Oregon

PUBLIC DEFENSE SERVICES COMMISSION

The Executive Director's Biennial report to the Oregon Legislative Assembly

Ingrid Swenson
(December 2009)

Table of Contents

Introduction page 2

Agency Mission
The Right to Counsel
Role in Public Safety System
Oregon's Public Defense Delivery Model

I. Agency Organization and Operation 4

II. PDSC's Accomplishments in 2007-2009 6

Contract and Business Services Division
Appellate Division
Service Delivery Reviews
Site Visit Process
Efficiency of Operation

III. PDSC's Challenges in 2007-2009 12

Quality Issues
Compensation Issues
Funding for 2009-2011

Conclusion 16

Appendix A 17

PDSC Strategic Plan 2009-2011 18

PUBLIC DEFENSE SERVICES COMMISSION

The Executive Director's Biennial Report to the Oregon Legislative Assembly

(July 1, 2007 – June 30, 2009)

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Gideon v. Wainwright, 372 US 335, 344 (1963)

"Our criminal and juvenile justice systems fail when defendants lack access to independent and effective counsel."

Written Testimony by Attorney General Eric Holder to Senate Judiciary Committee,Washington, D.C. ~ Wednesday, November 18, 2009

"The right to representation by counsel is not a formality. ….It is the essence of justice."

Kent v. United States, 383 U.S. 541, 561 (1966).

Introduction

Mission: The Public Defense Services Commission (PDSC) is an independent commission in the judicial branch of state government. In July of 2003 it assumed full responsibility for administering Oregon's public defense system. That system delivers trial level and appellate legal services in criminal, juvenile and civil commitment cases across

the state. In carrying out these responsibilities, PDSC's mission is to deliver quality, cost-efficient public defense services through skilled and accountable management, effective quality assurance oversight, and performance measurement.

The Right to Counsel: The legal services provided by PDSC represent an essential component of Oregon's public safety system. Under the United States Constitution, the Oregon Constitution and Oregon statutes, financially eligible individuals charged with crime, parents and children in abuse and neglect cases, and individuals facing involuntary commitment due to mental health concerns are entitled to representation by court-appointed counsel at trial and on appeal. In FYE 2009 Circuit and appellate courts appointed attorneys to represent indigent clients in more than 171,000 cases.

Role in Public Safety System: Public defenders defend the rights of all Oregonians by asserting the constitutional and statutory protections afforded to the criminally accused and protect the interests of all Oregonians by advocating for parents and children in cases of alleged abuse or neglect and by asserting the rights of allegedly mentally ill persons not to be inappropriately deprived of their liberty.

The state cannot prosecute crime[1], remove children from their parents, or involuntarily commit those in need of treatment without providing constitutionally mandated representation to financially eligible individuals subject to these proceedings.

In addition, defenders contribute directly to public safety by (1) advocating for effective criminal sanctions that help clients avoid future involvement in the criminal justice system; (2) finding resources for

[1] In the 01-02 biennium in several special sessions the Public Defense Services Account was reduced by 27.6 million (17%) from the legislatively adopted budget. Although $5 million of that cut was subsequently restored, these cuts occurred so late in the biennium that public defense funding was virtually eliminated during the last quarter. Crime rates increased, repeat property offenders could not be held. Fox Butterfield reported in the June 7, 2003 edition of the *New York Times* that "Because [there is] little money for public defenders, Mark Kroeker, the Portland police chief, said officers were now giving a new version of the Miranda warning when they arrested a suspect in a nonviolent crime. 'They effectively have to say, "If you can't afford a lawyer, you will be set free. Enjoy."' Chief Kroeker said. Noting a significant increase in shoplifts, car break ins and other crimes, Kroeker said, 'The scary thing is that the worst results are still six months down the road, as the bad guys realize nothing is going to happen to them….'"

families involved in dependency cases that help them to avoid or limit disruption of the family unit, lead to early reunification or, when reunification is not possible, help children find permanent safe and supportive homes; and (3) assisting allegedly mentally ill persons find safe and effective alternatives to involuntary hospitalization.

On the appellate level defenders play a critical role in clarifying the law and ensuring its consistent application across the state. On both the state and local level defenders participate in public safety planning groups and provide valuable input to policy makers regarding effective approaches to controlling crime, protecting children and providing for the mentally ill, and facilitating the efficient operation of the courts and the public safety system as a whole.

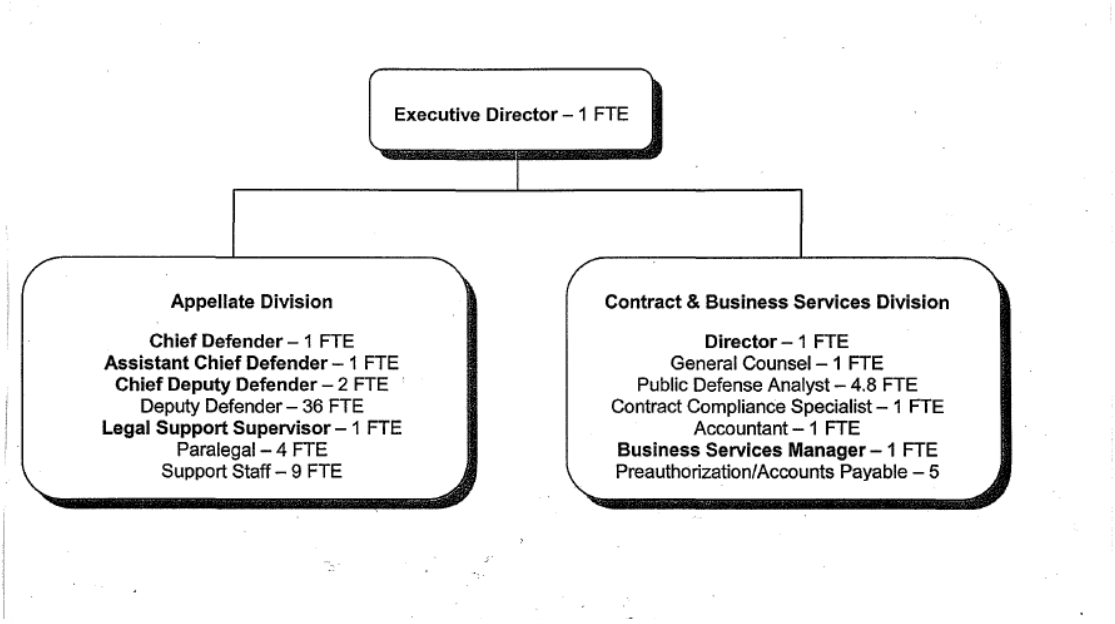
Oregon's Public Defense Delivery Model **:** PDSC provides representation in most criminal and juvenile dependency appeals directly through state employee lawyers and staff in its Appellate Division. PDSC approves and provides representation for all trial level cases and appellate cases not handled by AD through its Contract and Business Services Division, which negotiates and administers contracts with private contractors and administers payments to hourly providers.

I. Agency Organization and Operation

The Public Defense Services Commission is a seven-member commission that serves as the governing body for Oregon's public defense system. It provides policy direction and oversight for the administration of the system. The commissioners are civic-minded, uncompensated volunteers who are appointed by the Chief Justice who serves as an ex officio, non-voting member. By statute, two members must be non-attorneys, one must be a former prosecutor, and another must be an attorney engaged in criminal defense practice who does not serve as a court-appointed attorney compensated by the state. The current members of PDSC are listed in Appendix A.

The commission established the Office of Public Defense Services as its administrative agency and appoints the agency's executive director. Ingrid Swenson is the current executive director of the agency.

As shown below in the Organizational Chart for 2007-2009, the Office of Public Defense Services is comprised of two divisions. The Contract and Business Services Division (CBS)[2] manages the business functions of the two divisions, administers the Public Defense Services Account which funds representation and related services in all criminal, juvenile, and civil commitment cases at the trial level and in those appeals not assigned to the Appellate Division. CBS negotiates with private contractors for these services and authorizes and pays for expenses related to representation in public defense cases. The Appellate Division (AD)[3] provides direct legal representation in the state appellate courts in criminal cases, juvenile dependency and termination of parental rights cases, and parole cases.

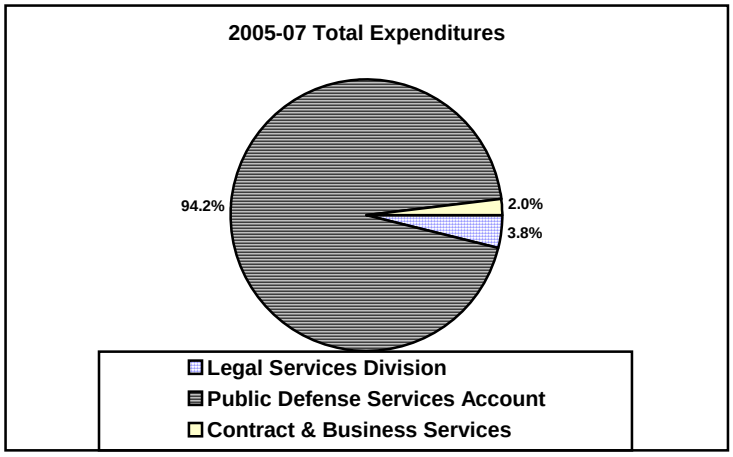


[2] Prior to the creation of the PDSC, the responsibilities of the Contract and Business Services Division were managed by the Indigent Defense Services Division of the Oregon Judicial Department.

[3] Formerly the State Public Defender's Office.

Kathryn Aylward is the manager of the Contract and Business Services Division. Peter Gartlan is the Chief Defender and manager of the Appellate Division.

The chart below sets forth the 2007-2009 funding allocations for the two divisions and for the Public Defense Services Account which funds private contractors, hourly rate attorneys and other private service providers such as investigators and expert witnesses.



II PDSC's Accomplishments in 2007-2009

(a) Contract and Business Services Division - With respect to the provision of trial-level representation services, the agency's Contract and Business Services Division was able to successfully negotiate contractual agreements with more than 100 private providers in every region of the state to ensure representation in approximately 340,000 cases during the biennium. The level of compensation negotiated under the contracts was adequate to meet at least the minimum needs of these organizations to survive and provide quality representation.

In addition to negotiating and administering contracts for the provision of legal services, the Contract and Business Services

Division manages the non-routine expense authorization process that was formerly overseen by Circuit Court judges in Oregon's 27 judicial districts. The expense authorization process requires OPDS to review each request for approval of fees for investigators, expert witnesses, discovery materials provided by other parties, and the like. The agency uses a peer-review process to obtain input from experienced attorneys about which expenses are truly "reasonable and necessary," as required by ORS 135.055. There were more than 30,000 such requests in 2007-2009. It is important to process these requests for services and the more than 50,000 invoices for completed services as promptly as possible. In 2007-2009 the agency exceeded its target by processing 98% of requests within five days of receipt and 98% of invoices within ten days of receipt. By assuring prompt and reliable payment the agency finds that providers are more willing to work at the below-market rates paid by PDSC. OPDS's Customer Service Survey in 2008 rated the agency very high in helpfulness, accuracy, timeliness, knowledge and expertise.

(b) Appellate Division - In order to allow the division to manage its criminal caseload and address a backlog of appellate cases, the 2007 Legislature approved the addition of eight new attorney positions to the Criminal Section of the division.

In an effort to improve the quality of representation in juvenile dependency cases, the 2007 Legislature also authorized the creation of a Juvenile Appellate Section within the division with four attorney positions.

The division used the positions to address the needs identified by the Legislature. The division assigned 3,919 cases during the 2007-2009 biennium. In addition to significantly reducing the case backlog the division reorganized its staff and designated two chief deputies to assist in the achievement of several long-standing administrative goals including updating the attorney manual, instituting a measurement tool for gauging appellate workload and providing additional support and supervision for the attorneys.

The Juvenile Appellate Section now represents parents in the majority of appeals in juvenile dependency and termination of parental rights cases. The agency created a juvenile case management database that served as a model for a revised case management system in its Criminal Section.

The Appellate Division increased the support it provides to trial level public defenders through various means. For example, every brief the division files is electronically sent to the trial attorney. An "attorney of the day" is available to respond to trial attorney inquiries about specific issues and opinions. Appellate Division attorneys regularly make presentations at continuing legal education training sessions sponsored by others, and also developed and presented two half-day in house trainings for its own staff attorneys. The evaluations from attendees consistently indicate a high level of satisfaction with the content and professionalism of AD presentations.

Appellate Division attorneys, OPDS staff, the executive director and its general counsel participate in a number of planning groups that prepare and present education and training sessions for public defense attorneys handling various types of public defense cases.

(c) Service Delivery Reviews - In pursuit of its mission to assure quality, cost effective public defense services in 2007-2009, PDSC continued its service delivery review process in four regions of the state and in one specific substantive area of law. This process includes holding public meetings in various locations in the state, gathering information from judges, prosecutors, other officials and citizens, evaluating the need for changes in the structure and delivery of local public defense services and directing the commission's management team to implement needed changes.

There are three phases in the process. The Executive Director and other agency representatives perform an initial

investigation. The commission then meets in the region to hear directly from the stakeholders in the local justice system. The commission then develops a service delivery plan, which is incorporated into a final report. This report serves as a blueprint for agency staff contracting with providers in the region.

In previous biennia, PDSC completed investigations and evaluations of the local public defense systems and developed service delivery plans to improve the structure and operation of local systems and the quality of legal services in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Wasco, Gilliam, Sherman, and Wheeler Counties.[4] The Commission also conducted service delivery reviews in juvenile dependency cases and in death penalty cases[5].

In the 2007-2009 biennium, PDSC conducted service delivery reviews in Washington, Coos and Curry Counties, Jackson and Josephine Counties, Grant, Harney, Baker and Malheur Counties and in Clackamas County. It also reviewed service delivery in post-conviction relief cases. At the conclusion of its review of post-conviction relief (PCR) representation it endorsed a number of approaches to improving the quality of the work provided, including a request to the Oregon State Bar to create a workgroup to develop performance standards for attorneys in PCR cases. A workgroup was formed. OPDS's General Counsel served as the reporter for the workgroup and assisted in all phases of the project. The bar's Board of Governors approved performance standards in February of 2009 that are now available to guide practitioners in the preparation and presentation of their cases, and to be used as a standard against which PDSC can measure performance. PDSC

[4] As they are completed these plans are posted on the PDSC website: http://www.ojd.state.or.us/osca/opds/Reports/index.html.

[5] As a result of its examination of representation in death penalty cases, PDSC adopted the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. It also approved the creation of a Death Penalty Resource Attorney position to provide expertise, training and assistance to other death penalty attorneys, investigators and mitigation specialists in the preparation and presentation of their cases. The efforts of the resource attorney enable other attorneys to be more efficient and effective.

staff has also organized a specialized training for post-conviction counsel for March of 2010.

(d) Site Visit Process - Since 2004 a task force[6] of PDSC's contractors have served as volunteers in developing and overseeing a systematic process to review the organization, management and quality of services delivered by the commission's contractors. The site visit process, apparently unique to Oregon, engages volunteer attorneys from across the state with expertise in public defense practice and management, in a comprehensive statewide evaluation process.

Teams of volunteer attorneys visit and evaluate the offices of the state's public defense contractors, administer questionnaires and interview stakeholders in the contractor's county, including the contractor's staff, prosecutors, judges, other defense attorneys, court staff, corrections staff and other criminal and juvenile justice officials regarding the contractor's performance and operations. After a site visit and deliberation among the team's members, the team prepares a report to the contractor's director and PDSC's executive director outlining its observations and recommendations. If significant problems are identified, the team can recommend that OPDS review the operations of the provider. In most instances, site teams find a mix of good practices and areas in which improvement is needed. Teams often commend contractors for special achievements and share these "best practices" with other contractors. Most contractors are quick to address concerns but failure to follow through can trigger further investigation by OPDS and may result in a decision not to renew a contract.

Among the best practices identified in previous site visits are regular and systematic evaluation of the contractors' attorneys and managers, independent boards of directors with relevant

[6] The Quality Assurance Task Force includes volunteer representatives of some of PDSC's major providers and OPDS staff including it's executive director, the director of contract and business services and its general counsel. The group is chaired by Jack Morris, an attorney in private practice, whose firm represents public defense clients in five Central Oregon counties.

business and management expertise, and financial management practices that conform to accepted accounting standards. In addition to improving operations of the contractors who are the subject of the site visits, the process is designed to improve the operations of other public defense contractors by sharing information about successful practices and polices.

In previous biennia site teams evaluated contractors in Deschutes, Douglas, Clackamas, Lane, Linn, Lincoln, Jackson, Morrow, Multnomah, Umatilla and Washington Counties. In 2007-09 teams evaluated providers in Benton, Columbia, Crook, Jefferson and Lane and Multnomah Counties.

(e) Efficiency of Operation – As a consequence of its statutory mission to provide public defense services "in the most cost efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice,"[7] and as part of its institutional culture, PDSC's staff as well as the independent contractors who provide public defense representation at the trial level and the experts, investigators and other service providers who work with them understand that cost-efficiency is a consideration in every decision that is made by the agency. From the outset PDSC adopted a business-model approach to the operation of its two divisions.

For example, when an out-of-town expert's testimony is needed in a trial, PDSC asks the attorney to consider having the expert appear by video instead of traveling to the location of the trial if it will not prejudice the defendant's case. If multiple parties to the same case have similar interests, PDSC will ask the attorneys for those parties to share expenses if possible.

Efficiency of operation and the need to conserve resources is a part of every monthly OPDS staff meeting. Employees know that identification of cost saving approaches to their work is

[7] ORS 151.216(1)(a).

welcomed. Employees responsible for agency purchases are skilled at identifying the most cost effective options including use of state surplus materials and used equipment. Efficient use of time is also emphasized. In February 2009 the agency provided its staff with a training in time management. The training was offered at no cost by the Professional Liability Fund of the Oregon State Bar.

The Appellate Division meets regularly with the Court of Appeals and the Attorney General's Office to streamline the appellate process and provide more timely case resolutions for its clients and the system. For example, the division works with the Attorney General to identify "lead cases" that will control the disposition of multiple cases presenting the same or similar issues. The division sits on the Oregon Rules of Appellate Procedure Committee, appears in the legislature as a resource and proposes statutory changes to improve the efficiency and cost effectiveness of the appellate system. For example, the division shepherded a 2007 statutory change that eliminated an unnecessary layer of litigation in appeals from the Board of Parole and Post-Prison Supervision that had proven to be unnecessary.

III PDSC's Challenges in 2007-2009

(a) Quality Issues – With respect to the provision of public defense services at the trial level, PDSC believes that the majority of clients receive quality, cost-efficient representation. There are some areas of practice, however, in which quality is not uniformly good, and in many parts of the state caseloads exceed national standards. As noted below, the agency continues to seek solutions to these challenges.

> When I arrived at court that morning, I was told this is my lawyer. My lawyer sat down with me for five minutes, asked me a couple of things, and told me to admit to my drug addiction. I didn't know anything about a fact-finding hearing. I wasn't told what my rights were. I wasn't told the

> procedure of court. I didn't have any idea what was happening, and I was very much afraid, because the most important thing in my life had just been lost.[8]

Representation in juvenile cases is one area of particular Concern in Oregon. Indigent Defense Task Force Reports II and III issued by the Oregon State Bar in 1996 and 2000 underscored the need for significant improvement in juvenile representation.

In 2005 the Oregon Secretary of State's Audits Division identified representation in juvenile cases as an area of management risk to the agency. In the fall of 2006 a group of interested legislators formed a workgroup to address the issue. The workgroup recommended a reduction in caseload for juvenile attorneys, an increase in compensation and the creation of a resource center for attorneys.

SB 411 in the 2007 session would have funded the work group's recommendations. At a public hearing on the bill in the Senate Judiciary Committee, members heard testimony about the success of a Washington State parents' representation program that began as a pilot program in three counties and was extended to 25 counties after the initial performance evaluation was conducted. In the Washington program, attorneys were required to commit to meeting a series of performance requirements. The program was deemed highly successful and resulted in significant reductions in termination of parental rights cases, significant increases in family placements and more timely resolution of cases.

In order to achieve similar success in Oregon, significant additional funding would be needed. Policy Option Package No. 100 in the agency's 2009 budget proposal would have

---

[8] Moynihan, Forgey, & Harrris, *Symposium: Fordham Interdisciplinary Conference Achieving Justice: Parents and the Child Welfare System, 70 Forham L. Rev. 287, 330 (2001) (citing testimony by a member of a panal of parents who participated in the Conference and had previously been involved in the child welfare system),* which testimony has been echoed by parents in Oregon in presentations to Oregon lawyers across the state.

allocated an additional $17 million to the agency for the purpose of decreasing juvenile caseloads. PDSC has determined that caseloads for its contract attorneys exceed national standards by 30%, and in October 2006 when OPDS requested a total client tally on two separate dates from contractors who represent only juvenile clients, all reported caseloads exceeding those of their Washington State counterparts in the pilot counties, some by more than 200%. The policy option package was not funded and PDSC continues to explore other kinds of assistance to offer its providers.

OPDS arranged for one of its premier providers to serve as a resource center for other attorneys. In addition, it created a parents' representation project at the same contract office to offer trainings and provide expertise to other contract attorneys in the representation of parents.

OPDS has worked with other groups interested in the representation of parents and children to sponsor and support a number of training opportunities for lawyers. PDSC believes that adequate training is now available to all juvenile attorneys.

With the budget approved by the 2009 Legislature, PDSC will be seeking to concentrate a greater portion of its resources on juvenile representation in the hope that even a relatively minor decrease in caseload would allow attorneys to be more proactive in the representation of clients in these cases.

Another area of practice in which quality of representation continues to be an issue is post-conviction relief. Although PDSC sought legislative approval for the creation of a new division within OPDS to handle these cases, when that request was not approved, PDSC attempted to concentrate the work among the best qualified contract providers. As noted above a set of performance standards is now in place and a special training on the standards has been scheduled for 2010.

(b) Compensation Issues – As PDSC reported to the Public Safety Subcommittee of the Joint Ways and Means Committee in both 2007 and 2009 the trial level public defense system in Oregon has relied for a long time on highly committed veteran lawyers who were drawn to the work by a sense of commitment to public service. It cannot be assumed that younger attorneys can or will make the same kinds of sacrifices these older attorneys have made, especially in view of the sizeable loans the younger attorneys have had to assume in order to finance their college and law school educations. PDSC's contractors, particularly its non-profit public defender offices, report that recruitment and retention of attorneys are significant concerns.

The other category of public defense providers who have been chronically underpaid are attorneys and investigators who work at hourly rates.

PDSC's Policy Option Package No. 101 would have allocated additional funds for both these groups of providers but, as with other agencies in the 2009 legislative session, not only were policy option packages not funded but even essential budget levels were not met.

(c) Funding for 2009-2011 – At the conclusion of the 2009 Legislative session, funding for trial level representation was reduced by more than $14 million which means that PDSC will be unable to provide public defense services for the final seven weeks of the biennium assuming an average monthly expenditure of $8.8 million per month. A portion of the deficit is expected to be filled by $3.5 million in Other Funds from revenue generated by HB 2287 and additional revenue from that or another source could be allocated by the 2010 special legislative session. PDSC has been instructed to report to the 2010 special session on caseload trends and any costs incurred as a result of resentencing proceedings authorized by the 2009 Legislative Assembly.

Conclusion

PDSC understands its mission and is dedicated to realizing its dual goals of providing representation that is consistent with the Oregon and United States Constitutions and Oregon and national standards of justice and doing so in the most cost efficient manner possible.

PDSC looks forward to meeting the challenges and providing the leadership and direction essential to a healthy, effective and efficient public defense system in Oregon.