least six felony convictions, at least three of which arose from trials including two or more jury trials.

A Level III attorney may accept any criminal appeals, except cases involving the death penalty.

4. Level IV

A Level IV attorney must have conducted as primary attorney, through submission for decision on the merits, appeals in at least ten felony convictions, at least five of which arose from trials, including three or more jury trials. At least one of the jury trials must have been a homicide conviction. Further, the attorney must have at a minimum, assisted on the conduct of at least one appeal from a homicide conviction in which the death penalty was imposed.

In exceptional circumstances, the Appellate Defender Commission may waive the requirements for Level II, III or IV when it determines that an applicant has acquired comparable experience.

In addition to providing the above recommendations concerning attorney qualification, we also offer the following guidelines

relative to implementing the qualification standards and managing the list of private counsel eligible to accept appellate cases.

1. Any attorney wishing to receive appointments in appellate cases must submit a written application with the Appellate Assigned Counsel Commission (AACC). In the application, the attorney shall indicate his or her prior appellate experience and provide such supporting documentation as is necessary; and the jurisdictions in which the attorney is available to accept appointments.
2. Based upon this information, the attorney shall be classified by AACC and so notified.
3. A roster attorney who seeks reclassification to a higher level shall submit a written request specifying the experience relied upon to support the reclassification.
4. The Commission shall develop written performance standards which shall be subscribed to by each attorney on the roster.
5. Any attorney who fails to comply with the performance standards may be removed from the list by the Assigned Counsel Coordinator provided 30 days notice of the intended removal is given and the attorney has the right to appeal the decision to the Commission.
6. Any attorney so removed shall be eligible to reapply after a period of one year, and upon re-application shall be recertified by the Commission upon a satisfactory demonstration of renewed eligibility.

## VII. Conclusion

In summary, we believe a statewide mixed system including both full-time staff appellate public defenders and a supervised private bar component is the best method to ensure uniform high quality representation throughout the state.

Each of the recommendations offered above includes the essential elements of such a mixed system although each varies in the overall organization of the system and in the apportionment of cases between staff public defenders and assigned private counsel.

Although we tend to favor the full-time appellate defender model, either of the above systems would present the opportunity to provide both an improved level of services, and reliable data necessary in order to plan and budget for the delivery of quality services in the future.

Each recommendation also relies heavily on the existence of an oversight commission to regulate the system and to insure independence for appellate defenders from the judiciary and from political influence. We believe the creation and constitution of an effective commission to be essential to the success of both systems.

Should either of the alternative systems be adopted, there will remain much to be done in terms of implementing the details of these recommendations and developing operational procedures, a case weighting system and performance standards. With this in mind, it is essential that those selected to be commission members be knowledgeable about and committed to the delivery of quality defense services to the indigent at the appellate level.

One final note. It is clear that the adoption of either of these two recommendations would mean a substantial increase over current costs. However, it is important to point out that the current system is substantially underfunded, particularly WADA. While the initial increase would be great, over the long run costs would stabilize and the state of Washington would have achieved a first-rate statewide appellate defense system.

APPENDIX A

Invoice of Counsel: Washington

INVOICE OF COUNSEL

COMPLETE IN TRIPLICATE

Attorney: \_\_\_\_\_ Cause #: \_\_\_\_\_

Case Title: \_\_\_\_\_

Crimes Convicted of: \_\_\_\_\_

List major issues researched: \_\_\_\_\_

<u>Description</u>	<u>Number of Hours</u>
1. Communications with client:	_____
2. Communications with trial counsel:	_____
3. Communications with family, co-appellate, counsel, clerk, other (specify):	_____
4. Ordering record on review:	_____
5. Review of verbatim report of proceedings. Number of pages _____.	_____
6. Research	_____
7. Brief writing:	_____
(a) Indigent's first brief and reply	_____
(b) Motions and memoranda	_____
8. Preparation and oral argument:	_____
(a) Court of Appeals	_____
(b) Supreme Court	_____
9. Post-decision proceedings (specify):	_____
TOTAL TIME	_____

Out-of-Pocket Expenses

<u>Description</u>	<u>Amount</u>
1. Long distance telephone	_____
2. Mileage at 24¢ per mile	_____
3. Postage	_____
4. Copy costs at 25¢ per page	_____
5. Parking and tolls	_____
6. Lodging and meals	_____
7. Messenger service	_____
8. Air fares	_____
9. Miscellaneous (specify)	_____
TOTAL AMOUNT	_____

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":

\_\_\_\_\_  
Date Place Signature

Tax Identification Number  
or Social Security Number: \_\_\_\_\_

APPENDIX B

Minimum Standards for Appellate Defense  
Michigan Supreme Court

**MINIMUM STANDARDS  
FOR  
INDIGENT CRIMINAL APPELLATE DEFENSE SERVICES**

*Approved by the  
Michigan Supreme Court  
effective February 1, 1982*

1. Counsel shall, to the best of his or her ability, act as the defendant's counselor and advocate, undeflected by conflicting interests and subject to the applicable law and rules of professional conduct.
2. Counsel shall not represent more than one of multiple codefendants on appeal regardless of whether the codefendants were jointly or separately tried, unless the codefendants express a preference for joint representation and there is no apparent conflict of interest.
3. Except in extraordinary circumstances, counsel shall interview the defendant in person on at least one occasion during the initial stages of representation.
4. Counsel shall fully apprise the defendant of the reasonably foreseeable consequences of pursuing an appeal in the particular case under consideration.
5. In any appeal of right, counsel shall comply with the applicable court rules regarding the timely and proper filing of claims of appeal and shall take any other steps which may be necessary to protect the defendant's right to review.
6. Counsel shall promptly request and review all transcripts and lower court records.
7. Counsel shall investigate potentially meritorious claims of error not reflected in the trial court record when he or she is informed or has reason to believe that facts in support of such claims exist.
8. Counsel shall move for and conduct such evidentiary hearings as may be required to create or supplement a record for review of any claim of error not adequately supported by existing records which he or she believes to be meritorious.
9. Counsel should assert claims of error which are supported by facts of record, which will benefit the defendant if successful, which possess arguable legal merit, and which should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research.
10. Counsel should not hesitate to assert claims which may be complex, unique, or controversial in nature, such as issues of first impres-



sion, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law.

11. When a defendant insists that a particular claim be raised on appeal against the advice of counsel, counsel shall inform the defendant that he or she has the right to present that claim to the appellate court *in propria persona*. Should the defendant choose to proceed in such manner, counsel shall provide procedural advice and such clerical assistance as may be required to conform the defendant's pleadings for acceptability to the court.

12. Assigned counsel shall not take any steps towards dismissing an appeal for lack of arguably meritorious issues without first obtaining the defendant's informed written consent.

13. Counsel should seek to utilize publicly funded support services designed to enhance their capacity to present the law and facts to the extent that such services are available and may significantly improve the representation they can provide.

14. Counsel shall be accurate in referring to the record and the authorities relied on in both written and oral presentations to the court.

15. Counsel shall comply with all applicable court rules regarding the timely filing of pleadings and with such other timing requirements as may be specified by the court in a particular case.

16. Counsel should request and appear for oral argument. In preparation for oral argument counsel shall review the briefs of both parties, file supplemental pleadings as warranted, and update his or her legal research.

17. Counsel shall keep the defendant apprised of the progress of the case and shall promptly forward to the defendant copies of pleadings filed in his or her behalf and orders and opinions issued by the court in his or her case.

18. Upon disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action which may be pursued as a result of that disposition, and the scope of any further representation counsel will provide.

19. At whatever point in the postconviction proceedings counsel's representation terminates, counsel shall cooperate with the defendant and any successor counsel in the transmission of records and information.

20. Counsel shall not seek or accept fees from the defendant or from any other source on the defendant's behalf other than those authorized by the appointing authority.