

### Members

Barnes H. Ellis, Chair  
Shaun S. McCrea, Vice-Chair  
Henry H. Lazenby, Jr.  
Peter A. Ozanne  
John R. Potter  
Janet C. Stevens  
Honorable Elizabeth Welch



### Ex-Officio Member

Chief Justice Paul J. De Muniz

### Executive Director

Ingrid Swenson

## PUBLIC DEFENSE SERVICES COMMISSION

### RETREAT

Saturday, October 22, 2010  
9 am to 2 pm  
Cove Room  
Agate Beach Hotel  
3019 N. Coast Hwy.  
Newport, Oregon 97365

### AGENDA

1. **The Budget Environment:** Review and discussion of information from 10/21/10 meeting regarding state budget, public safety system partners' plans for '11-'13 and impact on public defense
2. **Possible Strategies:** Staff information regarding costs associated with providing representation in particular case types; commission discussion of potential impact on public defense costs of possible prosecution and court actions
3. **Discussion of PDSC Role in the Legislature** and information/data to be provided to legislators regarding potential savings from possible legislative actions
4. **Possible PDSC Agenda Items for 2011**
  - Lane County update
  - Adoption of contracting policies and Procedures (including plan for contract review)
  - Marion County Update (annual)
  - Juvenile delinquency representation – continued service delivery review and planning
  - Juvenile dependency representation – continued service delivery review and planning
  - Civil commitments, PSRB representation
  - PCR update

Chair Ellis  
Commissioners

- Tillamook County service delivery review
- Updated strategic plan, biennial report, annual report
- Review of implementation of recoupment and amended eligibility standards
- Client-centered defense
- Evidence based practices
- Training Topics for Commissioners
- Training opportunities for public defense providers

**5. Initial Discussion of Agency Five Year Plan,**

Discussion of long term goals (including how to improve/maintain quality in a budget deficit period), succession planning for OPDS managers, other goals identified by commissioners  
(Attachments 1 - 3)

***Please note:***

***Participation in this informal commission retreat by non-commission members will be by invitation only. Written material may be submitted in advance for possible commission consideration.***

***Lunch will be provided for commission members at 12:00 p.m.***

***The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.***

# Attachment 1

To: Public Defense Services Commission

From: Mark McKechnie, Juvenile Rights Project, Inc.

Date: October 12, 2010

Re: Quality Assurance, Caseload Sizes and the Impact of Declining Caseloads

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Commission Members:

OPDS and the Commission have placed a great emphasis on improving the quality of public defense representation in Oregon and upon the quality of juvenile representation, in particular. Site reviews, conferences, best practice standards and technical assistance are some of the strategies that have been utilized to raise the bar. While many factors impact the quality of representation, it is clear that reasonable attorney caseload sizes are a prerequisite for providing the best quality of legal representation to clients, including dependent children, delinquent youth and parents. Excessive caseloads, by contrast, virtually guarantee that attorneys cannot attend adequately to the needs of and fulfill their obligations to each individual client.

Caseload sizes are notoriously difficult to measure consistently. We understand that OPDS is currently planning to do an updated survey on current caseload sizes. Anecdotally, juvenile caseloads in Multnomah County range from 60 cases to over 175 cases at any given time per full-time contract attorney.

Attorneys with the highest caseloads are more likely to double-book themselves for hearings and have the least time available to counsel and prepare each client for hearings and trials. This leads to delay and inconvenience for the court and for other parties.

The limited amount of time that attorneys with the highest caseloads have to spend working on behalf of each client also inhibits the abilities of these attorneys to employ the various strategies necessary to obtain the outcomes sought by their clients.

The Commission has sought additional funds in the past to reduce juvenile caseloads and has included Policy Option Package 100 in the OPDS budget request to the legislature for 2011-13 to reduce dependency and termination caseloads by 20%. It remains to be seen when additional resources might be allocated to reduce caseload sizes, and, in fact, budget reductions and/or caseloads that are lower than projected may lead to adjustments to provider contracts.

We encourage the Commission to make caseload size and its effect on quality of representation a primary consideration for OPDS both in letting original contracts and in making any adjustments to contracts that may become necessary due to declining caseloads.

Thank you for your attention to this very important issue. Please let me know if there is any additional information I can provide that may be useful.

# Attachment 2

# Public Defense Services Commission

## Strategic Plan for 2009-11

December 28, 2009

### ***Vision***

- An integrated state public defense system that is a leader in the delivery of quality, cost-efficient legal services and that is designed to ensure the continuing availability of competent and dedicated public defense counsel.
- A Public Defense Services Commission (PDSC) that serves as an (a) innovative planner for the effective delivery of public defense services and administration of justice, (b) responsive and cooperative policy maker in the state's justice system, (c) responsible steward of taxpayer dollars devoted to public defense, and, (d) through its Appellate Division attorneys and the private providers who represent public defense clients, a vigilant guardian of the legal rights and interests of public defense clients and the public's interest in equal justice and the due process of law.
- An Office of Public Defense Services (OPDS) that is a model for other Oregon state agencies in terms of (a) efficiency in the delivery of quality public services, (b) effectiveness of financial management standards and practices, (c) responsiveness to clients, customers and stakeholders and (d) accountability to itself, PDSC, the Oregon Legislature and the public through innovations in performance measurement and evaluation.

### ***Mission***

It is the mission of the Public Defense Services Commission to ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible and with sufficient support to enable competent and dedicated attorneys to provide those services. (See ORS 151.216)

### ***Values***

- **Quality** - PDSC is committed to providing quality public defense services consistent with the state and federal constitutions and with Oregon and national standards of justice. PDSC strives to provide direct and contract legal services that meet prevailing standards of professional competence and promote the sound administration of justice in Oregon, while seeking opportunities for its capable and diverse employees and contractors to experience fulfilling careers and engagements in public defense service.

- **Cost-Efficiency** - PDSC is a responsible steward of taxpayer dollars and constantly seeks the most cost-efficient methods of delivering and administering public defense services. PDSC's commitment to providing quality public defense services also promotes cost-efficiency by reducing the chances of legal error and the need for appeals, post-conviction proceedings, retrials, and other costly remedial actions.
- **Leadership** - PDSC is a responsible leader and cooperative partner with other state and local agencies in the development of justice policy and the administration of justice in Oregon. PDSC is a vigorous advocate for adequate public funding to support Oregon's public defense system. PDSC and OPDS are credible sources of information and expertise about public defense and justice policies, practices and their implications, for the benefit of the public, the Oregon Legislature, the media and other justice agencies and professionals.
- **Accountability** - PDSC is a results-based organization with employees and managers who hold themselves accountable by establishing performance standards and outcome-based benchmarks and who implement those measures through regular performance evaluations and day-to-day best practices. PDSC and OPDS administer public defense services contracts in an open, even-handed and business-like manner ensuring fair and rational treatment of all affected parties and interests.

### ***Organization and Decision Making***

PDSC serves as a governing body for the administration of Oregon's public defense system, providing policy direction, guidance and oversight to its operating agency, OPDS. As chief executive officer of OPDS, its Executive Director reports to PDSC and serves at its pleasure.

OPDS is comprised of two divisions:

- (1) the Contracts and Business Services Division (CBS), which administers the state's public defense contracting and payment systems and manages the operations of OPDS; and
- (2) the Appellate Division (AD), which provides (a) appellate legal services to financially eligible criminal defendants, (b) appellate legal services in juvenile dependency and termination appeals, and (c) training and support to public defense attorneys at the trial level in criminal and juvenile matters.

Each division is headed by a chief operating officer—the Contracts and Business Services Director at CBS and the Chief Defender at AD —both of whom report to OPDS's Executive Director.

ORS 151.216 sets forth the policy and decision-making responsibilities of PDSC, including the responsibilities to:

- establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the state and federal constitutions and state and national standards of justice;
- establish OPDS and appoint its Executive Director, who serves at the pleasure of PDSC;
- review and approve the Executive Director's budget proposals, and submit the final budget proposals of PDSC and OPDS to the Legislature, with budget presentations by the Chief Justice and PDSC's Chair;
- review and approve any public defense services contract negotiated by the Executive Director;
- adopt compensation and personnel plans and an employee classification system for OPDS that are commensurate with other state agencies; and
- adopt policies, procedures, standards, and guidelines regarding
  - determination of financial eligibility for public defense services,
  - appointment of legal counsel,
  - fair compensation for appointed counsel,
  - disputes over compensation for appointed counsel,
  - any other costs associated with public defense representation,
  - professional qualifications for appointed counsel,
  - performance of appointed counsel,
  - contracting of public defense services, and
  - any other matters necessary to carry out the duties of PDSC.

PDSC has approved the Executive Director's delegation of authority to negotiate contracts to OPDS's Director of Contract and Business Services. PDSC has delegated to the Executive Director its authority to execute public defense services contracts that it has reviewed and approved.

PDSC will continue to devote most of its time and energy to developing policies that will guide the shape and direction of the state's public defense system and will improve the overall quality and cost-effectiveness of public defense services in Oregon, and to overseeing implementation of the strategies set forth in this Strategic Plan.

ORS 151.216 directs PDSC **not** to:

- make any decision regarding the handling of an individual public defense case;
- have access to any case file; or
- interfere with the Executive Director or staff in carrying out professional duties involving the legal representation of public defense clients.

Accordingly, public defense contractors under contract with PDSC act as independent contractors in the operation of their law offices and practices and in the representation of their public defense clients. However, contractors are subject to the terms and conditions of their contracts with PDSC, which will include overall management, performance and quality assurance requirements and standards designed to ensure the provision of high quality, cost-efficient public defense services.

PDSC has approved the Executive Director's delegation to the Chief Defender of the authority to directly manage AD and directly supervise its attorneys and staff.

### ***Standards of Service***

The statute establishing PDSC (ORS 151.216) and the state and federal constitutions require PDSC to serve the interests of public defense clients by ensuring the provision of constitutionally mandated legal services. Besides public defense clients, PDSC serves:

- the community of public defense contractors, attorneys and allied professionals through its professional and contracting services, legislative advocacy and policy making,
- the public and Oregon taxpayers, primarily through their elected representatives in the Oregon Legislature and secondarily by responding to direct inquiries and through the media, and
- criminal justice agencies and other justice stakeholders through interagency collaboration, planning and policy making.

All of OPDS's employees will:

- deliver directly or contract for professional services in a manner that meets the highest applicable legal and ethical standards;
- conduct all legal, contracting and business services in a rational and fair manner;
- address all requests for information and inquiries in a timely, professional, and courteous manner;

- implement policies and best practices that serve as models for the cost-efficient delivery of public services and the effective administration of government;
- utilize results-based standards and performance measures that promote quality, cost-efficiency, and accountability.

### ***Legislative Advocacy***

PDSC views its role in appearing before the Oregon Legislative Assembly and committees of the Assembly to be limited to:

- providing information in response to requests from legislators or legislative staff;
- advocating for a state budget sufficient to ensure (a) the delivery of quality public defense services in a manner consistent with the state and federal constitutions and state and national standards of justice and (b) the continuing availability of competent and dedicated public defense counsel; and
- informing legislators of (a) the fiscal impact on the public defense system of proposed legislation or existing laws relevant to public defense, and (b) any potential constitutional or other problems that might occur as the result of the enactment, implementation, or amendment of legislation.

As a general matter, PDSC does not view its role before the Legislative Assembly to include advocacy for changes in criminal, juvenile, mental health or other areas of substantive law or procedure. The Commission may decide to take a position before the Legislative Assembly with regard to particular legislation proposing changes in substantive law or procedure only if such legislation is likely to substantially affect the quality of public defense services in the state, the cost-efficient operation of the state's public defense system, the continuing availability of competent and dedicated public defense counsel or the fundamental fairness of Oregon's justice system.

PDSC does not intend this policy to affect the ability of OPDS's Appellate Division (AD) or its attorneys to advocate positions before the Legislative Assembly that are designed to protect or promote the legal rights and interests of AD's clients.

## **Goals and Strategies for 2009-11**

### **Goal I: Secure A Budget Sufficient to Accomplish PDSC's Mission.**

***Strategy 1: As instructed in a budget note, PDSC will report to the 2010 Special Session of the Legislature on current caseload trends and any resentencing costs required by legislation enacted during the 2009 session.***

The 2009 Legislative Assembly approved a budget for PDSC that is projected to be \$10.6 million less than will be needed to provide public defense services funded from the Public Defense Services Account for the full 09-11 biennium, assuming PDSC receives the maximum amount of revenue potentially available to it from the Judicial Systems Surcharge Account established by HB 2287. Legislators were aware of this deficit at the time PDSC's budget was approved and directed PDSC to provide current caseload and cost information to the 2010 Special Session. The deficit will be greater than \$10.6 million if revenue under HB 2287 is less than projected or if other revenue sources relied upon by the 2009 Legislative Assembly to balance the 09-11 budget do not materialize.

***Strategy 2: Continue to build legislative support for adequate funding and remind legislative leadership of need for a supplemental appropriation.***

- A. OPDS's Executive Director will meet with key legislators before the 2010 session to keep them informed regarding caseload trends and the need for additional funds in the Public Defense Services Account before the end of the biennium. Depending on the December 2009 revenue forecast and the outcome of the January 26, 2010 election on two legislatively approved tax measures, PDSC may also need to return to the Emergency Board or to the 2011 Legislative Assembly to report on caseload projections and the amount of additional funds needed to provide trial level representation through the end of the biennium.
- B. OPDS staff will keep Legislative Fiscal Office staff apprised of caseload trends and resentencing costs<sup>1</sup>.

***Strategy 3: Develop a budget proposal for 2011-13 that builds on PDSC's long term plan to ensure the stability of the public defense system by addressing the three main challenges faced by the agency: (1) the need to attract and retain a well qualified group of public defense***

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<sup>1</sup> PDSC plans to review the eligibility standards for appointment of counsel in 2010. Depending upon whether or not revisions to the standards would expand the number of persons potentially eligible for court appointed counsel, the public defense caseload could increase. Any such projected increase in the current biennium would have to be communicated to Legislative Fiscal Office staff and discussed with legislators.

***providers; (2) the need to improve the quality of representation, especially in juvenile and post-conviction relief cases; and (3) the need to reduce caseloads.***

- A. **Pay Parity** – If PDSC so directs, OPDS staff will develop a strategy and supportive documentation for a presentation to the 2011 Legislative Assembly regarding the need for parity between Appellate Division attorneys and Department of Justice attorneys and between attorneys with not-for-profit public defender offices and their counterparts in the district attorney's offices in their counties and will discuss these needs with legislators prior to the 2011 session.
- B. **Other budget priorities** – If PDSC so directs, OPDS staff will also discuss with legislators PDSC's continuing support for the creation of a post-conviction relief unit at OPDS and for funding to reduce caseloads and increase compensation for attorneys in juvenile cases, and will develop policy option packages to be included in its 2011-13 budget.

***Strategy 4: Meet the targets established under PDSC's Key Performance Measures to assure the Legislative Assembly that PDSC is managing state funds devoted to public defense cost-effectively and develop an additional performance measure if so directed by the Legislature.***

PDSC's proposal to delete former KPMs 1 through 7 because they relied on insufficient data or were simply not useful measures of performance was approved by the 2009 Legislative Assembly. Two new measures were added. KPM No. 8 is a measure of PDSC's service providers' satisfaction. The target for the next survey in 2011 of the groups and individuals with whom PDSC does business is to have 95% of them rate their satisfaction with the agency's services as "good" or "excellent" in the categories of overall service, timeliness, accuracy, helpfulness, expertise and availability of information. In 2008 OPDS met or exceeded these ratings in all categories except availability of information. KPM No. 9 measures the percentage of best practices met by the Commission in its structure and operation. The Commission currently meets 100% of the requirements. KPM No. 10 measures the median number of days for the Appellate Division to file an opening brief. Former KPM No. 1 simply counted the number of cases in the Appellate Division backlog, which could vary based on factors other than productivity. KPM No. 10 allows OPDS to focus on its ultimate goal which is to maintain or lower the average number of days required to file the opening brief. A third proposed new measure – "Capacity for Providing Quality Representation" was not approved and PDSC has been directed to work with the Legislative Fiscal Office to evaluate the need for additional Key Performance Measure changes during the 2009-11 interim.

## **Goal II: Assure Continued Availability of Qualified Public Defense Providers in Every Judicial District**

***Strategy 1. With funding provided by the 2009 legislature, OPDS will apply the priorities PDSC has developed and refined over the course of the last several biennia to assure the maintenance of qualified providers in each judicial district. This will require that these providers receive sufficient compensation to allow them to recruit, train and retain an adequate number of qualified attorneys and support staff to handle the assigned caseload in an efficient and effective way.***

As OPDS informed both the 2007 and 2009 Legislatures, 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 desire to perform public service. It cannot be assumed that younger attorneys can or will make the same kinds of sacrifices, especially in view of the sizeable debt many assumed in order to finance their college and law school educations. PDSC's contractors, particularly some of its non-profit public defender offices, have reported significant difficulty in recruiting and retaining attorneys. Lack of parity with their counterparts in local district attorney offices contributes to the attrition rate among public defenders.

With the funds allocated by the 2009 Legislature, CBS staff was able to successfully negotiate contracts with providers in every county in the state and with specialized providers such as death penalty contractors and mitigation specialists for the two year period beginning January 1, 2010.<sup>2</sup>

***Strategy 2. Continue PDSC's service delivery planning process to ensure availability of qualified providers in every judicial district in the state and in all substantive areas of public defense practice.***

- A. Service delivery planning process: Following an investigation by OPDS of the public defense services and service delivery systems in a county or judicial district or a substantive area of law<sup>3</sup>, which includes input from public defense contractors, criminal and juvenile justice stakeholders and public safety officials in the county or district or area of practice, PDSC holds one or more public hearings and then develops a

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<sup>2</sup> PDSC approved many of these contracts at its October 23, 2009 meeting and will be asked to approve the balance at its December 10 meeting. In negotiating these contracts, CBS staff applied the priorities established by PDSC at previous commission meetings including the September 10, 2009 meeting. Prior to the September 10 meeting the commission held an executive session at its annual retreat at which CBS staff outlined its proposed approach to accepting proposals received in response to its RFP. PDSC approved that approach in the public meeting on September 10.

<sup>3</sup> Further discussion of the Commission's review of public defense practice in particular areas of law is included below under Goal II.

“service delivery plan” for the locale or practice area. A service delivery plan (1) takes into account local conditions, practices and resources unique to the county or district, (2) outlines the structure and mission of the delivery system and the roles and responsibilities of PDSC’s contractors, (3) proposes changes to improve the operation of the delivery system and the quality of its public defense services and (4) when appropriate, directs the incorporation of changes it proposes into the Commission’s contracts with service providers.

- B. PDSC’s service delivery plans encourage the adoption of “best” practices and procedures in a county, judicial district or practice area including (1) technical assistance and administrative support for contractors, (2) specialized training for public defense attorneys, (3) sharing of information and improvement of communication with the Commission, (4) accountability of public defense managers and boards of directors for the quality of their services and the performance of their lawyers and staff, and (5) public outreach and involvement in the particular public safety community.
- C. To date, PDSC has visited every region in the state, has reviewed the public defense delivery systems in more than half of the state’s judicial districts,<sup>4</sup> and, as noted below under Goal II has reviewed service delivery in three substantive law areas of practice. As time and resources permit, PDSC will review systems in the remaining districts, revisit some of those reviewed in the past and will review the delivery of services in additional areas of practice. Although budget restrictions this biennium will impact the ability of both the Commission and OPDS’s quality assurance site teams to travel outside the Willamette Valley, it will be important for the Commission to continue monitoring the delivery of services statewide, directing and implementing changes as needed in particular areas, and assessing budgetary needs and priorities for the next biennium.

***Strategy 3. OPDS will continue to co-sponsor an annual public defense management conference to promote good business practices by public defense contractors and approaches to defense firm management that will assist contractors to survive and succeed.***

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<sup>4</sup> PDSC has performed service delivery reviews in Baker, Benton, Clackamas, Clatsop, Coos, Curry, Gilliam, Harney, Hood River, Jackson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Polk, Sherman, Umatilla, Union, Wallowa, Wasco, Washington, Wheeler and Yamhill Counties. Columbia, Crook, Deschutes, Douglas, Grant, Jefferson and Tillamook remain. It has been more than five years since the Commission conducted its first service delivery review in Lane, Lincoln, Linn and Benton Counties and an updated review in Lane County was initiated in September of 2009.

The Oregon Criminal Defense Lawyers Association and OPDS have co-sponsored the annual October Management Conference for public defense providers for many years. The conference focuses on different topics each year, but usually includes presentations on effective business management, OPDS policies and procedures, legal ethics, and sharing of information about successful business strategies.

## **Goal II: Assure the Quality of Public Defense Services Performed by Private Providers**

### ***Strategy 1: Continue to develop quality assurance standards and programs to improve public defense services across the state.***

- A. Beginning in 2004, OPDS has coordinated a unique and cost-effective quality assurance review of public defense providers that has become a key strategy in improving public defense services across the state. With guidance from the Quality Assurance Task Force, a volunteer task force of Oregon's recognized leaders in public defense that advises the OPDS Executive Director, OPDS assembles peer review teams that conduct on-site quality assurance evaluations of public defense providers over the course of several days that include interviews and surveys of representatives of the court and of public safety agencies in the area. Each team makes findings and recommendations when areas in need of improvement are identified, and also documents local practices and procedures that are working well and can be recommended to other public defense providers. Over the course of the five years it has guided these reviews, the Quality Assurance Task Force has assembled a list of "best practices"<sup>5</sup> that are recommended to Oregon's public defense providers. The reviews have also identified a number of recurring challenges for public defense providers that are the focus of continuing quality improvement initiatives by OPDS.

Between 2004 and the end of 2009, OPDS coordinated peer reviews of 36 individual public defense providers who handle a majority of the statewide adult and juvenile public defense caseload.

The most recent site visit occurred in November of 2009 in Klamath and Lake Counties. OPDS and the Quality Assurance Task Force hope to complete additional site visits during the 2009 - 2011 biennium. Significant reductions to CBS's essential budget level may diminish the number of visits that can be conducted since OPDS must cover the travel costs incurred by the volunteer team members.

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<sup>5</sup> This document may be viewed on the PDSC website:  
<http://www.ojd.state.or.us/osca/opds/Reports/index.html>.

Without disclosing the contents of individual site visit reports, PDSC's Executive Director or General Counsel reports to the Commission periodically on the general problems, accomplishments and best practices identified by the site visits.

- B.** Over a period of approximately a year OPDS developed and PDSC approved new standards and processes for determining the eligibility of attorneys for court-appointments, including revisions to the standards for the qualification of attorneys to take court-appointments that were originally developed and adopted by the State Court Administrator's Office and readopted by PDSC. The new standards and procedures were based in part upon OPDS's experience in developing the Commission's court-appointment process in Lane County, the operation of the Appellate Division's appellate panel, and best practices from across the country. PDSC continues to update and revise these standards, most recently in February 2009.
- C.** In addition to establishing minimum qualifications for public defense attorneys, PDSC requires attorneys performing services under public defense contracts to observe the performance standards established by the Oregon State Bar for attorneys in criminal, juvenile, civil commitment and post-conviction relief cases. These standards, which may be found on the bar's website,<sup>6</sup> offer a detailed, comprehensive guide to good practice at all stages of the proceedings.
- D.** PDSC has established a formal complaint policy<sup>7</sup> that outlines the procedure to be followed by OPDS in addressing complaints from clients and other interested parties about the quality and cost effectiveness of public defense representation. OPDS will continue to work with contactors and the Oregon State Bar to ensure that the complaint process operates fairly and effectively, avoids duplication with the Bar's processes, and protects confidential and privileged information from disclosure.
- E.** OPDS staff will continue to work with other groups and organizations to plan education and training events for public defense attorneys and staff around the state. The agency's Executive Director and General Counsel participate on many committees and ad hoc workgroups that plan and present educational events. As noted below, making presentations at continuing legal education events and providing direction and advice in cases pending at the trial level is a core function of the Appellate Division.

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<sup>6</sup> [http://www.osbar.org/surveys\\_research/performancestandard/index.html](http://www.osbar.org/surveys_research/performancestandard/index.html)

<sup>7</sup> PDSC's complaint policy may be found at <http://www.ojd.state.or.us/osca/opda/CBS/index.html>.

- F. In 2007 OPDS developed and implemented a process for conducting an annual survey of judges, district attorneys and other juvenile and criminal justice system representatives regarding the quality of representation provided by public defense contractors and hourly rate attorneys. The survey results permit OPDS to monitor general trends in quality in different areas of practice over multiple years and to be alerted to quality concerns that may not otherwise come to the agency's attention. The Chief Justice has assisted OPDS to obtain high response rates from the judges by sending a letter along with the survey and urging them to respond.

***Strategy 2: Continue PDSC's Service Delivery Planning Process to address significant problems with the quality and cost-efficiency of local public defense services and with the systems to deliver those services and continue to review specific areas of practice and develop quality assurance standards and policies to address deficiencies.***

While PDSC's service delivery planning process as outlined above is primarily focused on the structure of the public defense delivery systems in the geographic and substantive law areas it has reviewed, quality of representation issues cannot be divorced from the structural analysis conducted by the Commission. The Commission therefore performs an important quality oversight function as well. This role is more pronounced in PDSC's review of service delivery in substantive law areas.

- A. Juvenile law** - When PDSC assumed responsibility for providing trial level public defense services statewide in 2003, juvenile representation was an area of law in which significant concerns had been expressed about the quality of representation being provided. Both the Oregon State Bar<sup>8</sup> and the Oregon Secretary of State's Audits Division<sup>9</sup> identified juvenile representation as an area in need of improvement.

In April 2006 PDSC conducted a review of service delivery in the juvenile dependency area. Since that time OPDS has taken a number of steps to improve representation. It has conducted evaluations of many of its juvenile contract offices. It has used its complaint procedure to investigate instances of poor representation and has removed chronically under-performing attorneys from appointment lists. OPDS worked with other interest groups to create the Juvenile Law Training Academy, which sponsors an annual two day low cost juvenile law seminar to supplement trainings sponsored by other organizations. PDSC, with dedicated funding from the

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<sup>8</sup> Indigent Defense Task Force Reports II and III were issued by the Oregon State Bar in 1996 and 2000. Both underscored the need for significant improvement in juvenile representation.

<sup>9</sup> In 2005 the Audits Division of the Secretary of State's Office issued a letter to PDSC identifying juvenile representation as an area of management risk to the agency as a result of ongoing quality concerns.

legislature, established a Juvenile Appellate Section in its Appellate Division in 2008 as a step toward improving both appellate and trial level representation, and in 2009 contracted with the Juvenile Law Resource Center to provide training and litigation support for parents' attorneys. PDSC has regularly sought increased state funding for public defense services and specifically for services in juvenile cases. PDSC's 2009 Policy Option Package No. 100 would have significantly increased funding for juvenile representation statewide but was not approved by the Legislature.

During contract negotiations with lawyers and law firms seeking contracts to handle juvenile cases in 2010-2011, OPDS advised applicants that attorneys representing clients under contracts would be required to observe the Rules of Professional Conduct, their contractual obligations to PDSC<sup>1</sup>, and the Performance Standards approved by the bar and incorporated into the Qualification Standards for Court Appointed Counsel established by PDSC. Because there appears to be some confusion over the role of counsel for children and youth, PDSC also provided contractors with a copy of a two-page document specifically addressing areas of apparent confusion.

Finally, as part of its contracting process in 2009, PDSC sought to direct a greater proportion of its resources toward representation in juvenile cases in the belief that with specific expectations in place and ready access to adequate training and support services, the major remaining obstacle to improved representation is the excessive caseloads handle by juvenile lawyers and which are unlikely to be reduced without additional resources.

PDSC will continue efforts currently underway and explore other approaches to improving quality in this area of public defense representation and may again propose a policy option package to increase compensation in its 2011-13 budget request.

In juvenile delinquency cases, anecdotal information provided to the Commission indicates that in some counties a large percentage of youth waive counsel and appear *pro se*. In March 2010 PDSC will conduct a hearing to review the frequency and causes of waiver. As part of its exploration of this issue and others, PDSC will seek to obtain any available data that would reveal the scope of the issue and allow for comparisons between, for example, different counties and different public defense providers. PDSC may decide to issue recommendations or policies regarding the waiver of counsel and may ask other stakeholders (such as the judges, the district attorneys, the juvenile departments and PDSC's providers) to participate in the discussion of possible solutions.

**B. Post-conviction relief (PCR)**, which is intended to address, among other issues, inadequate representation by counsel at the trial and appellate levels, is an area of practice in which the quality of representation has been uneven and often inadequate. A state bar task force report recommended intensive study and improvement of this area of practice. In 2008 and 2009 PDSC received testimony from public defense attorneys, prosecutors and judges throughout the state regarding the most effective ways to deliver quality public defense services in PCR cases. A clear consensus favored the establishment of a state office as a separate division of OPDS. Accordingly, OPDS developed a separate Policy Package in PDSC's proposed budgets for 2005-2007, 2007-2009, 2009-2011 to support a four-lawyer division of OPDS that would specialize in PCR cases at the trial and appellate level. The package has not been funded.

A number of other steps have been taken to improve representation, however, including identifying particularly capable lawyers and urging them to devote at least some of their time to representation in post-conviction cases. OCDLA has sponsored CLE sessions on post-conviction relief. At OPDS's request the Oregon State Bar created a task force of highly respected post-conviction experts to establish performance standards for post-conviction relief cases, as it had done previously for criminal, juvenile and civil commitment cases. OPDS's General Counsel served as the reporter for the task force. The standards proposed by this group were adopted by the Board of Governors of the Oregon State Bar in February 2009. Performance Standards for Post-Conviction Relief Practitioners are now in place and serve as a guide to good practice and a measure for OPDS to use in evaluating its providers in this area.

If a policy option package creating a discrete OPDS unit does not receive legislative approval and if OPDS's Appellate Division is able in the future to fill its vacant positions and to eliminate its backlog of pending criminal appeals and reduce the time from settlement of the record to filing of the opening brief to an acceptable time period, PDSC could then consider whether to move some of the attorney positions in the criminal appellate section into a new post conviction section or division.

**C. Death penalty representation** - The Commission conducted hearings in February and March of 2007 to review the delivery of services in death penalty cases. A consistent message heard from those who appeared before the commission – two circuit court judges,

a Senior Assistant Attorney General and three death penalty contractors – was that it is critical that adequate resources be made available to the defense from the outset of the case in order to ensure that high quality legal representation is provided and to avoid a costly retrial at some indefinite time in the future. Consistent with its obligation under ORS 151.216 to establish and maintain a system that ensures representation conforming to state and national standards of justice, the Commission approved a legal representation plan conforming to the ABA Guidelines for the Performance of Defense Counsel in Death Penalty Cases (the Guidelines). The Commission also approved a contract for a death penalty resource attorney as a cost-effective means of improving representation in death penalty cases. The resource attorney provides assistance to defense teams in all facets of capital case preparation, client relations, settlement efforts and litigation. The resource attorney is also responsible for: maintaining a library of legal memoranda and trial transcripts; assisting in the identification of expert witnesses and consultants, acting as a liaison to the federal defense bar, attending CLE conferences relevant to death penalty litigation and providing information from those conferences to other defense attorneys, conferring with counsel in individual cases, seeking grants or other funding and administering any grants awarded, and assisting OPDS to meet its obligations under the Guidelines. As of October 2009 the resource attorney had assisted teams in approximately fifty capital trial-level and post-conviction cases.

- D. **Other practice areas** that the Commission plans to review in 2010 are appellate representation, including the work of the Appellate Division of OPDS, and representation in civil commitment and Psychiatric Security Review Board cases.

***Strategy 3: Encourage or require public defense contractors to establish active boards of directors or advisory boards that include outside members in order to (a) broaden the support and understanding of public defense in local communities, (b) strengthen the management of contractors, (c) facilitate communication with PDSC and OPDS and (d) increase the number of advocates for adequate state funding for public defense.***

- A. OPDS will continue to urge public defense contractors that don't already have them to establish boards of directors or advisory boards.
- B. OPDS will continue to include a segment on boards of directors and advisory boards in its annual Public Defense Management Conference.

- C. PDSC should consider, on a case-by-case basis, requiring boards of directors or advisory boards with outside members as a condition of contracting with the Commission.

***Strategy 4: Encourage the adoption of other best practices identified by the Quality Assurance Task Force, including the regular evaluation of attorneys, a plan for recruiting new attorneys, and a system for training and mentoring new attorneys and experienced attorneys found to be in need of such training or mentoring.***

In 2010, PDSC will review attorney evaluation procedures currently in use and determine whether it would benefit contractors for PDSC to develop and promulgate model evaluation procedures.

In its structural reviews PDSC will continue to monitor the ability of contractors to recruit new attorneys as needed and to train and mentor them to ensure that they are prepared to provide quality representation to every client. Not-for-profit public defense offices are generally better situated to train and mentor new attorneys than most consortia. In areas where there are no public defense offices or where the public defender's office does not or cannot perform these functions for all of the local contractors, PDSC will encourage non public defender office contractors to devise their own plans for recruitment and training. The Oregon Criminal Defense Lawyers Association, the Oregon State Bar and other organizations provide substantive law training and some skills training for new lawyers. Some contractors also open trainings developed for their own staff to employees of other contract offices. Judges are a largely untapped source of beneficial feedback to new lawyers who appear in their courtrooms. In 2010 OPDS's general counsel will make a presentation to PDSC on the training resources currently available to public defense providers and PDSC will consider how best to address any unmet needs.

### **Goal III: Strengthen the CBS's Contracting Process and Business Services**

***Strategy 1: Continue to improve the effectiveness and cost-efficiency of OPDS's administration of the contracting system.***

- A. Since 2005 CBS has had in place a secure and reliable method for sending non-routine expense authorizations and denials by e-mail.
- B. In 2008 PDSC approved a new policy governing OPDS's release of public records, including its costs of production.
- C. In 2006 OPDS established a database to track attorney complaints by provider.

- D. In 2010 OPDS will propose to PDSC revisions in its current Confidentiality Policy to more clearly protect confidential communications involved in the administration of non-routine expenses and complaints concerning attorneys.
- E. OPDS will continue to survey its providers on a biennial basis concerning their satisfaction with OPDS's business practices and delivery of services. Previous surveys indicate high levels of satisfaction.

***Strategy 2. Continue and Enhance the Role of PDSC in Oversight of the Contracting Process.***

- A. PDSC convenes commission retreats to discuss principles and priorities for the expenditure of public defense funds and, during the course of structural reviews, often identifies specific needs and priorities in local communities that it then incorporates into its final directions to OPDS. PDSC receives information and testimony from representatives of the provider community at all of its meetings but specifically requests such input at its meetings in April and June of even-numbered years before it prepares its budget request for the regularly scheduled legislative session. In June of odd numbered years, at or near the end of the regular legislative session, PDSC again receives input from providers regarding the priorities and principles PDSC will adopt to direct OPDS in the next round of contract negotiations.
- B. As part of PDSC's oversight of the contracting process, after it has established the principles and priorities that will govern the contracting process for the succeeding biennium and before the final terms of contracts are negotiated by OPDS, PDSC will review OPDS's preliminary outline of its statewide plan and be advised how PDSC's principles and priorities were applied. PDSC can accept, amend or reject the proposed plan. Once PDSC has approved a statewide plan, OPDS will negotiate contracts in accordance with the plan. Prior to requesting PDSC's approval of individual contracts, OPDS will provide PDSC with the opportunity to review the terms of any or all of the proposed contracts. PDSC will undertake a detailed, in-depth review of the terms and conditions of an individual public defense contract only if requested to do so (a) by any commissioner; (b) by the Executive Director; or (c) in writing by a contractor or prospective contractor when, in the opinion of a majority of PDSC members in attendance, the request justifies such a review.

**Goal IV: Strengthen Working Relationships with Public Defense Contractors.**

***Strategy 1: Continue to hold PDSC meetings in various counties and regions across the state as funding permits.***

***Strategy 2: Continue to solicit information and advice from contractors on PDSC policies and procedures.***

***Strategy 3: Continue to meet and confer regularly with the Contractor Advisory Group.***

**Goal V: Continue to Provide High Quality Representation in Appellate Cases and Training and Support for the State's Entire Public Defense System through OPDS's Appellate Division.**

AD strives to be a premier appellate law office, a leader in the development of legal theories and strategies in the appellate courts and a valued resource to the court, to other public defense providers, to lawmakers and to the public in matters concerning criminal and juvenile law and policy.

***Strategy 1: Continue efforts to improve the quality of AD's legal services and reduce the backlog of AD's appellate cases.***

- A. AD has developed a training curriculum for new attorneys that includes initial training in file management, case review, file review and note taking, accessing archives and records, preparing to write an initial brief, editing, oral argument observation, team meetings, moot courts, case discussions with team leaders, and participation in a team.
- B. AD will update its attorney practice and procedure manual, combine it with a new secretary's manual and provide it to all AD staff in 2010.
- C. AD has implemented attorney caseload standards and a production reporting system that provides each attorney with a report of the attorney's filings and backlog each month. These reports assist management in quantifying some aspects of attorney performance. AD has also established performance criteria for its attorneys. All of these tools assist in the regular evaluation of attorneys. Similar evaluation and measurement tools are being developed for evaluation of the division's secretaries.

- D. AD attorney caseloads exceed national standards and high caseloads create delays. Currently clients must wait approximately seven months for an opening brief to be filed. With the addition of eight new positions to the criminal section in 2007, the backlog of cases waiting to be briefed was reduced from 91 cases in June 2007 to 49 cases in June 2008. AD would have received an additional six positions had the 2009 budget's mandated caseload increase been approved by the legislature. The additional positions were not funded, however. AD will nevertheless continue to seek reduction of the backlog.
- E. PDSC will seek sufficient funding from the 2011 Legislative Assembly to add positions to address any caseload increases and to fill vacancies that have remained open since the 2009 legislative session to address the reductions made to the AD budget in the end of session budget reconciliation bill.
- F. OPDS staff continues to upgrade and improve AD's databases, which now include a brief bank introduced in 2009.
- G. AD's Juvenile Section is fully functioning and already making progress on its long term goals of improving representation in juvenile appellate cases and developing a body of case law to clarify the scope of statutory provisions governing jurisdiction in dependency and termination cases. AD will fully staff the Juvenile Section by filling the next available vacancy with an attorney trained in juvenile law. The juvenile section will also serve as a resource center for juvenile dependency lawyers at the trial level and will work with other public and private entities interested in improving representation in juvenile dependency cases to provide training opportunities for attorneys and to explore other means of improving representation.

***Strategy 2: Achieve Parity of Compensation for AD attorneys with their Department of Justice Counterparts***

While OPDS has been able to improve compensation for AD attorneys over the last several biennia by conserving other resources wherever possible, it has not yet been able to achieve complete parity with attorneys in the Department of Justice with comparable responsibilities. OPDS will urge the Commission to again include a policy option package in its 2011 budget request addressing this issue. If such a package is approved by PDSC, OPDS staff will need to work closely with legislators to inform them about the extent of the disparity and the value of the work done by AD attorneys. Some legislators have already expressed support for achieving parity.

***Strategy 3: Expand AD's capacity to support PDSC's contractors and the state's public defense system.***

- A. AD will continue to submit articles on substantive legal issues to the OCDLA newsletter on a regular basis and will make its attorneys available for CLE presentations. Presentations by AD attorneys have been well received by conference attendees.
- B. AD attorneys continue to respond to inquiries from trial level defenders on a broad range of questions relating to substantive Oregon law and the preservation of issues for appellate review.
- C. AD now provides advice to contractors on the legal merits and strategies of potential mandamus actions, and is developing a collection of expert witness transcripts to assist public defense attorneys preparing for trial.

**Goal VI: Continue to Strengthen the Management of OPDS.**

***Strategy 1: Maintain and refine OPDS's performance-based employee evaluation system.***

***Strategy 2: As an employer that seeks to promote professional achievement and employee satisfaction, OPDS will continue to survey employees annually regarding perceptions about management's efforts to achieve these goals.***

***Strategy 3: Continue to integrate relevant functions and operations of AD and CBS and exploit the benefits of their combined experience and expertise.***

***Strategy 4: Develop a Management Manual outlining the decision making process for senior managers at OPDS and providing managers with clear authority, accountability and expectations regarding the performance of their responsibilities.***

***Strategy 5: Ensure that there is a contingency plan in place to cover critical management functions should one or more managers leave OPDS or be unable to fulfill managerial responsibilities for a period of time. Each member of the management team will develop a list of critical functions and the team will identify a backup resource for each of those functions. As previously approved by PDSC, a deputy director position will be created at CBS as soon as funding permits.***

**Goal VII: Promote the Diversity and Cultural Competence of Oregon's Public Defense Workforce.**

***Strategy 1: The recommendations of the Diversity Task Force which were aimed at improving the recruitment of minority attorneys and staff and increasing the cultural competence of the state's public defense workforce have been partially implemented. More remains to be done.***

A statewide directory of job openings in public defense offices across the state is now available on the OCDLA website; PDSC supported federal legislation creating a loan repayment program for public defense attorneys and OPDS and its Contractor Advisory Group explored, but ultimately did not recommend, the use of PDSC funds for such a program; OPDS created a recruitment brochure that sets forth PDSC's commitment to equal opportunity and to increased diversity and cultural competence; OPDS designed and distributed a baseline survey of providers to determine the current level of diversity among Oregon providers. It is hoped that the results of this survey will allow OPDS to identify contractors who have had success in achieving a diverse workforce and to determine whether there are strategies that can be used by other providers to increase diversity in their ranks as well.

***Strategy 2: Continue to develop working relationships with criminal law faculty, career counselors, and placement offices at Oregon's three law schools to identify and recruit law students of color who may be interested in internships and attorney positions in the state's public defense system.***

***Strategy 3: Participate in job fairs and recruitment programs throughout the Pacific Northwest for law students and attorneys of color who are interested in careers in public service. Announce OPDS positions in publications likely to reach members of minority communities in Oregon and elsewhere.***

***Strategy 4: Design and implement regular diversity training for OPDS employees and any interested members of the larger public defense community.***

**Goal VIII: Ensure that PDSC and OPDS Hold Themselves Accountable to this Plan.**

***Strategy 1: Integrate this plan into the operations and performance of AD, CBS and their individual employees.***

***Strategy 2: Use this Plan as a basis for the agendas of meetings of OPDS's Management Team and the personal performance and management plans of its members.***

***Strategy 3: Ensure that a progress report on the implementation of this Plan is presented to PDSC on a regular basis.***

# Attachment 3

## Chapter 151

√ - completed; ◇ - ongoing

PDSC shall:

√ **Establish and ◇ maintain a public defense system**

√ **Establish OPDS and appoint an ED**

◇ **Submit the budget - biennial**

◇ **Review and approve contracts – biennial**

*Revision of review and approval processes underway*

◇ **Adopt commensurate compensation plan, classification system and personnel plan for OPDS.**

*Plan in place; compensation and classification not yet commensurate with other state agencies*

◇ **Adopt policies, procedures, standards and guidelines re:**

- Financial eligibility

*Current standards in place in 2003; review and revision underway*

- Appointment of counsel, including substitution of counsel

*PDSC's Payment Policies and Procedures (PP&P);*

*The Public Defense Services Commission's Legal Representation*

*Plan for Death Penalty Cases; ("death penalty representation plan")*

*Development of proposal for juvenile delinquency representation underway*

*Other issues re appointment of counsel – representation of children in juvenile dependency cases, probate guardianships*

- Fair compensation of counsel – (PP&P)

- Appointed counsel compensation disputes - (PP&P)

- Other costs associated with representation - (PP&P)

- Professional qualifications for counsel

*Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense, revised 5/21/09 ("Qualification Standards")*

- Performance for legal representation

*Death penalty representation plan*

*Qualification Standards*

- The contracting of public defense services

*PDSC's requests for proposals*

*PDSC's model contracts*

*PDSC contracting policies and procedures under development*

- Contracting with expert witnesses

*PP&P*

- Any other matters necessary to carry out commission's duties

√ **Establish a peer review system for approval of nonroutine expenses**

*Implemented 2004 as required by HB 2074 (2003); report to Interim Judiciary Committee, 2004*

√ **Establish a complaint process**

*PDSC Complaint Policies and Procedures, October 22, 2004*

◇ **Reimburse SCA for costs related to eligibility verification and screening**

The PDSC Executive Director shall:

**Recommend how to establish and maintain delivery of legal services**

**Ensure compliance with contracts, policies of PDSC**

**Prepare biennial budget**

**Negotiate contracts**

**Employ personnel**

**Supervise personnel, operation and activities of OPDS**

**Provide services, facilities and materials for PDSC**

**Pay the expenses**

**Annual report**

**Biennial report**

**Provide legal representation for PDSC**

**Designate representatives for paying bills and approving expenses**