

PUBLIC DEFENSE SERVICES COMMISSION

THE EXECUTIVE DIRECTOR'S ANNUAL REPORT (JANUARY 2009)

INTRODUCTION

2008 was a year of growth and stabilization for the Office of Public Defense Services (OPDS). With the additional positions approved by the 2007 legislature, the Appellate Division was able to recruit, hire, train and integrate eight new criminal appellate lawyers into the Criminal Section and, with a significant amount of assistance and support from the Contract and Business Services Division, was able to open the new Juvenile Appellate Section.

With respect to the provision of trial level services, the Contract and Business Services Division, applying the priorities established by the Commission in August of 2007, was able by December 2007 to enter into contractual arrangements with providers in every county, which met at least the minimal needs of these organizations to survive and provide quality representation around the state.

Throughout 2008 OPDS continued its effort to integrate the administrative functions of its two divisions allowing both divisions to operate more effectively, eliminate duplication, improve efficiency and achieve the agency's performance goals as outlined in its Key Performance Measures and its strategic plan. The Oregon Legislature met in special session from February 4 to February 22. OPDS provided fiscal impact information on a number of legislative proposals but had no proposals of its own. For the first time in many biennia, as of the date of this report, PDSC has not been required to seek additional funding from the Emergency Board or the Legislative Assembly to meet its financial obligations for the 2007-09 biennium.¹

PDSC'S CHALLENGES AND ACCOMPLISHMENTS IN 2008

1. Major Achievements by OPDS's Contract and Business Services Division (CBS)
 - (a) CBS staff administered more than 100 contracts for the provision of legal services statewide. It also processed more than 10,000 requests for pre-authorization of non-routine expenses. The division's five accounts payable staff processed more than 20,000 operating bills and fee statements submitted for payment from the

¹ Of course, the 2009 legislature could still reduce PDSC's budget allocation for 07-09. If a significant reduction were imposed, PDSC might again be required to seek supplemental funding to complete the biennium.

Public Defense Services Account. Despite the high volume of transactions processed, division staff received very positive feedback from its “customers.” The OPDS Customer Service Survey in 2008 received over 200 responses from the 600 contract attorneys, private bar attorneys and service providers to whom it was sent. The individual and overall ratings of division staff in terms of their helpfulness, accuracy, timeliness, knowledge and expertise, and their willingness to provide information were remarkable, ranging from 88.7% to 98% of respondents who rated their work as either excellent or good. A typical comment was, “Every contact I have had with OPDS has been a very pleasant and professional experience. The decisions made by OPDS employees I have dealt with are made with a great deal of thought, respect, fairness, and an overall understanding of the system.”

- (b) Budget preparation – The agency prepared a budget that addressed Essential Budget Level requirements and included Policy Option Packages to improve the provision of public defense services statewide.

2. Major Achievements by OPDS’s Appellate Division

- (a) With a lot of technical and other assistance from CBS staff members, the Juvenile Appellate Section of the Appellate Division was launched. OPDS was able to contract with a highly regarded appellate attorney who specializes in juvenile law, Angela Sherbo, to assist in the creation of the section and the hiring and training of the attorneys and staff. A juvenile case management database was created that will serve as the model for a revised case management system in the Criminal Appellate Section. In May, the section began accepting cases and as of the end of the year had already argued several cases before the Court of Appeals and achieved a reversal of a trial court judgment in a termination of parental rights case.
- (b) With two additional chief deputy positions, the division was able to complete a number of important administrative tasks including revision of the attorney manual. The additional management positions also allowed for the participation of both a team leader and a chief deputy in all team meetings and freed the Chief Defender and the Assistant Chief Defender of some of their administrative responsibilities so they could devote more of their time to legal work. The division now holds monthly all-staff meetings to keep employees informed and to recognize special achievements. The division’s management team meets weekly to discuss legal issues and strategies, and office procedures.

Coordination with CBS is achieved by having the Director of CBS attend these meetings.

- (c) As of January 26, 2009, the Appellate Division reduced the case backlog (cases that have not been briefed within 210 days of record settlement) to 62 cases (50 cases between 210 and 250 days and 12 cases above 250 days). In 2008, the Court of Appeals lowered the “no further extension” (NFE) due date from 300 to 250 days, and the Court of Appeals is expected to lower the NFE brief due date from 250 to 180 days in the spring, which will impose additional strain on the division.
- (d) The Appellate Division continues to increase the support it provides to trial level public defenders through various means. For example, every brief the division files is electronically sent to the trial attorney. The attorney of the day is available as a resource to respond to trial attorney inquiries about specific issues and opinions. The “Appellate Review” webpage contains information about issues under advisement in the appellate courts, links to briefs, and links to several government websites. The AD death penalty unit has agreed to provide focused and direct assistance to the trial attorneys appointed in a high profile death penalty case currently pending in Marion County. Finally, AD attorneys regularly present at CLE events throughout the year, including the OCDLA annual conference, the OCDLA Winter CLE at the Benson Hotel, the OSB Criminal Law Section CLE in the spring, various other OCDLA CLE programs throughout the year, and two half-day AD sponsored CLE programs. The evaluations from attendees consistently indicate a high level of satisfaction with the content and professionalism of AD presentations.
- (e) In 2008, the Appellate Division argued its second case (Oregon v. Ice) in the United States Supreme Court in the past three years. Though the Supreme Court ultimately rejected the division’s position in a 5-4 decision, the division served its client and the Oregon defense community well.
- (f) Technical improvements to AD’s database have provided the ability to generate documents from the database thereby minimizing errors and automating document production. Files are now maintained electronically allowing all users to access case files electronically.

3. Other Activities

Take a Legislator to Court - OPDS in partnership with the Circuit Court Judges Association, the Oregon District Attorneys Association and the

Criminal Defense Lawyers Association organized and participated in a number of events for legislators, referred to as the “Take a Legislator to Court Project.” Legislators participated in court visits, the length of which ranged from an hour in one location to all-day events in others. Such visits occurred in Coos, Jackson, Lane, Marion, Multnomah, Tillamook, Umatilla, and Washington Counties. A typical visit included a meeting with the judges, a meeting with the district attorney, a meeting with a public defense provider, observation of court proceedings in criminal and juvenile court, and a question and answer period over lunch or coffee with the sponsors. In most instances a “white paper” was also developed for use by the legislator, which described the operation of the local court system and the role of the participants.

Support of Educational Opportunities - In addition to the direct educational services provided by Appellate Division lawyers and the agency’s General Counsel, OPDS staff participated in a number of planning groups which prepared and presented education and training sessions for public defense attorneys. OPDS’s Executive Director, its General Counsel and a Deputy Defender II serve on the Education Committee of the Oregon Criminal Defense Lawyers Association (OCDLA). This committee is responsible for planning most of the training events sponsored by OCDLA. In addition the Executive Director serves on the CLE subcommittee of the Oregon State Bar Juvenile Section, the planning committee for OCDLA’s annual juvenile law training and on the Juvenile Law Training Academy Workgroup. Service on these committees permits OPDS staff to monitor and make recommendations regarding the scope and quality of training available to public defense attorneys statewide. The Executive Director is also a member of the Advisory Committee of the Juvenile Court Improvement Project. This project is a federally funded Judicial Department project that seeks to improve outcomes in juvenile dependency cases by improving the handling of such cases in the court system. Among other important functions, the project supports training programs for judges, state’s attorneys, and children and parents’ attorneys. In addition, OPDS and OCDLA jointly planned and presented the annual Public Defense Management Conference for contract managers.

Structural Reviews and Site Visits - In 2008, PDSC reviewed the delivery of services in a number of both substantive law areas and geographic areas of the state. The Commission continued its structural review of public defense services statewide by holding hearings, receiving testimony and other information, and crafting service delivery plans for Jackson and Josephine Counties, and for Grant, Harney, Baker and Malheur Counties. It also received updated information regarding service delivery in Clatsop County. In March, the Commission held an initial hearing on service delivery in post-conviction relief cases. Since that meeting, at OPDS’s

request, the Oregon State Bar convened a workgroup of highly qualified members representing petitioners, the state and the court for the purpose of creating performance standards for attorneys in post conviction relief cases. OPDS's General Counsel staffed that workgroup and assisted with all phases of the project. It is expected that the bar's Board of Governors will approve the new standards in February of 2009. In addition, the Commission has begun the review of service delivery in drug court cases, having taken testimony in both October and November. The Commission also began a review of its service delivery plan in death penalty cases at its October meeting and will continue its review at one or more meetings in 2009.

The agency's General Counsel continued the "site visit" contractor evaluation process begun in 2004 by assembling teams of volunteer lawyers to conduct an in-depth review the quality of representation provided in Lane, Crook and Jefferson Counties. With the completion of these visits, PDSC and OPDS have now conducted either service delivery reviews or site visits in all counties of the state, except for Polk and Tillamook.

Statewide Survey – OPDS conducted a second annual quality of representation survey regarding all of its contractors at the beginning of January 2009. Surveys were provided to judges, district attorneys and the Citizen Review Board. Chief Justice Paul De Muniz assisted in this effort by notifying trial judges that the survey would be forthcoming and recommended their participation. It is hoped that the results of this survey will permit OPDS over time to measure the impact of funding and policy changes on the quality of services being provided.

Management Evaluation - As part of its self-evaluation process, OPDS conducted a second annual all-staff survey. Responses to the survey were reviewed by OPDS's management team and agreed-upon changes were incorporated into manager's work plans for the coming year. The performance of all members of OPDS's management team, other than the Executive Director, was evaluated in a process which included self evaluation, input from staff, from other management team members and from the Executive Director. All managers are functioning at a very high level but more effective communication with staff and between managers remains an important goal. Two management team retreats were held. An all-day retreat was facilitated by Geoff Guilfooy in July and a year end half-day retreat originally scheduled for December has now been rescheduled for early February.

Participation in Public Safety Planning – In addition to the meeting with other representatives of the public safety system in the normal course of business, OPDS representatives served on a number of workgroups and

task forces that seek to coordinate the efforts of multiple agencies to address issues within the larger public safety system. The executive director serves on the Chief Justice's Criminal Justice Advisory Committee, the Governor's Public Safety Team and in 2008, the Forest Payments Taskforce Public Safety Subcommittee on Courts and District Attorneys. General Counsel continued his participation on the Jury Orientation Video Committee, a project of the Oregon Judicial Department's Access to Justice for All Committee.

Consultation and Collaboration with Providers and Others – OPDS management team members met with contract administrators in the course of structural reviews, the annual Public Defense Management Conference and in meetings of contractor advisory groups. The Contractor Advisory Group, the new Juvenile Contractor Advisory Group, the Quality Assurance Task Force and the Death Penalty Peer Panel continue to provide invaluable information and advice to OPDS management.

Recruitment and Retention of Public Defense Attorneys - OPDS representatives including its executive director, chief defender and assistant chief defender attended a number of job fairs and recruiting events in 2008. Some of these events were focused on recruitment of members of minority groups. In an effort to increase the number of minority lawyers providing public defense representation, the Contractor Advisory Group participated in planning the first survey of contractors regarding the cultural composition of their staffs. It is expected that the survey will be initiated in February of 2009 with responses due in March or April. Survey responses will allow OPDS and its contractors to identify providers who have been the most successful in recruiting a diverse staff and provide model strategies for others to use. As a result of the PDSC's service delivery review in eastern Oregon in the summer of 2008 and the development of a service delivery plan for that area, OPDS has been instructed to participate in additional recruitment events and planning in order to attract a sufficient number of new attorneys to public defense practice to ensure that high quality representation can be provided in the future.

CHALLENGES FOR 2009-11

1. Quality Concerns. As noted above, while the agency's contract and hourly rate providers continue to provide quality representation in most areas of practice and most regions of the state, PDSC is well aware that in juvenile dependency cases and in post conviction relief cases significant

quality concerns remain despite the agency's continuing efforts to address those concerns².

Post conviction - In post conviction cases the agency increased rates moderately and directed some cases to particular providers whom it believed could provide quality representation. As of March 2008 when PDSC conducted a formal review of service delivery in this area of practice, however, continuing concerns were expressed by representatives of the judiciary, the Department of Justice and practitioners about the overall quality of representation being provided. Since that meeting, at OPDS's request, the Oregon State Bar convened a workgroup of highly qualified attorneys representing petitioners, the state and the court for the purpose of creating performance standards for attorneys in these cases. The agency's General Counsel staffed the workgroup and assisted with all phases of the project. It is expected that the bar's Board of Governors will approve the new standards in February of 2009. In addition PDSC asked the work group to make other recommendations for the improvement of practice. Those recommendations will be received by the Commission at its March 12 2009 meeting. It is anticipated that one of those recommendations will be to create within OPDS or under contract, a group of attorneys who would specialize in post conviction relief and provide training and mentoring to others. The agency's 2009-11 budget proposal includes Policy Option Package No. 101 which would authorize the creation of such a unit within the Office of Public Defense Services.

Juvenile Dependency Representation – Over the course of the last five years, PDSC has evaluated and sought to improve the work of its juvenile contractors through a number of approaches including the site visit evaluation process described above, its complaint policy, a service delivery review conducted by PDSC in 2006, its statewide quality assurance survey in 2007 and 2008, the creation of the Juvenile Law Training Academy Workgroup which sponsors trainings for juvenile lawyers, the creation of a Juvenile Appellate Section in its Appellate Division, and the establishment of a juvenile law resource center for

² The Oregon State Bar in its Indigent Defense Task Force Reports 2 and 3 issued in _____ highlighted these areas of practice as ones in need of improvement. In a 2005 letter from the Audits Division of the Oregon Secretary of State's office, two areas of management risk were identified to the agency: "OPDS may not ensure that contract and private bar public defense attorneys provide adequate representation in juvenile cases," and "OPDS may not ensure that contract and private bar public defense attorneys provide adequate representation in post-conviction relief." In the fall of 2006, at the request of a group of legislators, legislative staff convened a juvenile dependency work group to make recommendations for legislative proposals that would improve representation in dependency cases. The work group recommended that Oregon, like Washington reduce attorney caseloads, increase compensation for attorneys, create a quality improvement resource center for attorneys and establish performance standards for participating attorneys. Had it passed, SB 411 in the 2007 session would have allocated an additional \$23 million to PDSC for the purpose of implementing these recommendations.

parents' attorneys in 2009. In order to achieve the kind of success experienced in Washington State as a result of its parent representation pilot project³ significant additional funding would be needed in Oregon. PDSC's Policy Option Package No. 100 would allocate an additional \$17 million to the agency for the express purpose of decreasing caseloads for attorneys who practice in this area. PDSC has determined that caseloads for these attorneys exceed national standards by 30%, and in October 2006 when OPDS requested a total client tally on two separate dates, many PDSC contract attorneys reported caseloads that exceeded those of their Washington State counterparts by more than 100%.⁴

2. Lack of Parity

As PDSC reported in its presentation to the Public Safety Subcommittee in April of 2007, our trial level public defense system in Oregon has relied for a long time on highly committed veteran lawyers who were drawn to the work by a sense of commitment to public service. It cannot be assumed that younger attorneys can or will make the same kinds of sacrifices these older attorneys have made, especially in view of the sizeable loans the younger attorneys have had to assume in order to finance their college and law school educations. PDSC's contractors, particularly its non-profit public defender offices, report that recruitment and retention of attorneys are at record lows. The table on page ___ of the appendix shows that the salaries of the attorneys who work for non-profit public defender offices on average lag significantly behind district attorneys salaries, even though these attorneys do essentially the same work. The Oregon State Bar's 2007 Economic Survey of bar members indicates that among attorneys in both private and government employment, the lowest paid attorneys were public defenders at an average salary of \$55,388. The second lowest paid were public prosecutors at an average salary of \$78,872.⁵

The other category of public defense providers who have been chronically underpaid are attorneys and investigators who work at hourly rates. Although the 2007 Legislature authorized funds sufficient to increase both these rates in the 2007-09 biennium, that was the first increase in 16 years. For attorneys in non-death penalty cases the hourly rate was increased from \$40 to \$45 per hour. For death penalty cases, the rate was increased from \$55 to \$60 per hour and for investigators from \$25 to \$28 and from \$34 to \$39, respectively. Again, this biennium PDSC has

³ Complete information about the project as well as outcome studies that document its remarkable success may be found at the Washington State Office of Public Defense Website at www.opd.wa.gov under the heading "Parents Representation."

⁴ In counties participating in the Washington State pilot project, attorneys are permitted to have no more than 80 individual parent clients at any given time. In a spot survey in 2006 of its full time juvenile contract providers, the number of clients per attorney varied from a low of 87 to a high of 267.

⁵ The complete survey may be found on the bar's website, www.osbar.org, under "Surveys and Research."

submitted a policy option package, No. 102, that would fund increases to \$70 and \$95 for attorneys and \$35 and \$45 for investigators.

3. Need for Increased Diversity

OPDS needs to increase the diversity of its own staff, particularly its professional staff, and to assist and encourage its contractors to enhance the diversity and cultural competence of the statewide public defense community. OPDS has implemented some of the strategies recommended by its Diversity Task Force including the creation of a statewide directory of job openings in public defense, support for federal legislation that would provide loan repayment relief for new attorneys, and the development of a recruiting brochure. OPDS is preparing to release a baseline survey as recommended by the task force but has not yet created a plan for development of a training/mentoring program for new attorneys. The agency participates in job fairs and recruitment programs, has developed working relationships with criminal law faculty and placement offices at Oregon's three law schools and has sponsored two continuing legal education sessions focused on the representation of Latino clients and on recruiting and retaining minority attorneys. Despite these efforts, PDSC has had only limited success and needs to explore additional strategies to achieve its goal of having public defense attorneys who more closely reflect the racial and ethnic diversity of the clients they serve.

CONCLUSION

OPDS continued to pursue its statutory mission and the goals and strategies approved by PDSC in its strategic plan for the 2007-2009 biennium. It continued to provide quality representation in criminal appellate cases, created a juvenile appellate section and managed more than 100 public defense contracts, providing representation and related services in more than 170,000 cases during the FYE 2008. The agency has continued to effectively manage the funds devoted to public defense, to promote quality representation in the most cost efficient manner possible, and to provide leadership within the criminal and juvenile justice systems. Challenges remain but it is hoped that at least limited progress can be made in the next biennium toward improving quality in juvenile and post conviction relief cases, toward achieving parity for public defenders with their prosecution counterparts, and toward greater diversity in public defense offices statewide.

