



Building the Plane While We Fly It — Implementing Year One of Washington State’s Right to Counsel in Evictions

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Top: By Scott Crain (L); Michelle Lucas (C); Abigail G. Daquiz (R).

In Washington State we are in a unique moment in legal aid history. We have momentum to address the long-understood need for legal representation when an individual’s basic needs are in jeopardy. The COVID-19 pandemic and the anticipated end of a two-year eviction moratorium provided the necessary push to make a right to counsel (RTC) real for tenants. Implementation of this new statewide program has been a journey. Some describe it as building this plane while we fly it—but it’s important to take the time to step back, look at this plane, and assess. Are we building what clients need? Are we delivering on our mission to our clients and communities as we build this plane?

How RTC Became Law in Washington

In 2021, as part of a package of tenant protections related to the COVID pandemic, the Washington Legislature created an RTC for low-income renters being evicted from their homes. The RTC law passed in the same session as a number of laws that assisted tenants: a fiercely debated Just Cause Eviction Statute that protected the rights of renters to be evicted only

for good cause, COVID-19 rental assistance, a law ending the eviction moratorium, and protections from eviction for late or unpaid rent during the pandemic. Unlike other tenant protections that took years of advocacy and many iterations, the RTC statute passed and was funded in the first session it was considered.⁵ In

Northwest Justice Project (NJP)

Northwest Justice Project (NJP) is Washington State’s largest publicly-funded civil legal aid organization and the state’s only LSC-grantee. NJP is the largest partner within the RTC program, hosting a statewide Eviction Defense Screening Line that screens and refers tenants to the providers statewide and runs the Eviction Prevention Unit, providing lawyers for appointment, and providing contracting services. NJP also hosts the statewide Housing Task Force. The other providers of contract lawyers are the 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, and Chelan-Douglas County Volunteer Attorney Services.

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recognition of the unprecedented housing crisis caused by the COVID-19 pandemic, the law took effect immediately upon signing by Governor Inslee on April 22, 2021.

The RTC law tasked the Washington State Office of Civil Legal Aid (OCLA), a state agency responsible for the administration of state funding for civil legal aid, with the role of administering the new program. OCLA had a 90-day window to present an implementation plan to the legislature,⁶ with full implementation to be completed within 12 months of the bill's passage. By January 18, 2022, OCLA was able to certify that every one of Washington's 39 counties had trained lawyers in place to meet the statutory RTC requirements, thus permitting eviction actions to proceed.

While passing RTC, the legislature also ended the governor's moratorium on residential evictions for nonpayment of rent. After July 2021, landlords slowly started to evict tenants again. In October of 2021, programs around the state began to hire RTC staff to represent tenants in this new scheme. At the end of 2022, statewide eviction filing numbers are at approximately 50 percent of pre-pandemic levels, and there are approximately 64 attorneys to provide eviction defense around the state.

Who is eligible, and who is helping them?

RTC is limited to low-income tenants who have been served with an eviction summons, or against whom a complaint has been filed. Tenants who are below 200% FPL, after taxes, or renters who use means-tested public benefits are eligible.⁷

The vast majority of attorneys providing RTC services work for a legal aid provider in Washington State. NJP is one of the largest providers, offering RTC services in nearly every county. In some counties, we are the minor partner, with fewer staff than the local legal aid program. In others, we are the only game in town. To complement this network, attorneys in private practice contract to provide additional coverage.

Eligibility Begins with the Commencement of Litigation

The statute puts the onus on the court to appoint an attorney to a tenant facing eviction. While every indigent tenant has a right to appointment of counsel, the courts do not simply run down a list of available attorneys and appoint the next person in line. Instead, a

tenant calls the screening line and qualifies for appointment of counsel. The screening line refers them to one of the contracted providers, and they go to the court with their attorney. Or, as is more often the case, the tenant appears unrepresented at the first court hearing, the court advises them on their right to appointed counsel, and the hearing is set-over to allow the tenant to be screened for program eligibility and connect with an attorney. In both cases, the court eventually issues an order appointing the attorney.

Other statutory changes to the eviction process gave tenants the information and direction to seek appointment of counsel prior to the first appearance (called a show cause hearing in Washington State). This system presents opportunities for renters seeking earlier intervention to find counsel, but it places the burden on the legal aid providers to implement a screening system, screen for conflicts, and find counsel.

Local Intake Paired with Centralized Intake Connects Litigants with Counsel

The legislature modified the statutory eviction summons and the statutory pay or vacate notice to include information about RTC and encouraged tenants to call and ask for appointment of counsel. Before the launch of RTC, a technical advisory workgroup engaged providers across the state and determined that both an intake and placement model where local programs could conduct local intake, and a centralized intake system should be made available to all tenants facing eviction. As the statewide partner with an existing hotline and experienced screeners, NJP created a central screening phone line—the Eviction Defense Screening Line—to answer those calls. Our dedicated screeners respond to phone calls, voicemails, online applications, and call-back requests to evaluate each tenant's eligibility and refer them to the appropriate contracted provider. These changes have increased the ability of renters to reach counsel prior to the show cause hearing. The centralized intake system connects tenants to the appropriate RTC provider in each county to avoid having renters make multiple calls to find help.

Caseloads and Estimating the Demand

OCLA was charged with administering the program with the appropriated funds. The estimated rate of utilization (the number of tenants who would have appointed counsel) was 60 percent of 2016 case filings, or 11,000 statewide. The state budget used estimates from existing court-based eviction defense programs and legal aid providers to estimate an average of four

hours per case and a standing caseload per attorney of approximately 25 cases.⁸

Due to a confluence of factors, the estimate in the state budget for attorneys was low. As described above, when the legislature passed the RTC statute, it also passed game-changing tenant protections. Most important among these is the Just Cause Statute for residential evictions. Before the Just Cause Statute, a landlord could give a notice terminating a tenancy for no reason—concealing discriminatory or retaliatory reasons for evictions. After the passage of Just Cause, a landlord must give one of approximately 17 different justifications. They must also give specific facts, such as dates, names, and details for their justification, providing new avenues for tenants to prepare their defense.

These changes rewrote the rules of unlawful detainer defense. What was once a same-day hallway consultation and a brief appearance became a substantive fight with robust defenses and prevention of eviction for illegal or false reasons. Additional protections for tenants led to increased complexity of cases, resulting in more time invested on cases than was previously experienced in the courthouse-based tenant advocacy programs that predated RTC.

Our state funder has recognized the new normal of how long cases take, lowering the target of active and annual cases for contracting attorneys. As the legislature takes up the state budget again in 2023, the state funder is factoring in the increased workload of unlawful detainer cases.

RTC in Practice: A Dedicated Team of RTC Providers is Transformative in Eviction Courts

In most jurisdictions in Washington, RTC is provided through one of our dedicated nonprofit legal aid providers. Well-trained groups of eviction defense experts are changing the culture of eviction courts and saving tenants from homelessness. Because our state's RTC delivery system relies on many different legal aid providers and private contract attorneys, the RTC program created a full-time position to coordinate the advocacy of the smaller programs providing RTC. The Statewide RTC Advocacy Coordinator is housed at the King County Housing Justice Project. In coordination with the statewide Housing Task Force, convened by NJP, the RTC Advocacy Coordinator can coordinate trainings, provide guidance, and unify advocacy across the smaller organizations throughout the state who are contracted to be appointed counsel in eviction cases.

Challenges in Implementation

a. Tenant defaults

The goal of RTC is not just access to the courts for indigent renters, NJP is here to preserve tenancies and prevent homelessness. Consistently high rates of eviction decisions made by default against tenants, when tenants simply fail to appear in court, undermine this goal. Tenant default rates in 2022 are as high as 80 percent in some counties.

OCLA and NJP collaborated to create a media campaign about RTC and tenant protections at the outset of the program in hopes of encouraging tenants to show up in court and retain attorneys, thus reducing default judgments. NJP coordinated with locally based community groups to get the word out to those unlikely to see a social media campaign, such as farmworkers and other rural communities.

In addition, default judgments are being addressed through other avenues. Ongoing judicial education related to RTC processes and procedures, regular stakeholder meetings, targeted trainings, and advocacy through in-court litigation are making an impact that we can see in many courtrooms every day. While each courtroom operates differently, advocates are observing changes in the way courts handle eviction cases – from proactively offering tenants the opportunity to be screened for an RTC attorney to denying possession to a landlord even when the tenant did not appear at the hearing because not all appropriate steps were taken. This is an ongoing effort that needs to be paired with additional outreach and tenant education, especially to reach vulnerable communities with historically less access to resources.

One hurdle in creating consistent processes for the administration of RTC is that Washington does not have a unified court system. This disjointedness creates a landscape where all 39 counties have local policies for how appointed counsel eviction cases are handled. While model procedures were provided during the initial implementation, many of these examples were tweaked to conform to local practice, making the ability to counsel clients in numerous jurisdictions more difficult.

b. Last minute requests for appointment

The threat of eviction sometimes does not feel real for a tenant until the sheriff posts a writ of restitution on their door and tells them they have three days to leave or they will be forcibly removed and their property placed on the street. Accordingly, we get many cases where renters have not appeared in court and are only now seeking

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legal assistance, well after the court's decision to evict. Due to many factors impeding their ability to be proactive (e.g., disability, language, fear of an outcome), renters find themselves in this situation. The burden on the RTC program is immediate. An advocate must drop everything, race to the courthouse to seek a stay, and then prepare a case on extremely short notice.

State law provides limited authority for a court to order a stay in these circumstances. An affirmative step NJP took to address this issue was to petition our state Supreme Court for a court rule directing trial courts 1) to advise litigants of their right to an appointed lawyer, 2) to grant automatic stays for tenants in default who seek appointment of an attorney, and 3) to provide continuances of hearings for tenants. This proposed rule has been published for comment on an expedited basis and could become law in early 2023. Any statewide implementation of RTC would be challenging without anticipating the impact on the program of last-minute requests for representation and the need for court rules or policy changes that reflect the reality of late requests for assistance.

c. Confusion in court and screening eligibility

In order to maintain confidentiality and promote accurate eligibility determinations, one goal of the system is to avoid conducting eligibility screening in open court. Aside from the privacy issues, the opportunity for error is high. Thus, trained RTC providers and Eviction Defense Screening Line staff complete telephonic or in-person screenings. As this often relies on a phone call to the Eviction Defense Screening Line, wait times, and potential confusion, some tenants have misunderstood their eligibility and how to connect with appointed counsel. The combination of local and centralized screening continues to be a work in progress that will require time, flexibility, and continued collaboration to fine tune.

d. Adequate coverage for conflicts, vacations, and absences

RTC differs vastly from intake at most legal aid programs where the process often requires assessing whether the case has merit, meets priorities, or otherwise checks a box. RTC providers ask two questions: (1) do you have a summons? and (2) are you indigent? If the answer to both questions is yes, they are appointed counsel. LSC eligibility issues and conflicts

may determine which legal aid organization ultimately provides representation, but the right to appointment is clear. As a result, the case volumes are higher, and intake is demanding. To meet the demand for appointed counsel, RTC programs must have significant redundancy built into the intake and attorney appointment model.

Another reason for redundancy is the presence of conflicts inherent in multi-tenant households. While some multi-tenant households will not have conflicts and all members can participate in the litigation with the same attorney, NJP has seen a significant number of cases involving tenants who do not share the same goals in representation and therefore require separate counsel. One common example is where one tenant is accused of the behavior resulting in the eviction, but lives with another tenant who has different interests in resolving the case. One eviction filing quickly consumes attorney resources when the tenancy involves three or more different tenants, each potentially requiring appointment of separate counsel. We have spent training time and had difficult conversations with our partners to ensure that firms do not unnecessarily determine a conflict exists when joint representation possible. Not every law firm handles conflicts in the same way, and without training and attention to this issue, inequities and inefficiencies can result from unnecessary referrals due to nonexistent conflicts.

Imagining the Future of RTC

The speedy implementation period of RTC in Washington has been a huge benefit to tenants, many of whom would have been unable to access full representation before the law passed because of the limited resources available. As we continue to develop and adapt the statewide systems for RTC, we also recognize several areas where the law could develop to impact how RTC in Washington will function going forward.

RTC creates opportunities to develop landlord-tenant law that never existed before. Prior to RTC, appeals of adverse decisions were relatively rare. The risk of an adverse decision often resulted in a tenant avoiding trial or declining to pursue an appeal. With RTC, we have increased the number of opportunities to appeal bad decisions and challenge courtroom practices that harm tenants. After one year of RTC, our program has generated more eviction-related appeals than in the past 10 years combined.

With a new civil RTC, analogies are often drawn between appointed counsel for tenants and criminal defense, yet the two types of representation operate in

the separate silos of the criminal and civil legal systems. Bedrock rights within the criminal system, such as the right to effective assistance of counsel and the related right to continuances to be able to effectively prepare, are not automatic within a civil RTC model. Washington courts seem to be in agreement that a RTC is meaningless unless it is a right to effective assistance, but this leaves open the question of what “effective assistance” means. Another issue to be developed is what constitutes the knowing and voluntary waiver of defenses by unrepresented litigants, especially under a statute that requires action by the court to appoint counsel, leaving an opportunity for a defendant to appear unrepresented without counsel if the court fails to make such an offer.

Our program does not have to be limited to the rights and remedies delineated in the RTC statute. NJP has developed a housing practice that prioritizes housing stability and fighting discrimination in housing. Through this experience, we are able to advance the rights of tenants beyond evictions and build on these new tenant protections. One example is in wrongful evictions. Our RTC lawyers spot emerging issues, such as landlords misrepresenting their basis for eviction to more easily evict tenants. These cases are handed-off to our field offices that file wrongful eviction lawsuits to recover the client’s property or obtain damages.

RTC is creating a system in which legal aid is present in every court, every day. This system means the bench has a growing recognition of tenants’ rights and is building relationships with civil legal aid lawyers who represent the tenants. Judges can no longer rubber-stamp writs for possession or judgments in favor of landlords, knowing that the tenant may obtain an attorney and seek to vacate the writ and dismiss the case.

An example in one county shows the proof of concept. Previously in this county, legal aid attorneys appeared only sporadically in eviction cases, and many landlords routinely obtained default relief. Even if a tenant appeared, the judges rarely administered the hearing in a way that would elicit a defense. Since RTC



Eviction Prevention Unit, NJP, June 2022.

and dozens of hearings with counsel for tenants, these same judges are now closely scrutinizing even requests for default judgments to ensure that the landlord has complied with the law and that no procedural defenses are apparent from the pleadings. Today, some courts in the county are making records on behalf of a tenant who did not appear to preserve their rights and sometimes even denying landlords the relief they requested.

Conclusion

The landlord-tenant relationship will always involve a massive power imbalance. Washington has made vast improvements in tenant law—outlawing “source of income” discrimination, requiring just cause for eviction—but these rights are not enforced if tenants lack representation. RTC creates more opportunities for tenants to have their basic housing rights upheld. Although just over one year into full implementation of RTC, we can see incredible change in the way these cases move through the legal system now that tenants have dedicated advocates. As we noted at the beginning, this has been like building a plane as we fly it. But, through some turbulence this plane is on its way, and the course is set to transform this system for a more just and equitable world.

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Macy Disney and Ali Kingston, NJP, presenting on right to counsel at the Housing Justice Network Conference, October 2022.

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- Washington, and was previously a research fellow for the Institute on Race and Poverty. Scott received a J.D. *cum laude*, from the University of Minnesota, where he was the editor-in-chief of the *Journal of Law and Inequality*, and has a B.S. in Mathematics from Seattle University. Scott may be reached at scottc@nwjustice.org.
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- 3 Abigail Daquiz is the Director of Advocacy at the Northwest Justice Project, where she serves as part of the executive team supporting 21 offices and numerous statewide teams. Before coming to NJP, Abigail was a senior trial attorney at the Office of the Solicitor of the U.S. Department of Labor, enforcing federal labor and employment laws in partnership with agency investigators and compliance officers. Her work has involved complex litigation, administrative advocacy, and community and partner engagement in cases involving workers in the Western Region (CA, OR, AZ, WA, ID, AK, HI, and the U.S. Protectorates in the Pacific). Abigail is a board member of Benefits Law Center in Seattle, WA, a legal aid nonprofit serving community members experiencing homelessness and living with disabilities in social security advocacy. She has served on the Board of the Northwest Immigrant Rights Project, and was the founding president of the Filipino Lawyers of Washington. Abigail earned her J.D. (2004) and B.A. (2001) at the University of Washington.
- 4 Edits to this article were provided by Catherine Brown, Managing Attorney of the Screening Unit and Eviction Defense Screening Line and Eva Wescott, Senior Managing Attorney for Client Access. Catherine and Eva are invaluable resources for anyone working with a statewide intake/hotline considering the implementation of an eviction defense screening line. Catherine may be reached at Catherine.Brown@nwjustice.org. Eva may be reached at Eva.Wescott@nwjustice.org.
- 5 While the legislature funded a prior effort to study the impact of access to attorneys in certain counties, the COVID pandemic stopped that effort before it could be completed.

- 6 OCLA Implementation Plan — Right to Counsel for Indigent Tenants at <https://ocla.wa.gov/wp-content/uploads/2021/07/Implementation-Plan-Right-to-Counsel-for-Indigent-Tenants-7-15-21-Final.pdf>
- 7 LSC programs will note that having “after taxes” added to the eligibility questions would create hurdles to adapting existing systems to RTC. In Washington, we engaged LegalServer to implement updates to intake to facilitate income screening with tax deductions.
- 8 These caseload guidelines have been revised over time and should continue to be reviewed as the RTC program evolves.

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- of the Montana State Bar, and a small business owner. Mada earned her Juris Doctorate from the Alexander Blewett III School of Law in 2020 with a certificate in Alternative Dispute Resolution and a Pro Bono Honors designation. She is admitted to practice in the State of Montana, Fort Peck Tribal Court, and Northern Cheyenne Tribal Court.
- 3 William F. Hooks (he/his) is the Director of Advocacy for Montana Legal Services. He was in private practice and served as the state's Chief Appellate Public Defender and Chief Public Defender of the trial division prior to joining MLSA.
- 4 A client's household income must be at or below 80% of the Area Median Income (AMI) of their county of residence. For instance, the household income for a family of four in Missoula County must be at or below \$65,300 to be eligible for the MEIP.
- 5 MLSA's definition of eviction for MEIP purposes is those tenants who received a notice to vacate, have been served with a complaint for possession, are in the middle of an eviction proceeding, or are the subject of a self-help eviction by the landlord.
- 6 The data for 2022 are current as of October 7, 2022. Case data for housing cases handled by MLSA staff attorneys and MEIP contract attorneys are derived from MLSA's internal reports.
- 7 https://www.washingtonpost.com/business/interactive/2022/rising-rent-prices/?utm_campaign=wp_main&utm_medium=social&utm_source=twitter
- 8 Article: Spreading Justice to Rural Montana: Rural-ity's Impact on Supply and Demand for Legal Services in Montana, 76 Mont. L. Rev. 225, 245-246 (Summer 2015).
- 9 <https://www.mtpr.org/montana-news/2022-01-03/as-u-s-population-stayed-relatively-flat-montanas-grew-1-6-during-the-pandemic>.
- 10 Sam Schaefer, Individual Income Tax: Analysis of CY2020 New Residents, and Income Trends After Moving a Report Prepared for the Financial Modern-

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