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To: Judge Rachel Anderson, SCJA President
Chris Gaddis, President AWSCA
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From: Jim Bamberger, Director Office of Civil Legal Aid
Philippe Knab, OCLA Eviction Defense Program Manager

Re: Right to Counsel, Update Memorandum No. 9
Implementation Issues

Date: November 30, 2021

I hope all had a safe and happy holiday weekend.

The purpose of this Memo No. 9 is to share thoughts and observations regarding issues that appear to be arising during this initial period implementing the appointed counsel model for legal representation of indigent tenants in unlawful detainer cases in Washington state. These issues have come to our attention through active engagement with our RTC providers in every part of the state, conversations with judicial officers, and conversations with justice system and landlord/tenant community stakeholders. Some were highlighted during and following our two-day visit to Spokane on November 15th and 16th where Philippe Knab and I held or participated in 15 separate meetings with judicial officers, the Spokane County Clerk and Court Administrator, representatives of the landlord bar and rental housing industry, representatives from the Tenants Union, RTC attorneys, and a representative from one of the two dispute resolution centers working on the Eviction Resolution Pilot Program. The most prevalent issues are discussed below:

1. **Lack of Sufficient Attorney Capacity and the Threat of OCLA Suspension of Appointments**

OCLA has certified nearly every judicial district, allowing them to proceed to appoint attorneys to represent indigent tenants in unlawful detainer cases. We anticipate all judicial districts being certified by December 15th. We will accomplish this more than 5 months faster than the timeline set forth in SB 5160. We accelerated the implementation, hiring, training, and certification process in large measure out of recognition for (a) the needs of tenants threatened with eviction in the post-moratorium period, (b) the legitimate need of landlords to move forward and achieve certainty with respect to their rental properties, and (c) the need to support the courts in

managing backlogs in the number of unlawful detainer cases in this post-moratorium environment (on top of the many other backlogs in criminal right to trial, civil, *Blake*, and related cases).

To date, OCLA has not suspended certification in any judicial district. While we may very well have underestimated the number of attorneys it would take to operate this program in our March 2021 fiscal note that the Legislature used for the FY 2021-23 appropriation, to date that has not been proven to be the case. During implementation we adjusted RTC capacity on the fly adding, for example, additional capacity in Spokane County, Benton-Franklin Counties, and providing for regional at-large attorneys to serve as "gap fillers" where gaps result from RTC attorney turnover, temporary caseload overloads, and other circumstances that might disrupt the proper flow of cases and availability of RTC attorneys.

We monitor UD filings and RTC caseloads monthly. Unlawful detainer filing numbers may at some point exceed our point-in-time carrying capacity in a particular jurisdiction. In such case we will suspend our certification; action that will in turn temporarily suspend court appointments and evictions of indigent tenants until our RTC providers reduce caseloads to manageable levels.

Anticipating this possibility and in order to address capacities that were not fully appreciated as necessary at the time we crafted the 3/2021 fiscal note, OCLA submitted a request for $1.2M in supplemental funding for FY 2022 and 2023. If it turns out that we need more capacity for day-to-day tenant defense work, we will so advise the legislative budget writers. We hope SCJA, the Clerks, and Court Administrators will be supportive.

2. A Different Set of Expectations Regarding Landlord-Tenant Practice and Procedure is Emerging

Judicial officers, court administrators, and landlord attorneys have shared several concerns about the approach that OCLA-contracted RTC attorneys are taking in unlawful detainer actions, including but not limited to asking for jury trials. This change in practice approach is a logical consequence of the Legislature's fundamental reordering of rights, responsibilities, and power relationships in the landlord/tenant arena over the past three years through passage of SB 5600 (2019), HB 1236 (just cause eviction), and SB 5160 (establishing the Right to Counsel and Eviction Resolution Pilot programs and creating new procedural pre-UD filing requirements).

The Legislature created the right to appointed counsel as a deliberate step away from historical approaches to the delivery of legal services for tenants facing eviction. This practice was often characterized by day-of, courthouse-based legal advice or one-time assistance provided by volunteer private attorneys. The Legislature's intent was to change the status quo by mandating and professionalizing the availability and quality of indigent tenant representation consistent with performance expectations that attach to other arenas involving publicly funded appointed attorneys.

Many in the landlord bar want to go back to or preserve "business as usual" where orders to show cause were handed out routinely and hallway settlements ("cash for keys") were the norm, and tenant counsel rarely spent more than 1-2 hours per case. Recent policy choices made by the Legislature dictate that landlord-tenant practice change. Historical practice norms are no longer relevant benchmarks for what will happen moving forward.

By way of example, we have seen landlords with tenants far behind in rent try to engineer a way around the legislatively imposed 14-day reasonable repayment plan followed by the 14-day ERPP and pay or vacate notices (which may be served simultaneously). Instead, they file unlawful detainers alleging health/safety, waste/nuisance, or other bases for prompt removal.

By their very nature, cause-based unlawful detainers are fact-based cases that require discovery, witness testimony, and the production of demonstrative evidence. Tenant attorneys have an ethical duty to review and, where appropriate, affirmatively challenge claims, build a defense, and put the landlord's claims to a test in a trial on the merits. The summary writ process most appropriately used in non-payment cases was not designed for these cases. Nor was it designed for other cases alleging just cause under HB 1236. Many of these fact-based cases will need to proceed beyond the show-cause stage to a trial on the merits. In some circumstances, tenants (through their attorneys) will assert (as some have) their client's rights to a jury trial. RCW 59.12.130.

Judicial officers and court administrators (and landlord attorneys) will need to anticipate and accommodate a different level of practice in unlawful detainer cases, and a much higher level of engagement on the part of attorneys appointed to represent indigent tenants. Normal civil litigation practice will become the new normal in cases not based on non-payment of rent. RCW 59.12.180.

3. Continuances for Screening, Appointment, and Preparation

In cases where a tenant appears without legal counsel and consistent with the guidance provided in section 2.E of the Model Standing Order and the SCJA's Bench Card (both attached), judicial officers are routinely continuing hearings for a few days to allow the tenant to be screened and assigned counsel. In many of these cases counsel appears, requests appointment and additional time to prepare.

Several judicial officers across the state have expressed concern that RTC attorneys are or will routinely request continuances for the purpose of slowing cases down and avoiding prompt judicial review on the merits of the plaintiffs' claims. There is no basis for this concern. RTC attorneys will seek continuances necessary for client preparation, discovery, settlement discussions, and other activities appropriate to effective representation of their clients. We can all agree that delaying the process is not an appropriate basis for a continuance.

In the case of unrepresented tenants who need to be screened, we respectfully suggest that a best practice would be for courts to routinely grant a two-week continuance. This will allow for

prompt screening and assignment (2-3 day turnaround) either locally or through the Eviction Defense Screening Line and for the assigned attorney to meet with their client, send a NOA to plaintiff's counsel, and undertake preparation (including informal discovery, interviewing of witnesses, pulling together non-testimonial evidence, drafting and filing of motions, etc.) in advance of the show cause hearing. Such an approach will offer greater certainty of expectation for all parties and allow judicial officers to reasonably expect all parties to be ready to proceed at the return date.[1]

4. Update on Conflicts (Ref. Memo No. 7 (10/11/21))

In Memo No. 7 (attached) we advised that there are likely to be cases where the primary OCLA-contracted providers cannot accept an appointment due to conflicts of interest. We said then that efforts to secure conflict counsel should normally take "only a matter of days." Unfortunately, we found that securing conflict counsel is far more challenging than we anticipated.

RTC contractors are working to identify and engage law firms to be ready and able to accept conflict appointments. This will often require engaging attorneys/firms outside of the judicial district in which the case is pending – especially in rural and remote counties. Progress is being made and we anticipate securing the engagement of conflicts counsel in most regions of the state by year's end. We again request that courts make provision for remote (virtual) appearance and participation by contracted conflicts counsel. This will greatly help our contractors' efforts to recruit and engage conflicts counsel and avoid unnecessary delays in the processing of cases in which our primary RTC providers are conflicted.

Philippe Knab and I are always available to respond to questions. evictiondefense@ocla.wa.gov

[1] The applicable statute, RCW 59.18.370 requires that a hearing be scheduled for between 7 and 30 days following issuance of the Order to Show Cause. It does not require a hearing or determination on the merits within that timeline.