

**OFFICE OF PUBLIC DEFENSE SERVICES
REPORT TO THE PUBLIC DEFENSE SERVICES COMMISSION
(Adopted June 14, 2007)**

Delivery of Public Defense Services In Death Penalty Cases

Introduction:

Since developing its first Strategic Plan in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its mission to deliver quality, cost-efficient public defense services in Oregon. Recognizing that increasing the quality of legal services also increases their cost-efficiency by reducing risks of error and the delay and expense associated with remedying errors, the Commission has developed strategies designed to improve the quality of public defense services and the systems across the state for delivering those services.

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004, 2005 and 2006, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Wasco, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems. In addition, the PDSC reviews service delivery in specialized areas of practice. In 2006 the Commission completed reviews of service delivery in juvenile dependency and delinquency cases.

This report includes the results of the Commission's review of the delivery of public defense services in death penalty cases.

Information received in Invited Testimony

During the Commission hearing on February 8, 2007 at Portland State University, a number of invited witnesses presented testimony about issues relating to legal representation in death penalty cases.

Professor William Long described the history of the death penalty in Oregon and some of the issues that affect the demand for death penalty representation. He testified that there were approximately six cases that arose before 1989 that have accounted for a significant portion of the cost of death penalty litigation in Oregon. Execution dates in these cases, if the defendants are ultimately

sentenced to death, will overlap with later cases which are proceeding through the system more rapidly since many of the legal issues were addressed in the earlier cases. Involuntary executions could begin to occur as early as 2012. Professor Long expects that the cost of representation at the post conviction trial court level will continue to increase. Since all of these cases are being litigated in Marion County, they create a stress on the system and can take years to get to trial. Because of the development of a very sophisticated practice in death penalty post conviction relief cases, it would be appropriate to consider the creation of a separate office or division to handle these cases.

Judge Michael McShane testified that Multnomah County recently added a fourth judge to hear death penalty cases. Because of the volume of cases some are being docketed for two years from the date of arraignment. There is also an insufficient number of attorneys in the county to handle the cases. Multnomah County, unlike some smaller counties, is sufficiently funded so that the state does not have to be selective about the cases in which it seeks the death penalty. As for the defense bar, there are essentially two kinds of attorneys handling the cases – a dedicated group of “phenomenal” attorneys and a group who ought to retire. Judges are uncertain as to how they can best deal with problems of under-representation without making themselves witnesses in post conviction cases. There needs to be a safe way for judges to provide information to OPDS. It is a mistake to rely on letters written by judges at the request of the attorney because it is hard for judges to say no. There should be a form for judges to complete with objective data. Some defendants cannot accept negotiated settlements that are clearly in their own interest because their attorneys have not been able to develop a trusting relationship with them. Attorney substitutions are often necessary for these clients. Among the cases that go to trial there are many in which the state does not realistically expect a death sentence. It would be helpful to have a resource attorney for death penalty lawyers. OPDS could save money in the long run since, for example, some attorneys don’t know how to preserve all of the issues for appeal. One attorney developed a checklist for the court so that all of the issues raised could be acted upon and objections preserved. A resource lawyer could assist with standardizing this kind of practice. Judge McShane suggested that consideration should be given to bifurcating death penalty cases so that only after the guilt phase was completed would the penalty phase case be scheduled¹. This would avoid the cost of

¹ In an email received on March 7th, 2007 from Judge Barron, he said that in his judgment bifurcation would actually increase costs because the case would have to be retried to the second jury. It would delay the case and possibly raise new issues such as the need for a change of venue from the location where the guilty verdict was rendered. Matt Rubenstein, the death penalty resource attorney, reviewed Judge McShane’s proposal and responded that in all likelihood it would increase costs and possibly make it easier for the state to secure death verdicts. He discussed the proposal with experts from the Colorado Public Defender System, the Southern Center for Human Rights in Atlanta, Georgia and the Vice-Chair of the National Association of Criminal Defense Lawyers Death Penalty Committee all of whom believed the proposal would result in increased costs. Mr. Rubenstein also noted that Judge McShane’s proposal assumes that the defense team could delay preparing for the sentencing phase until the

preparing for the penalty phase before it is known whether the state will actually be seeking the death penalty.

Judge Richard Barron testified that he had been handling death penalty cases since 1980. Some cases have been tried by contractors and some by hourly rate attorneys. The contract system is the better system. A significant increase in compensation is needed for these attorneys. If there were an increase it might be possible to get additional attorneys to come to the Fifteenth Judicial District (Coos and Curry Counties) where there is an inadequate supply of attorneys to handle the criminal caseload. Attorneys are coming from as far away as Lane County. In death penalty cases the court contacts OPDS but it may take several days for a lawyer to get there. There is a need for a local attorney to be able to meet with and advise clients in these cases immediately upon arrest. It would also help to have a video conferencing system set up. The team in a death penalty case should include at least two lawyers and sometimes three. The third lawyer might be a local lawyer who may have represented the defendant in the past. In addition, there should be a panel of attorneys to assist when there is a rift between the attorney and the client. A local attorney could also fulfill this role. Attorneys need to be aware of the law on substitution. The lawyers should be aware that the court will not remove an attorney merely because the attorney and client don't have a working relationship at the moment. The relationship has to be worked on. Lawyers who work on these cases need support. They are emotionally draining cases. Lawyers have to think about post conviction relief and need to keep good records of what they have told their clients and what choices the defendants have made. Everyone should work to see that the case is handled properly from the beginning so that there is no need for a retrial.

Tim Sylwester is a Senior Assistant Attorney General in the Appellate Division of the Department of Justice and the Capital Litigation Coordinator. He has been working on death penalty cases for twenty years. He testified that there are currently approximately ten capital cases on direct review, twenty in post-conviction and three at the federal habeas stage. Capital cases are moving expeditiously through the direct appeal stage. Some of the post conviction cases, however, have been pending for ten years. There is a lack of resources on both sides. By the time a case gets to post conviction there is a voluminous record and the Department of Justice attorneys who have been handling them have very large caseloads. In addition, the petitioner has no incentive to accelerate the case. The Department of Justice has recently restructured its trial and appellate divisions so that all capital cases will be assigned to the appellate division and remain there. The Department will now be seeking to move the post conviction cases to trial. On the defense side, a way needs to be found to adequately fund the post-conviction work. Sometimes so much time has

end of the guilt phase, but the ABA Guidelines require that the mitigation investigation be undertaken as soon as possible in the case. In addition meaningful negotiation between the state and the defense requires that the defense have available as much mitigation information as possible.

passed by the time of the post conviction trial that witnesses no longer recall what occurred and investigative files may have been lost or destroyed. Some defense counsel are very professional about the manner in which they preserve their files and information related to the case. It would be helpful if PDSC contracts required defense counsel in these cases to keep certain records and notes and make sure their investigators do the same. In a March 7, 2007 email message Judge Barron also suggested that PDSC's contracts require attorneys to maintain summaries of developments in death penalty cases and to include on the team someone who is skilled in organizing files. He thought it might be helpful to have a central repository for all death penalty case files, or at least funding to offset the cost to the attorneys of maintaining them. If possible, these records should be scanned and filed electronically.

Duane McCabe testified that he is a full time PDSC contractor who does primarily trial level work but who occasionally handles post conviction cases as well. He is based in Bend but often handles cases in other parts of the state. Creating a good defense team is very important. Lawyers who handle these cases may suffer from a form of post traumatic stress disorder because of the emotional strain involved in working on these cases.

Richard Wolf testified that he is a PDSC contractor and the co-chair of the Oregon Criminal Defense Lawyers Association (OCDLA) Capital Defender Section. Death penalty cases are difficult cases, often with difficult clients. \$55 per hour is not sufficient compensation for the lawyers handling these cases. Mr. Wolf testified that he had submitted a grant application on behalf of OCDLA to the Department of Justice, Bureau of Justice Assistance, seeking up to \$50,000 for training of death penalty lawyers. Grant funds might also be available to use for a capital defense resource center. A resource center or attorney would be responsible for preparing generic motions relevant to all death penalty cases, for creating an expert database and for assisting other lawyers with their cases. With respect to appellate level representation in death penalty cases, Mr. Wolf indicated that he thinks it would benefit clients for them to have more contact with their appellate lawyers. Although it is different from the bifurcated trial Judge McShane described, Mr. Wolf noted that Washington State and the federal system both require that prosecutors wait a certain amount of time before deciding whether or not to pursue a death sentence in a particular case. A panel of prosecutors reviews the case and makes a recommendation and the defense is permitted to present preliminary mitigating evidence in an effort to persuade the state not to seek the death penalty. He also noted that there is a shortage of qualified mitigation specialists in Oregon. A contract option might attract more qualified people to the field.

Dennis Balske testified that he was formerly with the Federal Defender office and currently handles post conviction cases. When he was at the Federal Defender's office they would have said that the post conviction system in Oregon is broken because the quality of representation is so poor. They saw many

cases with meritorious issues which were procedurally defaulted because the post conviction lawyers failed to properly raise them under the federal constitution. The problem in Oregon is that there is such a small pool of lawyers experienced in death penalty cases who know how to aggressively litigate post-conviction. There are some lawyers who just don't have what it takes. How do you get rid of them? How do you attract better ones? You have to look at funding. In addition, most of the problem cases seemed to come out of Marion County. The Marion County judges have large caseloads and their implicit rule was that they didn't want lawyers using live testimony in these cases. The practice among the lawyers was to submit written exhibits and add very little. The really poor lawyers just called their clients and said "Tell the judge about your issues." The cases were often handled by the Marion County Association of Defenders rather than other death penalty contractors.² Proper representation in these cases is essential, especially after the enactment of the Anti-Terrorism and Effective Death Penalty Act. The PCR attorney has to review the record and reinvestigate the entire case in order to show the likelihood of a different result if things had been done properly in the trial or appellate court. The PCR attorney has to do more work than the trial or appellate attorney.

Richard Wolf noted that it would be helpful to bring in some civil trial attorneys since PCR cases are civil rather than criminal.

Mr. Wolf was asked to comment on the death penalty peer panel and whether it could serve the function suggested by Judge Barron of helping to heal rifts between defendants and their counsel. He said that the peer panel is called upon to assess nonroutine expense requests and to provide input on applicants seeking approval to handle death penalty cases but is generally not involved in providing direct assistance in cases where there is a strain in the relationship between the client and his defense team. It is his experience that, once the relationship is broken it is difficult to repair and the real solution is to prevent the rift from occurring.

Chair Ellis asked whether death penalty lawyers should be working in partnerships. Duane McCabe said that partnerships create conflicts. Individual contracts seem to be the most effective model.

Mr. McCabe said that it is difficult for him, working outside the metropolitan area, to find co-counsel and he often has to rely on other contractors. Mr. Wolf said that there is pressure on lead counsel to bring in and train new attorneys but the qualification standards require a certain level of expertise and, when someone's life is at stake it may not be appropriate to rely on inexperienced lawyers. It is much easier to work with someone you have worked with before. Duane McCabe said that one way to bring in new attorneys is to use them as second co-counsel.

² Attached as Exhibit A is a letter from Olcott Thompson, the Chair of the MCAD Board of Directors, responding to Mr. Balske's comments.

Chief Justice De Muniz thanked the capital attorneys for their dedication and commitment to the protection of individual rights. He said that, based on his own experience, there is a unique relationship that must exist between the lawyer and client in order for the lawyer to successfully defend these cases.

At its meeting on March 8, 2008, the Commission heard further testimony on death penalty representation.

Rebecca Duncan testified that for attorneys in the Legal Services Division death penalty cases are different from the other appellate cases that they handle. No notice of appeal is necessary since death penalty cases are subject to automatic and direct review in the Oregon Supreme Court. The cases are more difficult and more complex often with thousands of pages of transcript to review. In these cases attorneys raise a greater number of assignments of error than in other cases. The issues are often complex and unique so there is a need to have death penalty-experienced attorneys handling the cases. There are two attorneys in the office who handle death penalty cases. The Oregon Rules of Appellate Procedure require that the appellant's brief be filed within 180 days after the transcript is received. The respondent's brief is due 180 days later and then a reply brief is generally prepared and must be filed within 90 days. After oral argument and the issuance of an opinion, a petition for reconsideration will be explored and a petition for certiorari to the United State Supreme Court will be filed. If the petition for certiorari is denied the appellate attorney will then assist the defendant to prepare an initial petition for post conviction relief.

Among the issues raised in the opening brief there are often some which have not been preserved. Chair Ellis asked whether the Legal Services Division is doing everything it can to inform the trial lawyers of the failure to preserve all of the issues. Ms. Duncan said that there is no system in place to make sure that trial lawyers are informed of all of the errors identified on appeal. Once the death penalty resource attorney is in place, Ms. Duncan thought it might be appropriate, either during the briefing or after the opinion issues, to have the members of the death penalty community and the resource center come together to discuss each case.

At the post conviction relief stage one of the Legal Services Division death penalty attorneys identifies for each client any issues that could be raised in post conviction. Ms. Duncan noted that it would be helpful for the appellate attorney to have a face to face meeting with the PCR attorney when the case is transferred, and Paul Levy stated that under the ABA standards it is one of the duties of counsel to facilitate the transfer of the case to successor counsel. Greg Hazarabedian said that there have been reports over the years that the trial lawyers and PCR attorneys have been dissatisfied with the amount of time that the appellate attorneys have been able to devote to these discussions.

Currently the Legal Services Division has three open death penalty cases, all assigned to one attorney. The office will be changing its staffing practice in these cases. In order to prevent a backlog and meet the time demands and also to prevent attorney fatigue the division will be rotating new attorneys into the cases. Experienced attorneys who rotate out of death penalty cases will be available as resources to the newer attorneys. The division hopes to have six attorneys or more available to handle death penalty cases, with a primary attorney and a backup attorney on each case. Ms. Duncan reported that the Legal Services Division has been reviewing best practices and other ways of improving representation. She believes that improvement can be made in how cases are transitioned from the trial attorney to the appellate attorney and from the appellate attorney to the PCR attorney. The guidelines require two attorneys on each case. California does not provide two attorneys but a second attorney can be brought in to assist. Illinois provides for a primary attorney and a backup attorney. This is the model that the Legal Services Division would like to follow. A primary attorney will be responsible for the case but a backup attorney, who is also invested in the case, will work on select portions and brief discreet issues. This will provide additional support for the client and will ensure that experienced attorneys can continue to participate and that new attorneys can be trained. With respect to client contact, in the past the frequency of such contact has varied from one attorney to the next. Contact with the client need not be as frequent as it is for trial counsel but contact promotes good client relations and more personal investment by the attorney. It facilitates communication and helps the attorney to monitor the client's mental condition and to act on any emerging issues such as the need to preserve evidence in the event of a retrial.

Richard Wolf noted that it is critically important to initiate the state PCR petition as early as possible in order to stop the clock on the Federal Anti-Terrorism and Effective Death Penalty Act of 1996.

Chair Ellis said that whether the death penalty is good policy or not the public and the legislature ought to be given good information about the high cost of death penalty representation. PDSC should break out the costs that are being incurred by the defense. Kathryn Aylward said that PDSC does track aggravated murders costs. One problem in identifying the actual costs is that there are so few cases where the total is yet known because almost all of them are still active. With respect to cases that began in 1988 or 1989 we lack records from the early years. For death penalty appeals the estimate used in fiscal impact statements is \$80,000 per case, which is comparable to the amount of attorney time reported by the Attorney General.

Commission Conclusions

The Commission then reviewed the provisions of the American Bar Association Guidelines and heard the following comments and made the following decisions about the implementation of the guidelines in Oregon.

The Office of Public Defense Services will be designated as the “responsible agency” under the guidelines, with each division performing the functions appropriate to that division.

OPDS, rather than the courts, should assign individual attorneys to cases. When counsel is to be appointed in a death penalty case, the court should confer with OPDS about whatever is known about the circumstances of the case and the needs of the defendant and OPDS should assign appropriate lead counsel.

OPDS needs to create a more objective and reliable means of monitoring the quality of representation provided by counsel in death penalty cases. It will develop a survey to be sent to judges and others about the quality of representation provided by each attorney.

In all death penalty trial level cases lead counsel will be responsible for assembling a defense team to include co-counsel as needed, an investigator, and a mitigator. Each team will also have a member or expert advisor who is knowledgeable about mental health issues.

There is an urgent need for additional mitigators. OPDS will issue an RFP for a mitigation contract and OPDS will work with PSU and other potential training providers to explore the creation of a training program for potential mitigators.

There is also a shortage of attorneys to handle death penalty post conviction relief cases. It is difficult to find attorneys willing to work at the current hourly rate of \$55 per hour. If a request for proposals were issued at the \$55 rate it would be unlikely that providers would submit proposals. If the rate were increased for purposes of the RFP it would be unfair to those providers who are currently being paid at \$55 and they would object unless they received similar rates. Two Commission members recommended that the hourly rate be increased if we have arrived at a point where quality representation is not available at \$55. The Commission will discuss this issue further at the August retreat after the 2007-2009 budget has been approved. In the meantime, OPDS will work with the courts to see that the best qualified public defense attorneys available are assigned to any new death penalty PCR cases.³

Ingrid Swenson discussed caseload management and said that contractors are never directed to take additional cases if they do not believe they can handle them. Some private bar attorneys, however, may occasionally take more cases than PDSC believes is appropriate.

³ It should be noted that Timothy Sylwester warned the Commission that the Department of Justice is going to try to accelerate death penalty PCR cases. “I think that we need to figure out some way to adequately fund the post conviction petitioner’s work and get these cases moving, so there may be a need to get adequate funding on your end.”

With respect to the training available to death penalty lawyers, the Oregon Criminal Defense Lawyers Association offers an annual CLE on death penalty representation. The Federal Defender also sponsors an annual one-day death penalty seminar. The Legal Services Division provides CLE training for its own attorneys but these rarely focus on death penalty representation and have not generally been made available to lawyers outside the office. The death penalty resource attorney, Matt Rubenstein, will be working to identify additional training resources. Kathryn Aylward noted that PDSC should be providing funds for training of death penalty lawyers.

The Commission approved the personal services contract with Matt Rubenstein to serve as the first Death Penalty Resource Attorney in Oregon.

Standard of Representation

In death penalty cases, as well as all other public defense cases, The Public Defense Services Commission is required by statute 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 Oregon Constitution, the United States Constitution and Oregon and national standards of justice. ORS 151.216(1)(a) (Emphasis added.)

In 2003 the American Bar Association adopted a revised edition of its “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” The stated objective of the guidelines is to “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation....”⁴

A growing number of cases, including United States Supreme Court cases, look to the ABA standards as a statement of the standard of adequate representation in death penalty cases. In Strickland v. Washington, 466 US 668 (1984), a death penalty case, the Court held that in order to obtain federal habeas relief based on a claim of ineffective assistance of counsel, a petitioner must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. Performance is deficient if it falls below an objective standard of reasonableness. The Court said that “Prevailing norms of practice as reflected in the American Bar Association standards and the like...are guides to determining what is reasonable.” Id. at 688-689. In both Williams v. Taylor, 529 US 362 (2000) and Wiggins v. Smith, 539 US 510 (2003), the Court again highlighted the need for counsel in capital cases to make adequate investigations and pointed to the ABA standards as guides and “well defined norms” for determining what is reasonably required for adequate representation. In 2004, the Court again looked to the ABA standards as a measure of reasonable attorney performance when it

⁴ Guideline 1.1A.

invalidated a death sentence where counsel failed to obtain and review available mitigating evidence. Rompilla v. Beard, 545 US 374 (2004).

What the Guidelines Require

The February, 2003 revised edition of the ABA Guidelines for death penalty cases is generally divided into two sections – a set of principles and policies that are intended to guide jurisdictions in creating a system for the delivery of defense services (Guidelines 1.1 to 10.1), and a set of performance standards defining the duties of counsel handling individual cases (Guidelines 10.2 to 10.15.2).

A. System Requirements

The guidelines require each jurisdiction to create a system that includes the following components.

Legal Representation Plan (2.1)

Each jurisdiction needs a legal representation plan⁵ setting forth how the jurisdiction will conform to the guidelines. The plan must insure freedom from political influence and be judicially enforceable against the jurisdiction.

Responsible Agency (3.1)

The plan should designate one or more agencies to be responsible for ensuring high quality legal representation and performing all the duties of such agency. The agency should be independent of the judiciary and it, not the judiciary, should select lawyers for specific cases.

The responsible agency should: recruit and certify, publish rosters, publish certification standards, assign attorneys to cases, monitor performance, periodically review the attorney roster and withdraw certification if necessary, conduct or approve specialized training, and handle complaints.

The agency should not use a strict rotation system to assign counsel but should attempt to match a client with an appropriate attorney.

Defense Team and Support Services (4.1)

The plan should provide for no fewer than two attorneys, an investigator, and a mitigator. One member of the team should be qualified to screen for mental health issues.

⁵ A draft plan appears at pages 20 to 24 of this report.

Specialized training and qualification standards should be developed for investigators and mitigators.

With regard to other members of the defense team, the Commission heard testimony from a number of witnesses, including a representative of the state, that it is important to provide adequate resources at the early stages of the case in order to avoid having the case remanded, sometimes many years later, because of ineffective assistance of counsel at the trial level⁶. Appropriate use of investigators, mitigators and experts is critical.

As noted in the testimony before the Commission, currently there is a shortage of qualified mitigators. Duane McCabe said that Oregon attorneys are having difficulty getting mitigators because they get paid more to work on federal cases and other states. In Washington State they receive \$60 per hour. To address this problem PDSC has submitted a policy package to the legislature that would increase the hourly rate for all investigators in death penalty cases from \$34 per hour to \$45 per hour. Whether or not rates are increased, OPDS intends to issue an RFP for mitigation investigation in the fall of 2007. It is hoped that the benefits of a contract relationship with PDSC will attract additional well qualified investigators to perform mitigation investigation on a full time basis.

Other than the requirement that independent investigators to be licensed by the state⁷, OPDS has no qualification standards for investigators. There are trainings available to investigators, including specialized trainings for investigation of death penalty cases, but OPDS has not participated in their development. Greg Hazarabedian said that the National Association of Sentencing Advocates, which is affiliated with the Nation Legal Aid and Defender Association, also offers training for mitigation investigators. OPDS should work with the death penalty resource attorney, the peer review panel, OCDLA and others to determine whether the DPSST standards are adequate or whether particular standards for investigation in death penalty cases should be developed.

⁶ Timothy Sylwester testified that "The last thing we want to do after spending a million dollars prosecuting somebody and getting the death penalty, is to have it get reversed in post conviction on the ground that defense counsel did something wrong. I think from our standpoint, from the DA's standpoint, we want the case perfectly tried at the outset; we don't ever want to have to try it again. It makes sense from the efficiency standpoint, at the outset, that that lawyer who is handling the defense be given adequate resources -- a backup lawyer and a mitigation lawyer.... Later Mr. Sylwester characterized the need for adequate funding of the mitigation investigation as "imperative." In addition, Judge Barron recommended that "[W]e should all work to make these cases as right as they can be the first time so we are not going through [two or three] retrials."

⁷ ORS 703.430 ff. In order to qualify for a license, an investigator must, among other things, have "at least 1,500 hours of experience in investigatory work, have completed a related course of study approved by the department [Department of Public Safety Standards and Training (DPSST)] or have a combination of work experience and education approved by the department." ORS 703.415(1)(g). In addition, "an investigator must complete at least 32 hours of continuing education every two years." ORS 703.447(1)(a).

Qualifications of Defense Counsel (5.1)

The responsible agency should develop and publish qualification standards for counsel. The types of skills required should focus on the ability to provide high quality representation rather than just quantitative measures of experience.

PDSC's Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense were amended in 2006 to conform to the standards recommended by the ABA Guidelines in death penalty cases.

Workload (6.1)

The responsible agency should implement effective mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with the guidelines.

Capital murder contractors generally carry no more than three pending cases, each of which is usually at a different stage in the process so that they are not doing intensive trial preparation in multiple cases at the same time. Generally, OPDS is able to stagger the appointments so that at least one of the attorney's pending cases near completion before the contractor is asked to accept a third case. OPDS relies upon the contractor to gauge when a new case can be accepted and to refuse appointment to a new case if the current workload will not permit the contractor to devote sufficient time to the case. Occasionally, a contractor who is the most logical choice for a particular appointment will agree to take the new case if the court is willing to make certain accommodations, such as flexibility in the scheduling of the trial.

Cases assigned to private bar attorneys, especially when the court does not first consult with OPDS, may go to an attorney who is already overburdened, although most private bar attorneys will decline to take an additional case if they are not able to give it the attention it requires. If the Commission approves the proposed PDSC Legal Representation Plan for Death Penalty Cases, OPDS will assign counsel in each case. This should resolve the problem of cases being assigned to attorneys who are significantly overburdened or who lack suitable skills or experience. The number of qualified attorneys available remains a problem, however.

It is sometimes difficult to find a contractor or private bar attorney who is immediately available to accept a new appointment, especially in the case of multiple co-defendants. Contract attorneys may be at maximum workload and private bar attorneys may have other, non-death penalty cases that affect their availability. In addition, lead attorneys report significant difficulty in identifying qualified co-counsel in some cases.

The Commission heard testimony from an experienced trial judge who identified a shortage of qualified attorneys in Coos and Curry Counties. He urged the Commission to increase compensation substantially in an effort to attract more attorneys to the area.

A Multnomah County judge said that there are too many cases for the best qualified attorneys to handle and the cases then go to less qualified attorneys. He identified contract attorneys in the room as among the best, as “phenomenal” attorneys, committed to their work. He also noted that cases that should settle may not if the client does not have sufficient confidence in his attorney. Attorneys need the time and resources to develop a relationship of trust and confidence with the client.

PDSC’s budget proposal includes a policy package that would increase the hourly rate for private bar death penalty representation from the current \$55 per hour to \$95 per hour. If approved, this increased rate of compensation would help OPDS attract more highly-qualified attorneys to death penalty representation.

Currently, it is mainly through the contract process that OPDS has been able to attract and retain the services of well-qualified lawyers.

OPDS will seek to contract with more providers. Except in unusual circumstances PDSC will issue RFP’s before entering into contracts.

Witnesses also suggested that efforts should be made to avoid substitution of counsel by providing additional support for the attorney client relationship and better training of attorneys regarding what constitutes a conflict of interest. OPDS will confer with its Death Penalty Peer Panel on the need for additional support and will suggest that OCDLA consider including a segment on the law relating to substitutions in one of its upcoming CLE programs.

Monitoring and Removal (7.1)

The responsible agency should protect the interests of the attorney’s current and potential clients, have a complaint procedure, review rosters, suspend or remove attorneys or offices, provide for notice and opportunity to respond in writing for lawyers suspended or removed. Protect zealous advocates from improper suspension or removal.

Most of these responsibilities are discussed above. OPDS will design a survey for obtaining information on a regular basis about the performance of its death penalty lawyers. PDSC has a complaint policy that has been in place since October of 2004. PDSC’s complaint policy, its contracts and its Qualification Standards all permit the suspension or removal of attorneys who fail to provide

quality representation. OPDS will develop a system specific to death penalty cases, however, for evaluating the work of death penalty lawyers on a regular basis and for suspending or removing lawyers, whether under contract or approved for appointment on an hourly basis, from further representation in these cases, after giving the attorney the opportunity to respond in writing.

Training (8.1)

The state's plan should provide funds for training. Attorneys seeking to qualify should be required to complete a comprehensive training program approved by the responsible agency (outline of curriculum set forth). Additional training should be required at least once every two years. Training is also required for non-attorneys.

PDSC requires attorneys to complete training in the required areas but does not currently provide funds for training. With lawyers under contract it is assumed that some portion of contract funds will be used to access appropriate trainings. Training for non-attorneys is available from a number of organizations, including the Oregon Association of Licensed Investigators and the Oregon Criminal Defense Lawyers Association. No funds are provided to non-attorneys for training.

OPDS believes that the new death penalty resource attorney will be able to identify additional training resources, may be able to access OCDLA grant funds to offer additional training events and will be available to provide expert assistance and advice on particular legal issues. OPDS will work with its resource attorney, its peer panel, OCDLA and others to ensure that adequate training opportunities are available and accessible to attorneys and other members of the defense team.

Funding and Compensation (9.1)

The plan must assure full funding. Rates should be commensurate with high quality representation. There should be no flat fees, caps on compensation or lump-sum contracts. The salary scale should be commensurate with the prosecutor's office. Counsel should be fully compensated for actual time and the service performed (commensurate with prevailing rates for retained counsel). Non-attorneys should be compensated like their prosecution counterparts. Experts should be compensated on an hourly basis commensurate with rates paid by retained counsel.

Oregon does not have flat fees in death penalty cases, does not cap compensation, and does not use "lump-sum contracts." Private bar attorneys and contract attorneys are fully compensated for actual time. Hourly rate attorneys would not be receiving compensation comparable to the district

attorneys. Contract attorneys receive compensation that in many counties may be comparable to the compensation paid to the prosecutors who handle these cases. PDSC submitted a policy package with its 2007-2009 budget request which would have established parity with Department of Justice attorneys for Legal Services Division attorneys. Funding for this policy package was not approved by the full Joint Committee on Ways and Means.

Since the great majority of death penalty cases are public defense cases it is difficult to determine what the prevailing rate for retained counsel would be.

Another policy package included in PDSC's budget proposal would increase the hourly rate for death penalty lawyers and investigators. The budget, as approved by the Ways and Means Committee included sufficient funding to raise the hourly rate for attorneys in death penalty cases to \$60 per hour. In addition, an adjustment to PDSC's essential budget level has been approved by the Joint Committee on Ways and Means which would result in the application of the personal services inflation rate, rather than the Department of Administrative Services adjustment for services and supplies, for contractor costs. Such an adjustment would allow PDSC to increase contractor rates.

Some experts are willing to work for public defense attorneys at discounted rates. Others charge OPDS the same amount for their services as they charge clients with retained counsel but, in large part, public defense clients have available to them the same experts that would be used by retained counsel.

Establishment of Performance Standards (10.1)

The agency should establish standards including those set out in the guidelines for the performance of counsel.

B. Performance Standards for Counsel

Applicability of Performance Standards (10.2)

Counsel should provide high quality legal representation in accordance with the guidelines.

Obligations of Counsel Respecting Workload (10.3)

Lawyers should limit caseloads to provide high quality legal representation in accordance with the guidelines

The Defense Team (10.4)

The Responsible Agency should designate lead counsel who bears overall responsibility but may delegate in accordance with the guidelines. Lead

counsel should consult with the agency regarding identity of associate counsel, then select associate counsel and the defense team. Lead counsel should demand appropriate resources.

Relationship with the Client (10.5)

Clients should be seen within 24 hours of appointment. Attorneys should discuss with the client all matters that might reasonably be expected to have a material impact on the case. All counsel, including appellate and post conviction counsel, need to monitor the client's personal condition for potential legal consequences.

The Commission heard testimony from an experienced trial judge about the need for attorneys to see clients in death penalty cases as soon as possible, before arraignment. Currently it may be several days, and on occasion it has been significantly longer, before the designated death penalty lawyer is appointed and can see the client. OPDS has attempted to work with the courts and the attorneys to accelerate this process. Judge Barron's suggestion that local counsel be used for this purpose is a good one and has been considered in earlier discussions with the Death Penalty Peer Panel. The OCDLA Board of Directors has undertaken to establish a pilot project that would involve having local counsel in at least one county agree to be on call to make the initial contact with any in-custody homicide suspect as soon as counsel is informed of the arrest.

Obligations regarding Foreign Nationals (10.6)

Counsel for foreign nationals should, with the client's consent, contact the relevant consular office to inform it of the client's detention and arrest.

Investigation (10.7)

Counsel is to fully investigate guilt and penalty issues even if the client objects. Counsel at all stages must interview prior counsel and members of the defense team and examine files of prior counsel to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

The commentary to the guidelines includes useful checklists of documents to be obtained and examined, potential witnesses to be interviewed, physical evidence to be examined, personal and medical histories to be reviewed, collateral convictions and adjudications to be investigated.

Duty to Assert Legal Claims (10.8)

This guideline requires counsel at every stage of the case to consider, investigate, evaluate and properly assert and preserve appropriate claims.

Duty to Seek an Agreed-Upon Disposition (10.9.1)

Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agree-upon disposition and should pursue such a settlement with the state even if the state initially declined the proposed disposition.

Entry of Plea of Guilty (10.9.2)

Counsel should make certain that the client understands the rights being waived, the conditions and limits of the agreement, the maximum punishment and other consequences of the plea and should prepare the client for participation in the plea hearing.

Trial Preparation Overall (10.10.1)

Based on information received from investigation of the case, counsel should formulate a defense theory that will be effective for both the guilt and penalty phases.

Voir Dire and Jury Selection (10.10.2)

Counsel should consider possible challenges to procedures used for selecting the jury, should be familiar with the procedures and techniques for selecting a death-qualified jury, and should consider seeking expert assistance in jury selection.

The Defense Case Concerning Penalty (10.11)

This guideline sets forth a list of witnesses and evidence which should be considered in the penalty phase, an admonition to counsel to confer closely with the client regarding this phase, to review and, if appropriate, challenge the state's aggravating evidence, and to request jury instructions and verdict forms that would give effect to the defense's case.

The Official Presentence Report (10.12)

Counsel should challenge the inclusion of improper, incorrect or misleading information in the report and take steps to include information favorable to the client.

The Duty to Facilitate Work of Successor Counsel (10.13)

Counsel at all stages should safeguard the interests of the client and cooperate with successor counsel. The duty includes maintaining records in the case, providing files and information to successor counsel, sharing potential further areas of legal and factual research and cooperating with successor counsel's professionally appropriate legal strategies.

In view of the testimony provided to the Commission regarding the state of trial counsel's case files in some death penalty cases, especially years after the events to which the records relate, OPDS will explore with its Death Penalty Peer Panel ways in which files can be better organized, preserved and accessed by successor counsel.

Duties of Trial Counsel After Conviction (10.14)

Trial counsel should take such actions as may be required to maximize the client's ability to obtain post-conviction relief and shall continue acting on the client's behalf until representation has been terminated or successor counsel has entered the case.

Duties of Post-Conviction Counsel (10.15)

This provision requires post conviction counsel (including counsel on appeal) to seek a stay of execution, to seek certiorari in the Supreme Court, etc. Such counsel are also required to maintain close contact with the client regarding case developments, to continually monitor the client's mental, physical and emotional condition for effects on the client's legal position, to keep under review the desirability of modifying prior counsel's theory of the case and to continue an "aggressive investigation of all aspects of the case."

Commentary to the guideline (but not the black letter portion) recognizes that practice varies between jurisdictions regarding the limits of the appellate process and the relationship between direct appeal and post-conviction. The commentary requires appellate attorneys to explore issues that are only partially or minimally reflected by the record, or that are outside the record, as a predicate for informed decision making about legal strategy. It is described as critically important for counsel on direct appeal to proceed, like all post-conviction counsel, in a manner that maximizes the client's ultimate chances of success. "Winnowing" issues in a capital appeal can have fatal consequences. Appellate counsel must be familiar with the deadlines for filing petitions for state and federal post-conviction relief and how they are affected by the direct appeal. If the conviction and sentence are affirmed, appellate counsel should ordinarily file on the client's behalf a petition for cert. The appellate attorney must immediately inform successor counsel if the petition for cert was not filed or was denied. If no

successor counsel is appointed, appellate counsel should advise the responsible agency of need for appointment.

Duties of Clemency Counsel (10.15.2)

Clemency counsel should be familiar with the clemency procedure, should conduct an investigation, should seek clemency in a timely and persuasive manner, should ensure that the process is just, and, if it is not, seek appropriate redress.

C. Overall Assessment -- Compliance with Standards

Oregon's current delivery system for representation in death penalty cases complies in most important respects with the standards established by the American Bar Association. In addition, OPDS believes that the quality of representation provided at the trial and appellate levels is high in most cases. Representation in post-conviction relief cases, for all case types, needs to be improved. OPDS recommends that the Commission approve the PDSC Legal Representation Plan for Death Penalty Cases.

The Public Defense Services Commission's Legal Representation Plan for Death Penalty Cases

1. Responsible Agency

The Public Defense Services Commission is responsible for ensuring that defendants in death penalty cases who are entitled to and financially eligible for appointed counsel at state expense receive legal representation consistent with Oregon and national standards of justice.

2. Selection of Lawyers for Specific Cases

Effective June 14, 2007, except where existing contracts provide otherwise, when the court determines that a defendant in an aggravated murder case is entitled to appointed counsel the court shall notify the Office of Public Defense Services of the need for appointed counsel and of any circumstances of the alleged offense or of the defendant that may affect the selection of counsel in the case. The Office of Public Defense Services shall then advise the court of the attorney to be appointed as lead counsel in the case.

Upon motion by lead counsel who has received authorization from the Office of Public Defense Services for the appointment of co-counsel for a specified number of hours, the court shall appoint the attorney or attorneys approved by the Office of Public Defense Services as co-counsel for the number of hours authorized. Additional hours for appointed co-counsel may be requested and authorized as provided in the Public Defense Payment Policies and Procedures.

The Office of Public Defense Services shall authorize appointment of co-counsel whenever it is reasonable and necessary considering both the circumstances of the case and lead counsel's circumstances and needs. A denial of a request for appointment of co-counsel may be appealed to the presiding judge of the circuit court as a denial of a request for a nonroutine expense under ORS 135.055(3)(c). However, a denial by the Office of Public Defense Services of a request for a particular attorney to serve as co-counsel is final.

3. Qualification, Monitoring, Removal, and Training of Defense Counsel

The Office of Public Defense Services shall:

- a. Recruit and approve attorneys for appointment to represent defendants in death penalty cases;
- b. Publish and update the list of attorneys approved for appointment in death penalty cases;
- c. Continue to publish Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense ("Qualification Standards");
- d. Prepare and publish procedures for assignment of counsel in death penalty cases.

The Office of Public Defense Services should:

- a. Continue to require that attorneys approved for appointment to represent defendants in death penalty cases have demonstrated:
 - i. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
 - ii. skill in the management and conduct of complex negotiations and litigation;
 - iii. skill in legal research, analysis, and the drafting of litigation documents;
 - iv. skill in oral advocacy;
 - v. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
 - vi. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

- vii. skill in the investigation, preparation, and presentation of mitigating evidence; and
 - viii. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements;
- b. Monitor the performance of court-appointed attorneys providing representation in death penalty cases to ensure that clients are receiving high quality legal representation;
- c. Periodically review the list of approved attorneys, withdraw approval from any attorney who fails to provide high quality legal representation as provided in the attorney's contract or in the Qualification Standards for non-contract attorneys, and re-approve an attorney whose approval has been withdrawn only in exceptional circumstances;
- d. Work with death penalty attorneys and organizations providing legal training for death penalty lawyers to create adequate training opportunities for such lawyers, and provide financial support if needed to make it possible for lawyers to participate in trainings which should include presentations in the following areas:
 - i. relevant state, federal, and international law;
 - ii. pleading and motion practice;
 - iii. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
 - iv. jury selection;
 - v. trial preparation and presentation, including the use of experts;
 - vi. ethical considerations particular to capital defense representation;
 - vii. preservation of the record and of issues for post-conviction review;
 - viii. counsel's relationship with the client and his family;
 - ix. post-conviction litigation in state and federal courts;
 - x. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
- e. Require attorneys in death penalty cases to have attended and successfully completed within the two-year period prior to certification of qualification at least 18 hours of specialized training on current issues in capital cases through established training programs awarding CLE credits;

- f. Investigate and maintain records concerning complaints made by judges, clients, attorneys or others about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay in accordance with the Public Defense Services Commission's Complaint Policy and Procedures and such additional policies as the Commission may adopt.

4. Defense Teams, Workload, Compensation and Performance Standards

- a. Unless the particular circumstances of the case or the defendant make such a team or a particular member of the team unnecessary for high quality representation, the Office of Public Defense Services shall require lead counsel at the trial level in each death penalty case to assemble a defense team including co-counsel, as needed and authorized under paragraph 2 above, an investigator and a mitigation specialist. If the team does not include at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments counsel shall seek authorization for funds to obtain such services from a qualified provider.
- b. The Office of Public Defense Services shall authorize funds for experts, investigative and other professional services that are reasonable and necessary for the investigation, preparation and presentation of the defense as provided in ORS 135.055 and the Public Defense Payment Policies and Procedures.
- c. The Office of Public Defense Services should ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation.
- d. To the extent that funds are available to do so and in light of its obligation to provide defense services in other types of public defense cases the Public Defense Services Commission shall ensure that counsel in death penalty cases are fully compensated at a rate that is commensurate with high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.
- e. To the extent that funds are available to do so and in light of its obligation to provide defense services in other types of public defense cases, the Public Defense Services Commission shall ensure that non-attorney members of the defense team are fully

compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

- f. The Public Defense Services Commission hereby establishes as the standards for performance for all counsel in death penalty cases the standards set forth in Guidelines 10.2 to 10.15.2 of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February 2003. (Exhibit A)