

Public Defense Services Commission The Executive Director's Annual Report for 2011

Introduction

The Public Defense Services Commission was able to continue meeting or nearly meeting its Key Performance Measures and annual goals, as outlined in the strategic plan, during 2011. The PDSC also fulfilled its statutory obligations to provide quality public defense services in a cost efficient manner. These successes were achieved despite continued step increase freezes and reduced spending in all areas of operation.

PDSC's Accomplishments in 2011

1. The Commission

The Commission held eight public meetings during 2011, and met in executive session several times during the year to review statewide contracting plans and to accomplish the recruitment and hiring of a new executive director for the Office of Public Defense Services.

The March meeting, held in Lincoln County, included an update on the Lane County service delivery plan, as well as a system delivery review in Lincoln County. The Commission heard from contractors and others, including Presiding Judge Littlehales, who indicated that overall the public defense services provided in Lincoln County are adequate. The Commission accepted information regarding the proposed Service Delivery Plan for Lincoln County at its meeting in May. This plan noted the need for incorporation of specific structural changes by consortium providers, including the creation of, and oversight by, a board of directors. The Commission approved the Service Delivery Plan for Lincoln County in June 2011, with instructions to OPDS staff to continue to update the Commission on the progress of the Lincoln County consortium's efforts to implement an active and effective board of directors. The matter was raised again as the Commission began to review and approve service delivery plans for 2012-13 contacts, at which point the Consortium administrator indicated that a Board of Directors would be actively engaged prior to the start of 2012.

The Commission requested an additional update regarding progress in Lincoln County; that update is currently scheduled for the spring of 2012.

The Commission continued its review of the service delivery in Deschutes County in June, and approved the Service Delivery Plan for Deschutes County at its July meeting. The Commission's 2010 visit to this county revealed dropping caseloads in specific case types, some disparity in the way cases were distributed (resulting in an underage to one provider and overages for others), and concerns regarding some juvenile dependency court providers and the jurisdiction's Early Disposition Program (EDP). There were also significant changes on the horizon, with a new District Attorney being sworn into office on January 4, 2011. During 2011, violation and misdemeanor case filings increased in that county, while felony cases decreased, and very few cases were funneled into the EDP. Ultimately, the Commission approved a plan indicating that the service delivery system in Deschutes County appears to be working satisfactorily, with a recommendation to discontinue contracting with particular juvenile dependency providers if the quality of representation did not improve, and a recommendation to no longer enter into a special EDP contract, but to distribute those cases as they do other misdemeanor cases.

The Commission received information at the March meeting regarding the annual statewide survey results. The survey was sent to district attorneys, judges, citizen review board managers, juvenile directors, and other system partners statewide. There were, overall, favorable comments regarding public defense providers in the state. OPDS analysts and General Counsel followed up with specific individuals, both those who offered comments and those who were the subject of comments, when appropriate.

The May meeting included a review of the PDSC Budget Presentation prepared for the 2011 legislature, and review and approval of the Request for Proposals that was used to solicit bids for 2012-13 public defense services contracts. It also received a budget update in June, and received contractor recommendations regarding contracting priorities for 2012-2013. The Commission held an executive session to review the 2012-13 contract proposals, approve the priorities for statewide contracting plans for contracts beginning January 1, 2012, and to review information submitted by candidates for the executive director position.

In July, the Commission received a report from Ingrid Swenson, Executive Director, regarding representation of parents and children in juvenile dependency cases. This report outlined the efforts made over the last eight years to improve representation in juvenile dependency proceedings. With 32% of Oregon's public defense cases falling within juvenile dependency, adequate representation is a critical issue. Ms. Swenson's report indicates that some improvements have been achieved (as assessed through annual surveys), but emphasizes the importance of continued efforts to identify and fund additional improvement strategies.

The Commission held executive sessions in July and September to review individual contract proposals for 2012-13. Contractors and other interested parties were invited to provide input during two separate public meetings following contract negotiations, after which the Commission approved over 100 contracts for the provision of trial court non-death penalty representation, as well as all death penalty representation and mitigation services. At the September meeting, OPDS staff provided the Commission with recommendations to approve contracts pursuant to the Statewide Contracting Plan, and the Commission approved statewide contracts for non-death penalty representation. During an executive session in September, the Commission reviewed and approved the contracting plan for capital contracts.

The Commission held its October meeting in Umatilla County, in conjunction with the annual Public Defense Management Conference. Representatives of the Sixth Judicial District were invited to attend and provide the Commission with a Service Delivery update regarding criminal and juvenile representation in that district. Presiding Judge Pahl, two contractors, and representatives from the district attorney's office and juvenile department provided an overview of their systems, and while representation was reported as adequate, participants noted a tendency for juveniles to waive counsel in delinquency proceedings, and also noted the need for improvements in the Sixth Judicial District's drug court program. Commission members discussed at their December meeting whether there was a need to engage in further system improvement efforts in the Sixth Judicial District, and concluded that though there were some issues, they did not rise to the level of requiring further action.

During the October meeting the Commission also received input from providers who bid on capital contracts, and approved the plan for capital contracts. The Commission also received an update regarding the 2011-13 budget, and approved the OPDS 2011-13 Compensation Plan. Finally, the October meeting included a review of the Annual Performance Progress Report, which details the PDSC level of compliance with Key Performance Measures (KPMs). As in past years, PDSC met or nearly met all of its KPM targets, the last of which reflects the Commission's adherence to all of the recommended best practices for boards and commissions.

The Commission ended the year with its December meeting, at which time the Commission reviewed and adopted a schedule for meetings and activities in 2012. A retreat was scheduled for January 2012 to review the Commission's priorities and create a plan for progress in future years.

2. OPDS's Contract and Business Services Division

A. Public Defense Program Administration

During 2011, the Contracts and Business Services Division (CBS) successfully managed all aspects of OPDS business, including its primary obligation - the administration of existing contracts through the end of 2011, as well as negotiation and execution of contracts for services for 2012-2013.

Throughout 2011, CBS analysts and accounts payable representatives managed the final months of 2011 contracts, which included regular monthly payments for over 100 contracts statewide, review and approval or denial of non-routine expense requests, and reimbursement of providers for routine expenses. These activities resulted in more than 25,500 payment transactions and review of more than 16,500 expense requests.

CBS analysts dedicated significant time to the negotiation of new contracts for 2012 through 2013, including trial and appellate court representation, and death penalty contracts. Due to declining caseloads, analysts had to eliminate contracts in several counties, which required the redistribution of some caseload responsibilities. The process of redistributing caseloads, while a part of every contracting cycle, was particularly challenging this

year due to the need for elimination of contracts that had been in place for many years. The analysts addressed this challenge with a great deal of professionalism, and kept the Commission informed of the Division's rationale and plans at each step of the process. Analysts presented their contracting plans to the Commission during executive sessions, and during those presentations, demonstrated extensive knowledge regarding the service delivery needs in each county.

CBS staff also continued to make internal process improvements throughout 2011. The paperless systems developed in 2010 remain in effect, and will be expanded in 2012 to include accounts payable.

The Division continues to meet its KPM target regarding customer satisfaction, with a continued high level of confidence in the work of the division expressed by customers through spontaneous emails and comments. The Division will solicit specific customer satisfaction feedback again in 2012, when it sends out the biennial customer service survey.

B. CBS Division Director

The CBS Division Director provides management and oversight of all CBS business functions. The Director also serves as the Chief Financial Officer, responsible for creating and implementing the 2011-13 budget. The budget, developed during the latter part of 2010 and finalized through the 2011 legislative process required constant attention and management, as statewide budget deficits constrain spending in all state agencies. The CBS Director created a draft compensation plan for 2011-13, which was presented to the Commission for approval in October 2011. That plan includes furlough days, salary step increase freezes, and health benefit contribution amounts for all OPDS employees. Finally, the CBS Director prepared hundreds of fiscal impact statements and participated in legislative discussions regarding ways to reduce the cost of public defense services during the 2011 legislative session.

C. General Counsel

OPDS General Counsel continues to provide guidance to the Commission, OPDS staff and its customers on legal issues, attorney ethics and standards of practice. General Counsel analyzed several legal issues this year,

including the recent Washington state case holding that some Washington state trial-level contractors providing public defense services were county employees. Counsel provided the Commission with a detailed review of the opinion, and demonstrated the ways in which the Washington state model differs from the Oregon model. In each regard, Oregon remains free of the components that would lead a court to find that an employer-employee relationship exists between the Commission and its contractors. General Counsel continues to be involved in assessing other matters critical to the operation of OPDS, including issues arising under Oregon's public records, open meetings, government ethics, and public contracting laws, and also solicits the advice of OPDS's assigned attorney within the Department of Justice when necessary.

General Counsel also worked with the Marion County courts and OPDS contractors to help implement changes to the handling of both capital and non-capital post-conviction relief cases in Marion County.

General Counsel continued to provide critical services within OPDS quality assurance programs. Counsel planned, coordinated, and participated in the Quality Assurance Task Force (QATF) peer review of the criminal representation provided by Multnomah Defenders, Inc., and worked with the QATF and others to propose modifications to peer review protocols. He also continued to work closely with the death penalty provider community and attended regular meetings, providing organization and oversight for the death penalty peer panel, and the death penalty resource attorney program. This background will serve the agency well as General Counsel develops and implements a death penalty service delivery review in 2012. Finally, General Counsel planned and participated in several continuing legal education programs, and planned and produced a very well received day-long diversity training program for OPDS staff and other invited guests.

Administration of the OPDS Complaint Process and Attorney Certification Process are additional quality assurance responsibilities of OPDS General Counsel. General Counsel continues to work closely with the Oregon State Bar to ensure that the OPDS complaint process is not duplicative of their work. General Counsel also assists in the review of Non-routine Expense requests to help ensure compliance with constitutional and statutory requirements to provide funding for experts and other case expenses when

a sufficient showing is made that the assistance is reasonable and necessary.

3. Appellate Division

The Appellate Division (AD) continues to function well under a modified structure, established in 2010, when the Division's Assistant Chief Defender was appointed to the Court of Appeals. The new structure includes three Chief Deputy Defenders (instead of one Assistance Chief and two Chief Deputies) working at the direction of the Chief Defender, and offers a broad platform for support and training within the Division. Each Chief Deputy is responsible for discrete areas within the division (outreach, operation, and personnel). Through its management and team structure, AD trains, supervises, and evaluates its forty attorneys, allocates and redistributes manageable individual caseloads, and maintains documentation of its workflow. During 2011, the Division processed approximately 1,800 incoming cases, filing notices of appeal in 1,400 cases.

AD management revised the AD Manual and distributed the final version in October. This manual documents all processes and expectations for the division, and is a critical source of information for AD management and employees.

The Appellate Division was able to fill several positions in 2011, in both the criminal and juvenile sections. Each position received applicant pools of 120 to 180 individuals, with many qualified candidates. A hiring freeze was implemented at the end of 2011, and the Division expects to hold the positions that were unoccupied at the end of 2011 vacant through the next year. This necessity increases the pressure within the Division to get the new attorneys trained and accomplished in appellate court practice. Of the 40 attorneys in the Division, thirteen have been with OPDS for less than two years.

The Oregon Supreme Court issued 18 opinions in 2011 in cases litigated by AD's criminal section, eight of which were favorable to the defense. Some of the more noteworthy include: a ruling that merely visiting a pornographic website does not constitute "possession" of pornography under the controlling statute; an opinion that provides trial courts with guidance for assessing the reliability and probative value of dog sniffs for

search and seizure purposes; a ruling disapproving the “natural and probable consequences” theory of aid-and-abet criminal liability; and a reaffirmation of a criminal defendant’s due process right to introduce reliable hearsay evidence in his defense.

The Juvenile Section continues to serve Oregon well by pursuing cases and obtaining opinions that bring clarity to Oregon’s juvenile dependency laws. The Court of Appeals issued several important written opinions in 2011. Notably, the Juvenile Section argued its first case in the Oregon Supreme Court in January, 2012, and in February the court issued a favorable ruling that is expected to have a significant impact on the way trial courts structure visitation orders among siblings.

Attorneys from both the Criminal and Juvenile Sections continue to have increased interaction with the trial bar through CLE presentations, the Attorney Regional Contact Program, and by responding to an increasing number of daily inquiries from the trial bar. Attorneys from the division gave CLE presentations at, among others, the annual Oregon State Bar (OSB) Criminal Law Section CLE, at OSB’s Appellate Section CLE, at multiple OCDLA programs (including the OCDLA annual conference), and gave brown bag CLE presentations at various public defender and defense firms in the Portland, Eugene, and Roseburg areas. In addition, the division is a regular contributor to the OCDLA newsletter, and several of its attorneys drafted the OCDLA’s “Post-Judgment and Extraordinary Remedies Manual,” under the direction of Senior Deputy Defender Eric Johansen.

The Appellate Division’s Criminal Section slightly increased its median number of days to filing of the opening brief to 234 (from 226 in 2010). This slight increase is attributable to increased caseloads experienced as a result of budget cuts, but is still a dramatic reduction from 2006, when the median number of days to filing was 328. The limited increase is a significant accomplishment in light of the number of attorneys with less than two years experience and the number of positions that have been held vacant during the course of the year. The Division remains close to achieving its KPM goal of maintaining a median number of 210 days to filing of the opening brief.

4. Executive Director

The responsibilities of the executive director, as set forth in ORS 151.219, were completed through the work of the former and current executive directors. The Commission's agenda for 2011 was set by the former executive director, and finished by the incoming executive director. Each member of the OPDS management team shared critical information during the transition, and assisted in creating consistency throughout the year.

During the first half of the year, the Executive Director participated in a very active legislative session, advocating for a budget package that would provide adequate resources for public defense in Oregon. The 2011 session brought unprecedented statewide budget shortfalls, making that task a larger challenge than in past years. Members of the legislature were reminded of the challenges wrought by the PDSC budget shortfalls in 2003, and enough funding was secured to ensure funding for appellate and trial court services through the biennium. Legislative communication efforts were continued by the new executive director in November and December 2011, in preparation for the short 2012 legislative session.

Both executive directors participated in policy work groups and advisory committees. The Governor's Public Safety Team meetings, staffed by the Governor's Deputy Legal Counsel, are held one to two times each month and attended by all public safety agency heads. It serves as a critical point of communication and planning for Oregon's public safety system. Each executive director also served as a member of the Judicial Department's Juvenile Court Improvement Project (JCIP) Advisory Committee, a federally funded program to improve the functioning and case outcomes in juvenile dependency cases. Beginning in September 2011, the executive director participated in the Oregon State Bar's Judicial Administration Committee, which is working to develop a program for reaching out to business and community groups throughout the state to educate Oregon citizens about the importance of the court system, including the critical importance of access to justice in criminal, juvenile, and other case types. The Oregon State Bar remains committed to supporting funding for the courts, public defense, and legal aid, and sees this project as a critical foundation for building support around the state of Oregon.

The executive director and her management team also worked with OPDS's volunteer advisory groups, and assisted in the planning of important continuing legal education seminars. The Contractor Advisory Group, Quality Assurance Task Force, and Death Penalty Peer Panel met several times during the year, and provided input on proposed changes and important policy decisions. These groups all had meetings with the executive director at the October Management Conference, which was planned by OPDS management in collaboration with OCDLA. The Juvenile Law Training Academy was another conference planned and co-sponsored by OPDS, with OCDLA. Both conferences received very positive reviews. Each executive director also served as an editorial board member of the Juvenile Law Reader published by Youth, Rights and Justice.

The OPDS management team met almost weekly during 2011, with meeting agendas and minutes created and maintained by the executive director. Through these meetings, the management team is able to ensure consistency in procedures and policies in the office, address questions that arise during the course of the week, review documents and other materials that impact the office, review Commission meeting agendas to ensure that each division has an opportunity to share critical information with the Commission, and ensure that the team is working toward the OPDS goals and strategies as outlined in the agency strategic plan.

Challenges for 2012

The 2011-13 budget

All state agencies were asked to submit cut plans of 10.5% in preparation for the short 2012 legislative session, and were told that no agency would be given the 3.5% of their budget that was "held back" at the end of the 2011 legislative session. Like all agencies, PDSC provided a cut plan, but has been actively discussing the challenges and risks associated with underfunding the public defense function. The lessons of 2003, when district attorneys had to stop or suspend criminal prosecutions due to lack of funding for defense counsel, remain a clear memory for many in the legislature. The legislature was not able to come to agreement on any legislation during the 2011 session that would have reduced the crime seriousness level of certain crimes, thereby reducing or eliminating the costs associated with defending those crimes or violations. There is

legislative support for continuing this effort during 2012, in preparation for the 2013 legislative session, but the work group has not yet begun to meet, and will not do so until after the February legislative session.

The agency submitted several policy option packages for the 2011-13 biennium, but those were not funded by the legislature. If funded, they would have addressed the following long-term agency needs: reduced caseloads for juvenile dependency attorneys, salary parity for appellate division attorneys (with their Department of Justice counterparts), increased hourly rates for attorneys, and pay parity for employees of non-profit public defender offices (with district attorneys in their jurisdictions) and increased compensation for investigators.

The appellate division's challenges for 2012 will also be budget-related, as it will have to function with several vacant positions throughout the remainder of the biennium. This could compromise the positive gains the division has made in improving its median date to filing of the opening brief, and if caseloads climb too high, could also result in reduced quality of representation. The appellate division remains committed to finding efficiencies and providing the best representation possible despite the challenges ahead.