

WASHINGTON STATE OFFICE OF
PUBLIC
DEFENSE

ANNUAL REPORT FISCAL YEAR 2016

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Page 8: Pacific County Courthouse by Steven Pavlov, available on Wikimedia Commons

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ADVISORY COMMITTEE MEMBERS

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Honorable Sherry Appleton	Washington State House of Representatives
Gerald Hankerson	Seattle NAACP
Jane Ragland-Kirkemo	Association of Washington Cities
Honorable Kathy Lambert	Washington State Association of Counties
Honorable Jamie Pedersen	Washington State Senate
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Honorable Mike Padden	Washington State Senate
Honorable Patricia Clark 1945-2015	King County Superior Court, Retired
Sharon Paradis	Benton-Franklin County Juvenile Court Administrator, Retired



MISSION STATEMENT

"To implement the constitutional and statutory guarantees of counsel and to ensure the effective and efficient delivery of indigent defense services funded by the state."



EXECUTIVE SUMMARY

Welcome to the 2016 annual report for the Washington State Office of Public Defense (OPD). This report covers fiscal year 2016, which ran from July 1, 2015, to June 30, 2016. This report is intended to be an informative summary of OPD's activities for the year.

OPD is overseen by an advisory committee made up of appointees from a range of organizations, which conducts business at quarterly meetings. For day-to-day operations, our agency had 16 employees for fiscal year 2016: a Director (myself), a Deputy Director, seven Managing Attorneys, a Social Services Manager, and five administrative staff members.

OPD's duty is to implement the right to counsel guaranteed by the United States Constitution, the Washington State Constitution and the Laws of the State of Washington. The right to counsel means that people who are indigent—lacking the funds to afford a lawyer—are provided with public defense attorneys when charged with crimes or when subject to certain other proceedings that place their constitutional rights in jeopardy.

Although our mission is broad, the Washington State Office of Public Defense does not supervise public defense across the entire state. Counties and cities supervise all public defense services for felony and misdemeanor cases in Superior, District, and Municipal courts, and are not subject to control by OPD. The Legislature has conferred specific responsibilities on OPD with respect to public defense in the state. Those responsibilities are, primarily:

- Administering funds for court-appointed counsel for indigent parties in appeals to the Washington State Court of Appeals and the Washington Supreme Court;
- Administering grants to counties and cities for improvement of trial-level public defense;
- Administering funds for court-appointed counsel for indigent parents who are at risk of losing their children in dependency and termination cases; and
- Administering funds for court-appointed counsel for indigent detainees who are subject to civil commitment as sexually violent predators.

OPD is organized into four programs based around these primary responsibilities. They are, respectively,

the Appellate Program, the Public Defense Improvement Program, the Parents Representation Program, and the RCW 71.09 Program (named after the chapter of the Revised Code of Washington dealing with the civil commitment of alleged sexually violent predators).

In fiscal year 2016, the Appellate Program continued its work on case weighting to deal with ever-increasing appellate transcript lengths. The RCW 71.09 Program also made important strides towards implementing a case weighting system that takes account of the unique nature of civil commitment practice. The Parents Representation Program continued its important work of training attorneys and social workers to meet their clients' needs and facilitate family reunification; the legislature also provided OPD with pass-through funding for the Parents for Parents program, which supports parents who have been through the dependency system and helps them successfully reunite with their kids.

Leading up to fiscal year 2016, OPD made it a priority to ensure adequate compensation for its contractors. It is vital that contractors be compensated competitively with other publicly funded attorneys so that OPD can ensure quality representation for clients. OPD conducted a salary survey of its contract attorneys in the spring of fiscal year 2015, which showed comparatively low compensation after considering the business expenses that contractors must bear. Based on this survey, OPD requested a large vendor rate increase from the legislature that would have brought contractors into line with other publicly funded attorneys over the course of the biennium. The legislature allocated funds for a smaller increase. OPD remains committed to pursuing adequate compensation for its contract attorneys and social workers. Only by paying competitive rates can OPD continue to effectively implement the right to counsel in its program areas.

As Justice Hugo Black wrote in the watershed case of *Gideon v. Wainwright*, "The right to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." OPD strives to realize this ideal of fundamental fairness for all by working daily to improve public defense in Washington. I hope this report will provide an understanding of how OPD upholds justice and protects individual rights by implementing the right to counsel across each of its program areas.

Sincerely,

A handwritten signature in black ink, appearing to read "Joanne I. Moore". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Joanne I. Moore
Director



The United States Supreme Court

APPELLATE PROGRAM

Indigent appellate representation was OPD's first program, established at the agency's founding in 1996. At that time, OPD assumed responsibility for administering public defense services statewide for appeals to the Washington Court of Appeals and the Washington Supreme Court.

When a person loses their case in Superior Court, they have the right to appeal to the Court of Appeals, where a panel of three judges will decide whether the lower court's decision was valid. A case lost before the Court of Appeals can be appealed to the Washington Supreme Court. If a client is indigent and convicted of a crime, or is subject to another type of proceeding where there is a constitutional or statutory right to counsel, OPD is responsible for providing an appointed public defense attorney. OPD provides attorneys by contracting with qualified, independent attorneys across the state. OPD's contract attorneys provide representation before the Court of Appeals, and may continue cases before the Washington Supreme Court if they are unsuccessful in the Court of Appeals.

OPD's Appellate Program attorneys represent more than 1,000 indigent clients every year. Appellate Program Manager Gideon Newmark runs the day-to-day operations of the Appellate Program.

Case Weighting Continued

In fiscal year 2016, the Appellate Program continued to refine the case weighting system launched in fiscal year 2015. The case weighting system is designed to ensure reasonable caseloads for appellate public defenders in accordance with the Washington Supreme Court Standards for Indigent Defense. Those standards limit appellate public defenders to no more than 36 cases per year with an average transcript of 350 pages. Case weighting relies on statistical analysis to award additional credits for longer cases, ensuring that an attorney's caseload remains within the standards.

The case weighting system helped attorneys cope with escalating workloads in Divisions I and II during the fiscal year. An increase in both

transcript lengths and number of cases assigned led to the unprecedented situation of every contractor meeting their maximum caseload in May, a month before the end of the fiscal year. This required OPD to fulfill June's caseload needs by recruiting part-time contractors and qualified non-contract attorneys to handle appeals.

Training

The Appellate Program held its first open-to-the-public training in fiscal year 2016. The program, held at the SeaTac Airport Conference Center, featured John Salatti of LAWriters, a trainer with more than 20 years of experience. Mr. Salatti put on a full-day seminar entitled "Writing to Persuade," which focused on how to organize legal

writing in such a way that it is both clear and persuasive to judges. OPD funded the attendance of its own contractors, and invited outside criminal defense and public interest attorneys for a modest fee in order to help provide the venue and speaker. The seminar was well-received and the venue allowed easy attendance for the out-of-town speaker and OPD contractors.



Big Supreme Court Wins for Clients

Case: State v. E.J.J.

Attorney: Lila Silverstein

Result: Juvenile E.J.J. was convicted of obstructing the police for observing them from inside his house behind a screen door and verbally challenging them while they arrested his sister. The Supreme Court held E.J.J. could not be convicted of obstructing the police for his speech alone.

Case: State v. O'Dell

Attorney: Greg Link

Result: The superior court judge incorrectly believed he could not consider the defendant's youth as a factor in sentencing because the defendant was 18 years old. The Supreme Court held that the defendant's youth and immaturity were valid grounds for considering a reduced sentence even though he was legally an adult and remanded for resentencing.

Case: State v. Leonard
Attorney: Susan Gasch

Result: In line with last fiscal year's landmark ruling in Blazina, the superior court erred by imposing \$50 per day in incarceration costs on Mr. Leonard without finding that he had the ability to pay such costs. The Supreme Court remanded for a determination of Mr. Leonard's ability to pay.

Case: Personal Restraint of Moi
Attorney: Nancy Collins

Result: Mr. Moi was accused of using a gun to commit a murder. A jury deadlocked on whether he committed the murder, and a judge acquitted him of possessing the gun. Double Jeopardy barred the State from retrying him for the murder after he had already been acquitted of possessing the alleged murder weapon.

Case: State v. Larson
Attorney: Dana Nelson

Result: The Court of Appeals upheld Mr. Larson's conviction for

committing retail theft with tools "designed to overcome security systems" because he used wire cutters to remove a security tag. The court reasoned that because wire cutters are designed to cut wire, and because wire is used in security systems, wire cutters are "designed to overcome security systems" for purposes of the statute Mr. Larson was convicted under. The Supreme Court reversed, holding that just because an item can be used to overcome security systems does not mean it was designed to do so under the plain meaning of the statute.

Case: State v. DeLeon
Attorneys: Jan Gemberling, Ken Kato, Dennis Morgan

Result: Statements made by the defendants at jail booking that they were gang members could not be used against the defendants at trial. Refusing to disclose their gang affiliation would have put their safety at risk, so the statements were not voluntary.



Historic Pacific County Courthouse

PUBLIC DEFENSE IMPROVEMENT PROGRAM

Unlike OPD's other programs that retain and manage contract attorneys, OPD's Public Defense Improvement Program works with local jurisdictions to improve county and city administered trial level public defense in courtrooms across Washington State. Comprised of Managing Attorneys Katrin Johnson, Kathy Kuriyama, and George Yeannakis, the program's staff bring a great deal of experience and creativity to this critical mission. Kathy retired in November 2015 after many excellent years of service, for which OPD will forever be grateful.

Like many aspects of Washington's government, Washington's judicial system is decentralized and places great emphasis on local control. Thus, counties and cities administer and largely fund their own court systems, including their own local public defense systems. This has led to a variety of locally governed public defender agencies, independent law firms, and sole practitioners with contracts to provide public defense services across the state. OPD's Public Defense Improvement Program supports this diverse array of local public defense operations by holding trainings and consultations on key issues, and by administering state funds allocated to improve local public defense.

Federal Juvenile Justice Grant

In fiscal year 2016, OPD applied for and was awarded a Youth Access to Justice State Reform Planning Grant from the United States Office of Juvenile Justice and Delinquency Prevention. The grant was awarded for OPD to develop a strategic plan to ensure that every youth involved with the criminal justice system in Washington has fair and equal access to quality legal representation. OPD's activities under the grant included:

- Conducting visits with juvenile justice partners and stakeholders in 11 counties
- Organizing a workgroup including defense, prosecution, law enforcement, court officials, and others to help identify sustainable strategies for juvenile justice reform
- Conducting a survey of juvenile justice attorneys to gather previously unavailable data on local juvenile justice practices
- Producing a series of informational online videos designed to educate youth, their families, and professionals about the juvenile justice process, including resources to help mitigate the impacts of an adjudication
- Holding regional trainings on adolescent development and trauma attended by defense attorneys, prosecutors, court personnel, law

enforcement, and many other participants in the juvenile justice system

Public Defense Improvement Grants

The Public Defense Improvement Program also continued to carry out one of its core functions in fiscal year 2016, distributing grants to counties and cities for the improvement of trial level public defense. As mandated by chapter 10.101 RCW, the program distributed grants to each of the 38 counties that applied for the funding. In addition, 35 cities submitted applications for funding in calendar year 2014. 22 cities were awarded grant funds, and OPD worked with the city grant recipients to make improvements to their public defense systems.

OPD's Public Defense Improvement Program managing attorneys visited six counties and nine cities that received state funds in 2015. They observed courtroom procedures and met with judges, court administrators, public defense agency coordinators and directors, and public defense attorneys. They also met with city and county officials and their staff. These personal visits remain a vital tool for OPD to positively impact local public defense in Washington State.

Washington Defender Association

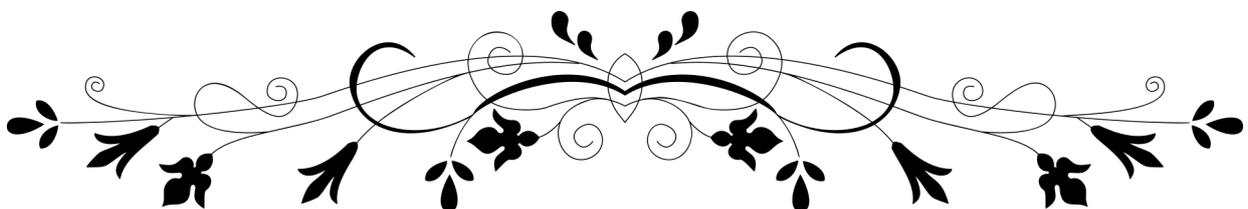
OPD continued to contract with the Washington Defender Association (WDA) for criminal law and immigration law resource attorney services in fiscal year 2016. WDA's immigration resource attorneys are available to help public defense attorneys understand the immigration consequences of criminal convictions so that they can properly advise their clients. Criminal cases can have a wide variety of consequences for a person's immigration status, and WDA plays a pivotal role in helping public defenders navigate the complex issues of federal immigration law. In addition, two resource attorneys at WDA provide targeted advice and consultation to public defense attorneys who contact them for assistance with individual criminal cases. WDA also provides training across the state for public defense attorneys.

WDA assumed the contract to staff the Death Penalty Assistance Center in fiscal year 2016. Under this contract, WDA provided training and resources for attorneys, investigators, mitigation specialists, and support staff working on capital cases.

Legal Financial Obligations and Collateral Consequences Training

In recent years, greater attention has been given to the detrimental impact of legal financial obligations (LFOs) and the collateral consequences of criminal convictions. Legal financial obligations are court costs, costs of incarceration, and other fees imposed by courts on convicted defendants. By law, they can only be imposed on defendants with the present or future ability to pay them. But for many years, LFOs were imposed with no meaningful consideration of a defendant's financial condition. The landmark Washington Supreme Court case of *State v. Blazina* sent a strong message that the ability to pay LFOs must be considered before they are imposed.

In fiscal year 2016, the Trial Level Public Defense Improvement Program put on trainings in Vancouver, Spokane, Olympia, Everett, and Yakima to educate attorneys on this vital issue, as well as the other collateral consequences that accompany a criminal conviction.





PARENTS REPRESENTATION PROGRAM

OPD's Parents Representation Program oversees the legal representation of indigent parents by attorneys who provide legal representation in dependency, termination, and guardianship cases. These are cases in which the State asks to take custody of a child after alleging that a parent has abandoned, abused, or neglected their child, or is incapable of caring for the child. Children are often removed from their parents' custody and placed with relatives, with another suitable adult, or in foster care. Indigent parents have a constitutional and statutory right to counsel in these cases to protect their fundamental right to raise their children. The Parents Representation Program has been providing counsel in these cases for more than a decade, since the Legislature authorized state funding to implement high quality of representation in these cases.

The Parents Representation Program contracts with attorneys, law firms, and public defender organizations to represent parents in all covered counties. These contractors follow the program's enhanced practice standards, which require regular client communication, diligent efforts to help parents access necessary services, adequate case preparation, effective negotiation with the State, access to social workers and experts, and competent litigation if a negotiated settlement isn't possible.

Amelia Watson, Brett Ballew, Jacob D'Annunzio and Jana Heyd are OPD's four Parents Representation Managing Attorneys. The four person managing attorney team supports the program's contract attorneys in applying OPD's practice standards. The managing attorneys provide legal resources during litigation, monitor attorney caseloads to ensure compliance with the Supreme Court Standards for Indigent Defense, conduct in-person attorney evaluations, and provide technical support and trainings each year.

Social Services Manager Mike Heard, the fifth member of the Parents Representation team, provides further support to contract attorneys by managing a group of independent social workers on contract with OPD. Mike provides both formal and informal training for the social workers, who give OPD's contract attorneys access to client support, social work theory, and resources in the community.

The Parents Representation Program continued to contract with attorneys in 31 counties in fiscal year 2016. A request to expand the program into Washington's remaining counties was not granted this fiscal year, but OPD remains committed to pursuing statewide Parents Representation Program coverage.

Training

As part of their training mission, the Parents Representation Program managers participated in the 2016 Children's Justice Conference. This conference, held in Spokane, brings together stakeholders from across the child welfare ecosystem.

Brett and Jacob spoke to conference attendees about the role of parents in working towards the best interests of children in the dependency process. They emphasized how high quality legal representation for parents leads to children being reunited with their parents more quickly when reunification is possible, and leads to children being adopted or placed with a permanent guardian more quickly when reunification can't be achieved.

Jana and Amelia helped plan workshops for the Children's Justice Conference, and Amelia gave a presentation on the ethics of representing parents with diminished capacity.

Also in fiscal year 2016, OPD created a two part webinar on the biology of trauma and the effective representation of parents with trauma. This training sought to help attorneys recognize the signs of clients with trauma and provided strategies for communicating with clients whose trauma makes it much more difficult for them to assimilate and act on legal information. OPD

Parents for Parents Program

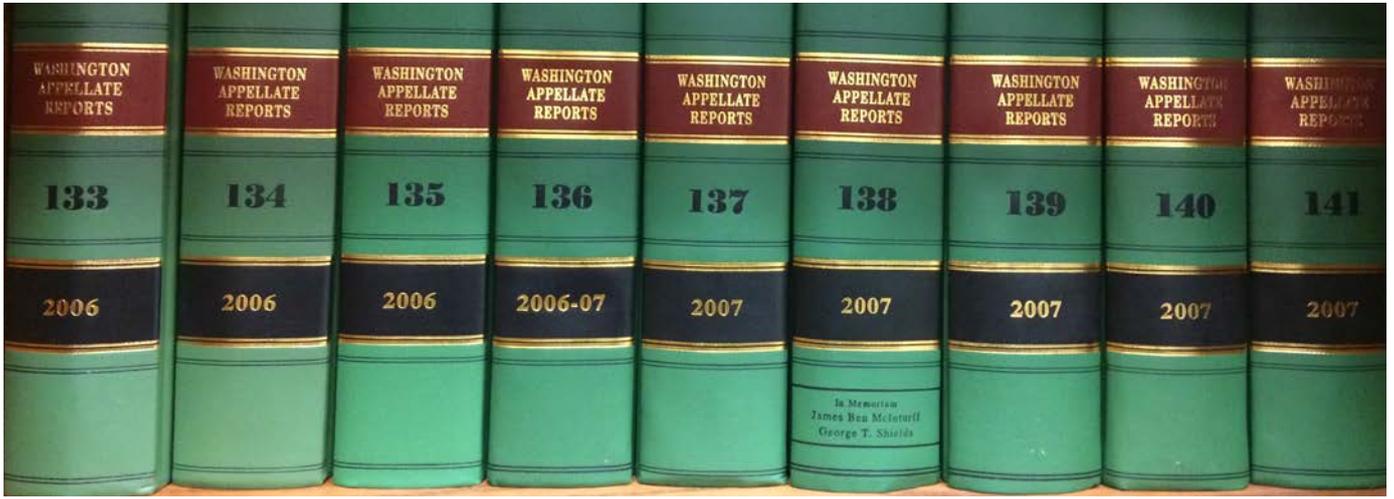
Fiscal year 2016 saw the beginning of state funding for the Parents for Parents program. OPD administers this funding through a contract with the nonprofit Children's Home Society. This innovative program recruits "parent allies" to help parents in dependency cases navigate the system and reunite with their children.

Parent allies receive extensive training and supervision to work with parents still in the dependency system. They provide peer mentoring to encourage positive engagement with child welfare stakeholders, increase compliance with court ordered services, and increase engagement in the dependency process as a whole.

Parent allies engage with their peers at the earliest stage of their dependency cases, providing the parents with support and showing them that there is hope for reuniting with their children. Parent allies also present "Dependency 101" classes to help introduce parents to the dependency system and educate them about how to succeed, and they provide ongoing support throughout the dependency process.

The Parents for Parents program is recognized as a promising practice for improving the child welfare system.





RCW 71.09 PROGRAM

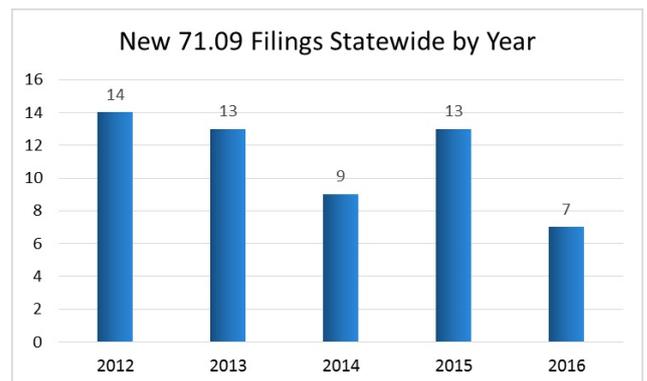
The RCW 71.09 Program is OPD’s newest practice area. The Legislature unanimously authorized the program in 2012, voting to transfer responsibility to OPD for public defense of respondents facing civil commitment as sexually violent predators. Public defense in these cases had previously been managed by the Department of Social and Health Services (DSHS), which also runs the Special Commitment Center (SCC) where the civilly committed are held. As civil detainees who are not under sentence for committing a crime, those in the civil commitment process must first be found by a jury to be mentally ill and likely to engage in future acts of violence due to the mental illness. Then, they have the right to annual reviews of their detention status, which can lead to trials on whether they should be released to a less restrictive setting or released unconditionally.

Washington law gives indigent persons facing civil commitment the right to counsel at every stage of the proceedings against them, including for each year’s annual review following commitment. OPD is responsible for providing that counsel, and does so by contracting with a small but dedicated group of attorneys. The RCW 71.09 program is overseen by Managing Attorney Shoshana Kehoe-Ehlers. Shoshana maintains the program’s quality of representation by carefully monitoring attorney caseloads and meeting individually with attorneys to discuss their performance. She also consults on issues that arise during cases and conducts training on handling RCW 71.09 cases for judges, judicial staff, and attorneys.

In fiscal year 2016, OPD maintained 10 contracts for RCW 71.09 representation with public and private law firms, for a total of 22.5 full-time equivalent attorney positions. Most of these attorneys carried a full-time RCW 71.09 caseload. OPD also contracted for 2.75 social work positions. Social workers worked with attorneys and clients to help the clients engage in treatment, to develop release plans, and to navigate public assistance options for clients.

Case Weighting

The 71.09 program refined its approach to contractor caseloads in fiscal year 2016 with a new case weighting standard. The standard was based on a detailed time study showing how much time attorneys spent at the various phases of a 71.09 case in four categories: communication with the client, research and litigation preparation, travel, and in-court time. The data showed that initial commitment cases demand the most attorney time, and the case weighting system accordingly weights initial commitments more heavily.



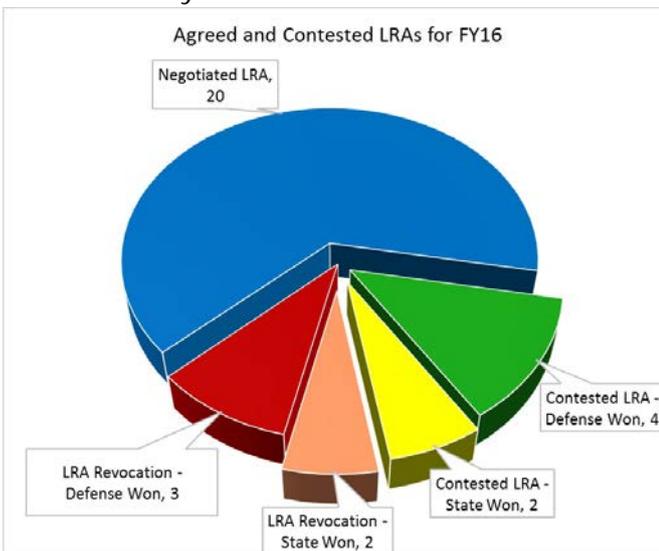
New 71.09 filings declined in FY16

Continuing Quality Enhancement

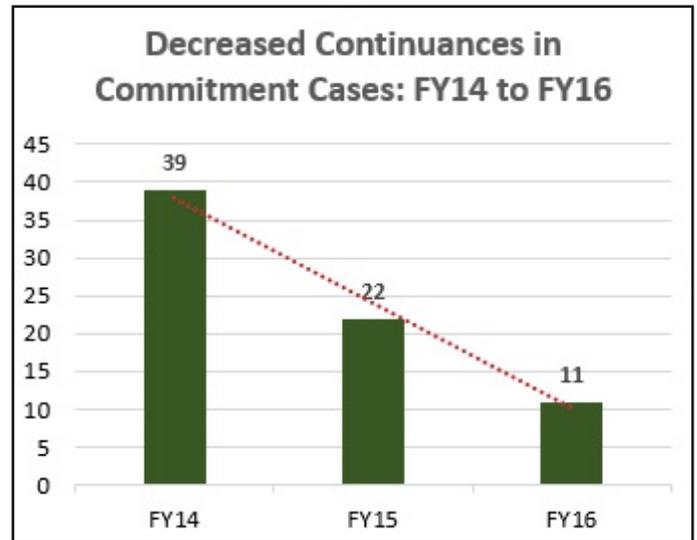
Since its inception, the RCW 71.09 program has seen improvements in the functioning of the civil commitment process. In 2015, continuances in new RCW 71.09 cases fell by more than 40 percent, from 37 to 22. Continuances fell another 50 percent in 2016, from 22 to 11. Six civil commitment proceedings were completed in 2016, two of which resulted in a verdict of no commitment or dismissal of the commitment petition.

The RCW 71.09 program continues to see progress for committed clients, as well. Once they have undergone treatment, civilly committed clients can petition to be released from total confinement at the SCC to a less restrictive alternative (LRA), or they can request unconditional discharge. LRA settings retain a great deal of security procedures to keep the community safe, but permit civilly committed clients to transition out of total confinement in an institutional setting and prepare for reentry into society should they complete treatment and be deemed eligible for release. In 2016, OPD contractors helped 20 clients move to an LRA with the agreement of prosecutors, and won four contested LRA trials, up from just one in 2015.

RCW 71.09 contractors won unconditional release for a number of clients as well in 2016. Six clients were released with the agreement of prosecutors for no longer being sufficiently mentally ill or dangerous for civil commitment, and two were unconditionally released after contested trials.



OPD contractors delivered strong results for clients on both agreed and contested LRAs



Trial continuances continued to decline in FY16

Conditions for LRAs

Courts impose conditions when respondents are approved for release from the SCC to a less restrictive alternative (LRA). These commonly include, among other requirements:

- DOC supervision; weekly reporting
- Electronic monitoring and chaperones
- Registration as a sex offender
- No travel without advance authorization
- Sex offender and other treatment
- Pre-approval for any work, school or volunteer activity
- A phone log of all calls made and received
- No contact with prior victims
- No contact with minors, felons, or persons with any sex crime conviction
- No firearms, alcohol, marijuana, or controlled substances, or pornographic or sex themed materials
- Alcohol and drug testing
- Polygraph testing to assess compliance