



2017 REPORT
CHAPTER 71.09 RCW
INDIGENT DEFENSE REPRESENTATION
PROGRAM
(CIVIL COMMITMENT OF INDIVIDUALS CONVICTED OF
SEXUALLY VIOLENT OFFENSES)

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

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

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Chapter 71.09 RCW Indigent Representation Program:

Shoshana Kehoe-Ehlers

Nicole Dodge

Introduction

Chapter 71.09 RCW establishes the legal procedure to civilly commit and provide treatment for sex offenders who have completed criminal sentences and are determined by a court to be at high risk for re-offending. Attorneys and judges rely on statutory standards, the input of experts, and the availability of community resources to inform decisions on respondents' progress in the civil commitment process.

The Washington State Office of Public Defense (OPD) is responsible for ensuring the constitutional right to counsel for indigent respondents in these highly complex cases. Among its duties, OPD is required to report annually on program operations to the Legislature, the Governor, and the Chief Justice.¹ This is the fifth annual report on the Chapter 71.09 RCW Indigent Defense Representation Program, covering operations for Fiscal Year 2017 (July 1, 2016 to June 30, 2017).² As required by statute, the report includes the time to trial for commitment proceedings; an update on activities in Chapter 71.09 RCW defense practice; and recommendations for policy changes to improve the civil commitment process.

Program Administration at OPD

OPD administers contracts with 10 private and public law firms, totaling 21.5 attorney FTEs, to represent indigent respondents in Chapter 71.09 RCW proceedings throughout Washington State. Most of the OPD-contracted attorneys carry a full-time civil commitment caseload and specialize in these cases exclusively. OPD also contracts with four independent social work professionals³

In addition, the agency employs one FTE managing attorney to authorize payments for RCW 71.09 defense services, monitor contract performance, and ensure quality. The OPD managing attorney also assists the trial court when a respondent wants to appear pro se or with standby counsel, responds to trial support requests, and screens for ethical conflicts of interest related to an attorney's current or former representation of RCW 71.09 respondents. Due to the vulnerability of some residents, the defense attorneys must handle issues of client competency and seek appropriate services, such as the appointment of a guardian ad litem. OPD works with courts and attorneys to ensure clients with diminished capacity are provided effective representation.

¹ RCW 2.70.025(6)

² The first four 71.09 RCW Reports can be found at <http://opd.wa.gov/index.php/quicklink-report#CC-reports>

³ Three have a Master's in Social Work (MSW) and one has a Master's in Public Administration (MPA)

Update of Activities in RCW 71.09 Defense Practice

At the close of Fiscal Year 2016, the King County Department of Public Defense (DPD) consolidated its RCW 71.09 defense practice, reduced its attorney FTEs from six to five, and will represent only respondents with cases in King County courts. Prior to the reorganization of four King County nonprofits into a county government agency, they represented RCW 71.09 respondents in multiple counties. Other OPD contractors expanded their contracts to make up for the reduced practice at King County DPD.

Specialized Training. OPD's program oversight identifies emerging issues for continuing legal education (CLE) seminars for the contract attorneys, whose law practices present a unique combination of civil and criminal law. This past year OPD sponsored two CLEs targeted to RCW 71.09 defense issues. In addition, the Washington State Office of Financial Management (OFM) and the Washington State Sex Offender Policy Board (SOPB) sponsored a three day conference⁴



RCW 71.09 Program contractors attending the 2017 OFM Sex Offender Management Conference in Lacey, WA.

(May 31 – June 2, 2017) at St. Martin's College in Lacey, Washington. The training, titled *Different Roles, One Goal*, focused on the statewide sex offender management system and was well attended by stakeholders across the state. Two OPD 71.09 contractors presented at the conference on the myths and practical tips about working with persons with sex offense history.

On September 18, 2017, OPD's managing attorney, along with representatives from the Washington Attorney General, King County Prosecuting Attorney, and Department of Social and Health Services, jointly presented at the Annual Judicial Conference in Vancouver, WA, on the developments and challenges in the civil commitment of sexually violent predators. The bulk of this discussion centered on the shift to post-commitment treatment and release to Less Restrictive Alternatives.

⁴ OFM received a grant from the Federal Department of Justice Programs – The Office of Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) to sponsor the 2017 training. OFM recently announced that the 2nd Annual Sex Offender Management Conference will take place in Yakima, WA from May 8 – 10, 2018.

Pre-Commitment Filings, Litigation, and Negotiations

New Filings. During Fiscal Year 2017, prosecutors⁵ filed eight new petitions⁶ for civil commitment and these cases are currently in various stages of litigation and negotiation. Seven new cases were filed in FY16.

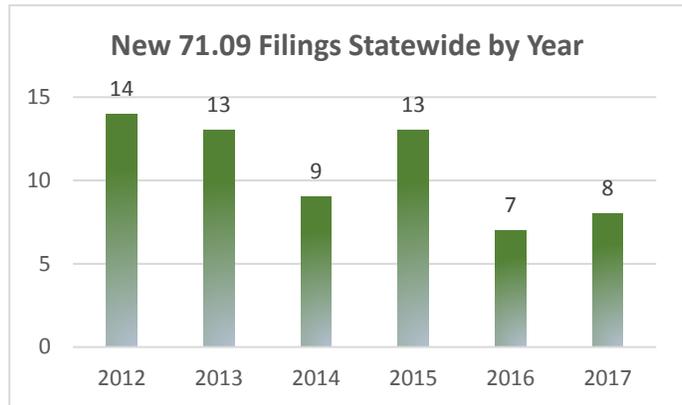


Figure 1

Continuances. RCW 2.70.025(6)(b) requires OPD to report on continuances. Trial courts granted eight continuances in initial commitment cases set for trial during FY17, a steady decrease from 11 continuances in the previous fiscal year, 22 in FY15, and 39 in FY14.⁷

County	Initial Commitment Continuances
Grant	2
King	3
Skagit	1
Snohomish	1
Yakima	1
Total	8

Table 1

Table 1, to the left, identifies the counties in which continuances were granted in initial commitment cases. Nearly all continuances were agreed by the court and both parties, usually for purposes of negotiations and trial preparation. The duration of the continuances varied.

Case Outcomes. Ten initial civil commitment proceedings were completed during FY17. Six commitment cases were completed the previous year. As illustrated in Table 2, the completed cases in FY17 resulted in seven new commitments to the Special Commitment Center (three through stipulation, and four through trials), one hung jury, one dismissal through summary judgment⁸, and one negotiated dismissal.

Outcome	Number
Verdict of Commitment	4
Stipulation to Commitment	3
Hung Jury	1
Dismissal of Commitment Petition	1
Summary Judgment No Commitment	1

Table 2

⁵ The King County prosecuting attorney (KCPAO) files Chapter 71.09 RCW cases in King County. The Washington Attorney General (AGO) files Chapter 71.09 RCW cases in all other counties.

⁶ In FY17 the AGO received 12 referrals for filing and the KCPAO received 16 referrals for filing.

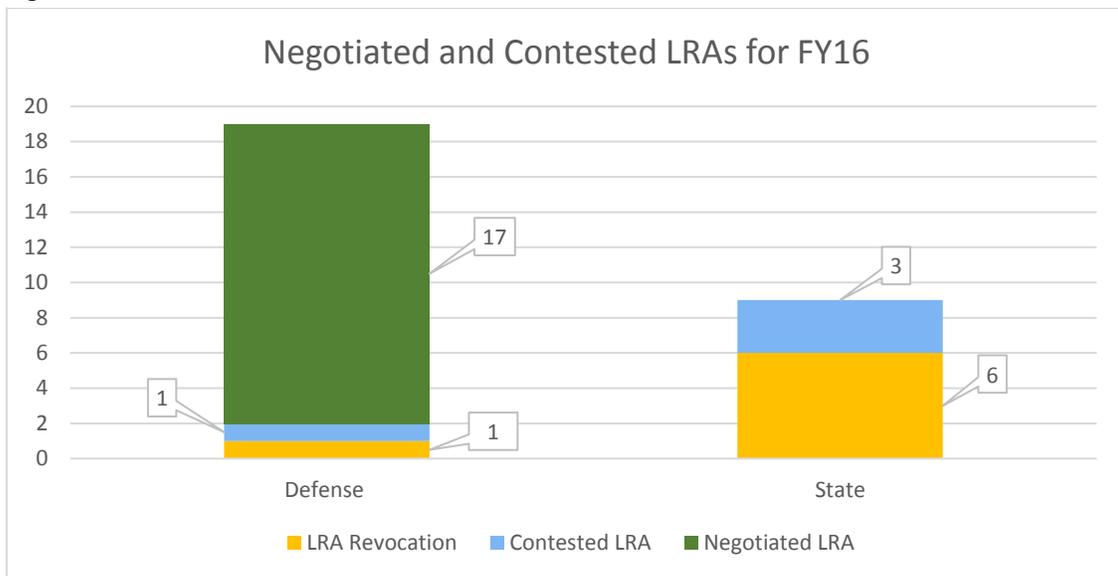
⁷ The data used for Tables and Figures in this report are derived from JIS-SCOMIS and the DSHS-SCC resident monthly rosters.

⁸ The respondent who won his release through summary judgment was featured in the Tacoma News Tribune. He continues to do well in the community and is now employed full-time. Shortly after his release, the King County Sheriff's Office assessed his risk to reoffend as low, and dropped his sex offender registration level from a three to a one. <http://www.thenewstribune.com/news/politics-government/article161546878.html>

Annual Review and Post Commitment Litigation and Negotiation

Each respondent is entitled to an annual case review in which the Department of Social and Health Services (DSHS) assesses whether the respondent continues to meet the definition of sexually violent predator (SVP) and must remain confined at the Special Commitment Center (SCC). Alternatively, DSHS may find that a respondent still meets the definition of SVP, but has sufficiently progressed with treatment to be released under supervision to a “less restrictive alternative” (LRA). In addition, regardless of DSHS’s annual review recommendation, the individual respondent is permitted under RCW 71.09.090 to petition the court for release to an LRA or an unconditional discharge.

Figure 2



Less Restrictive Alternative. Guided by expert evaluation and analysis for each respondent, the parties often are able to avoid trial and negotiate conditions for an appropriate LRA that meets the respondent’s needs and ensures public safety. In FY17, courts approved 17 LRAs that were negotiated by the state and the defense. In addition, four contested LRA trials were held in FY17; the defense won one and the state prevailed in three.⁹ See Figure 2. The level of community supervision on an LRA in the RCW 71.09 civil commitment program is stricter than any level of DOC community supervision imposed on criminal defendants. When a respondent is approved for provisional release from commitment at the SCC to an LRA, the court imposes terms and conditions, which if violated, can lead to revocation and/or modification of the LRA. The court also may revoke/modify an LRA when the respondent needs additional treatment or specialized care. Finally,

⁹ One of the respondents who lost his LRA trial in FY17 entered into a negotiated community LRA later in FY17.

those who demonstrate sustainable progress in their LRA can petition the court to decrease their LRA conditions as they move closer to unconditional discharge, this is also referred to as a step-down LRA.

Unconditional Discharge. When the court determines that a respondent no longer meets the SVP criteria under Chapter 71.09 RCW, he or she is released without conditions.

However, many respondents will be supervised by the Department of Corrections (DOC) for up to two years related to the underlying criminal sentence. Respondents subject to DOC

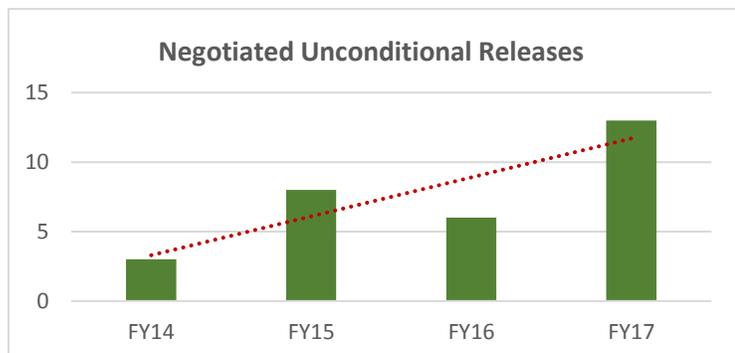


Figure 3

supervision are required to follow a long list of conditions, including: GPS monitoring, sex offender registration, point to point check-ins, community sex offender treatment, regular check-ins with CCO, employment, travel restrictions, polygraphs, restricted internet use, and prohibited use of alcohol and non-prescribed medications. A respondent requests the court to order unconditional discharge by petitioning the court for a show cause hearing. DSHS’ annual review results, along with other information, are evaluated by the court to determine whether probable cause exists to support further consideration of the respondent’s petition. If so, the court sets the matter for trial. The majority of unconditional discharges are negotiated by the parties without a trial.

In FY17, 17 respondents petitioned for unconditional discharge. Thirteen of these -- 76 percent -- achieved unconditional discharge by negotiated agreement of both parties, and one was discharged following a jury trial. Three respondents were recommitted to the SCC following a trial.

Fiscal Year	Negotiated Unconditional Releases	Trials Resulting in Unconditional Release	Trials Resulting in Recommitment to the SCC
FY14	3	0	2
FY15	8	0	2
FY16	6	2	1
FY17	13	1	3

Table 3

Policy Recommendations

RCW 2.70.025 directs OPD to make recommendations for policy changes that may improve SVP civil commitment proceedings. Based on SVP policy discussions over the years as well as recent

observations of the civil commitment process, OPD recommends the following to improve the system's overall effectiveness:

- **Streamline Less Restrictive Alternatives and update Chapter 71.09 RCW**

In 2016, the Sex Offender Policy Board recommended¹⁰ that a panel of individuals with specific knowledge in the civil commitment of those previously convicted of sexually violent offenses review RCW 71.09 in its entirety and identify appropriate updates to the statute. Recently the AGO, KCPAO, and OPD have agreed to work collaboratively and with other stakeholders (judges, prosecutors, defense attorneys, treatment providers, Community Corrections Officers, SCC staffers, DOC and DSHS administrators) to review the Less Restrictive Alternative section of Chapter 71.09 RCW.

- **Funding a release plan specialist**

As more respondents progress in treatment and prepare for an LRA or unconditional release, there is an increasing need for a specialized position to assist with locating appropriate community housing, securing certified sex offender treatment providers, arranging court-ordered transportation and chaperone services, enrolling eligible respondents in federal and state benefits, and various other services to support successful transition from the SCC to the community.

- **Allow limited rental assistance for indigent respondents granted LRAs**

RCW 9.94A.729 authorizes short-term rental vouchers for some individuals released from prison to facilitate successful community reentry. OPD recommends that similar vouchers be authorized for 71.09 respondents granted a community LRA. Currently, a lack of financial resources to pay a rental deposit for approved housing can derail a respondent's transition to an otherwise non-contested LRA.

- **Provide Cost of Living Adjustment (COLA) for OPD 71.09 contractors.**

OPD's RCW 71.09 contract attorneys have not received an increase in compensation since before OPD assumed administration of the indigent representation program five years ago.

¹⁰ Sex Offender Policy Board, General Recommendations for Sex Offender Management, October 2016, *available at* <http://www.ofm.wa.gov/sgc/sopb/publications.asp>.