

**2013 REPORT ON THE CHAPTER 71.09 RCW
INDIGENT REPRESENTATION PROGRAM
(SEXUALLY VIOLENT PREDATOR)**

**Washington State Office of Public Defense
December 2013**

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

The Office of Public Defense Advisory Committee

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

The Honorable Sherry Appleton
Washington State House of Representatives

Professor Helen Anderson
University of Washington School of Law

Robert Flennaugh II
The Law Office of Robert Flennaugh II, PLLC

Gerald Hankerson
President, Seattle Chapter, NAACP

The Honorable Nick Harper
Washington State Senate

The Honorable Mike Padden
Washington State Senate

The Honorable Kathy Lambert
Washington State Association of Counties

Jane Ragland-Kirkemo
Association of Washington Cities

The Honorable Karen Seinfeld
Retired, Court of Appeals

The Honorable Matt Shea
Washington State House of Representatives

The 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

Acknowledgements

The Washington State Office of Public Defense (OPD) was supported by many individuals and organizations during its first year administering indigent defense services in Chapter 71.09 RCW civil commitment cases.

In particular, OPD appreciates the professional assistance extended by the Superior Court judges and staff, the staff of the Special Commitment Center, the Attorney General's Office, all the defense attorneys who participated in the RFQ process and transfer of cases, and especially the attorneys who signed on to a new way of doing business. OPD thanks the clients for their cooperation during this time of transition.

Executive Summary

The 2012 Legislature voted unanimously to transfer administration of state-funded indigent defense services under Chapter 71.09 RCW (sexually violent predator) from the Department of Social and Health Services (DSHS) to the Office of Public Defense (OPD), acting on a report it had commissioned the previous year. OPD officially took on its new duties under Chapter 71.09 RCW on July 1, 2012, with an annual budget of \$6,065,000.

Among other requirements, the Legislature directed OPD to contract with qualified attorneys to represent indigent respondents in their civil commitment cases, establish and follow procedures for reimbursing authorized expert witnesses and other professional services, and report annually on program operations to the Legislature, the Governor, and the Chief Justice. This is the first of the required annual reports on the Chapter 71.09 RCW Indigent Defense Representation Program, covering operations for Fiscal Year 2013 (July 1, 2012 to June 30, 2013).

Soon after final passage of Substitute Senate Bill 6493, which transferred duties to OPD, the agency issued an RFQ for defense attorneys, and following a competitive selection process secured annual contracts with 23 highly qualified attorneys throughout the state. Contracts were executed and all attorneys were on the job by July 1. One full-time managing attorney at OPD monitors attorney caseloads and contract compliance, reviews and approves invoices from attorneys, court reporters, experts and other professional service providers, responds to public record requests, and develops and delivers specialized defense attorney training.

Highlights of the program's first year include:

- A reduction in the backlog of SVP civil commitment cases. Twenty-seven commitment trials occurred in FY13. Of these more than half had been filed prior to 2011.
- Use of defense experts and professional services largely within the limits established in statute. OPD-contracted attorneys only twice obtained experts or other professional services by court order, and court-ordered additional costs were minimal.
- Savings to the state of \$1.2 million over previous years' costs for SVP defense services.
- An average of 1.25 continuances per case scheduled for trial. Many continuances were identified as agreed among the parties and were typically due to scheduling conflicts.
- Specialized continuing legal education for OPD-contracted attorneys.

Table of Contents

<i>Acknowledgements</i>	i
<i>Executive Summary</i>	ii
<i>Introduction</i>	1
<i>RCW 71.09 Procedure</i>	3
<i>Program Operation</i>	5
Implementing the OPD Program.....	5
Administering the OPD Program.....	6
Budget.....	6
Caseload Standards.....	7
Investigation and Social Work.....	7
OPD Oversight.....	7
<i>Expert Services</i>	9
<i>Time to Trial</i>	11
<i>Policy Recommendations</i>	14
<i>Appendices</i>	15
APPENDIX A.....	15
APPENDIX B.....	19
APPENDIX C.....	20

Introduction

Chapter 71.09 RCW Indigent Defense Services Program at the Office of Public Defense

In 2011, the Washington Legislature directed the state Office of Public Defense (OPD) to develop a proposal to transfer statewide responsibility for indigent defense of sexually violent predator civil commitment cases from the Department of Social and Health Services (DSHS) to OPD. OPD submitted a proposal for the transfer, estimating that the state could save approximately \$1 million annually through efficient and effective administration of the defense program.

During its 2012 session, the Legislature unanimously passed and Governor Gregoire signed into law Substitute Senate Bill 6493 transferring to OPD the administration of all state-funded services for representation of indigent respondents involved in civil commitment proceedings under Chapter 71.09 RCW. In implementing the transfer, the Legislature directed OPD to:

- contract with attorneys or groups of attorneys for the provision of legal services;
- establish annual contract fees for payment of indigent defense counsel;
- ensure a person qualified for appointed counsel has one contracted attorney appointed;
- establish procedures for the reimbursement of expert witnesses and other professional and investigative costs;
- review and analyze existing attorney caseload standards and recommend updating standards as appropriate;
- annually, with the first report due December 2013, submit a report to the Chief Justice, the Governor, and the Legislature on Chapter 71.09 RCW indigent defense services.

The Legislature directed DSHS and OPD to complete the transfer of duties by July 1, 2012, but permitted OPD to temporarily maintain existing counsel on cases set for trial within six months after the transfer date to facilitate continuity of representation and avoid further continuance of trials.¹ Some of these trials already had been continued for years.

This document was prepared in response to the 2012 legislative directive that OPD report pertinent data on the operation of indigent defense services for civil commitment proceedings under Chapter 71.09 RCW. As required by RCW 2.70.025, this report includes recommended levels of appropriation to support the services to the extent constitutionally required; the time to trial for commitment trial proceedings including a list of the number of continuances granted, the party that requested the continuances, the county where the proceedings are being heard, and, if available, the reason the continuances were granted; and makes recommendations for policy changes appropriate for the improvement of sexually violent predator civil commitment proceedings.²

¹ RCW 2.70.900(3)

² RCW 2.70.025(6)

RCW 71.09 Procedure

In recent years stakeholders and the Legislature have expressed concern about the length of time to trial during the pre-commitment phase of sexually violent predator (SVP) civil commitment proceedings under Chapter 71.09 RCW. Because of the unique civil/criminal hybrid nature of Chapter 71.09 RCW proceedings, it may be helpful to outline the multiple stages involved in each case.³

In most cases, the process commences long before the prosecutor files the SVP petition. Prior to their release, criminally convicted Level 3 sex offender prison inmates undergo a risk assessment to determine whether they should be referred for possible SVP civil commitment at the Special Commitment Center (SCC) on McNeil Island.

RCW 72.09.345 requires an “End of Sentence Review Committee” to review every sex offender prior to release from prison. The committee, with members representing several state agencies and chaired by the Department of Corrections (DOC), reviews each offender’s criminal history, involvement and progress in sex offender treatment, mental health status, and other relevant information to assess the level of risk for re-offending upon release. The committee assigns a risk level for each offender, with Level 1 the lowest risk level and Level 3 the highest risk level.

Every year about 800 sex offenders, including about 200 Level 3 sex offenders, are released to the community upon completion of their criminal sentences. However, if the End of Sentence Review Committee finds that a Level 3 sex offender potentially meets the legal definition of a “sexually violent predator,” the individual is referred for possible civil commitment at the SCC.⁴ Offenders who were convicted of sex crimes by King County Superior Court are referred to the King County Prosecutor’s Office. All others are referred to a special unit of the state Attorney General’s Office (AGO), which acts as the prosecutor in the civil commitment process for the other counties.⁵

When the AGO or King County is ready to file a petition for Chapter 71.09 RCW civil commitment, the prosecuting agency notifies OPD that it intends to file a petition. Only at this point in the

³ See also Lieb, R., Royster, A., & Lemon, M. (2013). *Special Commitment Center for Sexually Violent Predators: Potential Paths toward Less Restrictive Alternatives* (Document No. 13-01-1101r), 4. Olympia: Washington State Institute for Public Policy. The report provides a SVP case flow chart to illustrate the multiple stages of the Ch. 71.09 RCW SVP process.

⁴ The Washington State Attorney General’s Office has received 19 referrals to date in 2013, 22 referrals in 2012, and 19 referrals in 2011. They have filed 9 SVP petitions to date in 2013, 11 in 2012, and 17 in 2011. The King County Prosecuting Attorney’s Office has received 11 referrals to date in 2013, 8 referrals in 2012, and 11 referrals in 2011. They have filed 2 SVP petitions to date in 2013, 2 in 2012, and 5 in 2011.

⁵ Pursuant to RCW 71.09.030(1)(e) a petition may also be filed alleging that a person is a sexually violent predator if that person has at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.

process does a defense attorney become involved, and in order to ethically represent his or her client must become familiar with voluminous amounts of information that already has been generated in the case, including the client's criminal and mental health history.

The individuals referred for civil commitment are detained at the SCC pending an investigation by the prosecutor for a "probable cause" hearing. The hearing is held in the county Superior Court where the sex offender was previously convicted. If the judge agrees that there is probable cause to believe that the individual meets SVP commitment criteria, the court will order the person detained at the SCC pending trial. If not, the individual is released. Individuals detained after the probable cause hearing undergo an in-depth evaluation for the court. The civil commitment trial may be held before the judge or a jury empanelled by the court. The court or unanimous jury must find beyond a reasonable doubt that the individual meets the legal definition of a sexually violent predator. If so, the individual is committed to DSHS custody for placement in the SCC's total confinement facility "for control, care, and treatment."

Post-commitment Proceedings. RCW 71.09.070 directs that each committed person shall have a current examination of his or her mental condition by DSHS at least once every year. The DSHS Secretary determines then whether the resident continues to meet the definition of an SVP, or whether a "less restrictive alternative" (LRA) can adequately protect the community. Regardless of DSHS's recommendation, the respondent is permitted to petition the court for conditional release to an LRA or unconditional discharge.

If the respondent petitions for conditional release or unconditional discharge, the court must set a hearing to determine whether probable cause exists to warrant a trial. If the court finds probable cause, the court then sets a trial. At the conclusion of the trial, if the judge or jury determines that the respondent no longer meets the definition of an SVP, that person must be released. If the court finds that the person continues to meet the SVP criteria, but there is an available LRA that is in the best interest of the respondent and conditions can be imposed that will adequately protect the community, the court will direct DOC to investigate the placement to ensure that it meets the statutory criteria⁶ for a community-based LRA. If the Court denies the respondent's request for an LRA, the person will receive another annual review on his or her anniversary date.

⁶ Pursuant to RCW 71.09.090, the court must find the following before ordering a community LRA: (1) a qualified treatment provider has agreed to treat the person; (2) the treatment provider has outlined a specific treatment plan and rules that the person is expected to follow; progress is regularly reported to the court; and any violations immediately reported to the court, prosecutor, supervising Community Corrections Officer (DOC), and the SCC; (3) the person will comply with the treatment provider and the court; (4) the person will comply with the treatment provider and the court; and (5) the person will live in housing that is sufficiently secure to protect the community, and the housing provider has: agreed in writing to allow the person to live there; will provide the security required by the court; and will immediately report to the court, the prosecutor, the supervising community corrections officer, and the SCC if the person leaves the housing without authorization; and (6) the person will comply with DOC conditions.

Program Operation

Implementing the OPD Program

In transferring statewide responsibility for indigent defense of Chapter 71.09 RCW civil commitment cases to OPD, the Legislature directed the agency to contract with attorneys or groups of attorneys to provide legal services to the indigent client population; establish annual contracts for payment of indigent defense services; and establish procedures for the reimbursement of expert witnesses and other professional service providers.⁷ Substitute Senate Bill 6493 was signed by the Governor on March 30, 2012, and became effective on July 1, 2012.

Shortly after SSB 6493 passed, OPD issued a Request For Qualifications (RFQ) for attorney contracts, which generated 32 applications representing 70 full-time attorneys. Following a detailed review process with a selection committee that included a retired State Supreme Court justice and a Gonzaga Law School professor, OPD entered into annual indigent defense contracts with 23 well-qualified attorneys from various individual and group practices throughout the state. Compensation is set at an annual amount based on the pre-existing court-ordered hourly rate of \$85.65 per hour applied to a standard number of work hours. The contracted amount also covers administrative costs associated with providing legal representation, including a quarter-time paralegal/legal assistant for each full-time attorney.

In June 2012, OPD coordinated with existing attorneys who did not pursue or secure an OPD contract to transfer 120 cases to ODP-contracted attorneys. To ensure appropriate caseloads, a few cases were transferred between OPD contractors. Throughout the implementation process, OPD regularly communicated with attorneys and judges in the various counties to ensure a smooth transition for the clients and the courts. Eight cases required court continuances to accommodate this transition process.

In order to prevent delays, SSB 6493 provided that OPD could execute temporary contracts for cases with trials scheduled within 180 days of the transfer date. OPD entered into 10 temporary contracts for cases scheduled for trial between July 2012 and December 2012. By January 1, 2013, all but four trials had been held, and by April 2013, all those trials were completed. Some of these cases previously had been continued for more than a decade.

Three private attorneys filed legal challenges during the Chapter 71.09 RCW defense transfer process. Two attorneys who participated in the RFQ application filed RFQ protests, alleging that they wrongfully did not receive contracts. Pursuant to the procedure set out in the RFQ, the OPD Advisory Committee Chair assembled a protest committee, which considered the applicants' requests but upheld OPD's decision. In addition, shortly before the finalization of the transfer, OPD successfully defended a court action by a temporary contractor who was not selected for an

⁷ See OPD's Proposal for the Administration of Defense Services for Indigent Persons Involved in Ch. 71.09 RCW Proceedings. http://www.opd.wa.gov/documents/0063-2011_OPD_Proposal.pdf

ongoing contract through the RFQ process. This attorney filed an ex parte motion seeking a court order to continue her appointment as her client's ongoing defense counsel, and the trial court initially granted the motion. After OPD responded, the trial court reconsidered and upheld OPD's authority to select contract attorneys rather than allow non-contract attorneys to represent indigent respondents at state expense.⁸ The attorney's appeal of this decision to the Washington Court of Appeals was denied.

Administering the OPD Program

Under Washington's new indigent defense representation model, 23 contracted attorneys represent indigent respondents in Chapter 71.09 RCW proceedings throughout the state. Most of the OPD-contracted attorneys carry a full-time civil commitment caseload and specialize in these cases exclusively. Previously, commitment cases were handled by 54 attorneys who billed the state on an hourly basis with limited opportunities for the state to provide administrative or financial oversight. Some of these attorneys accepted SVP court appointments in addition to carrying full-time caseloads in other case types. The now-specialized defense practice is expected to result in fewer delays due to attorney over-scheduling and in higher quality case preparation, leading to more negotiated case resolutions. Accordingly, the new program's contract-based structure is resulting in significant efficiencies and is on track to save the state \$1.2 million per year.

In addition to paying the costs of indigent defense representation, OPD also provides administrative support necessary to effectively oversee the program. A full-time managing attorney with support from a quarter-time administrative assistant monitors compliance with the client service contracts; reviews and approves invoices from attorneys, experts, court reporters, investigators, and social workers; reviews extraordinary compensation requests; manages and responds to public record requests; and develops and delivers statewide attorney training. OPD's oversight is key to ensuring that the contract attorneys have the support necessary for effective representation while carefully managing the costs of the program.

Budget

The Legislature approved an OPD program budget of \$6,065,000 for FY13 to cover all costs associated with administering indigent defense for respondents in civil commitment proceedings under Chapter 71.09 RCW, including client-service contracts with attorneys, experts and professional services, and temporary contracts to complete commitment trials that had been scheduled to occur within six months of the OPD transition. OPD provided all necessary client services and paid all authorized invoices, including court-ordered costs in excess of statutory limits, within this budget in FY13. The 2013 Legislature adopted a 2013-14 maintenance level biennial

⁸The statute provides that at all stages of the SVP proceeding a respondent has the right to be represented by counsel, and if the court determines that the person is indigent it shall appoint OPD-contracted counsel. 71.09.050(1).

budget for the program, and as of the writing of this report OPD expects to meet all the program's obligations within the funds appropriated.

Caseload Standards

As reported in OPD's 2011 proposal, based on existing caseload standards developed by the Washington Defender Association as well as then-current 2011 practices, OPD concluded that an appropriate per-attorney caseload would be up to three pre-commitment trials and up to nine ongoing post-commitment clients. However, when OPD implemented the new defense program in July 2012, the existing mix of cases proved to consist of fewer pre-commitment trials and more post-commitment clients.

Since, in general, pre-commitment trials generate the heaviest work demand, OPD initially distributed the cases to consist of two pre-commitment trials and up to 11 post-commitment clients per attorney. Although post-commitment proceedings are generally less labor-intensive, attorneys typically are preparing at any one time for a number of evidentiary hearings and post-commitment trials seeking unconditional discharge or release to an LRA, as provided in RCW 71.09.090. This caseload configuration is currently being monitored by OPD. To date, the contract attorneys have indicated that it is an appropriate caseload level.

Investigation and Social Work

In FY13, similar to costs reported in recent years, OPD approved \$210,857 for defense investigator services and \$11,149 for social worker services. Investigator services appear to be utilized to independently research a client's mental health issues, sex offense history, and employment and relationship history, as well as to identify current services that may be available for the respondent. OPD contract attorneys have indicated a need for more social worker services to assist in developing case plans involving community mental health and sexual deviance treatment providers, chemical dependency services, the Social Security Administration and DSHS, and local housing agencies – all of which are important components in achieving a successful LRA. It has become apparent that social worker services can contribute to high-quality LRA case plans and save attorney time. For that reason, instead of using a relatively small amount of existing funding for an additional half-time contract attorney at this point, OPD is adding two contract social workers. These two social workers are expected to assist attorneys statewide in efficiently preparing case plans and help avoid continuances of hearings and trials.

OPD Oversight

When a respondent is taken into custody and a commitment petition is filed in a Chapter 71.09 RCW proceeding, the statute requires the Superior Court to notify OPD of the potential need for indigent defense representation.⁹ In practice, however, OPD now typically receives early notice from the prosecuting agency that a commitment petition is pending. The advance notice

⁹ RCW 71.09.040

represents a positive development that improves overall system efficiencies in the civil commitment process. The OPD managing attorney is responsible for reviewing caseload capacity and timely providing the court with the name of a contract attorney available for appointment. In this way, OPD is able to closely monitor contract attorney caseloads. When cases are dismissed or commitment trials are completed and attorneys have room in their caseloads, OPD can designate them as available for new court appointments.

As part of OPD's responsibility to assure that clients receive effective representation, the agency has implemented several measures to provide contract attorneys with necessary training and support, including the following, among others:

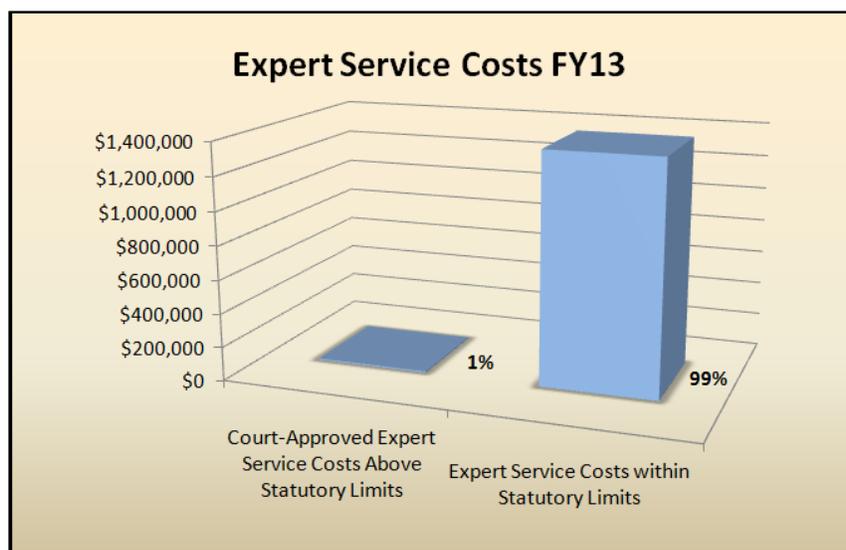
- The OPD managing attorney met individually with each contract attorney in spring 2013 prior to offering a contract renewal in order to discuss the attorney's performance, progress of the program transfer, and the attorney's experience with the new program.
- Contract attorneys maintain regular contact with the program managing attorney about their cases and anticipated expert service needs, including notifying OPD when they anticipate needing a court order for additional costs. This brainstorming has resulted in fewer requests, because of the more efficient, less costly and sometimes more effective ideas generated.
- Ongoing communication allows the OPD managing attorney to identify and rectify case issues that may emerge, such as working with the court when a respondent wants to appear pro se or with standby counsel, responding to trial support requests, and so forth.
- OPD conducted conference calls to provide administrative training for judges and court personnel as well as for contract attorneys as the new program began operation in July 2012.
- To date OPD has coordinated two continuing legal education (CLE) seminars for the contract attorneys. The first occurred in SeaTac on December 3, 2012, and focused on the new program administration. On September 19-20, 2013, OPD participated in a CLE that focused on current trial practice issues. Statewide discussions at this conference enabled the program to implement more effective procedures, such as an efficient model for providing social worker services.

Expert Services

In 2010 the Legislature amended Chapter 71.09 RCW to limit the number of experts and other professionals that may be funded at public expense to evaluate and assist a respondent with his or her defense in SVP proceedings.¹⁰ The same legislation also directed DSHS to adopt administrative rules addressing compensation for defense services.¹¹

Two years later, in transferring SVP indigent defense responsibilities from DSHS to OPD, the Legislature further enhanced oversight of publicly funded defense experts and professional services. Substitute Senate Bill 6493, the 2012 bill that transferred duties to OPD, retained the previously established limit on the number of defense experts and also capped compensation rates based on those that DSHS had established through its public rule-making process.¹² To ensure that these limits would not hinder due process requirements in any particular case, the Legislature further provided that upon a showing of good cause a court could order OPD to pay additional experts and fees above the statutory caps.

Figure A



Courts ordered OPD to pay for expert services above the statutory caps only twice in FY13.

The Legislature's efforts to establish predictable costs appear to be functioning as intended. In FY13, OPD-contracted attorneys only twice obtained experts or professional services above the statutory limits. The costs of expert services where a court ordered OPD to pay more than the statutory cap were minimal.

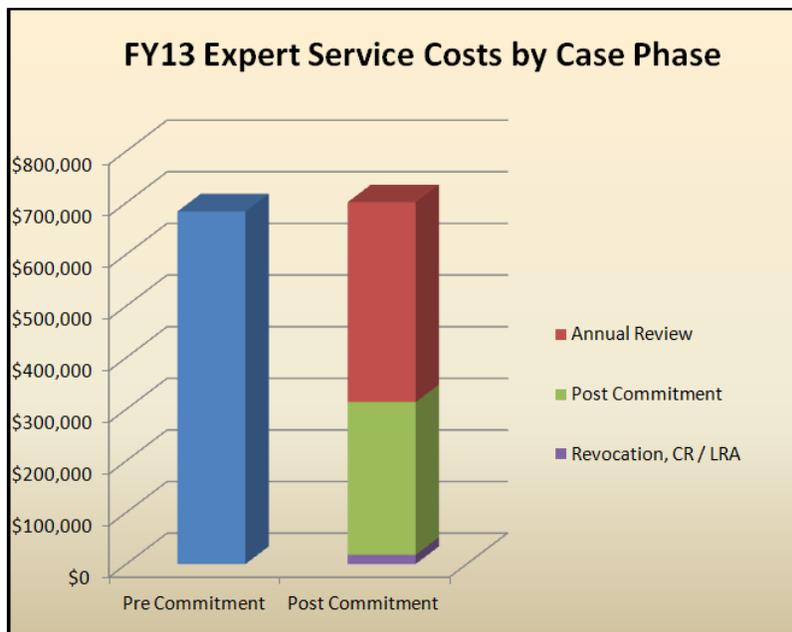
¹⁰ ESSB 6870, Ch. 28 L 2010.

¹¹ DSHS amended Chapter 388-885 WAC specifying compensation rates and conditions.

¹² SSB 6493, Ch. 257 L 2012

In order to effectively monitor the ongoing cost of defense expert and professional services, OPD established policies and procedures that agency staff follow when approving and paying for non-attorney indigent defense services.¹³ The OPD policies are based on the statutory requirements of Chapter 71.09 RCW, and were developed in consultation with attorneys practicing in the field, DSHS, and the OPD Advisory Committee. OPD staff also developed and utilize a detailed coding system to track expert and professional service invoices and payments by attorney or client name, category of service, name of the expert or other service provider, and the phase of the case.¹⁴

Figure B



Most expert costs were associated with preparing for a respondent’s initial civil commitment trial.

Prior to retaining a defense expert or other professional service provider, the OPD policies require contracted attorneys to notify OPD of their intent using an approved form.¹⁵ The notification includes the name of the client, name of the expert or other service provider, phase of the case, type of service, prior expert or other professional services provided in the case, and a cost estimate. If the estimated cost or the number of experts exceeds the statutory amount, the attorney must provide OPD a copy of the Superior Court’s finding and order that the costs are for good cause as required by RCW 71.09.055. Upon completion of services, the attorney must review and approve the expert’s invoice before submitting it to OPD for payment. OPD pays the expert or other approved professional directly or reimburses the contracted attorney up to the amount authorized in statute or by court order.

¹³ See Appendix A.

¹⁴ SVP civil commitment procedures involve four distinct phases: initial or pre-commitment trial, annual review, post-commitment trial, and LRA modification/revocation.

¹⁵ See Appendix B.

Time to Trial

Representing clients who are charged with being, or who have been adjudicated as, “sexually violent predators,” is complex and difficult. These cases are often time-consuming both during any given stage of the proceedings and cumulatively over years of continuing representation. Trials sometimes require more than 1,000 hours of defense attorney preparation time, and review hearings can demand hundreds of hours.

As illustrated in Figure C below, 27 commitment trials were completed in FY13. Of these cases, more than half were filed prior to 2011, and some trials had been continued numerous times over the course of a decade. While completing the longer trials, the OPD contract attorneys also readied cases for trial that had been filed one to two years ago.

Figure C



Cases that had been delayed for more than a decade went to trial in FY13.

Under OPD’s administration of civil commitment indigent defense services, contracted attorneys provide the agency with a monthly report on court continuances. As illustrated in Figure D below 61 continuances were granted for SVP cases going to trial in the various counties during FY13.

Among all cases scheduled for trial in FY13, there was an average of 1.25 continuances per case.

Figure D

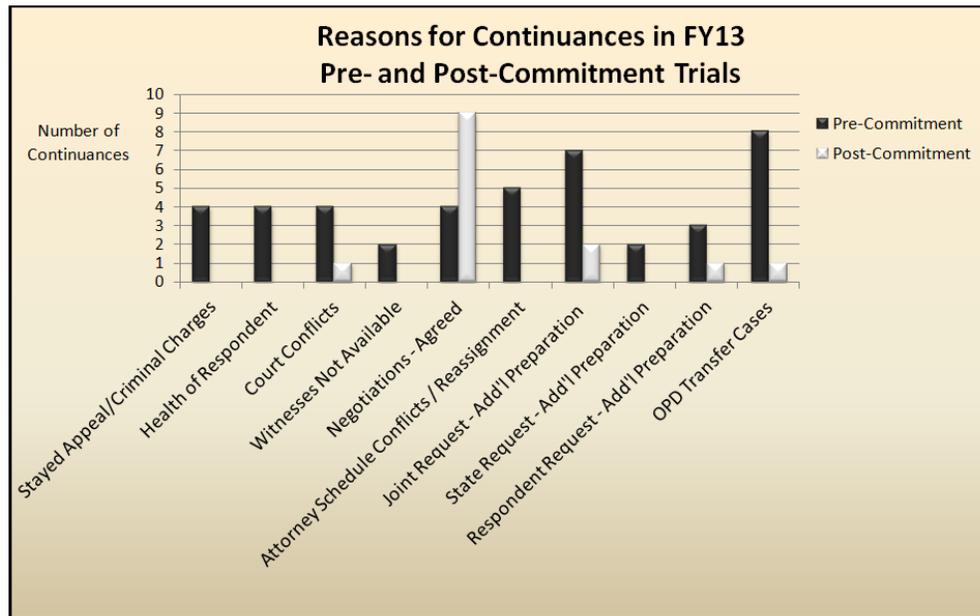
	Defense	State	Agreed	Court	Unknown	Total
Benton			1			1
Clark	1					1
Cowlitz	1		2			3
Island	2					2
King	10		9			19
Kitsap		2	2	1		5
Lewis	1					1
Pierce			2	2	1	5
Skagit	1	1				2
Snohomish	1	1	2	1	1	6
Spokane	1		2	1		4
Walla Walla			2	1		3
Whatcom			4			4
Yakima	1		4			5
Total	19	4	30	6	2	61

FY13 Pre- and Post-Commitment Continuances by County, and by Continuation Requestor

Please note that Figure D above does not include defense-requested continuances that were granted due to attorney reassignments when OPD implemented its program July 1, 2012. Eight such continuances were granted, and are included in Figure E below.

In their monthly reports, in addition to noting when a continuance is granted, OPD-contracted attorneys identify a reason for each continuance. As illustrated in Figure E, a variety of circumstances may lead to a continuance in a case. For example, an SVP case may be continued or stayed pending the outcome of an interlocutory appeal in the civil commitment proceeding or to address new criminal charges that are filed against the respondent. Sometimes the parties may agree to postpone a trial date because they are making progress in negotiating a resolution, such as an appropriate LRA. In addition, commitment trials can extend over several weeks, during which time the attorneys, witnesses, judge, courtroom facilities, etc., all must be available, and scheduling conflicts can lead to continuances.

Figure E



Many continuances were agreed to by the parties in order to negotiate a case resolution.

Policy Recommendations

In its annual report on administration of Chapter 71.09 RCW defense representation, OPD is directed to include recommendations for policy changes that may improve SVP civil commitment proceedings.¹⁶ Based on a review of SVP policy discussions over the years as well as recent observations of the civil commitment process, OPD believes the following recommendations would enhance defense efficiencies during the process and improve the overall prospects for program effectiveness.

- **Allow audio recording or attorney observation of respondents' annual review evaluations.** House Bill 1081, introduced by Representative Sherry Appleton during the 2013 legislative session, would have allowed defense counsel to make an audio recording of or personally observe the annual review examination of a respondent, at the respondent's request. This would allow defense counsel to have first-hand knowledge of the SCC evaluation, rather than have to rely on sometimes inconsistent accounts of the interview as perceived by the evaluator and the respondent. While other aspects of the bill have generated concerns, the recording/attorney presence provision does not appear to be controversial. The assistant attorney general who testified at the January 29, 2013 Public Safety Committee hearing said she did not object to the recording provision of the bill.¹⁷
- **Develop and provide appropriate treatment for SCC residents with special needs.** OPD-contracted defense attorneys say that they often encourage their clients to participate in sex offender treatment at the SCC, however, comprehensive individualized treatment is not available for some respondents. As reported by the Washington Institute for Public Policy (WSIPP), a 2012 independent Inspection of Care Team (ICT) expressed concerns about the quality of treatment for special needs residents and a lack of treatment for severely mentally ill residents.¹⁸ Because progress in treatment is a gateway to a less restrictive alternative (LRA) and eventual release, defense attorneys also share these concerns.

¹⁶ RCW 2.70.025(6)(c) and Ch. 257 L 12, Sec. 2(6)(c).

¹⁷ See House Public Safety Committee hearing, Jan. 29, 2013, available at TVW.org, beginning at 1:24:50. Assistant Attorney General testimony at 1:33:23.

¹⁸ See LIEB ET AL, supra note 3, at 13.

APPENDIX A

**WASHINGTON STATE OFFICE OF PUBLIC DEFENSE (OPD)
CHAPTER 71.09 RCW PROGRAM
EXPERT AND OTHER PROFESSIONAL SERVICES AND INCIDENTAL DEFENSE COSTS
DRAFT POLICY AND PROCEDURE
(updated 11/29/12)**

Purpose:

The purpose of this Policy and Procedure is to establish the requirements for authorizing non-attorney indigent defense costs incurred during the civil commitment process related to Chapter [71.09](#) RCW, Chapter 257 Laws of 2012, and direct payment or reimbursement of authorized costs.

As required by Chapter 71.09 RCW and Chapter 257 Laws of 2012, this Policy and Procedure provides for payment for non-attorney indigent defense services performed on or after July 1, 2012, when the state funds these services for the defense for indigent persons subject to the civil commitment process under Chapter [71.09](#) RCW.

Definitions:

- 1) "Civil commitment process" as used in this Policy and Procedure refers to the several distinct phases of Chapter [71.09](#) RCW commitments, including:
 - a) Completion of a seventy-two hour probable cause hearing under RCW [71.09.040](#).
 - b) Completion of an initial civil commitment trial under RCW [71.09.050](#).
 - c) Completion of annual review proceedings under RCW [71.09.090](#) which commence with the filing of an annual review report under RCW [71.09.070](#) and ends with a waiver of a show cause hearing by the resident or completion of the show cause hearing.
 - d) Completion of a post-commitment conditional or unconditional release trial under RCW [71.09.090](#).
- 2) "Deposition" means the legal fact finding interview of a person under force of subpoena or by agreement of the parties.
- 3) "Evaluation(s)" means the different types of evaluations that occur related to a person's commitment or detention under Chapter [71.09](#) RCW as follows:
 - a) The "initial evaluation performed by the defense," which occurs under RCW [71.09.050](#).
 - b) The "annual review evaluation performed by the defense," which occurs under RCW [71.09.070](#).
 - c) The "post commitment evaluations," required by RCW [71.09.090](#), and [71.09.098](#), which occur when the person qualifies for a conditional or unconditional release trial.
 - d) "Partial evaluations performed by the defense," as provided in Section 9 Chapter 257 Laws of 2012, means an evaluation performed by the same evaluator less than twelve months after performing an initial evaluation or post commitment evaluation.
- 4) "Expert evaluation cost" means the cost of a professional psychiatric and/or psychological evaluation of a person for purposes of assessing and/or rendering an opinion about whether such person meets the criteria for commitment, release, or conditional release in the civil commitment process under Chapter [71.09](#) RCW. Restrictions shall be as provided in Section 9 Chapter 257 Laws of 2012,

except when ordered by the superior court that additional appointment or extraordinary fees are for good cause.

- 5) "Supporting expert cost" means the cost of specific physical or specialty testing done by other experts at the request of the single expert for the defense if such testing is normally relied on by the professional community in conducting an evaluation and ordered by the court for good cause.
- 6) "Investigative cost" means a cost incurred by an investigator / social worker in the course of investigating issues specific to:
 - a) Responding to a petition alleging a person is a "sexually violent predator;" or
 - b) Testifying at a hearing to determine if a person is a "sexually violent predator."
- 7) "Interpreter cost" means a cost incurred by a certified, registered or otherwise qualified interpreter, as provided in Chapter 2.42 RCW and Chapter 2.43 RCW, whose services are necessary for a hearing impaired or non-English speaking indigent respondent to communicate with defense counsel appointed to represent him/her in the civil commitment process. This does not include the cost of interpreter services in court.

Limitation of Expert Costs As Provided in RCW 71.09.055 and Section 9 Chapter 257 Laws of 2012:

- 1) OPD will pay an expert directly or reimburse a contracted attorney for the costs of a single expert or professional to evaluate an indigent person at each stage of the civil commitment process, up to the amount authorized by RCW 71.09.055 and Section 9 Chapter 257 Laws of 2012.
- 2) OPD will pay an expert directly or reimburse a contracted attorney for costs related to a higher-cost or additional evaluation of an indigent person by more than one expert or professional, or in an amount exceeding the statutory limits, only upon a finding and order of the superior court for good cause, as provided in RCW 71.09.055 and Section 9 Chapter 257 Laws of 2012.
- 3) OPD will not pay:
 - a) Costs for any expert or professional evaluation services performed on or before June 30, 2012;
 - b) Costs for more than one expert or professional to evaluate an indigent person at each stage of the civil commitment process, unless ordered by the court;
 - c) Costs that exceed the statutory limits in RCW 71.09.055 and Section 9 Chapter 257 Laws of 2012, unless ordered by the court;
 - d) Costs related to an expert's international travel to or from a destination outside of North America, including but not limited to, airfare, meals, hourly rates, and accommodation;
 - e) Evaluation costs associated with mental health or sex offender treatment services rendered to a person committed or detained under Chapter [71.09](#) RCW. Treatment costs are the responsibility of the Washington State Department of Social and Health Services (DSHS);
 - f) Expert or other professional service provider costs or fees incurred when the prosecuting agency deposes the expert or other professional service provider as provided in CR 26.

Limitation on Payment for Defense Services as Provided in RCW 71.09.045 and Section 8 Chapter 257 Laws of 2012:

- 1) OPD will not pay investigative costs, court reporter costs, or costs for any other indigent defense services performed on or before June 30, 2012.
- 2) OPD will not pay costs of the following activities, unless provided as part of defense investigation and preparation for a hearing or trial in the civil commitment process under Chapter 71.09 RCW:
 - a) Investigation or legal representation challenging the conditions of confinement at the Special Commitment Center or any secure community transition facility or less restrictive alternative;
 - b) Investigation or legal representation for making requests under the Public Records Act, Chapter [42.56](#) RCW or relevant court rule;
 - c) Legal representation or advice regarding filing a grievance with DSHS as part of its grievance policy or procedure;

- d) Such other activities as may be excluded by policy or contract with OPD;
- e) Depositions conducted without a subpoena or by agreement of counsel, unless authorized by the court;
- f) Costs associated with finding or developing a different less restrictive alternative other than what the department supports, unless ordered by the court for good cause.

Limitation on Payment for Defense Services Not Specified in Statute or Policy:

- 1) OPD will not pay for defense services that are not specified in statute or policy unless the contracted attorney secures prior agency approval, as provided in the Exceptions section below.

Payment Rate Schedule and Restrictions

The following schedule of OPD payment rates, based on statute, is effective July 1, 2012 and applies to services performed on or after July 1, 2012.

- 1) Investigator/social worker per-hour rate of forty-six dollars plus travel and per diem per state schedule.
- 2) Expert service:
 - a) Payment for one expert evaluation requested by the respondent (but not ordered by the court), including professional fees, travel, per diem, and other costs, is capped at ten thousand dollars to be paid at an hourly rate of not more than two hundred dollars per hour for evaluation activities including client interviews, document review, report preparations, pre-trial discovery activities (including additional document review, compelled interviews and declarations and consultation). This is exclusive of testimony at trial or depositions.
 - b) Payment for a partial evaluation is capped at five thousand five hundred dollars and shall be paid for evaluation activities including client interviews, document review, report preparations, pre-trial discovery activities (including additional document review, compelled interviews and declarations and consultation). This is exclusive of testimony at trial or depositions.
 - c) Payment for testimony at trial or deposition is capped at two hundred fifty dollars per hour.
 - d) Payment for expert services apart from an evaluation, exclusive of testimony at trial or deposition, is capped at six thousand dollars.
 - e) When payment is ordered by the court for good cause, payment will be made as specified in the order.
- 3) Court reporter per-hour rate of twenty dollars and seventy-one cents plus transcript preparation at four dollars and thirteen cents per page.
- 4) Expert witnesses' cost for travel and per diem per state schedule.
- 5) Non-expert witnesses' cost for travel and per diem per state schedule.
- 6) Supporting expert costs based on receipts, and travel and per diem per state schedule, up to the amount ordered by the court.
- 7) Interpreter costs based on receipts, and travel and per diem per state schedule.
- 8) Subpoena costs for service and processing based on receipts.

Exceptions

- 1) The OPD Director may grant exceptions to these Policies and Procedures unless prohibited by law.
- 2) The OPD Director may allow exceptions on a case-by-case basis for:
 - a) Unanticipated expenditures; or
 - b) For a new type or class of expenditure, as necessary to ensure adequate legal defense.
- 3) Only an OPD contracted attorney may request an exception. The request shall be in writing with a description of the services requested, estimated costs, and the need for the exception.

Expert and Other Professional Services Procedure Notification

An OPD contracted attorney shall notify OPD on an approved form of the intention to retain an expert or other professional service provider. The notification shall include the name of the client, name of the provider, phase of the case, type of service (for example, initial evaluation, post commitment evaluation, supporting expert services, partial evaluation, or investigator), prior expert or other professional services provided in the case, and an estimate of the cost. If the estimated cost of the evaluator or the number of evaluation experts exceeds the limits set forth in RCW 71.09.055 and Section 9 Chapter 257 Laws of 2012, the OPD contracted attorney shall provide to OPD a copy of the finding and order by the superior court that such additional costs or experts are for good cause as provided in RCW 71.09.055 and Section 9 Chapter 257 Laws of 2012.

Billing Procedure

- 1) For direct payment to expert or other professional service provider -- the OPD Contractor shall:
 - a) Submit the OPD-required invoice form on behalf of the expert or other professional service provider;
 - b) On a form provided by OPD, certify that the services were provided and identify at which stage of the civil commitment process the services were rendered;
 - c) Attach the invoice or other billing documentation submitted to OPD Contractor by the expert or other professional service provider and indicate the time frame for the services provided (for example investigator services from June 1, 2012 to July 1, 2012); and
 - d) Provide the expert or other professional service provider's name, mailing address, and OFM statewide vendor payment number.
- 2) For Contractor reimbursement -- The OPD Contractor shall:
 - a) Submit the OPD-required invoice form;
 - b) On a form provided by OPD, certify that the services were provided and identify at which stage of the civil commitment process the services were rendered; and
 - c) Attach a copy of the service provider's invoice, name of provider, and receipt of payment.
- 3) Claims for either payment or reimbursement of costs may not be accepted if the span of time between the time the services were rendered and the bill was submitted is greater than twelve months.
- 4) In submitting invoices for reimbursement under this Policy and Procedure, the billing entity agrees to maintain records of its billed services and make those records available for auditing by OPD, or other state auditing service, for a period of sixty months following the submission of the invoice.

APPENDIX B

EXPERT & OTHER PROFESSIONAL SERVICES NOTIFICATION									
CHAPTER 71.09 RCW CASES									
Please refer to Expert & Other Professional Categories & Limits for Additional Detail									
Attorney Name					Email Address				
Client Name				County		Case No			
Phase of Case (CHOOSE ONLY ONE OF THE FOLLOWING)									
Phase of Case	[1] Initial		[2] Annual Review		[3] Post Commitment		[4] Revoke CR/LRA		
	71.09.040 & 71.09.050		71.09.070		71.09.090		71.09.098		
Type of Service:									
Expert Evaluation \$10,000 or less (NB601X)		Estimated Cost	\$						
Expert Evaluation over \$10,000 (NB608X)		Estimated Cost	\$				Court Order Attached		
Additional Expert Evaluation (NB611X)		Estimated Cost	\$				Court Order Attached		
Partial Evaluation (less than 12 months after initial evaluation or post-commitment evaluation) \$5,500 or less (NB603X)		Estimated Cost	\$						
Partial Evaluation (less than 12 months after initial evaluation or post-commitment evaluation) more than \$5,500 (NB609X)		Estimated Cost	\$				Court Order Attached		
Expert Service Apart from Evaluation \$6,000 or less (NB605X)		Estimated Cost	\$						
Expert Service Apart from Evaluation more than \$6,000 (NB610X)		Estimated Cost	\$				Court Order Attached		
Supporting Expert (NB607X)		Estimated Cost	\$				Court Order Attached		
Investigator (NB612X)		Estimated Cost	\$						
Court Reporter (NB613X)		Estimated Cost	\$						
Service Provider Information:									
Name of Service Provider						Phone No			
Service Provider Address	City		State		Zip Code				
Service Provider Statewide Vendor No (Required for direct payment to provider*)									
Estimated Date of Completion									
Prior Expert Evaluations									
Date									
Email this completed electronic EXCEL form to Shoshana.Kehoe-Ehlers@opd.wa.gov*** Questions? 360-586-3164 X110									
*OPD is unable to pay a service provider directly unless the service provider has a Statewide Vendor Number. Please ask your Expert/Other Professional Service Provider if he/she has a Washington State Statewide Vendor Number. Questions? Please contact Missy Young @360-586-3164 extension 101 or michele.young@opd.wa.gov									

APPENDIX C

EXPERT & OTHER PROFESSIONAL SERVICES INVOICE- CHAPTER 71.09 RCW				
Invoice No: _____		Invoice Date: _____		
<i>Your internal tracking #- for this invoice</i>				
Contract Attorney Information			Client and Case Information	
Firm Name: _____			Client Name: _____	
Attorney Name: _____			Case No.: _____	
Address: _____			County: _____	
City: _____	State: _____	Zip: _____	Phase of Case: Initial ____ Annual Review ____	
SWV No. _____	OPD Contract # _____		Post-Commitment ____ or Revoking Conditional Release or LRA ____	
Payee Information- <i>Select Only One</i>				
<input type="checkbox"/> Reimburse Contract Attorney Directly				
<input type="checkbox"/> Remit Payment Directly to Expert or Other Professional Service Provider <i>Service Provider must be registered as a "statewide vendor" to receive payments. Contract attorney must identify the service providers Statewide Vendor Number for the payment to be made directly to the service provider.</i>				
Service Provider Statewide Vendor No.: _____ Please refer your service provider to: http://www.ofm.wa.gov/isd/vendors.asp . If the service provider has questions, refer the service provider to OPD, Michele Young at 360.586.3164 ext. 101.				
<i>Service date must be on or after July 1, 2012. This form should only be used to bill OPD. Any services performed prior to July 1, 2012, should be billed to DSHS per their invoicing policies.</i>				
Invoice Detail				OPD Use
Date Service Provided	Category	Invoice Description(s) Attach receipt/invoices	AMOUNT	
	<input type="checkbox"/> Expert Defense Evaluation			
	<input type="checkbox"/> Partial Defense Evaluation			
	<input type="checkbox"/> Expert Service Apart From Evaluation			
	<input type="checkbox"/> Supporting Expert			
	<input type="checkbox"/> Investigator			
	<input type="checkbox"/> Court Reporter			
	<input type="checkbox"/> Non-Expert Witness Costs			
	<input type="checkbox"/> Subpoena Costs			
	<input type="checkbox"/> Other Costs			
TOTAL			\$0.00	
<i>I certify (or declare) under penalty of perjury under the laws of the state of Washington that the services being billed have been provided to my satisfaction.</i>				
Contract Attorney Signature _____		Place of Signing _____	Date _____	
Return form and attachments to: Washington State Office of Public Defense P.O. Box 40957 Olympia, WA 98504-0957				

July12, 2012