

Public Defense Services Commission

The Executive Director's Annual Report for 2012

Introduction

The Public Defense Services Commission (PDSC) was able to continue meeting or nearly meeting its Key Performance Measures and annual goals, as outlined in its strategic plan, during 2012. 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, mandatory furlough days, and reduced spending in all areas of operation.

PDSC's Accomplishments in 2012

1. The Commission

The Commission held eight public meetings during 2012, and had a partial day retreat. At the PDSC's January meeting, the Commission discussed the upcoming February legislative session, the Executive Director's Biennial Report to the Oregon Legislative Assembly, and gave feedback regarding the 2012 contracting process, which was completed at the end of 2011. Following the meeting, PDSC members had a retreat to discuss strategic planning and succession planning for the Office of Public Defense Services.

The Commission met again in March. At that meeting, the Commission discussed and ultimately approved an adjustment to the contribution amounts required through the Application Contribution Program (ACP). The new amounts simplify the structure, making it easier for court staff to administer the ACP. The Commission also discussed the number of juvenile delinquency cases that are adjudicated without the appointment of counsel. As they have in the past, Commission members expressed concern about waivers of counsel in juvenile delinquency cases, and asked OPDS general counsel to provide information regarding the Commission's decision making authority in this area. In March, Commission members also heard from OPDS general counsel regarding the statewide public

defense survey results, which are compiled from comments made by judges, district attorneys, and other system partners regarding the quality of defense services throughout the state. The survey showed some areas of needed improvement and required further follow up by OPDS analysts in those counties. This process remains an effective tool in identifying and addressing problems that arise in each jurisdiction.

In May, the Commission met in Douglas County to conduct a service delivery review, discussed further below.

In June, the Commission received updates regarding the provision of public defense services in Clackamas and Yamhill counties, with very positive reports regarding changes made by contractors in both of those counties. The Commission also heard about a recent case, *State v. West*, regarding a defendant's right to receive non-routine expenses (further discussed below). The Commission accepted contractor comments regarding the 2013-15 agency request budget, including potential policy option packages.

The Commission spent time reviewing the best practices for boards and commissions at its August meeting, and after reviewing those, confirmed that it does adhere to the best practices, and that it is in compliance with the best practices. The Commission also reviewed the OPDS customer service survey results, which measure the satisfaction of customers served by the Contract and Business Services division (CBS). The survey results were very positive, and confirmed that CBS continues to provide exceptional service. The Commission approved the Service Delivery Plan for Douglas County, and received an update regarding the review of Oregon death penalty contract providers.

The September PDSC meeting included a discussion of death penalty case filings, which had been increasing at a rate that is above average, and recent opinions in capital post-conviction relief cases that included reversals for inadequate assistance of counsel. All of the cases involved trial attorneys that no longer have a contract with OPDS. The Commission also discussed the PDSC's policy regarding disclosure of billing records. This policy was fully discussed through the next several meetings, and amended at the October meeting.

At the Commission's October meeting, members heard from three public defense practitioners. The discussion highlighted the need for increased funding for public defenders, many of whom are not able to continue working as public defenders due to the low compensation and significant law school loan debt. The Commission requested additional information regarding student debt and loan forgiveness and repayment options; this information will be provided at the March 2013 PDSC meeting.

The December meeting included a Service Delivery Review in Linn County, an overview of the Oregon Judicial Department's eCourt program, and an annual review of the Executive Director.

The Commission performed two Service Delivery Reviews in 2012 - Douglas County in May, and Linn County in December. Each jurisdiction presented with issues unique to their own counties. The PDSC will continue to monitor representation and planning for those counties to ensure the provision of quality public defense services. The Commission also received updates regarding representation in Lincoln, Clackamas, and Yamhill counties. In those counties, problems identified in earlier service delivery reviews were addressed, and the Commission heard testimony indicating that representation has improved in both counties as a result of the changes.

The Commission also addressed budget issues, with regular briefings regarding the February legislative session and September emergency board request. The Commission reviewed the 2013-15 draft budget and policy option packages at the June meeting, and contractors were invited to comment upon the proposed policy option packages. The Commission approved the PDSC 2013-15 budget narrative at its October meeting.

Finally, the Commission experienced changes in its composition during 2012. Former Chief Justice Paul De Muniz stepped down as Chief Justice at the end of June 2012. Chief Justice Thomas Balmer became the third Chief Justice to serve as an ex officio member of the Commission. One of his first official acts was to appoint a member to replace outgoing Commission member Peter Ozanne. During these transitions, Commission members expressed their significant appreciation for the work of Justice De Muniz, and Peter Ozanne, both of whom played a critical role in shaping public defense services in Oregon. After a thorough search, the Chief appointed

Per Ramfjord to the Commission. Commissioner Ramfjord is a lawyer at Stoel Rives in Portland, who served as an Assistant US Attorney, and has experience providing pro bono representation for petitioners in capital PCR cases. Chief Justice Balmer and Commissioner Ramfjord have been wonderful additions, and have already been instrumental in supporting and guiding the work of the agency.

2. OPDS's Contract and Business Services Division

A. Public Defense Program Administration

During 2012, the Contract and Business Services Division (CBS) successfully managed all aspects of OPDS business, including its primary obligation - the administration of existing contracts scheduled to end in December 2013. Statewide caseload variances, with significant upticks in some counties, declines in others, and an above average number of aggravated murder charges, yielded an increase in expenditures.

Throughout 2012, CBS analysts and accounts payable representatives managed all contract responsibilities, 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 25,000 payment transactions and review of more than 17,000 expense requests.

CBS staff continued to make internal process improvements throughout 2012. The paperless non-routine expense review system developed in 2010 remains in effect and was expanded this year to include paperless vouchers used in the accounts payable unit. The new system has the added component of sending a copy of the fee statement to the attorney who requested the service to confirm that the duration and description of work billed is appropriate.

The Division continues to meet its Key Performance Measure (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 2014, 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.

During 2012, the Division Director developed a caseload tracking system in which all data statewide is stored in a single database from which individual contractor spreadsheets pull “live” data. This not only saves manual data entry but allows the agency to analyze a wide variety of statewide data.

The Division Director continued to work on upgrading the juvenile database and developed processes to enable the juvenile unit to begin electronic filing.

The Division Director also developed a new spreadsheet based timesheet system for all employees. Not only did this eliminate the need to produce and circulate paper timesheets, but it had the added benefit of preventing mathematical errors and errors claiming vacation or sick leave that was not available.

The agency request budget for the 2013 legislative session was developed during the latter part of 2012. It includes the current service level plus three policy option packages, for a complete package that is 16.5 percent above the 2011-13 legislatively approved budget.

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. As mentioned in the summary of Commission activities during 2012, General Counsel provided the Commission with several trainings and updates regarding policy matters throughout the year. In March, he summarized statutes outlining the Commission’s authority to adopt policies, rules, procedures and guidelines for juvenile delinquency cases. General counsel also presented on the topic of public meetings laws at the March meeting. In June, General Counsel discussed a recent court ruling in

State v. West, 250 Or App 196 (2012), which addressed the criteria for determining whether a non-routine expense request is necessary and reasonable. Also in June, General Counsel provided an update regarding the best practices for boards and commissions, highlighting the Secretary of State's audit report regarding boards and commissions. Following that presentation the PDSC reviewed its own practices to ensure that it is in compliance with best practices for boards and commissions. General Counsel began in August a several month discussion of OPDS practices regarding disclosure of records when PCR litigation is pending and the state seeks disclosure of OPDS records, and the written PDSC policy regarding disclosure. In October, the Commission adopted a new policy that better reflects the state of the law, and will aid the agency in its efforts to appropriately respond to requests for disclosure.

General Counsel regularly assists OPDS staff, courts and providers concerning the scope of the right to appointed counsel under state and federal law. In this regard, he drafted a memorandum for trial courts regarding OPDS's understanding of *State v. Fuller*, 252 Or App 391 (2012), which held that the constitutional protections of a criminal trial are required in some prosecutions for violation offenses. He also litigated, in the trial court and on mandamus to the Oregon Supreme Court, the question of whether a death-sentenced inmate is entitled to the appointment of counsel at state expense in his civil declaratory judgment action seeking to invalidate the Governor's reprieve of his execution. Both courts denied the request for appointment of counsel, as urged by General Counsel.

General Counsel continued to provide critical services within OPDS quality assurance programs. Counsel planned, coordinated, and participated in the peer review of the contractors in Clatsop County. He also completed the review of five death penalty contract providers, which resulted in the continuation of all contracts for which the contractor requested continuation. Counsel works 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.

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 the leadership of the Chief Defender and three Chief Deputy Defenders. Each Chief Deputy is responsible for discrete areas within the division (outreach, operations, 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 2012, the Division processed approximately 1642 incoming criminal case referrals, and filed notices of appeal in 1140 cases. In addition, the Juvenile Appellate Section processed 313 case referrals, filed 271 notices of appeal, and assigned 204 cases internally.

AD management revised the AD Manual and distributed the final version in October 2012. 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 2012, in both the criminal and juvenile sections. Each position received applicant pools of 120 to 160 individuals, with many qualified candidates. The Division agreed to hold several positions vacant through the current biennium, increasing the pressure within the Division to rely upon attorneys who are well trained, experienced, and accomplished in appellate court practice. Nine of the 40 attorneys in the Division have been with OPDS for less than two years.

The Division's Criminal Section was able to further reduce the median filing date for merit briefs in the Court of Appeals. At the end of 2011, the Criminal Section's median brief filing date was 234 days. At the end of

2012, the median brief filing date was reduced to 224 days. (For historical perspective, at the end of 2006 the median brief filing date was 358 days.) The longstanding internal goal is to reduce the median filing date to 180 days.

The Division continues to have an active practice in the Oregon Supreme Court. In 2012 the Oregon Supreme Court issued fourteen opinions (eight favorable to the defense) in criminal cases litigated by AD's criminal section, including the groundbreaking opinion in *State v. Lawson/James*, 352 Or 724 (2012), which dramatically alters how Oregon courts analyze the reliability and admissibility of eyewitness identification. Senior Deputy Ryan O'Connor proposed much of the analytical structure that the court ultimately adopted.

The Juvenile Section continues to serve Oregon well by pursuing cases and obtaining opinions that bring clarity to Oregon's juvenile dependency laws. The unit litigated and won its first case in the Oregon Supreme Court, *Department of Human Services v. J.R.F.*, 351 Or 570 (2012). The Court of Appeals issued seventeen opinions in 2012 that address the rights of the parents and describe for the trial bench and bar how various provisions in the juvenile code operate and impact procedural and substantive decisions in dependency cases.

Attorneys from both the Criminal and Juvenile Sections continue to have 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, and at multiple OCDLA programs, including the OCDLA annual conference and the Juvenile Law Training Academy in Eugene.

4. Executive Director

The responsibilities of the Executive Director, as set forth in ORS 151.219, were completed throughout the course of the year. As noted above, the Executive Director planned a short Commission retreat in January, so that PDSC members could provide guidance regarding strategic and succession planning for the agency. After this retreat the Executive Director scheduled

several meetings with the management team to further develop agency succession planning. These meetings offered members of the management team an opportunity to discuss the tasks they view as most important to moving the agency forward.

Also in January 2012, the Executive Director traveled with PDSC Commission member Peter Ozanne to appear before the Michigan Commission on Indigent Defense. The Michigan Commission was created by Michigan Governor Rick Snyder through an executive order. Commissioner Ozanne and the Executive Director provided the Michigan Commission with information regarding Oregon's public defense system. Much of Oregon's model was built into Michigan House Bill 5804, a bi-partisan bill for the establishment of a permanent commission to oversee the provision of public defense services in Michigan.

The year afforded many opportunities for the Executive Director to talk with legislators about the work of the PDSC. Preparation for the short February legislative session began at the end of 2011, and continued into January and February. The Executive Director and CBS Division Director met with legislators throughout 2012, first to discuss PDSC's need for funds that were held back in the 2011-13 budget. The hold back amount was 3.5 percent of the agency's budget, totaling \$8.1 million. The PDSC was able to absorb the entire 3.5 percent within the agency's operating budget (including both the appellate division and contract and business services division), by imposing furloughs, holding vacancies throughout the year, and curtailing agency expenses. The PDSC received limited restoration of funds for the professional services account, which funds contracted and hourly representation and associated expenses, and the legislature placed \$3.5 million in a special purpose appropriation dedicated to professional services account expenses. The Executive Director and CBS Division Director met with legislators again in preparation for the September 2012 emergency board. The Executive Director appeared before the emergency board in September 2012 to request restoration of funding for the professional services account. The legislature granted the PDSC's request for funding, allocating \$2 million from the \$3.5 million special purpose appropriation. The PDSC anticipates that it will need to make a request at the start the next regular legislative session, which starts in February 2013, for funds to cover professional service expenses through the end of this biennium.

The Executive Director participated in many policy work groups and advisory committees throughout the year, including one at the national level. In March, the Executive Director was appointed to the National Legal Aid and Defender Association (NLADA) Research, Data & Analysis Advisory Committee. She participated in teleconferences, and traveled to Washington DC for a two day meeting to discuss the use of data in the provision of criminal defense services and the degree to which data can be uniformly collected, analyzed, and used to support public defense funding. Though it is clear that there are dramatic differences in collection and data analysis in each state, and indeed most jurisdictions, due to the unique structures and needs of each, there is potential for using data to improve representation and funding.

The Executive Director's state level policy work included judicial, executive, and legislative branch work groups. The Governor's Public Safety Team meetings, staffed by the Governor's Deputy Legal Counsel, is held once each month for all public safety agency heads. This committee serves as a critical point of communication and planning for Oregon's public safety system, and includes representatives from all three branches. The Executive Director served as a member of the Judicial Department's Juvenile Court Improvement Program (JCIP) Advisory Committee, a federally funded program to improve the functioning and case outcomes in juvenile dependency cases. She also served as a contributing editor of the Juvenile Law Reader Editorial Board, a member of the Oregon Law Commission's Committee on Juvenile Records, and attended the Appellate Judicial Selection Committee (which was sometimes attended by the Chief Defender), as an interested party representing the Office of Public Defense Services. She also participated in a small inter-branch work group, chaired by former Attorney General Hardy Myers, convened to examine the issue of state representation at dependency shelter hearings across the state. The Executive Director worked with Michael Livingston, Juvenile Law Staff Counsel for the Judicial Department, to launch a survey that will be used by the Chief Justice's Task Force on Juvenile Representation. That Task Force will begin its work in 2013, once the survey results have been collected and analyzed. Finally, the Executive Director acted as Secretary of 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 and of access to justice in criminal, juvenile, family 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 helpful tool in its effort to build support around the state.

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 met several times during the year, and provided input on proposed changes and important policy decisions. The Executive Director spearheaded planning for the Juvenile Law Training Academy, and worked with OCDLA and the OPDS management team to plan the Public Defense Management Conference. Both conferences received positive reviews.

The OPDS management team met almost weekly during 2012, 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, reviews documents and other materials that impact the office, reviews 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 2013

The 2013-15 budget

The 2013 Legislative session begins on February 4, 2013. Though the December 2012 revenue forecast was better than previous forecasts, it is expected that the limited economic gains will still be outstripped by the growing costs of providing state services. The PDSC will again be asking for general fund resources to cover constitutionally and statutorily required expenses, with only limited, if any, hope of being able to achieve desperately needed improvements that could be achieved through funding of the agency's requested policy option packages. Recognizing the limited funding available in the next biennium, the PDSC adopted a three biennia strategy to achieve its policy option package goals of increasing provider compensation and reaching parity for public defender attorneys at the trial

and appellate court levels, and reducing dependency caseloads statewide. Efforts to secure funding for the remainder of this biennium and for next biennium will be a major focus throughout the first half of the year.

The Executive Director has also been asked by the Commission to take time during 2013 to analyze its current structure to ensure that the agency is prepared to continue supporting its staff and the clients it serves. When the Office of Public Defense Services was formed in 2003, bringing the Public Defender Office and the Indigent Defense Services Division into one agency, it had just over 56 full time equivalent (FTE) positions. The office has grown by almost 20 positions during the last ten years, and now has 76 FTE. Nonetheless, the agency structure remains very lean. The agency is also experiencing the challenges that often come with succession planning, and will have to dedicate additional time and resources to the development of plans to support management and staff, and to preserve institutional knowledge, as the agency prepares for the years ahead.