Oregon

Public Defense Services Commission

Office of Public Defense Services (OPDS)

Executive Director's Biennial Report to the Oregon Legislative Assembly

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(December 2011)

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Executive Director's Biennial Report to the Oregon Legislative Assembly

(July 1, 2009 – June 30, 2011)

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Gideon v. Wainwright, 372 US 335, 344 (1963)

"Our criminal and juvenile justice systems fail when defendants lack access to independent and effective counsel."

Written Testimony by Attorney General Eric Holder to Senate Judiciary Committee,Washington, D.C. ~ Wednesday, November 18, 2009

"The right to representation by counsel is not a formality. …It is the essence of justice."

Kent v. United States, 383 U.S. 541, 561 (1966).

I. Introduction

The Public Defense Services Commission (PDSC) is an independent commission within the judicial branch of state government. In July of 2003 it assumed full responsibility for administering Oregon's public defense system. That system delivers trial level and appellate legal services in criminal, juvenile, and civil commitment cases across the state.

(a) Agency Mission

In carrying out these responsibilities, PDSC's mission is to establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.[1]

(b) The Right to Counsel

The legal services provided by PDSC represent an essential component of Oregon's public safety system. Under the United States Constitution, the Oregon Constitution and Oregon statutes, financially eligible individuals charged with a crime, parents and children in abuse and neglect cases, and individuals facing involuntary commitment due to mental health concerns are entitled to representation by court-appointed counsel at trial and on appeal. In FYE 2010 Circuit and appellate courts appointed attorneys to represent clients in more than 170,000 cases.

(c) Role in Public Safety System

Court appointed attorneys defend the rights of all Oregonians by asserting the constitutional and statutory protections afforded to the criminally accused. They also protect the interests of all Oregonians by advocating for parents and children in cases of alleged abuse or neglect, and by asserting the rights of allegedly mentally ill persons to ensure that they are not inappropriately deprived of their liberty.

The state cannot prosecute crime,[2] remove children from their parents, or involuntarily commit those in need of treatment

[1] ORS 151.216(1)(a)

[2] In the 01-03 biennium in several special sessions the Public Defense Services Account was reduced by $27.6 million (17%) from the legislatively adopted budget. Although $5 million of that cut was subsequently restored, these cuts occurred so late in the biennium that public defense funding was virtually eliminated during the last quarter. Crime rates increased, repeat property

without providing constitutionally mandated representation to financially eligible individuals subject to these proceedings.

In addition, defenders contribute directly to public safety by (1) advocating for effective criminal sanctions that help clients avoid future involvement in the criminal justice system; (2) finding resources for families involved in dependency cases that help them to avoid or limit disruption of the family unit, lead to early reunification or, when reunification is not possible, help children find permanent safe and supportive homes; and (3) assisting allegedly mentally ill persons find safe and effective alternatives to involuntary hospitalization.

On the appellate level defenders play a critical role in clarifying the law and ensuring its consistent application across the state. On both the state and local level defenders participate in public safety planning groups and provide valuable input to policy makers regarding effective approaches to controlling crime, protecting children and providing for the mentally ill, and facilitating the efficient operation of the courts and the public safety system as a whole.

(d) Oregon's Public Defense Delivery Model

PDSC provides representation in most criminal and juvenile dependency appeals directly through state employee lawyers and staff in its Appellate Division (AD). PDSC approves and provides representation for all trial level cases and appellate cases not handled by AD through its Contract and Business Services Division (CBS), which negotiates and administers contracts with private contractors and administers payments to hourly providers.

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offenders could not be held. Fox Butterfield reported in the June 7, 2003 edition of the *New York Times* that "[b]ecause [there is] little money for public defenders, Mark Kroeker, the Portland police chief, said officers were now giving a new version of the Miranda warning when they arrested a suspect in a nonviolent crime. "They effectively have to say, 'If you can't afford a lawyer, you will be set free. Enjoy.'" Chief Kroeker said. Noting a significant increase in shoplifts, car break ins and other crimes, Kroeker said, "The scary thing is that the worst results are still six months down the road, as the bad guys realize nothing is going to happen to them…."

II. Agency Organization and Operation

The Public Defense Services Commission is a seven-member commission that serves as the governing body for Oregon's public defense system. It provides policy direction and oversight for the administration of the system. The commissioners are civic-minded, uncompensated volunteers who are appointed by the Chief Justice who serves as an ex officio, non-voting member. By statute, two members must be non-attorneys, one must be a former prosecutor, and another must be an attorney engaged in criminal defense practice who does not serve as a court-appointed attorney compensated by the state. The current members of PDSC are listed in Appendix A.

The Commission established the Office of Public Defense Services, as required by ORS 151.216(1)(b), as the administrative agency responsible for carrying out the Commission's directives and other statutorily defined duties. The Commission appoints the agency's executive director. Ingrid Swenson served as the executive director of the agency through the end of the biennium and retired on July 31, 2011. The Commission hired a new executive director, Nancy Cozine, who joined the office on September 7, 2011.

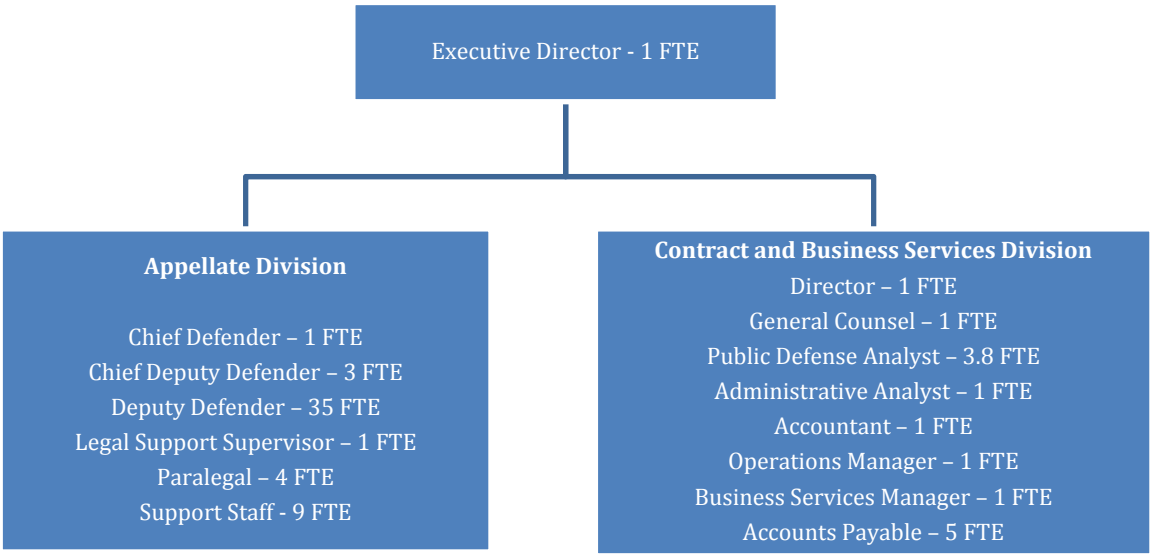
As shown on the Organizational Chart (next page) for 2009-2011, the Office of Public Defense Services is comprised of two divisions, the Contract and Business Services Division (CBS),[3] and the Appellate Division (AD).[4] CBS manages the business operations of the two divisions. CBS also negotiates with private contractors and administers the Public Defense Services Account which funds representation and related services in all criminal, juvenile, and civil commitment cases at the trial level and in those appeals not assigned to the Appellate Division. Finally, CBS processes all expenses related to representation in public defense cases. The Appellate Division (AD) provides direct legal representation in the state appellate courts in criminal cases, juvenile dependency and termination of parental rights cases, and

[3] Prior to the creation of PDSC, the responsibilities of the Contract and Business Services Division were managed by the Indigent Defense Services Division of the Oregon Judicial Department.

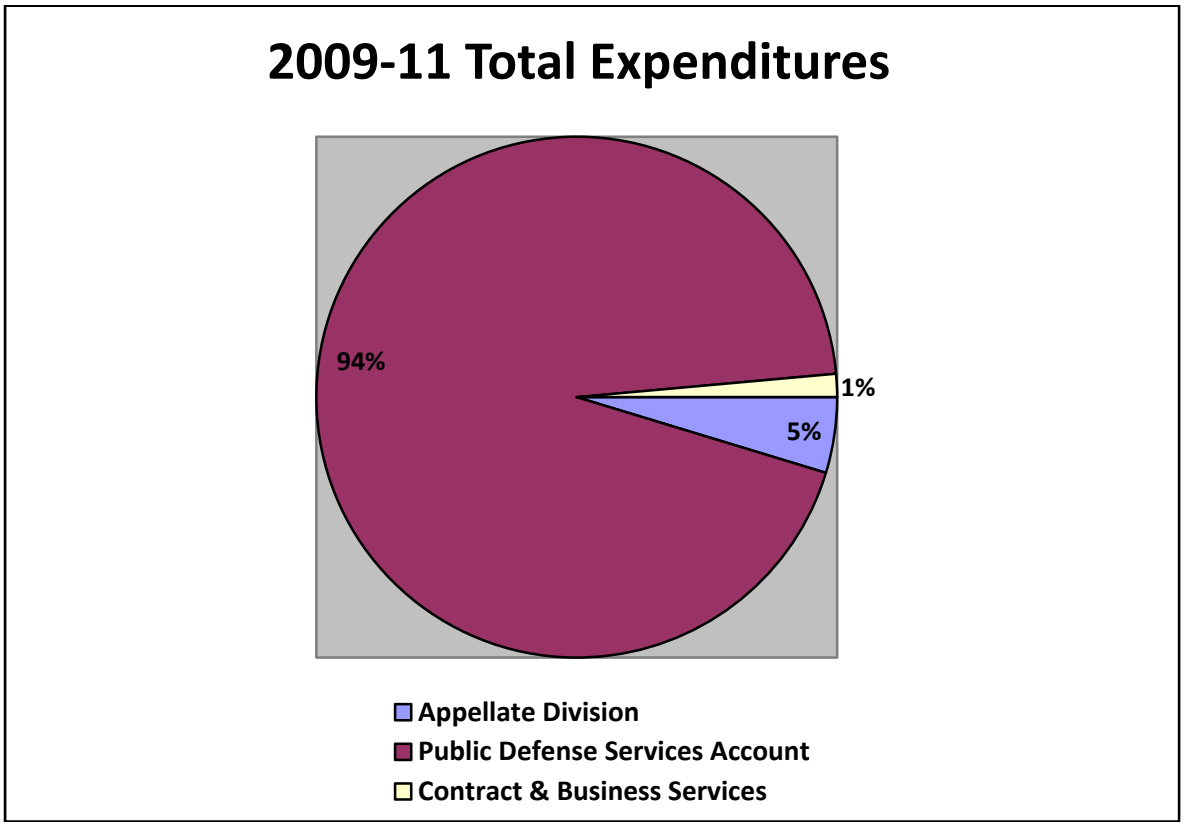
[4] Formerly the State Public Defender's Office

parole cases. The Agency's General Counsel serves as legal counsel for the entire agency.

Kathryn Aylward is the director of the Contract and Business Services Division. Peter Gartlan is the Chief Defender and manager of the Appellate Division. Paul Levy is the agency's General Counsel.



The chart below sets forth the 2009-2011 funding allocations for the two divisions and for the Public Defense Services Account which funds private contractors, hourly rate attorneys, and other private service providers such as investigators and expert witnesses.



III. PDSC's Accomplishments in 2009-2011

(a) Contract and Business Services Division (CBS)

With respect to the provision of trial-level representation, the agency's Contract and Business Services Division was able to successfully negotiate contracts with more than 110 private providers in every region of the state to ensure representation in over 340,000 cases during the biennium. The division also monitored performance under these contracts by performing a monthly reconciliation of case counts from contractors and

data from the Oregon Judicial Department regarding court appointments.

In addition to negotiating and administering contracts for the provision of legal services, the Contract and Business Services Division manages the non-routine expense authorization process that was formerly overseen by Circuit Court judges in Oregon's 27 judicial districts. The expense authorization process requires OPDS to review each request for approval of fees for investigators, expert witnesses, discovery materials provided by other parties, and the like. The agency uses a peer-review process to obtain input from experienced attorneys about which expenses are truly "reasonable and necessary," as required by ORS 135.055. There were more than 30,000 such requests in 2009-2011. It is important to process these requests for services and the more than 50,000 invoices for completed services as promptly as possible. By assuring prompt and reliable payment the agency finds that providers are more willing to work at the below-market rates paid by PDSC. Responses to OPDS's Customer Service Survey in 2010 rated the agency very high in helpfulness, accuracy, timeliness, knowledge and expertise. One respondent commented that "[t]he PDSC is the most competent, efficient and professional agency I have ever dealt with in a government bureau in the State of Oregon."

CBS staff also planned and implemented the relocation of the Office of Public Defense Services in 2010. The agency had been housed in a location that was remote from the appellate courts, from the legislature and from other state office buildings. Some portions of the former building were not usable due to water leakage and others were at best uncomfortable. A search for alternative space disclosed that a new building near the capitol mall area could be completed and leased at a lower monthly cost than the former structure.

In addition to serving as the agency's legal counsel, OPDS's General Counsel provided oversight on quality of representation issues for public defense providers statewide.

He worked closely with the agency's advisory group, the Quality Assurance Task Force, to assemble teams of volunteer lawyers to perform intensive three-day site visits to public defense contractor offices and review the quality of services provided. When a peer review team identifies significant quality issues, General Counsel assists in outlining and implementing quality improvement measures. In 2009-11, he completed three site visits, in Klamath/Lake, Multnomah and Yamhill Counties. He also conducted two statewide public defense performance surveys and worked with CBS contract analysts to follow up on concerns raised in responses to the survey. General Counsel also oversaw the agency's complaint process that permits judges, district attorneys, clients and members of the public to bring complaints regarding the cost or quality of public defense services to the agency's attention.

The agency's General Counsel is a frequent presenter at continuing legal education training sessions for public defense attorneys statewide. He also organized a day-long diversity training for all OPDS employees, to which public defense providers from around the state were also invited.

In addition to managing the division and overseeing the work of her staff, the CBS Division Director serves as the agency's Chief Financial Officer. She prepared the draft budget proposal for the 2011-13 biennium for approval by the Commission. She and her staff monitored the agency's expenditure of funds to ensure that available resources were not exceeded.

(b) Appellate Division (AD)

During the 2009-11 biennium the Appellate Division made significant progress on PDSC's Key Performance Measure No. 1, which is to file opening briefs earlier in the appellate process. In 2006 the median number of days to file the opening brief was 328. In 2010 it was reduced to 226 days.

The division's juvenile unit, first approved by the 2007 Legislative Assembly, firmly established its presence in the

state appellate system. The Juvenile Appellate Section now represents parents in the majority of appeals in juvenile dependency and termination of parental rights cases. One of the unit's primary goals was to compel the component parts of the juvenile dependency system to more faithfully adhere to the statutory structure. The unit's appellate practice has spurred the Court of Appeals to issue written opinions that provide guidance to the trial bench and bar and promote more consistent statewide dependency practices. The Attorney General and the Court of Appeals report that the unit has provided superior representation that has enhanced and guided the development and application of juvenile dependency law statewide. One judge reported that the unit is practicing "vigorous advocacy" and producing "wonderful work" and has "pushed the court" in "several helpful ways." Another judge reported that the juvenile unit's attorneys "embody why we all wanted to become lawyers."

The criminal and parole section had many successful appeals, several of which established important new legal principles.

In October 2010 and October 2011, the Appellate Division undertook the annual project of revising and expanding its employee manual. The manual addresses AD policies, procedures, and commonplace issues that arise daily for attorneys and secretaries.

During the 2009-11 biennium the division restructured its approach to a particular class of non-trial cases that require unique and time consuming initial procedural requirements. Instead of assigning those cases to all of the attorneys, the division funneled the cases to one attorney for preliminary screening. This allowed the remaining attorneys to focus on cases that do not contain this procedural impediment. The restructure enables the division to address cases more efficiently.

Division managers continue to meet regularly with the Chief Judge of the Court of Appeals and Department of Justice

attorneys to promote practices that improve the appellate process without prejudicing the rights of clients. When the court implemented the statutorily enacted two-judge panel as an economy measure, the Appellate Division internally articulated criteria to identify cases that would benefit from the two-judge panel without jeopardizing client interests.

The Appellate Division provides ongoing support to trial level public defenders through various means. For example, the division sends an electronic copy of each brief filed in the Court of Appeals or Supreme Court to the attorney who represented the client in the trail court. An "attorney of the day" is available to respond to trial attorney inquiries about specific issues and opinions. In 2010 the Division initiated the Attorney Regional Contact program which designates individual Appellate Division attorneys as the appellate resource for trial level defense attorneys in specific judicial districts. Appellate Division attorneys regularly present at continuing legal education training sessions sponsored by others, and also developed and presented two half-day in house trainings. The evaluations from attendees consistently indicate a high level of satisfaction with the content and professionalism of Appellate Division presentations.

The Division's workload increased significantly during the biennium. In view of the increase, the 2011 Legislative Assembly approved the addition of seven new positions in the division.

(c) Service Delivery Reviews

In pursuit of its mission to assure high quality, cost effective public defense services in 2009-2011, PDSC conducted service delivery reviews in five counties (Polk County, Lane County, Clackamas County, Lincoln County and Deschutes County), making significant structural changes in two of those counties. The service delivery review process includes holding public meetings in various locations in the state, gathering information from judges, prosecutors, other officials and

citizens, evaluating the need for changes in the structure and delivery of local public defense services and directing the Commission's management team to implement needed changes.

There are three phases in the process. The Executive Director and other agency representatives perform an initial investigation. The Commission then meets in the region to hear directly from the stakeholders in the local justice system. The Commission then develops a service delivery plan, which is incorporated into a final report. This report serves as a blueprint for agency staff contracting with providers in the region. All of these reports appear on the agency's website.

In previous biennia, PDSC completed investigations in, and evaluations of, most of Oregon's local public defense systems.[5] It developed service delivery plans to improve the structure and operation of local systems, and to raise the quality of legal services in those jurisdictions.

(d) Quality Assurance Task Force – Peer Review Site Visits

As noted above, during 2009 - 2011, the OPDS General Counsel organized three peer reviews. The reviews contributed to significant changes in the operation of a contractor's practices in one jurisdiction, and identified practices and procedures in another jurisdiction that were working particularly well and could be recommended to other public defense providers. Each review assisted contractors in understanding areas in need of improvement. Peer review team members report that they gain valuable insight from their participation in the process, allowing them to implement improvements in their own work environments.

[5] As they are completed these plans are posted on the PDSC website: www.oregon.gov/OPDS/PDSCReports.page.

(e) Efficiency of Operation

In August 2009, the Appellate Division converted from paper client files to electronic client files. Prior to that time, OPDS had been scanning closed paper files primarily to avoid storage costs. Since the conversion to electronic files, documents are immediately stored electronically without the intermediate steps of printing and then scanning. The electronic file is available to the attorney from any location, and provides significant savings in staff time spent filing and retrieving files. In addition, client files can now be provided to post-conviction relief counsel instantly at no expense.

Appellate Division attorneys regularly file briefs and other court documents electronically, which contributes to the Divisions ability to maintain paperless files and avoid the costs associated with reliance upon paper documents.

OPDS also developed an in-house brief bank linked to Westlaw searches so that issues that have already been researched and briefed by AD attorneys are readily available to all attorneys in the office.

IV. PDSC's Challenges in 2009 – 2011

(a) Quality Issues

PDSC continued to actively pursue improved quality and case outcomes throughout the 2009-2011 biennium, through the work of both the Appellate and Contract and Business Services Divisions.

PDSC's 2007-2009 Biennial Report to the Legislature noted the Commission's desire to concentrate a greater portion of its resources on juvenile representation in an effort to improve quality in that area of practice. Through increased training for trial level attorneys, and through the work of the OPDS's Juvenile Appellate Section, there is more clarity on legal issues

within juvenile law, particularly in the area of juvenile dependency law. PDSC believes there is still room for improvement, and that continued efforts will avoid needless removal of children from family homes, improve time to reunification, and improve outcomes in juvenile dependency cases. PDSC's ability to achieve these goals requires continued efforts to reduce caseload sizes throughout the state so that attorneys have the time to be more proactive in their representation of clients.

(b) Recruitment and Retention

Public defense firms and other contract law firms report that Oregon's depressed economy has increased their ability to retain attorneys for longer periods of time. This small reprieve is not expected to last, and contractors, especially non-profit public defender firms in rural areas, continue to struggle with recruitment and retention issues. PDSC will be exploring different models to help contractors with their recruitment and retention efforts, but must continue to address the issue of compensation, which is a critical factor in the effort to recruit new lawyers, many of whom have substantial law school debt.

(c) Compensation Issues

PDSC has advocated for increased compensation for Oregon's public defense lawyers each biennium in an effort to reduce caseloads and improve quality of representation. Reduced caseloads improve representation and case outcomes in juvenile dependency cases,[6] but are possible only when case rates are increased to amounts that allow attorneys to handle fewer cases. PDSC submitted three policy option packages (POPs) in the 2011-13 agency request budget, all of them addressing compensation issues.

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[6] Mark E. Courtney, PhD., Jennifer L. Hook, PhD., and Matt Orme, *"Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*," Partners For Our Children at the University of Washington, Discussion Paper Volume I, Issue I (February 2011). This report is available electronically at: http://partnersforourchildren.org/pocweb/userfiles/PRP%20Discussion%20Paper.pdf

- POP 100: Increase in compensation necessary to achieve a 20% caseload reduction in juvenile dependency cases
- POP 101: Increased compensation for appellate division attorneys (to match Department of Justice attorney salaries)
- POP 102: Increased compensation for public defense provider compensation

These policy option packages were not funded by the legislature. Public defense contractors, as well as attorneys and investigators who are paid at an hourly rate, have not had an increase in pay for several years and will be operating at a decreased real income amount through the next biennium.

(d) Funding for 2011-2013

At the conclusion of the 2011 Legislative session, funding for PDSC was approved at 7.7% below the 2011-13 Current Service Level budget. This decrease was partially based upon expected caseload reductions. Any unexpected uptick in trial level caseloads may cause some funding deficits in the 2011-13 biennium, which would require the agency to request additional funding at an Emergency Board at some point prior to the end of this biennium, as it did at the end of the 2005-2007 biennium.

V. Conclusion

PDSC has been functioning in its current form since 2003. The Commission understands its role and statutorily mandated obligations. During the 2011-2013 biennium, the Commission will be examining the excellent work it has accomplished over the last eight years, and creating a strategy to bring public defense in Oregon to a higher level of excellence. PDSC looks forward to meeting the challenges of the next biennium, and providing the governance necessary to keep Oregon established as a national leader in the provision of a healthy, effective, cost-efficient public defense system.