

Analysis

**District Attorneys and Their Deputies/Judicial Department/
Association of Oregon Counties
Grand Jury Recordation Report**

Analyst: John Borden, Gregory Jolivet, and Ken Rocco

Request: Acknowledge receipt of a report on grand jury recordation.

Analysis: The budget report for HB 5050 (2019), a legislative omnibus budget measure, included the following budget note direction, which was adopted by the Legislature:

The Judicial Department, District Attorneys, and the Association of Oregon Counties are to report to the Interim Joint Committee on Ways and Means in January of 2020 with a joint plan that provides for the most efficient, consistent, and cost effective delivery of grand jury recordation across the state, including, but not limited to, the assignment by entity of responsibility for: (a) non-attorney staff to manage recording equipment and train grand jurors on the use of recording equipment; (b) non-attorney staff to review and redact grand jury recordings; (c) production of grand jury transcripts; and (d) information technology costs for the day-to-day upkeep of the recording devices and the storage or archiving of recordings.

Background

In 2017, the Legislature enacted SB 505 (Chapter 650, Oregon Laws 2017). The bill requires county district attorneys to electronically record all grand jury proceedings, and to store and maintain copies of the audio recording. The Judicial Department is charged with providing and maintaining the recording equipment. Three counties - Multnomah, Deschutes, and Jackson, were required to begin recording grand jury proceedings on March 1, 2018. The remaining counties began recording grand jury proceedings on July 1, 2019.

The impact of recording grand jury proceedings was initially thought to result in district attorneys choosing to initiate cases in court using preliminary hearings instead of using grand juries. Such a shift has failed to materialize. Counties are reporting that the recordation of grand jury hearings is going better than anticipated and that there will be little, if any, move to preliminary hearings.

With the beginning of the statewide roll-out, the Legislature raised questions regarding how grand jury recordation could be delivered in the most efficient, consistent, and economical method across the state given services are required in each of the 36 counties and the Legislature's funding of similar recordation services for state courts. The Legislature sought the answer to this question before providing additional funding, which was set aside in a special purpose appropriation of \$3 million General Fund for the purposes of funding of grand jury recordation.

Report Summary

The District Attorneys (DAs), Oregon Judicial Department (OJD), and Association of Oregon Counties (AOC) convened, via phone, on several occasions, to work on the joint budget note report. The report findings and recommendations are summarized in the following table:

Issue	District Attorney/AOC	Judicial Department
Non-attorney staff to maintain recording equipment	Support enhanced definition of “maintain” as assigned to OJD in current law. Propose clarifying definition of maintenance to clarify the assignment of the responsibility to OJD	OJD did not join in the maintenance recommendation due to other options being more cost-effective, as well as: (a) court staff not being permitted in grand jury proceeding; (b) lack of court information technology staff in all facilities; (c) lack of data showing technical issues are systemic in nature. OJD also noted the need for DA/County training on the recording equipment*
Production of grand jury transcripts	A state agency to execute a statewide transcription service contract for both prosecution and defense	OJD did not join in the recommendation due to lack of information supporting this solution as cost-effective and lack of discussion with defense attorneys. OJD has no role in the production of grand jury transcripts; however, it is willing to include grand jury transcripts in a two-year review the Department is undertaking with Department of Justice and Public Defense Services Commission for appellate court transcription services.
Information technology costs for the day-to-day upkeep of the recording devices and the storage or archiving of recordings	DAs to manage the storage of grand jury recoding audio file when case is active, but believe efficiencies exist for a state agency to be responsible for archiving audio files	OJD believes more information is needed to determine whether this is a cost-effective solution and might serve as a method to reduce discovery costs.
Legislative clarification of the responsibilities of each entity regarding grand jury recordation	Amend statute: to clarify the definition for “maintenance;” direct OJD to lead a statewide transcription service contract; and assign a state agency responsibility for managing and maintaining archiving of grand jury audio files.	OJD did not join in the recommendation believing that the statutory clarification, as proposed, is unneeded.

**After submission of the report, OJD proposed annual training of DA/county staff in the operation of the recording devices.*

While the entities failed to achieve complete consensus, they did agree in several areas and made important progress in helping to define the outstanding issues and possible solutions.

Legislative Fiscal Office Recommendation: Acknowledge receipt of the report.

BUDGET NOTE REPORT

January 17, 2020

The Honorable Senator Betsy Johnson, Co-Chair
The Honorable Senator Elizabeth Steiner Hayward, Co-Chair
The Honorable Representative Dan Rayfield, Co-Chair
Joint Interim Committee on Ways and Means
900 Court Street NE
H-178 State Capitol Salem, OR 97301-4048

Dear Co-Chairpersons:

Budget Note Report – HB 5050 (2019)

House Bill 5050 (2019) directed the Judicial Department (OJD), District Attorneys (DAs), and the Association of Oregon Counties (Counties) to “report to the Interim Joint Committee on Ways and Means in January of 2020 with a joint plan that provides for the most efficient, consistent, and cost effective delivery of grand jury recordation across the state, including, but not limited to, the assignment by entity of responsibility for: (a) non-attorney staff to manage recording equipment and train grand jurors on the use of recording equipment; (b) non-attorney staff to review and redact grand jury recordings; (c) production of grand jury transcripts; and (d) information technology costs for the day-to-day upkeep of the recording devices and the storage or archiving of recordings.”

After several discussions the budget note stakeholders were unable to reach complete consensus on the following report. We have noted where areas of agreement have been reached, as well as explanations in diverging areas of recommendation.

Background

The 2017 Legislature passed Senate Bill 505 (SB 505) which mandated District Attorneys to begin recording all grand jury proceedings. Three counties (Multnomah, Deschutes, and Jackson) began recording grand jury proceedings on March 1, 2018, and all other counties in the state began on July 1, 2019.

In 2017, initial funding for this program was set aside in a Special Purpose Appropriation (SPA) of \$7,900,000. In 2018 the three initial counties sought \$882,932 for implementation costs and were granted funding for the following costs: funding for the direct costs that are attributable to the implementation of grand jury recordation, including protective orders, non-attorney staff to manage recording equipment and train grand jurors on the use of equipment, non-attorney

staff to review and redact grand jury recordings, the production of transcripts, information technology costs for the day-to-day upkeep of recording devices and the storage or archiving of recordings, and one-time startup costs. The allocated funds for the three counties totaled \$386,107.

The 2017 Legislature appropriated \$2.1 million to OJD for equipment purchases and for 15 positions (9.79 FTE) authorized to develop start-up processes and address anticipated workload in the three initial counties to assist with processing protective orders and conducting preliminary hearings.

In 2018, the Emergency Board approved OJD using unspent funds from its initial appropriation to purchase recording equipment for the July 1, 2019, expansion of the grand jury recording requirement to the remaining 33 counties.

The 2019 Legislature has set aside an additional SPA of \$3 million for further costs related to the statewide implementation of grand jury recordation. The District Attorneys and Association of Oregon Counties acknowledge that costs for grand jury recordation are significantly lower than initially anticipated, however, assert that they still represent a cost to already struggling counties and will likely be felt hardest by our rural counties with small DA offices and budgets. In addition, the DAs and counties are concerned that the legislature might not continue to reimburse costs created by the grand jury recordation requirement.

Budget Note Process

The parties to the budget note participated in four joint conference calls to identify and discuss opportunities for future efficiencies in the implementation of grand jury recordation. The District Attorneys stated they have strived to ensure verbatim recording is handled professionally, effectively and efficiently, that grand jury protocols are fair and in place, and that adequate protections for victims and witnesses are established. Each county has executed implementation of recordation based on its particular needs and evaluation of the above considerations.

The District Attorneys have identified ten “expense categories” relating to the implementation of grand jury recordation. The categories are:

	Expense Category
1	Purchase Recording & Replacement/Back-up Equipment
2	Maintain Recording Equipment
3	DA time to prepare and present cases to grand jury
4	Protective Orders
5	Daily management of equipment; training of grand jurors on FTR recording equipment
6	DA review of grand jury recordings/Non-attorney review of recordings
7	Production of Transcripts

8	Storage of recordings (case active)
9	Archiving of recordings (long-term storage)
10	One-time setup/startup costs

OJD incurred costs in expense categories #1 (purchasing equipment), #2 (maintaining equipment), #4 (ruling on protective orders), and #10 (one-time start-up costs). The DAs have incurred costs for all expense categories except #1 (purchasing equipment).

Currently, the responsibility of expense category #1 and #2 (purchasing and maintaining equipment) are assigned to OJD under SB 505 (2017). The Counties and District Attorneys are responsible for funding the remaining expense categories.

Recommendations

The DAs and Counties offer the following re-assignment of responsible entity in the below chart (shifts noted in red). The DAs and Counties believe these requests are the most efficient, consistent, and cost-effective delivery of grand jury recordation across Oregon.

OJD does not join in these requests; their recommendations are noted below.

Current/Proposed Funding Responsibilities of Grand Jury Recordation On Expense Categories Related to HB 5050 Budget Note					
	Expense Category	District Attorney and County	Oregon Judicial Department	State Funding Responsibility	OJD Comments
1	Purchase Recording & Replacement/Back-up Equipment		OJD	State GF Responsibility	
2	Maintain Recording Equipment (ENHANCE)		OJD	State GF Responsibility	OJD staff is not allowed in grand jury proceedings and does not have staff or resources to provide on-demand services. Not enough information to conclude other assistance would not be as efficient or cost-effective.
3	DA time to prepare and present cases to grand jury	County/DA Responsibility			
4	Protective Orders	County/DA Responsibility			

5	Daily management of equipment; training of grand jurors on FTR recording equipment	County/DA Responsibility			
6	DA review of grand jury recordings/Non-attorney review of recordings	County/DA Responsibility			
7	Production of Transcripts	County Responsibility Shifts to OJD		State GF Responsibility	OJD has no role in production of grand jury transcripts and is not the keeper of the grand jury record. OJD is willing to assist with examination of a statewide model for contracted transcription services that could be utilized by any entity.
8	Storage of recordings	County/DA Responsibility			
9	Archiving of recordings	County Responsibility Shifts to State		State GF Responsibility	OJD is not aware of how efficiencies would be captured by requiring DA offices to upload grand jury recordings to a state agency repository
10	One-time setup/startup costs (3 counties – 2019; 33 counties 2020)			State GF Responsibility	

1. Enhancement of Equipment Maintenance & Access to OJD Staff – Agreement Not Reached.

From DAs & Counties:

OJD currently has a legislative mandate to provide maintenance to the recording equipment (Expense Category #2, above). One of the largest hurdles for DA Offices and their staff has been the daily maintenance and troubleshooting of the “For The Record” (FTR) equipment. Multnomah County, one of the original pilot counties (and albeit one of the largest grand jury conveners) estimates that more than one hundred hours have been spent troubleshooting reoccurring issues with the FTR devices to-date. Accordingly, District Attorneys and Counties request an enhanced maintenance agreement between OJD and the DA Offices which will allow for an integration of existing court staff and OJD tech staff to address issues with the grand jury recordation equipment.

District Attorneys have found that when a recording system fails to function, the entire grand jury proceeding is shut down until the issue can be remedied. Depending on the County size and available staff, it could take anywhere from a few minutes to more than an hour waiting on the current 1-800 help line to pinpoint the system glitch. For example, Multnomah County’s four FTR recording systems failed to function recently due to automated Windows updates set

by the vendor. This should be expected to be replicated in the remaining thirty-five counties across Oregon. Accordingly, the DA's and Counties believe that efficiency exists in taking a broader perspective as it relates to maintenance of the equipment by relying on OJD's current IT staff located across Oregon's Counties and servicing, among many other responsibilities, the courtroom recording systems. In addition, having access to on-site court staff (when/as available) will allow a problem solved in one county to be quickly solved in another county. The Counties and the DAs recognize that not every county has on-site OJD IT staff, and that the FTR equipment in the grand jury room is different than the courtroom equipment, however, believe those traveling and on-site techs can more efficiently serve and address needs of the grand jury recording equipment than district attorney staff members. In addition, the courtroom staff and or techs currently respond to troubleshooting and are accordingly well trained on FTR equipment and all the potential issues from the clock stopping to software problems.

From OJD:

OJD does not agree to the District Attorney's proposal for several reasons. Although we understand that there are often challenges associated with managing technology , we only have information about four specific types of problems: the equipment not working due to timing of software updates being installed (which has been resolved), malfunctioning clocks (a warranty issue), the equipment not working even though the red operating light was on, and a juror receiving an electrical shock (attributed to a faulty extension cord). Although we have no reason to doubt that problems occur(as they do with any technology product), we have no information that these are challenges cannot be addressed by county IT staff. Having OJD staff – either court staff or IT staff – directly assisting DA offices is not a more efficient or cost-effective solution than providing a training for DA and/or county IT staff so that they can effectively manage the equipment.

Additionally, because court staff are not permitted in grand jury proceedings, staff would not necessarily be readily available and additional delays would ensue. If District Attorneys want to have OJD staff manage recordings, they can opt to hold a preliminary hearing in the courtroom, where court staff are present and available to record.

Finally, most courts are not sufficiently staffed even to answer phones or have public service counters open during regular business hours. To compound these existing issues by adding on-call support from already-understaffed courts to address problems that have not been quantified cannot be justified from an efficiency or cost-effectiveness standpoint. In the long run, training county IT staff will provide the most efficient solution.

2. Production of Transcripts – Agreement Reached

From DAs and Counties:

District Attorney offices currently are responsible for producing transcripts (Expense Category #7) – both for the criminal cases they prosecute and when a member of the public requests a transcript of a grand jury proceeding that results in a Not True Bill finding in a case involving a public servant.

To-date, transcript requests have been limited. However, as all counties come on-line and more complicated cases are presented, the parties DAs and Counties anticipate that requests for grand jury transcripts will increase by both the prosecution and defense bar. These transcripts will be used for pre-trial and during trial, by both the prosecution and the defense, to cross-examine witnesses and refresh the recollection of witnesses and victims during trial. Accordingly, DAs believe both parties should rely on the same transcription document – provided by the same vendor. Currently, district attorney offices are ordering a transcript from one vendor and potentially defense offices are ordering a transcript of the same recording from a different vendor. *Note: Further discussion with the defense bar is needed here.*

The DAs research has found that only one county currently has a contract in place for transcription services and three other offices have a vendor or local certified court reporters which could do the work, subjecting the others to costly production. Current costs for those services range from \$3.00 per page to \$4.50 and up to \$7.40 for next day delivery. The average cost for typical turnaround is \$4.07 per page.

The DAs and Counties believe that a state agency needs to be identified to execute a statewide price agreement or engaged vendor list for transcription services. This change will reduce cost and be more effective, consistent, and efficient for both the DAs and the defense bar across Oregon. Additional research is also needed on the effect of ORS 21.345 (capping transcription costs at \$3.00 per page) and the current review OJD is undertaking of their current transcription contracts to identify further cost savings.

From OJD:

OJD is working with the Department of Justice and Office of Public Defense Services to improve the timeliness and accuracy of appellate transcripts. That work – which is expected to continue into the 2021-23 biennium – might yield future benefits, but is not an immediate solution for grand jury transcripts. Nonetheless, OJD believes it is an area worth exploring.

3. Storage & Archiving – Agreement Not Reached

All three entities agree that DAs should continue to manage the storage of a grand jury recording audio file while the case is active.

From DAs and Counties:

The DAs and Counties recommend identifying an appropriate state agency to manage and procure a statewide archiving storage system (for example a storage cloud where DA offices could upload files ready for archiving) for statewide efficiency and security purposes.

Current State law is unclear regarding the retention period of grand jury recordings. Grand jury records, which include “notes, votes, subpoenas, and dockets” must be retained a minimum of ten years, per Oregon Administrative Rule 166-150-0095(6). Records pertaining to criminal cases, which does not directly address grand jury recordings, must be retained a minimum of three years, but in Class A felonies the retention is “60 years or 3 years after the sentence expires, whichever is longer...” OAR 166-150-0095(6). OARs have not been updated to reflect the new medium of recordation. Accordingly, these new audio files present new storage

requirements on counties and are likely to exceed case management software capacity, FTR equipment capacity and present new online storage security risks.

From OJD:

While OJD has no information that would lead it to conclude that a state-level archiving solution would be more efficient, cost-effective, or secure, we agree that the concept could be worth exploring. We also note that this could also be an effective method for DAs and defense attorneys to exchange discovery at a lower cost. We believe the Oregon DOJ and defense bar would need to be involved in this conversation.

Issues for Legislative Action

From DAs and Counties:

In addition to funding requirements, the DAs and Counties recommend the following statutory revisions necessary to achieve the above recommendations. Those revisions likely include:

- A clear definition of “maintenance” as it relates to OJD’s current responsibility.
- Direction for OJD to lead collaborative effort to seek a statewide transcription purchase contact or approved vendor list for DAs and the defense bar to request transcripts and link to cost per page requirements outlined in ORS 21.345 or a maximum per page price point.
- Assign state agency responsible for managing and maintaining storage for archiving grand jury audio files.

DA funding requests will be made in accordance with this report to the 2020 Emergency Board to access the SPA for the above Expense Categories by the District Attorneys and Counties and other applicable agencies. In addition, the District Attorneys & Their Deputies will seek start-up costs for the thirty-three non-pilot counties that came online in 2019. If the proposals are adopted, additional fiscal requests related to these three expense categories by the Counties and District Attorneys & Their Deputies will be eliminated and replaced by state agency requests.

From OJD:

The OJD does not believe any request or recommendation warrants statutory revision. Additionally, the OJD believes that the grand jury conversation, started in 2013, must finally come to an end. OJD’s costs associated with rehashing the division of roles reduces our ability to do more productive work that benefits the larger justice system and Oregonians. OJD requests information from courts all across the state regarding how the grand jury system is working; other than the information provided by district attorneys in this report, all reports have been that the system is working well.

OJD needs to use its limited resources to move forward on improving services to Oregonians in all areas of access to justice including not only electronic, counter, and phone services, but

offering training and improving court practices related to behavioral health, delinquency and dependency proceedings, and trauma-informed proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tim Colahan".

Tim Colahan
Oregon District Attorneys' Association

A handwritten signature in blue ink, appearing to read "Rob Bovett".

Rob Bovett
Association of Oregon Counties

A handwritten signature in grey ink, appearing to read "Nancy Cozine".

Nancy Cozine
Oregon Judicial Department

Cc: Members of Subcommittee on Public Safety
John Borden and Gregory Jolivet, LFO
Michelle Lisper and April MacDonald, DAS/CFO
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