



Oregon

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The Future of Public Defense in Oregon: The Discussion Continues

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I. Introduction: A Critical Time for Public Defense Reform

As a national debate continues over criminal justice reform and the disproportionate impact of policing and prosecution on communities of color, the focus has increasingly turned to the adequacy of public defense services provided to the vast majority of those charged with crimes.¹ Meanwhile, state and local public defense systems have become the focus of litigation alleging the systemic denial of the right to counsel by underfunded and overworked public defense attorneys who may fail in their fundamental obligations to provide meaningful adversarial testing of the government's case against their clients.² And in Oregon, as detailed further below, growing numbers of public defense providers are demanding change to a chronically underfunded system that they say cannot be sustained, treats them unfairly, and disserves the clients it is charged with defending.

This memorandum is intended to serve as a resource to the Public Defense Services Commission as it considers whether public defense services in Oregon are fulfilling the

¹ The call for criminal justice reform, including how public defense services are provided, cuts across the political spectrum. See, *How Conservatives Learned to Love Free Lawyers for the Poor*, by Alysia Santo (*Politico Magazine*, September 24, 2017), at <https://www.politico.com/magazine/story/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor-215635>; *Prison Revolt: A Former Law-and-Order Conservative Takes on Criminal-Justice Reform*, by Bill Keller (*The New Yorker Magazine*, June 29, 2015), at <http://www.newyorker.com/magazine/2015/06/29/prison-revolt>.

² A detailed catalog of pending or concluded systemic litigation challenging public defense systems can be found at Sixth Amendment Center's webpage entitled "Systemic Litigation & Federal Investigations." <http://sixthamendment.org/the-right-to-counsel/systemic-litigation-federal-investigations/>. Not yet listed there is new litigation in Nevada. See, *ACLU Files Long-Threatened Lawsuit Alleging Nevada's Overstretched Rural Public Defense System is Unconstitutional*, by Michelle Rindels (*The Nevada Independent*, November 2, 2017), at <https://thenevadaindependent.com/article/aclu-files-long-threatened-lawsuit-alleging-nevadas-overstretched-rural-public-defender-system-is-unconstitutional>.

constitutional and statutory rights of those who require the services, and whether there may be a better way of providing those services. The first section, a historical perspective, offers further understanding of an underfunded and stagnant service delivery system that pre-dates the creation of PDSC. Section two examines PDSC's statutory mandate in light of the systemic challenges of excessive workloads, low case rates, and an inflexible contracting model. The section concludes by identifying tangible risks to realizing PDSC's mission of delivering competent, client-centered legal representation within a sustainable public defense system. Section three identifies opportunities to mitigate risks and suggests possible strategies for improvement.

II. History and Structure of the Public Defense Services Commission

Today's Public Defense Services Commission was created by legislation in 2001, Senate Bill 145 (Oregon Laws 2001, Chapter 962), which was the product of a study commission authorized by legislation in 1999. Senate Bill 145 merged two existing entities, the State Public Defender (SPD) and the Indigent Defense Services Division (IDSD) of the State Court Administrator, into an Office of Public Defense Services that would be governed by the Public Defense Services Commission.

Since 1965, the SPD had existed as an independent agency in the judicial branch under the administration of the State Public Defender Committee.³ The SPD was a state office that handled most of the appeals for financially eligible persons in criminal, probation, and parole appeals. Trial level public defense services had been the responsibility of a state Indigent Defense Program since 1983, when the state assumed responsibilities from the counties for funding public defense services. The IDSD managed the program since 1987 and, as described further below, for a brief period before that time.

The PDSC assumed the responsibilities of the SPD on October 1, 2001. On July 1, 2003, the PDSC took over the operations of IDSD. Today, after over 14 years of responsibility for trial level representation statewide, the Commission's system of delivering those services—through reliance on contracts with private law firms and consortia of lawyers in private practice—is virtually unchanged from the system it inherited from IDSD. In fact, the contracting system we work with today is little different from what the state inherited from the counties in 1983.

Oregon law has recognized a right to appointed counsel in criminal case since 1935, although provisions for the payment of appointed counsel came much later. When that happened, the financial burden fell on counties and cities, except for the cost of appellate representation provided by the SPD. Although reliance on pro bono representation

³ For a history of the State Public Defender and Oregon's long-standing right to appointed counsel in criminal cases, see *Humble Roots: Chronicling the State Public Defender's Office*, by Marc Brown (Oregon State Bar Bulletin, December 2013), at <http://www.osbar.org/publications/bulletin/13dec/legalheritage.html>.

persisted for decades in many counties, hourly-paid appointed counsel and contracted defense services became more common in the 1970s. But as the right to counsel expanded beyond criminal felony cases and the caseload of appointed counsel steadily increased, counties sought to rid themselves of responsibility for financing the right to counsel.⁴

A bill to shift financial responsibility for public defense to the state by creating a state public defender for trial level cases failed in 1969, as did similar efforts in 1977 and 1979. But shedding what was described at the time as a crushing financial burden continued to be a highest priority of the Association of Oregon Counties and finally in 1981, a bill passed shifting administrative and fiscal responsibility for statewide public defense to the State Court Administrator (SCA), to become effective in 1983.⁵

But it was not long before legislation in 1985 shifted responsibility for public defense from the SCA to the State Indigent Defense Board (SIDB), an independent voluntary board served by one full-time administrator and a part-time staff person. The SIDB was short-lived. After the SIDB amassed a projected budget shortfall of over \$10 million in its first biennium of operation, requiring emergency appropriations and extensive reliance on pro bono representation, legislation in 1987 returned responsibility for public defense to the SCA, along with stern budget notes on cost-containment measures. It is little wonder that a 1995 report by the Oregon Criminal Justice Council called public defense a “lonely stepchild.”⁶

With the resumption of responsibility for public defense, the SCA also increased reliance on contract groups, relying especially on consortia of private lawyers and law firms. At the same time, the SCA also introduced cost containment measures, such as contract “case counting” provisions that limited the number of cases or counts in an indictment for which the contractor would be paid under the contract. Nonetheless, costs continued to increase, as did questions about the quality of representation.

The 1994 report of the Oregon State Bar Indigent Defense Task Force (the first of three major OSB task force reports on public defense) expressed serious concern about maintaining quality representation in the face of rising caseloads of increasingly serious and complex crimes, and the rising costs of practicing law. The task force was “especially alarmed” by the failure of IDSD to accord contractors appropriate cost-of-living increases, and requiring them instead to simply accept more work in order to receive more pay.

⁴ *Final Report of the Oregon State Bar Indigent Defense Task Force* (July 1994).

⁵ *Assessment of the Oregon Adult Criminal Indigent Defense System* (The Spangenberg Group, March 1989), Appendix B.

⁶ *Reconfiguration of the Current System of Providing Indigent Defense Services* (Oregon Criminal Justice Council, February 1995).

Ultimately, the task force recommended that Oregon move toward a state employee-based public defense system for trial level representation.

Nearly concurrent with the OSB task force recommendation, a budget note in the 1993-95 appropriation for the Judicial Department required a report, to the November 1994 Emergency Board, on the operational and financial desirability of establishing a state agency public defender system for both trial level and appellate representation. That report largely supported the establishment of such an entity. In addition to citing administrative efficiencies, it also pointed to the prospect of improvements in the quality of representation with the provision of training and supervision that is only possible with an employer/employee relationship. But even though the cost model created for the report showed a statewide public employee system to be only marginally more expensive than the contracting model, after onetime startup costs were incurred, the proposal went nowhere.⁷

Thus, the system we operate with today is little different from the “stepchild” that shuttled from the counties to the state and then among different administrators within the judicial branch. A report to the Public Defense Services Commission on “recommendations to improve Oregon’s public defense contracting system,” received on the eve of the PDSC’s takeover of responsibilities from IDSD in 2003, reads like a litany from PDSC meetings 14 years later. According to the report, IDSD “is frequently perceived as insensitive to the business needs of contractors;” contractors “have had to assume financial burdens and professional liabilities associated with the woefully inadequate resources provided by the state;” the state fails to appreciate or understand “what it takes to build office infrastructure and, therefore, fails to compensate for it;” there is a false assumption that “private contractors and consortia have greater flexibility than nonprofit public defenders to absorb the risk of reduced caseloads;” and inconsistent performance across the state, and within counties, along with the challenge of attracting competent lawyers to rural areas, require focused efforts on training and oversight of attorney performance.⁸

III. The Status of Public Defense in Oregon Today

There is no better guide to the PDSC’s work or measure of its success in accomplishing it than its simple statutory mandate to provide public defense services that satisfy constitutional and statutory requirements and fulfill applicable performance standards, and to do so cost-efficiently. Indeed, these two complimentary instructions—ensure appropriate performance and do so with fiscal responsibility—became the twin overarching goals of the

⁷ *Report to the November 1994 Emergency Board on the Operational and Financial Desirability of Establishing a State Agency Public Defender System in Oregon* (Indigent Defense Services Division, Office of the State Court Administrator, November 7, 1994).

⁸ *Report to the Public Defense Services Commission, Recommendations to Improve Oregon’s Public Defense Contracting System* (Peter Ozanne, Executive Director, Office of Public Defense Services and Geoff Guilfooy, Aldrich Kilbride & Tatone LLC, September 2003), available at: <http://www.ocdla.org/pdfs/guilfooy-ozanne-latest.pdf>.

PDSC's five-year strategic plan adopted just a little over a year ago. But what became apparent in the year of stakeholder gatherings and PDSC meetings that led up to the adoption of that plan was a stark clash of aspiration and reality: Our current system may be incompatible with the goals it seeks to achieve, and fundamental change may be required to make it otherwise.

As explained in the first section of this memorandum, from its inception PDSC has relied almost exclusively on a case-rate contracting model that predates its own existence. And from its beginnings, PDSC has heard dissatisfaction with that model. The dissatisfaction, which has grown more pronounced with the passage of time, has raised several specific concerns. First, stagnant contract rates fail to meet the business needs of contractors with direct and adverse consequences for the clients they serve. Second, one of the most pronounced consequences of low rates are unreasonably high workloads of increasingly complex cases and needs. And third, the case-rate contracting model presents significant barriers to meaningful administrative oversight and is increasingly difficult to explain to legislators who demand accountability and clarity when making funding choices.⁹

For more than a decade, excessive workloads and inadequate funding have been the primary challenges to a sustainable trial-level public defense system. Low case rates and high caseloads are closely related. Under PDSC's case rate contracting model, contractors are forced to make tradeoffs that pit adequate compensation against manageable caseloads. As a result of stagnant contract rates, contractors face a terrible dilemma: maintain manageable caseloads that allow for competent, client-centered representation or maintain an economically viable and sustainable law practice. To do both is nearly impossible.

Additionally, the case-rate contracting model does not adequately meet the needs of providers, their clients, or policy-makers. Under PDSC's case-rate contracting model, contractors are paid a flat rate, by case type, regardless of the amount of time invested, the work completed, the quality of services provided, the outcome of the case, or the size of the attorney's caseload.¹⁰ While this model may present with administrative efficiencies, the model has a number of glaring flaws.¹¹

Within the current system, provider attorneys are incentivized to take more cases than they should, as they will always be compensated more for taking on more cases. Without

⁹ See *Appendix A* for a brief overview of PDSC and public defense provider expression of dissatisfaction and concern with the current contracting and funding model.

¹⁰ 2016-2017 Public Defense Legal Services Contract General Terms, <http://www.oregon.gov/OPDS/docs/CBS/ModelContractTerms/ModKJan2016.pdf>

¹¹ Litigation challenging the adequacy of public defense services in Idaho sought, among other things, an injunction barring the use of fixed-fee contracts. That issue was rendered moot by legislation that prohibited the use of such contracts. *Tucker v. Idaho*, 394 P.3d 54, 162 Idaho 11 (2017).

caseload standards there is no meaningful bright-line limit to the number of cases an attorney may handle. If case rates do not keep up with the cost of doing business, rational public defense contractors necessarily have to take additional cases to provide compensation and meet business expenses. This perverse incentive is harmful to attorneys and their clients. Workload should never be so large as to interfere with the delivery of quality representation.¹² A sustainable system also requires that workload be manageable enough to permit a reasonable work-life balance.

Local practice variations magnify the challenges of the case-rate model. When law enforcement and district attorneys change practices, the inflexibilities of the case-rate model may lead to over or under compensation, depending on the rate and case type. For example, in jurisdictions utilizing data-driven sentencing, attorneys report spending significant additional time on cases. The PDSC has heard testimony about the projected increase in workload in jurisdictions moving to a preliminary hearing practice in lieu of recorded grand juries. And in juvenile dependency cases, the case-rate model does not appropriately adjust for local practice requirements such as more frequent service provider meetings or limited review hearings.

The case-rate system is difficult to translate to legislators when advocating for the PDSC budget. One legislator indicated that the complexities of the case-rate model leave her confused. She said, “We don’t know what we are buying.” Ideally, the funding model would easily translate to tangible resources and measures familiar to the legislature: how many FTE (or full-time equivalent contract attorneys), how many defendants, how many cases, and return on investment.

Monitoring quality and ensuring competent representation is challenging under the case-rate contracting model. Because attorneys are independent contractors, OPDS has limited oversight ability and must be cautious not to exert control over the method or means by which services are provided. Contract administrators are charged with quality assurance obligations;¹³ however, the practical reality is that administrators are not compensated by PDSC for this heightened expectation. The consortia model of contracting exacerbates quality assurance challenges. Within this model, the consortium contracts with a number of independent provider attorneys. As a result, the consortium administrator and board also must maintain an arms-length relationship with attorneys and are limited in their ability to direct change in attorney performance.

¹² American Bar Association Ten Principles of a Public Defense Delivery System, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenn_principlesbooklet.authcheckdam.pdf. See also, OSB Formal Ethics Op. 2006-178 *Competence and Diligence: Excessive Workloads of Indigent Defense Providers*, <http://www.osbar.org/docs/ethics/2007-178.pdf>.

¹³ Public Defense Legal Services Contract General Terms 2016-2017, <http://www.oregon.gov/OPDS/docs/CBS/ModelContractTerms/ModKJan2016.pdf>.

Despite a decade's worth of efforts by the provider community, PDSC, and OPDS staff, excessive workloads and inadequate compensation for attorneys continue to be the primary obstacles to achieving PDSC's goals.¹⁴ According to testimony presented by a number of contract administrators at the August 2017 PDSC meeting, the viability of the public defense system is at significant risk due to inadequate funding, an ineffective contracting model, and unmanageable caseloads.¹⁵

IV. Opportunities to Improve Oregon's Public Defense System

There is nothing immutable about the way in which PDSC is currently providing public defense services. While contracting for services is clearly authorized by the statutes defining the duties and responsibilities of the Commission and the OPDS Executive Director, this is not a system that is *required* by statute. What is required, though, is a system that ensures appropriate representation, and does so with fiscal responsibility.

There are, indeed, other ways of providing public defense services, which will be briefly outlined below. Rather than attempt an exhaustive description of these alternatives, OPDS staff will await further direction from the Commission on which models PDSC would like to learn more about, and how the Commission would like that information presented.

But one point on which there appears to be growing consensus is that Oregon would likely benefit from a thorough and frank assessment of public defense services in the state conducted by a knowledgeable and independent entity. Prior to the establishment of PDSC, Oregon's public defense system was labelled "one of the most studied indigent defense systems in the nation,"¹⁶ with three major studies conducted by the Spangenberg Group which, at the time, was the recognized national expert on public defense systems. There has been no independent examination of public defense in Oregon after the Commission assumed responsibility for statewide public defense. And since that time, the Spangenberg Group has ceased to exist. It has been replaced, though, by the Sixth Amendment Center, which has assisted states with assessments of their public defense system and with crafting proposals for reforming systems.¹⁷ PDSC may wish to consider seeking an assessment from the Sixth Amendment Center.

Options for fundamental changes to Oregon's public defense system involve two separate but related issues. First, how should the work of the system be compensated? As explained above, currently the most common method is a "case-rate" system in which providers are

¹⁴ The one exception is the Parent Child Representation Program that provides for a workload model of contacting with caseload limits.

¹⁵ See PDSC August 24, 2017 meeting minutes, <http://www.oregon.gov/OPDS/docs/Agendas/09-28-2017.pdf>.

¹⁶ *Final Report of the Oregon State Bar Indigent Defense Task Force* (July 1994).

¹⁷ The Sixth Amendment Center has published assessments and/or provided technical assistance to policymakers in Delaware, Idaho, Indiana, Mississippi, Nevada, Tennessee, Utah, and Wisconsin. Links to reports and other information is available at <http://sixthamendment.org/about-us/our-current-projects/>.

paid a set price-per-case for the work they do. The other basic question is who should be providing public defense services? Again, currently at the trial-court level attorneys and associated professionals are entirely non-governmental providers, mostly under contract with PDSC and organized primarily as consortia of lawyers in private practice, along with about 10 non-profit public defender offices.

Options for system compensation, other than continuing with the current case-rate system, include a “workload model” and an hourly-rate model. The workload model is currently used in Oregon in the few counties where the Parent Child Representation Program operates. It establishes attorney compensation based on a calculation of the cost to maintain a law practice, accounting for rates of pay comparable to government-paid attorneys and with support staff. A key component of the PCRCP, however, is a caseload limitation based upon standards borrowed from a similar program in the State of Washington. PDSC has not established system-wide caseload standards, although the Commission has expressed its intention to do so.

Another compensation model is to compensate lawyers at an hourly rate for their work, a method currently used only for contracted representation in capital cases and in the small percentage of non-capital cases that are not handled by contract attorneys. The hourly-rate model removes the disincentive to quickly close cases that is inherent in the case-rate model, but it also presents significant administrative and auditing challenges to ensure the integrity of billing and payments. It is also a system that would be especially difficult to implement for the various non-profit public defender offices currently under contract with PDSC.

The question of who should be performing public defense services, or the “service delivery” method, is complex and challenging. As related above, except for a small percentage of cases handled by non-contract attorneys, trial level representation has been provided entirely through contracts with private entities and lawyers. This method has presented significant oversight and quality assurance challenges for the Commission, particularly with the primarily reliance on consortia where attorney accountability is especially difficult to achieve. One option is to increase reliance on non-profit public defender offices, where attorneys and other staff are subject to direct supervision and oversight by the entity. But establishing such offices, particularly in sparsely populated counties, would be especially challenging, suggesting the possibility of regional offices.

Another service delivery model is the use of state employees to provide trial level representation. This is obviously the model used currently for most appellate representation. As with non-profit public defender offices, this model brings the benefit of an employment relationship and the ability to directly monitor and supervise attorney performance, something that is nearly impossible to achieve with the independent contractor model currently in place. But the logistical challenges and possible cost of

establishing publicly performed trial-level services are significant concerns. However, a small pilot program of state-employee trial level attorneys is an option that might be explored with relatively minimal overall additional cost.

Historically, PDSC has eschewed a “one-size-fits-all” approach to public defense in Oregon, and it is unlikely, not to mention impractical, to expect that any one compensation or service delivery model would be appropriate for the entire state. Moreover, each of the options outlined above require a great deal more examination and description before the Commission would be able to seriously consider them. They are presented here so a discussion of alternatives and improvements to our current way of doing business can begin.

V. Conclusion

Oregon’s trial-level public defense system is struggling. As costs have increased and cases have become increasingly complex, Oregon’s public defense system has remained largely unchanged since its creation. High caseloads, inadequate funding, and an outdated contact model create significant risk that the legal services provided to clients fail to meet state and national standards. Fortunately, there is an emerging consensus in the public defense community, and on the Commission, that change is necessary. There is likely less agreement on how that change should happen. But that may yet emerge as further consideration of the possibilities continues.