

PDSC Service Delivery Plan for Post Conviction Relief Cases

(June 18, 2009)

Introduction

Since developing its first Strategic Plan in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its mission to deliver quality, cost-efficient public defense services in Oregon. Recognizing that increasing the quality of legal services also increases their cost-efficiency by reducing risks of error and the delay and expense associated with remedying errors, the Commission has developed strategies designed to improve the quality of public defense services and the systems across the state for delivering those services.

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through 2008, the Commission completed investigations of the local public defense systems in Baker, Benton, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into service delivery in post conviction relief cases and a summary of the testimony received at the PDSC's public meeting in Salem on Thursday, February 14, 2008. The final version of this report will contain PDSC's service delivery plan for post conviction relief cases.

PDSC's Service Delivery Planning Process

There are four steps to PDSC's service delivery planning process. First, the Commission has identified regions in the state and particular areas of practice for the purposes of reviewing public defense delivery systems and services, and addressing significant issues of quality and cost-efficiency in those systems and services.

Second, starting with preliminary investigations by OPDS and the preliminary draft of a report such as this, the Commission reviews the

condition and operation of local public defense delivery systems and services in each county or region or in a particular area of practice by holding one or more public meetings to provide opportunities for interested parties to present their perspectives and concerns to the Commission.

Third, after considering OPDS's preliminary draft report and public comments during the Commission's meetings, PDSC develops a "service delivery plan," which is set forth in the final version of OPDS's report. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or area of practice or propose changes to improve the delivery of public defense services. In either event, for geographic areas the Commission's service delivery plans (a) take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts. Similar factors are considered with respect to the delivery of services in particular areas of practice.

Finally, under the direction of PDSC, OPDS and contractors subject to the Commission's service delivery plans are urged to implement the strategies or changes proposed in the plans. Periodically, OPDS and these contractors report back to PDSC on their progress in implementing the Commission's plans and in establishing other best practices in public defense management.

Any service delivery plan that PDSC develops will not be the last word on a service delivery system, or on the quality and cost-efficiency of the public defense services in the area. The limitations of PDSC's budget, the existing personnel, level of resources and unique conditions in each county and area of practice, the current contractual relationships between PDSC and its contractors, and the wisdom of not trying to do everything at once, place constraints on the Commission's initial planning process in any region or practice area. PDSC's service delivery planning process is an ongoing one, calling for the Commission to return to each region of the state and area of practice over time in order to develop new service delivery plans or revise old ones. The Commission may also return to some areas on an expedited basis in order to address pressing problems.

Background and Context to the Service Delivery Planning Process

The 2001 legislation establishing PDSC was based upon an approach to public defense management widely supported by the state's judges and public defense attorneys, which separates Oregon's public defense function from the state's judicial function. Considered by most

commentators and authorities across the country as a “best practice,” this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, while judges remain responsible for appointing attorneys to represent eligible clients, the Commission is now responsible for the provision of competent public defense attorneys.

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission’s view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in its mission statement, PDSC is also dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

Service delivery planning is one of the most important strategies PDSC has undertaken to promote quality and cost-efficiency in the delivery of public defense services. However, it is not the only one.

In December 2003, the Commission directed OPDS to form a Contractor Advisory Group, made up of experienced public defense contractors from across the state. That group advises OPDS on the development of standards and methods to ensure the quality and cost-efficiency of the services and operations of public defense contractors, including the establishment of a peer review process and technical assistance projects for contractors and new standards to qualify individual attorneys across the state to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and lawyers have visited contractors in Benton, Clackamas, Columbia, Crook, Deschutes, Douglas, Clackamas, Jackson, Jefferson, Lane, Lincoln, Linn, Multnomah, Umatilla and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have

highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and developed a statewide Service Delivery Plan for juvenile representation.

In 2007 PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in these cases was approved by the Commission in June of 2007.

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that the impact of such shortages is greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

“Structure” versus “Performance” in the Delivery of Public Defense Services

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service delivery planning process. That process is aimed primarily at reviewing and improving the “structure” for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into “best practices,” recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.¹ A public agency like PDSC, whose volunteer members are chosen for their variety

¹ Debates over the relative effectiveness of the structure of public defender offices versus the structure of private appointment processes have persisted in this country for decades. See, e.g., Spangenberg and Beeman, “Indigent Defense Systems in the United States,” 58 Law and Contemporary Problems 31-49 (1995).

and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

Most of PDSC's other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the "performance" of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time to time in the course of the Commission's service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission's deliberative processes. OPDS, with advice and assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

In light of the distinction between structure and performance in the delivery of public defense services and the relative capacities of PDSC and OPDS to address these issues, this report will generally recommend that, in the course of this service delivery planning process, PDSC should reserve to itself the responsibility of addressing structural issues with policy implications and assign to OPDS the task of addressing performance issues with operational implications.

Organizations Currently Operating within the Structure of Oregon's Public Defense Delivery Systems

The choice of organizations to deliver public defense services most effectively has been the subject of a decades-old debate between the advocates for "public" defenders and the advocates for "private" defenders. PDSC has repeatedly declared its lack of interest in joining this debate. Instead, the Commission intends to concentrate on a search for the most effective kinds and combinations of organizations in each region of the state from among those types of organizations that have already been established and tested over decades in Oregon.

The Commission also has no interest in developing a one-size-fits-all model or template for organizing the delivery of public defense services in the state. The Commission recognizes that the local organizations currently delivering services in Oregon's counties have emerged out of a unique set of local conditions, resources, policies and practices, and that a viable balance has frequently been achieved among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of

taxpayer dollars available for public defense services in Oregon. Accordingly, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to those proposals. As the largest purchaser and administrator of legal services in the state, the Commission is committed to ensuring that both PDSC and the state's taxpayers are getting quality legal services at a fair price. Therefore, the Commission does not see its role as simply continuing to invest public funds in whatever local public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide services in each region of the state.

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of their relative advantages and disadvantages. This discussion is by no means exhaustive. It is intended to highlight the kinds of considerations the Commission is likely to make in reviewing the structure of any local service delivery system.

Over the past two decades, Oregon has increasingly delivered public defense services through a state-funded and state-administered contracting system. As a result, most of the state's public defense attorneys and the offices in which they work operate under contracts with PDSC and have organized themselves in the following ways:

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.² Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated regions. In either case, PDSC expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, administer specialized internal training and supervision programs for attorneys and staff, and ensure the delivery of effective legal representation, including representation in specialized justice programs such as Drug Courts and Early Disposition Programs. As a result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

Because of the professional management structure and staff in most public defender offices, PDSC looks to the administrators of these offices, in particular, to advise and assist the Commission and OPDS. Boards of directors of public defender offices, with management responsibilities and fiduciary duties required by Oregon law, also offer PDSC an effective means to (a) communicate with local communities, (b) enhance the Commission's policy development and administrative processes through the expertise on the boards and (c) ensure the professional quality and cost-efficiency of the services provided by their offices.

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public

² Spangenberg and Beeman, *supra* note 2, at 36.

defender office alone.³ As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

2. Consortia. A “consortium” refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC’s RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

Consortia offer the advantage of access to experienced attorneys who prefer the independence and flexibility associated with practicing law in a consortium in which they still represent public defense clients under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger law firms, but in which they no longer wish to practice law.

In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the consortium is reasonably well-organized and managed, PDSC has fewer contractors or attorneys to deal with and, therefore, OPDS can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar’s “firm unit” rule, conflict cases can be cost-efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys to handle such cases and,

³ Id.

frequently, to pay both the original attorney with the conflict and the subsequent attorney for duplicative work on the same case. Finally, if a consortium has a board of directors, particularly with members who possess the same degree of independence and expertise as directors of not-for-profit public defenders, then PDSC can benefit from the same opportunities to communicate with local communities and gain access to additional management expertise.

Some consortia are made up of law firms, as well as individual attorneys. Participation of law firms in a consortium may make it more difficult for the consortium's administrator to manage and OPDS to monitor the assignment and handling of individual cases and the performance of lawyers in the consortium. These potential difficulties stem from the fact that internal assignments of a law firm's portion of the consortium's workload among attorneys in a law firm may not be evident to the consortium's administrator and OPDS or within their ability to track and influence.

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services the consortium delivers. These methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receive court appointments.

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus, PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. Those observations simply suggest that PDSC may have less influence on the organization and structure of this type of contractor and, therefore, on the quality and cost-

efficiency of its services in comparison with public defender offices or well-organized consortia.

Finally, due to the Oregon State Bar's "firm unit" rule, when one attorney in a law firm has a conflict of interest, all of the attorneys in that firm have a conflict. Thus, unlike consortia, law firms offer no administrative efficiencies to OPDS in handling conflicts of interest.

4. Individual attorneys under contract. Individual attorneys provide a variety of public defense services under contract with PDSC, including in specialty areas of practice like the defense in aggravated murder cases, in post-conviction relief cases, and in geographic areas of the state with a limited supply of qualified attorneys. In light of PDSC's ability to select and evaluate individual attorneys and the one-on-one relationship and direct lines of communications inherent in such an arrangement, the Commission can ensure meaningful administrative oversight, training and quality control through contracts with individual attorneys. Those advantages obviously diminish as the number of attorneys under contract with PDSC and the associated administrative burdens on OPDS increase.

This type of contractor offers an important though limited capacity to handle certain kinds of public defense caseloads or deliver services in particular areas of the state. It offers none of the administrative advantages of economies of scale, centralized administration or ability to handle conflicts of interest associated with other types of organizations.

5. Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as "overflow" from other types of providers. This organizational structure does not involve a contractual relationship between the attorneys and PDSC. Therefore, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, carefully administered qualification process for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation into Delivery of Services in Post Conviction Relief Cases

The primary objectives of OPDS's investigations into particular areas of practice are to (1) provide PDSC with an assessment of the strengths and weaknesses of service delivery in those areas for the purpose of assisting the Commission in its determination of the need to change the structure or operation of the system and (2) identify the kinds of changes that may be needed and the challenges the Commission might confront in implementing those changes. PDSC's assessment of the strengths and weaknesses of public defense delivery system begins with a review of an OPDS report like this.

PDSC's investigations into service delivery systems in various parts of the state or into particular areas of practice serve two other important functions. First, they provide useful information to public officials and other stakeholders in the justice system about the condition and effectiveness of the system. The Commission has discovered that "holding a mirror up" to these systems for all the community to see can, without any further action by the Commission, create momentum for reassessments and improvements. Second, the history, past practices and rumors in local justice systems or particular areas of practice can distort perceptions of current realities. PDSC's investigations of public defense delivery systems can correct some of these local misperceptions.

On February 14, 2008 from 9:00 a.m. to 1:00 p.m., PDSC held a public meeting in Salem at the Labor and Industries Building. The purpose of that meeting was to (a) consider the results of OPDS's investigation into post conviction relief as reported in the preliminary draft report, (b) receive testimony and comments from interested officials and other individuals regarding the quality of the service delivery, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Post Conviction Relief Cases.

The initial draft of this report was intended to offer guidance to PDSC's guests at its February 14, 2008 meeting, as well as to the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving public defense delivery in post conviction relief cases. This revised draft report is intended to provide a framework to guide the Commission's discussions about the condition of service delivery in this area of practice and the

range of policy options available to the Commission – from concluding that no changes are needed to significantly restructuring the delivery system. In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the justice system is the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan

A. Description of Post Conviction Relief

What is post conviction relief?

Post conviction relief (PCR) is the principal means by which a convicted person may challenge the lawfulness of a criminal conviction or the proceedings that resulted in the conviction. It is often the only avenue for seeking redress for fundamental miscarriages of justice that may not appear on the record. Consequently, it is an important component of Oregon's public defense system even though it represents only a small portion of the public defense caseload.⁴

PCR is a remedy reserved for situations in which other remedies are not available. A petition for post conviction relief may not be filed when a motion for new trial, a motion in arrest of judgment or direct appellate review remain available.⁵ A criminal judgment must be final before a petition for post conviction relief may be filed. All formerly available common law post-conviction remedies except habeas corpus were abolished upon enactment of Oregon's post conviction relief act. ORS 138.540.

What are the grounds for relief?

ORS 138.530 requires the court to grant post conviction relief if one or more of the following grounds is established by the petitioner:

- A substantial denial of the petitioner's federal or state constitutional rights in the trial or appellate court proceedings that rendered the conviction void
- Lack of jurisdiction by the court to impose the judgment
- A sentence in excess of that authorized by law or an unconstitutional sentence
- The unconstitutionality of the statute under which the petitioner was convicted

⁴ There were 536 post conviction cases in Oregon in 2008 out of a total of 170,306 trial-level non-death penalty public defense cases.

⁵ A petitioner is not required to pursue an appeal before filing a petition for post-conviction relief but when an appeal has been taken, no ground for relief may be asserted in the PCR petition unless it was not and could not reasonably have been asserted in the appellate proceeding (except where the appellant was indigent and was denied counsel and the ground for relief was not actually decided by the appellate court). ORS 138.550.

The most frequent circumstance in which relief is sought is upon the petitioner's claim of ineffective assistance of counsel. Among the other circumstances in which relief has been granted are cases alleging faulty guilty pleas, governmental misconduct, denial of adequate defense resources, and the mental incompetence of the defendant.

What forms of relief are available in PCR?

The post conviction court is authorized to provide a variety of forms of relief including release from custody or supervision, a new trial, modification of the sentence, or "other proper and just relief." ORS 138.520.

What is the appropriate venue for PCR proceedings?

ORS 138.560 provides that proceedings must be commenced in the circuit court of the county in which the petitioner is imprisoned. If the court finds that the hearing can be more expeditiously conducted in the county of conviction, the court may order the case transferred to that county. SB 45 (2003) amended the venue statute to provide that the court may deny a motion for change of venue when a petitioner in a PCR proceeding is transferred to a state institution in another county.

How are proceedings initiated?

PCR is a civil proceeding in which the petitioner carries the burden of proof by a preponderance of the evidence. The proceeding must be initiated by the convicted person, except that in some death penalty cases they may also be initiated by a person with a significant relationship to the convicted person. The petitioner may request appointment of counsel by filing an affidavit stating inability to pay. Once appointed, counsel may move to amend the petition as filed by the petitioner within 15 days following appointment or as otherwise allowed by the court. ORS 138.590.

What is the deadline for initiating proceedings?

There is a two-year statute of limitations for post conviction relief actions that begins to run when the conviction has become final for purposes of appeal. ORS 138.510. The time frame for relief under 28 USC 2241(d)(1) of the federal Antiterrorism and Effective Death Penalty Act, however, is only one year and while the statute is tolled once the petition for post-conviction relief is filed, if an Oregon petitioner does not file the state petition until after the federal statute has run, the petitioner (except under rare circumstances) is barred from relief under the federal act.

What are some of the other pitfalls to be avoided in state proceedings which may limit or defeat federal claims? (These will be described in more detail in the oral presentation.)

- Exhaustion of state remedies (Requires a petition for review in the Oregon Supreme Court if the Court of Appeals upheld the denial of the PCR request)
- Procedural default rule and the doctrine of independent and adequate state grounds
- Presentation of facts and proper statement of federal claim

How are PCR hearings conducted?

ORS 138.620(1) requires that the petitioner be present at any hearing on the petition (other than a hearing on a defense demurrer or other legal issue) but the court may order that such appearance be by telephone or other communication device and this is the most common means of appearance. ORS 138.622 permits the court to approve the appearance of any of the parties, counsel for the parties or witnesses by telephone or other communication device approved by the court. The statute prohibits this alternative form of appearance for petitioner or petitioner's counsel, however, unless the facilities used enable the petitioner to consult privately with counsel during the proceedings. Evidence at the hearing may be in the form of affidavits, depositions, oral testimony or other competent evidence. ORS 138.620(2).

What is the appropriate role of the client in PCR proceedings?

In state post conviction cases the client is ultimately responsible for raising all appropriate issues, *McClure v. Maass*, 110 Or App 119 (1991), *rev. denied*, 313 Or. 74 (1992). ("A petitioner's failure to bring counsel's refusal to raise an issue to the trial court's attention in the first post-conviction proceeding bars subsequent post-conviction litigation on that issue.")

How should an attorney prepare for a post conviction proceeding?

The following outline is derived from materials prepared by Wendy Willis, a former Assistant Federal Defender, as part of her presentation in March 2002 at an Oregon Criminal Defense Lawyers Association seminar on post conviction relief. This outline is provided only as a very basic summary of the components of representation in PCR cases. As noted below, an Oregon State Bar work group developed performance standards that were approved by the Board of Bar

Governors in March of 2009 for attorneys practicing in this area.

- Preparation by counsel:
 - Meeting with client
 - Review of written materials (including transcript; court file, state's file, trial and appellate attorneys' files, bar files on attorneys, jail records (including medical records)
 - Investigation (trial team, client, client's family, witnesses, law enforcement personnel, jurors, DNA evidence, appellate counsel)
 - Consultation with appropriate experts (forensic experts, mental status experts, legal experts, statisticians or social scientists)
- Discovery – Oregon Rules of Civil Procedure govern in PCR cases
- Pleading – framing the issues, preserving claims, exhaustion and default
- Preparation of client for deposition and hearing
- Post conviction hearing: evidence and methods of proof
- Findings of fact and conclusions of law
- Appeal and petition for review - role of appellate attorney

B. Quality Concerns

Concern about the overall quality of representation in post conviction relief cases is not a new issue for PDSC. Since the early days of the Commission the problem has been discussed and a number of possible solutions offered. There are, of course, some attorneys who provide the highest quality of representation in these cases and who have won relief for their clients from a variety of sentences. Unfortunately, however, the quality of performance is very uneven and it is therefore appropriate for the Commission to consider what steps can be taken to improve quality statewide.

Indigent Defense Task Force III Report

In May 2000 the Oregon State Bar's Indigent Defense Task Force III Report expressed significant concerns were about the quality of representation being provided in post conviction relief cases. The Task Force noted that its members were especially concerned about inadequacies in representation in post conviction cases since post conviction relief is supposed to provide a forum for monitoring the adequacy of representation in other types of cases. It found that PCR cases were handled almost exclusively in a relatively few judicial districts where state prisons are located and that small firm contractors in these areas handle a disproportionate amount of the work and that, as a result relatively few judges and practitioners have firsthand experience with these cases. Judges in these areas and the state Indigent Defense Services Division reported significant difficulty finding competent attorneys willing to accept the cases at the rates offered. Funding for these cases was considered grossly inadequate. The Task Force reported on its interview of Steven Wax, the Federal Defender for the

District of Oregon. Mr. Wax's perspective is a uniquely broad one since his office represents persons convicted in state courts who seek relief in federal habeas corpus. He noted that post conviction cases are even more under-funded than trial level representation since trial level cases are often negotiated by way of plea so that providers assume that a certain percentage of cases will be resolved without trial. But this assumption does not apply to post conviction cases, virtually all of which go to trial since there is no procedural mechanism for negotiated resolutions. Every post conviction case, therefore, requires thorough investigation, preparation, and litigation. The Federal Defender's Office had found, however, that few post conviction cases in state court were investigated. That office has investigated cases five or ten years later, discovered new evidence and, in some cases, successfully obtained a new trial for the client. Mr. Wax noted that the problem is exacerbated by attorneys' reliance on the *McClure v. Maass, supra*, standard, which allows post conviction practitioners to shift the burden to their clients to identify errors that occurred at trial. Of course few indigent clients have the legal sophistication, technical knowledge or investigative resources to adequately identify the manner in which their trial level representation may have been legally inadequate. He also noted that issues not raised in the state court proceedings were becoming increasingly difficult to raise during later federal review. Constitutional violations not alleged by the state post conviction attorney often are deemed waived by federal courts. It was recommended to the task force that increased funding, additional investigative resources, additional education and greater oversight be provided in post conviction relief cases.

C. Possible Solutions

In a status report on April 19, 2002 the Task Force reported that no remedy other than the creation of a statewide entity would be able to provide competent and economical representation in post conviction cases. It noted the advantages of a single specialized office where lawyers could develop the expertise to handle PCR cases in an efficient manner, like the Oregon Department of Justice has done in the defense of these cases.

The PDSC created its own workgroup in June of 2002, chaired by the Vice-Chair of the Commission, Shaun McCrea, to explore solutions to the problem. Among the proposals explored were the drafting of performance standards, and the consolidation of representation at both the appellate level and the trial level. No formal request was apparently made to the bar to create a work group on performance standards until 2005. At that time a bar group was already working on updating performance standards in juvenile and criminal cases and the bar suggested that the post conviction relief project be postponed until the completion of the earlier project. In March of 2007 a formal request was made to the bar to create a task force to develop performance standards for post conviction relief practitioners. The proposal was approved and task force

members were appointed.⁶ That task force completed its work and proposed a set of performance standards that have now been approved by the Oregon State Bar and are available on its website⁷. A summary of the testimony of Dennis Balske, the chair of the group, describing the role of the new standards at the March 12, 2009 PDSC meeting is set forth below.

Consolidation of representation has also been pursued. Post-conviction relief appeals (in other than death penalty cases) are now being directed almost exclusively to the Oregon Appellate Consortium, a group of highly experienced appellate attorneys. PDSC has proposed in several legislative sessions a budget policy package that would create four full time-equivalent positions at OPDS that would be devoted to PCR trial level representation.⁸ These packages have not been approved. As an alternative, OPDS has attempted to identify a group of well-qualified private providers to concentrate on PCR representation at the trial level. Currently two Salem practitioners are devoting a significant amount of their professional time to these cases.⁹

Other efforts at improving representation have come from the Oregon Criminal Defense Lawyers Association, which continues to sponsor a post-conviction relief seminar every two years¹⁰, and from the Federal Defender's office which offers advice and assistance to attorneys working on these cases and provides speakers and program materials for OCDLA's seminars. The Bar's Criminal Law CLE volume includes a chapter summarizing the post conviction relief statutes and case law co-authored by Chief Justice Paul J. De Muniz, Federal Defender Steven Wax, Assistant Attorney General Lynn Larsen, and PCR attorneys Douglas Park and Andy Simrin.

Unfortunately, despite the efforts that have been made, OPDS continues to receive reports about quality concerns from a variety of sources including the Federal Defender, PCR trial judges, Department of Justice attorneys, Appellate Consortium attorneys, the Client Assistance Office at the bar, clients, and at least one correctional officer.

OPDS is also advised that some of the judges who hear post conviction cases on a regular basis exacerbate the problem by discouraging or attempting to prevent

⁶ Task Force members were: Dennis Balske, Tony Bornstein, Noel Grefenson, Lynn Larsen, Harrison Latto, Paul Levy, Ingrid MacFarlane, Mark Olive, Rita Radostitz, Matt Rubenstein, Marc Sussman, Hon. Youlee You.

⁷ <http://www.osbar.org/docs/resources/ConvictionReliefProceedings/CSPCR3.pdf>.

⁸ In the 2007 session, PDSC's Policy Package No. 102 sought an increased allocation for the Legal Services Division of \$835,293 to add three Deputy Public Defender 1 positions and one Senior Deputy Public Defender 2 position. A reduction in the allocation to the Public Defense Services Account of \$531,840 would have meant a net impact of \$303,453 to fund the package.

⁹ In addition, the Marion County Association of Defenders continues to represent a significant number of clients in PCR cases.

¹⁰ OCDLA included a review of the new performance standards for post conviction relief cases in a March 2009 CLE in Salem.

full review of the issues raised in these proceedings. It is hoped that improved representation might result in effective challenges to these practices.

Although neither the federal nor the state constitution require appointment of counsel at public expense in post conviction cases, in the past when the legislature has considered the elimination of the right to representation, the Department of Justice, among others, has advised against such action.¹¹

Testimony provided by invited guests and others at the Commission's February 14, 2007 meeting highlighted additional concerns and included additional recommendations for improvements. In addition to the measures previously recommended for consideration - enhanced compensation, a continued effort to centralize services either at OPDS or through contract providers, and additional training opportunities for attorneys - presenters at the February 14 meeting identified changes to statutes, rules and practices that might impact quality.

Summary of Testimony at February 14, 2008 Meeting

At its meeting on February 14, 2008, the Commission heard testimony from attorneys Noel Grefenson and Marc Sussman, both of whom represent petitioners in trial level PCR cases.

Mr. Grefenson said that he had been asked by PDSC in 2006 to enter into a contract to handle PCR trial level cases, that he agreed to such a contract, that he currently receives approximately five appointments per month and has about 30 active cases in his office at any one time.

After accepting this assignment he met with the paralegals at the prisons and offered to assist them in getting the materials they needed to do their work. They agreed to let him know if his clients were expressing dissatisfaction with his representation. He has received only one bar complaint since 2006.

Upon receiving an appointment in one of these cases, his office sends the former attorney a release of information from the client and begins gathering records that are then scanned and organized. He receives cases from all parts of the state. Investigating cases that arise in other parts of the state can be difficult. Petitioners have a right, and if they will later be seeking relief in federal court, an obligation, to ensure that all viable claims are raised. Prison inmates often lack the skill to do that.

¹¹ In 2003, for example, the Department of Justice testified in opposition to HB 2092 which would have eliminated the right to counsel in post conviction cases. The bill was referred out of the House Judiciary Committee without recommendation and was sent by prior referral to the Ways and Means Committee where it remained upon adjournment. In March of 2003 appointment of counsel in all PCR cases was suspended as part of the Oregon Judicial Department's Indigent Defense Budget Reduction Plan and was not resumed until July 1, 2003.

ORCP 17 requires lawyers to certify only meritorious claims, but the case law holds petitioners responsible for not raising any other issues that they might claim as a basis for relief. For lawyers this creates a dilemma. In order to maintain a good relationship with his clients an attorney may not be able to filter out the groundless claims from the meritorious ones. Some cases are resolved quickly when the inmate realizes that if he is successful in overturning his plea agreement the result will not be a dismissal of the case but a return to court to face all of the charges again, including those that were dismissed. Other cases are huge cases with thousands of pages of transcript. If an attorney gets bogged down with too many cases, the attorney may just file claims without setting forth the evidence to support them.

Mr. Grefenson receives \$2,100 per case and post conviction work is approximately 50 to 75% of his practice. He does not have an investigator on staff but hires them as needed. He does not use an investigator in many cases. His staff does contact some witnesses directly. He obtains documents from the District Attorney's office and from trial counsel. He gets medical and crime lab reports when they are involved. He does not use the Oregon Rules of Civil Procedure to request production of documents. He does not often take depositions of witnesses and uses affidavits instead. Although there is a hearing in every case, most of the time he does not call live witnesses.

In Marion County, PCR cases are assigned to all of the judges except those at the annex and to one of the criminal judges. The case remains with the original judge throughout the proceeding. A status conference is scheduled in each case. Counsel notify the court when the case is ready to proceed to trial and the court schedules a hearing date. The average case is resolved within approximately eight months. The judges seem to treat these cases no differently from other cases. The petitioners are unlike the plaintiffs in other cases since they sometimes contact the court directly and express concerns about the actions taken by the court.

In the division of the Attorney General's office that handles post conviction cases the attorneys are easy to deal with.

It has not been difficult to get approval from OPDS for funds for investigation or for experts but Mr. Grefenson requests them only when he needs them.

Mr. Grefenson believes the quality of representation statewide is average and could be improved. One change he would make would be to standardize some of the procedures since different courts have different approaches. One court gives the attorney 30 days to file an amended

petition, others allow 90 or 120 days. A complex case designation would allow the attorneys to separate out the cases that need more attention.

A central PCR office would be a positive development. Among other things it could install a video system to permit more contact with clients.

Mr. Sussman said he had come to this work from a slightly different direction. He has practiced law for more than 30 years and started doing post conviction cases about 13 or 14 years ago. Those cases are now about 25% of his practice, not including the capital post conviction cases he does under his death penalty contract. If an attorney puts a lot of effort into a case, word can get around and other inmates start calling you. Post conviction has become a significant part of his practice. He gets fewer calls from prisoners in Marion County than from eastern Oregon prisoners. Having been both a public defender and a private practitioner, he knows that attorney caseloads have a lot to do with the kind of representation people get. In his retained work he can select the cases he wants to handle and sometimes declines to take a case that doesn't have merit. In some areas he is comfortable recommending that prisoners accept appointed counsel but there is a huge disparity in the range of quality of representation that people get in these cases. The approach to representation outlined by Wendy Willis in the Commission's materials for the commission meeting describes his own approach to preparation of these cases.

The interplay between the state post conviction and the federal habeas timelines is very important to his practice. Most PCR cases revolve around the issue of ineffective assistance of counsel. In order to obtain relief you have to show that counsel made a serious error or admission and that the client was prejudiced. It is not enough to show that trial counsel didn't call a witness, you have to show what the witness would have said and that it would have affected the outcome of the case. The attorney has to look at PCR cases from two perspectives – that of the trial lawyer in reviewing what was done and not done, and that of the appellate lawyer in reviewing the record and applying legal standards to the issues. He uses an investigator in almost every case because that has been one of the most fruitful areas of post conviction practice. He investigates and consults with experts and calls those experts and witnesses at trial. In eastern Oregon there is pressure to present cases on paper. Marion County judges will accommodate live witnesses. It has been a good idea to use retired judges to handle cases in eastern Oregon because they have time to review all the materials but typically those judges are in Salem in a hearing room at the Department of Justice and the petitioner and his lawyer are in a prison on the other side of the state. It is hard to get a witness to a hearing room to testify in most cases. He relies on

affidavits for tactical reasons in some cases and on depositions, which may be held anywhere in the state.

If PDSC moves in the direction of setting up a statewide office to handle post conviction and it is adequately staffed and has appropriate resources it could provide more uniformly competent representation.

Mr. Sussman said that one thing that has to be considered with PCR cases is that the cost will be driven by fact that the case is tried in the county in which the petitioner is imprisoned even though the underlying offense may have occurred on the other side of the state. The system might be more efficient if venue lay in the county in which the conviction occurred.

Judge James Hargreaves testified that he is a senior judge from Lane County who had never tried a post conviction case until he assumed senior status five years ago. He has now tried hundreds of post conviction cases filed by prisoners in the three prisons in Umatilla and Malheur Counties. When he began trying these cases he was appalled at the poor quality of the legal work. He had been a judge for 20 years and had never seen such poor practice. There is a culture in both counties that accepts poor practice. Umatilla County, in particular, still has a very big problem. He filed a bar complaint against one of the attorneys.

The legal community in both counties is so small that it is difficult to find attorneys to take the cases. Even the firms that do good work in other cases don't do much better than anyone else in these cases. The standard procedure in both counties was for a prisoner to file a petition which included a laundry list of complaints about what his trial lawyer had not done. After counsel was appointed an amended petition would be filed by the lawyer that generally recited the same list, including misspellings. Lawyers disregarded ORCP 17 which requires them to certify the merit of the claims. Prisoners are concerned that if they don't submit the laundry list they cannot get their cases into federal court.

Periodically a new claim will be filed by one inmate and then all of the other petitions from that prison will include the same claim. Lawyers are concerned about angering their clients by not complying with their demands regarding the claims to be filed. Angry clients threaten attorneys, threaten their families, file bar complaints and sue their attorneys. The culture that has developed is a "go along, get along" approach. Occasionally an attorney puts some real effort into a case.

Ninety percent of the cases probably lack merit; 10 percent require a serious look and only three to five percent have merit, although it is true that you can't know which cases have merit if they never get developed

because so few are investigated. Most cases in Malheur and Umatilla Counties are tried via television. The judge (who is usually a senior judge, not one of the judges from the court where the matter is pending) is located in a hearing room in Salem with the Assistant AG. The petitioner and his counsel are usually in one of the prisons. All of the exhibits are provided to the judge before the hearing. Only occasionally is live testimony presented at the hearing except for brief testimony by the petitioner. It is a paper trial and that is the only way these cases can get done.

Beginning March 14, 2008 new rules will be going into effect in Malheur and Umatilla counties. Judge Hargreaves worked with both sides to develop rules that comply with the PCR statutes. The rules are set forth in a document he wrote entitled "The Pleading Edge." Among other things the rules will require that the petitioner make a prima facie case before he is allowed to go forward. There will be a 120-day period within which the amended petition must be filed. He hopes the new process will weed out meritless cases at the pleading stage. The judge made presentations on the new rules to the legal assistants at all three eastern Oregon prisons. The main issue the prisoners wanted to discuss was the poor quality of representation they receive from court-appointed counsel. The legal assistants were recommending that prisoners represent themselves. Judge Hargreaves urged them to get counsel to assist them in complying with the new rules.

Attorneys could be more effective in cases if they used expert testimony instead of just relying on the transcript. OPDS needs to have a system of peer review. All these trials are recorded and copies of the CDs could be reviewed. The practice in Umatilla and Malheur is extremely poor. People should not get contracts without being reviewed.

Lynn Larsen has been with the Department of Justice (DOJ) for more than 18 years. In his experience, because of the number of these cases, the trials have always been paper trials. DOJ currently has 650 PCR cases in the office, which represents all of the felony PCR cases in the state. The trial division used to handle the death penalty PCR cases as well but these cases have now been transferred to the Appellate Division. There are six lawyers in the trial division. They received 40 new cases this month. They see spikes in case numbers when new Supreme Court opinions are issued. Statewide there are around 17,000 criminal prosecutions per year. There are 1100 appeals and 400 post conviction cases filed every year. Most of the cases used to be in Marion County but now about half are there and half in other counties, primarily Umatilla and Malheur. The trial division also handles all of the federal habeas cases as well.

The AG attorney deposes the petitioner in almost every case once counsel has been appointed and an amended petition filed. All of the depositions are done by phone. It is expensive for DOJ to take the depositions when the cost of a court reporter is approximately \$3.00 per page. Some cases are settled but DOJ tries to get agreement from the DA's office since they have gone to a lot of trouble and expense to prosecute the case. Even though they don't have the burden of proof the state deposes the petitioner so that the issues can be narrowed before trial. The state also submits the record of the case so that a reviewing court has an adequate record on which to proceed. Parties submit their trial memos at the same time so neither side knows what the other side will be saying. The better practice would be to require the petitioner to submit a memo and allow the state to respond (which Judge Hargreaves indicated will be the practice under the new pleading rules in eastern Oregon.) The Department of Corrections and the courts have both set up video connections for the trial of these cases.

The practice in Umatilla County when he first started handling cases there was not very good. Trial memoranda were seldom filed. The petitioner would attend the hearing and the attorney would generally ask some of the same questions that had been asked in the state's deposition. In order to improve the quality of representation standardizing the process would be helpful. Status conferences like those held in Marion County could be used to set time frames for pleadings and the trial. A peer review process is something that the Commission or OPDS could do. But it really boils down to a question of time and money. The fewer cases an attorney has, the more time there is to work on each case. DOJ has objected to legislative proposals to remove funding for appointed counsel in PCR cases principally because it is easier to litigate a case with counsel. DOJ does not want innocent people in prison.

Erin Largesen is an AAG who handles PCR and habeas appeals. She has a background in civil practice and was surprised to see how poorly developed the record sometimes is in these cases. There is often only a trial file and no external evidence. She was also surprised by the lack of the use of civil discovery tools, the lack of attachments to the petition, the simultaneous filing of trial memos and the lack of issue selection. The lawyers appear to need more training in civil litigation. Standardization of practice and additional resources would also be helpful. The creation of a unit within OPDS would offer not only the peer review component but would add the benefit of having two attorneys looking over a case.

Chris Mullmann is with the Client Assistance Office of the Oregon State Bar. In the last two years the bar received 2,210 complaints. Seven hundred and eight of those or 32.85 percent came from inmates. A significant proportion involved PCR cases. The issues raised by inmates

generally do not amount to ethical violations although they may constitute ineffective assistance of counsel. The bar generally informs complainants that the lawyer's conduct does not fall below the level of competent representation although it might be constitutionally defective. There was one PCR attorney in eastern Oregon who had 130 bar complaints. He knew what he had to do to meet the bar's ethical standards. The bar now refers complainants with complaints about the quality of representation provided by court appointed counsel to OPDS and also provides OPDS with a weekly report of new bar complaints. This year, out of 2800 complaints that the Client Assistance Office received, approximately 365 were sent to Disciplinary Counsel for further action. Most practitioners are sole practitioners and most complaints are about sole practitioners. His impression is that sole practitioners who share space with attorneys in a similar practice seem to have fewer complaints than those who are entirely on their own and lack support staff.

Steven Wax is the Federal Defender for Oregon. He has handled or supervised more than 3,000 federal habeas cases all of which came from the state system. The culture in the prisons, among the defense bar and on the bench have all combined to create the problems that exist in the system today. There needs to be communication between the bar and OPDS and between OPDS and its contractors. The law which requires the petitioner to identify the issues needs to be changed. But regardless of whether the law is changed, OPDS needs to get qualified lawyers to do the work and then monitor their performance. The issues which need to be focused on in PCR representation are issue identification and issue development. The attorneys can't identify the issues unless they investigate and gather the necessary materials. Part of the problem is that these cases are treated like a continuation of the criminal case. They are civil cases where the petitioner is the plaintiff. OPDS should use lawyers who understand both criminal law and civil practice. Simultaneous pleadings also present a problem. The AG should not be taking depositions of the petitioners in these cases. Identification of the claims should come from the petitioner's attorney. If the AGs continue to take petitioner depositions, the petitioners' attorneys should be active participants.

Caseloads need to be appropriate. Federal defenders are assigned 25 new cases a year and have 50 to 60 cases in their caseload at any given time. Cases in the state system don't last as long so if they receive 25 new cases per year they might have 30 or 40 at a time. There also needs to be a sufficient number of investigators and paralegals. If OPDS establishes a PCR unit of 12 lawyers it would also need approximately 12 support staff.

Drew Chilton is a co-director of the Oregon Appellate Consortium and handles non-capital post conviction appeals. The Attorney General's office is highly professional and does good work. As an appellate attorney Mr. Chilton reviews the post conviction file and generally the most informative document he finds in that file is the AG's trial memo. There is a big difference in the quality of representation at the trial level in cases in Marion County as compared to those in the eastern Oregon counties. In Marion County attorneys like Noel Grefenson and Olcott Thompson do excellent work. Five years ago the representation he saw in Umatilla and Malheur Counties was an unmitigated disaster. Today it is merely a mitigated disaster. Some of the causes are the small size of the legal community in Malheur County, the desire by the court to expedite PCR cases, and the lack of meaningful investigation. Additional resources would improve the system but other things could help as well including changing the venue statutes to have cases heard in the county in which the conviction occurred. The quality of representation is consistently better in cases tried in the county of conviction. Both the lawyers and the judges are more attentive. A properly operating PCR system provides a useful check on the quality of performance of trial and appellate counsel.

OPDS staff and members of the commission discussed the difficulty of finding well-qualified attorneys to handle PCR cases. Commissioner Greenfield asked whether OPDS would receive proposals if it were to simply issue an RFP for these cases. Kathryn Aylward indicated that she did not believe OPDS would receive any proposals. It would also be difficult to recruit attorneys for a PCR unit at OPDS. Paul Levy described his experience with a PCR firm in Indiana. He noted that in Oregon very few PCR attorneys, except in death penalty cases, seek approval for non-routine expenses for investigators and experts in PCR cases. He reported that the bar, at the request of OPDS, has established a workgroup to create performance standards for attorneys in PCR cases. The group has met and is scheduled for a second meeting in March. In addition to creating performance standards the group is interested in making recommendations for improvements. Ingrid Swenson said that although concerns with the quality of representation in PCR cases were well known to OPDS, the system problems identified at the hearing were not. She noted that OPDS had tried to address quality concerns but had few options.

Steve Gorham testified that Judge Hargreaves's rules will prevent petitioners from having their day in court and are meant to exclude litigants from the process. The Attorney General's office handles cases professionally unless they believe they are going to lose. A central PCR office is a good idea if you provide sufficient resources.

Summary of Testimony at March 12, 2009 PDSC Meeting

Dennis Balske, who served as the chair of the Post Conviction Relief Task Force that was created by the Oregon State Bar to prepare written performance standards for attorneys in post conviction relief cases, testified that the standards that the group developed are comprehensive and should serve as a road map for lawyers new to the field. They can also assist judges who may not understand the extent of the attorneys' obligations in these cases.

The task force recommended that PDSC create an office that specializes in PCR representation. Other approaches are unlikely to succeed.

Chair Ellis identified some of the obstacles to improving representation in this area of practice and agreed that a specialized office, as proposed by the Commission in its current and previous budget requests, would be the best option.

Kathryn Aylward was asked whether a contract office could provide the necessary services. She said that that effort had been made but that individual contract attorneys have not been willing to create such an office.

Mr. Balske said PDSC would not be able to attract the best quality lawyers to this work because the level of compensation provided is not sufficient.

Commissioner Potter inquired whether an attorney taking a high volume of those cases wouldn't be able to put more effort into the meritorious cases and, by averaging those cases with the non-meritorious cases, on average receive a reasonable rate of compensation.

Mr. Balske said that a lawyer can't determine whether a case is meritorious without putting in a significant amount of time and PDSC's current rate of \$2500 per case is not nearly sufficient to do that.

Summary of PDSC Discussion at April 16, 2009 Meeting

Ingrid Swenson said that, since performance standards have been adopted by the bar, the next step is to provide comprehensive training on the standards. She suggested that the commission continue to seek funding for a post conviction relief unit at OPDS in future legislative sessions and noted that it would not be possible to use currently authorized positions at the Appellate Division for this purpose since attorneys cannot be spared from that division and additional positions will not be forthcoming. In addition most of the appellate attorneys lack trial experience.

Chair Ellis inquired about the number of public defense attorneys currently handling post conviction cases. Kathryn Aylward said that there are five contractors who do primarily PCR cases and approximately fifteen others who have some PCR cases included in their contracts. Chair Ellis said that it is preferable to have the work done by specialists, like the Department of Justice.

Peter Ozanne said the current model is unsustainable and that it may be time to inform the courts and others that elimination of PCR or court appointed counsel in PCR cases might be preferable. Peter Gartlan said that the right to counsel in PCR cases is statutory and PDSC is required to provide counsel in these cases. If the state system fails to provide an adequate process, the federal courts could decide to hear these cases under its habeas jurisdiction, which would be far more expensive for the state.

Chip Lazenby said that if the legislature doesn't fund a function then there is no obligation to provide it.

Paul Levy noted that PDSC's case rates in PCR cases are higher than the rates in most other categories of cases and that investigation costs are covered separately.

Kathryn Aylward said that the PCR caseload has fallen off dramatically and since there are only a few providers involved she and her staff can have direct discussions with each of them during the contract renewal process about compliance with performance standards.

Peter Ozanne said the service delivery plan should articulate quality standards and should support the creation of an FTE based post conviction relief office that can effect a complete change of culture.

Service Delivery Plan for Post Conviction Relief Cases

The quality of representation provided by public defense attorneys in some non-death penalty post conviction relief cases continues to be unsatisfactory.

The Oregon State Bar's Post-Conviction Relief Task Force made two recommendations for improving representation in its December 12, 2008 report to the bar. Its principal recommendation was that, "The Office of Public Defense Services should develop a specialized group of attorneys with expertise in post-conviction cases to represent petitioners, comparable to the trial division of the Oregon Department of Justice, which handles the cases for the state." It also recommended that PDSC amend its qualification standards to require knowledge of and adherence

to the performance standards and that training on the performance standards be provided.

At its meeting on May 21, 2009 PDSC approved an amendment to the qualification standards requiring that to be approved to represent financially eligible persons at state expense, an attorney must have “read, understood and agree[d] to observe applicable provisions of the current edition of the Oregon State Bar’s Performance Standards for Counsel in Criminal, Delinquency, Dependency, Civil Commitment, and Post-Conviction Relief Cases....” In addition the amended standards now require that attorneys seeking appointment in post-conviction relief cases have attended and completed a legal education and training program on post-conviction relief proceedings within two years prior to appointment.

As reported to the commission at the May 21 meeting, the Oregon Criminal Defense Lawyers Association is tentatively planning a one day training on the new performance standards in March of 2010.

With respect to the recommendation that PDSC develop a specialized unit of post conviction relief attorneys within OPDS, PDSC proposed the creation of such a unit in its budget proposal for 2009-2011 as well as in previous budget proposals. The PDSC budget, as approved by the Joint Ways and Means Committee, however, includes neither funding nor position approval for such a unit.

Without funding for a specialized unit, PDSC will continue to seek improvement in the quality of representation provided to public defense clients in post conviction relief cases through the contract process. PDSC directs staff, using the resources available, to secure contracts with the best qualified public defense providers with whom it is able to come to agreement through its RFP process. OPDS staff will also continue to work with CLE providers including the Oregon Criminal Defense Lawyers Association to ensure that adequate training in PCR representation is available.

PDSC will revisit the delivery of services in post conviction relief cases in the spring of 2010.