

Public Defense Services Commission

The Executive Director's 2015 Annual Report (February 2016)

Introduction

The Public Defense Services Commission, with the help of the Oregon State Legislature and system partners at both the state and local levels, achieved some incremental improvement in client representation across the state in 2015. Of particular note are four accomplishments. First, the Parent Child Representation Program (PCRP) entered its second year of service in Yamhill and Linn Counties, and in addition to improving representation in those counties, the Program generated enough savings throughout the previous biennium to allow expansion of the Program into a third small county – Columbia County – in January 2016. Second, plans for a Public Defense Resource Center in the Multnomah County Courthouse, focused on improving clients' access to justice, were more fully developed and continue to move forward. Third, the office took steps toward improving its ability to make data-driven decisions by beginning development of a case management system for use in the juvenile appellate division (JAS) and PCRP counties. Finally, the 2015 legislative session ended with approval for permanent funding for administration of the PCRP, and additional funding to permit consistent case rates for different types of public defense providers (non-profit public defender, law firm, and consortium).

The PDSC also moved through change within Office of Public Defense Services' Appellate Division. Peter Gartlan, Chief Defender and a public defender in Oregon for over 25 years, retired in April 2015. With Mr. Gartlan's retirement came the need to select a successor. Ernest Lannet assumed the role of Chief Defender of the Criminal Appellate Section in April 2015. Shannon Storey continued in her leadership of the Juvenile Appellate Section, a separate section of the Appellate Division. Both Mr. Lannet and Ms. Storey are responsible for the day-to-day management of their sections, and report directly to the Executive Director. They bring tremendous experience, dedication, and expertise to their sections, and have continued the excellent leadership demonstrated by their predecessor.

In the final quarter of the year, the PDSC launched the start of a strategic-planning process to help build a strategy for continued achievements through 2020. The Commission also saw the retirement of long-time PDSC Chair and public defense advocate, Barnes Ellis, who dedicated over 50 years to the advancement of legal services for those who could not afford representation. Mr. Ellis was honored by the Oregon State Bar on December 10, 2015, for his countless hours of volunteer and public service work.

PDSC's Accomplishments in 2015

1. The Commission

The PDSC held eight meetings in 2015, including two meetings in central Oregon, two in Portland, one in Hillsboro, and three in Salem. The January 2015 meeting, included a Service Delivery Review in Marion County. The Commission was pleased with the level of service provided by practitioners there, and applauded providers for working well together to meet the needs of clients and system partners. The Commission held a second Service Delivery Review, in Washington County, during its September meeting. Again, the Commission was pleased with the work of the majority of providers and the overall functioning of the public defense system in that county.

The February meeting, held in Portland, allowed Commission members to get detailed information regarding the planned Multnomah County Courthouse with a co-located Public Defense Resource Center. Commission members passed a resolution in support of the project, and later in the year, submitted a letter of interest for a similar project in Lane County.

During the course of the year, Commission agendas included information on a variety of topics. Some of the subjects were continued throughout the year, including representation of veterans, national trends in public defense, Parent Child Representation Program updates, legislative updates, government ethics, workload standards, and representation trends in Oregon delinquency cases.

The Commission Chair and OPDS staff also focused on the budget and the 2015 legislative session. There were three days of budget hearings before the Joint Committee on Ways and Means Public Safety Subcommittee of the Oregon State Legislature during its regular session, which ended in July 2015. The hearings were launched by Chief Justice Balmer and Commission Chair Barnes Ellis, as required by ORS 151.216(1)(e), and included letters of support and testimony from the Oregon State Bar, judges, public defense providers, District Attorney Walt Beglau, the Attorney General's office, CASA, and individuals who had been represented by a court appointed attorneys. These hearings demonstrated, once again, that public defense is a critical component of Oregon's justice system.

With the budget established in early July, the Commission began evaluating contract proposals. In October the Commission completed the process and approved a statewide contracting plan to begin January 2016.

The Commission's December meeting focused on strategic planning and, as noted above, the retirement of longtime PDSC Chair, Barnes Ellis.

2. Statewide Contract and Financial Services

A. Contracts

In 2015, OPDS analysts managed 107 statewide contracts. Total contract payments for 2015 were approximately \$92,257,000, with representation provided in approximately 167,581 criminal and juvenile case proceedings; approximately \$550 per case for lawyer services. In 2015 there were 11 new death penalty cases filed, adding to the number already in the system pending resolution in the trial courts, in post-conviction proceedings, and in the state appellate courts.

OPDS received funds through two different policy option packages to improve public defense funding beyond the current service level. Policy Option Package 100 provided partial funding to increase consortia and law firm rates to public defender office rates. This package also allowed OPDS to direct \$161,700 toward mileage reimbursement for providers in rural counties. These packages were built as a direct result of input from contractors across the state, who indicated that their contract rates were insufficient to cover the high cost of mileage required to visit clients and court hearings.

A primary area of continued concern for most contractors is the lack of predictability in funding for public defense work, and the inability to be competitive with the DA's office. When fixed costs such as rent, technology, health insurance, and professional expenses continue to increase, compensation based exclusively on low case rates becomes a bigger challenge. Policy Option Package 101, requested by OPDS to address these further inequities in public defense funding, was not funded, but conversations around this topic continue, and the OPDS remains committed to pursuing improvements. Additionally, contractors are very concerned about their inability to recruit and retain qualified lawyers given the low rates, especially when coupled with the high loan debt new lawyers face upon graduation from law school.

OPDS is increasingly aware of lawyers challenged to meet professional obligations when faced with unanticipated family or medical incidents. In 2015, the agency observed a troubling increase in the number of complaints arising when contract lawyers experience a medical incident, and found that in most instances, the lawyers did not have adequate coverage to meet their professional obligations during their absence. While recruiting and retaining good lawyers to work in public defense continues to be a challenge because of low compensation compared to other areas of practice, OPDS is also increasingly informed of problems with lawyers continuing to take public defense cases largely because they cannot afford to retire.

B. Financial Services

Contract and hourly providers, as well as experts retained by counsel, must submit information to the Office of Public Defense Services in order to be paid for their work. The Financial Services unit processed 19,593 non-routine expense requests and 40,578 billings

in 2015. Each expense requested, and billing submitted, is reviewed before authorized to ensure that expenses are necessary and reasonable for defending the case.

3. Quality Assurance

OPDS General Counsel Paul Levy, in collaboration with Deputy General Counsel Amy Miller and others at OPDS, continued to pursue a number of quality assurance measures in 2015.

In 2015, General Counsel planned and staffed a peer review of the public defense provider in criminal cases in Clackamas County. The review team included administrators of four other public defense contractors, a senior judge, an attorney in private practice, and a lawyer handling criminal cases in the OPDS Appellate Division. OPDS intends to follow up on the review with a Commission service delivery review in Clackamas County in 2016.

In July 2015, the OPDS Executive Director, along with an OPDS analyst and PDSC Commissioner John Potter, conducted interviews with justice system stakeholders in Washington County as a follow-up to the 2014 peer review of providers in that county. The Commission conducted hearings and finalized that review during meetings in September, October, and December 2015.

As in preceding years, in early 2015 General Counsel conducted a statewide survey of public defense performance. He then participated in follow-up contacts, along with OPDS Analysts, to speak personally with survey respondents who provided their name and expressed specific concerns about public defense services in their counties. General Counsel reported to the Commission on survey results at its March 2015 meeting. For 2016, OPDS plans to launch a revised survey, which will seek more specific information about provider performance, and to do so later in the year after providers have worked for a number of months under new contract terms and conditions.

As in previous years, OPDS received complaints about public defense services from provider clients, judges, prosecutors, and others. In many instances, these complaints concern problems with attorneys not responding to requests for case information and assistance. General Counsel, or Deputy General Counsel if the complaint concerns a juvenile case, is able to quickly resolve these matters through telephone or email contact with the appointed attorney or the contract administrator. However, both General Counsel and Deputy General Counsel devoted significant time to several matters that required substantial investigation and other efforts to resolve the matter. General Counsel also continued to serve on the Oregon State Bar Disciplinary Board, actively participating on a trial panel in 2015.

General Counsel continued to work closely with the OPDS analyst for death penalty cases to identify the appropriate assignment of counsel for new capital cases. He also worked closely with assigned counsel and others to address specific challenges that arise in those cases.

General Counsel's office participated in multiple education efforts in 2015. General Counsel worked with the Oregon Criminal Defense Lawyers Association Education Committee and also participated, along with OPDS Executive Director and others, in the planning for the annual public defense management seminar. He worked closely with Norman Lefstein, who presented at the program and to the Commission on the subject of establishing jurisdiction-specific caseload standards. Work on creating such standards for Oregon will continue in 2016. General Counsel also planned and produced the 2015 OPDS Diversity Program, entitled *Our Evolving and Diverse Community: Understand the Role of Immigration Law and Policy*. Deputy General Counsel, Amy Miller, coordinated planning for the 2015 Juvenile Law Training Academy. She also serves on the OCDLA Juvenile Law Committee, the Oregon State Bar Juvenile Law Committee, and contributed articles for publication in the *Juvenile Law Reader*.

The primary work of Deputy General Counsel Amy Miller is management of the Parent Child Representation Program which, as noted above, is expanding to include Columbia County in 2016. This work requires frequent meetings, usually on site, with participating attorneys, the court, deputy district attorneys, DHS, CASAs, and case managers. She has other quality improvement responsibilities focused on monitoring and improving the quality of legal representation of parents and children in juvenile court cases statewide. She investigates and resolves complaints related to juvenile matters, handles all juvenile non-routine expenditure requests, and regularly consults with trial practitioners statewide.

Reviewing funding requests for non-routine expenses is an important component of monitoring attorney performance, and is a function shared by General Counsel, Deputy General Counsel, and the contract analysts. From this review, OPDS staff gain information about the quality of case investigation and preparation conducted by attorneys and can address specific concerns that come to light during the review of funding requests. The review also assists in cost containment efforts and in predicting cost trends related to the preparation of particular case types.

General Counsel continued his responsibility for reviewing certificates of attorney qualification submitted by lawyers wishing to provide public defense services. In conjunction with the Executive Directive, Deputy General Counsel, and OPDS analysts, General Counsel also led a review and revision of the General Terms of the PDSC Public Defense Legal Services Contract. The review included a major reorganization and revision of the quality assurance provisions. Prior to the Commission's adoption of contract revisions, the proposed changes were reviewed and discussed by the OPDS Public Defense Advisory Group, and were also discussed and commented upon by contract providers at PDSC meetings.

Finally, General Counsel tracked and reported to the Commission developments in litigation outside of Oregon concerning the responsibility of public bodies to provide constitutionally sound public defense services. Such information is important for OPDS staff and the Commission to understand the public defense challenges facing other jurisdictions, how those challenges are being met, and to measure our work in Oregon in light of those developments.

4. Appellate Division

The Appellate Division (AD) is comprised of the Criminal Appellate Section (CAS) and the Juvenile Appellate Section (JAS). The division provides legal representation in the state appellate courts on direct appeal in criminal cases, parole appeals, juvenile dependency appeals, and appeals from the termination of parental rights. Peter Gartlan was the Chief Defender and manager of the Appellate Division until his retirement on March 31, 2015. Ernest Lannet assumed the role of Chief Defender of the Criminal Appellate Section upon Mr. Gartlan's departure. Shannon Storey serves as Chief Defender of the Juvenile Appellate Section.

Appellate Division managers meet regularly with the Chief Judge of the Court of Appeals and the Solicitor General of the Department of Justice to advance and promote practices that improve the appellate process without prejudicing the rights of clients. In addition, representatives from AD, the Attorney General's office, and appellate court operations meet quarterly to address operational issues that affect system efficiencies.

The division provides ongoing support to the trial level juvenile and criminal defense bar. AD lawyers sit on the executive committees of the Oregon State Bar's criminal law, juvenile law, constitutional law, and appellate law sections, as well as the executive and educational committees for the Oregon Criminal Defense Lawyers Association (OCDLA). AD lawyers regularly present at continuing legal education (CLE) seminars sponsored, for example, by the Oregon State Bar and the Oregon Criminal Defense Lawyers Association. The division's attorneys field email and telephone inquiries from the juvenile and criminal defense trial bar on a daily basis and provide briefing and memoranda to trial practitioners.

The Appellate Division produced its annual "Holidaze" half-day CLE program, which included a review of the new mandatory elder abuse reporting requirement for attorneys, an update on the 2015 legislative session, and practical and ethical considerations regarding responding to medial inquiries. The office also held several "PD Coffee, Pastry, and Chit-Chat" sessions featuring judges from the Court of Appeals and Supreme Court.

A. Criminal Appellate Section

The Criminal Appellate Section (with 37 attorneys) is significantly larger than JAS (5 attorneys). CAS represents individuals on direct appeal in misdemeanor and felony criminal cases (including capital cases), parole appeals, denial of applications for DNA testing, and victim's rights challenges, and acts as a resource for mandamus actions. All CAS attorneys work in one of six teams, led by a senior attorney. The teams meet weekly to review pending cases, discuss briefs, and prepare for oral argument.

Three Chief Deputy Defenders support the Chief Defender in the management of the section. Each Chief Deputy primary responsibilities fall into one of three areas: outreach, operations, and office development. The four managing attorneys meet at least weekly to address the section's needs and determine courses of action. They train, supervise, and

regularly evaluate the 34 non-management attorneys, set caseload expectations, allocate and redistribute manageable individual caseloads, and maintain documentation of workflow.

Filing Dates. The Criminal Appellate Section's Key Performance Measure (KPM) is the median age to file an opening brief past record settlement. In February 2014, at AD's request, the legislature reduced the KPM from 210 days to 180 days.

The median filing date during the fiscal year (FY) ending in June 2014 was 227 days. CAS attorneys reduced the median filing date during FY 2015 to 223 days. The median filing date for the first half of FY 2016 is 210 days. Two entry-level attorneys joined the section in 2015, replacing two of the section's most experienced attorneys. An additional 11 CAS attorneys have less than five years of experience in the section. CAS expects that the median filing date will continue to decrease as those newer attorneys gain experience.

Case Referrals. During 2015, CAS processed 1,482 incoming criminal case referrals (versus 1,574 in 2014) and filed 1,080 notices of appeal (versus 1,058 in 2014).

In 2015, the section filed 662 merit briefs in the Court of Appeals. By comparison, the section filed 779 merit briefs in 2014, 807 merit briefs in 2013, 720 merit briefs in 2012, and 654 merit briefs in 2011.

Supreme Court Practice. CAS has an active practice in the Oregon Supreme Court, with a record number of accepted cases in 2015. 16 CAS attorneys filed briefs in 23 cases in the Oregon Supreme Court (21 cases in which CAS represented a party and 2 cases in which AD appeared as amicus at the Court's request). During the same period, the Court issued 15 opinions in cases litigated by 11 different CAS attorneys (12 cases in which CAS represented a party and 3 cases in which AD appeared as amicus at the Court's request).

The Court's requests for AD to appear as amicus signal its recognition of AD's institutional role in the appellate system and the Court's confidence in AD's practice.

Practices and Procedures Manual. CAS management revised its Manual of Practice and Procedure and released it to the Criminal Section in November 2015. The 155-page manual is a desktop resource for CAS employees and management. It describes the office structure, provides the section's policies and procedures for routine issues confronting CAS attorneys, and identifies attorney performance expectations.

Outreach. CAS continued its current practice of contacting the trial attorney when a new case is assigned, a brief is filed, and a written opinion is released.

CAS attorneys have regular contact with the criminal defense bar and the public. A designated "officer of the day" is available to field inquiries from the trial bar and the public every business day; attorneys participate on OCDLA's "pond" listserv exchanges; several AD attorneys telecommute several days a month at Public Defender firms in Portland and Eugene and provide occasional noon-time "brown bag" CLE presentations at the firms; and

CAS considers whether the issuance of a media release is warranted when the Oregon Supreme Court announces its opinions.

Criminal Appellate Section attorneys present regularly at the annual Oregon State Bar (OSB) Criminal Law Section CLE, the OSB's Appellate Section CLE, the OCDLA annual conference, and at various OCDLA-sponsored CLE programs. CAS attorneys regularly submit an appellate perspective column for the OCDLA bimonthly journal, "The Oregon Defense Attorney."

In June, the section sent Chief Deputy Marc Brown to the 2015 National Forensic College at the Cardozo School of Law at Yeshiva University in New York City, a weeklong seminar cosponsored by the law school and the National Association of Criminal Defense Lawyers (NACDL).

Legislative Activity. Senior Deputy Shawn Wiley served as a resource to OCDLA's substantive lobbyist and stayed current with the Department of Justice's legislative agenda through meetings with DOJ's legislative director Aaron Knott.

B. Juvenile Appellate Section

The Juvenile Appellate Section consists of five attorneys and two support staff. JAS represents parents on direct appeal in juvenile dependency and termination of parental rights cases and serves as a resource for trial attorneys representing parents. Attorneys in this section work in a highly collaborative team environment led by the JAS Chief Defender. The team meets weekly to review pending cases, discuss briefs, and prepare for oral argument.

The JAS Chief Defender manages all areas of the JAS including outreach, operations, and office development. The Chief Defender trains, supervises, and regularly evaluates the JAS attorneys, sets caseload expectations, allocates and redistribute manageable individual caseloads, and maintain documentation of workflow.

Case Referrals and Briefing. During 2015, the JAS processed 376 referred cases (versus 312 in 2014), filed 300 notices of appeal (versus 258 in 2014), and filed 97 opening briefs (versus 102 in 2014). Due to the sharp increase in juvenile case referrals over the last five years, an additional attorney position will be assigned to the Juvenile Appellate Section in 2016.

Juvenile dependency cases are on an expedited appellate timeline. The Oregon Rules of Appellate Procedure allow a maximum 42-day limit per party for filing the appellate briefs. The expedited schedule produces a frenetic pace for the unit, particularly in those cases where the exhibits are not timely made available.

Supreme Court Practice. In 2015, the JAS filed one brief in the Oregon Supreme Court.

Outreach and Legislative Activity. The juvenile section attorneys regularly serve as a resource to the trial bar, providing daily consultation and support. Because most dependency cases are ongoing at the trial and appellate levels, the JAS often consults with trial attorneys and, on occasion, drafts motions and memoranda for trial attorneys. The unit has worked successfully with trial counsel in several cases to obtain favorable outcomes in the trial courts that obviate the need for appeal.

JAS attorneys are recognized leaders in the juvenile dependency community. They presented at various CLE presentations in 2015, including the Oregon State Bar Juvenile Law CLE, the OCDLA annual juvenile conference, and the annual OCDLA Juvenile Law Training Academy.

In 2015 JAS Chief Defender, Shannon Storey, served on the Oregon Law Commission's Juvenile Records Task Force, the Executive Committee the Oregon State Bar's Juvenile Law Section, the Editorial Board of the Oregon State Bar's Juvenile Law Book, and the planning committee for the Juvenile Law Training Academy. JAS Deputy Defender, Sarah Peterson, served as the Chair and Conference Coordinator of OCDLA's Juvenile Law Section. Finally, in 2015, Governor Kate Brown appointed JAS Deputy Defender, Valerie Colas, to serve on the "Task Force on Legal Representation in Childhood Dependency."

Appellate Panel. By February 2014, OPDS established a panel of independent juvenile appellate practitioners to represent parents in overflow and conflict cases that did not remain in the JAS and to supplement Youth Rights and Justice's (YRJ's) representation of children. Like the criminal panel, the juvenile panel members are pre-approved to serve on the panel and are compensated pursuant to a prescriptive administrative model that reflects case type and transcript length. As an important quality control measure, every two years the juvenile panel members must obtain re-approval to serve on the juvenile appellate panel. The juvenile panel's first reapplication process concluded on December 31, 2015, with all of the original panel members having applied for re-approval.

5. Executive Director

The Executive Director's responsibilities are set forth in ORS 151.219. In addition to completing the tasks outlined there, the Executive Director coordinated meetings of the Public Defense Services Commission, participated in several work groups and conference planning committees, convened or participated in regular meetings at both state and local levels, and stayed in regular communication with Oregon Criminal Defense Lawyers Association, Oregon Youth Authority, Department of Justice, Criminal Justice Commission, CASA, Governor's office, courts and legislative leadership and members who had an interest or question about public defense services.

The Executive Director's committee work focused primarily on system improvements. She was part of two Oregon Law Commission projects - the Collateral Consequences Work Group, which drafted a legislative concept that did not pass during the 2015 session, and the Juvenile Records Work Group, which continues to improve the language around access

to juvenile court records in the new eCourt environment. That committee will have further recommendations ready for the short 2016 legislative session. The Executive Director also serves as an external member of the Oregon Judicial Department's Audit Committee, and is a member of the Oregon State Bar's Bar Press Broadcasters Council, the National Legal Aid and Defender's Systems Development and Reform Committee, and the Multnomah County Courthouse User Group planning committee. She also participated in regular meetings of the Governor's public safety team, All Agency Directors meetings, Juvenile Court Improvement Program meetings, and regular meetings with the Chief Justice. Finally, she attended two Justice Reinvestment Summits, and the office continues to work with providers to encourage use of the state's prison-diversion programs.

The Executive Director convened regular meetings within the Office of Public Defense Services, as well as with contract providers, in order to keep Oregon's public defense system running smoothly. The OPDS Executive Team met almost weekly, OPDS All Staff meetings were held every-other month, and the Public Defense Advisory Group met twice during the year to provide their perspectives on the provision of public defense services across the state and to help plan upcoming peer reviews. The Executive Director also participated in planning for the Juvenile Law Training Academy and the OCDLA Public Defense Management Conference.

6. Staff

In addition to ensuring excellent services to all of our clients and constituents, OPDS staff members continue to play an active role in supporting Oregon communities. Gracious and committed employee volunteers guide the agency's charitable fund drive, food drive, and toy drive. As noted in last year's report, these activities bring staff together in an effort to support Oregon's more vulnerable populations outside the legal context.

Challenges for 2016

As always, adequate funding remains a challenge at both the trial and appellate levels. With case rates drastically below market rates, and fewer attorneys willing or able to work at these rates, the Commission must adopt a strategy for improved funding over the next few biennia. Student debt hampers efforts to attract and retain new lawyers to the practice, and lawyers who entered public defense with high student debt are reporting an inability to pay down the debt at their current rate of compensation. For some, the debt is actually growing because the amount they can afford to pay does not cover the accruing interest. According to the New York Times, "In 2012, the average law graduate's debt was \$140,000, 59 percent higher than eight years earlier."¹ The Wall Street Journal reports that, for many, student debt is now much higher due to changes in federal lending policies,

¹ See The New York Times, October 25, 2015, Sunday Review, Editorial - The Law School Debt Crisis: http://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?_r=0

resulting increases in tuition costs across the country.² Consistent with the Wall Street Journal report, several Oregon public defenders have reported debt exceeding \$240,000. The agency will continue to work with the Commission, the Legislature, and interested stakeholders to ensure continued support for improvements in public defense funding and compensation.

During the Commission's October meeting, providers from around the state shared their thoughts on challenges they expect to encounter over the next four years. The list included

- the need to reduce caseloads, as the amount of work necessary to resolve each case and meet professional standards of practice increases;
- additional training and oversight, especially for newer public defense lawyers;
- more staff support to manage large volumes of electronic discovery and sophisticated software systems necessary for efficient management of a law practice;
- adoption of new technologies to better manage cases, and assistance with implementation, efficient use, and on-going technology training;
- the need for increased OPDS visits to individual counties in order to increase understanding of contractor challenges, and assist contractors with system challenges in their communities;
- improved communication and transparency during the contracting process and an improved funding structure that accounts for increasing provider costs;
- improved community support through education and outreach; and
- funding to address recruitment, retention, and succession planning.

In addition to developing strategies to address these provider challenges, the agency must continue to develop specific performance indicators to help the agency quickly identify potential problem areas. It must also continue to develop evaluation and support tools for the Parent Child Representation Program, which continues to offer many lessons regarding strategies to improve public defense representation.

Conclusion

The Public Defense Services Commission and OPDS managers will be working to identify efficiencies and opportunities as it works toward a new strategic plan for the agency. While much has been accomplished, the agency recognizes that it must continually assess its strengths and weaknesses in order to preserve excellence and enhance its services each year.

² See The Wall Street Journal, August 18, 2015, Grad-School Loan Binge Fans Debt Worries, by Josh Mitchell <http://www.wsj.com/articles/loan-binge-by-graduate-students-fans-debt-worries-1439951900?alg=y>