



# Oregon

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## Public Defense Services Commission

The Executive Director's Annual Report for 2010  
(March 10, 2011)

### Introduction

Despite budget reductions in the 2009-2011 biennium that caused the Public Defense Services Commission (PDSC), like other state agencies, to forego step increases for its employees, minimize expenditures in all its operations, and find new economies in the way it fulfills its core responsibilities, PDSC was able to make progress on its Key Performance Measures and the goals outlined in its Strategic Plan and to fulfill its statutory mission of providing quality public defense services in a cost efficient manner.

### PDSC's Accomplishments in 2010

#### **1. The Commission**

During the 2010 calendar year the Commission met seven times, including a two-day meeting and retreat in Lincoln County, a meeting in Deschutes County and a meeting in Clackamas County. In both Clackamas County and Deschutes County, commissioners heard testimony from stakeholders in the local criminal and juvenile justice communities regarding existing service delivery systems in those counties and recommendations for improvement. In connection with the Clackamas County review, the Commission explored the role of boards of directors for public defense providers and adopted a policy requiring that all public defense contracts beginning on or after January 1, 2011 have a board of directors with outside members or, in the alternative, have in place approved systems for financial oversight and quality assurance. Commissioners also reviewed attorney evaluation procedures used by some of its contractors and decided that, rather than require the use of a particular model by all providers, the Office of Public Defense Services (OPDS) would make a number of models available to all contractors to assist them in developing a procedure suitable for their own organizations.

A final service delivery plan for Deschutes County was postponed until several system-wide changes in the county justice system could be implemented. The Commission expects to finalize a plan in early 2011 that addresses issues identified during the review.

As part of their statutory oversight duties, commissioners reviewed the eligibility standards for appointed counsel, adopted a schedule for use by trial judges in assessing the amount of attorneys fees and costs to impose on public defense clients at the conclusion of the case, and requested an internal audit of the financial monitoring systems in place at OPDS. Eligibility standards, which had not been updated in 16 years, were amended to more accurately reflect the cost of representation by retained counsel. The internal audit disclosed a high degree of accuracy in the review and processing of payments to public defense providers.

Commissioners received a detailed report regarding the frequency of waiver of counsel by youth in delinquency cases and the county-to-county disparity regarding waiver practices. It received testimony from a Washington State expert on how a similar issue was resolved in that state. The Commission considered what actions it might take to ensure that Oregon youth were not waiving representation without an adequate understanding of the right to counsel, and appointed Commissioner Elizabeth Welch to chair a small workgroup to explore the issue. A model waiver colloquy was developed with the cooperation of the Oregon Judicial Department and the support of Chief Justice Paul DeMuniz and provided to judges in early 2011.

In April 2010 PDSC reviewed the delivery of services by its Appellate Division (AD). The Chief Defender described the structure and philosophy of the Appellate Division. He outlined the team approach used by the office, the requirement that all briefs submitted by the office be edited by a second attorney, the attorney performance review process, the office's efforts at outreach to the trial bar, and recent changes in caseload.

The Commission reviewed and approved a draft agency request budget and identified policy option packages to be included in the request.

In October, the Commission met in Newport, Oregon, in conjunction with the annual Public Defense Management Conference, co-sponsored by the Commission and the Oregon Criminal Defense Lawyers Association to assist public defense managers in identifying and implementing best business practices. At its meeting commissioners heard testimony from Craig Prins regarding trends in the crime rate, from District Attorneys Mike Schrunk and Walt Beglau about changes in charging practices they had undertaken in their respective counties to compensate for the loss of deputy district attorney positions, and from Chief Justice Paul DeMuniz about changes he foresaw for the judicial branch in coming biennia. In a retreat setting the following day, commissioners discussed how changes in charging practices on a statewide basis could result in significant savings to the state for the cost of public defense and approved the presentation of information regarding potential savings to the legislature. Commissioners also agreed that legislators should be made aware of the cost differences between Washington and Oregon for representation in death penalty cases and that OPDS should assist in the exploration of factors affecting costs in both states. Commissioners also discussed succession planning for members of the agency's management team.

At its December meeting, commissioners received training in ethics rules for public officials, approved changes in the agency's strategic plan for the balance of the 2009-11 biennium and approved a schedule and list of topics for meetings in 2011.

The agency's Key Performance Measure 3 requires that the Commission meet all of the recommended best practices for boards and commissions. As noted in the agency's Annual Performance Progress Report, it continues to conform to these practices.

## **2. OPDS's Contract and Business Services Division**

- a. One of the many functions of Contract and Business Services Division (CBS) is the management of the OPDS office and the ongoing effort to integrate the work of the two divisions and realize cost savings as a result of consolidation and coordination. In 2010 CBS planned and implemented the office's move to a new location. 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 had been vacant for several years and could be completed and leased at a lower cost than the former structure. CBS staff, under the direction of the Division Director, oversaw the design and construction of the building's interior, negotiated a ten-year lease on favorable terms and implemented a well-organized move with minimal disruption for staff. Staff morale improved significantly in the more convenient and comfortable environment of the new space.

The layout of the new structure has permitted more interaction between the staff of the two divisions and Appellate Division attorneys are now coordinating with CBS contract analysts to provide outreach to trial attorneys on a regional basis.

CBS also provides technical support for both divisions. Among the improvements introduced this year was an integrated electronic tickler system for attorneys and staff to set reminders for actions taken on cases in order to avoid missed deadlines.

The agency also successfully completed the migration of its website from an antiquated server to the new platform used by the Judicial Department which hosts the website. The website includes an online appellate referral form.

The most significant process improvement, however, was the conversion within CBS of a paper-intensive process for approval of non-routine expense requests submitted by public defense attorneys to a paperless system. This high-level programming conversion was developed at no additional expense to the agency, using existing resources. A plan to implement a similar process for accounts payable is still in the development stage.

In its effort to ultimately become a paperless office, CBS replaced its fax machines with modems that accept faxes only in electronic format.

- b. The principal work of this division, however, is the continuing organization, operation and oversight of the trial-level public defense system in Oregon.

CBS contract analysts under the direction of the Division Director administered more than 110 contracts for legal services statewide. This requires monthly reconciliation of

case counts from contractors and review of Judicial Department records to confirm appointments. Contract analysts also serve as the contact persons for judges and others who have questions or concerns about public defense contracts and the attorneys who practice under them. They participate in meetings with local justice system officials when PDSC examines delivery of services in their regions. They also assist in the review of requests for non-routine expenses that are submitted by attorneys in their regions of the state and work with Appellate Division attorneys to coordinate interaction between Appellate Division attorneys and the trial bar.

In addition to their other responsibilities, this year the contract analysts conducted an internal audit of a sample of 300 bills paid by accounts payable staff, each of whom process about 7,000 such bills each year. Only two minor errors were identified. As a result of the audit the division installed a new safeguard that alerts staff when a provider bills more than once for services on overlapping dates and decided that it would perform such an audit on an annual basis in the future.

Accounts payable staff under the supervision of the division's Business Services Manager processed more than 25,000 operating bills and fee statements submitted for payment from the Public Defense Services Account. As noted above, an audit performed by contract analysts indicated a high degree of accuracy in the processing of these bills and statements.

Division staff also processed more than 17,000 requests for pre-authorization of non-routine expenses. Requested services are sometimes authorized in increments. In 2010 the amounts of those increments were decreased in an effort to encourage providers to maximize efficiency. Requests for additional increments can be approved with adequate justification.

As has been true in previous years the agency exceeded its ambitious customer satisfaction goal as set forth in Key Performance Measure 2, receiving comments such as, "The PDSC is the most competent, efficient and professional agency I have ever dealt with in a government bureau in the State of Oregon."

c. Legal Counsel

In addition to providing legal advice to the agency and representing the agency in a variety of proceedings, the agency's General Counsel provides oversight on quality of representation issues for public defenders statewide. He works 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 significant quality issues are identified, he assists in outlining and implementing quality improvement measures. In 2010 he organized and staffed a site visit team that reviewed the quality of representation provided by the agency's Yamhill County contractor.

He also conducted an annual statewide public defense performance survey, the results of which were reported to the Commission, and he worked with the contract analysts to follow up on information received in the survey.

OPDS has a 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. One of the General Counsel's responsibilities is to oversee this process and refer complaints to contractors when appropriate and investigate and resolve others.

The General Counsel manages the certification process for attorneys wishing to handle public defense cases and participates in the process of identifying counsel to be assigned in new death penalty cases.

He also makes recommendations to the Division Director regarding the legal sufficiency of justifications submitted in support of requests for non-routine expenses. In 2010 he reviewed hundreds of these requests. Some denials were appealed to the Circuit Court and he appeared and defended the agency's actions in these proceedings.

The General Counsel, the Director of the Contract and Business Services Division and the Executive Director all participated in the planning and presentation of the annual continuing legal education seminar for public defense managers co-sponsored by the agency and the Oregon Criminal Defense Lawyers Association.

d. CBS Division Director

In addition to managing the division and overseeing the work of her staff, the director of the Contract and Business Services Division also serves as the agency's Chief Financial Officer. She prepared a draft budget proposal for the 2011-13 biennium which was approved by the Commission. She and her staff monitor the agency's expenditure of funds to ensure that available resources are not exceeded. She worked with a legislatively appointed interim workgroup to develop alternative revenue sources to replace funding from HB 2287, a portion of which was allocated to PDSC. She prepared reports regarding use of HB 2287 funds and changes in the agency's caseload for the Emergency Board during the legislative interim as directed by a budget note. She continued to work closely with legislative fiscal staff to keep them apprised of the agency's funding needs. She also provided fiscal impact reports to the 2010 legislature on bills affecting public defense. At the direction of the Commission, she prepared and presented updated retained counsel schedules used to determine financial eligibility of persons requesting appointed counsel and made regular reports to the Commission on the work of her division.

### **3. Appellate Division**

The Appellate Division lost its Assistant Chief Defender when Governor Kulongoski appointed her to the Oregon Court of Appeals. Her selection reflected her individual talents and achievements and was an honor for the division she served so ably for ten years.

The division did not directly fill her vacated position, rather it revised its management structure. Instead of one Chief Defender, one Assistant Chief, and two chief deputies, management now consists of the Chief Defender and three Chief Deputies.

The division restructured its approach to a particular class of cases (non-trial cases) that has unique and time-consuming initial procedural requirements. Non-trial cases consist of guilty and no contest pleas, probation hearings, and resentencing proceedings. By statute, the appellant must establish a “colorable claim of error” to file a notice of appeal in this case category. The colorable claim procedural requirement imposes a front-end investigatory function that delays filing the notice of appeal in most cases. Instead of assigning those cases to all the attorneys, the division now funnels the cases to one attorney for preliminary screening. By dedicating one attorney to address the initial set-up stage for this case category, the remaining attorneys are free to work directly on cases that do not contain this procedural impediment. The restructuring enables the division to address cases more efficiently.

In October 2010, AD issued a revised and expanded 144-page employee manual. The manual addresses AD policies, procedures, and commonplace issues that arise daily for attorneys and secretaries.

The division received over 135 applications to fill six attorney vacancies and selected six highly qualified and promising applicants. Five of the six attorneys have completed the initial training period, and the sixth attorney is near completion.

The 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 had been reduced to 226 days.

The division’s juvenile unit firmly established its presence in the state appellate system. One of unit’s primary goals is 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, including *State v. Rodgers/Kirkeby*, 347 Or 610 (outlining constitutional contours of permissible traffic stop); *State v. Moore*, 349 Or 245 (refining appellate rule regarding harmless error in criminal cases); *State v. Baker-Kroft*, 348 Or 655 (having a dirty house does not, by itself, constitute second degree criminal mistreatment); and, *State v. Sierra*, 349 Or 506 (identifying scope of kidnapping statutes).

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, AD internally articulated criteria to identify cases that would benefit from the two-judge panel without jeopardizing client interests.

The Division continued to enhance its outreach to the criminal trial bar. At the October Management Conference, it initiated the Attorney Regional Contact program, which designates individual AD attorneys as the appellate resource for trial level defense attorneys in specific judicial districts.

AD attorneys serve as members of several standing bar committees, regularly contribute to the Oregon Criminal Defense Lawyers Association's monthly newsletter, and present on a regular basis at CLE events on criminal and juvenile law.

The Division sponsored two CLE sessions in 2010, the "May Daze" event featuring then Court of Appeals Judge Jack Landau and Justice Thomas Balmer as well as two division attorneys, and the "Holidaze" event that focused on new amendments to the Oregon Rules of Appellate Procedure and the rules of professional responsibility.

Division attorneys participated in a number of attorney recruiting and information events, including the Oregon State Bar's annual Affirmative Action Program Spring Social and the bar's Annual Employment Retreat Employer Forum.

The Division submitted three legislative proposals to the interim Judiciary Committee addressing specific issues that arose in 2010: (1) establishing the filing date of documents filed by incarcerated persons, (2) conforming a provision of Oregon's Evidence Code to a recent United States Supreme Court ruling on the right to confrontation, and (3) restoring a ceiling on the punishment that a trial court may impose following a criminal defendant's successful appeal.

The Chief Defender provided a detailed description of the division's philosophy, structure, and performance measures at the April 2010 PDSC meeting. The Division recently conducted the attorney performance evaluation process for the 2010 evaluation period.

#### **4. Executive Director**

In addition to meeting her statutory obligations as set forth in ORS 151.219, in 2010 the Executive Director initiated or participated in the following activities.

After consulting with the Chair of the Commission she prepared the Commission's agenda for 2010 and planned hearings and presentations at Commission meetings, including hearings that focused on juvenile representation, the scope of the Commission's statutory responsibilities, a service delivery review in Deschutes County, approval of a service delivery plan for Clackamas County, updates on service delivery plans in Marion and Lane Counties and a presentation on the factors that affect the public defense caseload.

She and the CBS Director met with legislative leaders and members of the Ways and Means Committee and the Judiciary Committees to discuss the needs of public defense and the factors that control the cost of public defense services and appeared before the legislative Emergency Board and the Ways and Means Committee of the 2010 legislature to report on the agency's caseload and use of funds allocated under HB 2287.

She served as a member of the Governor's public safety team which met twice monthly to exchange information about developments within each of the agencies and changes affecting the whole public safety system.

She convened almost weekly meetings of the agency's management team. These meetings allow managers to remain informed about agency-wide issues and the activities of both divisions. They also permit regular discussion of Commission directives, budget priorities, emerging public defense issues, staff matters and other developments.

She, as well as the agency's General Counsel and Appellate Division attorneys participated in quality improvement efforts including serving on committees that plan continuing legal education programs for criminal and juvenile defense attorneys. The Executive Director chaired the Juvenile Law Training Academy workgroup that planned the 2010 academy CLE for attorneys who practice in juvenile court. This was the 6<sup>th</sup> annual event sponsored by the group, which is comprised of representatives of organizations interested in improving representation in juvenile dependency proceedings. She sought and obtained grant funding to support the CLE. She also participated in planning groups for CLE sessions sponsored by the Oregon Criminal Defense Lawyers Association and the Juvenile Law Section of the Oregon State Bar and served as a contributing editor of the Juvenile Law Reader published by Youth, Rights and Justice.

She served on the Oregon Law Commission's Juvenile Code Revision Workgroup which had multiple meetings aimed at revising the juvenile court jurisdictional statute to clarify the grounds for court intervention. The group was not able to arrive at consensus and the project, unfortunately, was abandoned. She also participated in the group's continued effort to obtain legislative approval of a bill that would codify the juvenile court procedure for determining competency of youth to aid and assist in their own defense.

She served on the Interbranch Workgroup with representatives of the legislature, the courts and administrative agencies to identify ways of improving the child welfare system and participated in the planning group that made a presentation to a joint session of the interim Judiciary Committees. One area of focus that emerged from the group's deliberations was a decision to seek additional funding to improve the quality of legal representation in juvenile dependency cases.

She and other agency staff continued to work with OPDS's volunteer advisory groups - the Contractor Advisory Group, the Quality Assurance Task Force and the Death Penalty Peer Panel - to receive input on important policy decisions.

She served on the Advisory Committee of the Judicial Department's Juvenile Court Improvement Project, a federally funded program to improve the functioning of the juvenile court in dependency cases, and on a DHS committee relating to rules regarding relatives of children in the dependency system and on the Child Welfare Discovery and Disclosure Advisory Council.

The Executive Director and the agency's General Counsel participated in the planning group that developed the new attorney mentoring program to be implemented by the Oregon State Bar in 2011 for all new Oregon attorneys.

## Challenges for 2011

### **The 2011-13 budget**

PDSC, like other state agencies, has been asked to address its budget needs for the coming biennium in the context of its current funding level. Because of the agency's inability to control the volume of cases in which counsel is appointed or the crime seriousness level of the offenses filed by the state, and its inability to control the cost of doing business of its providers, PDSC has very limited capacity to take steps other than to cease providing counsel at some point in the biennium in order to reduce the agency's budget needs.

At a PDSC meeting in October 2010, the Commission heard testimony about the practices of two district attorney offices that had lost deputy positions and had had to revise charging policies in order to manage with fewer staff members. Legislators have been advised that if such changes were made statewide a reduction in the cost of the public defense system could be realized without an interruption in the provision of services. As part of its budget presentation to the 2011 Legislature, PDSC will outline some of the options legislators might consider.

The agency's budget proposal includes several policy option packages that address long-term funding needs of the agency. These packages would: reduce caseloads for juvenile dependency attorneys, provide salary parity for appellate division attorneys with their Department of Justice counterparts, increase hourly rates for attorneys, provide parity of compensation for employees of non-profit public defender offices with district attorneys in their counties and increase compensation for investigators. The prospect of obtaining additional funding for these items when cuts in current funding levels are under consideration is not great.

Budget concerns are also the primary challenge for the Appellate Division. The Division does not want to lose the significant and hard-fought progress it has made toward timely brief filings. Similarly, a budget deficit will negatively affect the Division's capacity to provide high-quality representation for its clients, serve as a resource for the Oregon State Bar and the Oregon Legislature, and productively collaborate with the criminal defense trial bar.