



Washington State Office of Civil Legal Aid

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From: Jim Bamberger, Director
Philippe Knab, Eviction Defense Programs Manager
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Office of Civil Legal Aid

Re: Report to the Legislature on Implementation of the Appointed Counsel Program for Indigent Tenants in Unlawful Detainer Cases (RCW 59.18.640; 2.53.050; sec. 116(7), ch. 297, laws of 2022)

Date: July 28, 2022

Please accept this memo as the Office of Civil Legal Aid's report on implementation, operation, and early data associated with the indigent tenant court-appointed attorney program established in sections 8 and 9, ch. 115, laws of 2021.¹

1. Legislative Charge

Sections 8 and 9 of ch. 115, Laws of 2021 (2ESSB 5160, codified at [RCW 59.18.640](#)) established a court-appointed counsel program for indigent tenants in unlawful detainer (eviction) cases. The right to appointed counsel is held by all indigent tenants against whom unlawful detainer proceedings have been commenced. The duty to appoint attorneys to represent indigent tenants is assigned to the superior court.²

Administration was assigned to the Office of Civil Legal Aid (OCLA). RCW 59.18.640(1). OCLA was directed to develop and submit an implementation plan within 90 days of the effective date and given one year to fully implement the program statewide. The Legislature appropriated \$24.1M for OCLA to implement and operate the program during the FY 22-23 biennium.

¹ The program is commonly referenced as the tenant right to counsel (RTC) program. This report uses the terms "appointed counsel program" or "right to counsel (RTC) program" interchangeably.

² "Subject to the availability of amounts appropriated for this specific purpose, the court must appoint an attorney for an indigent tenant in an unlawful detainer proceeding under this chapter and chapters [59.12](#) and [59.20](#) RCW." RCW 59.18.640(1).

This report responds to the Legislature's directive that:

By June 30, 2022, the department [OCLA] shall provide to the legislature a detailed report of program expenditures and outcomes including but not limited to the number of individuals served, the average cost of a representation case, and the number of qualified individuals who qualified for but were unable to receive representation for funding or other reasons.

In late June, we advised you that this report would be delayed by about one month as we continued to review and analyze data.

The appointed counsel for indigent tenants program has only been fully operational since mid-January 2022. Six months into full statewide operation, it is premature to run a cost per case analysis. This is, in large part, because the unlawful detainer practice itself (for plaintiffs, tenant defendants, judicial officers, and court administrators) is still in the early stages of transition. Specifically,

- OCLA's data acquisition, reporting, and analytical tools are new and still in the early stages of implementation; technical issue identification and resolution and data cleaning efforts continue with each new sync from OCLA-contracted providers
- Tenant defense practice is new and still evolving
- Plaintiffs' practice is also in a significant evolutionary moment with simultaneous implementation of the RTC program, just cause eviction, the Eviction Resolution Pilot Program (ERPP), and other substantive and procedural changes enacted during the 2021 legislative session
- Court and court administrative management of unlawful detainer cases are also in a state of transition resulting in ever-evolving processes, timelines, and expectations
- The substantive mix of unlawful detainer caseloads is changing as Washington State moves further away from the eviction moratorium and as federal and state pandemic rental assistance is increasingly exhausted

While a work in progress, the interactive dashboard referenced in the Data and Reporting section below and attached to this report offers insight into many of the data points that OCLA is tracking and monitoring. In addition, OCLA engaged a research team at the University of Washington's Evans School of Public Policy and Governance to track and report on a range of indicators for the June 30, 2023 report. That report will include the cost per case data requested by the Legislature.

2. Key Tenant RTC Implementation Mileposts

- April 22, 2021 – Governor Inslee signs 2ESSB 5160 making the right to appointed counsel program (RTC Program) effective

- July 15, 2021 – OCLA publishes initial [RTC Program Implementation Plan](#)
- July – August 2021 – OCLA contracts with 13 civil legal aid programs to provide RTC services in every judicial district of the state and issued authorization to recruit and hire up to 70 FTE attorneys to be trained and dedicated to represent indigent tenants throughout Washington State
- September 2021 – statewide Eviction Defense Screening Line (EDSL) opens for operation; indigency screening and assignment of eligible tenants to RTC contracted providers occurs on average within two working days following referral to or tenant request for screening and assignment
- October 2021 – OCLA certifies that RTC attorneys are hired, trained, and available for appointment in the first 18 of the state's 37 judicial districts
- January 18, 2022 – OCLA certifies that RTC attorneys are trained and available for appointment in all 37 judicial districts
- April 22, 2022 – first anniversary of the RTC Program; *full implementation completed three months early*

3. Indigent Tenants' Right to Appointed Counsel

Under RCW 59.18.640(1) all indigent tenants have a right to a civil public defender to represent them in unlawful detainer actions commenced under RCW 59.12; 59.18; and 59.20. This right:

- Attaches upon commencement by a landlord of an unlawful detainer (UD) action seeking to reclaim possession of rental residential property occupied by a tenant³
- Requires appointment of an OCLA-contracted attorney by the superior court in all unlawful detainer cases where the tenant defendant(s) is(are) indigent

To ensure effective and uniform implementation of the right to appointed counsel, OCLA engaged the Superior Court Judges' Association (SCJA) and a broad range of stakeholders (including representatives of the rental housing industry) to develop uniform protocols for courts to follow when a tenant appears in response to an Order to Show Cause. To ensure courts adhere to the requirements of RCW 59.18.640, OCLA also conditioned certification of RTC services on court adoption of a standing order or administrative assignment in each of the 37 judicial districts outlining the process for appointment of counsel for indigent tenants in unlawful detainer cases in the jurisdiction.⁴

Under both a “bench card” developed by the SCJA (attached) and local court-adopted protocols, judicial officers must advise every unrepresented tenant defendant of their possible right to appointed counsel; provide them with information about where and how to be screened for

³ UD actions are commenced either by (a) service of a Summons on the tenant or (b) filing of a Summons and Complaint in the superior court in the county in which the property is located.

⁴ OCLA certification is a condition precedent to the authority of a court to entertain an unlawful detainer action involving an indigent tenant.

eligibility, including the number to the Eviction Defense Screening Line; and continue the hearing for time necessary (a) for the tenant to be screened, (b) for tenants found eligible, to seek appointment of an attorney to represent them, and (c) for counsel to meet with their clients and prepare defenses to the claim for writ of restitution.⁵

4. Components of OCLA's Appointed Counsel (RTC) Program

The RTC program has five core components:

- **Eviction Defense Screening Line (EDSL)** – EDSL (855-657-8387) is staffed by non-attorney screeners who receive telephonic and [online](#) requests from tenants for screening and assignment to an OCLA-contracted attorney. EDSL also receives referrals from courts, court administrators, legal aid programs, community-based programs, and others on behalf of tenants against whom unlawful detainer actions have been commenced. RCW 59.18.365 requires landlords to include the EDSL contact number in their UD summons.
- **RTC Legal Aid Programs and Contractors** – Thirteen (13)⁶ established legal aid programs were initially engaged to provide representation for indigent tenants found eligible for appointment. Each program was assigned responsibility to hire, train, and oversee the work of attorneys dedicated exclusively to representation of RTC-eligible clients. Some judicial districts do not experience a level of demand sufficient to support a full-time eviction defense attorney. There, tenants are represented by trained attorneys under contract with a local or statewide legal aid program. Contract attorneys also represent tenants in judicial districts where the primary OCLA-contracted provider has a conflict that prohibits it from representing a tenant and there is no other OCLA-contracted provider available to serve tenants in the judicial district. While contract attorney representation is not the preferred approach to providing effective assistance of counsel, it is a necessary corollary to the staffed attorney model.
- **RTC Appellate Representation** – Recent revisions of laws governing landlord-tenant relations and eviction practice fundamentally changed the rules of the game. HB 1236 established a uniform requirement that evictions be based on “just cause”. Among other things, SB 5160 established both the ERPP and the indigent tenant RTC program. These laws are new and subject to an array of interpretations that are now being examined by judicial officers in every corner of the state. Conflicting judicial decisions in UD cases interpreting these new laws has generated a need to seek clarification and legal certainty through the appellate process. It also demonstrated a need to establish meaningful and coordinated appellate capacity within the indigent tenant RTC program.

⁵ Writs or judgments entered against indigent tenants who have not been properly apprised of their rights under RCW 59.18.640 are likely void and subject to being vacated.

⁶ Northwest Justice Project, King County Bar Association/Housing Justice Project, Tacoma Probono Community Lawyers Housing Justice Project, LAW Advocates of Whatcom County, Skagit Legal Aid, Snohomish Legal Services Housing Justice Project, Kitsap Legal Services, Thurston County Volunteer Legal Services, Clark County Volunteer Lawyer Program, Yakima County Volunteer Attorney Services, Benton-Franklin Legal Aid, Spokane County Bar Association Housing Justice Project, Chelan-Douglas County Volunteer Attorney Services.

Appellate advocacy is a specialized practice. While a few RTC contracted programs have experience and capacity to undertake appeals of adverse judicial decisions, most do not. Statewide appellate capacity needed to be established to accept and pursue appeals on behalf of tenants served by OCLA-funded programs without internal appellate capacity or expertise.

- **Statewide Training and Support** – Statewide training, technical assistance, and support capacity is critical to consistent and effective implementation of indigent tenants’ right to effective assistance of counsel.
- **Conflict and Emergency RTC Capacity** – Early experience indicated a need to establish statewide capacity to (a) provide cover for local RTC attorneys who may be at caseload limits, on leave, or otherwise unavailable, (b) address situations where the primary RTC program(s) in a particular region are unable to represent the tenant(s) due to conflicts of interest with currently or previously represented clients, and (c) provide emergency representation for tenants faced with the potential loss of their right to appointed counsel or dispossession from housing due to improper issuance of a writ of restitution.

5. Data and Reporting

The appointed counsel program in Washington State is new and unique among “tenant right to counsel” programs nationally. To ensure proper stewardship of scarce state resources, assess efficacy of the RTC program, and to provide public policy makers with the best information possible about the human, fiscal, and operational costs and benefits of the program, OCLA approached data gathering, tracking, analysis, and reporting with a sense of urgency. Components of this effort are outlined below.

- OCLA-contracted providers are required to use the [LegalServer](#) case management system. This powerful cloud-based system provides a platform for comprehensive client demographic and legal service tracking, time keeping, and outcome data. OCLA contracted with [JustTech](#), a national data analytics firm with expertise in the LegalServer system, to build a uniform data module for the RTC Program. This module is resident on each RTC contractor’s incidence of LegalServer and is regularly updated as new information or data needs are indicated.
- Each RTC-contracted program syncs RTC data quarterly to OCLA’s incidence of LegalServer. The data shared is comprehensive, yet (as required under applicable Rules of Professional Conduct) protects information that might lead to disclosure of client identity.
- In addition to LegalServer data, OCLA receives monthly reports from all RTC contractors documenting the number of open cases (both brief and extended representation) and average professional attorney time per closed case. OCLA uses this data to track and compare experience between and across programs, and to compare with UD filing and writ data provided monthly by the Administrative Office of the Courts.

- OCLA’s data analytics contractor created and updates an interactive dashboard that tracks a range of data points captured by RTC-contracted programs. An initial version of the RTC data dashboard showing experience from January through May 2022 is attached.⁷

As noted earlier, OCLA contracted with the University of Washington’s Evans School of Public Policy to monitor, analyze, and produce a report by June 30, 2023 that responds to the data points outlined in section 116(7), ch. 297, Laws of 2022 (the FY 2021-23 supplemental operating budget).

6. Coordination and Communication with Courts, Court Administrators and Clerks:

Upon passage and the Governor’s signing of SB 5160, OCLA engaged with the Superior Court Judges Association (SCJA), the Association of Superior Court Administrators, and the Washington Association of County Clerks to help facilitate effective implementation of the court-appointment program. These efforts resulted in adoption of protocols in all judicial districts that ensure timely identification, screening, and appointment of counsel for indigent tenants in all unlawful detainer proceedings. Examples of related efforts include:

- OCLA participates in the SCJA’s ERPP Work Group. Staffed by the Administrative Office of the Courts, this group brings together rental housing industry members, judicial officers, clerks, court administrators, legal aid, state rent assistance, and dispute resolution program representatives. The Work Group meets monthly.
- OCLA published and shared eleven (11) memoranda (all hosted on [OCLA’s website](#)) judges, court administrators, and clerks on issues related to effective and proper implementation of the RTC Program established in RCW 59.18.640.
- OCLA worked with the SCJA Education Committee, rental housing interests, and legal aid providers to offer an initial three-day training for judicial officers on the legislative changes to landlord-tenant substantive law and unlawful detainer practice and procedure enacted in 2021. OCLA is currently working with the SCJA Education Committee to update and enhance the UD training for judicial officers with a focus on peer-to-peer judicial officer engagement so that there is consistency of understanding and expectation among all who preside over unlawful detainer dockets.

7. Early Lessons and Findings

Since commencing operations in October 2021, RTC attorneys have been appointed for all tenants screened and found eligible for appointed counsel in every case in every judicial district in the state. While this is a benchmark worth celebrating, we caution that there remain significant numbers of tenant defendants who do not know of their rights to appointed counsel,

⁷After each monthly data sync, OCLA staff, JustTech, and the research team at the UW Evans School review and assess for irregularities and changes that need to be made to ensure consistent and reliable pushes of all relevant data points. This is a work in progress, and “data cleaning” efforts are ongoing both at the programmatic and statewide level. Significant data discrepancies remain between providers in a number of fields reported in the most recent data dashboard.

do not understand the complex documents served on them at the start of an unlawful detainer proceeding, experience significant barriers to asserting their legal rights, and who fail to appear in response to the Order to Show Cause. For these tenants, the right to counsel is illusory. For OCLA and the RTC provider community, the challenge is to identify and inform tenants of their rights and how they can timely assert and defend them. This work is in progress.

Though the program has been fully operational on a statewide basis for only six months, several early lessons and observations can be shared now. These include:

a. The Reforms of 2021 (Including RTC) Are Having A Salutory Effect

As of the date of this report, UD filings remain significantly below historical norms, though there has been a progressive increase in filings in recent months.⁸ Initial experience suggests that the cumulative impact of the substantive and procedural changes enacted in 2021 (HB 1236 and 2ESSB 5160) resulted in a recalibration of cost-benefit considerations for landlords (and their counsel) when considering whether to commence an unlawful detainer proceeding.

In a sharp departure from prior practice, the 2021 reforms place tenant property rights on a more balanced footing with those of landlords. As a consequence, landlords (and counsel) appear to recognize that writs no longer come cheap or easy; that should they decide to commence a UD proceeding, they will be required and tested to prove their right to extraordinary, accelerated relief (summary dispossession of their tenants' right to live in their home); and that their tenants will be effectively represented by skilled attorneys appointed by the court.

As noted above, HB 1236 (introducing just cause evictions) altered the eviction landscape in Washington State at the same time as the appointed counsel requirements and imposition of ERPP processes for cases involving nonpayment of rent took effect. Preliminary data suggests that most UD cases filed in the year since enactment of HB 1236 and 2ESSB 5160 did not involve allegations of nonpayment of rent. Most cases handled by RTC attorneys during this time involved some cause-based reason or other claim of legal basis for relief not involving payment of rent.⁹ By their very nature, cause-based cases involve a possession-related factual dispute, requiring significantly more time for attorneys to litigate than nonpayment of rent cases.

The balance between the percentage of cause-based and rent-based UD filings is likely to change as the availability of rent assistance subsidies and rental rates continue their unparalleled inflationary rise, placing more tenants – including those with excellent rental histories – at increasing risk of inability to pay and eviction. These trends have already begun to drive increased numbers of nonpayment cases being filed.

⁸ Average UD filings in Washington State during the pre-pandemic period were between 16,000 and 18,000 per year. The most recent filing data (June 2022) shows a monthly total of 997. This is an increase from prior post-moratorium months and suggests that we are now entering a period of significant UD filing increases.

⁹ A significant number involve claims of landlord intent to reoccupy or sell the property. These, too, must be tested to assess whether the claim of intent is legitimate or a ruse to avoid the need to prove just cause.

b. Representation Preserves Tenancies and Promotes Residential Housing Stability

Court-appointed attorneys represented tenants in close to 3000 Unlawful Detainers proceedings between January 1 and May 31, 2022. Data from OCLA-contracted providers confirms that legal representation protected tenant rights to remain in their homes in more than 50% of closed cases in which the outcome is known. Further, in cases where an adverse outcome regarding continuity of the tenancy is indicated, attorneys are successfully negotiating agreements that extend time to move, result in orders of dismissal and orders of limited dissemination, provide the tenant relief from future claims of back-due rent, and other outcomes that significantly benefit the tenant and reduce the long-term negative impact on their ability to find rental housing.

c. RTC Attorneys are Professional and Effective; Courts Processes Have Not Suffered

The unlawful detainer process under RCW 59.12, 59.18, and 59.20 is accelerated, allowing landlords to quickly recover property as an interim measure through judicial issuance of a writ of restitution. Writs issue following hearings in which landlords are required to “show cause” or demonstrate that there are no material facts at issue and they are entitled to immediate recovery of the premises. Historically, landlords faced few obstacles in securing lightning quick relief even in cases in which they were not entitled to the same under applicable law and the facts of the case.

Historically well over 90 percent of UD cases involving indigent tenants were not contested either because the tenant did not show or because the unrepresented tenant was unable to explain why the landlord (represented by counsel) should not evict them. The Legislature recognized the unfairness of this situation and determined that indigent tenants should be represented before they are summarily disposed of their right to live in their homes. The right to appointed counsel now established in RCW 59.18.640 ensures that such representation is available for indigent tenants.

During legislative debate, concerns were raised that the appointed counsel program would interfere with the right of landlords to early relief. 2ESSB 5160 did not change the time in which a hearing must be scheduled on a landlord’s claim of right to a writ of restitution, nor did it alter the landlord’s right to early relief where the facts and law support it. However, nothing in pre-existing law requires that judgment on the claim for early relief be granted within a specific timeframe, and nothing in 2ESSB 5160 changed that.

Due process requires that tenants be given notice of the landlord’s claim for early relief and a fair opportunity to contest the same. Appointing and providing the tenant’s attorney an opportunity to properly contest the landlord’s claim of right to possession may very well extend cases beyond their historical average timelines. This is the inevitable consequence of restoring fairness to and ensuring due process in a system that was previously skewed heavily in favor of the landlord.¹⁰

¹⁰ Significant changes in average time per case have not been observed. OCLA data shows that contested cases involving extended representation are on average closed within 77 days of being opened.

Every day across the state, court-appointed attorneys provide zealous, effective, ethical, and professional representation on behalf of tenants in unlawful detainer cases. Judicial officers across the state with whom OCLA staff regularly consult confirm that tenants receive effective assistance of counsel in these cases, know and effectively identify and argue applicable law, understand the circumstances of their clients' cases, file appropriate motions, and are highly professional.

Locally and statewide, judicial officers recognize the substantial change in UD practice resulting from the 2021 landlord-tenant reforms. Several courts have convened "landlord-tenant working groups" that bring landlord attorneys, tenant attorneys, ERPP staff from the local dispute resolution center, and providers of rental assistance. Meetings of these work groups offer a forum for identifying, discussing, and resolving issues related to UD process and procedure. In superior courts as diverse as Yakima, Kitsap, Skagit, Snohomish, and Spokane, discussions in these work groups resulted in substantial changes to standing court orders and consensus of understanding related to local UD practice and procedure.

The SCJA and local superior court judicial officers have been vital partners in the program's implementation and deserve credit for early successes. The development of the UD bench card and presentation of judicial officer training referenced above helped get the RTC implementation effort on a solid footing. Presiding judicial officers consistently forward OCLA's update memoranda to their peers.

While some challenges remain, courts are routinely informing tenants of their rights to appointed counsel, providing them time to be screened for eligibility, appointing attorneys for indigent tenants, and respecting the new and enhanced role of tenant defendants' court-appointed attorneys.

d. Attorney Recruitment and Retention is a Challenge

Commencing in July 2021, OCLA-contracted RTC programs had to quickly recruit, train, and deploy more than 70 full-time attorneys statewide to accept court appointments in UD cases. Recruiting and retaining attorneys to practice in rural regions of the state – particularly in eastern Washington – has been a challenge.

Attorney retention is also challenging. Given the RTC attorneys' heavy caseloads and accelerated timelines in these cases, UD defense practice is intense, fast-paced, and stressful. The program has already witnessed turnover in the ranks of RTC attorneys, and more is inevitable. Recognizing the need to create a permanent "pipeline" of attorney talent dedicated to eviction defense and other housing justice related work, OCLA partnered with Seattle University School of Law (SU Law) to start a first-of-its-kind Housing Justice Collective (description attached). Through the Housing Justice Collective, SU Law will develop academic, clinical and internship offerings intended to train and regularly place into practice new lawyers who are enthusiastic about tenant defense and are prepared to start appointed counsel tenant defense work immediately upon passage of the bar exam.

e. Caseloads; Time/Case

The RTC Implementation Plan made several assumptions that were incorporated into OCLA's budget and operational planning. Two assumptions grounded in historical practice prior to enactment of 2ESSB 5160 and SHB 1236 involved the average number of contested extended representation cases that dedicated RTC attorneys can handle at one time (25) and the average time per case to defend tenants in such cases (5 hr./case). Neither assumption is being borne out in practice.

The substantive and procedural changes in eviction law and practice made UD cases more complicated and increased the time needed for attorneys to effectively defend tenants against landlord efforts to evict them. Average attorney time from appointment through resolution of a contested UD case ranges from between 10 and 15 hours. The average time from appointment through case closure is 77 days. OCLA has begun a deeper dive into what is driving these numbers and will continue to assess whether changes in assumptions on time/case, caseload levels, or both are indicated.

8. Conclusion

The Legislature made a bold commitment to justice and fairness by enacting the nation's first right to court-appointed counsel for indigent tenants in eviction cases. Six months into the program's full operation, the right to an attorney (RTC) is clearly a game-changer. The balance of power between landlords with attorneys and tenants predominately without attorneys in unlawful detainer cases substantially shifted, ensuring a greater chance of just results consistent with applicable law in these cases that involve some of the greatest stakes – the right to live in one's home.

While data is just beginning to come in, there can be no doubt about the program's beneficial impact – from reducing the number of unnecessary UD filings through achieving results that protect tenant residential housing rights from wrongful summary dispossession.

The Office of Civil Legal Aid embraces the trust and confidence the Legislature demonstrated when it assigned this program to it. We have been earnest and transparent in our planning, implementation, and early oversight of the program. We will continue to monitor, adjust, and administer the program in a manner that ensures that all indigent tenants who face judicial eviction – wherever in the state they reside – receive consistent, high quality, effective legal representation by trained and increasingly experienced eviction defense attorneys.

We look forward to submitting our biennial implementation report next year.

Jim Bamberger, OCLA Director
Philippe Knab, Eviction Defense Programs Manager
Erin Ryan, Eviction Defense Programs Counsel

Questions/Comments should be forwarded to evictiondefense@ocla.wa.gov

Attachments:

- OCLA Eviction Defense Data Dashboard (Jan. – May 2022)
- SCJA Unlawful Detainer Bench Card
- OCLA-Seattle University Housing Justice Collective