



**WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE**

(360) 586-3164
FAX (360) 586-8165

Internet Email: opd@opd.wa.gov

December 1, 2011

The Honorable Ed Murray
Chair, Senate Ways & Means Committee
303 John A. Cherberg Building
PO Box 40443
Olympia, WA 98504-0443

The Honorable Jim Hargrove
Chair, Senate Human Services & Corrections Committee
411 Legislative Building
PO Box 40424
Olympia, WA 98504-0424

The Honorable Ross Hunter
Chair, House Ways & Means Committee
315 John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

The Honorable Chris Hurst
Chair, House Public Safety & Emergency Preparedness Committee
335 John L. O'Brien Building
PO Box 40600
Olympia, WA 98504-0600

Dear Committee Chairs:

As you directed in Section 114 of the 2011-2013 biennial state Operating Budget adopted last spring, the Washington State Office of Public Defense (OPD) is submitting to fiscal and policy committees a "Proposal For the Administration of Defense Services for indigent Persons Involved in Proceedings Under Chapter 71.009 RCW (Sexually Violent Predator)." The Proposal accompanies this letter and is available on the OPD website at www.opd.wa.gov. It also has been submitted to the Chief Clerk of the House and Secretary of the Senate for inclusion among "Reports to the Legislature," posted at the Legislature's website.

In the Proposal, OPD offers four options for providing defense that range from continuing the current hourly reimbursement process but under OPD administration, to contracting with individual attorneys or groups of attorneys, to hiring state employees. Each option would ensure the right to counsel under the federal and state constitutions and state statutes, as well as incorporate accountability and cost controls. Each option is estimated to cost less than the current system of providing defense legal services, with savings projections ranging from \$50,000 per year to \$1 million per year.

If you or your staff have any questions regarding this Proposal, please feel free to contact OPD Deputy Director Sophia Byrd McSherry or me. We understand that this Proposal is merely a first step in your assessment of possible changes in how the state ensures the right to counsel in these cases, and we look forward to working with you.

Respectfully,

Joanne Moore
Director

Proposal

**For the Administration of Defense Services
For Indigent Persons Involved in
Proceedings Under Chapter 71.09 RCW
(Sexually Violent Predator)**

December 1, 2011

This page is intentionally left blank.

Proposal

For the Administration of Defense Services For Indigent Persons Involved In Proceedings Under Chapter 71.09 RCW (Sexually Violent Predator)

December 1, 2011

Washington State Office of Public Defense
711 Capitol Way South, Suite 106
P.O. Box 40957
Olympia, Washington 98504-0957

Phone: (360) 586-3164
Website: www.opd.wa.gov

This page is intentionally left blank.

OPD Advisory Committee Members

Honorable Bobbe J. Bridge, Chair
Retired, Washington State Supreme Court

Robert Flennaugh II *
Supreme Court Appointee

Honorable Sherry Appleton
Washington State House of Representatives

Jeff Hall
State Court Administrator

Jane Ragland-Kirkemo
Association of Washington Cities

Honorable Kathy Lambert
Washington State Association of Counties

Andy Pascua
Gubernatorial Appointee

Honorable Debbie Regala
Washington State Senate

Honorable Matt Shea
Washington State House of Representatives

Honorable Karen Seinfeld
Retired, Court of Appeals

Catherine Smith
Edwards, Sieh, Smith & Goodfriend

Honorable Val Stevens
Washington State Senate

*Mr. Flennaugh did not participate in the preparation of this proposal.

Office of Public Defense

Joanne I. Moore, Director
Sophia Byrd McSherry, Deputy Director
711 Capitol Way South, Suite 106
P.O. Box 40957
Olympia, Washington 98504-0957

This page is intentionally left blank.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	1
EXECUTIVE SUMMARY.....	1
INTRODUCTION.....	2
2011 BUDGET PROVISIO	3
WORK METHOD.....	4
CURRENT SYSTEM FOR DEFENSE.....	5
OPD’S PROPOSED OPTIONS FOR DEFENSE	15
Option One – Continue Existing Reimbursement Process.....	16
Option Two -- Contract With Multiple Attorneys Statewide	17
Option Three -- Contract With Group Practices	17
Option Four -- Hire State Employees	18
CONCLUSION	24
Appendix A -- Stakeholders.....	25
Appendix B -- Survey	28
Appendix C – Current System.....	34
Appendix D – Costs & Expenditures	36

This page is intentionally left blank.

ACKNOWLEDGEMENTS

OPD consulted with numerous stakeholders during the research and development of this proposal and would like to thank them for their availability and responsiveness. Their contribution of employee time, program data and candid professional opinions were invaluable.

EXECUTIVE SUMMARY

Pursuant to a proviso in the 2011-2013 biennial state operating budget, the Washington State Office of Public Defense (OPD) has developed this Proposal to transfer statewide responsibility for indigent defense in Chapter 71.09 RCW sexually violent predator civil commitment cases from the Department of Social and Health Services (DSHS) to OPD.

OPD performed all research and outreach activities associated with developing this Proposal, including contacting numerous individuals and organizations that might be considered potential stakeholders. Research tools included online surveys, personal interviews and site visits, and data collection. Responses to OPD's online survey indicate generally favorable stakeholder support for transferring administration of RCW 71.09 indigent defense services to OPD, while preferences vary as to how the agency might structure administration of indigent defense in these cases.

Currently, indigent defense in RCW 71.09 civil commitment cases is decentralized, generally organized at the county level, and subject to local practice variations. Although the cases are initiated by county prosecutors, or assistant attorneys general at the request of county prosecutors, and take place in the Superior Courts of the counties where the underlying criminal convictions occurred, the State of Washington covers virtually all costs associated with the commitment proceedings, including defense legal services. The state, through DSHS, paid approximately \$5,678,992 for all RCW 71.09 indigent defense-related costs in 2010, excluding expert witnesses.

Public defense attorneys and contracting authorities in Washington State are accountable to several sources of practice standards for indigent defense services, including the Rules of Professional Conduct (RPCs), the Washington State Bar Association (WSBA) Standards for Indigent Defense Services, statutes, case law and court rules. These practice standards apply regardless of who administers and pays for

indigent defense services. OPD's Proposal to administer indigent defense services in RCW 71.09 cases adheres to all relevant practice standards.

In this Proposal, OPD offers four options for providing public defense in RCW 71.09 cases that range from continuing the current reimbursement process but under OPD administration, to contracting with individual attorneys or groups of attorneys, to hiring state employees. Each option would ensure the right to counsel under the federal and state constitutions and state statutes, as well as incorporate accountability and cost controls. Each option is estimated to cost less than the current system of providing defense legal services, with savings projections ranging from \$50,000 per year to \$1 million per year.

INTRODUCTION

The Washington State Office of Public Defense (OPD) is an independent agency of the Judicial Branch of government. The Legislature established OPD in 1996 "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... ." ¹

Since the agency's inception, OPD has implemented a number of successful programmatic reforms to improve the effectiveness and efficiency of indigent defense services in the appellate and trial courts. OPD currently provides qualified contracted attorneys to represent indigent clients in the state Court of Appeals and Supreme Court as well as indigent parents involved in child dependency and termination actions in the trial courts in 25 counties. OPD also administers state pass-through funding and an improvement program for criminal indigent defense in counties and cities.

An extensive performance audit by the Joint Legislative Audit and Review Committee (JLARC) concluded that OPD substantially meets legislative intent and operates in an efficient and economical manner, with adequate cost controls in place. ²

As the state agency responsible for ensuring the right to counsel, with a proven track record in delivering efficient, high-quality public defense representation, OPD could appropriately administer indigent defense services to implement the statutory right to counsel in RCW 71.09 civil commitment cases. When Chapter 71.09 RCW was

¹ See RCW 2.70.005.

² Office of Public Defense Review, Report 08-2, Joint Legislative Audit and Review Committee, Jan. 2008.

adopted in 1990, however, OPD did not yet exist and the current system of defense reimbursement was established at the Department of Social and Health Services (DSHS). In recent years, stakeholders and the Legislature have expressed interest in transferring this defense responsibility to OPD.

Pursuant to a proviso in the 2011-2013 biennial state operating budget, approved by the Legislature and signed by the Governor, OPD has developed this Proposal to assume statewide responsibility for indigent defense in RCW 71.09 cases.

2011 BUDGET PROVISO

Section 114 of 2ESHB 1087 Directs OPD to Prepare Proposal

“ 2) By December 1, 2011, the office of public defense shall submit to the appropriate policy and fiscal committees of the legislature a proposal for office of public defense to assume the effective and efficient administration of defense services for indigent persons throughout the state who are involved in proceedings under chapter 71.09 RCW. In developing its proposal, the office of public defense should consult with interested stakeholders, including the King county public defender, the Washington defender association, the Washington association of criminal defense lawyers, the administrative office of the courts, the superior court judges association, the office of the attorney general, the King county prosecuting attorney, the Washington association of counties, and the department of social and health services. At a minimum, the proposal should identify:

- (a) Procedures to control costs and require accountability, consistent with the state's obligation to ensure the right to counsel under both the United States Constitution and the Washington Constitution;
- (b) Appropriate practice standards for trial-level defense of indigent persons involved in proceedings under chapter 71.09 RCW, an estimated number of attorneys statewide who are qualified to provide such representation, and reasonable compensation for such defense services;
- (c) The total budget necessary to implement the proposal statewide for fiscal year 2013, including administrative support; and
- (d) Possible savings to the state and counties that might result from implementing the proposal.”

WORK METHOD

OPD performed all research and outreach activities associated with developing this Proposal. OPD initially contacted all stakeholders listed in the budget proviso above, as well as numerous other individuals and organizations that might be considered potential stakeholders for defense-related services in RCW 71.09 civil commitment cases. Most expressed an ongoing interest in participating in OPD's research and discussion; their expertise and observations have been invaluable. A sample "notice to stakeholders" as well as a list of stakeholders who were involved in this project are available at [Appendix A](#).

In addition to being reviewed by the OPD Advisory Committee, a November 8 draft version of this Proposal was shared with stakeholders. Fourteen stakeholders submitted written comments, which were taken into account in finalizing the report.

OPD utilized three primary research tools to gather information for this project: online surveys; personal interviews and site visits; and data collection.

Online Surveys

OPD developed a 19-question online survey that was distributed to stakeholders, several of whom forwarded the survey to additional constituent groups. The 129 survey responses represent a valuable cross-section of stakeholders, with 29.5 percent of responses coming from Superior Court judges or court commissioners, 26.4 percent from public defense attorneys, 14 percent from county staff or other persons designated to compile defense costs for reimbursement, 7 percent from assistant attorneys general who prosecute RCW 71.09 cases, and a handful each from elected county officials, legislators, and the Administrative Office of the Courts (AOC). Although officials from the Special Commitment Center (SCC) and the Department of Social and Health Services (DSHS) did not complete the survey electronically, they responded to the survey questions in an alternate format. The survey is available at [Appendix B](#).

Personal Interviews & Site Visits

Two OPD managing attorneys conducted numerous in-person and telephone interviews with stakeholders as well as observed court proceedings and visited the SCC on McNeil Island. Persons interviewed include Superior Court judges and commissioners, local staff who compile defense invoices for reimbursement, state staff who process defense reimbursement payments, assistant attorneys general, deputy King County prosecutors, SCC staff, DSHS staff, and defense attorneys representing clients from most of the counties with currently active civil commitment cases. Several

interviews occurred as a result of requests submitted via the online survey; however, OPD initiated many of the interviews. As questions arose during OPD's research and analysis, many stakeholders provided additional detailed feedback and participated in multiple ongoing discussions.

Data Collection

OPD solicited and received substantial quantities of financial and other data from DSHS and the SCC (defense and other commitment-related costs) as well as AOC (case statistics and court activities). OPD initially sought to compile the information into a complete overview of all cases in order to develop a typical case cost profile over the past several years. This proved to be a complex analysis due to disparities in local and state agency data-entry practices over the years and different case-reporting practices among the courts. Unfortunately, available legal case information from AOC frequently did not align with financial case information supplied by DSHS and the SCC. Ultimately, many of the conclusions and models for this proposal relied heavily on multiple in-depth discussions with numerous stakeholders.

CURRENT SYSTEM FOR DEFENSE

The overview presented below does not attempt to capture the many nuances and complexities that have developed over more than 20 years of implementing the state's sexually violent predator law. Rather, it is intended to offer a basic framework for understanding the structure of the statute and the state's current approach to providing indigent defense services in RCW 71.09 cases.

Background & Summary of Chapter 71.09 RCW

Background: Chapter 71.09 RCW originated as "The Community Protection Act of 1990." The Legislature has amended the Act numerous times in the intervening years, often in response to state and federal appellate court rulings.

The Act provides that a so-called Sexually Violent Predator (SVP) may be civilly committed for an indefinite period upon the expiration of that person's criminal sentence for a sex-related violent crime. Although SVP commitment is technically a civil legal matter, Washington law requires certain procedures and due process protections that are more aligned with criminal law than with standard civil proceedings. Among the due process protections is the right to legal counsel, including court appointed public defense counsel for indigent respondents.³ Under longstanding statutory standards for

³ See RCW 71.09.050.

determining indigency,⁴ the court, or its designee, is required to screen each respondent and issue a written determination as to whether the respondent is indigent. Virtually all respondents meet the legal definition of “indigent” and qualify for a public defender.

Summary: Chapter 71.09 RCW provides that a “sexually violent predator” (SVP) is a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that is not amenable to traditional mental health treatment and makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.

When it appears that a person may meet the criteria of SVP, the prosecuting attorney of the county where the person was convicted, or the Attorney General’s Office if so requested by the prosecuting attorney, may file a petition alleging that the person is an SVP. Commitment petitions are filed annually on roughly 10 percent to 15 percent of all Level 3 sex offenders being released from prison, according to DSHS.⁵ Historically and as routine practice the Attorney General handles SVP cases in all counties except King, where the King County Prosecuting Attorney handles all SVP cases. King County generates approximately 30 percent of all SVP cases in the state.

Persons being prosecuted under RCW 71.09 are transferred to a secure facility operated by DSHS after a 72-hour probable cause hearing in the county where they were previously convicted. They await their commitment trials in the state facility. If, after a civil commitment trial in the county where the person was previously convicted, the person is found by the court or a jury to be an SVP, the state is authorized to involuntarily commit the person back to a secure treatment facility operated by DSHS. The primary facility housing SVPs from all counties – the SCC – is sited on McNeil Island in Pierce County. Once a person is committed, DSHS must conduct annual reviews to determine whether the person’s condition has changed such that the person is no longer considered an SVP and should be unconditionally discharged or conditionally released to a “less restrictive alternative” (LRA) in the community.

Even if DSHS’s annual review does not result in a recommendation for discharge or less restrictive conditions, the committed person may petition the court for conditional release or unconditional discharge. If a committed person petitions the court, the court must set a show cause hearing at which the prosecuting agency can respond that the committed person continues to meet the RCW 71.09 definition of sexually violent predator. The committed person may present evidence that he or she no longer meets

⁴ See RCW 10.101.010 – 020.

⁵ DSHS web page on the SVP civil commitment process, available at www.dshs.wa.gov/scc/CCProcess.shtml

commitment criteria or that conditional release to an LRA is appropriate. If the court finds that the prosecuting agency does not make its prima facie case or that probable cause exists the court must set a review hearing. To prevail at the review hearing, the prosecuting agency must prove beyond a reasonable doubt that the person meets the definition of SVP or that conditional release is not appropriate. If the prosecutor does not meet this burden, the committed person will be released to an LRA or unconditionally discharged.

Prosecutors have filed an average of 23 new SVP petitions statewide each year since 2000. Superior Court records show that the largest number of new cases – 32 – occurred in 2004; the fewest – 13 – occurred in 2002. In the decade between 2000 and 2010, courts dismissed 28 SVP cases before the commitment trial, according to AOC data.

As of mid-October 2011, according to DSHS and AOC data, 305 persons resided in either the SCC on McNeil Island or an LRA, including a Secure Community Transition Facility (SCTF). Approximately 25 percent of current residents at the SCC are detained there pending their initial commitment trial, according to SCC staff. Such pre-trial detention at the SCC appears to last from a few months in a limited number of cases to two or more years in most cases, according to OPD survey responses and interviews.

DSHS has forecast increasing populations for at least the next five years, peaking at 346 to 360 residents at the SCC and 27 to 30 residents in LRAs/SCTFs.⁶

Between 1999 and 2010, according to records shared with OPD, approximately 62 residents were unconditionally discharged from the SCC and more than 40 were released to an LRA or SCTF. In addition, 15 residents died at the SCC, approximately 10 were transferred to federal custody, six were released to another state, one was committed to Western State Hospital, and one was sentenced to the Department of Corrections following a criminal assault conviction.

Current Method of Providing Defense in RCW 71.09 Cases

As is common with trial-level indigent criminal defense services in Washington,⁷ indigent defense in RCW 71.09 civil commitment cases is decentralized, generally organized at the county level based on several models, and subject to local practice variations. See [Appendix C](#) for information on each county.

⁶ Special Commitment Center Housing Addition Design Alternatives Report, P. 6, KMB Design Groups, Inc., Oct. 31, 2007.

⁷ 2010 Status Report on Public Defense in Washington State, pp. 17-18, Washington State Office of Public Defense (Jan. 2011).

One county that provides other trial-level indigent defense using attorney employees of a county-based public defender agency maintains one agency attorney to represent some RCW 71.09 clients while contracting with numerous private attorneys to handle additional commitment cases. Some counties – including two with county-based defender agencies – have relatively few commitment cases and arrange for representation via agencies and attorneys located elsewhere in the state. Some counties rely on non-profit public defense entities that employ full-time attorneys to handle all but a few commitment cases in the county. Some counties contract with individual private defense attorneys who may handle only RCW 71.09 cases or a mix of case types.

Concurrent representation by multiple public defenders for an individual respondent illustrates one variation among local practices in RCW 71.09 cases. For example, attorneys and judges report that two attorneys routinely represent each respondent in King and Snohomish counties. Pierce County, on the other hand, usually appoints two attorneys just for the initial commitment trial and any subsequent release trial. Other courts appoint only one attorney for most or all of a case. The WSBA Standards for Indigent Defense Services say that “generally, there should be two counsel” on these cases but do not specify which stages of the cases require active involvement of two attorneys.⁸ Judges appear to be interpreting the number of attorneys needed for individual cases within the court’s discretion.

Another local variation among cases, though not attributable exclusively to defense practice, is the amount of time that elapses before a case proceeds to trial. The statute provides that trials should begin within 45 days after the probable cause hearing, but few progress on that schedule. Most survey respondents said that commitment trials actually occur six months to two years-plus after the probable cause hearing. In stakeholder interviews, several attorneys reported time-to-trial delays of three to five years. Courts frequently grant continuances requested by either party or on the court’s own motion, and according to survey responses, most continuances occur due to scheduling conflicts or pre-trial issues. Because these are long trials, lasting from two weeks to a month or more, the long delays result to a large extent from scheduling issues in the various county courts.

State DSHS Reimburses SVP-Related Costs, Including Indigent Defense

Although RCW 71.09 civil commitments are initiated by, or at the request of, county prosecutors and take place in the Superior Courts of the counties where the underlying criminal convictions occurred, the State of Washington covers virtually all costs associated with the commitment proceedings. The state, through DSHS, currently

⁸ Standard Fourteen (2)(N), WSBA Standards for Indigent Defense Services 2011.

reimburses for costs associated with judges, court clerks, bailiffs, court reporters, transcription, juries, expert and non-expert witnesses, prosecution, indigent defense, transport and secure detention of respondents, etc.⁹

In response to 2010 legislation seeking to contain costs associated with expert witnesses, as well as generalized concern about commitment expenses, DSHS recently amended Chapter 388-885 of the Washington Administrative Code (WAC) regarding state reimbursement for RCW 71.09 costs. The WAC amendments, which became effective June 4, 2011, focused heavily on costs associated with expert witnesses and did not significantly change payments for other defense-related legal services costs. In developing this Proposal, OPD looked to the existing WAC provisions for guidance regarding pay rates for hourly or contracted defense legal services.

State payments: According to data provided by DSHS and the SCC, Washington State paid approximately \$5,678,992 for all RCW 71.09 indigent defense-related costs in 2010, excluding expert witnesses. This included payments for attorney time at \$85.65 per hour, legal assistant/paralegal and investigator time at \$46 per hour, court reporter services at \$20.71 per hour plus \$4.13 per page for transcription, travel and per diem at the state rate, and other incidental costs based on receipts. In two judicial districts, counties contract for lead attorneys at \$100 per hour, thus incurring some expenses that were not reimbursed by DSHS. Costs for defense expert witnesses in 2010 were \$1,432,748.

The state's current reimbursement rates for defense attorneys, paralegals and investigators were initially established by court order in King County as the minimum rate necessary to secure "effective assistance of counsel" – the constitutional benchmark for public defense.¹⁰ These rates were subsequently applied statewide. In three of its proposed service options, below, OPD utilizes these court-ordered rates as the basis for calculating reasonable compensation for contracted defense legal services in SVP cases.

Process to seek reimbursement: In a number of jurisdictions, county or court staff compile and submit defense-related costs to the state, regardless of whether indigent defense services were provided by county employees or contract attorneys. In some counties that contract for indigent defense services in RCW 71.09 cases, the county pays contract attorneys up front and then seeks state reimbursement.

⁹ See Chapter 388-885 WAC for current reimbursement rules, as authorized by Chapter RCW 71.09.

¹⁰ Order of Judge Richard Jones, King County Superior Court, Dec. 21, 2005. Order of Judge Linda Lau, King County Superior Court, Jan. 20, 2006.

Stakeholder interviews indicate that counties exercise varying degrees of oversight in reviewing and submitting indigent defense-related expenses for reimbursement.

King County has its public defense contractors submit SVP defense-related costs directly to the state. The Defender Association (TDA) and Society of Counsel Representing the Accused (SCRAP), both private non-profit entities that provide indigent defense representation in King County commitment cases, submit their billings to DSHS.

Reimbursements for costs in King County are processed by DSHS accounting staff at Olympia while all other reimbursements for RCW 71.09 costs in counties other than King are processed by accounting staff associated with the SCC at Steilacoom. Survey responses from attorneys and county staff indicate that DSHS occasionally questions or denies costs submitted for defense-related reimbursements.

Survey responses indicate widespread problems with the current state payment system. Among those who responded to the survey, 70 percent of defense attorneys and 80 percent of judges said they are less than fully satisfied with the existing reimbursement process.

Practice Standards for Indigent Defense

Public defense attorneys and contracting authorities in Washington State are accountable to several sources of practice standards for indigent defense services, including the Rules of Professional Conduct (RPCs), the Washington State Bar Association (WSBA) Standards for Indigent Defense Services, statutes, case law and court rules. These practice standards apply regardless of who administers and pays for indigent defense services. OPD's Proposal adheres to all relevant practice standards.

Rules of Professional Conduct:¹¹ The RPCs, commonly known as attorney "ethics rules," are adopted by the Washington Supreme Court and regulate professional conduct of all attorneys licensed in the state. Violating these requirements can lead to serious negative consequences for the attorney involved, including varying degrees of discipline possibly culminating in permanent disbarment.

While the RPCs apply to all attorneys, including public defenders, some provisions are specific to attorneys who contract with government entities to perform public defense work, including indigent defense in RCW 71.09 cases. For example RPC 1.8(m) provides that:

¹¹ Washington Court Rules, "Rules of Professional Conduct" available at http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC

a) An attorney shall not make an agreement with a government entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting attorney or law firm to bear the cost of providing conflict counsel.

b) Costs for providing investigation or expert services shall not be paid by the contracting attorney or law firm, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the attorney, law firm, or law firm personnel.

c) An attorney shall not knowingly accept compensation for the delivery of indigent defense services from an attorney who has entered into a current agreement in violation of paragraphs a or b above.

OPD adheres to the RPCs in its current programs that contract for appellate attorneys statewide and parents representation attorneys in dependency and termination cases in 25 counties.

WSBA Standards for Indigent Defense Services:¹² The WSBA Standards for Indigent Defense Services establish 18 “best practices” related to the administration of public defense as well as the provision of direct client services. Washington law requires counties and cities to adopt public defense standards and recommends the WSBA Standards for Indigent Defense Services.¹³ OPD incorporates the WSBA Standards in its current programs that contract for appellate attorneys statewide and parents representation attorneys in dependency and termination cases in 25 counties.

Many of the WSBA Standards apply generally to all indigent defense services regardless of the types of cases involved. For example: Standard One promotes defense attorney compensation commensurate with training and experience and comparable to that of prosecutors; Standard Five provides that defense contracts should include funds to support basic law office overhead and requires contract attorneys to have telephone and postal service as well as an office; and Standard Seven establishes an attorney-support staff ratio.

WSBA Standard Fourteen, however, establishes minimum attorney qualifications for handling certain case types, including what it calls “Sex Offender ‘Predator’ Commitment Cases”¹⁴ – RCW 71.09 cases. In part, Standard Fourteen (2)(N) states that “The lead counsel shall meet the following requirements:

¹² WSBA Standards for Indigent Defense Services, (June 2011), available at [http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Standards%20for%20Indigent%20Defense%20Services%20\(2011\).ashx](http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Standards%20for%20Indigent%20Defense%20Services%20(2011).ashx)

¹³ RCW 10.101.030.

¹⁴ Standard Fourteen (2)(N), WSBA Standards for Indigent Defense Services, (June 2011).

- i. The minimum requirements set forth in Section 1; and
- ii. Have at least:
 - a. Three years criminal trial experience; and
 - b. One year experience as a felony defense attorney or one year experience as a criminal appeals attorney; and
 - c. Experience as lead counsel in at least one felony trial; and
 - d. Experience as counsel in cases involving each of the following:
 1. Mental health issues; and
 2. Sexual offenses; and
 3. Expert witnesses; and
 - e. Familiarity with the Civil Rules; and
 - f. One year of appellate experience or demonstrated legal writing ability.”

As noted earlier, Standard Fourteen (2)(N) also provides that: “Generally, there should be two counsel on each sex offender commitment case.” Judges in individual cases use their discretion to appoint a second attorney, and for which aspects of the case. Judicial officers and attorneys responding to the online survey identified the original commitment trial and any subsequent release trial as the most work-intensive stages of RCW 71.09 representation for defense counsel.

Only a few attorneys statewide maintain full-time RCW 71.09 practices. Currently, in all counties but King and Snohomish, most of the attorneys who represent civil commitment respondents also handle other case types in their law practices. In these counties, for the most part, a second attorney is not appointed to an SVP case. In King County, two attorneys are routinely appointed to each case. In Snohomish County, the court usually appoints a second attorney, who is actively involved in the case as needed during periods of high-intensity work.

The WSBA Standards do not include a specific numeric caseload standard for RCW 71.09 cases, but do provide that: “The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation.”¹⁵ However, the Washington Defender Association (WDA), a non-profit organization representing more than 1,100 public defense attorneys in all 39 counties, recommends similar attorney standards that do specifically address RCW 71.09 caseloads. The WDA Standard 3 states that each public defense attorney shall have no more than the following caseload: “Four new ‘predator’ commitment cases per attorney per year; or up to 12 open cases at a time”¹⁶ Attorneys who currently represent

¹⁵ Standard 3.2, WSBA Standards for Indigent Defense Services (June 2011).

¹⁶ Standard 3, Washington Defender Association Standards for Public Defense Services (2006). See also Commentary to Sex Offender Commitment Cases, pp 45-47, Washington Defender Association Standards for Public Defense Services (2006).

RCW 71.09 respondents report caseloads within a relatively narrow range consistent with the WDA caseload standard. In general, each full-time attorney is responsible for two to three pre-commitment trials and four to 10 post-commitment clients, some of whom may be pursuing further court review. Based on the WDA standard and current practices, OPD has concluded that an appropriate per-attorney caseload would be 12 total cases, including three pre-commitment trials and up to nine ongoing post-commitment clients.

Statute and case law: RCW 71.09.050 provides that persons facing civil commitment proceedings are entitled to legal counsel, and, if indigent, are entitled to court-appointed counsel.

The constitutional standard for court-appointed indigent defense is “effective assistance of counsel,” which requires the defense attorney’s performance to be “reasonable ... under prevailing professional norms.”¹⁷ The Washington Court of Appeals has expressly adopted the *Strickland* standard for effective assistance as applied to the statutory right to counsel in RCW 71.09 civil commitment matters.¹⁸ The Washington Supreme Court also has recognized and applied the *Strickland* standard in commitment cases.¹⁹ The Washington Supreme Court has further acknowledged the relevance of both the WSBA Standards for Indigent Defense Services and the WDA Standards for Public Defense Services when reviewing matters related to effective assistance of counsel.²⁰

Court rules: The Washington Supreme Court promulgates numerous rules governing procedure at various levels of court and in various case types. RCW 71.09 civil commitment cases are conducted pursuant to the Superior Court Civil Rules.

Number of Qualified Defense Attorneys Available

Absent a detailed inquiry of every member of the state Bar, it may be virtually impossible to ascertain exactly how many Washington attorneys are qualified and potentially available to handle RCW 71.09 civil commitment cases. Certainly dozens if not hundreds of attorneys meet the minimum professional qualifications established in

¹⁷ *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

¹⁸ “We conclude that the subject of a civil commitment has a statutory right to the effective assistance of counsel, including the right to claim ineffective assistance of counsel as a basis for review. . . . There is no reason to distinguish between chapter 71.09 RCW and the relevant chapter here, 71.05 RCW, for the purpose of setting a standard for effective assistance of counsel. Both address involuntary, civil commitments.” *In re Det. of Smith*, 117 Wn. App. 611, 72 P.3d 186 (2003); And see *In re Det. of T.A.H.-L.*, 123 Wn. App. 172, 179, 97 P.3d 767 (2004).

¹⁹ *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009); *In re Det. Of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007).

²⁰ *State v. A.N.J.* 168 Wn.2d 91 (2010).

WSBA Indigent Defense Standard Fourteen, including many private attorneys whose practices feature high-profile, complex criminal defense cases. Many qualified lawyers, however, may not identify themselves as “available” to provide indigent defense services in RCW 71.09 cases.

Embedded in the concept of attorney “availability” to handle these cases is a significant time element. Due to the many systemic delays involved, an attorney appointed to represent a respondent in an RCW 71.09 civil commitment may spend several years working on the matter before the initial commitment trial. Then, if the client is civilly committed, the attorney may continue to represent the client in review hearings and potentially a release trial over the course of many more years. Several stakeholders interviewed for this project described the job of defense counsel in these cases as a “lifetime appointment.”

Based on information provided to OPD regarding the number of attorneys currently representing civil commitment respondents, it appears that, at a minimum, 60 individual attorneys possess the required skill and experience and, by virtue of their current assignment to commitment cases, are presumed to be “available” to handle RCW 71.09 cases.

The majority of defense attorneys who accept RCW 71.09 cases are located in Western Washington. Two judicial districts in Eastern Washington currently contract with Puget Sound area defense attorneys to handle most of their cases because, they say, local attorneys are not available.²¹

In this Proposal, OPD estimates 22-24 full-time attorneys (plus support staff) are necessary to effectively represent the anticipated number of active cases, including conflicts cases. This includes new filings as well as ongoing reviews.

²¹ Yakima County and Benton-Franklin Judicial District.

OPD'S PROPOSED OPTIONS FOR DEFENSE

The State of Washington has a legal obligation to provide effective assistance of counsel to respondents in RCW 71.09 civil commitment cases. In developing this proposal, OPD's primary focus has been on ensuring the right to counsel, consistent with constitutional and statutory mandates. The analysis and structural options discussed below reflect this focus.

Due to the limited time frame for its research OPD did not seek to audit all recent civil commitment defense expenses but rather examined a sample of individual invoices. The sampled invoices, along with an analysis of existing procedures and overall expenditures, reveal several factors that may contribute to unpredictable costs and potential administrative inefficiencies in the state's current approach for providing indigent defense in RCW 71.09 civil commitment cases. In reviewing these factors, OPD identified systemic changes that it believes could reduce state costs and inefficiencies without impairing each client's right to effective assistance of counsel. OPD has concluded that any of several different service structures could improve the effectiveness and efficiency of indigent defense services in RCW 71.09 cases.

The media in recent months have reported possible legislative interest in relocating the SCC to a site other than McNeil Island, and some legislators and judges also have suggested that some or all legal proceedings could occur at a single court location. In developing this proposal OPD includes options for defense service structures that could integrate with other major adjustments in how the state implements RCW 71.09 civil commitment, should the state choose to make them.

Factors That May Contribute to Defense Costs & Potential Inefficiencies

- *Individual hourly billing* for defense attorneys, support staff and investigators, with little oversight. As noted above, the state currently pays an hourly rate for each attorney, legal assistant/paralegal and investigator. Such hourly billing is rare in other types of public defense cases in Washington.
- *Lengthy case delays* at every stage of the process. As noted above, the SCC reports that 25 percent of residents currently are awaiting their initial commitment trial. When trials are routinely delayed for years, all parties' caseloads and other case-related demands are increased. Respondents, who must be held at the SCC pending their initial commitment trial, may be unfairly detained at great expense to the state and untold cost to themselves and their families.
- *Potential ethical conflicts* related to budget management and accountability. (DSHS and the SCC arguably face a conflict of interest in being responsible for

the costs associated with both prosecution and defense of these cases, as well as the detention and care of respondents.)

Changes OPD Could Implement to Manage Costs & Ensure Accountability

- Maintain the current hourly billing practices but implement a more formal system for reviewing and approving invoices.
- Replace unlimited hourly billing with an annual defense legal services contract based on attorney-staff ratios as provided in WSBA Standards for Indigent Defense Services.
- Coordinate statewide attorney training on emerging issues.
- Actively monitor/manage contracts for defense legal services.
- Utilize primarily full-time attorneys working in group practices.
- Ensure that respondents receiving public defense counsel are documented to be indigent, pursuant to the requirements of RCW 10.101.020.²²

Structural Options for OPD to Administer RCW 71.09 Defense Services

Responses to OPD's online survey indicate generally favorable stakeholder support for transferring administration of RCW 71.09 indigent defense services to OPD, while preferences vary as to how the agency might structure administration of indigent defense in these cases.

The budget proviso directs OPD to develop a proposal for administration of defense services for indigent persons who are involved in proceedings under Chapter 71.09 RCW. In response, OPD has developed four options that range from continuing the current reimbursement process, to contracting with individual attorneys or groups of attorneys, to hiring state employees. Each option would ensure the right to counsel under the federal and state constitutions and state statutes, as well as incorporate accountability and cost controls.

Option One – continue existing reimbursement process, but transfer state agency responsibility from DSHS to OPD: Currently, DSHS is the agency responsible for confining respondents being prosecuted under RCW 71.09 and for reviewing and initially determining whether their confinement should be continued. As

²² RCW 10.101.020(6) provides that "The office or individual charged by the court to make the determination of indigency shall provide a written report and opinion as to indigency on a form prescribed by the office of public defense, based on information obtained from the defendant and subject to verification. The form shall include information necessary to provide a basis for making a determination with respect to indigency as provided by this chapter." OPD has made such forms available to all courts.

such, there is an appearance of a conflict of interest for DSHS to also administer payments for respondents' public defense services.

The Legislature could decide to transfer a substantially similar payment process to OPD, which has no conflict of interest in reviewing the defense function. Through a skilled managing attorney, OPD would scrutinize all invoices before approving payments, thus improving the efficiency of the payment system without disrupting existing case assignments. Under this option, the present method for appointment of attorneys for these cases would continue. This option would require the least time and cost to fully transition to OPD.

About 33 percent of the survey respondents opposed continuing the present system. However, the majority of public defense attorneys responding to the survey generally supported continuing the present hourly billing system.

Option Two – contract with multiple attorneys statewide: Through an RFP process, OPD could contract with multiple individual private attorneys or small firms around the state to provide indigent defense services in RCW 71.09 cases, including conflict cases. Compensation would be an annual contracted amount based on the existing hourly rates applied to a standard number of work hours. Transition time and costs for this option would depend in large part on the number of existing SVP attorneys who accept an OPD contract.

OPD currently utilizes a similar contracting approach in its program to provide indigent defense for parents in dependency and termination cases.

Among the various survey respondents, 57 percent generally supported this option.

Option Three – contract with group practices: Through an RFP process, OPD could contract with two or more private law firms or a consortium of attorneys to provide indigent defense representation in RCW 71.09 civil commitment cases statewide, including conflict cases. Compensation would be an annual contracted amount based on the existing hourly rates applied to a standard number of work hours. As with Option Two, transition time and costs would depend on whether many of the attorneys in the contract groups were already assigned to these cases.

One important advantage of this option is that all clients would benefit from representation by attorneys working in a group practice. This would ensure that two attorneys could be available to work each case, one as lead counsel and the other assisting as needed. As identified by the survey respondents, there are points in every

ongoing case that require intense preparation and attorney time, while other stages in the case generate low to moderate workload.

The online survey did not include a “group practice” option, thus there are no survey preferences to report.

Though certainly viable with the current practice of conducting court proceedings in various counties, Option Three also would be efficient if the Legislature decides to locate most or all proceedings at a single court location. In that case, OPD could seek qualified primary contracting entities located near the court and the SCC.

Option Four – hire state employees: This service structure would be similar to that currently used by the Attorney General’s Office, which provides assistant attorneys general (state employees) to prosecute all RCW 71.09 civil commitment cases outside King County. The Legislature could establish an OPD direct services division for RCW 71.09 defense representation, which would hire attorneys, support staff and investigators consistent with the staffing ratios directed by the WSBA Standards for Indigent Defense. Compensation would be based on standard state salary practices, with defense attorneys and staff receiving state salary and benefits comparable to prosecutors in the AG’s office. Like the assistant AGs, defense division employees would be responsible for commitment cases around the state. Conflict attorneys would be provided by contract, as necessary. This option likely would require a significant period of time to fully transition all cases to OPD staff attorneys.

Among the constituent groups who responded to the online survey, 56.5 percent of the public defense attorneys opposed this option; however 72.7 percent of county staff, 57.1 percent of AGs, and 42.4 percent of judges supported the option.

As with Option Three, this centralized approach to defense legal services might be most efficient if the Legislature decides to locate proceedings at a single court location. Offices for an OPD Defense Division could be located near the court.

Time Required to Transition Defense Services to OPD

If the Legislature directs OPD to assume administration of indigent defense services in RCW 71.09 cases, a phased transition would be necessary to minimize disruptions in currently active cases that are nearing trial. OPD recommends that this transition occur over several months, depending on the administrative structure chosen by the Legislature. A different transition process would be required for each of the four options.

Transition time would be minimal for Option One. There would be no case transfers as a result of the payment responsibility transfer, as existing attorneys would continue representing their current clients.

Under Option Two and Option Three the transition process would be more detailed and time-consuming, as OPD would need to evaluate any remaining non-contract cases and work with individual attorneys who are currently representing clients to maintain existing trial schedules and transfer cases where appropriate.

Under Option Four, the transition process would be the most complex and time-consuming, as OPD would need to work with all attorneys who are currently representing clients to transfer cases at the appropriate time.

Expert Services

Stakeholders and legislators have raised concerns about the cost of RCW 71.09 defense experts in recent years. However, while expert witness costs increased significantly from 2008 to 2009, records indicate they have remained relatively stable for the past three years. The Legislature has established statutory limits on the number of defense experts to be paid with state funds,²³ which, when combined with court rules pertaining to expert requests, provide some predictability of costs while also protecting respondents' rights.

After consulting with stakeholders and considering comments submitted by defense attorneys and judges, OPD believes it can effectively manage the authorization and payment of defense experts.

As required by the RPCs and the WSBA Standards for Indigent Defense Services, OPD would separately identify and segregate funds for payment of defense experts from funds for defense attorney compensation.²⁴ Consistent with statutory requirements, OPD would rely on the trial court to grant defense requests for expert

²³ RCW 71.09.050(2) provides, in part, "Whenever any person is subjected to an evaluation under this chapter, the department is responsible for the cost of one expert or professional person to conduct an evaluation on the person's behalf ..."

²⁴ RPC 1.8(m)(b) provides that costs for expert services shall not be paid by a contracting attorney, unless a reasonable amount for such costs is specifically designated in a manner that does not adversely affect the income or compensation allocated to the attorney, law firm, or law firm personnel. Standard Four of the WSBA Standards for Indigent Defense Services provides that "Expert witness fees should be maintained and allocated from funds separate from those provided for defender services."

witnesses,²⁵ or could, within the agency, evaluate requests for experts if delegated that duty by the court. OPD would pay invoices for expert services as directed by the court.

Budget Considerations

Defense legal services costs: *Option One* of the service structure options above would retain the current practice of paying defense legal services costs on an hourly basis for attorneys, legal assistants, investigators, etc., based on periodic invoices. The budget requirements for these defense services would be slightly less than the status quo.

Option Two and Option Three of the service structure options above assume similar budget requirements: annual contracts for defense legal services for attorneys and support staff; additional payments for investigator services, separate payment for expert services, court reporter services and transcripts, and travel costs. In addition, as is standard practice in the administration of public defense services, contract attorneys who document that a particular case required extraordinary time and effort may be eligible, at the agency's discretion, to receive "extraordinary compensation."

In developing a formula for a basic defense legal services contract for indigent defense in RCW 71.09 civil commitment cases OPD considered its current successful contract models for appellate services and parent representation, and the essential components required by various practice standards and court-ordered payment rates, as well as the current market for public defense services.

OPD recommends the following formula to calculate a basic contracted defense services payment: the minimum hourly payments previously established by court order, multiplied by a standard number of hours worked annually for an attorney who does not bill to a private client, applied to the attorney/assistant staffing model in Standard Seven of the WSBA Standards for Indigent Defense Services.

A generally accepted range of work hours for a public defender is between 1,650 and 1,900 hours annually. Because RCW 71.09 cases are demanding and periodically very labor intensive, and the clients have time-consuming ongoing communication needs, 1,800 hours annually is appropriate. The WSBA Standards provide that every 1 FTE attorney requires the additional services of ¼ FTE legal assistant/paralegal. Applying this formula results in \$85.65 per hour for 1 FTE attorney (1,800 hours)+ \$46 per hour for ¼ FTE legal assistant (450 hours) = \$174,870 annually for contracted

²⁵ RCW 71.09.050(2) provides, in part, "In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an evaluation or participate in the trial on the person's behalf."

defense legal services. Figuring overhead for a trial attorney's office as generally 44 percent to 50 percent of the annual gross revenue, depending on variable expenses such as insurance costs and some taxes, the attorney's salary would be roughly between \$87,000 and \$98,000.²⁶ This pay range is consistent with earnings for highly experienced attorneys currently handling RCW 71.09 cases.

In addition, WSBA Standard Ten specifies that one supervising attorney should be available for every 10 full-time staff attorneys. Option Three, which would contract with group practices, includes funding for up to two supervisors.

Each defense attorney also would have access to investigator services as needed.

In conformance with the WSBA Standards for Indigent Defense Services, OPD would cover costs for investigator services using a similar formula but paid separately to comply with RPC 1.8(m). OPD estimates the statewide annual cost for investigator services at approximately \$227,000, based largely on recent actual usage of investigator services, which appears to be at an appropriate level. OPD estimates annual court reporter and other incidental costs at approximately \$250,000 and annual extraordinary compensation payments at no more than \$150,000.

Option Four, a new state office, would require establishing a direct-service division of OPD and providing office space, furniture and technology, in addition to hiring approximately 20 staff attorneys, two supervisors, and several support staff, not including investigators and conflict attorneys. (Up to three private attorneys would be contracted to handle conflicts cases.)

OPD estimates staff attorney compensation averaging \$77,000 plus benefits. Consistent with WSBA Standards regarding staffing, the new office would include two supervising attorneys. Unlike contractors in Options Two and Three, employee attorneys would not be eligible for "extraordinary compensation" for the most difficult cases. Support staff compensation would average \$47,000 plus benefits. Annual court reporter and other incidental costs would be similar to projections above at approximately \$250,000. Investigator services could be provided by employees or contractors, and are estimated to cost \$227,000, based on recent actual usage of investigator services. Conflict attorneys would be contracted utilizing the contract attorney formula outlined above. Option Four would allow OPD to exercise greater

²⁶ 2007 Law Firm Economic Survey, Altman Weil Publications, Inc. Overhead may include staff; health, liability and malpractice insurance; retirement contributions; employer social security and B&O taxes; office space and furnishings; communications and other technology equipment and services.

direct supervision and day-to-day oversight of staff attorney practices than would be possible with the structures outlined in Options One, Two and Three.

(See [Appendix D](#) for a table of estimated costs and projected savings.)

OPD administrative costs: In addition to the costs for defense legal services, as outlined above, OPD would incur administrative costs necessary to provide effective oversight of statewide indigent defense services in RCW 71.09 civil commitment cases. However it is expected that the additional OPD administrative costs could be offset by shifting workload from DSHS to OPD.

Option One, continuation of the existing reimbursement process, likely would impose the greatest administrative impact on OPD among the first three options, creating substantial accounting workload and requiring the addition of a full-time managing attorney and part-time accountant/administrative assistant to review attorney invoices, investigator invoices, expert invoices, manage public records requests and develop and deliver statewide attorney training.

Option Two, contracting with multiple attorneys statewide, depending on the number of individual attorney contracts involved, could require adding a half-time accountant/administrative assistant and a full-time managing attorney, who would handle the contract oversight, review investigator and other assorted invoices and extraordinary compensation requests, manage public records requests, and develop and deliver statewide attorney training.

Option Three, contracting with group practices, possibly generating less accounting workload than Option Two, would require a part-time managing attorney and part-time administrative assistant to perform functions as described above.

Option Four, a new state office, would include administrative functions within the new office. The budget considerations of the administrative functions are included in the discussion above of defense legal services costs. The two supervising attorneys would manage the agency, including contracts with conflict attorneys. As with the other options above, a new office would require a part-time accountant/assistant.

A note on public records: Implementation of any of the structural options above would require additional agency capacity to process public records requests. In these scenarios OPD would be the sole government entity involved in administering indigent defense services in RCW 71.09 civil commitment cases and thus would be a

primary recipient of public records requests.²⁷ Records requests related to the state's SVP civil commitment program often involve sensitive information requiring careful, specialized legal review, according to a DSHS public records attorney. She reports that in the past year the SCC received approximately 400 requests for records with SCC residents themselves generating 277 of those requests. Two full-time staff at the SCC and at least one DSHS staff are necessary to adequately respond to these requests under current public records laws. In addition, the Attorney General provides a full-time legal advisor to DSHS for RCW 71.09 issues, including public records issues. Roughly 7 percent of the total requests in the past year were for records related to indigent defense services and/or costs, according to DSHS.

OPD's current public records officer, who also is responsible for multiple other crucial duties, could not absorb the additional potential public records workload associated with indigent defense in RCW 71.09 cases. It is anticipated that the RCW 71.09 managing attorney would handle the public records requests associated with that program. (In contrast with the hundreds of annual civil commitment-related requests reported by DSHS, OPD has averaged 13.5 public records requests per year across all of its program areas over the past five years.)

Potential Savings to the State and Counties

County savings: Survey responses and interviews with county staff indicate that most counties are not currently bearing unreimbursed expenses for indigent defense in RCW 71.09 cases. The two exceptions are Yakima County and the Benton-Franklin Judicial District, which report paying lead attorneys an additional \$14.35 per hour over the amount reimbursed by the state.

If OPD were to implement one of its proposed options for providing indigent defense in RCW 71.09 cases, Yakima County estimates that it would annually save approximately \$10,000 that it currently pays attorneys and for which it is not eligible to be reimbursed. Based on recent expenditures, Benton County would save approximately \$7,355 and Franklin County would save \$5,024.

State savings: *Under Option One*, merely transferring the existing payment method to OPD, the state could expect to save up to \$50,000 per year as a result of OPD's additional scrutiny of invoices.

²⁷ While OPD, as an agency of the Judicial Branch, is not subject to the requirements of Chapter 42.56 RCW, it looks to that statute for guidance and is subject to Court Rules on public disclosure, including amendments to GR 31.

Under Option Two, utilizing individual and small firm defense contracts based on the formula discussed above, the state could expect to save about \$1 million per year over current defense legal services costs for attorneys, legal assistants/paralegals, investigators, court reporters and incidental costs.

Under Option Three, utilizing defense contracts with group practices, the state could expect to save between \$700,000 and \$900,000 per year over current defense legal services costs for attorneys, legal assistants/paralegals, investigators, court reporters and incidental costs. The lesser savings would occur if multiple supervisors were required for large group practices.

Under Option Four, if the Legislature established a new SVP Defense Division of OPD, it is estimated that the state's yearly defense-related costs could decrease by about \$1 million initially, depending on a number of variables such as office location, required travel around the state, and the potential need for conflict attorneys. The state could benefit from current depressed values for commercial office space as well as a state salary schedule that provides for lower compensation for attorney and support staff positions than the contract formula utilized in Options Two and Three.

Under any of the options, additional state savings related to housing SCC residents could occur if time-to-trial delays could also be reduced. However, regardless of how defense services are structured, OPD estimates no savings in expert costs, which have remained stable for the past three years.

CONCLUSION

Following several months of research, analysis, and consultation with interested stakeholders, OPD concludes that, if so directed by the Washington Legislature, it could provide effective and efficient administration of legal defense services for indigent persons involved in sexual predator civil commitment proceedings under Chapter 71.09 RCW. As the state agency entrusted to ensure the statutory and constitutional right to counsel, OPD has a track record for providing cost efficient, quality legal representation.

This Proposal offers four structural options for administering public defense in RCW 71.09 cases. OPD believes any of the four could be implemented at less cost than the current system while safeguarding each respondent's due process rights.

OPD looks forward to working with legislators as they consider the ideas presented in this Proposal.

Appendix A -- Stakeholders

The following is a sample notice sent to numerous stakeholders seeking their input and assistance.

June 16, 2011

Re: Budget Proviso Regarding Public Defense in Cases Filed Under Chapter 71.09 RCW

Dear Stakeholder:

As you may be aware, the Legislature in its recently passed 2011-2013 biennial budget directed the Washington State Office of Public Defense (OPD) to “submit ... a proposal for office of public defense to assume the effective and efficient administration of defense services for indigent persons throughout the state who are involved in proceedings under chapter 71.09 RCW.” (*Sec. 114(2) of 2ESHB 1087.*) OPD’s proposal is due to the Legislature by December 1, 2011.

The proviso further directs OPD to consult with certain stakeholders as it researches and develops the defense proposal. Your agency is identified as one of these key stakeholders, and I hope you or your designee will be able to participate. To ensure that your agency receives timely communications from OPD, please let us know who you would like us to contact regarding this project, including email and phone number. You may send contact information to OPD Public Defense Service Manager David DeLong at david.delong@opd.wa.gov. David also may be reached by telephone at 360-586-3164 ext. 110. It would be helpful to receive this information by June 30.

Because time and other resources are tight for all of us right now, and the proviso did not include funding to cover costs associated with developing the proposal, OPD plans to conduct most stakeholder outreach via email, telephone, and perhaps a short online survey. We will observe court proceedings as time allows. Certainly OPD staff and I also are available to meet with you in person, if you are interested.

As this project proceeds, I look forward to receiving your input.

Best regards,

Joanne I. Moore
Director

The following stakeholders participated to varying degrees in the research and development of this Proposal.

Name	County	Agency
Alvarez, Letty	Skagit	County Office of Assigned Counsel
Armstrong-Smith, Kelli	Skagit	Attorney
Bamberger, Jim	n/a	Washington State Office of Civil Legal Aid
Bridget Cooper	n/a	Gordon Thomas Honeywell Gov't Affairs
Burbank, Brooke	n/a	Attorney General's Office
Carney, Christopher	n/a	Wash. Association of Criminal Defense Lawyers
Chang, Kenneth	King	The Defender Association
Christian, Ann	Clark	County Public Defense Coordinator
Cross, John	Kitsap	Attorney
Cunningham, Kelly	n/a	SCC Director
Davies, Richard	Jefferson	Attorney
Dreyfus, Susan	n/a	DSHS Secretary
Engkraf, Gayle	Cowlitz	County Administration
Enslow, Brian	n/a	Washington State Association of Counties
Fessler, Dan	Yakima	County Public Defender
Fraser, Elizabeth	Snohomish	County Public Defense Office
Garrison, Leslie	King, Thurston	Attorney
Gasnick, Harry	Clallam	Attorney
Gonzales, Rafael	Grant	County Public Defense Office
Hackett, David	King	Office of the Prosecuting Attorney
Hall, Jeff	n/a	State Court Administrator
Harrison, Sally	Thurston	County Department of Assigned Counsel
Hartman, Russell	Kitsap	Attorney
Hedman, Christie	King	Washington Defender Association
Henrikson, Ken	King	Attorney
Heyd, Jana	King	Society of Counsel Representing the Accused
Hocraffer, David	King	County Public Defense Office
Howard, Keith W.	Chelan	Attorney
Hsu, Eric	Benton/Franklin	County Public Defense Office
Judge Inveen, Laura	King	President, Superior Court Judges Association
Jackson, N.F.	Whatcom	Superior Court Administrator
Jaquette, Bill	Snohomish	County Public Defender's Association
Johnson, Eric	n/a	Washington State Association of Counties
Judge Schacht, Donald	Walla Walla	Superior Court
Judge Godfrey, Gordon	Grays Harbor	Superior Court

Name	County	Agency
Judge Lohrman, John	Walla Walla	Superior Court
Kawamura, Michael R.	Pierce	County Department of Assigned Counsel
MacDonald, Pete	King	The Defender Association
Manion, Leesa	King	County Prosecuting Attorney's Office
Mathis, Teresa	n/a	Wash. Association of Criminal Defense Lawyers
Mayhew, Jim	Clark, Cowlitz	Attorney
McAleenan, Mellani	n/a	Administrative Office of the Courts
McBride, Tom	n/a	Wash. Association of Prosecuting Attorneys
McDougall, Regina	n/a	Administrative Office of the Courts
McIntyre, Jennifer	Snohomish	Attorney
McKenna, Rob	n/a	Washington Attorney General
Mooney, Martin	Snohomish	County Public Defender's Association
Mulhall, Cathy	Chelan	County Administration
Ostlund, John	Whatcom	Attorney
Satterberg, Dan	King	County Prosecuting Attorney
Schattauer, Leta	King	Attorney
Schoenberger, James	Pierce	Attorney
Judge Small, Chip	Chelan	Superior Court
Smith, Anne	Pierce	County Department of Assigned Counsel
Stenberg, Ann	Pierce +	Attorney
Strickler, June	Grant	County Administration
Thompson, Robert	Yakima	Attorney
Tibbits, Clarke	Kitsap	County Public Defender
Trageser, Tim	Spokane	Attorney
Tyne, Keith	Skagit	County Public Defender
Van Hook, Bill	n/a	Attorney General's Office
Vinti, Connie R.	Walla Walla	Court Administration
Wakefield, Leanne	Spokane	County Administration
Wiitala, Kristal	n/a	DSHS

House Ways and Means Committee and Staff
House General Gov't Appropriations Committee and Staff
Senate Ways and Means Committee and Staff
House Public Safety Committee and Staff
Senate Human Services and Corrections Committee and Staff

House and Senate D & R Caucus Staff

Appendix B -- Survey

The following online survey was provided to all stakeholders, many of whom forwarded it to additional constituent groups. The survey generated 129 responses from a variety of stakeholder groups.

Stakeholder Survey Regarding Public Defense Services in SVP Cases

The State Legislature has directed the Washington State Office of Public Defense (OPD) to develop a proposal to assume statewide administration of public defense services for indigent persons involved in proceedings under chapter 71.09 RCW (sexually violent predators).

OPD is gathering information that might assist the agency in drafting a viable proposal and is seeking input from persons currently involved in many aspects of SVP cases.

Although you might already have discussed some of these issues with OPD staff, we hope you also will take a few minutes to participate in this brief online survey. The survey closes at 5 p.m. Thursday, August 25, 2011.

*** 1. Please select the choice that best describes your current role with respect to Chapter 71.09 RCW sexually violent predator (SVP) cases in Washington State.**

- I am not a stakeholder for this issue
- Public defense attorney (agency employee, private contractor, assigned counsel)
- Deputy prosecuting attorney
- Assistant attorney general
- Trial judge or court commissioner
- State legislator
- Legislative staff
- County elected official
- Administrative Office of the Courts (AOC) staff
- Department of Social and Health Services (DSHS) staff
- Special Commitment Center (SCC) staff
- County staff or designee responsible for compiling/submitted defense costs for reimbursement
- Other

2. If you answered "other" to Question 1, please identify your role with respect to SVP cases in Washington State.

Stakeholder Survey Regarding Public Defense Services in SVP Cases

3. How many years have you served in your current role?

4. Which county or counties do you work in?

5. Approximately how much work time do you spend on SVP cases and related administrative matters?

- 40 to 60 hours per week
- 30 to 40 hours per week
- 20 hours per week
- 10 hours per week
- Fewer than 10 hours per week

6. On average, how many requests do you receive each year for public records or other information related to SVP issues? (Please include informal inquiries such as phone calls, emails and handwritten notes, as well as requests on official public record request forms.)

- None – I am not a public agency or public employee subject to the state Public Records Act
- More than 100 requests each year
- 50 to 100
- 25 to 50
- 10 to 25
- Fewer than 10 requests each year

7. Approximately what percentage of your job is devoted to reviewing and responding to public records requests related to SVP issues?

Stakeholder Survey Regarding Public Defense Services in SVP Cases

8. Currently, each county or the county's designee submits invoices for defense-related expenses to DSHS for reimbursement. How satisfied are you with this reimbursement process?

- Very satisfied -- (e.g. all costs are fully reimbursed in a timely manner)
- Somewhat satisfied
- Somewhat dissatisfied
- Very dissatisfied -- (e.g. legitimate costs are denied and/or reimbursement is not timely)

9. If you answered "somewhat dissatisfied" or "very dissatisfied" to Question 8, please explain what you think the flaws are in the current process.

10. A statute requires the court to conduct an SVP trial within 45 days after completion of a probable cause hearing, except when the court grants continuances "upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced." (RCW 71.09.050(1)). In your experience what is the likely time to trial for an SVP case after completion of the probable cause hearing?

- 45 days or less
- 45 to 90 days
- 90 to 180 days
- 180 days to 1 year
- 1 year to 2 years
- More than 2 years

Stakeholder Survey Regarding Public Defense Services in SVP Cases

11. In your experience, which of the following circumstances most commonly cause trial dates to be continued or re-set? (Choose up to three.)

- On the motion of the Court
- Prosecutor or defense motion due to scheduling conflict with expert(s)
- Defense motion due to request for additional attorney
- Motions practice/pre-trial litigation (e.g. discovery, constitutional claims, etc.)
- Securing appearance of respondent (e.g. transportation, medical/mental health issues, etc.)
- Other

12. If you answered "other" to Question 11, please describe.

13. Based on your experience or observations, what stages of SVP proceedings place the most intense workload demands on defense counsel? Rate each of the activities below as generating either low workload, moderate workload, or intense workload.

	Low workload	Moderate workload	Intense workload
Probable cause hearing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Preparation for original trial	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Original trial	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
DSHS annual evaluation of respondent	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Petition for release / show cause hearing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LRA / release trial	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ongoing client communication	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Stakeholder Survey Regarding Public Defense Services in SVP Cases

14. Currently under Chapter 388-885 WAC (as amended 2011), DSHS authorizes and reimburses certain costs associated with the services of defense experts. How satisfied are you with the current administration of defense experts in SVP cases?

- Very satisfied
 Somewhat satisfied
 Somewhat dissatisfied
 Very dissatisfied

15. If you answered "somewhat dissatisfied" or "very dissatisfied" to Question 14, please specify what you believe to be shortcomings in the current process as well as possible suggestions for improving the administration of defense experts in SVP cases.

16. Currently each county or the county's designee employs or contracts with attorneys to represent indigent clients in SVP cases arising in that county. As it prepares to respond to the Legislature's request for a proposal to assume administration of SVP defense services, Washington State OPD is analyzing various methods for providing attorneys in these cases. Please rank your level of support for the alternatives listed below.

	Generally support	Neutral	Oppose
Present system continues	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
OPD contracts with qualified attorneys around the state (including agencies or firms) to provide defense services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Each county secures attorneys in accord with OPD practice standards and seeks state reimbursement for allowed services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
OPD establishes an SVP defense division with state-employee attorneys to handle all cases statewide	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Stakeholder Survey Regarding Public Defense Services in SVP Cases

17. Would you like Washington State OPD to contact you to further discuss issues related to administration of public defense services in SVP cases?

Yes

No

18. If you answered "yes" to Question 17, please provide your name, email and telephone number where you can be reached during business hours.

19. If you answered "yes" to Question 17, what additional issues would you like to discuss related to administration of public defense services in SVP cases? Please be specific.

Appendix C – Current System

The following table shows the number of attorneys taking RCW 71.09 cases in various counties. Some attorneys devote a full-time practice to these cases; other attorneys handle only a few.

COUNTY	# CASES	# ATTYS taking cases	COMMENTS
Adams	0		
Asotin	1	1	
Benton/Franklin	9	3	
Chelan	3	2	
Clallam	1		
Clark	10	7	
Columbia	1	1	
Cowlitz	6	4	
Douglas	1	1	
Ferry	0		
Garfield	0		
Grant	5	1	
Grays Harbor	4	5	One attorney who is available to take SVP cases currently is not assigned an SVP case.
Island	3	2	County using SCRAP for one case.
Jefferson	0		
King	93	TDA: 11 attys SCRAP: 4 attys	TDA and SCRAP are non-profits devoted exclusively to public defense whose staff attorneys handle King County cases. SCRAP also covers cases from Island and Yakima counties. They bill directly to DSHS.
Kitsap	16	2	
Kittitas	2	1	
Klickitat	0		
Lewis	3	1	
Lincoln	0		
Mason	2	2	
Okanogan	1	1	
Pacific	1	1	
Pend Oreille	0		

COUNTY	# CASES	# ATTYS taking cases	COMMENTS
Pierce	46	19 total attys; 10 receiving new cases; 1 FTE @ DAC	The 1 FTE @ Pierce County Department of Assigned Counsel has 3 pre-commitment cases and 4 post-commitment clients, but will have more cases.
San Juan	0		
Skagit	5	1	
Skamania	0		
Snohomish	39	3.6 plus .5	The Public Defender's Association also handles some cases from Skagit, Whatcom, Benton and San Juan counties.
Spokane	19	2	
Stevens	1	1	
Thurston	14	4	
Wahkiakum	0		
Walla Walla	7	4	
Whatcom	5	2	
Whitman	0		
Yakima	7	SCRAP +1	Yakima has SCRAP handle most cases; one local contract attorney also has some cases.

Appendix D – Costs & Savings

Annual Costs & Savings for OPD Options for Indigent Defense in RCW 71.09 Cases FY 2010 Defense Legal Services costs to state: \$5,678,992 (not including experts*)

Option	Estimated Costs	Projected Savings	Comments
Option 1 Hourly Billing	Approx. \$5,630,000 for defense legal services. (Not including experts.*)	Up to \$50,000 saved , compared to FY 2010 state costs for defense legal services.	Add part-time accountant/assistant and 1 FTE managing attorney @ OPD. (Offset by transfer of duties from other agencies.)
Option 2 Multiple Atty Contracts	Approx. \$4,625,000 for 23 contract attorneys (including conflict counsel), legal ass'ts, ex comp, investigators, court reporters, incidentals. (Not including experts.*)	About \$1 million saved compared to FY 2010 state costs for defense legal services.	Add part-time accountant/assistant and 1 FTE managing attorney @ OPD. (Offset by transfer of duties from other agencies.)
Option 3 Group Atty Contracts	Up to \$4,971,750 for 23 contract attorneys (including conflict counsel), up to 2 supervisors, legal ass'ts, ex comp, investigators, court reporters, incidentals. (Not including experts.*)	Between about \$700,000 and \$900,000 saved , depending on the number of supervisors, compared to FY 2010 state costs for defense legal services.	Add part-time accountant/assistant and part-time managing attorney @ OPD. (Offset by transfer of duties from other agencies.)
Option 4 State Employees	Approx. \$4,651,000 for 20 staff attorneys, 2 supervisors, legal ass'ts, part-time accountant, contracts for 3 conflict attorneys, investigators, court reporters, etc. (Not including experts.*)	About \$1 million saved compared to FY 2010 state costs for defense legal services.	Estimated cost includes start up costs for the new office.

*Expert witness costs are estimated to remain at about \$1.4 million per year, and are in addition to the estimated costs for defense legal services.