



Washington State Office of Civil Legal Aid

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To: Hon. Rachelle E. Anderson, SCJA President
Chris Gaddis, AWSCA
Kimberly Allen, WSACC

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

Re: RTC Implementation Memo No. 10

Date: 3/4/2022

The Right to Counsel (RTC) program for indigent tenants has been operational for six months and has been implemented statewide for three months. We are the first state in the country to implement a statewide Right to Counsel program for low-income tenants, and the only jurisdiction with a court-appointed model. Jurisdictions across the nation are following our efforts closely. Our intent with these memos is to broadly communicate the lessons we have and continue to learn to judicial officers, court administrators, and clerks; continue to identify issue areas requiring attention; and ultimately build on the impressive work we have done together to ensure consistent and effective implementation of this new right.

Experience to date confirms that (a) courts in most (but not all) jurisdictions are consistently informing unrepresented tenants of their right to appointed counsel consistent with the protocol outlined in the SCJA Bench Card, (b) screening is occurring in a timely manner, cases are timely assigned, and, (c) for the most part, orders appointing counsel are being properly entered.

As we exit the post-moratorium landscape and try to chart the new normal, we are finding the number of unlawful detainer filings is still significantly below historical average. This is fortuitous because RTC attorney time per case is significantly higher than the 5 hr./case estimate that we originally provided the Legislature and was assumed in the [RTC Implementation Plan](#). Depending on the jurisdiction and the provider, the average runs between 11 and 15 hr./case. This is, in large measure, because of the substantial substantive legal and procedural changes that have fundamentally changed longstanding assumptions and practices in unlawful detainer cases.

OCLA is actively working with RTC providers to identify efficiencies that should help reduce the time/case ratio without compromising the integrity, quality, or effectiveness of representation. But no amount of efficiency can turn a fact-intensive case into a simple matter. Tenants have a right not only to appointed counsel, but the effective assistance of said counsel. All OCLA-supported RTC attorneys have been trained to effectively represent their clients

consistent with the new laws, court rules, and the RPC's. We appreciate the feedback we consistently receive from judicial officers across the state relating to the quality of their representation. We welcome your continuing observations, ideas, and suggestions about the performance of RTC attorneys and the overall program. We invite you to forward these to us at evictiondefense@ocla.wa.gov.

As you likely know, the federally funded Tenant Rent Assistance Program (T-RAP) has either been exhausted or will be shortly in most parts of the state. Looking at the budgets that have been passed by the House and Senate, we anticipate that the amount of funding for rent assistance will drop by between 90% and 95% -- from about \$1B in FY 22 to between \$40M to \$95M in FY 23. This means that far fewer cases will be resolved at the ERPP level, and substantially larger numbers of cases will be coming to the courts.

OCLA receives monthly and quarterly statistical and narrative data from our RTC contractors. On the basis of early (and at this point incomplete) data, we are encouraged by the outcomes reported by OCLA-contracted RTC providers. We have built a substantial infrastructure to track a rich spectrum of data points and contracted for third party analysis. Additionally, we engaged researchers at the University of Washington's Evans School of Public Policy and Governance to track and report meaningful data. As the data becomes available, we will share insights from it with you.

Against this background we want to focus on a few issues for which we think further collaboration and problem solving might be helpful. These are outlined below.

1. Defaults

One issue that has arisen, both in the data provided by AOC and reports from providers, is the tenant default rate. In jurisdictions where we have reliable data, we are finding that close to 50% of filed unlawful detainers result in a default judgement against the tenant.

Compounding the problem is that in many jurisdictions tenants are defaulted immediately prior to the return date on the order to show cause (OSC). As a consequence they are effectively denied their rights to a hearing on the merits *and* to appointed counsel. Tenants (especially those with limited English proficiency and those with literacy or other cognitive challenges) are often confused by (a) the ream of materials that are served on them, (b) the language in the summons requiring them to serve a notice of appearance, and (c) the language in the Order to Show Cause telling them that “[i]f you get notice of a hearing, **you must go to the hearing**” (bold in statute). Not surprisingly, they believe that since they have been directed to appear in court in both the Summons and the OSC, they should do so. But, because of the sequencing of the notices they've received, they show up only to discover the landlord's attorney has already obtained an *ex parte* default order one or two days prior and that the OSC has been stricken.

Recognizing this problem and its effective denial of due process, at least one local court (Skagit County Superior Court) adopted a rule prohibiting *ex parte* defaults when a court date has been

set. Section (a)(2) of the rule (attached) ensures fairness and helps protect against and effective (but legally allowed) “bait and switch” when landlord attorneys schedule the show cause return date for a date following the date on which a notice of appearance was required to have been sent to the landlord or their attorney. The relevant language reads:

“The Court will not issue an order of default or an order for writ of restitution until the hearing has occurred. A properly served defendant’s failure to appear at the how cause hearing will be treated as a default.”

Courts are the ultimate protectors of not only competing landlord and tenant property rights substantive rights but also due process rights. They have inherent authority to manage practice and procedure in the cases that come before them. The language in Skagit County Superior Court LR 8 promotes this by ensuring that tenants have a meaningful right to secure appointed counsel and participate in a hearing on the merits. Nothing in Skagit County LR 8 prevents entry of a default order if the tenant fails to respond or appear at the OSC.

Requested Assistance: Because of the unique and accelerated nature of these cases and the complexity of applicable law, we ask each Superior Court to consider adopting a local rule governing practice and procedure in unlawful detainer cases. While every such rule must reflect local circumstances, we respectfully suggest that the Skagit LR 8 approach to defaults in cases where OSC’s have issued be adopted in all jurisdictions.

2. Short-Term, Limited Lack of Available Counsel

RTC attorneys in a specific jurisdiction can be unavailable temporarily to attend to an unlawful detainer matter. This unavailability can occur when staff is absent, there is difficulty in hiring staff, or if there are conflicted obligations in another jurisdiction. As a result, we have added additional redundancy statewide by providing attorneys with the ability to step in regionally (or even extra-regionally) through the Northwest Justice Project (NJP) and other RTC providers (including contracted private RTC attorneys). This allows us to provide coverage at the show cause hearing in most (but not all) cases.

We anticipate these types of temporary interruptions will be a rare but they are an unavoidable part of the program, just as they are a regular part of legal practice. We have encouraged local RTC providers to engage directly with their courts to ensure that accommodations are available during these times and that tenant rights to counsel are not compromised due to short term capacity disruptions. At the same time, we ask that courts make appropriate accommodations by continuing cases where OCLA-contracted programs or attorneys advise in advance that no one is available to appear at a particular docket. Under current law, no writ should ever enter against an indigent tenant who appears at a show cause hearing because of a short-term unavailability of counsel at the designated RTC provider(s).

3. Day of/Next Day Emergencies

At least 10% of cases coming into the Eviction Defense Screening Line (EDSL) involve matters that require day of/next day action to protect both substantive rights of tenants and their rights to appointed counsel. These involve both pre- and post-writ matters. The urgency with which these matters must be addressed to prevent physical eviction and keep tenants in the home solely to allow tenants access to appointed counsel puts a considerable strain on the OCLA-contracted RTC providers. Due to the expedited nature of unlawful detainer cases, these providers are faced with incredibly tight timelines on cases that run the normal course. They often do not have the ability to drop what they are working on to address emergency motions to keep tenants housed. This problem is particularly acute in jurisdictions with few *ex parte* dockets for presentation of emergency motions, long travel distances with no or limited remote access, or fewer contractors providing RTC services.

We are working with the Legislature and our contractors to free up dedicated statewide emergency response capacity to help address the challenges presented by these cases. In the meantime, and to ensure judicial fairness and avoid the unintentional denial of rights of all parties, including tenants' rights to appointed counsel, we ask courts to adopt local rules or protocols that effectively stay matters upon receipt of a NOA until such time as counsel can be appointed and the matters can be heard on the merits. Provisions to this effect are included in the attached proposed Model Local Unlawful Detainer Rule.

4. Pilot Testing On-Site Screening

Six months of RTC operation have shown that there are multi-tiered benefits to local screening and referral as a complement to the statewide Eviction Defense Screening Line (which strives to achieve 2-working day turnaround). Unsurprisingly, in jurisdictions where local screening is available, appointments happen more quickly, RTC attorneys have more time to work with their tenants prior to court, and fewer requests for continuance are filed.

We would like to undertake a pilot project to test the efficacy of a complementary local intake process. This would involve close coordination with court administrator and/or clerk offices (not sure which is best positioned in any given judicial district). In the pilot the designated entity (administrator or clerk) will electronically send information (case no., tenant name, contact info.) to a designated screening e-mail address at a local RTC provider (e.g., screening@localhjp.org). The provider will receive these and quickly contact and screen the tenant. For those eligible, they would prepare and submit a request for appointment. We hypothesize that such an approach might reduce "tenant loss" resulting from tenants who leave court and fail to successfully connect with the EDSL or the local provider. Facilitating direct referral from the court of case information relating to tenants who have appeared unrepresented could also help speed up court process as well. If your court is interested in participating in this pilot effort, please contact Philippe Knab, OCLA's Eviction Defense Program Manager at Philippe.knab@ocla.wa.gov.

5. Updated Training (Peer to Peer) for Judicial Officers (Regular and Pro Tem) Presiding Over Unlawful Detainer Proceedings

In July 2021, the SCJA Education Committee hosted a three-day series of trainings on the new laws and procedures resulting from recent legislation affecting the eviction and unlawful detainer process. In recent months, we've received several suggestions for an additional series of short trainings and updates. We endorse this idea and have suggested that such updates/trainings be scheduled for one or more of the noon-hour sessions periodically hosted by the Administrative Office of the Courts. We have reached out to AOC staff to help us design and schedule such trainings. Judicial officers who are interested in or would like to help present at any such training should contact us at evictiondefense@ocla.wa.gov.

6. Court Observation, Issue Identification, Problem Solving

Because the right to counsel is so new and the changes in practice and procedure so profound, we want to understand how it plays out across the state. To that end, we are observing unlawful detainer dockets in many jurisdictions. Our goal is to observe what is happening, identify issues to bring to the attention of RTC funded attorneys, and share observations relating to the appointment of counsel with judicial officers in a manner that does not compromise their independence, integrity, or adherence to the Code of Judicial Conduct. We have been advised by the Commission on Judicial Conduct that such engagement is appropriate as it is undertaken in a non-representational capacity and in service ensuring that rights of individuals entitled to appointed counsel are properly honored and implemented.

We are all navigating uncharted waters. There remain many unanswered questions – legal and operational – relating to the new landlord-tenant laws and the right to appointed counsel now codified in RCW 59.18.640.

We are grateful for the guidance and feedback we have and continue to receive from our judicial branch colleagues presiding over these cases. Not unlike AI, we are learning as we go. We thank you and all your colleagues for your willingness to work with us, to share ideas and solutions, and to help us operationalize the Legislature's directive that all indigent tenants receive the effective assistance of counsel before they are judicially evicted.

SKAGIT COUNTY SUPERIOR COURT

RULE 8 UNLAWFUL DETAINER ACTIONS

(a) Complaints for writs of restitution, money judgments, and other orders in residential, post-foreclosure, and manufactured and mobile home unlawful detainer actions will be granted only under the following conditions:

(1) Owners or lessors of real property, or any duly appointed attorney in fact, may properly be a plaintiff in an unlawful detainer action. All complaints must include the following:

(i) A copy of the rental agreement or lease upon which the tenancy is based, if any, shall be filed with the complaint. A complaint that involves a month-to-month tenancy that is the result of a conversion from a lease shall include a copy of the underlying lease.

(ii) Plaintiff owners of the real property must state ownership in the complaint and if the tenants participate in federal housing assistance programs or if the real property has a federally backed mortgage.

(iii) Plaintiff lessors and sublessors must state their status as lessor or sublessor in their complaint.

(iv) Duly appointed attorneys-in-fact of the property owners must state their status in the complaint and must file with the complaint a copy of the power of attorney so designating them.

(v) If the action is brought under the Residential Landlord Tenant Act and is based upon any reason other than exclusively nonpayment of rent, the plaintiff shall specifically plead the just cause exception under RCW 59.18 et. seq. to ending a residential tenancy and shall state with specificity the facts supporting such exception.

(vi) If the action is based upon a facility rules violation, a copy of the rules shall be attached.

(vii) If the property or housing unit is federally, state or tribally subsidized in any manner (including but not limited to Section 8 housing, Public Housing, Rural Development housing, or Low Income Tax Credit Program) the name of the program and nature of the subsidy shall be included in the complaint.

(viii) A certification that the plaintiff notified Skagit Legal Aid and the approved dispute resolution center prior to the filing of this action in the form of Attachment B which is attached to this rule.

(ix) A copy of the notices required under RCW 59.12, et seq. and any notice required pursuant to any standing order of this Court and proof of service or mailing of the aforementioned notices.

(2) A plaintiff seeking a writ of restitution must either schedule the matter for trial or schedule a Show Cause Hearing on the issuance of the writ, with proper notice to the defendant of the hearing and notice that failure to attend may result in a default judgment and writ of restitution.

Notice of the hearing must be by an Order to Show Cause which may be served with the Summons and Complaint or at any time thereafter. The Order to Show Cause must include information about how tenants can access remote proceedings in accordance with Local Rule 7(b).

The Plaintiff shall attach to all Orders to Show Cause issued in all residential, post-foreclosure and manufactured and mobile home unlawful detainer actions the following in English and Spanish:

(i) IMPORTANT NOTICE TO TENANTS CONCERNING SCHEDULED COURT HEARING TO SHOW CAUSE AND HOW TO ACCESS LEGAL ASSISTANCE AND VIRTUAL PROCEEDINGS, which is attached to this rule and incorporated herein as Attachment A, and

(ii) Request for Interpreter Services form as maintained and updated by the Court Administrator's office.

The Court will not issue an order of default or an order for writ of restitution until the hearing has occurred. A properly served defendant's failure to appear at the show cause hearing will be treated as a default.

- (3) A plaintiff seeking the entry of a writ of restitution in any residential post-foreclosure, manufactured or mobile home unlawful detainer action shall cause to be served with the Order to Show Cause a copy of Attachment A which is attached to this rule.

(b) The following procedure shall be followed during the Unlawful Detainer calendar:

- (1) At the commencement of each unlawful detainer court calendar a representative of a Qualified Legal Services Provider shall be permitted to announce to the parties present either in person or virtually the availability of free legal services for those who desire legal assistance and who financially qualify.
- (2) The Court will, at the commencement of the hearing, advise the parties that the defendant may seek a continuance of the hearing to a later date if the defendant wishes to seek an attorney to represent them or if they need more time for some other valid reason. The defendant must exercise this option at the very start of the hearing.
- (3) The Court will continue the hearing for any defendant who indicates to the court the desire to consult with an attorney associated with the Qualified Legal Services Provider. Plaintiff's counsel is encouraged to meet with and negotiate resolution of matters.
- (4) The court shall consider the tenant's circumstances, including decreased income or increased expenses, and the best repayment plan terms offered during any unlawful detainer proceeding.

ATTACHMENT A

**IMPORTANT NOTICE TO TENANTS CONCERNING
SCHEDULED COURT HEARING TO SHOW CAUSE**

This notice contains legal rights that you have under the law and Skagit County Superior Court Local Rules.

- If you do not participate in your Show Cause hearing, the Sheriff could evict you.
- State law provides you the right to legal representation. The court may be able to appoint a lawyer to represent you without cost to you if you are a qualifying low-income renter.
- You have the right to appear at the Show Cause hearing and present your side to the Court either in person or virtually in accordance with this Court's Local Rules.
- Your landlord is required to give you this addendum if they give you an "Order to Show Cause."

Remote Appearance

You may appear remotely if you have a clear audio and video connection. Information about connecting remotely is posted on the Court's website in the Daily Court Schedule:

www.skagitcounty.net/Departments/SuperiorCourt

The rules of courtroom decorum continue to apply to anyone appearing remotely, including the public. All parties are expected to wear courtroom appropriate attire when appearing remotely.

Legal Help

**State law provides you the right to legal representation. If you qualify,
the court may be able to appoint a lawyer to represent you at no cost to you.**
If you believe you qualify and would like an attorney appointed to represent you,

Contact the Eviction Defense Screening Line
by phone at 855-657-8387
or apply online at <https://nwjustice.org/apply-online>

For additional resources, please call the CLEAR Advice and Referral line at **1-888-201-1014** weekdays between 9:15 a.m.-12:15 p.m. or the CLEAR Senior line at **1-888-381-7111** for seniors age 60 and up. You will be screened for eligibility. Legal representation is not guaranteed.

Any person should qualify who, at any stage of a court proceeding, either

(a) Receives one of the following types of public assistance:

- Temporary assistance for needy families,
- aged, blind, or disabled assistance benefits,
- medical care services under RCW 74.09.035,
- pregnant women assistance benefits,
- poverty-related veterans' benefits,
- food stamps or food stamp benefits transferred electronically,
- refugee resettlement benefits,
- medicaid, or
- supplemental security income;

or

(b) Receives an annual income, after taxes, of 200 percent or less of the current federally established poverty level.

If you are unable to contact CLEAR, you may contact Skagit Legal Aid's Housing Justice Project at (360) 230-8100. The clinic operates either in person or virtually during each court unlawful detainer calendars.

You may also visit WashingtonLawHelp.org for information on landlord/tenant law.

Individuals with Disabilities or Limited English Proficiency

If you have a disability or do not primarily speak English and need assistance in order to fully participate in your Show Cause hearing, you should promptly contact the Superior Court Administrator's office and follow the provided instructions by calling (360) 416-1200 or in-person at the Court Administrator's office (2nd floor courthouse), and then follow the provided instructions.

Applicants should request the accommodation that will allow them to best participate in court programs, services, or activities. A reasonable accommodation could be, but is not limited to:

- an interpreter,
- a sign language interpreter;
- large print or high contrast documents and forms;
- hearings held by teleconference;
- extended time for hearings and recesses; or
- assistive listening and seeing devices;
- personal assistance or someone who can help present the case or claim to the Court.

All parties with Limited English Proficiency who need an interpreter to participate in court hearings must submit the attached Request for Interpreter form to Superior Court Administration at the earliest opportunity.

ATTACHMENT B

Certification of Property Owner, Landlord, or Counsel

I certify and declare under penalty of perjury under the laws of the State of Washington that on _____(the date prior to filing), I e-mailed/mailed notice of my intent to file a Complaint in Unlawful Detainer against Tenant _____(insert Tenant's name) along with the Tenant's last known contact information (i.e. address(es), telephone number(s) and e-mail(s), and preferred communication language) to the approved dispute resolution center and Skagit Legal Aid.

[Adopted September 1, 2020; Amended September 1, 2021]

**OCLA PROPOSED LOCAL RULES FOR UNLAWFUL DETAINER ACTIONS (RCW 59.12;
59.18; 59.20)**

(a) Complaints for writs of restitution, money judgments, and other orders in residential, post-foreclosure, and manufactured and mobile home unlawful detainer actions will be granted only under the following conditions:

(1) Owners or lessors of real property, or any duly appointed attorney in fact, may properly be a plaintiff in an unlawful detainer action. All complaints must include the following:

(i) A copy of the rental agreement or lease upon which the tenancy is based, if any, shall be filed with the complaint. A complaint that involves a month-to-month tenancy that is the result of a conversion from a lease shall include a copy of the underlying lease.

(ii) Plaintiff owners of the real property must state ownership in the complaint and if the tenants participate in federal housing assistance programs or if the real property has a federally backed mortgage.

(iii) Plaintiff lessors and sublessors must state their status as lessor or sublessor in their complaint.

(iv) Duly appointed attorneys-in-fact of the property owners must state their status in the complaint and must file with the complaint a copy of the power of attorney so designating them.

(v) If the action is brought under the Residential Landlord Tenant Act and is based upon any reason other than exclusively nonpayment of rent, the plaintiff shall specifically plead the just cause exception under RCW 59.18 et. seq. to ending a residential tenancy and shall state with specificity the facts supporting such exception.

(vi) If the action is based upon a facility rules violation, a copy of the rules shall be attached.

(vii) If the property or housing unit is federally, state or tribally subsidized in any manner (including but not limited to Section 8 housing, Public Housing, Rural Development housing, or Low-Income Tax Credit Program) the name of the program and nature of the subsidy shall be included in the complaint.

(viii) A certification that the plaintiff notified the approved dispute resolution center prior to the filing of this action in the form of Attachment B which is attached to this rule.

(ix) A copy of the notices required under RCW 59.12, et seq. and any notice required pursuant to any standing order of this Court and proof of service or mailing of the notices.

(2) A plaintiff seeking a writ of restitution must either schedule the matter for trial or schedule a Show Cause Hearing on the issuance of the writ, with proper notice to the defendant of the hearing and notice that failure to attend may result in a default judgment and writ of restitution.

Notice of the hearing must be by an Order to Show Cause which may be served with the Summons and Complaint or at any time thereafter. The Order to Show Cause must include information about how tenants can access and participate in remote proceedings.

The Plaintiff shall attach to all Orders to Show Cause issued in all residential, post-foreclosure and manufactured and mobile home unlawful detainer actions the following in English and Spanish:

(i) IMPORTANT NOTICE TO TENANTS CONCERNING SCHEDULED COURT HEARING TO SHOW CAUSE AND HOW TO ACCESS LEGAL ASSISTANCE AND VIRTUAL PROCEEDINGS, which is attached to this rule and incorporated herein as Attachment A, and

(ii) Request for Interpreter Services form as maintained and updated by the Court Administrator's office.

(i) AVISO IMPORTANTE PARA LOS INQUILINOS SOBRE LA AUDIENCIA JUDICIAL PROGRAMADA PARA MOSTRAR CAUSAS Y CÓMO ACCEDER A ASISTENCIA LEGAL Y PROCEDIMIENTOS VIRTUALES, que se adjunta a esta regla y se incorpora aquí como Anexo A, y

(ii) Formulario de Solicitud de Servicios de Intérprete tal como lo mantiene y actualiza la oficina del Administrador del Tribunal.

[Note: This Spanish translation needs to be checked]

The Court will not issue an order of default or an order for writ of restitution until the hearing has occurred. A properly served defendant's failure to appear at the show cause hearing will be treated as a default.

(3) A plaintiff seeking the entry of a writ of restitution in any residential post-foreclosure, manufactured or mobile home unlawful detainer action shall cause to be served with the Order to Show Cause a copy of Attachment A which is attached to this rule.

(b) In all unlawful detainer cases where RCW 59.18.640 applies to appoint lawyers for indigent tenants: If the tenant appears, before taking any action in the case, the court shall:

- (1) Inform the tenant they have a right to be represented by a lawyer at public expense if they are indigent;
- (2) Ask the tenant if they want the court to appoint a lawyer if they are eligible;
- (3) Appoint a lawyer if the tenant is eligible; and
- (4) Continue the hearing for 10 days.
- (5) If the tenant is unrepresented and the court issues a writ of restitution before judgment or by default, the tenant may move for appointment of a lawyer at any time before law enforcement executes the writ. During this time, a lawyer seeking appointment may make an ex parte motion for appointment and to stay the writ. Upon such motion, the court shall appoint the lawyer and stay the writ for ten days. The motion shall be submitted **[where is it submitted if they don't have an ex parte docket? Each county will be different.]**
- (6) A stay issued under this rule will be set to expire ten days after entry without further

order from the court. If new information arises and the court finds the tenant is not eligible for appointment of a lawyer, the court shall lift the stay immediately.

- (c) For CR 60 motions filed within unlawful and forcible detainer actions, service may be accomplished by the means set forth in RCW 59.18.410(4).

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- food stamps or food stamp benefits transferred electronically,
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