

PUBLIC DEFENSE SERVICES COMMISSION

The Executive Director's Annual Report (December 2007)

Introduction

2007 was a year of transition for the Public Defense Services Commission (PDSC) and for its administrative agency, the Office of Public Defense Services (OPDS). A new executive director had been appointed in September of 2006 after the resignation of the agency's initial director to accept another position. Fortunately, the agency's mission and direction had been securely established and achievement of many of the goals and strategies outlined in PDSC's 2005-2007 strategic plan permitted the agency to identify new goals and strategies in its 2007-2009 plan.¹

It was also a year of growth for the agency. The 2007 Legislature approved a budget for PDSC which allowed it to increase the hourly rates for attorneys and investigators for the first time in sixteen years and permitted it to make long overdue adjustments to case rates for contractors. In addition, twelve new positions were approved in the Legal Services Division and significant reorganization of that division and of OPDS administrative operations were necessary to make the most effective use of those positions.

The Commission lost one of its original members when Commissioner Jim Brown resigned, but gained a new member, Commissioner Elizabeth Welch, who brings to the commission many years of experience as a Circuit Court judge and as the Chief Family Law judge in Multnomah County, as well her experience as a former deputy district attorney.

This report summarizes the major challenges and accomplishments of PDSC in 2007.

PDSC's Challenges and Accomplishments in 2007

1. Obtaining a Budget for 2007-2009

Prior to the beginning of the 2007 Legislative Session, meetings were held with the Governor's staff and a number of key legislators regarding the PDSC budget request for 2007-2009.

The 2007 session was convened on January 8, 2007 and adjourned on June 28, 2007. On March 20, 2007, OPDS made a presentation to the Natural Resources Subcommittee of the Joint Ways and Means Committee in support of

¹ A copy of PDSC's Strategic Plan for 2007-2009 is attached as Exhibit A.

supplemental funding for the 2005-2007 biennium,² which PDSC had requested from the 2005 –2007 Emergency Board.

On January 24, 2007 after an introduction by Chief Justice Paul J. De Muniz, PDSC chair Barnes Ellis opened the agency's initial presentation to the Public Safety Subcommittee on its 2007-2009 budget request. The Chief Justice, Chair Ellis and OPDS Executive Director Ingrid Swenson described the history of public defense funding in Oregon, the structure of OPDS, the clients served by the office and some of the quality and cost efficiency initiatives undertaken by PDSC (described in detail later in this report). The Subcommittee was also advised that in later budget hearings it would hear why a new caseload projection model was needed and why OPDS could well experience a shortage of contractors available to handle the caseload in the next biennium unless a mandated caseload adjustment were approved and at least some portion of the agency's policy packages were funded.³

The chair and the members⁴ of the Public Safety Subcommittee were knowledgeable, concerned, and attentive to the testimony and information provided. Many of the members had significant legislative experience and knowledge of criminal justice issues. They clearly understood the role of public defense in the public safety system and the need to fund it adequately for the benefit of the entire system.

After the initial budget presentation in January, PDSC returned to the Public Safety Subcommittee for a three-day detailed presentation on April 23 – 25. The first day involved discussion of trial level representation, the second day appellate representation, and the third day the operation of OPDS. On each day the presenters addressed key performance measures, quality and efficiency initiatives and policy option packages related to the function under review. Invited testimony concluded the presentations on each of the three days. On the first day the subcommittee heard about the number and types of cases handled at the trial level, who provides representation in these cases and what the key budget drivers are for trial level representation, namely, caseload growth and declining real income for contractors and hourly rate attorneys. The subcommittee was informed that the entire system was in jeopardy with the pending retirement of the generation of attorneys who had built the system, with

² The Emergency Board allocated a total of \$6,871,375 from the Emergency Fund in September and December 2006. An additional \$1,057,517 was deferred to the 2007 legislative session and appropriated to PDSC in May of 2007 as part of Senate Bill 5545.

³ PDSC's policy option packages would have brought public defender salaries in line with district attorney salaries, would have increased the rate for hourly paid attorneys and investigators, would have brought appellate attorney compensation rates in line with their Department of Justice counterparts and would have established a juvenile dependency appellate unit and a post-conviction unit in its Legal Services Division.

⁴ Rep. Chip Shields chaired the subcommittee; Sen. Ben Westlund served as the Vice Chair. Other members were Senators Kate Brown, Ginny Burdick, David Nelson and Jackie Winters and Representatives Jeff Barker, Kevin Cameron, Bruce Hanna and Nancy Nathanson.

caseloads significantly exceeding national standards and with contract offices unable to attract and retain a sufficient number of attorneys to manage their caseloads. The subcommittee was advised that, while the under-funding of the defense function had been chronic and could not be addressed in a single session of the legislature, a substantial “down payment” was needed in 2007 in order to keep the system viable. The subcommittee then heard from Washington County District Attorney Bob Hermann about the critical role played by public defense providers and the importance of having skilled, experienced attorneys to do the work. Public defense contractor Gordon Mallon described the challenges of attempting to attract defense attorneys to remote areas of the state and his concern that he might not be able to continue handling public defense cases at existing rates of compensation. Professor Stephen Kanter talked about the importance of quality representation to the promotion of justice in the state, and the need for all components of the system to be adequately funded. Maren Furlong, an attorney with the Crabtree & Rahmsdorff public defender office in Bend, Oregon, told subcommittee members about the passion she has for her work, about the large debt she carries for her law school education, and about the high cost of living in Deschutes County. She explained that she could only do this work because she and her husband and children resided with her parents.

On the second day of the subcommittee presentation, the work of the Legal Services Division was described, including how an appeal is filed, how the assigned attorney reviews the case for viable issues and decides whether or not to file a merit brief. The agency’s backlog of cases awaiting briefing was discussed and its efforts to reduce the backlog in compliance with OPDS’s Key Performance Measure No. 1. The subcommittee was advised that the agency’s budget proposal included an essential budget level mandated caseload adjustment for its appellate caseload that, if approved, would allow the division to keep pace with caseload growth in the same way the Department of Justice has. It was also noted that despite the fact that LSD and DOJ attorneys do essentially the same work, LSD attorneys’ salaries would have to be increased by 21 to 34% in order for them to be comparable to the salaries of their DOJ counterparts. Appellate cases not handled by LSD, and a policy package proposal to create a juvenile dependency appellate section were also described to the subcommittee. Finally, the post conviction relief process was outlined and a policy option package that would have created a post conviction relief unit at OPDS was described. At the conclusion of this presentation, the subcommittee heard additional testimony from invited witnesses. Chief Judge David Brewer of the Oregon Court of Appeals described the quality of representation and administration provided by the Legal Services Division and the need for a juvenile appellate section. Patrick Birmingham, an attorney in private practice in Portland, discussed the cost of doing business for criminal defense attorneys and the inadequacy of compensation being provided to public defense attorneys. John Connors, the Director of the Multnomah County office of the Metropolitan Public Defender, Inc. described the difficulty his office has had in retaining

qualified attorneys when the office cannot compete with salaries paid by the district attorney's office and when caseloads are unreasonably high.

On the final day of the hearings, the subcommittee was informed about the contracting process and about contractors' indications in the prior cycle that they would not be able to continue providing services for another two-year period without a significant increase in compensation. Non-routine expenses were also discussed, including the process for reviewing requests for such funds.

The agency's quality assurance efforts were described in detail and additional witnesses testified. Brandon Mayfield talked about the critical role of counsel, Multnomah County District Attorney Michael Schrunck spoke about the benefits to the public safety system of adequately compensated defenders and Jack Morris and Angel Lopez discussed the challenges faced by contract providers attempting to compete with private firms for skilled attorneys when PDSC's case rates are barely sufficient to cover the overhead of the firm.

At the work session on PDSC's budget almost every member of the subcommittee noted the need for increased funding and expressed the hope that adequate funds would be made available in future sessions, if not the 2007 session. The subcommittee chair was successful in persuading the co-chairs to add \$856,302 to their budget amount in order to increase the hourly rates for attorneys to \$45 and \$60 and to get public defenders one sixth of the way to parity with their district attorney counterparts.

In addition, in a separate budget bill, subcommittee members appropriated an additional \$1.9 million in subcommittee funds to public defense, \$958,926 of which was directed at the creation of a juvenile appellate section within LSD.

OPDS's budget presentation was the result of extensive consultation within OPDS, with OPDS's contractors, with the Oregon Criminal Defense Lawyers Association, with representatives of the Oregon State Bar and with numerous legislators.

It is certainly hoped that OPDS can continue to work closely with legislators and others to make certain that the following principles are not lost on future legislatures:

1. Public defense is a key component of the public safety system.
2. Public defense providers cannot perform their constitutionally mandated function without adequate compensation.
3. Excessive caseloads must be reduced if public defense clients are to be properly served.
4. PDSC is a performance based agency that can be relied upon to provide high quality, cost effective services.

2. Major Achievements by OPDS's Contract and Business Services Division

(a) Working with the Chief Judge of the Court of Appeals and with a committee he established to improve appellate practice in juvenile dependency cases, Kathryn Aylward, the Director of CBS, designed a process for having OPDS prepare and file the notice of appeal in juvenile dependency cases. In the past, the notice of appeal was not always filed within the statutory time frame due to confusion about who would be appointed to handle the appeal and whether the appellate lawyer or the trial lawyer would file the notice.

(b) OPDS continued to integrate the functions of its two divisions and created an Operations Manager position to manage the facility, equipment and supplies. The creation of this position will eliminate the need for each division to manage its portion of the facility independently and will free up some of the Division Director's time, allowing her to direct her attention to other critical functions. The Operations Manager supervises a staff of two receptionists/office specialists. One of these staff members is located at the main level entry to the office and greets the public as well as answers the phone. It is no longer necessary for someone conducting business with the agency to ring a bell and follow written instructions in order to have contact with OPDS staff. The current receptionist is bi-lingual in English and Spanish.

The employee who handles the agency's accounting function also serves as the human resources manager and the office safety coordinator. She works closely with the staff of both divisions.

(c) After lengthy negotiations with the owner of the building in which both of its divisions are located, OPDS was able to acquire sufficient new space to house the twelve additional positions approved by the legislature. The agency now occupies all of the first and second floors and a small portion of the basement area. A remodel of the first floor area allowed for the creation of a staff lunchroom. Previously, neither division had an area suitable for use as a lunchroom. With a common room accessible to staff in both divisions it is hoped that they will have more opportunity to interact.

(d) After PDSC's 2007-09 budget received final legislative approval, the Commission met in August of 2007 for its annual retreat and identified budget priorities for contracts beginning in January of 2008. Thereafter CBS staff prepared and issued a request for proposals based on the Commission's funding priorities. With the two goals of sustaining Oregon's public defense system in the long term and assuring the availability of quality providers for the next biennium, CBS will be

recommending that the Commission approve over 90 separate contracts. These recommended contracts represent OPDS's best effort to meet its statutory obligation to maintain a public defense system that ensures the provision of 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. Efforts were made in all cases to address the needs that had been identified in the course of the Commission's structural reviews.

- (e) Business Service Manager, Lorrie Railey, and CBS staff continued to receive very positive reviews by PDSC's contractors and providers for timely, courteous service. The division met and exceeded Key Performance Measures relating to its responsibilities.

3. Major Achievements of OPDS's Legal Services Division

- (a) Addressing the Appellate Backlog. Despite the huge influx of cases after the Blakely and Crawford decisions, LSD is on target to eliminate its backlog as currently defined (opening brief filed no later than 210 days after settlement of the appellate record) within the next few months. Should it accomplish this long-sought goal, it could then reduce the 210-day period to a more reasonable time such as 180 days. Lessons learned from Blakely and Crawford about methods for efficiently processing a large number of appeals with similar issues are helping the division accommodate another influx of appeals after its successes in State v. Ice and State v. Raney.
- (b) LSD has undergone a major reorganization in order to integrate new positions approved by the Legislature in its criminal appellate section and to create a juvenile appellate section. The division's Chief Defender, Peter Gartlan, and Chief Deputy, Rebecca Duncan, had created an ambitious agenda for improving the functioning of the division but were needed on too many fronts to accomplish all of their objectives. Important goals, such as updating the attorney manual and instituting a measurement tool for gauging appellate workloads had to be postponed in order to meet the demands of the caseload and provide training for new staff members. Both of these highly regarded appellate lawyers were also unable to devote an adequate portion of their time to direct representation of clients. With the reorganization, the division has two additional chief deputies who will assume a portion of the administrative responsibilities. The creation of more senior attorney positions will provide additional support and supervision for the work of the attorneys. LSD was able to hire new attorneys from a pool of exceptionally well-qualified candidates, reflecting the growing esteem in which the work of the division is held in the criminal justice community. As part of the reorganization, an attorney has been

assigned to update the webpage and organize continuing legal education seminars as part of an ongoing effort to provide high quality training to its own attorneys and additional support to the trial bar. The division has also begun assigning more than one attorney to represent appellants in death penalty cases as recommended by the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and in conformity with the Commission's Legal Representation Plan in Death Penalty Cases.

- (c) Creation of a New Juvenile Appellate Section. After integrating the new attorneys into its criminal appellate section, LSD is now ready to establish its juvenile appellate section. It is hoped that the new section will begin accepting cases early in 2008.
- (d) Legislative Measures. LSD proposed and received legislative approval of three measures. One made it clear that if a defendant had been found qualified for court-appointed counsel at the trial level, a subsequent finding of eligibility was not necessary in order to prepare a transcript of the proceedings at public expense for use in the appeal. The second measure clarified the law with respect to the time for filing a petition for post-conviction relief when a petition for certiorari has been filed. The third streamlined the parole appeal process by eliminating the requirement that an additional motion -- the motion for leave to proceed -- be litigated before an opening brief could be filed.

4. Structural and Quality Improvement Initiatives

- (a) In 2007, the Commission reviewed the delivery of public defense services in three separate geographic areas and met in seven different locations throughout the state. It reviewed service delivery in Washington, Coos, Curry, Umatilla, Morrow, Union and Wallowa Counties.

It received testimony from judges, prosecutors, defense contractors and others regarding the challenges faced by public defense providers in various areas of the state. This information helped Commission members identify budget priorities that could help to address some of the critical needs of the public defense system.

The Commission also reviewed delivery of services in death penalty cases and, after hearing testimony from a law professor, two of the judges who regularly hear these cases, a Department of Justice representative and four attorneys who represent clients in these cases, the Commission approved adoption of a Legal Representation Plan for Death Penalty Cases and the creation of a death penalty resource

attorney position to address concerns raised at the hearings and to bring Oregon into compliance with the Guidelines issued by the American Bar Association.

- (b) During 2007, Quality Assurance Task Force site teams reviewed the quality of representation provided in four contract offices, the Metropolitan Public Defender Office in Portland, the Benton County Legal Defense Corporation in Corvallis, the Independent Defenders, Inc. in Clackamas County, and the Columbia County Consortium in St. Helens. Fourteen attorneys and other professionals from around the state volunteered to serve on these site teams coordinated by OPDS's General Counsel, Paul Levy. With the completion of these reviews, OPDS has now reviewed 29 of 63 providers who cover approximately 56 percent of the statewide caseload.
- (c) In December of 2007 OPDS undertook its first statewide survey of judges, prosecutors and other local juvenile and criminal court system representatives regarding the quality of representation being provided by OPDS's contractors. It is hoped that the results of this survey will allow OPDS to establish a baseline from which to measure the impact of policy and funding changes on the quality of representation statewide.

5. Consultation and Collaboration within OPDS, with Providers and Others

- (a) The Executive Director meets regularly with the group of managers whom she has asked to serve on the agency's management team. In order to prepare a draft of the 2007-2009 PDSC Strategic Plan, the group participated in a retreat facilitated by Geoff Guilfooy who remains committed to supporting public defense with his organizational and management training skills. In addition to discussing the strategic plan the management team also prepared an initial draft of a revised organizational chart and outlined a manager evaluation process. The management team continues to discuss all important agency decisions.
- (b) The management team has now completed its first series of management evaluations using the process outlined at its earlier retreat. The first step in the process was to survey OPDS staff on job satisfaction and the performance of management. The survey results provided valuable information for the team member evaluations. In addition, the job satisfaction portion of the staff survey identified some critical issues to be addressed by management, primarily related to improving communication within the agency. As a result, the Executive Director will be scheduling quarterly meetings with staff to make sure that important information and decisions are shared with all and to

permit staff more opportunities for informal interaction. More frequent email updates from management will also be used to keep OPDS staff better informed about events and developments important to the office and to public defense. CBS already holds regular staff meetings and LSD will be initiating monthly staff meetings in the near future.

- (c) OPDS continues to receive invaluable input from contractors through a number of advisory groups and task forces. The Contractor Advisory Group, the Quality Assurance Task Force and the Death Penalty Peer Panel continue to meet on a regular basis. Other work groups have been convened to tackle particular problems or provide advice on specific issues. There are currently two such groups meeting. One is helping to craft a proposal to the Commission on a loan repayment assistance program and another is reviewing caseload and workload studies in order to determine whether to recommend a statewide workload analysis to the Commission.
- (d) Members of OPDS's management team and other staff members participate in many committees and workgroups in the criminal and juvenile justice systems.

Conclusion

2007 was a year of change at OPDS. It was also a year of significant accomplishment. PDSC has a budget in place for the next biennium that will allow OPDS to better manage its appellate caseload and permit private providers to address some of their longstanding needs. Both divisions have been pursuing their individual and shared missions and have made significant progress. The Commission and OPDS continued their structural and quality reviews, and both PDSC's contractors and OPDS's staff continued to contribute their expertise and advice on policy issues affecting public defense in Oregon.