

Washington State Office of Public Defense

Annual Report 2014

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Advisory Committee Members FY 14

Honorable Bobbe Bridge, Chair

Washington Supreme Court Justice, retired

Honorable Jamie Pedersen

Washington State Senate

Robert Flenbaugh II

The Law Office of Robert Flenbaugh II, PLLC

Honorable Matt Shea

Washington State House of Representatives

Honorable Sherry Appleton

Washington State House of Representatives

Honorable Karen Seinfeld

Washington Court of Appeals Judge, retired

Gerald Hankerson

Seattle NAACP

Prof. Helen Anderson

University of Washington School of Law

Jane Ragland-Kirkemo

Association of Washington Cities

Honorable Mike Padden

Washington State Senate

Honorable Kathy Lambert

Washington State Association of Counties

Honorable Pat Clark

King County Superior Court Judge, retired

Sharon Paradis

Benton-Franklin Juvenile Court Administrator, retired



Mission Statement

The Washington State Office of Public Defense's mission is "to implement the constitutional and statutory guarantees of counsel and to ensure effective and efficient delivery of indigent defense services funded by the State of Washington."



Executive Summary

Welcome to the 2014 annual report for the Washington State Office of Public Defense. As always, I hope you will find an informative summary of our agency's activities for the year.

First, some background. Our agency has 15 employees: A Director (myself), a Deputy Director, seven full time Managing Attorneys, one half time Managing Attorney, a Social Services Manager, and four administrative staffers. OPD is overseen by an advisory committee made up of appointees from a range of organizations, which conducts business at quarterly meetings.

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

Given our agency's name, it's common for people to assume that OPD is in charge of all public defense in the State of Washington, but that's not the task the Legislature has given us. An important feature of Washington State government is that counties and cities have a great deal of control over their own local affairs. Thus, most public defense is handled at the county and city level. The Legislature has given OPD specific responsibilities with respect to public defense in the state. Those responsibilities are, primarily:

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

OPD is organized into four programs based around these primary responsibilities. They are, respectively, the Appellate Program, the Public Defense Improvement Program, the Parents Representation Program, and the RCW 71.09 Program (named for the chapter of the



Revised Code of Washington dealing with the civil commitment of alleged sexually violent predators).

Fiscal year 2014 saw continuing developments in each of these programs. The Appellate Program conducted a detailed survey of its contractors' business expenses, the Public Defense Improvement Program developed a model case weighting policy to help local jurisdictions implement new caseload limits, the Parents Representation Program expanded its operations into six additional counties, and the RCW 71.09 Program dealt with increasing post-commitment litigation activity.

The core principle behind public defense is that the rights of all are not safe unless they extend to those that society disfavors. There can be no justice for anyone unless there is justice for alleged criminals, allegedly unfit parents, and even offenders accused of being sexually violent predators. As Justice Hugo Black wrote in the watershed case of *Gideon v. Wainwright*, "The right to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." OPD strives to realize this ideal of fundamental fairness for all by working daily to improve public defense in Washington. I hope this report will provide an understanding of how OPD upholds justice and protects individual rights by implementing the right to counsel across each of its program areas.

Sincerely,

Joanne I. Moore
Director



Appellate Program

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

When a person loses their case in Superior Court, they have the right to appeal to the Court of Appeals, where a panel of three judges will decide whether the lower court's decision was valid. A case lost before the Court of Appeals can be appealed to the Washington Supreme Court.

If a client is indigent and convicted of a crime, or subject to another type of case where the right to counsel at public expense applies, OPD is responsible for providing the client with an appointed public defense attorney for their first appeal, as well as for their appeal to the Supreme Court if the Court grants review. OPD's Appellate Program attorneys represent more than 1,000 indigent clients every year. Appellate Program Manager Gideon Newmark runs the day-to-day operations of the Appellate Program in close consultation with Director Joanne Moore.

Continuing Contract Development

The Appellate Program adopted new contracts in fiscal year 2013, adopting a flat rate structure where attorneys were paid a certain amount to accept a predetermined caseload, leading to better stability and predictability for the attorneys' practices. However, it was still possible for attorneys to receive a larger than average caseload if they received disproportionately large cases.

In fiscal year 2014, the Appellate Program studied the time required for cases of various sizes. The program used this information as a baseline for an informal system of caseload adjustments, awarding additional credit to contractors for exceptionally large cases to make caseloads reflect the actual workloads being undertaken.

Contractor Business Costs Survey

In order to measure the adequacy of current contractor compensation levels, the Appellate Program conducted a survey of Appellate Program contractors in the spring of fiscal year 2014. The survey asked a series of detailed questions to measure such expenses as staff, insurance, rent, training, and taxes. Although OPD was expecting to see clear differences in the costs of doing business between different regions of the state, region did not appear to determine reported business expenses. Instead, other factors predominated, such as the size of the contractor's firm, its ratio of attorneys to staff, its decision to rent more or less expensive real estate, and its tax status. OPD also surveyed appellate prosecutors in the counties where appellate contractors practice in order to establish a comparison as to take-home pay and benefits.

Death Penalty Expenses Increase

Fiscal year 2014 saw a significant increase in expenses for death penalty appeals. Expenses came due simultaneously in several cases, including older cases that happened to terminate in 2014, and new cases that arose in 2014. OPD sought and received supplemental funding from the Legislature to cover these unexpected death penalty appeal costs.



Public Defense Improvement Program

Reinforcing the Right to Counsel

Unlike OPD's other programs that retain and manage contract attorneys, OPD's Public Defense Improvement Program works with local jurisdictions to improve trial level public defense in courtrooms across Washington State. Comprised of Managing Attorneys Karin Johnson, Kathy Kuriyama, and George Yeannakis, the program's staff bring a great deal of experience and creativity to this critical mission.

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

state funds allocated to improve local public defense.

Furthering the Standards for Indigent Defense

The Public Defense Improvement Program spent much of fiscal year 2014 helping to implement the Washington Supreme Court's Standards for Indigent Defense. These standards set mandatory qualifications and caseload limits for public defense attorneys, and require defense attorneys to use investigators where appropriate. The caseload limits for felony and juvenile cases went into effect in October 2013, while the caseload limits for misdemeanors were delayed until January 2015.

In fiscal year 2014, local jurisdictions continued their efforts to prepare for implementation of the caseload limit for misdemeanors. The standards permit attorneys to handle up to 400 misdemeanor cases per year, or up to 300 case weights if a case weighting system is used. Under a case weighting system, some simpler cases can count as less than a full case, allowing attorneys to handle more of such cases. Be-

Funding Independent Public Defense Resources

In addition to OPD's direct work on improving trial level public defense, OPD contracts with two important clearinghouses for public defense assistance: the Washington Defender Association (WDA) and the Death Penalty Assistance Center (DPAC).

- *WDA provides high quality training, publications, and consultation to public defense attorneys throughout the state. WDA's resource attorneys provide services including general technical assistance, case consultation, research, assistance on immigration consequences impacting criminal cases, education and training programs, a brief bank, case law updates, and an expert bank.*
- *DPAC provides unique expertise in handling death penalty cases and assists public defense attorneys with death penalty cases. DPAC's technical services include case assistance in aggravated murder cases where the death penalty could be imposed, information on the practicalities of capital case defense, briefing on legal issues, mitigation investigation, expert consultants and witnesses, and the development and presentation of education and training programs.*



cause many jurisdictions requested assistance in developing a case weighting policy, the Supreme Court ordered OPD to produce a model policy with case weight values derived from an attorney time study.

To create the model policy, the Public Defense Improvement Program launched a statewide time study to measure the time spent on misdemeanors in sample jurisdictions where attorney caseloads were within the Supreme Court's standards. The program accomplished this by working with a software developer to create an online time-tracking system that could be accessed through the internet or a smartphone app. A group of volunteer attorneys used this system to record their activities, providing the program with data on over 3000 misdemeanor cases. The program then used this data to create a model case weighting system that can be adapted for jurisdictions across the

state.

In March 2014, the House Judiciary Committee requested further assistance from OPD to better understand the financial implications of the misdemeanor caseload limits, including any local practices that can offset increased costs. A committee consisting of judges, prosecutors, defense attorneys, and city and county representatives met at the end of fiscal year 2014 and the beginning of fiscal year 2015.

Public Defense Improvement Grants

The Public Defense Improvement Program also continued to carry out one of its core functions in fiscal year 2014, distributing grants to counties and cities for the improvement of trial level public defense. As mandated by chapter 10.101 RCW, the program distributed grants to each of the 38 counties that applied for

the funding. In addition, 21 cities submitted applications for funding in calendar year 2014. Twelve cities were awarded grant funds, and OPD worked with the city grant recipients to make improvements to their public defense systems, particularly in anticipation of the misdemeanor caseload limits going into effect in 2015.

The program's managing attorneys conducted site visits to all the city grant recipients, and fielded hundreds of technical assistance requests. The program's managing attorneys also reviewed data collected from county and city grant applicants to compile the eighth annual Status Report on Public Defense in Washington State. This report examines current issues in public defense and provides detailed information about public defense in the grant applicant jurisdictions, including information on population, poverty rate, caseload, and public defense spending.

Federal Funds for Training Death Penalty Practitioners

In 2012, OPD applied for and received a two-year federal grant for training prosecutors and defense attorneys to handle trial-level death penalty cases. OPD collaborated with the Death Penalty Assistance Center and the Washington Association of Prosecuting Attorneys to design these trainings. Each group held two four-day trainings, the first of which were conducted in Spokane in August 2013. Attendance at the defense trainings was decided through a competitive process aimed at selecting both highly qualified and geographically diverse participants. The next trainings were scheduled for fiscal year 2015 in Vancouver.



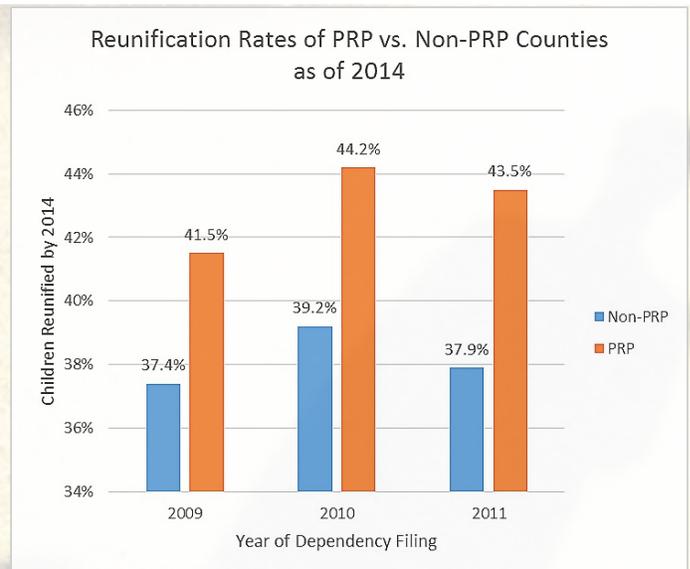
Parents Representation Program

Preserving Family Ties

OPD's Parents Representation Program provides legal representation to parents in dependency, termination, and related cases. These are cases where the state asks to take custody of a child and alleges that a parent has abandoned, has abused or neglected, or is incapable of caring for the child. Children are often removed from their parents' custody and placed with relatives or in foster care. The parents have a constitutional and statutory right to counsel in these cases to protect their fundamental right to raise their children. The Legislature authorized the Parents Representation Program more than a decade ago, following an investigative report showing that indigent parents throughout the state typically received poor legal representation in dependency and termination cases.

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

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



A 2014 OPD study of reunification data showed that children in Parents Representation Program counties had a higher rate of reunification with their parents than in other counties.

team of social services workers on contract with OPD, managed by Social Services Manager Mike Heard. Mike provides both formal and informal training for OPD's social services workers, who give OPD's contract attorneys access to social work theory and resources in the community.

In fiscal year 2013, The Parents Representation Program contracted with attorneys in 25 counties. In fiscal year 2014, the program expanded to six additional counties, including King County, and now covers 90 percent of the state. The expansion to King County was a major focus of 2014 due to the complexity of integrating with the state's most populous county, especially during a phase of massive reorganization as King County transitioned from public defense being provided by several independent nonprofits to a unified public defense department.



RCW 71.09 Program

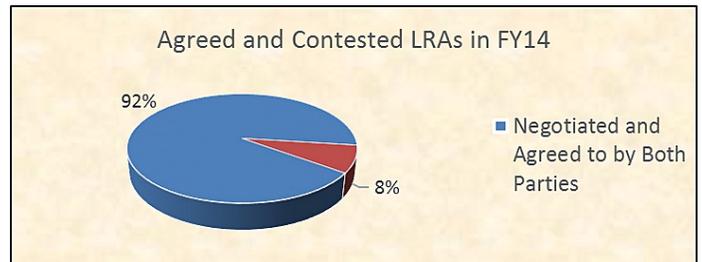
Protecting Civil Rights in Civil Commitment

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

Washington law gives indigent civilly committed persons the right to counsel at every stage of the proceedings against them, including for each year's annual review. OPD is responsible for providing that counsel, and does so by contracting with a small but dedicated group of attorneys. The RCW 71.09 program is overseen by Managing Attorney Shoshana Kehoe-Ehlers. She oversees attorney contracts, reviews and approves invoices from expert service providers, manages public record requests, and develops and delivers statewide attorney training. The monitoring and oversight provided by OPD has been key to providing the contract attorneys with the necessary support to effectively represent their clients while also managing the program's costs.

Keeping up the Momentum

At the onset of the RCW 71.09 Program, OPD contracted with 23 highly qualified attorneys to provide defense services to the indigent clients in



The vast majority of transfers to less restrictive alternative (LRA) settings in 2014 were agreed without requiring a trial.

residence at the SCC. These attorneys were on the job on July 1, 2013. Their first major task was to resolve a backlog of civil commitment trials, which had left many clients in the SCC for long periods without a final determination of whether they met the criteria to be committed as sexually violent predators. Program attorneys were able to clear most of this backlog in the program's first year of operation, completing 27 commitment trials that year.

In fiscal year 2014, program attorneys had the opportunity to focus greater resources on the post-commitment phase of proceedings, where committed clients who have undergone treatment or other changes that reduce their chances of recidivism can petition to be released or transferred to LRAs. Defense expert services are instrumental in post-commitment petitions because they allow attorneys to gather the evidence needed to show that a client is ready to leave the SCC. Fiscal year 2014 saw a dramatic increase in the number of petitions for transfer to LRAs; there was a corresponding rise in the cost of expert services for the year. However, program attorneys were able to reach negotiated settlements on 23 of these LRA petitions, avoiding the need for expensive trials and allowing the state to transfer residents out of the SCC and into less costly treatment settings.



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