

Oregon State Bar Post-Conviction Relief Task Force
Report to the Board of Governors

Introduction

On September 28, 2007 the Board of Governors approved a request to create a task force on Post-Conviction Relief Proceedings. The purpose of the task force was to identify and draft performance standards for counsel for petitioners in state post-conviction relief proceedings.

The Board of Governors appointed thirteen members to the task force. The task force included a broad array of attorneys with post conviction experience, including a current trial court judge and the attorney in charge of the Department of Justice criminal and civil rights litigation section.

The task force held eight meetings in 2008. It reached consensus on performance standards. These standards have been submitted to the Board of Governors for approval and adoption. The Chief Justice is writing a preface to the standards.

The recommended performance standards are one response to longstanding concerns about the quality of representation that petitioners receive in state post-conviction relief cases. The task force found, however, that there has been no appreciable improvement in post-conviction practice since a number of concerns were identified in the May 22, 2000 report of the Oregon State Bar Indigent Defense Task Force III (Task Force III).¹ Many of these concerns were also identified at a February 14, 2008 hearing on the quality of post-conviction representation before the Public Defense Services Commission.²

The task force has concluded, therefore, that performance standards alone will not significantly improve representation without other systemic changes to the manner in which post-conviction cases are handled in Oregon. This report identifies a number of systemic improvements which, if implemented, would improve representation in post-conviction relief cases. The task force requests that the Board of Governors review and adopt these systemic recommendations, and further, that the bar actively pursue these changes through its public affairs, regulatory and educational functions.

¹ http://www.osbar.org/surveys_research/idtf3/intro.html

² For details and a transcript of that meeting, see <http://www.ojd.state.or.us/osca/opds/Agendas/index.html>

Task Force Recommendations

I. Providing Representation

The principal systemic recommendation of the task force concerns the manner in which counsel is provided to financially-eligible petitioners, and is the same as the recommendation of the Task Force III. There is consensus among task force members that the Office of Public Defense Services (OPDS) should develop a specialized group of attorneys with expertise in post-conviction cases to represent petitioners, comparable to the trial division of the Oregon Department of Justice, which handles the cases for the state.

Whether such an entity would be a unit within OPDS or a provider that contracts with OPDS, is a matter that should be studied and determined by the Public Defense Services Commission. In either case, such a unit could develop and maintain expertise in post-conviction cases, provide peer support and review for this difficult work, and serve as trainers and mentors for other attorneys representing petitioners. The task force notes that in order to be effective, such a unit must be adequately funded.

For those appointed counsel who do not work as part of a specialized post-conviction unit, compensation should be significantly increased in order to attract qualified attorneys and to allow for smaller caseloads for those who contract to handle post-conviction cases.

II. Education

Post-conviction representation is a complex practice of law that requires specialized knowledge and skills. The performance standards, which the task force believes may be the first comprehensive description of non-capital post-conviction practice expectations in the country, should be the focus of educational and training programs by the Oregon State Bar, the Oregon Criminal Defense Lawyers Association, and other entities concerned with advancing the quality of representation in this field.

The Public Defense Services Commission's *Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense* should be amended to specifically require familiarity and adherence to the performance standards for those attorneys who accept court-appointments to represent petitioners in post-conviction proceedings. The qualification standards currently require no more than qualification for appointment to a criminal proceeding involving the highest charge in the post-conviction proceedings. This fails to recognize the specialized nature of post-conviction practice.

Additional Areas Discussed

This task force discussed challenges arising from the issues of venue and the burden of raising and preserving claims. The task force has not made a recommendation regarding these issues and instead suggests that additional study be completed.

I. Issue Identification and Pleading

Identifying, pleading and litigating appropriate issues for post-conviction relief is an area that needs substantial improvement among post-conviction relief practitioners. This was a major finding of the Task Force III, which attributed the deficiencies in large part to current requirements, established by caselaw, that place the burden of raising and presenting legal issues upon the petitioner personally. The task force did not reach consensus on resolving this issue, but did agree that adoption of the task force performance standards, better education and training about post-conviction practice, and pursuing a study of other methods to improve representation could be of assistance.

II. Venue

Currently, ORS 138.560(1) establishes venue for post-conviction cases in the county in which the petitioner is imprisoned. Venue may be changed when the court finds that “the hearing upon the petition can be more expeditiously conducted in the county in which the petitioner was convicted and sentenced,” ORS 138.560(4).

Venue for post conviction relief cases is typically established in the mostly rural counties where many of the state’s prisons are located. These are often counties that are underserved by public defense attorneys, and finding local qualified lawyers willing to accept this class of cases is problematic. Because these counties are in judicial districts that typically have only a few judges, special “visiting” judges are often appointed to hear the cases. The visiting judges often participate by video connection from a remote location. Usually, relevant witnesses and documentary evidence will be located in the county of conviction, which is often neither the county of imprisonment nor the site where the judge is located. It is often impossible for witnesses to attend the post-conviction hearings. All of these factors converge to make post-conviction hearings less effective proceedings.

One option discussed is to change the presumption of venue to the county of conviction. This might broaden the pool of attorneys available to represent petitioners and remove other barriers to effective advocacy in these cases. However, if the hearing is held in the county of

conviction, the petitioner will still be located in prison in a different county from the actual court proceeding. Video communications equipment can alleviate some issues raised, but the problems of increased travel costs, and prioritizing who should be present remain. Also of concern is the additional expense likely to be incurred by the Oregon Department of Justice, which represents the state in cases of imprisoned petitioners, if it were required to appear in these proceedings throughout the state, and the probability of increased costs to some state courts.

This is a complex issue without an easy solution and the task force suggests it be studied further to determine whether additional methods for improving representation exist. The members of the task force do not agree on whether venue should be changed.

Submitted this 12th day of December, 2008.

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