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Budget Information Report

State Funding of Trial Court Representation for Eligible Persons

During the 2003-05 interim, questions have been asked by legislative members serving on the Emergency Board and other policy committees relating to the costs of public defense services. Specifically, the questions have centered on what is required, how services are delivered, what changes have occurred, how Oregon compares to other states, and what studies and actions have been done to contain caseload growth and costs. The purpose of this budget information report is to provide answers to these questions in preparation for the 2005 regular legislative session.

This budget information report addresses issues related to the provision of public defense services at the trial court level. The issue of representation at the appellate level is not included in this report.

What is the Requirement to Provide Public Defense Services?

Eligible persons are entitled to adequate representation in court, at state expense, under provisions of the Oregon and federal constitutions and Oregon statutes. In *Gideon v. Wainwright*, the United States Supreme Court held that, "no state shall deprive any person of life, liberty or property, without due process of law..." Constitutionally, due process has been held to include the right to appointed counsel in criminal proceedings - from arrest, through trial, at sentencing, and on appeal. In *Gideon*, the court wrote, "...reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to be an obvious truth."

Public defense representation is not limited to criminal cases. Other statutory and constitutional provisions include the right to appointed counsel in court proceedings involving life, liberty, and property, including: habeas corpus; post-conviction relief; contempt; juvenile dependency, delinquency, and termination of parental rights; civil commitments for the mentally ill or developmentally disabled; and parole and probation violation proceedings. The U.S. Supreme Court has also held that the right to appointed counsel includes related costs such as expert witnesses and investigation expense.

What is the State Public Defense History?

Until 1983, the administration and cost of representing eligible persons at the trial court level was the responsibility of Oregon counties. The State of Oregon defined the crimes and other court proceedings that required appointment of counsel, but did not bear the cost of these actions. In the 1970s, as costs for public defense rose, counties were increasingly concerned about their responsibility for costs that they felt they did not control. In 1981, the Oregon Legislature transferred the cost of public defense services from counties to the state, effective in 1983. This transfer was contemporaneous with the transfer of the administrative cost of the state court system from the counties to the state. (Counties retained responsibility for court facilities and security.) State funds were appropriated to the State Court Administrator to pay the cost of public defense. Administration of the program was divided among various parties, including the State Court Administrator who had the responsibility for contracting for representation services, and judges and local trial court administrators who had the responsibility for authorizing payments. This arrangement made it difficult for the State Court Administrator to control costs. In 1985, the Oregon Legislature created a State Indigent Defense Board. The Board was directed to study public defense services and report to the Legislature. The Board was also directed to relieve judges of the responsibility for authorizing public defense payments.

During the 1985-87 biennium, the cost of public defense services increased by 24%, from \$34 million to \$42.3 million, due to an initial budget that made no provision for caseload growth and to costs that resulted from the reinstatement of the death penalty. The funding crisis significantly hampered the Board's ability to carry out its assigned duties, and the 1987 Legislature abolished the Board. Responsibility for the administration of public defense services was returned to the State Court Administrator. The Legislature also enacted ORS 151.465, which prohibited the transfer of funds appropriated for the operation of the state court system to public defense costs. However, judges remained concerned about the potential conflict of interest between the cost of public defense and the need for adequate court operating funds, since both budgets were within the Judicial Department.

Administration of the public defense system remained with the State Court Administrator until July 1, 2003, when the Public Defense Services Commission (PDSC) assumed responsibility for both appellate and trial level public defense services. The transfer began with the 1999 Legislature, which established the Public Defense Services Commission. The Commission was directed to develop a plan for the consolidation of appellate and trial court public defense services. The Commission assumed responsibility for most appellate services in 2001 and the remainder of the public defense system was transferred in 2003.

How are Public Defense Services Delivered?

According to a 1999 report by the Bureau of Justice Statistics, Oregon is one of 21 states where the cost of public defense is solely funded by the state. Of these states, 19 had a state-employee based public defender system for trial level cases. In Oregon, trial level public defense services are delivered through four primary contractual mechanisms: contracts with private non-profit public defender organizations, primarily in large metropolitan areas such as Portland; contracts with law firms or a group of affiliated private attorneys, in a consortium, either for general or specific caseload types; contracts with law firms to provide public defense services while maintaining private clients; and contracts with individual attorneys for specialized services, such as death penalty or juvenile matters. Appellate level public defenders are state staff, while trial level services are provided through this mix of contract services. The PDSC may choose to change this mix in the future.

What Factors are Used to Determine Eligibility?

ORS 135.050 and ORS 151.485 provide that a person is financially eligible for appointed counsel if that person is determined to be **"...financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family."** The Judicial Department eligibility verification staff uses a two-pronged means test to determine whether or not to recommend that a judge appoint counsel at state expense. The first consideration is eligibility under the federal food stamp guidelines (which are revised annually). This includes consideration of the liquid assets owned by the person. The second consideration is whether or not a person whose income exceeds the food stamp eligibility standard has sufficient income and liquid assets to hire an attorney, based on the seriousness of the case. A factor in that consideration is local standards for the cost of hiring counsel. Eligibility verification staff is authorized by statute and policy to contact a number of outside sources to verify the financial information provided by persons seeking court-appointed counsel, including the State Employment Department, Workers' Compensation Division, county assessor, financial institutions, credit bureaus, private credit companies, and the Department of Human Services.

What Studies and Reports Have Been Issued on Public Defense Services?

There have been a number of studies and reports on public defense services since the transfer of responsibility for public defense in 1983. Eighteen of these reports are summarized below. The following summary is not exhaustive. (Note: a number of the cited reports are by The Spangenberg Group, which is a nationally-recognized research entity specializing in public defense issues.)

- "Assessment of the Oregon Adult Criminal Indigent Defense System," The Spangenberg Group, March 1989. The study found that **Oregon ranked third in the nation in terms of per capita criminal defense cases. Reasons included a higher rate of indigency in Oregon than in the nation, and a higher level of prosecution than in other states. The study also found that Oregon was 37th in the nation in terms of the cost per case.**

- “The Potential Impact of Prosecutorial and Court Practices and Procedures on Indigent Defense Costs in Oregon,” Bureau of Justice Assistance, Technical Assistance Project, April 1989. The study identified **prosecutorial charging and negotiation practices, which, if revised, could reduce the cost of public defense services.**
- “A Comprehensive Approach to Containing the Cost and Caseload of Indigent Defense Services in the Criminal Justice System,” The Spangenberg Group, January 1993. The study involved the Oregon Legislative Task Force on Indigent Defense Cost and Caseloads, consisting of 35 members with representation from the Legislature, the Judicial Department, the Executive Branch, law enforcement, prosecution, and public defense practitioners. Among the findings and recommendations were: **the administration of the public defense function should be separated from the judicial function, to reduce potential conflict of interest for judges; there should be early screening and disposition programs to dispose of as many cases as possible at an early stage; and that, in Oregon, the right to counsel is expanded beyond that provided in the federal Constitution, but that any restrictions on that right would require an amendment to the Oregon Constitution.** (See note below regarding the subsequent U.S. Supreme Court ruling that clarified constitutional requirements, and, by expanding the federal right to counsel, made federal and Oregon constitutional law the same for appointment of counsel in criminal matters.)
- “Final Report of the Oregon State Bar Indigent Defense Task Force,” July 1994. The report noted that, “Paying for the cost of indigent defense is an obligation of the state that charges persons with crimes, seeks to affect parental rights, or seeks to involuntarily commit individuals. That obligation has never been a popular one. Because it is not popular, the effort to create a permanent and reliable system for providing indigent defense services has never been made in any truly systematic way. Instead, funding of indigent defense has been grudgingly doled out and loudly condemned. Today, rising costs of providing indigent defense services, coupled with new and extreme limitations on the availability of funds to the Legislature, will no longer permit a piecemeal, insular, and ad hoc approach to the problem.”

The report included a number of recommendations, including the establishment of a commission (versus the judiciary) to administer public defense services, Attorney General guidelines for prosecutors, and representation for eligible persons by attorneys who are full-time state employees. The report noted testimony from Professor Wayne Westling to the Oregon Senate Judiciary Committee in March 1992, who commented that, **“the spigot is in the hands of county district attorneys.... All the state can do is provide pails...the state has no choice. Since the state is constitutionally bound to provide defense services, the fiscal impact of (public defense) has passed from the control of the state to the agency which has control of the (spigot).”**

- “Report to the November 1994 Emergency Board on the Operational and Financial Desirability of Establishing a State Agency Public Defender System in Oregon (Trial and Appellate),” Judicial Department, Indigent Defense Services Division, November 1994. The report compared the advantages and disadvantages of a state agency public defense system. Advantages included reduced contract negotiations, equalization of operational costs, removal of authorization responsibility from judges to a central authority, and enhanced coordination of service delivery and quality control. Disadvantages included the loss of competition with respect to quality of service and cost, potential higher costs from the elimination of private practice attorney subsidies, and higher estimated costs to establish and operate a state agency public defender system.
- “Report to the November 1994 Emergency Board on Right to Counsel at Government Expense, Comparison of Oregon’s Provisions to Federal Provisions,” Judicial Department, Indigent Defense Services Division, November 1994. The report noted that federal and state constitutional rights in criminal cases are comparable. At the time of the report, it was believed that the federal Constitution limited misdemeanor representation to cases where the defendant would be sentenced to jail time, while Oregon’s Constitution required representation where a potential for a jail sentence existed. However, in 2002, the United States Supreme Court clarified that the federal constitutional standard is that counsel must be appointed where a potential for jail may exist. In other words, federal constitutional law and the Oregon Constitution are the same as it relates to appointment of counsel in criminal matters.

The report also noted that Oregon provided representation in civil cases, such as post-conviction relief, probation violation, juvenile dependency, termination of parental rights, civil commitment, extradition, and habeas corpus, where the right to counsel in the federal Constitution was not as clear, or where the federal courts did not have jurisdiction.

- “Reconfiguration of the Current System of Providing Indigent Defense Services: A Report to the President of the Senate and the Speaker of the House,” Oregon Criminal Justice Council, February 1995. The report compiled previous studies and reports, and noted “a lack of coordination among system components.” As an example, **increasing the number of police officers on the street resulted in more arrests and prosecutions which, in turn, directly impacted indigent defense costs.** The report also noted the success of efforts, such as the Eligibility Verification Program, to control costs.
- “State of Oregon Indigent Defense, Office of the State Court Administrator,” Secretary of State, Audits Division, fieldwork completed October 1994. The review found that significant variations existed in the cost of providing representation, that some hourly rate paid attorneys were charging unreasonable amounts, and that some contractors were not complying with the terms of the contracts or were working without contracts.
- “Oregon Judicial Department Indigent Defense Special Review,” Secretary of State, Audits Division, June 1996. The review found \$41,000 was over-billed by two attorneys.
- “Indigent Defense Task Force Report: Principles and Standards for Counsel In Criminal, Delinquency, Dependency and Civil Commitment Cases,” Oregon State Bar, September 1996. The Oregon State Bar Board of Governors adopted these standards and principles and the Indigent Defense Services Division incorporated them into its standard form public defense contract.
- “Report on Indigent Defense in Oregon,” Criminal Justice Foundation, January 1999. The report compared the right to counsel in Oregon to federal constitutional requirements, and noted **Oregon expanded the right to counsel to include juvenile dependency and termination of parental rights, civil commitments, habeas corpus and other cases, where the right to counsel in the federal Constitution was not as clear, or where the federal courts did not have jurisdiction.** (The U.S. Supreme Court subsequent ruling clarified constitutional requirements, and made federal and Oregon constitutional law the same for appointment of counsel in criminal matters.)
- “Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-By-State Overview, 1999,” The Spangenberg Group, November 1999. The report described, but did not rank, how states compensate counsel in capital cases.
- “Rates of Compensation for Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-By-State Overview, 1999,” The Spangenberg Group, November 1999. The report described, but did not rank, how states compensate counsel in non-capital felony cases.
- “Indigent Defense Task Force Report on the Quality of Indigent Defense Services,” Oregon State Bar, May 2000. The report noted that “**...funding is the key to fulfilling the state’s obligation to provide adequate representation....** Although some mechanisms exist for promoting high quality indigent defense services, these mechanisms are dependent, finally, on a provider organization’s ability to fund them.”
- “Contracting for Indigent Defense Services: A Special Report,” The Spangenberg Group, April 2000. The report noted problems inherent in contract systems, including the drive to control contract costs emphasizes quantity over quality and leads to lower standards of representation, and that contract systems drive out appointed counsel systems with private bar representation. **The report used Oregon to illustrate an effective contract system.**
- “Planning for the Future of Public Defense: New Leadership, New Partnerships, New Strategies,” The Spangenberg Group, August 2000. This article reported on new developments in public defense.

- “State-Funded Indigent Defense Services, 1999,” Bureau of Justice Statistics, September 2001. The report noted that, “...the decentralized nature and diverse ways of delivering indigent defense services makes collecting nationwide information...difficult.” The report found that 21 states had a solely state-funded program. The remaining states either had local funding of public defense or a mix of state and local funding. **Oregon ranked 8th out of the 21 states in terms of the operating expenses per 1,000 population for criminal cases, at \$9.82, compared to the average of \$9.05. However, Oregon ranked 20th in terms of the growth in cost of criminal representation from 1982 to 1999, at 49%, compared to the average of 164% (after all states’ data was adjusted for inflation).**
- “Constitutional Right to Appointed Counsel,” Oregon Legislative Counsel, May 2002. At the request of the Joint Interim Judiciary Committee, Legislative Counsel issued an opinion on the constitutional right to appointed counsel. The opinion was in response to concerns that Oregon could save public defense costs by more closely aligning appointment of counsel to federal constitutional standards. As noted above, subsequent to this opinion, **the United States Supreme Court clarified that the federal constitutional standard is that counsel must be appointed where a potential for jail may exist. In other words, federal constitutional law and the Oregon Constitution were the same in the requirement to appoint counsel in criminal matters.**

What Are the Factors that Drive Caseloads and Costs?

A consistent theme in the various studies and reports listed above is the disconnect between local factors that drive costs and the ability of the state to pay these costs. These factors include the number of local law enforcement personnel available to cite or arrest persons and the local public safety environment, such as the availability of jail space and district attorney charging practices, including the severity of the charges that are filed. The state has no direct ability to control these factors and must pay the cost of representing persons brought into the system by these local actions. In addition, resources for human services (such as drug abuse treatment funding and family support services) and community corrections directly impact public defense costs.

Comparative data on public defense costs cannot be definitively established. States vary in how they describe offenses, and an offense that is a felony in one state may be a misdemeanor in another. Even when offenses are similarly classified, the penalties may be different. Furthermore, not all states were appointing counsel in misdemeanor cases where the potential for jail existed prior to the United States Supreme Court ruling in 2002 that clarified this requirement. Therefore, data prior to 2002 is not comparable among the states.

Indigent Defense Caseloads and Expenditures in Comparable States										
State	Population	Cases	Felony	Misdo.	Juvenile	Appeal	Other	Ratio Felony/ All Other	Av. Cost Per Case	Cases Per Capita
OR	3,031,867	135,175	34,996	40,417	10,027	2,525	47,210	26%	\$ 394.00	0.045
MN	4,517,416	177,013	17,572	99,214	31,434	858	27,935	10%	\$ 230.94	0.039
NM	1,616,483	59,154	20,000	29,562	9,137	455		34%	\$ 303.55	0.037
MA	6,012,268	210,120	19,428	163,167	5,710	1,367	20,448	9%	\$ 290.46	0.035
WV	1,820,137	62,784	12,363	21,446	8,979	898	19,098	20%	\$ 324.92	0.034
WI	5,037,928	118,545	20,104	48,456	32,384	3,013	14,588	17%	\$ 472.73	0.024
IA	2,814,064	60,763	9,222	34,319	5,597	499	11,126	15%	\$ 290.46	0.022
CO	3,565,959	65,387	32,518	15,212	9,766	474	7,417	50%	\$ 404.43	0.018
MO	5,233,849	71,172	30,140	21,926	3,220	1,398	14,488	42%	\$ 325.55	0.014
Totals	33,649,971	960,113	196,343	473,719	116,254	11,487	162,310	20%	\$ 303.70	0.029

Source: Spangenberg Group, October 1997

As illustrated in this table, costs are affected by the number of cases that are filed per capita, and the overall ratio of felony case filings, which have greater complexity and cost, to all case filings. The table includes data from comparable states where the state funds all of the public defense services costs, and where data was available in all of the case types noted in the table. Oregon ranks first out of these comparable states in the number of cases filed per capita, at .045 cases. The average filing per capita was .029, and the state with the lowest filing was Missouri, with .014 per capita. Oregon ranked 4th out of these 9 comparable states in the

average cost per case, which was equivalent to its ranking in the percentage of all cases that were identified as felonies.

Data suggesting Oregon's relatively high overall rank in public defense costs per 1,000 population, which, as noted above, was 8th out of the 21 states with a statewide funding system (see Bureau of Justice Statistics Special Report: State-Funded Indigent Defense Services 1999), is directly attributable to the total number of Oregon public defense cases and its relatively high level of felony case filings.

Statewide Cost Per Case Comparisons, FY 2002				
State	Case Totals	Total Expenditure	Cost Per Case	Cost Per Case Ranking
Colorado	45,675	\$ 40,629,765	\$ 889.54	1
Ohio	130,482	\$ 93,837,502	\$ 719.16	2
Alabama	62,451	\$ 37,698,403	\$ 603.65	3
Iowa	67,957	\$ 38,743,352	\$ 570.12	4
West Virginia	48,168	\$ 24,730,658	\$ 513.43	5
Massachusetts	201,569	\$ 94,427,468	\$ 468.46	6
Oregon	167,893	\$ 74,707,995	\$ 444.97	7
North Carolina	169,590	\$ 73,859,355	\$ 435.52	8
Missouri	82,206	\$ 31,601,168	\$ 384.41	9
Georgia	178,655	\$ 55,419,847	\$ 310.21	10
Maryland	191,232	\$ 58,528,208	\$ 306.06	11
Virginia	309,911	\$ 77,565,518	\$ 250.28	12
Totals	1,345,878	624,183,721	\$ 463.77	

Source: Spangenberg Group, January 2004

As the 2002 data on this table illustrates, Oregon ranks 7th out of 12 comparable states in terms of the cost per case. This data also suggests that Oregon's ranking in terms of public defense costs relates to the overall number of cases, rather than the per case costs.

As suggested above, another factor that drives costs in Oregon is the complexity and seriousness of cases, including the effect of Ballot Measure 11, reinstatement of the death penalty, and other actions that increase the potential penalty upon conviction of a crime.

Crime seriousness levels affect the number of defense hours and other costs, including investigation and expert witness costs, expended per case. Federal requirements in juvenile abuse and neglect matters increase the number of hearings and complexity of these cases, also adding to public defense costs.

Finally, the 1999 Legislature amended ORS 161.565 to allow, **rather than require**, a district attorney to declare at first appearance whether a case would proceed as a violation rather than a misdemeanor. This legislation reversed previous statutory language that held that the presumptive status was a violation, unless otherwise specified by the prosecutor. This change increased the appointment of counsel at first appearance since more cases could presumably carry a possible sentence of incarceration.

What Judicial Branch Actions Have Been Taken to Control and Recover Costs?

Eligibility Verification Program

In 1987, the Chief Justice established Indigent Defense Guidelines that provided standards for determining eligibility for appointed counsel and set attorney compensation rates. According to these guidelines, judges would appoint counsel based on information contained in an Affidavit of Eligibility. However, since there was no verification of the data contained in the Affidavit, judges, legislators, and prosecutors were concerned that ineligible persons were receiving counsel at state expense. In 1988, the courts, with funding from the Legislature, implemented a pilot project to verify the data contained in the Affidavit. Data from the pilot project indicated that 14% of applicants did not qualify for court appointed counsel. In 1989, the Eligibility Verification Program was implemented statewide. Ongoing review of the program indicates that for every dollar spent on the Eligibility Verification Program, over two dollars are saved in public defense costs. Responsibility for the Program remains with the Judicial Department, with the Other Funds portion of costs coming from the Application and Contribution Program (discussed below).

Recoupment of Court Appointed Counsel Costs

Pursuant to ORS 151.505, for all cases filed after July 1, 1998, a person who received public defense services could be ordered to repay all or part of this cost at the conclusion of the case. A judge must determine that the person has the financial ability to pay this cost. The funds collected (approximately \$7 million in the 2001-03 biennium) become part of the Criminal Fines and Assessment Account that, by statute, is distributed to public safety programs.

Application and Contribution Program

The Application and Contribution Program (ACP) was established in 1997 pursuant to ORS 151.487. ACP is a two-part program that requires persons who apply for appointment of counsel to pay an application fee of \$20. The court may also order these persons to contribute some amount of money toward the cost of appointed counsel. These requirements can be waived by a judge if the person is unable to pay. In the 2001-03 biennium, over \$1 million was collected from ACP, and revenue is projected to grow to \$2 million by the end of the 2003-05 biennium. These funds are used to support the Eligibility Verification Program.

What Legislative Actions Have Been Taken to Control Caseloads and Costs?

Since the transfer of responsibility for public defense in 1983, the Oregon Legislature has enacted laws and undertaken studies to control public defense caseloads and costs. Some recent examples include:

House Judiciary Committee Hearings on Extraordinary Expenses, 2003

These hearings found no evidence of systematic abuse of extraordinary expenses, and made specific recommendations for procedural and statutory changes to monitor and reduce costs, including establishing a peer review system for approval of extraordinary expense and establishing a work group of prosecutors and defense attorneys to improve the process and procedures involved in complex criminal and death penalty cases. The PDSC has implemented most of the procedural recommendations.

Early Disposition Programs, 2001 (ORS 135.941-.949)

This legislation required counties to implement early disposition programs for certain offenders. The purpose was to speed the resolution of criminal cases, hold offenders accountable, and ensure public safety. Alternate sanctions provide for the use of drug treatment and other community resources as an alternative to incarceration and other sanctions for criminal conduct. The Criminal Justice Commission is responsible for compiling data and reporting on the implementation of these programs statewide.

Structured Sanctions for Felony Probationers, 1999

This allowed local probation officers, without any judicial hearing, to impose structured sanctions for persons who violated terms of felony probations. Previously, only judges could impose these sanctions, so this reduced court and appointed counsel costs.

Administrative Review and Preauthorization of Public Defense Non-Attorney Expenses, 1995

This allowed for administrative, rather than judicial, review of extraordinary expenses, which reduced the court and appointed counsel costs for this review.

What is the Current Budget Status?

The public defense system is facing a \$7 million deficit for the last quarter of the 2005 fiscal year. This could result in disruptions to the public safety system, including the dismissal of cases for lack of counsel. The deficit is adjusted to include a 2003-05 biennial cost avoidance of \$3 million. The deficit is the result of the failure of Ballot Measure 30. The Ballot Measure 30 cuts were to the funds the Legislature restored following budget cuts in the 2001-03 biennium, and were based on caseload estimates for the 2003-05 biennium. The budget adopted by the 2003 Legislature includes no adjustment for inflation or for any salary and benefit changes for persons employed under these contracts. The Public Defense Services Commission will report to the January 2005 meeting of the Emergency Board on the status of the deficit. The Emergency Board could consider allocating \$7 million from the general purpose Emergency Fund or could defer the issue to the 2005 Legislature.

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