

# PUBLIC DEFENSE SERVICES COMMISSION

## The Executive Director's Annual Report for 2009

February 2010

### Introduction

Like other years in which there is a regular legislative session, preparation for and participation in the legislative process was a major part of OPDS's work in 2009. Since the state experienced a severe budget shortfall at the end of the 2007-09 biennium and the beginning of the 2009-11 biennium, it was more important than ever that legislators be made aware of the critical nature of PDSC's mission.

The Public Defense Services Account budget ultimately approved by the legislature did not provide funding for the full 09-11 biennium and OPDS's internal operations had to be carefully monitored and vacancies left unfilled during 2009 because of significant cuts to funding for both the Appellate Division and the Contract and Business Services Division.

Nevertheless, in a very challenging economic environment, OPDS has been able to retain its contract providers and continue essential services. PDSC has continued to serve its oversight and policy making functions and OPDS has continued its vigorous pursuit of quality improvement. This report summarizes the major challenges and accomplishments of PDSC in 2009.

### PDSC's Challenges and Accomplishments in 2009

#### 1. Obtaining a Budget for 2009-2011

PDSC's budget proposal for 2009-2011 included an Essential Budget Level of \$235,977,608 General Fund dollars. (The essential budget level is the amount of funding that would be required for the agency to provide the same services it had provided in the previous biennium as determined by a fixed formula.) This amount represented an increase of \$21 million over the 2007-09 budget. In addition the agency requested policy option packages totaling \$39,182,189 to decrease the caseload for juvenile attorneys, increase the hourly rate and compensation for public defenders, and create a new OPDS division to handle post conviction relief cases.

PDSC's budget hearings occurred during the week of March 31. Prior to those hearings Ingrid Swenson and Kathryn Aylward visited with each of the members of the Public Safety Subcommittee of the Joint Ways and Means Committee and

met with some of them on multiple occasions during the course of the session in order to ensure that they were aware of both the agency's financial needs and its critical role in the public safety system.

At the initial hearing on March 31, Chief Justice Paul De Muniz presented the PDSC budget and introduced PDSC Chair Barnes Ellis. In his remarks, the Chief Justice reminded legislators that the public safety system must be viewed as a whole and that public defense is a critical component of that system. He also said that defense work is a noble calling and that no right is valued as highly by Americans as their right to liberty. It is these attorneys who protect that right and often go the extra mile for their clients without adequate compensation.

Chair Ellis provided a history of PDSC and reminded legislators of the fiscal crisis that occurred in 2003. When thanked by the committee for his years of service to public defense he said that it was the defenders who should be commended.

Ingrid Swenson, Kathryn Aylward and Rebecca Duncan presented the agency's budget proposal to the sub-committee, outlining the structure of OPDS, the scope of services provided, the agency's accomplishments, the measures taken to conserve resources and the factors that drive the public defense budget.

On April 1 public testimony was provided to the subcommittee by a number of invited witnesses. Attorney General John Kroger urged the subcommittee to adequately fund the defense function. He said that when defense attorneys are required to handle too many cases quality representation is compromised and over time it is important to move in the direction of parity between defense and prosecution attorneys. He said there are not any "extras" in defense services. The constitution requires these services.

Multnomah County District Attorney Michael Schrunk testified that he strongly supports adequate funding for public defense. He said that when a system is out of balance it does not function properly. Well-trained defense counsel are crucial.

Attorney Tonya Stiles-Johnson from the Juvenile Rights Project and the grandmother of one of her clients testified about a case in which Ms. Stiles-Johnson was ultimately successful in having her client placed with the grandmother despite continued opposition from the Department of Human Services. She explained the extent of the demands on the lawyer in these cases and the impact zealous advocacy can have on the outcome of a case.

Judge William Cramer from Grant and Harney Counties testified about the difficulty of providing public defense services in his two rural counties. The two current providers are aging. When additional attorneys are needed they must come from other counties. Caseloads in the district fluctuate substantially so it might be appropriate for PDSC to provide longer contracts to assure the

continued presence of local attorneys. Adequate funding is especially important in rural areas.

PDSC defense attorneys Angel Lopez, Jack Morris, Paul Lipscomb, and Bert Putney testified about the challenges facing public defense providers, the connection between compensation and quality of performance, the continuing departure of good lawyers from public defense representation and the difficulty of replacing them. Jack Morris said that the public defense system is on the verge of collapse in the rural areas of the state.

After PDSC's budget presentation the Co-Chairs of the Joint Ways and Means Committee issued their proposed budget. It included a number of reductions to the agency's initial Essential Budget Level (EBL) and eliminated all of the agency's policy option packages. A \$9.2 million reduction to EBL reflected a decline in projected trial level expenses as reported by PDSC to the Legislative Fiscal Office. In addition, vacant positions in the Appellate Division were eliminated, there was a reduction in services and supplies to the Contract and Business Services Division and an additional \$14.1 million reduction to the Public Defense Services Account. Legislators understood that a cut of that amount to the Account would mean that PDSC would be unable to provide services at the trial level for approximately a six-week period at the end of the 2009-11 biennium.

At the conclusion of the legislative session, after additional changes made in the final budget reconciliation bill, the total funds available to PDSC, including anticipated revenue through February of 2010 from HB 2287 (the court fee and surcharge bill) was \$214.8 million, leaving a potential deficit of \$10.6 million to cover projected expenses for 2009-11 (or approximately five weeks of public defense services). PDSC was directed to report to the 2010 legislature regarding the projected deficit at that time. One potential source for additional funding would be revenue generated by HB 2287 after March 1, 2010.

## 2. Achievements by OPDS's Contract and Business Services Division (CBS)

- (a) After PDSC's 2009-2011 budget received final legislative approval, CBS issued a request for proposals for all trial level and some appellate level public defense services. Responses to the request were received and reviewed and an initial statewide plan for distribution of resources was developed based on priorities and principles previously adopted by PDSC. The plan was presented to PDSC in executive session at the September 9, 2009 meeting. The presentation included proposed contract terms for providers in every county. Upon receiving direction from PDSC at a public hearing on September 10, 2009, CBS staff conducted negotiations and reached tentative agreement on contracts for all but a small portion of the caseload. At the October 23, 2009 PDSC meeting

these contracts were approved. The balance of the contracts for the two-year period ending December 31, 2011 were presented to the Commission at the December 10 and January 28 meetings.

- (b) CBS developed and issued its first request for proposals for mitigation specialists in death penalty cases to provide services under contract.
- (c) In addition to negotiating new contracts, CBS staff administered over 100 contracts for the provision of legal services during calendar year 2009. Accounts payable staff received and processed more than 16,000 requests for non-routine expenses and more than 27,000 operating bills and fee statements payable from the Public Defense Services Account. The turn around time for both these activities was very prompt<sup>1</sup>. Providers frequently express gratitude for the speed with which requests and payments are processed. CBS has a well-defined system for referring unusual or questionable expense requests to its general counsel for review.
- (d) CBS continues to develop and improve technical procedures that reduce costs and save staff time. For example, the 2009 contract negotiations were essentially a paperless process for the first time.
- (e) CBS's Alan Gibson designed software that automatically reviews contractor caseload reports by verifying the information in OJIN. In addition, Alan is working with the analysts to develop a system in which all caseload data is maintained in a central database rather than being kept in separate spreadsheets for each contractor. This centralization will allow the agency to produce information for fiscal impact statements quickly and with greater accuracy.

### 3. Achievements of OPDS's Appellate Division

- (a) Appellate judges, Department of Justice attorneys, and individuals in the defense bar acknowledge the superior work produced by the division's attorneys over the past year, resulting in major defense victories in several cases. Superior representation in the appellate courts remains the division's core mission.
- (b) The division's production level remained high (740 merit briefs filed in the Court of Appeals) despite several attorney position vacancies during the year.

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<sup>1</sup> During the 2007-09 biennium staff processed 98% of requests within five days of receipt and 98% of invoices within ten days of receipt.

- (c) The Division again completed evaluations of all attorneys and staff, using its model performance review process.
- (d) With technical assistance from CBS, AD implemented an electronic brief bank that provides AD attorneys instant access to written legal analyses and arguments prepared by their colleagues.
- (e) Division attorneys contribute a monthly column on emerging legal issues to the OCDLA monthly newsletter and are frequent speakers at criminal and juvenile law CLE events.
- (f) The division mounted a serious challenge to Oregon's state constitutional rule that permits non-unanimous jury verdicts in felony cases. The division collaborated with the Stanford Law School Supreme Court Litigation Clinic to file a petition for *certiorari* in the United States Supreme Court in the case *Bowen v. Oregon*. Though the Court ultimately denied the petition, the division gained considerable experience (on top of prior appearance in the cases *Sanchez-Llamas v. Oregon* and *Oregon v. Ice*) practicing in the United States Supreme Court and coordinating the briefing from "friends of the court" organizations interested in the litigation.
- (g) Division management continued to consult and collaborate with the appellate courts and the Department of Justice to implement appellate system efficiencies that do not negatively impact client interests.
- (h) The division designated a senior deputy as a mandamus resource attorney for trial level defenders.
- (i) AD lawyers and management participated in several job fair and other recruiting events, including events directed at minority law students, to interview potential applicants, inform students of the division's work, and generally raise the division's profile at the three Oregon law schools.

#### 4. OPDS Structural and Quality Improvement Initiatives

- (a) In 2009, the Commission reviewed the delivery of public defense services in four geographic areas. It conducted initial service delivery reviews in Clackamas and Polk Counties and conducted follow-up reviews in Marion and Lane Counties. In each of these locations the Commission received reports from staff and testimony from judges, prosecutors, defense contractors and others regarding the operation of local justice systems, the performance of public defense providers and, in some cases, recommendations for change. In each county a plan, or a revised plan for service

delivery was either developed or is under development. In Polk County a new contractor was added to handle the criminal conflict caseload and in Lane County the Commission directed that OPDS pursue a contract with a consortium of attorneys to handle the criminal conflict caseload in place of the panel that had been in place since 2004.

- (b) The Commission also continued its review of services in post conviction relief cases and approved representation guidelines as an educational tool for attorneys in drug court cases.
- (c) During 2009 Quality Assurance Task Force site teams completed evaluations of the representation provided by public defense contractors in Crook, Jefferson, Klamath and Lake Counties. In addition, a small team updated previous Commission and site team reviews in Umatilla County and the Task Force revised and expanded on its list of best practices.
- (d) OPDS receives complaints regarding both the expenditure of public defense funds and the performance of public defense providers from judges, prosecutors, clients and others. OPDS maintains a database in which contacts regarding complaints are recorded. The agency's general counsel reviews complaints and determines whether an investigation is warranted. If a complaint is sustained at the conclusion of an investigation he determines in consultation with the CBS director and sometimes the executive director what if any remedial action should be taken. In some cases attorneys have been removed from court appointment lists. Counsel also works closely with the Oregon State Bar to monitor complaints received by the bar about the work of public defense attorneys.
- (e) In 2009 OPDS conducted its third annual statewide quality of representation survey of judges, district attorneys and Citizen Review Boards. Results of the survey permit OPDS to monitor system wide changes in overall quality of representation and provide an opportunity to those surveyed to bring both good and bad performance to OPDS's attention.

## 5. Other Activities of OPDS's Managers and Staff

- (a) OPDS's management team continues to meet on a regular basis. Instead of monthly meetings the group now meets weekly for shorter periods. This has improved the focus of management team meetings and allowed for more timely consideration of issues.

- (b) OPDS conducted its third annual all staff survey. There was an increase in the number of employees who felt appreciated and happy to be at OPDS. There were improved marks for leadership and planning and a noticeable increase in the number of responses saying that employees felt that they are treated with respect by managers and coworkers. The office did well in communication, which had been an area of focus in the previous year. There was a slight decline in satisfaction with career development and some employees felt less challenged than they reported feeling the previous year and there was a slight decrease in the number of employees who felt they were receiving the appropriate level of training. OPDS management and division directors use survey results to guide them in policy development.
- (c) Evaluations of OPDS's management team members, begun in late 2008, were completed in April of 2009. The process included a self evaluation and input from staff, other managers and the executive director. In addition to evaluating past performance the process involves establishing goals for the coming year and a session in which other managers offer ideas and support to assist each other in reaching their goals.
- (d) OPDS managers participated in a number of legislative workgroups in 2009 addressing issues such as: methods for reducing public safety system costs, identifying categories of offenders for early release (HB 3508), implementation of victims' rights legislation (SB 233), distribution of resources under the court fee bill (HB 2287), assisting veterans involved in the public safety system, and creating of a statutory framework for challenging the competency of youth in delinquency cases system (HB 3220). In addition the executive director serves on the advisory board of the Juvenile Court Improvement Project, the Governor's public safety team and a number of Department of Human Services advisory committees. Paul Levy staffed the Oregon State Bar Post-conviction relief Task Force which promulgated performance standards for attorneys representing clients in PCR cases. He also completed work on the Oregon Judicial Department Juror Orientation Video Workgroup.
- (e) OPDS staff including managers participated in the planning of continuing legal education programs for OPDS's own attorneys as well as for other defenders around the state. Sponsors of these programs include the Oregon Criminal Defense Lawyers Association, the Oregon State Bar's Criminal and Juvenile Law Sections, the Juvenile Court Improvement Project, the University of Oregon School of Law and the Juvenile Law Training Academy (of

which OPDS is a founding member). The Appellate Division sponsored three in-house CLE events in 2009 that were open to other defenders. Paul Levy organized an Oregon Criminal Defense Lawyer's Association CLE on post-conviction relief scheduled for March of 2010. OPDS also co-sponsored the annual public defense management seminar. Issues covered included innovations in attorney training, communication with the media, employee discipline, group health plans, client centered representation, working with boards of directors, law firm management pitfalls, and best practices endorsed by the Quality Assurance Task Force.

- (f) OPDS meets regularly with representatives of its contractors who advise OPDS on quality assurance and other matters of mutual interest. The Contractor Advisory Group and the Death Penalty Peer Panel meet at least annually and the Quality Assurance Task Force more frequently in order to oversee the contractor site visit process and the continuing development of best practices for public defense providers. These groups provide invaluable input and advice on issues critical to public defense.

#### Challenges for 2010-2011

It appears that revenue collected under HB 2287 will fall well below the amount projected. If that is the case legislators are aware that PDSC will need revenue from another source to meet the demand for public defense services funded from the Account for the final weeks of the biennium.

Internally, OPDS has been striving to maintain all necessary operations while cutting costs. Little flexibility remains. The agency has operated in a very cost efficient manner since its inception and therefore finds it difficult to identify additional cost cutting measures that do not interfere with essential functions. PDSC will seek legislative approval of a fund shift to assist in addressing the shortfall at OPDS.

Looking beyond the current economic downturn, OPDS needs to continue to pursue adequate compensation for defenders, both on its own staff and among its contractors, and reduced caseloads. OPDS must continue to work with its contractors to improve quality, especially in juvenile dependency and delinquency cases, in post conviction relief cases and in civil commitment cases. It must also work with contractors to increase diversity within public defense offices in order for them to better reflect the diversity of the communities they serve.