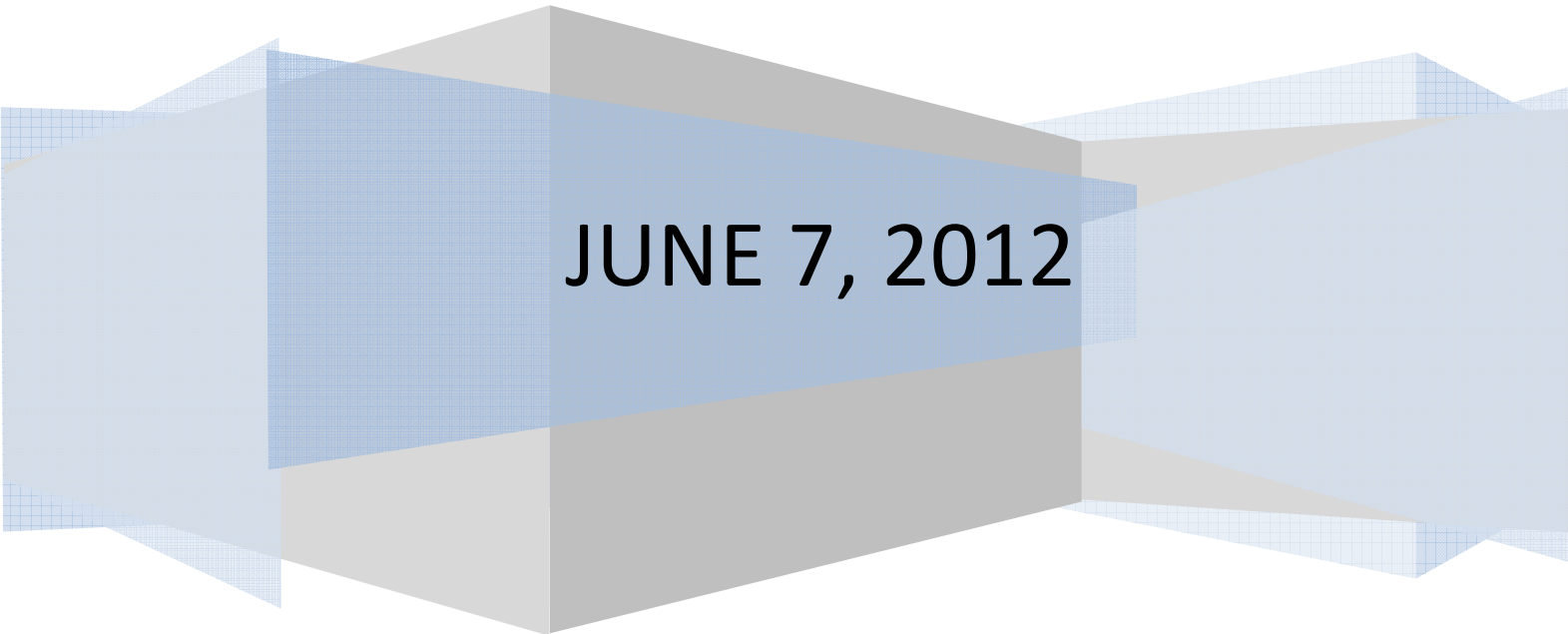


YAKIMA COUNTY

LAW & JUSTICE

PANEL REVIEW COMMITTEE REPORT

By: James Hutton, David Thorner, David Connell



JUNE 7, 2012

Law and Justice Panel Review Committee

This committee was formed to evaluate the efficient operation of the law and justice system in Yakima County. The Board of County Commissioners (BOCC) has expressed concern that 82% of the County's general fund is spent on the courts and law and justice agencies and departments. The Yakima Board of County Commissioners asked for three volunteers to comprise the committee. David Connell, a Yakima businessman, David Thorner, a Yakima civil trial attorney and James Hutton, a former state Superior Court judge and current U.S. Magistrate Judge, are the members of the committee. The committee began regular meetings in February, 2012, after meeting with the BOCC. During our active participation, the committee reviewed several hundred pages of financial and budget information, case load statistics, reports from the agencies and the courts and other materials. We interviewed all department heads and elected officials within the County law and justice community, as well as key personnel within several of the departments. All judges were invited to meet with members of the committee. Additional time was spent soliciting opinions of other community members, including jurors, outside law enforcement, and persons concerned about the juvenile justice system.

Introduction

It is useful to have a "peer review" of the law and justice system on a regular basis. Although we are making a number of recommendations in this report, we understand that resources are stretched thin and the BOCC and the law and justice community may not be able to implement all of the recommendations for budget reasons.

It may seem that the tenor of this report emphasizes the negative aspects of the law and justice operations in Yakima County. In fact, the courts, agencies and departments have handled many times the appropriate case loads in the past 5 years, with the numbers of new felony filings peaking in 2006 at 2,735 cases. In 2008, the Superior Court instituted the Criminal Calendaring Project which was designed to reduce the criminal case backlog and shorten the time cases took to get to trial. This project met with mixed success. The backlog was reduced, but the number and rate of criminal cases going to trial dramatically increased. In 2008, 93 jury trials were commenced by calling in a jury. In 2009, that number increased to 137 jury trials. In 2010, the number receded to 93 jury trials. These are trial numbers that far exceed historical numbers where, for example, in 2004 only 37 jury trials were held. So, in that vein, the courts agencies and departments should be commended for handling the case load well given the increasing numbers and decreasing resources.

The criminal justice system is an adversarial system. It must be by necessity and to be true to the concepts of liberty and justice preserved in State laws and the State and Federal Constitution. There are, and always will be, concerns about the effective interaction of the several agencies and department heads. It is not the committee's objective to cast aspersions on the methods used by any individual elected official or department head in conducting business. However, having said that, we believe that improved and continued communication and cooperation will result in cost savings and more efficiency system wide. It is our intent that the following recommendations be implemented in order to achieve the greatest cost savings and efficiencies possible in what all concede are challenging economic times.

1. Reconstitution of local law and justice committee

In years past, members of the law and justice community met on a regular basis to discuss problems and issues that would arise within the day to day operations of the law and justice system. That practice was dropped in early 2009. The committee strongly suggests that regular meetings be held so the department heads and elected officials have a forum to discuss and hopefully resolve their differences. We further recommend that one of the County Commissioners be designated as chair of that committee and remain personally involved in the committee's work. Since Yakima County eliminated the position of "county executive", there is no one who has served as a liaison between the law and justice agencies, county departments, elected officials, the courts and the BOCC. It is imperative, given the large percentage of the County's general fund designated towards law and justice costs, that the BOCC be closely involved in the system's operation.

2. Pre trial release and Yakima County Department of Corrections

As an initial substantive matter, approximately 21.5% of the County's general fund expenditures are paid for the Yakima County Department of Corrections (YCDOC) operations (In excess of \$11M). The cost of housing, feeding, transporting and providing health care for local prisoners continues to escalate while the funds for paying for such costs continue to be reduced.

Anecdotally, there were approximately 450 local prisoners in the YCDOC when this project began. Local prisoners are housed at a cost of between \$75-89 per day.

The committee recommends that an aggressive program geared towards reducing the number and duration of local prisoner pre trial confinements be instituted. Specifically, these policies and programs should include:

- a. Creation of booking standards or criteria. YCDOC could establish booking criteria basically refusing to take certain non-violent felonies (e.g. forgery) into custody. This would require acquiescence from the Prosecutor and the Courts. It is believed this already occurs with respect to low level misdemeanors. Persons might be detained temporarily, booked and placed on electronic home monitoring (EHM) or work release pre trial.
- b. Empower YCDOC to release accused persons on their own recognizance (O.R.). One example would be persons arrested for DUI. Once a person suspected of DUI has their blood alcohol level return to a non-intoxicated level, they could be released to a family member. YCDOC would have appropriate identification, address, job and other information before release.
- c. Reduce the number of competency/mental health evaluations conducted at Eastern Washington State Hospital (EWSH). These exams necessitate transport to EWSH, often long delays before the prisoner is returned, and additional delays in re-setting and then conducting trial, all of which results in increased local incarceration time. Currently, EWSH does send mental health professionals to the jail to conduct exams, but it is unknown how long funding will be available to maintain these visits. We suggest the use of local mental health professionals whenever possible to conduct these exams.
- d. Greater use of Electronic Home Monitoring (EHM) in pre trial. Under state law, electronic home confinement does count against a defendant's ultimate sentence. Thus, a person who is placed on EHM pending trial gets credit for time served on EHM when they are sentenced after a conviction or guilty plea. Although the Yakima County Prosecuting Attorney's office (PA) has historically been adamantly opposed to EHM in all but a very select number of cases (i.e. for health reasons), the use of EHM pre trial has the potential to substantially reduce the number of pre trial confinements in the County jail. Since the average sentence imposed on defendants serving local time is approximately 3 months, the use of EHM in misdemeanor and 3rd degree felonies, in combination with other conditions of release, makes great economic sense.

- e. Revitalize Work Ethic Detention (WED) program. This program could allow persons to remain out of custody even during their pre trial phase during the work week. It has been demonstrated to work as a sentencing alternative for people serving a sentence in local custody. YCDOC needs at least 30 participants to make the program viable. WED would allow a defendant out of custody to work, earn and enable them to pay fees, fines and court costs that now do not get paid if they are held in total incarceration. As a result of hearing from members of the community, the committee believes that the concept of supervised work crew should be expanded as a means of imposing meaningful sentences that will assist in cleaning up the Yakima community and instilling work values in the defendants participating in such programs. Diversion courts now replace some of the potential participants who might use this alternative sentencing mechanism.

- f. Change the current bail bond format. Now, almost all bail bonds are issued by a bail bondsman (who charges a premium that the defendant and family loses as the bondsman's fee). Consider using a "percentage" bond arrangement as is done in federal court where the defendant posts a percentage of the face amount of the bond with the County clerk. This amount is returned to the defendant or family if the defendant is compliant with his/her conditions of release. This may be a greater incentive for the defendant to be compliant and potentially creates a fund for payment of fees, fines and costs when the case is resolved. A disadvantage of this approach is that it would take additional clerk staff time to deal with the bond, accept payment and take collection efforts if the defendant absconds.

- g. Modify the current process for setting bail. The court rules and statutes mandate the least restrictive conditions for release pre trial. The current system has morphed into one that often sets very high bail without adequate information, thus usually insuring that a defendant is held in custody for several days and longer before any bail hearing is held. Currently, the prosecutor makes a recommendation for bail at the time of arrest or initial appearance. The defendant is unrepresented at these times and is almost always detained. The arraignment is currently held as long as 10-12 days after the criminal information is filed. If no bail hearing is held at the time of arraignment, a third, later hearing is often required for a bail hearing. Currently, Department of Assigned Counsel (DAC) sends the specific attorney assigned to the case to the arraignment. The PA uses one

deputy prosecuting duty attorney who is not responsible for any individual case after the initial criminal hearings for probable cause and arraignment. The committee recommends that the arraignment hearing routinely be combined with a bail hearing and, that prior to the combined hearing, sufficient information be developed by the Pre-trial unit so that the judge can make a meaningful and informed decision about conditions of release. This would eliminate a third hearing on bail, transport time and other associated expenses. A bail hearing should not, however, be mandated in every case and a defendant always has the option of waiving a bail hearing. It would also be useful if the deputy prosecuting attorney assigned to the case be present at the combined hearing. This would result in an opportunity for counsel to confer and discuss early plea offers and settlement of simple cases.

- h. Reinststitute the Pre-trial unit. The pre trial unit was disbanded as a cost saving measure. In the past, pre trial officers would interview defendants, pull criminal histories and provide a recommendation for release on one of four levels of release. For money reasons, that unit has been disbanded. This information needs to be available to allow the Prosecutor's office to make a reasoned recommendation on bail as soon as the preliminary appearance after arrest and for defense counsel to seek reasonable bail. We suggest that perhaps this is a function that District Court probation can assist with or take over.
- i. Increased Utilization of Jail Inmates on Work Crews. There are opportunities available to utilize inmates on increased work crews to address graffiti, debris collection, and other similar projects in the area between 7th Avenue and Interstate 82. Working with business owners and community service organizations to provide cover paint, tools and equipment would have some positive impact on improving the appearance of this area. In addition, it would provide an opportunity for the inmates to contribute to the betterment of the community.

3. Early Intervention in Felony Cases (Judicial Settlement Conferences)

We recommend that felony cases be targeted for early resolution whenever possible. It is necessary to "incentivize" defendants, defense counsel and prosecutors to discuss early resolution of cases. Utilizing a judicial settlement conference format should result in a significant reduction in pre-disposition confinement time. Currently, according to information provided us by YCDOC, there are 35 defendants awaiting trial

who have been in jail in excess of one year. That is unacceptable and beyond aspirational dispositional guidelines. One model would be to require the Prosecutor's office to offer a resolution, on a one-time basis, with a lower incarceration time recommendation. Then, within a limited time (e.g. 45 days), the defendant would have to respond. If no resolution is reached, the case could be mediated by a judge. While we understand that there is great resistance in both the Prosecutor's office and the defense bar to creating another "hearing" that takes them out of their offices and/or makes them wait in court, early disposition of cases will substantially reduce additional court appearances, attorney time and other costs.

4. Court operations

Currently, the Superior Court mandates two hearings for each pending felony trial close in time to the trial date. An "omnibus" hearing is held approximately 10-11 days out from the trial date and a triage or trailing case hearing is held on the Thursday or Friday before trial is supposed to begin the following Monday. These mandated hearings are sometimes useful in determining the priority of cases going out to trial, but many times are just "continuance" calendars with the court routinely being asked to put a case farther out in the calendar. These hearings result in much lost lawyer time, court time, transport time for YCDOC staff and need to be consolidated or eliminated if at all possible. There needs to be a way to resolve cases on the "trailing" list so that only 2-4 cases remain on the list in the week before the trial is called to start. This would require the Prosecutor's Office to move for dismissal of a given case at least a week before the trial is to begin. This now occurs even on the day the trial is to start when a material witness is not found or is not available at the last minute. This results in a jury being called in for no reason and increases the cost of trial.

The committee also recommends that the Superior Court's presiding docket be restructured to put the plea and sentence calendar on a specific day of the week and that two (2) judges be assigned to those dockets to allow both the deputy prosecutors and defense counsel a predictable schedule and more time out of court to work on cases.

Additionally, we recommend that the lengthy omnibus calendars not be combined with other motions, pleas and sentences and that all matters other than omnibus be handled by another judge.

The committee received a recommendation that all Class A felonies be pre-assigned to a specific judge after the first omnibus hearing. Pre-assignment will require a judicial assistant for each judge, whether that is the JAVS operator or someone else. The judicial assistant could also help manage pre-assigned civil cases for each judge.

As of January, 2012, there are 34 persons in custody awaiting trial on homicide charges. Those cases alone will tax current resources if they are pre-assigned. There is value and efficiency in pre-assignment and individual calendaring, but doing so will require more, not less, financial support from the County's general fund.

5. Juror costs

Jurors constantly complain about all the time they spend waiting around after they are called to jury service. (See Attachment "A") It is imperative to make efficient use of their time. Reduce the number of jurors called to the Courthouse in a "garden variety" case. Ask jurors to waive their fee for the first day of service and just pay mileage for that first day. Do not call in jurors on Monday morning in case the defendant decides to change his/her plea. While jury fees and costs are significant, they are far from the most expensive components of the law and justice system. Jury fees reached a peak of \$375,741 in 2009 which is commensurate with a record number of jury trials. In 2010, jury fees were \$288,184 and in 2011 were \$194,500. Early resolution of criminal charges will eliminate or at least reduce the number and expense of jury panels called in.

In 2011, 98 jury pools were called in to start the jury selection process. Of these 98, only 71 jury trials actually commenced. Of the others, 2 cases were continued, 16 defendants pled guilty and 9 waived trial by jury. Sometimes there are valid reasons why a guilty plea cannot happen before a jury pool is called in. Many times, however, this situation can be avoided, and jury costs saved, by early resolution of the case.

We do not agree that jury costs should be "assigned" to the budget of either the Prosecuting Attorney or the DAC. These are costs that have to be borne by the County's General fund. To do otherwise creates a conflict for the parties in having to balance a defendant's constitutional right against the County's checkbook.

6. System technology

The electronic filing and file retrieval system (Liberty) currently used by the Yakima County Clerk's office is balky and undependable despite the best efforts of the Clerk staff to improve it. Although expensive to install, a new system of case management/ electronic case filing similar to that used in the Federal Court is a must. Users will all save valuable time and money in filing, calendaring and maintaining files. Additionally, we recommend that the Court install a reliable wireless remote access system that would be available to attorneys and parties who experience "down time"

during trials and hearings so that they can maintain contact with their offices, clients and other matters. Approximately 9 years ago, the Superior Court began replacing live court reporting with the Jefferson Audio Visual System (JAVS) or electronic court reporting. This change resulted in annual savings to the County of \$300,000. The JAVS system is in need of replacement with updated equipment. The committee was not advised of the cost of replacement.

7. Juvenile justice issues

In 2011 the Yakima County Juvenile Department had 1,388 criminal cases and 850 juvenile dependency cases filed in Juvenile Court, totaling 2,238 cases filed. We also place close to 1,000 youth per year on diversion contracts. The department runs a 94-bed juvenile detention facility and has between 340 and 360 juveniles on probation at any one time. Due to budget cuts over the past five years, our staffing levels have been reduced from 72.09 in 2007 to 65.40 in 2012. Positions lost include supervisors, detention officers, probation counselors, work crew leader and clerical staff.

The total budget for the department is \$5,642,356. Of that total, \$3,438,549 comes from the General Fund, \$1,580,500 comes from grants, and \$623,307 comes from 3/10ths funding.

The department is a leader in the development of Gang Intervention programs. The Yakima County Gang Court is a national model and Governor Gregoire recently signed the Gang Court bill that was modeled after the Yakima County Gang Court. Initial data indicates that the program is very successful in assisting offenders who want to get out of gangs.

Although the department is fulfilling its mission, it is clear that the county has to invest or re-invest in the following initiatives:

Work with the Gang Commission and communities on the development of Youth and Family Development Centers. Because the service providers would be co-located in one facility, services could be more coordinated and effective.

The establishment of physical locations from which centralized management and services can be delivered to youth and families.

A single point of access for information and services related to at-risk youth and their families.

Services such as academic enrichment, career/employment, recreation, mentoring, and family development could be offered in one facility.

Restore the work crew at the department to enable restorative community service projects such as Graffiti paint out.

Hire a work crew supervisor. Because of budget cuts the work crew supervisor was laid off. Youth on probation are ordered to do community service work by the Judge. The hiring of a supervisor would allow for the development of a graffiti abatement program at the department.

Involve citizens, including the faith based community, in the development of a mentoring/tutoring program. Many youth are in need of an adult role model. Government does not have the resources to pay adults to be mentors or tutors for these youth so it is vital that the community step-up and assist in this program.

Tutors are needed in detention as well as in the community for probation youth who are not incarcerated.

Mentors are also needed for probation youth.

Hire more outreach workers. One of the initial findings of Gang Court is that a very effective tool in working with young Hispanic youth is to have youth outreach workers from the same culture working as mentors to high risk youth (gang involved youth). These outreach workers have come from this culture and can provide valuable assistance to youth exposed to the gang life style.

The department has a 94-bed juvenile detention facility but is funded to operate 42 beds. Although the department is doing a very good job of managing the detention population, we should look at expanding alternatives to incarceration like electronic monitoring. Presently the department has 5 electronic monitoring units and the expansion of this program could be a valuable component for youth accountability and community protection.

The recent Yakima County Gang Assessment, initiated by the Yakima County Gang Commission, lists the following three key findings:

Yakima County has an environment that contains multiple risk factors for gang involvement including a culture of poverty which is magnified by single parenting, low adult educational attainment, and high seasonal unemployment rates.

Yakima County has a high rate of at-risk youth with multiple risk factors for gang involvement including higher rates of school failure, high teen birth rate, suicide and suicide attempts, depression, illegal drug use, and low neighborhood attachment. Students also report feeling less safe in school.

Yakima County contains a multitude of micro cultures among segments of the population as illustrated by the wide disparities in race and ethnicity, income, crime and educational attainment.

Given these findings it is imperative that we support the development of Youth and Family Development Centers, invest in a work crew supervisor, outreach workers, alternatives to incarceration, and community mobilization to get the community involved in addressing at-risk youth and their families.

8. Prosecutor issues

The current elected prosecuting attorney took office in January 2009. The Superior Court had already determined that the backlog of felony cases should be reduced and a plan (Criminal Calendaring Project) was in place to accomplish that end. Accordingly, 137 jury trials were commenced in 2009, an all-time record number for Yakima County. Today, each felony deputy prosecutor maintains a case load of between 70-75 cases each. Such high case load numbers make it impossible for anyone to effectively manage the resolution of those cases. This leads to large numbers of continuances, last minute plea negotiations, failure to return phone calls from defense counsel, difficulty maintaining witness contact and declining office morale. Between January, 2009 and December, 2011, 21 deputy prosecutors have left the office. This turnover of professional staff has meant delays, waste and inefficiency in moving cases through the system.

The elected prosecutor has had a policy of personally reviewing every felony plea bargain offered by his deputy prosecutor staff. If he does not agree with the deputy prosecutor's recommendation, he has often insisted that the case go to trial. In 2011, there was an overall 30% acquittal rate, twice the acquittal rate in other large counties and due, in part, to forcing weaker cases to trial instead of settling them. It is clear that the elected prosecutor must delegate more discretion to his chief criminal deputy prosecuting attorney and other deputy prosecutors to resolve cases by plea.

The elected prosecutor has a policy of personally handling cases of 3rd degree assault (law enforcement victim) cases. The number of these cases has grown dramatically in the past three years. While these are serious cases, as are all felony cases, the elected prosecutor should be able to delegate 3rd degree felony cases to others in his office so that he has more time for training less experienced deputies and the administration of the office.

The elected prosecutor has had a policy of no plea bargain from a felony to a misdemeanor. Again this is within the prosecutor's discretion, but particularly in cases of weaker evidence or first felony charges, we question if this is always wise.

Special attention should be paid to homicide cases. Yakima County has an equivalent number of homicides to Pierce County. There are currently 34 homicide defendants awaiting trial in custody at the Yakima County jail. Until recently, the prosecutor's office had charged many of the homicides as aggravated 1st degree murder. By doing so, the possibility of the death penalty is maintained, usually as a bargaining chip in plea negotiations. Death penalty cases are extremely expensive to prepare and try, both from a defense and prosecutor perspective. By law, death penalty qualified lawyers must be hired (two for each defendant) and typically a mitigation package (seeking to dissuade the prosecutor from filing a death penalty notice) has to be prepared at additional expense. The charging decision is the province of the prosecutor, but it seems to make no sense to charge a potential death penalty case when there is little, if any, likelihood of actually filing a death penalty notice and conducting a death penalty trial. It makes even less sense to file a later amended information charging an aggravated 1st degree murder because by then additional time and resources have already been spent in defending the case on the original charge and without the expectation of facing a possible death penalty prosecution.

9. DAC issues

The BOCC asked very specific questions about the system composition, vitality and mission of the Department of Assigned Counsel. We shall address the mission first. There is no doubt from our perspective that the DAC is not in business to simply get defendants "off". DAC lawyers adhere to a rigid code of conduct, dictated by Washington State Rules of Professional Conduct, ABA Principles, case law, statutes and the Yakima County public defense standards ordinance that mandate they are professional lawyers first and advocates second. DAC has repeatedly asked for early efforts at resolution of cases, indicating that their attorneys have no interest in delaying trials just for the sake of holding a trial. Having said that, however, the large case load per staff attorney results in many of the same issues that plague the Prosecuting Attorney's office such as delay in returning phone calls, late or delayed preparation of cases and the like. But DAC, like the Courts, has no ability to control the number or seriousness of arrests made or charges filed by law enforcement and the prosecutor.

The DAC has used a mixed system of delivery of indigent defense services since 1989. This system came about after a thorough and comprehensive review of the process by the Yakima County Public Defender Task Force. This task force was composed of judges, private attorneys, County Commissioner Alex Deccio, the elected Prosecuting Attorney and the Administrator for DAC. The mixed system consists of an organized public defender office with staff attorneys, contracted attorneys, and a smaller component of "list" or "panel" attorneys for overflow and conflict cases. The task force

report recommended that the DAC handle approximately 60% of the cases filed. Today (calendar year 2011), despite mushrooming new filings since 1989, the DAC still handles more than 50% of the cases filed with approximately 35% handled by contract attorneys and 7% handled by panel lawyers.

The mixed system structure appears to this Committee to be the most efficient form of delivery of indigent defense services. It provides economy of scale where needed, outsources portions of the program when needed, and limits the use of the more expensive panel appointments to an overflow situation as needed. As noted in a special report from the U.S. Department of Justice in 2000, total contract systems are rarely instituted when an existing public defender office is in place. Total contract systems have been found deficient (such as occurred in Grant County) and there is no evidence there is any cost savings with such a total contract system. State wide, more of the large counties with more than 30 criminal jury trials per year embrace the mixed system than any other and, in fact, Kitsap, Cowlitz and Grant counties have added such a system since 2005.

The suggestion has been made that the DAC should be disbanded in favor of a total contract or list system. The suggestion was made based on two (2) premises: first, that there would be a cost savings to the County since there would be no need for salary or benefits to be paid to the DAC staff attorneys and, secondly, that there would be fewer disqualifications for conflicts of interest since currently when one DAC staff attorney is disqualified, all the attorneys in the DAC office are disqualified.

This Committee believes this suggestion is not well founded. There is no demonstrated cost savings to a County when the contract system is utilized. Attorneys in private practice have salary and overhead commitments just like anyone else. It is unlikely that they will be willing to work for less than an attorney in DAC if they are given a comparable case load. As to the issue of fewer disqualifications for conflict of interest, this, too, is only anecdotal. County personnel would still be needed to make assignments to contract attorneys, check for conflicts and serve as a clearinghouse for appointments when private, retained lawyers become unavailable. Further, since 2010, DAC has been responsible to manage the costs of expert witnesses and other support staffing needs for defense counsel. Also, DAC staff attorneys are currently available on short notice to serve the Court, whereas private lawyers may not be since they are not "on call".

In short, this Committee endorses the current system of delivery of criminal legal services to the indigent population in Yakima County.

10. Sheriff / law enforcement issues

The committee has received information that there are staffing issues within the Sheriff's office. If cost savings can be achieved in regard to pretrial release of prisoners or early disposition of cases, for example, additional funds can be assigned to the Sheriff's budget. Greater resources can potentially be committed to the Sheriff's office so that essential services and the responsibilities of the office can be improved.

Conclusion

There are no easy solutions to the BOCC's primary concern about budget overruns and hoped for cost savings within the system of law and justice. This report is only intended to identify areas where such cost savings **may** be found. But perhaps it will furnish the basis for continued discussion among and better management of the components of the law and justice system in the future. It has been our privilege to participate in this project and we are willing to answer any questions the BOCC may have.

James P. Hutton

David A. Thorner

David C. Connell