

Members

Barnes H. Ellis, Chair
 Shaun S. McCrea, Vice-Chair
 Henry H. Lazenby, Jr.
 John R. Potter
 Per A. Ramfjord
 Janet C. Stevens
 Honorable Elizabeth Welch

**Ex-Officio Member**

Chief Justice Thomas Balmer

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

Thursday, January 16, 2014
 10:00 a.m. – 2:00 p.m.
 Office of Public Defense Services
 1175 Court St. NE
 Salem, Oregon 97301

MEETING AGENDA

- | | |
|--|-------------------------|
| 1. Action Item: Approval of minutes - PDSC meeting held on December 12, 2013 (<i>Attachment 1</i>) | Chair Ellis |
| 2. 50 th Anniversary of Oregon's Public Defender Office (<i>Attachment 2</i>) | Marc Brown |
| 3. US District Court Decision; <i>Wilbur v. City of Mount Vernon</i> (<i>Attachment 3</i>) | Paul Levy |
| 4. Update: Regional Meetings with Contract Providers | Caroline Meyer |
| 5. Discussion of PDSC Key Performance Measures; Report to the Legislature (<i>Handout</i>) | Nancy Cozine |
| 6. Proposed Revision of Certification Process for Non-Capital Providers (<i>Attachment 4</i>) | Paul Levy |
| 7. Action Item: Amendment to PDSC Legal Representation Plan for Death Penalty Cases (<i>Attachment 5</i>) | Paul Levy
Jeff Ellis |
| 8. Executive Director Review Process | Cynthia Gregory |
| 9. OPDS Monthly Report | OPDS Staff |

Please note: Lunch will be provided for Commission members at 12:00 p.m. The meeting location is accessible to persons with disabilities. Please make requests for an interpreter for the hearing impaired, or other accommodation for persons with disabilities, at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.

Next meeting: March 20, 2013, at 9:00 a.m. - 10:00 a.m., location TBD. Meeting dates, times, and locations are subject to change; future meetings dates are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, December 12, 2013
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea (by phone)
Chip Lazenby
John Potter (by phone)
Per Ramfjord
Janet Stevens (by phone)

STAFF PRESENT: Nancy Cozine
Peter Gartlan
Paul Levy
Angelique Bowers
Cynthia Gregory
Caroline Meyer
Billy Strehlow

Agenda Item No. 1 PDSC and OPDS Meet & Greet

Commission members, OPDS staff and others in attendance enjoyed a festive social gathering to meet or become better acquainted. At the conclusion of the gathering, the Chair called the regular meeting to order.

Agenda Item No. 2 Approval of minutes – PDSC meeting held on October 25, 2013

Chair Ellis noted one typographical error in the October minutes.

MOTION: Commissioner Ramfjord moved to approve as amended; Commissioner Lazenby seconded the motion. With no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 3 Update: Regional Meetings with Contract Providers

Nancy Cozine reported on the first of six planned regional meetings with contract providers. Eastern Oregon providers met in Portland, in conjunction with the OCDLA Winter Conference. All but one provider was able to attend representing Malheur, Baker, Union/Wallowa, Umatilla, Harney and Grant counties. Providers identified similar needs regardless of provider type, and mileage reimbursement was a major concern because of the

significant distances within the region. Under the current system, the entire contract rate can be expended simply travelling to courthouses and jails, leaving nothing as attorney income. This becomes a disincentive for visiting clients. Providers also expressed interest in case management systems.

Commissioner Potter also attended the Eastern regional meeting, and Ms. Cozine invited other commissioners to attend future meetings. She will circulate dates for those meetings. She also commended OPDS Analyst Amy Jackson for her work in convening the Eastern Oregon contractors.

Agenda Item No. 4

Review and Discussion of Contractor Comments Regarding Goals and Challenges for Public Defense Providers

Caroline Meyer summarized provider comments about their needs, as presented to the Commission at its October meeting, following separate breakout meetings of consortia, law firm and public defender groups at the OCDLA Management Seminar. She noted that there were more similarities than differences among the three groups, and highlighted commonalities: the need to recruit and retain good people, provide effective training and mentoring, acquire effective case management systems, identify reasonable caseload standards, and manage cases during the transition to the Oregon eCourt Case Information System. She said the list will serve as a starting point for discussions at regional meetings, and reiterated that travel was a focus of the Eastern Oregon meeting.

The Chair emphasized his interest in seeing OPDS explore savings and efficiencies in bulk purchasing of IT solutions for providers. Commissioner Potter reported that the Eastern Oregon discussion emphasized the need to look at how costs may be shifted due to the movement toward providing discovery electronically. He also reported the interest, expressed at the meeting, in a centralized legal resource, managed by OPDS, for complex financial cases, similar to the assistance provided to district attorneys by the Attorney General's office. Commissioner Ramfjord urged OPDS to explore other areas in which centralized services and a common approach could benefit providers, mentioning training as one example. Commissioner Lazenby asked if attention is being paid to system compatibility as the Judicial Department moves forward with its eCourt implementation and public defense providers explore their own IT solutions. Nancy Cozine explained that the backbone of eCourt is designed to be compatible with many different types of systems. The company that is building the eCourt system, Tyler Technologies, has developed a component for public defenders. She reported that some Oregon public defense providers are using the Defender Data program, and that she and Paul Levy are scheduled to meet with Washington public defense administrators to learn more about how they use that program in managing their parent representation program. The new IT staff person at OPDS will be asked to look specifically at how well Defender Data can "push/pull" data with the eCourt system. She agreed with Commissioner Lazenby that system compatibility should be a major concern in any bulk IT purchasing plans.

The Chair then invited Judge Paul Lipscomb to address the Commission. Judge Lipscomb told the Commission that he would be resigning as the executive director of the Marion County Association of Defenders (MCAD) at the end of the year and wanted to offer his perspective after five years of leading that organization. He thanked the Commission for its service and applauded how well it and the staff of OPDS are managing the public defense system now and praised the organizational changes at OPDS, but shared his concern that perhaps the consortia model isn't sufficiently valued and that OPDS staff should include individuals who have something other than a public defender background. He observed that the Commission's old notion of consortia members as part-time public defense providers, who could earn additional funds through retained work, has changed, in part because of initiatives of the Commission. But he cautioned against the trend he sees of imposing too many oversight responsibilities on consortia, saying that the more consortia adopt centralized

management and data systems, supervision structures, and other commonality expectations, the more they begin to look like a public defender office and risk losing the benefit of avoiding conflicts of interest that are shared by firm members. He also noted that there are lots of performance expectations for consortia members but nothing to incentivize improvements. When asked by the Chair if he saw any incentives other than money, Judge Lipscomb said there may be some but money was the one he had in mind.

The Chair thanked Judge Lipscomb for both his good work leading MCAD through a period of progress and improvement but also for his testimony before the Commission, while still serving as Presiding Judge in Marion County, which led to the creation of the public defender office in the county.

Agenda Item No. 5

Contractor Concerns – Avoiding Antitrust Violations: Use of Contract Funds for Lobby efforts

Paul Levy addressed two documents included in the meeting materials. The first was a letter written by the late Ross Shepard in 2004, when he served as director of Defender Legal Services for the National Legal Aid and Defender Association, that notified defenders of fines imposed by the Federal Trade Commission in connection with a group of lawyers in Clark County, Washington that had allegedly violated antitrust laws in their contracting practices for public defense services. Mr. Levy explained that it was likely this letter, along with an FTC investigation of the consortium in Clackamas County around the same time, that prompted a comment by a contractor at the October Commission meeting about antitrust concerns when contractors gather to talk about improving compensation. Mr. Levy explained that he was providing this history so that newer Commission members and providers had the context for the remark at the previous meeting. The Chair added his own history, explaining that at the time of the Clackamas County investigation, he and then OPDS Executive Director Peter Ozanne corresponded with an FTC official reminding them that the consortium model provided a benefit to the State's public defense system. In the Chair's view, those antitrust concerns were long gone.

Paul Levy also described a memorandum he authored for the OPDS Executive Director and analysts explaining that, under the contract with PDSC, contractors could not expend funds from OPDS for lobbying expenses. He explained that the memorandum was prompted by inquiries from contractors about the matter. He said that while a consortium could not directly expend contract proceeds on lobby expenses, consortium members were free to expend their income from consortium work on whatever they wished, including lobby expenses.

Commissioner Potter added historical context. In the early 1980s, before the State assumed funding responsibility for public defense from the counties, the Metropolitan Public Defender had its own lobbyist. When the State took over public defense, he explained, they said that contractors could not use State funds to hire lobbyists. In response, OCDLA took over funding lobbying efforts on both substantive legal matters and fiscal concerns. In response to questioning from a contractor in the audience, Commissioner Potter explained that lobby efforts now are funded largely through fundraisers and special appeals, which are supported by lawyers working for all types of public defense contractors. He also said that OCDLA plans to resume fiscal lobbying efforts.

Agenda Item No. 6

Compensation Plan and Budget Update

Nancy Cozine reminded the Commission that legislation now requires OPDS to report compensation plan changes to the Legislature before they become effective. She made such a report to the Joint Ways and Means subcommittee on General Government in November 2013, describing changes approved by the Commission in September that were scheduled to take effect in December. Legislators did not have any questions or concerns about the changes. They did, however, have questions about the policy option package that provided

salary improvement for public defender office attorneys. Ms. Cozine reported that legislators had concerns about insufficient funding support for consortium attorneys. She said there was a very full discussion of this concern, led by Senator Betsy Johnson. She reported that the conversation will continue with legislators but there appeared to be strong support for public defense funding in the legislature.

Angelique Bowers reported that at about 20% into the current biennium, expenditures for both agency and account expenses were also right about 20% of the biennial budget. She also explained that there continues to be doubt about whether the Legislature will fund the 2% holdback for either the account or the agency but that the Legislature might not decide until June 2014. Nancy Cozine explained that she is continuing to emphasize with legislators the need for restoration of the holdback.

Agenda Item No. 7

Approval of Hourly Rate Increase

Angelique Bowers explained that when the 2013 Legislature approved the public defender salary policy option package, they also included some funding for rate increases for noncontract attorneys, investigators and mitigators working at an hourly rate. The increases, which she set forth in a document included with the meeting materials, worked out to a one dollar an hour increase for each provider type. She explained that Commission approval was necessary for the rates to become effective. Commissioner Stevens asked if the Commission could approve the increase but express its horror at the thought that a one dollar an hour increase is enough. The Chair said yes.

MOTION: Commissioner Stevens moved to approve the rate increases with her comments; Commissioner Potter seconded the motion. With no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 8

Commission Feedback Regarding 2014 Contracting Process

Caroline Meyer sought Commission feedback on the recently concluded contracting process. She briefly reviewed the contracting process, which involved release of the Request for Proposals on May 3, 2013, a discussion of contracting priorities at the June Commission meeting, and due dates for proposals of June 17 for non-death penalty contracts and July 15 for death penalty contracts. She reminded the Commission that it conducted three executive sessions at which analysts discussed the proposals they had received, after which analysts proceeded to negotiate over 100 contracts, which the Commission approved at its October meeting. She said that the analysts were mindful of past concerns by the Commission that providers who might not receive new contracts be given plenty of notice. Those providers who did not receive contracts this cycle had between four to six months notice. She also said that analysts sought to continue the practice, which Commissioners had appreciated during the last contracting cycle, of providing detailed information about each contract proposal.

Commissioner Potter shared a suggestion that contract proposers receive a phone call, in addition to a letter, in circumstances where a contract will not be awarded. Chair Ellis commended the OPDS staff, observing that he thought the contracting process this year was the best yet. He said it was a tribute, in part, to the strong contracting group that Kathryn Aylward built. Commissioner Lazenby said he thought the level of Commission involvement and the information provided by the analysts was spot on. Steve Gorham, who attended the meeting, said he appreciated that the Commission provided uniform contract rates for death penalty attorneys.

Agenda Item No. 9

Discussion of PDSC Key Performance Measures

Nancy Cozine introduced a discussion of the Commission's Key Performance Measures (KPMs), explaining that the agency is expected to report to the legislature in February, 2014,

regarding whether there will be new or modified KPMs. Thus, any changes would need to be approved by the Commission at the January meeting. She said that she has reviewed the topic with the Legislative Fiscal Office and has meetings planned with key legislators. There is a sentiment that the agency should have measures that more meaningfully track trial level representation. A challenge is identifying what can be meaningfully measured, and gathering the relevant data points. One possible new KPM is the rate of participation of lawyers at the first appearance in criminal and dependency cases, and appointment of a lawyer when a petition is filed in delinquency cases.

The Chair said that he finds it helpful to think about KPMs in terms of inputs and outputs. Examples of inputs include the number of hours of training that providers attend, or the rate of attorney substitutions, or the number of peer reviews conducted and the number of attorneys who volunteer to participate in them. Outputs are more difficult to identify and measure. A grossly simple measure would be wins and losses, but that would require defining what constitutes winning. The number of PCR claims is another possibility. In any case, the Chair said, we should not be satisfied with a false sense of accomplishment with KPMs that are easily met. He would like to see expanded KPMs that challenge us to achieve more.

Commissioner Ramfjord asked if Ms. Cozine had looked at the KPMs of other organizations. She said that the agencies she has looked at, such as DHS, the Department of Corrections and the Oregon Judicial Department, have very well developed data collection capabilities that we presently lack. She explained that we have learned about some particularly relevant measures in dependency representation by studying Washington's Parent Representation Program, but she is hesitant to recommend adopting those measures now while we are still in the process of developing our own pilot program. Another example is the project in New York that measured the effect of requiring lawyers to be present at arraignment. Researchers expected to see more recognizance releases but instead found that courts were setting more reasonable bail amounts, which caused an increase in persons posting bail. Ms. Cozine said that we presently lack the capacity to gather the data points that were used in the New York study. However, she said, the presence of lawyers at first appearances and shelter hearings, which is an area that we know needs improvement, is something that we have the ability to measure.

Commissioner McCrea suggested that an easy and appropriate measure would involve communications between the Commission and providers. Commissioner Lazenby agreed with the Chair's call for new measures.

Paul Levy cautioned that measuring wins and losses might not be appropriate. He said that the Commission's purpose should be to ensure that defendants have good, capable lawyers who provide clients with the benefit of good representation. The outcome of a trial is not necessarily a measure of whether that has occurred. Mr. Levy pointed out that the same is true for PCR claims. He suggested that one appropriate measure could be the extent to which providers fulfill the best practices recommended for public defense contract entities.

Commissioner Ramfjord suggested that the average length of sentence per indictment filed would be an interesting measure since sentencing advocacy is a large part of public defense work. He said that knowing the mean sentence for a conviction and then measuring the actual sentence against the mean could yield a relevant measure. Ms. Cozine pointed out that this might be achievable if were contractors using case management systems that gathered such data.

Pete Gartlan then talked about the Appellate Division KPM that measures the median filing date for the appellant's brief in criminal cases after the trial court record is settled. He reviewed the history of that date, which was 328 days in 2006. In 2013, the number was 223 days, with a target of 210. He explained that there is consideration now of moving the target to 180. There is also consideration of what types of briefs should be included in the measure. It turns out that not counting *Balfour* briefs has little effect on the number. He also looked at

how the Appellate Division compares to other states. In Colorado, for instance, the appellate brief is not filed until 12 months after the record settles. Some states measure from the time judgment is entered in the trial court. In North Carolina, which uses that starting point, appellant's briefs are filed at about seven to 10 months. In Wisconsin, where appellants have a choice to pursue a direct appeal or PCR, briefs are filed within four to five months after the trial judgment is entered. In Illinois, as a result of a federal court consent decree, the time to file after trial judgment has decreased from two years to 10 to 12 months.

Commissioner Ramfjord asked about measuring extensions of time to file briefs. Mr. Gartlan explained that in the past Appellate Division lawyers would seek many extensions, but now by agreement with the Court and the Attorney General there is a briefing schedule that provides a first brief due date at 210 days, with one 35 day extension allowed. As a result, the median filing date for the AG is 210 days, after which the Court does not set a case for argument for another six to eight months. So far there has not been enthusiasm for shortening the initial briefing schedule due date.

Nancy Cozine talked briefly about two other existing KPMs. One is an OPDS customer service measure, which is a standard KPM. Another is the extent to which the Commission meets best practices. She noted that if this measure is retained, there may be a more meaningful measurement process, such as an evaluation process that each Commissioner completes independently. She indicated that OPDS staff would continue to explore possibilities and have a draft report ready for the Commission at its January meeting.

Agenda Item No. 10

National Juvenile Defender Center Annual Leadership Summit

Paul Levy reported on the National Juvenile Defender Center leadership summit that he recently attended. He said that in addition to being the best gathering of juvenile justice leaders in the country and providing a forum to discuss systematic changes in providing public defense services, the meeting provides an opportunity to measure how Oregon compares to other states. For instance, unlike a number of other states, Oregon does not routinely incarcerate status offenders, and has a system for determining fitness to proceed that many other states lack. Oregon also requires representation of expressed interests in delinquency cases, and has made some progress on sex offender registration requirements for youth. On the other hand, while some states have made significant progress on reform of "direct file" laws that permit prosecuting youth as adults, Oregon has not. Mr. Levy also described an excellent workshop at the meeting where representatives of top public defender offices described how they assure quality representation within their organizations. He promised to provide Commissioners with the matrix of protocols that was created for this workshop.

Agenda Item No. 11

OPDS Monthly Report

Pete Gartlan reported on Appellate Division developments, beginning with recent staffing changes. He noted that Dave Ferry was selected to fill the senior deputy vacancy created by Susan Drake's retirement, and that Jed Peterson is leaving OPDS to work with O'Connor and Weber. He also explained that the Appellate Division is working with the Court to accommodate the introduction of a fourth panel of judges.

Nancy Cozine reported that interviews would be conducted with four top candidates for the new IT position. She also noted that Marc Brown, an Appellate Division lawyer, will present to the Commission in January regarding an article he wrote for the Oregon State Bar Bulletin on the 50th anniversary of Oregon's appellate public defender office. She also described a meeting of a legislatively created dependency workgroup, on which she serves with Commissioner Welch, which will take place January 17 in conjunction with a joint meeting of the House and Senate Judiciary Committees. The manager of Washington's Parent Representation Program will be presenting at the meeting.

Ms. Cozine also reminded the Commission that it will need to undertake her annual performance review. The Commissioners and staff discussed the logistics of completing the review at the Commission's March meeting.

Paul Levy briefly described a recent opinion from the Federal Court for the Western District of Washington finding two Washington municipalities to have systematically and deliberately denied criminal defendants the assistance of counsel. He said the remedy might interest the Commission since it required a "public defender supervisor" to collect data on the frequency of use of investigators and experts; motions filed and outcomes; frequency of dismissals; frequency of conviction on lesser included offenses; and number of trials. He said the opinion will be provided to Commissioners at their next meeting.

MOTION: Commissioner McCrea moved to adjourn the meeting; Commissioner Lazenby seconded the motion. With no objection, the motion carried: **VOTE 6-0.**

Meeting adjourned

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, December 12, 2013
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea (phone)
Chip Lazenby
John Potter (phone)
Per Ramfjord
Janet Steven (phone)

STAFF PRESENT: Nancy Cozine
Peter Gartlan
Paul Levy
Angelique Bowers
Cynthia Gregory
Caroline Meyer
Billy Strehlow

Agenda Item No. 1 PDSC and OPDS Meet & Greet

The meeting was called to order at 10:00 a.m.

Agenda Item No. 2 Approval of minutes – PDSC meeting held on October 25, 2013

1:19 Chair Ellis Alright. We will call the meeting to order. Could those who are on the phone identify themselves so we know you are there? There is at least one stickler in the audience who challenges our quorum.

1:35 J. Stevens Barnes, it is Janet and your phone is breaking up some for some reason.

1:44 Chair Ellis John Potter are you on?

1:46 J. Potter I am on and Shaun is here as well.

1:50 Chair Ellis Shaun, let's here your voice to be sure you are there.

1:51 S. McCrea Hi Barnes.

1:56 Chair Ellis Alright. I declare we have a quorum.

2:00 C. Lazenby Let the record reflect that nobody saw the Chair's lips move while people were responding.

2:07 Chair Ellis First of all, Nancy, that was a great idea to have a little time to meet everybody here.

2:15 N. Cozine Thank you. We will try to do that with some regularity.

2:18 Chair Ellis The first action item is the approval of minutes of October 25, 2013. Are there additions or corrections? I have one correction on page 7, "system" I am sure should be "season", current fire season. Otherwise I was fine. Are there any other additions or corrections? If not, I would entertain a motion to approve the minutes of October 25, 2013.
MOTION: Per Ramfjord moved to approve the minutes; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 3 Update: Regional Meetings with Contract Providers

3:10 Chair Ellis Okay. Nancy the next one is regional meetings with contract providers.

3:18 N. Cozine Chair Ellis, members of the Commission, you may recall that at our October meeting you heard from all of the three separate groups. You heard from the consortia, the law firms, and the public defender groups and we devised a plan to meet with our providers in regions. We had our first regional meeting on December 7. That was with our eastern region. We actually met at the Benson in downtown Portland following the OCDLA conference. We were luckily enough to have all but one of our providers there. We had two participating by phone. So that included Malheur County, Baker County, Union/Wallowa, Umatilla, Harney and Grant. We had a very productive conversation. It was fascinating to have everyone in one room at one time. It was very confirming in the sense that I think we speculated that there would be similarities between provider type, and we speculated that there would be similarities within regions, but the amount of overlap between their needs was significant. I think that the feedback we had from providers in the room was that it was really helpful for them too. That they can learn from each other. I think they were already taking notes on what providers in their area do to resolve some of the challenges they face. It is clear that we are going to have to talk more about how their mileage is covered. Some providers explained a dynamic where they literally are pretty much left with nothing by the time they pay for mileage to get from their office to the courthouse or to the jail. If they take too many trips it can actually eat up the entire contract rate. There is a disincentive for them to visit a client if they will have nothing left of their contract payment to use as income. We also heard a lot about case management and the way different providers out there are handling case management or what they need. These were the two primary themes and we will continue with these regional meetings. I suspect the others will be just as fruitful and helpful. The next meetings are scheduled for January 10, and that will be Central Oregon. January 14 is North Coast. January 28 is Southern Oregon and January 30 is the Tri-County area. John Potter sat in on the December 7 meeting and we have given him these dates so that he can participate in the other meetings. He is doing that not only as a commissioner, John can speak to this, but also as the executive director of OCDLA. It is really helpful for him to know what contractors' needs are and to meet with them personally in these regional groups. I would say that if any Commission member wants to attend, the one that we had was very helpful.

6:16 Chair Ellis Could you circulate to the Commission the dates and times?

6:16 N. Cozine I will do that, absolutely. I also would say that we are going to type of minutes from the meeting. We don't have that done yet but we will circulate those as well. At some point we

will be including legislators in some of these conversations. I don't know, John, if you want to comment or anyone else does. I just want to also say that our analysts have done an amazing job pulling these meetings together. Amy Jackson was the one who pulled the December 7 meeting together. She did it in very short order and got everyone there. I was really pleased.

6:57 Chair Ellis

John, did you have anything that you wanted to add?

6:58 J. Potter

I was just going to ask Nancy a question, which I talked to her a little bit before. We had these four dates and is there a date in February for the Central Willamette Valley region.

7:12 N. Cozine

We do not have the February date scheduled yet. One of the things we are working around is the legislative schedule. So the legislature convenes in February and we want to get a better idea of what is happening then. That is the next meeting on our agenda.

7:30 Chair Ellis

John, glad to hear your voice. You are doing alright. You had a health issue over the weekend I understand.

7:40 J. Potter

Yes I did. It was one of the more painful health issues you can have.

7:47 Chair Ellis

This too shall pass. Good to hear you are doing better. Anything else on that?

Agenda Item No. 4

Review and Discussion of Contractor Comments Regarding Goals and Challenges for Public Defense Providers

8:02 Chair Ellis

The next one is review and discussion of contractor comments regarding goals and challenges for public defense providers. I think Carolyn was going to lead the discussion on that.

8:22 C. Meyer

Chair Ellis and members of the Commission. Nancy did a good job – this sort of dovetails in terms of what she was just talking about in terms of specific regional meetings. Attachment 2 in your materials is the list. What this list is is a compilation of the actual testimony that was provided at the October 25 Commission meeting from the different providers. We had representations from the public defenders office, consortia, and law firms. They are identified in terms of who the representatives were. So this was just taken from the minutes. It is four pages total. The second one entitled “Commission meeting notes,” this was really – I don't know if you will recall the white pages that were displayed when they were talking with you at the October 25 Commission meeting. This is essentially just taking those and putting them down on paper so that we had them all in one place. As Nancy mentioned, what we found is that even though they were broken out by provider types, there were more similarities amongst the provider types in terms. There were recurring themes regardless of whether you were a PD, consortia, or a law firm. Out of these strategic planning sessions where they all got together and said what is important for you? In order for us to start this process of developing option packages that get you the funding you need we need to know what is most important to you. So we pulled out some recurring themes. Some of the ones that kept coming up were the ability to recruit and retain good people, both staff and attorneys. Effective training and mentoring. Efficient case management systems and I think particularly as we go to a more data driven system that becomes very important.

10:23 Chair Ellis

There is one item on the top of page 2 about bulk IT functions and whether we can catalyze some savings by pooling. I don't want that to just be an item that nothing happens. If there is a way to follow up on that, that is a cost saving that I see no downside to it.

10:54 C. Meyer

Definitely something we can look into. Reasonable caseload standards again that is a real big one for everybody. Determining what that is and how do we get there. Then concerns with eCourt organization. We have several counties that have already gone over to Odyssey. Multnomah is next on the list.

11:15 N. Cozine I think we have three small counties before Multnomah, but Multnomah is in May or June.

11:19 C. Meyer I am the analyst for Multnomah so I am hearing from my providers that this is a big concern in terms of what is this going to look like with juvenile review hearings not happening for possibly two months. There are some real concerns there about what that looks like. But I think more than that it is just what does the full implementation of eCourt look like for everybody. This is a big list. It is very ambitious.

11:52 Chair Ellis It is. I was very impressed the piece of it that we saw at our meeting. The whole tone of it wasn't a gripe session, it was a constructive what can we do to make the work we are doing better and more effective. I thought the tone was helpful.

12:16 C. Meyer Absolutely. I think that is certainly what we came away with. Then having the first regional meeting last Saturday was really helpful. This was our starting point. We emailed this list to them and said this is where we are starting from. If there is something that is not on the list that you feel should be added, and as Nancy mentioned really for that particular region of Eastern Oregon it was travel. We probably spent half the meeting talking about that one issue for them. Although they do have other issues, that was really the big one for them, so I think that we will find that in different regions there are maybe one or two that stand out.

12:58 Chair Ellis I am assuming the courts in the east where you big geographic distance and relatively few cases, are doing all they can to make those trips multiple purpose and get more done and that they do what they can on video connect on the types of the hearings that don't really require the lawyer to be physically present but you do want counsel involved.

13:25 C. Meyer We talked about that at the meeting. That is my understanding is that the court is trying to work with providers, but there were a few personal examples they gave where depending on the client where the judge may say, "no" I want you in here in person with this particular client or case the issues that were involved.

13:45 N. Cozine Yes. I thought it was really interesting; one administrator shared with us he actually looks at where particular hearings are going to be set when he is doing assignments to lawyers, and his comment was that it actually can in some ways work against proper administration. He would like his first analyst to be who is the right attorney for this case? Who is already working on the issues that are presented in this case, but what he has to do is make sure that he is assigning cases so that a lawyer is going out to that court on one particular day. So there is some room to explore what we could do to try and help with that kind of dynamic.

14:29 Chair Ellis Anything else?

14:30 C. Meyer I think that was it from our point of view in terms of just any input that you might have.

14:43 Chair Ellis Any commissioner have any comments they want to make on the provider comments?

14:52 J. Potter I couldn't hear Nancy's comment. The phone was going in and out a little bit, but this whole area of IT systems we learned a bit on our Saturday meeting with Eastern Oregon that overlapped. Besides going paperless for those who are going paperless and some of the assertions that the costs are now being shifted to the defense system, I think we have to look at that and see what that cost shift really is, and then the specific types of cases. I don't think it is just an Eastern Oregon problem. For an example an embezzlement case was raised. Embezzlement cases raise a lot of discovery and the DA oftentimes brings in an AG to help with those cases. The contractor doesn't have that kind of resource, doesn't have an AG resource, and having a special lawyer for complex financial cases might be something to consider as well.

- 16:04 C. Lazenby John, this is Chip. Are you suggesting sort of a specialist lawyer on contract through our system to be available all over?
- 16:16 J. Potter I think it is something worth discussing. We have specialty lawyers for death penalty cases. We recognize that as a specialty. It may be that these contractors, regardless of what kind of contractor they are in terms of a service delivery system contractor, with an embezzlement case that involves 10,000 pages of discovery and you are trying to make sense of it. What you are getting paid to do the case it is virtually impossible to do an adequate job. I am just throwing it out that it was an idea that was mentioned by the consortium folks. It just struck me as one of those little idiosyncratic cases that we may have to take special attention to when they come up. They can't just be treated as embezzlement.
- 17:10 Chair Ellis You know John, it is interesting because in the immigration law area we are trying to provide specialists in that field to be available. This one might be another one that would be similar. I can see it.
- 17:32 P Ramfjord I think that as you go forward to and you have these additional meetings trying to identify the areas in which there could be some common services provided, it could be very useful. I think on the IT side too on the transitioning to eCourt on the discovery management in large cases that John was just talking about. I think trying to figure out some areas in which this office could provide some services that would be centralized would be really, really useful. That goes to some of the training issues here that were raised as well that also could benefit from some common approach. To the extent that you find people who are interested in them and interested in providing some assistance to the office in terms of volunteering the organization of that, that could be useful to. I recognize that there are limited funds here. I think it is really the kind of thing that could benefit the provision of services enormously if it is done well. I think this is a great effort and going around and trying to identify those common themes would be very helpful.
- 18:45 C. Lazenby Are there conversations going on right now as eCourt moves along about compatibility of other platforms? We as we start talking about eCourt coming in and we need to integrate with that, but sometimes my experience in some other organizations is they go to new system and not every external platform can coordinate with it. Is there a cognizance of that going on at the state level where they are planning eCourts? To the extent that it would dictate what sort of systems we might go to in order to help our contractors? I just don't know. I am just wondering what they are thinking.
- 19:17 N. Cozine Right. Chair Ellis, Commissioner Lazenby, the platform of eCourt, the backbone that is sort of the repository and also sending mechanism for data within eCourt is built in a way that it can actually interact with many different types of systems. There are systems available in the market right now for defense providers that would speak very clearly with the eCourt system. Tyler Technologies has a component for public defenders. I haven't looked at it in depth in the last six months. When I last looked at it, it was very rudimentary. It wouldn't offer the kind of depth for case management that providers would really need. We have providers who are using defender data. Paul and I have a trip scheduled up to Washington next month where they are using defender data in their parent representation program. That would be a really nice opportunity for us to learn a little bit more about that and once we have IT on staff here, I think we can look at how well defender data can do data push/pull with eCourt. I don't think we have the answer to that question, but because of the way eCourt is structured, my understanding is that there is an expanded capability for data sharing compared to what OJIN offered, but I think we need IT expertise in this building to really explore that to the fullest extent possible so that our providers get as much accurate information as they can.
- 20:49 C. Lazenby I would just hate to see us get so far down the road that between the consortia and the defenders organization and the individual contractors, they are all pursuing IT solutions that fit them but there is not a cohesive, systematic effort that we are engaged in with them around

that to integrate it with eCourt. Then at some point we are faced with a situation where we have uneven economic or financial contributions that we have got to make to make that system work. Whereas if on the front we were more proactive and got it streamlined and we could save ourselves some dollars and make it effective for everybody.

- 21:23 N. Cozine Right. Then you combine that with the bulk purchase concept, perhaps you could get defender data or some other case management system to offer an affordable product for all of our providers and perhaps that could actually be built into a policy option package.
- 21:39 C. Lazenby Yes. My perspective is I lived through two years of hell in an organization that had three major computer systems that did not talk to each other. We had to tear them all down and try to build them back up into a cohesive system and it still twitches to this day.
- 21:59 Chair Ellis Anything else on the contractor comments? Thank you.
- 22:08 Chair Ellis Judge Lipscomb do you want to do your shtick now?
- 22:15 J. Lipscomb It is not really that much of a shtick. If somebody is looking for that kind of input you are probably going to be woefully disappointed. I am resigning from MCAD effective the end of the year. I just thought I would offer to give the Commission whatever benefit of my experience over the last five years as executive director for MCAD. I think there is going to be an interim director and I think that will happen as early as tonight. Certainly before the end of the year and then over the next two or three months there is going to be a really careful examination of the needs of the organization and recruitment process that goes on.
- 23:15 Chair Ellis I think I see at least one of your board members here. Not anymore?
- 23:27 J. Lipscomb What I wanted to say is that I have been honored to be an executive director for MCAD and to assist MCAD in turning the corner that you folks set as an objective for not only yourself but for the indigent defense system some years ago. I want to thank you folks for the really good job that you are doing with very limited resources on behalf of the indigent defense community in general. You probably feel that the role that you play is largely unappreciated. I think I would feel that if I was sitting where you are sitting, but I don't think that is really true. I hate to think where we would be without this Commission. When I started practicing law I actually did a couple of indigent cases back in the old days when you sat in the back of the courtroom and Val Sloper would say, "Take this one." We were paid \$50 for a plea and a \$100 for a felony trial. It was hard to get the extra \$50. The system is way better and I think it is great that you under the wing of the courts to some extent. I know that you treasure your independence but I think you could probably use that maybe more effectively going forward than it has been used in the past. The court still has - not as much power as it use to in the legislature, but it still holds significant power and resources that you could tap into pretty effectively there. I want to emphasis how well this indigent defense system is going. It is doing better than I thought it was when I served as the presiding judge in Marion County. Statewide this is a really good system and one that I think you are justifiably proud of. You should be proud of the staff that you have at OPDS. I think they are doing an excellent job. Nancy has made some really significant progress in terms of pushing the organization forward. I know she has had a lot of help. I think that has been a very good thing. If I were I would suggest that staffing inside OPDS could benefit from more people from the outside who were not former public defenders or incorporated into the system. I have to say that there is a public defender outlook that is common to OPDS and I am not sure there is always the realization as to how important consortia are to the success of the objective and goals that you folks have. I was trying to think of a good analogy and I am not sure I came up with one. As I have sat here and heard a lot of conversation from the board over the years. I think that your desire is to have public defender offices be the point of the sphere of indigent defense. I think you can argue that one way or another. I think that is a decision that one could easily have and easily defend, but the point of the sphere is not the only critical part of the system. I

would suggest to you that the point of that sphere cannot function well without a very strong shaft behind it. The system really is dependent upon consortia and private contractors to work effectively because of all the conflict cases that you have. Five years ago the model for consortia still was we thank you for taking these cases. We are sorry we have to pay you less than we would pay public defender offices, but on the other hand you have the ability to go out there and earn additional funds in other cases. We have moved away from that over the last five or six years and frankly that has been at the instigation of the board and OPDS. I think that is a good move. It can go too far. I would warn you a bit against that. I will talk about the two dangers. One is and I think you are seeing some of the political pressures concurrently that are pushed back against that model, when in fact and on a day facto basis, consortia have become full time public defenders. It is really hard from the outside looking in to see the differences in the work that is done. Operationally they function differently and those operational differences are important if you want to continue to avoid the conflict of interest problem that exists inside a public defender's office and still doesn't yet exist inside consortia offices. But I think there is a real danger. As we move more and more towards being on a par with the public defender offices and there is more and more common management, common data systems that we were talking about today, I think there are very definite plusses to that. The more commonality there is, commonality in supervision, commonality in expectation, commonality in direction from this board and even more so from PDSC, it begins to look and feel more and more like a public defender office. I think if you go too far in that direction. If it looks like a duck. Quacks like a duck, then people are going to think it is a duck. You are going to create the same conflict of interest problems that you would have if you had a pure public defender office system. I don't think the system will work as effectively if that happens. The other problem that I wanted to talk to you about is incentivizing change. Pretty much that is preceded via the stick versus the carrot. That can be effective to a point particularly when people aren't doing a good job. But I think almost 100% throughout the system as far as I can tell, your public indigent defense representatives, whether they are PD offices or consortia, are doing a good job. It is hard to use the stick effectively on people that are doing a good job. Incentives work a whole lot better. At the conference on October 25, we were all given what I think is a really good document. "Challenges for Public Defense Providers." It sets forth five categories of focuses for public defense service providers whether they are consortia or public defender offices. What I would point out is this. None of these are incentivized under our current system and incentives matter. People respond to incentives.

31:59 Chair Ellis

Do you see any incentives other than money?

32:03 J. Lipscomb

Those would be carrots in my prior analogy and no one that are currently being used. If it exists it is a very liquid, easy form to utilize. You could be creative and come up with some other incentives. I don't know what they would be. I do know from my Economics 101 course that incentives matter to human beings. I think you are seeing in the Affordable Care Act and the philosophy behind that a desire to incentivize medical practice towards quality. I think that is the most effective way of incentivizing quality in the public defense system also. There is no simply fix for that. That is just a suggestion as you think about the problems. How do we incentivize change for better towards excellence for people that are already doing a good job? I think the stick isn't going to work for you anymore and I think you need to find a way to incentivize moment towards that. That is pretty much all I have. I don't expect everybody to agree with that. That is just kind of my view of where you are and I want to close the same way that I began. This is a good system. You guys have made a lot of progress and I am proud to have been part of that progress. But there are still big challenges ahead and I know you realize that.

33:49 Chair Ellis

I think you, because I have said it and others have said it, you have been a really big factor in the progress of MCAD and public defense generally. We want to thank you for that. Both when you were a presiding judge and a witness when we had all the hearings down here in 05.

Then the transition we went through with the Marion PD formed and then MCAD really stepped up and you were a big part of the leadership on that.

34:29 J. Lipscomb Time for somebody else to take over.

34:32 Chair Ellis Well you can be in charge of the sister's defense system over there.

34:39 J. Lipscomb I don't think so.

34:42 Chair Ellis Thank you very much. You have really been terrific.

Agenda Item No. 5 Contractor Concerns – Avoiding Antitrust Violations: Use of Contract Funds for Lobby efforts

34:49 Chair Ellis Paul, we are now ready for antitrust.

34:54 P. Levy I want to speak to two documents that are in your materials at attachment 3. The first is really a follow up or clarification from the last meeting. You will recall that during the reports to the Commission from the breakout groups, for the law firm breakouts, Jim Arneson presented for the law firm breakout and among other things he said was that a challenge for firms always is when talking about common compensation concerns is avoiding possible antitrust violations.

35:38 Chair Ellis I didn't think that was a private firm issue. I thought the only time I have seen it was the consortium model.

35:45 P. Levy I think it actually is potentially a concern across provider types. In any case the comment at the meeting came from him. Because some Commission members are newer, some provider administrators may not have been around, so we wanted to provide the context in which he made that remark so that it could be understood. I think at the meeting it may not have been fully understood. Our intention in providing this material is in no way intended to chill concerted activity among our providers to improve their standing with the legislature, with the Commission, or with us, but because there was a remark that in a sense dismissed his concern I wanted to remind the Commission and others and the attachment in your material is part of this. Early in the history of this Commission antitrust concerns were very real and very present.

36:55 Chair Ellis Only because, and I still don't understand where this push came from, but somewhere in the bowels of the Federal Trade Commission there was somebody kind of stirred about this and I sat through a very long meeting with them at one point with Peter Ozanne. It is crazy from an antitrust analytic point of view.

37:21 P. Levy I am not providing legal advice to anyone. I am providing history.

37:29 Chair Ellis You should know that Per is a qualified antitrust expert. We are ready.

37:35 P. Levy I for some reason, rightly or wrongly, assumed that you, as well, knew a great deal about the subject. The history is important and the memo from Ross Shepherd when he was with NLADA. A prosecution buddy very close to FTC in Clark County Washington and then on the heels of that there was a rather protracted and expensive for them, investigation of the consortium in Clackamas County.

38:16 Chair Ellis That is the meeting that I remember.

38:20 P. Levy I talked recently with Ron Gray to get some more information about that. I asked him what came of that and he said it just faded away.

- 38:36 Chair Ellis But it didn't just fade away. If I recall correctly, Peter Ozanne and I composed a communication to this overzealous person at FTC pointing out that from an economic bargaining point of view, we were not weaklings. We thought we were in a position to protect ourselves. If I recall correctly, we also said this fits within the doctrine of *Brown v. California*, I think is the name of the case, where if you are dealing with a state government that is not an antitrust violation to do that on a collective basis even if it has an economic component. You can't distinguish that quickly between economics and the policy. So we essentially told the FTC to get lost. We are the alleged victim here and we don't feel victimized. That is why it died off.
- 39:52 P. Levy It is good to have that history. I certainly inherited a very thick file from Ingrid Swenson and it included many copies of proposed - well a legislative concept that the Commission actually considered and then put on hold pending the resolution of the Clackamas County matter. I think it was probably then felt that it wasn't necessary. The reason for this, and the discussion here is very helpful, is to explain the context in which Jim articulated those concerns because he certainly was also around and may not have had the benefit of all of the history and involvement that you had. I think maybe we can just close that chapter now unless there are other comments about it. I will just say this, I didn't have in my file any evidence of the meeting that you are referring to with the FTC, but it was well understood in the agency that this state immunity doctrine probably was being ignored by the FTC and that it would be helpful for them to understand that.
- 41:21 Chair Ellis My guess is that they had a bureau within the FTC and somebody thought this was a good idea. I think it is long gone.
- 41:33 P. Levy Well in the Clark County matter, especially as described by Ross Shepherd, it is a very different model than what happens in Oregon. In fact our agency and its predecessor urged the formation of consortia as a convenience to our agency and its predecessor in contracting for public defense services. That chapter, at least for now, is closed. To open another chapter for the Commission's information we have included in your materials a memo from me to the analysts and the executive director about expenditure of consortia funds for lobby expenses. This memo was actually written in response to an inquiry to our agency from a consortia administrator asking for our understanding of what consortia can and cannot do with respect to lobby expenses. Again, as I think the memo says, it is not our interest to discourage lobbying activity. In fact we encourage and have long sought for provider engagement in the legislative process. But it does seem clear from the contract provisions referenced in the memo, especially in light of the instructions in the RFP, that it is the expectation that Commission funds to consortia are for the purposes of obtaining legal services. I think the distinction is important that those legal services are obtained from lawyers in consortia with whom we contract. We pay those lawyers for their services. They are then free to use their income however they wish. If they want to use it to hire a lobbyist we are not interested in how they spend their money, but it does appear from the contract terms that the consortium itself should not be financing a lobbyist.
- 44:24 C. Lazenby Paul, isn't there a distinction between hiring somebody to lobby the legislature, or having one of your employees go and lobby the legislature on behalf of a particular issue and invited participation in the legislative process. Where the lawyers are asking to come down and offer information to the legislature based on their experience and what they end up doing. That is not prohibited. They could get paid for being down here if they are an invited. Isn't that true?
- 44:50 P. Levy Yes. I don't think we have a problem with that.
- 44:57 C. Lazenby I just wanted to be sure because people might blur those concepts.

44:57 N. Cozine If I could just clarify that the question - we actually received questions from multiple administrators. I want to be clear too that I think the terms are applicable to every provider type. It shouldn't be viewed through the lens of any one particular type provider. It is really all of our providers and just making sure that they have the information so that when they are making decisions about how to spend money that is directly from the Commission to that group, they have the information they need to decide when and where to spend that money.

45:33 P. Levy To follow up on this, this is a situation where public defender offices are at a disadvantage. They are not likely to get the agreement of their employees to chip in to hire a lobbyist and couldn't make direct expenditures from PDSC funds for that purpose.

46:02 Chair Ellis I think your memo was just right.

46:08 P. Levy Thank you. It was a little more than simply repeating the terms of the contract.

46:15 Chair Ellis Any other questions or comments on that issue?

467:20 J. Potter Paul. A long history on this. Didn't it start way back in the early 80s before the state even took over the funding of public defense. Statistically Metro PD had as their own lobbyist in the form of Marcy Hurtsmark in 1979 and then again in 81. OCDLA then joined in and started funding Marcy Hurtsmark. Then when the state took over funding the predecessor to OPDS said we can't use state money, specifically saying to Metro PD, you can't use state money to hire a lobbyist. At that point OCDLA was then full funding the lobbyist. Initially though the lobbyist at Metro PD was simply working on substitutive issue things and tracking bills and providing information to defense community about what was out there. Then it matured into taking real positions and then when the state took over the funding there was a fiscal lobbyist issue and the state was very clear that their money could not be used to fund a lobbyist either on substantive or fiscal things. Back then in the late 80s OCDLA ended up hiring Mark Nelson for 20 something years to work on fiscal things and other lobbyists to work on substantive things. Metro PD was no longer a contributor to that lobbying effort. I think it has a long history and I think your memo while it doesn't track that history it is still on point today.

48:12 P. Levy Thank you for another history lesson.

48:15 B. Liebowitz Bruce Liebowitz with the Portland Defense Consortium. My question is does OCDLA currently do fiscal lobbying?

48:31 Chair Ellis Did you hear that, John.

48:37 J. Potter I did hear that. Bruce, this is John Potter. The last year was the first year since the late 80s that we did hire fiscal lobbyists.

48:50 B. Liebowitz Is it contemplated that there will be a fiscal lobbyist in the next two years?

48:55 J. Potter Yes. In fact the board of directors approved a resolution at their December 5 meeting that directed me to put together a plan for the hiring of a fiscal lobbyist and present it to the board at their February 1 meeting.

49:14 B. Liebowitz Okay. Then my question would be to counsel, Mr. Levy, if the RFP calls for direct payment of OCDLA dues to their members, Metropolitan and MDI members, are we not paying for lobbying efforts directly. Under the contract we are paying those dues.

49:44 J. Potter We just had a fund raising event for OCDLA to pay for the lobbyist. Our membership dues don't pay for our fiscal lobbying efforts, so we have to do the sidebar and fund raising events. At the Benson conference this last weekend we put together a fund raising auction. We will

do another one at the annual conference. We do these every year to fund for lobbying. It is a discussion amongst the board, and has been for a long time, we cannot afford the fiscal lobbying activities on dues. So either you raise dues dramatically, and I mean you would have to raise dues about \$100 bucks a year to pay for all our lobbying activities, or you go out to members and do special appeals and fund raising. So that is how we are getting our money for this fiscal lobbyist. The other option before the board is to raise dues and cover all our lobbying expenses. It hasn't happened today.

51:04 B. Liebowitz Okay. So those fundraisers you probably receive dues probably from public defenders, consortia members, just general members of OCDLA.

51:17 J. Potter What you are saying is if you make a contribution and raise your paddle for \$100 bucks.

51:24 B. Liebowitz Right.

51:24 J. Potter You could have been a public defender. You could have been a consortia member.

51:27 B. Liebowitz Correct. That is exactly what I was asking. Thank you. You have totally answered the question.

51:37 Chair Ellis Okay anything else on Item 5?

Agenda Item No. 6 Compensation Plan and Budget Update

51:50 Chair Ellis Okay. Nancy, compensation plan and budget update, and Angelique I think you are part of this.

52:05 N. Cozine So Chair Ellis, commission members, you may recall, or you may not, that in the special 2012 session there was a statutory amendment, a few of them, that affected this agency. One of those amendments was a new provision that requires this agency to report to the legislature its compensation plan changes for the Office of Public Defense Services. In fact the statute as written requires the report to be made before the compensation changes become effective. So this Commission approved a compensation plan for the Office of Public Defense Services in September. On November 21 we reported to the legislature the compensation plan changes that took effect on December 1. That presentation was scheduled before the Joint Ways & Means subcommittee on general government. The hearing went well in that none of the legislatures expressed any concern about the compensation plan for this office. But I did want you to know that there were questions about the way that contract funds were distributed this contract cycle, particularly the policy option package funding that went to fund public defender offices and the lack of a counterpart policy option package for consortia groups. Senator Johnson is the one who raised the concern. There was a very full discussion. A little bit of history on the consortia model. It is something that we will continue to discuss with the legislature. Clearly it is a model that this Commission has embraced and it is a model that existed before this Commission was created. So I think the end result is that we have a lot of support within the legislature right now in terms of funding public defense, but there are concerns about what the compensation levels are for our consortia members. You heard some of that in October. You know that this conversation is swirling all around us. So it was both a very good hearing and also a hearing in which the stage was set for more conversation about the way that we pay our providers.

54:40 C. Lazenby So what were Senator Johnson's concerns?

54:42 N. Cozine Senator Johnson was concerned about the fact that there was a policy option that provides funding only to non-profit public defenders and not consortia groups. It is a conversation this Commission has had and Chair Ellis expressed concern about the fact that consortia members weren't included in that policy option package and our providers have had that conversation

with this Commission. So it was that conversation that had been taken to Senator Johnson and even though everyone acknowledged that it wasn't on the agenda, because the agenda item before that subcommittee was really just the compensation plan for this office. Ironically that received pretty much no attention and the attention quickly turned to what is happening with our consortia. So her concern is to make sure in her county, it is Clatsop County that we have one consortia group and they provide all of their representation.

- 55:40 Chair Ellis I thought there were two?
- 55:40 N. Cozine There is Maryann Murk who is providing services. She is not a consortium. She is her own firm. You are right that there are two entities.
- 55:57 Chair Ellis Angelique your name was on the program. Did you have something to add?
- 56:00 A. Bowers I was going to give you guys an update about the budget.
- 56:04 Chair Ellis Okay.
- 56:04 A. Bowers I just wanted to bring a very high level of discussion on the budget. The numbers that I put together were for the end of November. Right now we are about 20% into the biennium. The expenditures are right where I would like to see them. For the public services account we are at just over 20% of the expenditures to budget. With the office for OPDS we are just over 18%.
- 56:38 J. Potter Can you speak a little bit louder. We are having a hard time picking you up.
- 56:40 A. Bowers Sorry about that. At this point we have paid the majority of the large bills that we were anticipating. We have bar dues coming in January. That is the next large one. There are a few unknown pieces of our budget at this point. We have the salary pot adjustment. That would be for the office, OPDS only. Then we have the 2% hold back that would be for the account as well as OPDS. The salary pot adjustment probably won't be distributed with the February session, but most likely we will hear more about that in June, 2014. Then with the 2% holdback, right now for both the office and the account, I am budgeting as if we are not going to receive that back. With the revenue forecast they showed that the economy is stable and it is growing slowly, but that is what they also were expecting to happen. I guess that I have talked about it before but the fire suppression costs were higher than what they expected, so that did cut into the general fund ending balance statewide. For those reason right now they are saying that most likely we need to plan on not getting the 2% back. We should hopefully hear a final decision on that in June, 2014, as well.
- 58:14 Chair Ellis That 2% holdback applied to a lot of agencies in addition to ourselves.
- 58:23 A. Bowers Right. That was statewide.
- 58:23 Chair Ellis Are they talking about nobody gets it, or are they going to say some get it and some don't?
- 58:31 A. Bowers At this point I am hearing that they are going to look at all agencies the same. They are going to treat it as statewide. If they can give a percent back or all or nothing.
- 58:46 C. Lazenby But it is early yet.
- 58:46 A. Bowers Yes. Still too early to say. The only other thing that I had on there is I wanted to just ask for the future is a verbal update like this what you would like, or would it better if I gave you something ahead of time, the materials with the numbers?

59:03 Chair Ellis I think there is significant news in the sense that we are significantly above or below, I think we would all like to know that enough ahead that we can think about it. If it is rocking along as you say 18 out of 20 on the operations side and 21 out of 20 on the funds side that is close enough. Thank you.

59:32 J. Potter Can I ask a question? Did I understand Angelique to say that we will not know about the 2% holdback until June?

59:45 A. Bowers We are hearing that mostly likely that is when we will hear the final word. It is still pretty much up in the air.

59:58 J. Potter I thought earlier that we might know by this interim session whether or not that holdback would be held back or not. Is that a change or did I just misinform myself?

1:00:11 A. Bowers I think initially they were hoping that they would get information or make a decision by February. That seems to be pushed out.

1:00:21 C. Lazenby There will be a March forecast. It will run off the March forecast and then they will make a decision that will probably go into effect in June, right?

1:00:32 N. Cozine Right. In my meetings with legislators I am continuing to discuss the 2%. I think that with regard to the account I don't think we can anticipate a full release of the 2% holdback in February. I think that is unrealistic given where they are. However, I think there is a fairly good depth of knowledge in the legislature about the level of need of the professional services account, so it remains to be seen whether or not they will be able to return to that 2% holdback for the professional services account. I think there is some acknowledgement that that account is different and that our contract providers are in a different situation than state agencies.

1:01:33 Chair Ellis Any other questions on the budget update?

Agenda Item No. 7 Approval of Hourly Rate Increase

1:01:40 Chair Ellis Do you want to go ahead with the hourly rate? This is attachment 4. I obviously know exactly what they are, but some of the others may not know what ARB and LAB refers to. You might translate that.

1:01:58 A. Bowers So attachment 4, I listed out the information on Policy Option Package 102 for the hourly paid attorney and investigator rates. We requested our agency request budget, which is ARB, we requested \$1.8 million for attorneys and about \$730,000.

1:02:23 J. Stevens I am sorry to interrupt you. What did you say ARB means?

1:02:23 A. Bowers Agency Request Budget.

1:02:30 J. Stevens Thank you.

1:02:30 A. Bowers And about \$730,000 for investigators. From that request we received at the legislatively approved budget, LAB, \$230,000 for attorneys and about \$450,000 for the investigators. So I took what we received at LAB and use the methodology that Kathryn had used when she put the policy package together and calculated out what we could increase the hourly rate to. In that it just happened to work out that I could increase each of the rates by one dollar an hour. That is what the new reflects in that table that is effective January 1, 2014.

1:03:18 Chair Ellis So you need for us an approval of that?

1:03:25 A. Bowers Yes. I need you to approve the new hourly rate for both the attorneys and the investigators.

1:03:30 J. Stevens Barnes?

1:03:28 Chair Ellis Yes.

1:03:28 J. Stevens Can we approve it but express our horror at the thought that a one dollar an hour increase is enough?

1:03:42 Chair Ellis Yes.

1:03:46 J. Stevens Good. I move that we do that.

1:03:50 Chair Ellis Alright. Steve?

1:03:50 S. Gorham I have a question. Can you approve more?

1:03:55 Chair Ellis Not if we don't have it.

1:03:58 S. Gorham I think there would be consequences to approving more, but

1:04:02 Chair Ellis Yes. We would probably all be liable.

1:04:05 S. Gorham I guess it would mean that you would run out of money at some point, unless they back filled in some way. It is not a simply question but do you have the authority to approve more?

1:04:18 Chair Ellis I think we don't. But I think we do have the authority to do what Janet proposes. Janet that was a motion including your comment?

1:04:34 J. Potter I second it.

1:04:35 Chair Ellis Any further discussion?
MOTION: Janet Stevens moved to approve the rate increase with her comments; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 8 Commission Feedback Regarding 2014 Contracting Process

1:04:52 Chair Ellis Okay. Next is Caroline. Commission feedback on the contracting process.

1:04:58 C. Meyer So this is the point at which we come back to and say we have now concluded the contracting process. I think historically we have done this the past several contract cycles where we have asked for the Commission's input at the conclusion of the process. What I wanted to do is very briefly run the timeline of what happened when just as a reminder. You were very involved in this process so you will remember most of this dates, and then just comment on two highlights from your comments two years ago that we have felt like we have made an effort to improve on and we would like to have you give us feedback as well. So May 3 we issued the request for proposal for all contracts statewide including death penalty. June 13 was the Commission meeting in Bend, the annual conference. Paul Levy gave an overview of the contracting priorities. Then we also had contractor's comments at that point. June 17 the RFP responses were due for statewide contracts. We gave an additional month, so July 15 was when the death penalty contract proposals were due. July 17 you will remember that we had an executive session in Astoria where two of the analysts presented contract recommendations for those counties. We broke it up into two segments. July 31 we did the second phase of that in executive session. We gave you the details of what we were proposing those contracts. Then essentially going forth with that in the month of August we made all of our phone calls. We contacted all of our 69 statewide contractors and were able to

reach agreement with our contractors. Then in September at the September Commission meeting in executive session, Billy Strehlow presented on the capital contracts. Then, again, in September and October following that meeting he negotiated those contracts. I think there were 40 some total. Then in October, most recently at the Commission meeting, you approve the statewide contracting plan. Then we finalized the contracts after that. I believe, and I am hoping that anyone in the room will correct me, but everyone at this point has received their fully executed contracts. In looking back at comments from the last contract cycle there were two things that stood out. From commission members comments was you wanted to see more communication with contractors regarding contracting timeframes and potential if any contractors were not going to receive a contract going forward that we gave them plenty of notice. In checking back and talking with the analysts there was really only one contractor that we didn't renew. One of my contracts went from operating in two counties down to one. Then we certainly had a few contracts that we chose to just do a one year with. Primarily due to some quality concerns that need to be addressed and we are working with those contractors. All of those contractors received at least four to six months notice that this was coming. This was the plan for 2014-15. The other issue or comment that came out of last time was – let me go back to the first point. There was really two parts to that. One was giving plenty of notice for anyone who wasn't going to get another contract, but the other piece was having plenty of time to respond to the RFP. You may remember that this was an issue two years ago where we had at least one or two contractors who said we didn't get our response in on time because for whatever reason either the email ended up in the junk folder and they came to you and asked for an exception.

1:09:06 Chair Ellis

That was Rieke.

1:09:10 C. Meyer

We are not aware that we had anyone that fell into that category. It didn't come to our attention. Everyone felt that they had proper notice. Then the second comment was you have expressed appreciation that the analysts were presenting information for their specific counties and getting that information first hand and feeling like you had a better understand of what was happening in the counties. As you are being asked to help approve plans for those counties, you felt like you had an idea of the challenges in each of the regions were and the rational behind our contract decisions. We certainly agree that it is a good system and we intend to continue that.

1:10:00 Chair Ellis

Any comments from commissionners?

1:10:03 J. Potter

I have one comment, Barnes. I have mentioned it to Nancy already but I think it is worth repeating. Part of the process should be appropriately contacting those who did not get contracts. As I understand it what happens is if you didn't a contract or you were denied a contract, then you receive a letter thanking you for applying. It was brought to my attention that certainly in the case of a couple of the death penalty applicants that they received a letter and it didn't seem like enough for some of those folks. My suggestion would be, and I think it has been implemented now, is that a direct phone call from the analyst to those who were denied in addition to a formal letter, but a conversation takes place. Especially with death penalty contractors when we are trying to break in new people, and we can't bring them in because the cases aren't there or we haven't had people retire, we want to cultivate them as much as possible. So to the extent that a contractor, an applicant, didn't get a contract and would have gotten a contract had there been cases there, or didn't get a contract because they didn't have quite enough experience. I think the analyst might do well by just contacting that person directly by phone.

1:11:37 Chair Ellis

Okay. I do want to say that this was to my observation the best process year we have had since the Commission got started. If you look back to how contracting was done 10 years ago and contrast it with how it is being done now, I think we all feel a whole lot better. There are several things that make that happen. One is the timing of the process is such that this year I think we did have information reasonably early. The three executive sessions we had with the

analysts that was just terrifically good information and a good process. I also think that the contracting community, I could be wrong, but I think they felt the transparency was much better now than it use to be. When the Commission started the contracts were all on different cycles and you would have a pocket approved here and that, of course, would have implications for others but they are not up for another four months so they are not part of this. It was not a good system at all. I know as recently as three years ago there were some commissioners who felt that the result may be good, the process may be good from inside OPDS, but the Commission was kind of asked at the end, oh by the way here are 110 contacts. Would you approve them? I know there was a level of discomfort that it was being brought way too late in the process. So I would commend the contract analyst group and Nancy. I think it was a far better process this year than we have ever had before. I just very impressed that the provider community seems to be comfortable that the process is fair. Not everybody wins and not everybody gets what they want and all that. The process seems to be fair, so kudos.

1:14:05 C. Meyer Thanks, Chair Ellis. It has been a very busy six months getting all of this done, but it is so helpful to have the input from the Commission. Paul and Nancy were directly involved in all of this from day one which really helped. Being new to the contract manager position I am still learning the ins and outs of the process. I have understood it from an individual analyst perspective. The providers have been great and I would say but we really appreciate the patience they have given us. We have been down an analyst for the last three months for family leave and that is going to be changing here shortly. When you have four analysts and suddenly you have three for an extended period of time. They have been extremely patient with us in getting contracts out. We have tired to make sure that we have met those deadlines.

1:15:05 Chair Ellis The other comment I would make is it is a tribute to Kathryn Alyward that she built a strong staff and in many ways the test of a good manager is when the manager leaves what happens? What happened here was a positive, moved right into it. You guys took on your now more visible role and I thought did a terrific job. Steve?

1:15:37 S. Gorham Steve Gorham for the record. I wanted to thank the board and the staff at OPDS. I know I was very critical of the difference in the death penalty rates and, I think, the mitigation contract rates. That seems to have been corrected in this cycle, which I think is a really good thing and thank you for doing that.

1:16:02 C. Lazenby The only comment I want to make is I was around when we had the early concerns about the unevenness of the contracts and negotiations. I appreciate it and I think we have got it right with the kind of Commission involvement in this process. I know that some former commissioners almost wanted us to be involved contract by contract. I objected to that. I thought that was a no win for the Commission and commissioners to be involved at that level. I really thought this level of involvement was absolutely spot on.

1:16:38 Chair Ellis Anything else on this? Thank you.

Agenda Item No. 9 Discussion of PDSC Key Performance Measures

1:16:47 Chair Ellis Nancy. KPMs.

1:16:52 N. Cozine The KPMs will be a longer discussion. I might want to bring in a little table.

1:17:01 Chair Ellis Shaun, did you just kick me?

(Break)

1:29:54 Chair Ellis Shall we resume? Nancy, the key performance measures.

1:30:02 N. Cozine

Yes. You will see in your packet attachment 5.

1:30:11 N. Cozine

Attachment No. 5. I included our existing KPM report, which lays out the three different KPMs that this Commission has adopted and reports on to the legislature each year. I also included a document that is a flow chart of the development of performance measures. One logic model that one might apply. I will remind the Commission that this is on the agenda because we are required to report to the legislature in February, 2014, regarding our key performance measures and whether or not there is something that this Commission would like to adopt as a new KPM, or any modifications to existing KPMs that we would like to consider. I have a meeting scheduled with Representative Williamson to talk about this. I am also in the process of scheduling one with Senator Winters. We have talked to Legislative Fiscal Office and as we have discussed previously, really what they would like is something that gets at the heart of our contracting process and the results that we would like to see in that process. I have thought quite a bit about the kinds of results that we would like to see from our contractors and whether or not that is measurable. Chair Ellis, you consistently ask the question what kind we measure? What data is meaningful? One of the things that I think is measurably that keeps coming back to my mind is a topic that this Commission discusses very regularly, is the appearance for the participation of lawyers at the first appearance in arraignments in criminal cases and shelter hearings in dependency cases, and at the time the petition is filed in delinquency cases. It is a clear demarcation. It is measurable. We can get that information from the courts. We can get it from our providers, but may be other things that this Commission is interested in, in terms of how we measure trial court providers. That is one thing to think about. The other pieces are appellate KPM. We need to talk about that. We have been very close to meeting the KPM target. The thing we need to consider is whether we want to adjust that. Pete can tell you more about the information he has dug up on that topic. My vision for today is that we discuss these two different areas. We don't come to any conclusions, but that by January we should be ready to have something that I can present to the legislature in February. Again, I don't know that having a lawyer at first appearance is the right measure, but it is one measure. When I try to think about things that are more complicated, collecting those data points becomes very difficult. I think we can get there some day. I would view whatever we decide to do as a step one with more to come later once we have a more fully developed data collection and analysis capability. With that I will leave it to you, Chair Ellis.

1:33:39 Chair Ellis

I find it helpful in trying to think about KPMs to divide them between inputs and outputs. The easy one is inputs. There are a lot we don't include that I don't think it would be that hard to include. I was just trying to think of some of them. For example training is something we are very focused on, but we never develop a baseline and an objective measurement on that. We could. The number of providers that go to 10 hours or 20 hours of training. The number one issue that seemed like a big one five or six years ago and I hear less and less about it, so I am guessing that we are making progress are substitutions. You know you get down a track and then there is conflict that could have been detected sooner but wasn't. Then you have to bring in a whole new legal team and that has got obvious cost ramifications. We don't keep track of substitutions, but I think it is a useful measure. We don't report as a KPM a very simple one. The number of peer reviews that are conducted during a year, or the number of peer volunteers that do reviews agencies. There are a lot of the input things that we do that we are not measuring and we could because they are not hard. Now much harder for me, and this is why I keep bringing the subject up, is the output measurement. Obviously the most grossly simple is wins and losses, but in this business you really have to define winning before that becomes meaningful at all. An obvious one is number of PCR claims involving our trial service lawyers. I am guessing there aren't very many but that would be something that I would be interested in. So somebody who knows more about all this than I do could do it, but I would like to see us expand our list. I think we have kind of let ourselves get lulled into a false sense of, "oh ain't life great," because we get 95% happiness on our handling of contract funds and the like. I would like to see us expand our list and push ourselves a little bit. That doesn't quite answer the conundrum that I think is out there, which

is impact is a hard thing to measure in an awful lot of activities. The virtue of for profits is that they have one way of measuring that the rest of us don't. But I would like to see more. I think the list is too short, too general, and it smacks a little of complacency that that is all we are doing.

1:37:09 N. Cozine So what I think I hear you suggesting as potential measurements as training, substitutions, and number of peer reviews and number of peers participating in peer reviews. Those are all things that we could explore and develop and present to the Commission at the January meeting for your adoption or not.

1:37:30 Chair Ellis Right.

1:37:30 N. Cozine Are there other suggestions?

1:37:35 P. Ramfjord I am curious about whether you have looked at what other similar organizations might measure themselves on? I think we talked a little bit about that briefly the last time. I am mostly curious and I don't want to put you on the spot, but you obviously have thought about this more. Are there other things that you have thought about that even if you are not sure we are ready for you think we might aspire to? Are there steps that we might take to help get us closer to being able to do those?

1:38:08 N. Cozine So, yes, Chair Ellis, Commissioner Ramfjord. I looked at other state agencies and some of the ones that I looked at were like DHS. On the dependency front they have an arguably similar role in the sense that they are responsible for representing a piece of the system. I looked at Department of Corrections and Oregon Judicial Department. All of these agencies have their own very rich data collection capabilities. So they are able to measure outcomes in a way that we really can't get. One of the things that we learned from the Washington Parent Representation Program was that by setting standards in terms of number of training hours. By capping the number of cases an attorney can have at any one time. By setting standards that lawyers are required to meet by reviewing those standards and setting contact expectations with client. Not only were they able to reduce the time to permanency to children, they were actually able to get cases in and out of the system more quickly. We could do something like that theoretically. I think that is what we are doing pilot project funding this cycle. I think my hesitancy in tackling something else that bit is that it is going to be quite a bit of ramp up just for this agency to meet that type of measurement that we will have to do for the dependency program. But I think similar kinds of KPMs would be interesting. On the arraignment side, I think I have mentioned this before so I apologize if I have, but in New York there was recently a study of the presence of lawyers at the arraignment. The expectation was that by having the lawyers at arraignment they would increase the number of individuals released on their own recognizance. They were not. That did not happen. The defense organization that instigated the study was disappointed initially until they realized that as they continue to look at their data what had happened was that the bail amount that was set was actually set at a more realistic level for each defendant, and they had an increased number of defendants who posted bail. Their jail beds were then freed up for other people, and the court had some security that the person would come back to court. So what they ended up with was actually a study that resonated much better in their political climate than if people had simply been released ROR, but they had the data points to take that measurement. I would like to be able at some point to collect that kind of information. We just don't have those data points right now. I think I get a little caught up in what a challenge it would be. As Chair Ellis has pointed out you first have to identify the data points that are meaningful in that analysis. Then you have to make sure that you can get them. Then you have to make sure that they are reliable. So they really need to be entered into a system for a purpose that is not simply the purpose of compiling with the study. They are entering data into a system for a discreet purpose that isn't just (inaudible) based. That is the most reliable data you can use. So there are things are there and agencies are doing very complex kinds of analyses. I don't know that we are in a position right now to do it. That is why I say that I

would like us to focus on what I would consider to be baby steps. Things like we want to get lawyers in the courtrooms across the state consistently. That is not happening right now. We know from studies that other states have done that that is an advantage to the system. It is one where we continue to fall short. We have many counties where we simply don't have lawyers and that is for a variety of reasons. In some regions it is because of the geographies of the regions. In others it is because the court schedule conflicts with other court hearings that lawyers have to appear at. Every peer review and every service delivery review I am amazed by the fact that we don't have lawyers there. This plays out in the delinquency context too. We keep saying what can we do to change this? I suppose one thing we could do to change this is to make sure we take the basic step of ensuring that a lawyer there and we measure ourselves on that. So that is a long winded answer.

1:43:27 S. McCrea

Nancy, this is Shaun.

1:43:30 N. Cozine

Yes.

1:43:30 S. McCrea

After all of that wonderful complexity my suggestion is going back to more what Barnes was talking about, which is something simple. My suggestion for a possible KPM would be something related to communication. Because it seems like that is something we have been working on for the past 13 years that we can easily measure and that is appropriate. I mean communication between the Commission and the provider like we are going around having our regional meetings. Now we have communication from the providers to the Commission with the new regional meetings coming up. We also have communication from the agency from our analysts to the Commission in terms of what we have been doing with the contract analysis this time around. It seems like there are a lot of parts that we could have as part of the KPM. It is something that we could measure. It is something that we are doing and that we will continue to do and it is important. So there is my two cents.

1:44:41 N. Cozine

Thank you.

1:44:50 Chair Ellis

Any other thoughts on the KPM issue?

1:44:45 C. Lazenby

I like Barnes' suggestion. I think he is right. We need to start looking at a lot more. I have wrestled with this myself. It is very difficult to say the number of cases you have handled. The short period of time you have handled them. Sometimes delay is in the client's best interest. That is just the nature of the game. It is very difficult in this context to develop metrics that make sense across the street to those folks. I like Barnes' suggestion. Very well thought out as always, Mr. Chair.

1:45:41 Chair Ellis

He wants me to buy him a free lunch.

1:45:41 P. Ramfjord

I agree with that, but I also like the idea of the first appearance. I think that is a good idea. I think there is a sort of broken windows theory to having better representation among defendants. I think part of it is just getting there are the first instance. I think that measuring that would be a good thing to do and I think it makes a lot of sense.

1:46:09 C. Lazenby

Are there any metrics on the prosecutorial side of the system? I think the question should be asked.

1:46:20 N. Cozine

I did not look at the DA's KPM and whether they have one. They have such limited funding from the state that I am not certain. I will look at that. They are not a state agency so I think they are not required to. I will look.

1:46:35 P. Levy

Mr. Chair, if I could chime in. While I agree with the rest of your colleagues that your idea of expanding the KPMs is a good one, I am hoping we are not also endorsing or wedding ourselves to your specific suggestions. I see big problems with the outputs. I know you were

suggesting measuring wins and losses is a difficult venture, but I am not sure that is at all an appropriate one either. We certainly want to measure how well we are doing to whether there is an acquittal or not. There is much more that goes into whether that happens than the performance of the lawyer, and indeed we don't want to wed ourselves to believing that an acquittal is the right thing that this agency or Commission is trying to achieve. We want to make sure that the lawyer that defendants have are good, capable lawyers who will give their clients the benefit of good representation. If as a result of that they go to trial and nonetheless lose...

1:48:03 Chair Ellis

Or get diversion.

1:48:04 P. Levy

A well tried case where you do not win is still good services from this Commission and the case where the lawyers win – because as I know I have heard the jury took pity on the defendant because they had such a terrible lawyer. That is not exactly a win either. There are other measures and I am going to allude to these in our staff update that might be considered. The same is true with PCR claims. You could have an exceedingly well tried case, you lose, and if I lost and went to prison and had time on my hand I can guarantee you that I would file a PCR claim if nothing else to assume myself as the years go by. I think that happens.

1:49:03 Chair Ellis

I am not wed to anything I said.

1:49:10 P. Levy

No. I absolutely agree with that. I don't want us to go away with here our the chair's suggestion.

1:49:18 P. Ramfjord

One can think of other things too. One could think of average length of sentence per indictment filed which would be an interesting thing. I often feel that sentencing is an area where – it is an interesting measure across the board. What you have done in terms of conviction versus indictment. What you have done in terms of actual sentence versus the mean. Sentencing is an area where I think there has traditionally has been as much emphasis as there could be to gain effectiveness. That is another type of thing that one might consider.

1:50:03 Chair Ellis

Or trial outcome compared to best deal offered pretrial. That is a more meaningful measure.

1:50:10 P. Levy

In the staff update, I will briefly give you some information about a very recent federal district court opinion finding a municipal public defense system in Washington to violate the constitutional right to trial, and to tell you what the federal court remedy is there. There may be some ideas out that that could form a KPM.

1:50:37 P. Ramfjord

But given the number of cases that are plead versus the number of cases that are tried, sentencing is an interesting thing to look at generally as well. It is a large part of the advocacy of lawyers who do work with us do.

1:50:55 C. Lazenby

Yes. In one county, at least, we have had this conversation where one of the reasons that people don't participate in the early disposition program is because the offers get better. In other cases it is like this is your offer and it doesn't get any better from here going forward. We have to make those systematic adjustments in the data that comes through to figure out whether it is a key thing. I think sentencing is really important. I had a facebook conversation with a criminal defense lawyer, private sector, who had spent two days in trial with a Len Bias drug case. Her client sold the drugs to somebody else who gave it somebody else and then somebody died. She ended up with probation and a fine out of that. Whereas this person was looking at serious time on the Len Bias change of custody of the drug things. It was great advocacy on her part to get that outcome. I don't know how we capture that kind of quality in our key performance measures, but that was a great outcome for the client that the lawyer achieved through her hard work.

1:52:10 N. Cozine If people were using case management systems where they actually input the charges in the indictment and then actually put in the sentencing, you could easily pull and compare those data points. I think that is where we need to get if we can.

1:52:34 P. Levy If I could just add one other thing. A KPM that I have wanted us to have, but I am not really sure it is an appropriate one, is we do have a document called “Best Practices for Oregon Public Defense Providers,” and this is directed at administrators of contract entities. It was assembled by the Quality Assurance Task Force. It remains a very good document of describing how public defense providers should operate. There are areas in which our agency really should be ensuring that they do these things. The extent to which providers fulfill each of those best practices could be a KPM. The problem with this is that we don’t actually know that, and don’t have any data to prove, that fulfilling those practices actually does end up resulting in better service. It is all the anecdotal and collective wisdom of the experience administrators.

1:53:53 P. Ramfjord Plus if you had self reporting on that you don’t really know how accurate the reporting would be.

1:53:59 P. Levy Absolutely, and I don’t envision self reporting. I envision, in fact, it would require stepped up monitoring by our agency and that is why I think it could be an appropriate measure. It really does require more engagement by us in the process.

1:54:20 C. Lazenby On this charging sentencing thing will eCourt going to give us the ability to distill that data system wide?

1:54:29 N. Cozine It might. It is a definite possibility. It is built to be a data analysis tool, so there are discreet locations for different data points. There is certainly much more opportunity there then there has been in OJIN.

1:54:54 Chair Ellis Okay.

1:54:54 N. Cozine We also have the appellate side and Pete is prepared to talk about that, but I don’t mean to cut the contracting side short. Just to review the ideas that I had listed for us to explore to come back with some more firmed up concepts at the next meeting were training, substitutions, peer reviews, participations in peer reviews, communication between PDSC and OPDS and contractors. I also have the PCR on the list and sentencing. I think we will likely have to wait until we have more additional data points. Then best practices for public defense providers. Maybe there is one on that list that we could start with in terms of measuring. Under current staffing I don’t think we could go out to every county and do an in depth analysis for every year that we have to report on the KPMs. These are the concepts that I have listed. If there are any that I am missing or you want me to add, feel free to send an email and we will do our best to get that in there as well.

1:56:03 Chair Ellis Okay. Mr. G. Bon jour.

1:56:12 C. Lazenby It is aloha.

1:56:16 P. Gartlan Mr. Chair and the rest of the board, the KPM for the appellate division is the media filing date for the appellant’s brief in criminal cases.

1:56:33 J. Potter Pete, you have to speak up for us.

1:56:34 P. Gartlan Sorry. The KPM for the appellate division is the media filing date for the briefs in criminal appeals. On page – the pyramid and if you go back a few pages, page 5 of 14, which is from the budget proposal there is a chart there that says, “media number of days to file opening brief.” It starts in 2006, when the media filing date was 328. It has gone down regularly. In

the 2012, it was 234. In 2013, we are at 223. The target date is 210. We were thinking about moving down the target date to 180. I think everybody agrees that going down is where we want to go.

1:57:42 Chair Ellis

But you do that with or without the *Balfour* briefs.

1:57:47 P. Gartlan

We ran some numbers without the *Balfour* briefs and they were negligible. The difference between this number 223, and without *Balfour* briefs it was actually 221. So we have been playing around with maybe there are other types of cases that should not be in here. If we are thinking what we are really trying to measure are people who are convicted of a crime and are sitting in prison. How long does it take for them to get their opening brief filed. Maybe that should not include state's appeals. Maybe that should not include the people on parole. We have a considerable parole practice also. We were wondering if we could maybe play around with that. If that is the more specified....

1:58:35 Chair Ellis

I think that is a good idea. I have always worried about the *Balfour* brief could be a skewing factor that would be so subtle when you look at the gross data, but so impact full if it is done the wrong way.

1:58:57 P. Gartlan

For us it is really not the filing of a *Balfour* brief. It is the letter to the client explaining to the client why there is not going to be a merit brief filed. Why there are no meritorious issues in the case. For us that is really the closing date for – not the closing date but you know what I mean in terms of the major work being done on the case. So we would like to play around with that KPM and come back at the next meeting and say here is how we would like to measure the KPM and what it would look like. It is targeting criminal cases where somebody has been convicted and they are challenging the judgment against them. In relation to that this started kind of a line of inquiry a couple of meetings ago. You were asking me how we compare with respect to comparable or other states with respect to filing. So I did some calling around and there is a caveat here and that is other states have different systems. They start counting at different times. So other states start counting from the date that the judgment is entered in the trial court until the brief is filed. In our state we start counting from the time that the record settles and then the brief is filed. So there is going to be disparity because in some states the system allows like three to six months to settle the record and then the brief is filed sometime after that. I will try to point out the differences as we go through, but I think at the last Commission meeting that Colorado was now suffering some difficulties. The appellate brief is not filed until 12 months after the record settles. That is an average. The court in Colorado has set a no further extension of 18 months out. Some cases are not filed until 18 months out.

2:01:21 Chair Ellis

And that is an FTE state system like ours.

2:01:28 P. Gartlan

North Carolina – I will preface this by rule. I wasn't able to talk to anybody in North Carolina, but by rule it looks like about seven to 10 months from the time of judgment entry to filing the brief. Wisconsin seems to be the most expeditious of the states. They have a system that starts counting from the time the trial judgment is entered. Wisconsin takes 50 days to determine whether or not the individual is eligible for court appointed counsel. Then 60 days after that for preparation of transcript. Then at that point the appellate attorney and they have a system that allows the attorney to go PCR or direct appeal, and according to Wisconsin, Joe Irvine who runs the office, most of the time the attorneys go PCR. But if you add up the time in Wisconsin, and assuming that the attorney does file an appeal, it is about four to five months after the trial judgment is entered. So they have a very sane system. Illinois it was interesting. A little over 10 years ago they had a broken system and it was taking the Illinois Public Defender regularly two years before filing the opening brief. The federal court stepped in and there was a consent degree and there was more resources given to the State Appellate Defender. Now they are filing within 10 to 12 months after the entry of the trial judgment. If you think about it that is really probably where we are right now. There

is an entry judgment in the Oregon trial court. We have 30 days to file a notice of appeal, so assume we take the whole 30 days which we don't, but let's assume that we do. That is one month. Then it is by statute 30 days to prepare the transcript. So that is another month. Then if you add on our 223 days and I will round it to eight months then that is 10 months, so right now our system is comparable to Illinois. In Washington they have a system that counts from the filing of the judgment and completion of the record. Right now they are running at 153 days to do that. Then from completion of the record to filing the brief is 102 days, so that comes down to about six and a half months total. So they are speedier than we are.

- 2:04:44 P. Ramfjord That is very helpful. I am also curious, though, about how many extensions you get on briefs. Is there some potential of maybe measuring the number of extensions as opposed to the actual days, or minimizing the number of extensions?
- 2:05:02 P. Gartlan I will give you the historical perspective. Ten years, 12 years ago we were buried and we were filing extensions like every 35 days. There is now a provision in conjunction with the AG and the Court of Appeals there is a provision in the Oregon Rules of Appellate Procedure that allows the Chief Judge and this office and the AG to set a briefing date. We came up with a system that says the first brief due date is 210 days out. There is one extension after that to 35 days to 245, but under no circumstances can you get more than 250. We use to file 10, 12 motions for extensions per case. We don't do that anymore. It is rolled into the system.
- 2:06:01 P. Ramfjord So if you were to go to 180 would you contemplate working with the AG's office and trying to back off of that 210 date that you have now?
- 2:06:11 P. Gartlan We have put out feelers already. We are trying to do that. We brought it up with the Court of Appeals. So far it is a cold reception.
- 2:06:23 Chair Ellis We want them to wince in pain. We are coming at them so fast with our briefs.
- 2:06:29 P. Gartlan That is a truth. That is the major, primary reason why there is a fourth panel. It is because this office is producing a lot more briefs than we use to. That is on record. We want to keep pushing the system down because historically I have said this before but I will bore you again, but historically it was outrageous. Some part of me says this is great 210 to 223 days. If you were devising a system, if you were building a model system, 223 days is just not acceptable. You would want something, I think, two to four months or something like that.
- 2:07:17 Chair Ellis It has got to be one of the challenges of your job. On the one hand you do want to put emphasis and incentives and everything to reduce this. On the other you don't want to do it at the expense of quality. That is why you get paid the big bucks.
- 2:07:40 P. Gartlan That is why I go to Maui and Paris. You also asked me once, Mr. Chair, what is the median filing date for the state.
- 2:07:47 Chair Ellis Right.
- 2:07:47 P. Gartlan Their median filing date is 210 days.
- 2:07:57 Chair Ellis From when they get our brief?
- 2:07:57 P. Gartlan Because that is what the Court of Appeals has set the first brief due date for this office is 210, so the AG gets the equivalent.
- 2:08:10 P. Ramfjord That is a painful number.

2:08:14 Chair Ellis Frankly, there job is easier. They don't have to look for what issues might be out there. The issues are set for them.

2:08:28 P. Ramfjord Does this agreement have a reply deadline built into it too for us? What is that?

2:08:34 P. Gartlan No. The way the system is set up and the way the Court of Appeals is running, the Court of Appeals has such a backlog right now that they don't even set a case on the docket for six to eight months after the full briefing is done. So there is no set time limit other than the ORAP rule. The ORAP rule you have to move to file a reply brief. That is all for the KPM.

2:09:10 Chair Ellis Okay. Is that all on the KPM?

2:09:11 N. Cozine I have just one more brief mention. Our other two KPMs are customer service. Many agencies have a customer service KPM. It is rather standard. The other one is Commission best practices. We have self measured in that area every year that I have been here. I think there is some sentiment that the funding that we receive isn't really to run a Commission. The funding that we receive is to fund trial court services and appellate court services, and that that KPM may not be the best measure of the work that we are doing. I am not necessarily suggesting that we do away with it entirely, but I wanted you to know that there is some sentiment that it may not be the best measure. That is coming from the legislature. That being said if we want to keep it, I have looked at what other commissions were doing in terms of measurement. There is a methodology used by other commissions where each commission member receives the evaluation form and fills it out independently. They then come together to determine or not they are meeting each KPM – best practice. That, at least, is distinguishable from what we have been doing because we have been providing you with a list of how the Commission complies with each one. So it seems from appearances that it isn't as meaningful as it could be if you each were measuring from where you sit independently. I think that is another thing to think about as we approach our meeting in January. Whether or not we want to continue with the Commission KPMs? I think there is no doubt that we want to be mindful of what those Commission best practices are, and we want to adhere to them whether we measure it or not. We want to make sure that we have a Commission that is functioning in a way that does meet all the best practice standards. Then if we want to keep it, then thinking a little bit about how we want to measure the compliance with best practices. That is all I have key performance measures for this meeting. Again, I welcome any input.

Agenda Item No. 10 National Juvenile Defender Center Annual Leadership Summit

2:11:25 Chair Ellis Alright. Paul, what is up with the National Juvenile Defender Center annual leadership summit?

2:11:32 P. Levy We thought that the Commission would be interested in this if for no other reason than to see the breadth of topics at this meeting.

2:11:45 S. McCrea Paul, you are breaking up.

2:11:45 P. Levy What. I'm breaking up. I'll speak louder. Does that help? I think it is the conferencing system that we are using are not our phone and not me. I will be louder for you folks who didn't want to drive up here. Who are sitting at home in your jammies.

2:12:06 Chair Ellis Remember safety is our number three priority.

2:12:13 P. Levy This meeting is the best gathering of juvenile system leaders in the country. It is primarily concerned with juvenile defense but it includes more than defenders. The idea is not to provide practice skills. It is to provide a forum for leaders in juvenile justice to talk about systematic changes both within providing defender services and within the justice system

more generally. This is third conference that I have attended. One of the really valuable things that I take away from it is that you get a measure of where we are compared to other states. Where we are ahead of the game and where we are behind. So, for instance, we are now among the few states that a procedure for determining fitness to proceed for youth in juvenile delinquency cases. We don't incarcerate status offenders as many states do. Our defense attorneys are supposed to be representing the expressed interests of their clients in delinquency cases. Now do they always do that? I am not convinced, but at least Oregon, unlike some other states, that have a crazy model for defender services where they are in delinquency cases representing best interests. Where you have the involvement of what in the dependency world would be a CASA. You have sort of the equivalent at a delinquency case which seems insane. We have made some progress that other states have to make on sex offender registration for juveniles. Some states are ahead of us on this. The work of some Oregon lawyers is cited nationally for their work in ending shackling abuse in court proceedings. Areas where it is very clear where we are behind the curve, at least there our states that our ahead of, in dealing with what is generally called "direct file." Here we call it "Measure 11." Where a prosecutor gets to decide to try a youth as an adult with very serious outcomes. We have a lot of work to do in post disposition representation. After the case is done with the court and the youth is in the Oregon Youth Authority or elsewhere. For the most part in Oregon the representation ends. The need for representation does not end and some states are doing better than we are there. Representation at school disciplinary proceedings. Oregon is making some improvement in what is generally called the school prison pipeline. But we have to work to do here. Quality assurance in our defender services. I attended a breakout with representatives of three of the really top defender organizations in the country. The Defender Services in Washington, D.C. Legal Aid in Manhattan and the Miami Public Defender, and there was very useful matrix created for that workshop of their quality assurance protocols in their various entities. I provided that to the directors of all of our public defender offices. We, or course, have a lot of work to do on waiver of counsel. In any case, it is a excellent conference and I was not the only person from Oregon there. There were folks from YRJ, MPD, and also Karen Stenard's consortium in Lane County. As you see on the agenda there, there were regional breakouts. We had one regional summit in Seattle a couple of years ago. We got together and are planning another. That is quick update on that.

2:16:59 P. Ramfjord Paul, the quality assurance diagrams that you sent out. That is something that I know I would love to see. I think it would be great. Maybe some of the other commissioners would like to see it too, but that could be useful.

2:17:16 P. Levy I will be happy to circulate that. It is a really interesting document.

2:17:23 C. Lazenby We have talked in some of our meetings throughout the state about racial disparities. Anything new come up on that front that you saw from around the country? Strategies that people are using?

2:17:40 P. Levy There was quite a bit about that. There was plenary on the role of race in the juvenile justice system. Then specifically there were presentations by what are the main litigators in the New York City stop and frisk litigation which affected disproportionately black boys and men. As far as tips that I could take back here, not specific except to the extent that class action litigation was described. I picked up a lot of other stuff. What I would call "summit swag." There is an enormous amount of material available and it all comes on one very small thumb drive.

2:18:47 C. Lazenby Nice.

Agenda Item No. 11 OPDS Monthly Report

2:19:00 N. Cozine Do you want to start?

2:19:00 P. Gartlan Sure. From the appellate division side a couple of items. One is personnel. I mentioned that Susan Drake is retiring. She retired a few weeks ago and we had interviews and promoted Dave Ferry to take her place as a senior deputy. Dave is a good man from Yale, so we trust he will do a good job.

2:19:18 Chair Ellis That is redundant.

2:19:25 C. Lazenby I think it is going to require a lot of supervision.

2:19:27 P. Gartlan His office is right next door. Another personnel matter is Jed Peterson. He has been with us for about five years. He is an excellent attorney. He is leaving the office to take a position with Ryan O'Connor's firm up in Portland. Ryan use to be in our office. He has a death penalty appeal contract and PCR contract. So Jed is going to be leaving us.

2:20:05 J. Potter Can you speak up a little bit.

2:20:05 P. Gartlan So Jed Peterson is leaving us in February. He will be joining Ryan O'Connor's firm in Portland. We had interviewed people back in August for a vacate Deputy I position. We identified some people to keep in the pool in the event that we had subsequent vacancies. So we do have subsequent vacancies. I am very pleased to say that John Evans, who is an excellent candidate for a Deputy I position. He will be joining us in February.

2:20:45 Chair Ellis I want to tell you that Friday at the dinner I sat with one of your younger lawyers. Today I had occasion to talk with three of your younger lawyers. They were all four just terrific. They are obviously motivated. They enjoy their work. They are excited by it. A lot of things are going well.

2:21:06 P. Gartlan A lot of that is attributable to the seniors who run the team meetings. It is really a good culture.

2:21:15 Chair Ellis It sure felt good. Good work.

2:21:18 P. Gartlan On the more systematic front, the Court of Appeals – I mentioned this before but the Court of Appeals now that it has a fourth panel, each panel will be hearing 20 of our cases per month for the next six to seven months or so. With the intention of eating into the backlog as I mentioned a little bit earlier. Once the briefing is done and the case is at issue, it is taking the Court of Appeals six to eight months to set a case on the docket. So the anticipation is that by the end of this six or seven months period, the court will have eaten into the backlog and it will take about three months to docket a case after full briefing. Somewhat related to that is one of the new judges is Erin Lagesen. She was in the Department of Justice. She was in the appellate division. She has a conflict with respect to this office on cases that were active in her office when she was there. The Court of Appeals intends to address those cases. There is going to be one panel a month that will hear 20 cases, but it will be a two judge panel. I don't know if you remember but years ago when Chief Judge Brewer went to the legislature to get authorization for a two judge Court of Appeals panel to hear cases. We agreed to take part but only if we could identify the cases. We have internal criteria for doing that. There are multiple categories of cases which I prefer not to discuss. So we intend to take advantage of that two judge panel system in a similar way as we had in the past. That will end once Judge Lagesen and the time for conflicts goes away.

2:23:31 Chair Ellis She worked in our firm for awhile. She is a terrific person. I think she will be quite fair. Okay. What else?

2:23:47 N. Cozine So lots of additional updates. One is that we are holding interviews for our four top IT candidates tomorrow. We anticipate holding a second round of interviews the week

following. We are excited about the candidates that we do have. This office is celebrating its 50 anniversary in January. You may have noticed in the Oregon State Bar....

- 2:24:12 Chair Ellis If you trace it all the way back to the ...
- 2:24:13 N. Cozine Sorry. The State Public Defender.
- 2:24:27 Chair Ellis How old is Larry Aschenbrenner?
- 2:24:33 N. Cozine It has been a long meeting. Marc Brown in the office wrote an article that is in the January – or this months Oregon State Bar Bulletin. You can read the article and Marc will actually give us a little bit of background himself at our January meeting. He is in contact with Mr. Aschenbrenner. That should be a delightful little experience for all of us, but you may want to read the article. We have been meeting again regularly with legislators and with Mr. Bender. He is our legislature fiscal office analyst. I just want to note that Mr. Bender has spent significant amounts of time getting to know us and getting to know this office. Getting to know the contracting system and was here for about two and a half hours last week just pouring through the information that we have to document the work that we do. I just want to note that because I really appreciate his time and the attention that he is giving to this office. We intend to follow up to that meeting with some more information particular to the appellate division. Those meetings have been going well. I have also been participating in the dependency..
- 2:25:49 J. Potter You have to speak up again.
- 2:25:49 N. Cozine Sorry. I have been participating with Judge Welch in the dependency work group. That was a legislatively created work group. We met last week and we have an exciting update, which is that through the work of that group we are bringing the Washington State Parent Representation Program managing lawyer down here for a meeting. We also arranged to have a joint meeting of the judicial committees. That will be on January 17. This Commission is scheduled to meet on January 16. The question that I have is does this Commission have an interest in moving the meeting date to the 17th so that we can all be here to hear from the Washington State Parent Representation Program, along with the Judiciary Committee and the dependency work group. Then we would go from that meeting to our own meeting. We have our own agenda items that we need to cover. We could do it in reverse if there is more time in the morning, but essentially to schedule around that meeting so that this Commission could actually hear that information with the legislators.
- 2:26:59 Chair Ellis Why don't you send an email to the Commission. Then everyone respond promptly. If we can do it then I would favor doing it. It if really conflicts with more than two commissioners than don't change.
- 2:27:24 N. Cozine Okay. I will do that. I will send an email to everyone. Another item is that last year at this time we had on our agenda the executive director's annual review. We did not have it on the agenda this time. We did not have it on the agenda this time. I think we got caught up on everything else that has happening in the last six months. I wanted to ask if you wanted that on the January agenda. We need to recreate our process.
- 2:27:42 Chair Ellis It was very Kathryn centered with data gathering. I think it is a good idea to do it. In my mind wondering what the best way to get staff input is. Caroline or Paul – why don't I do it with you, Paul. If you would.....
- 2:28:07 N. Cozine If I could suggest we do have human resources now. It may actually be a nice human resources job. We have Cynthia.

2:28:18 Chair Ellis Cynthia, what we have done in the past is get input from any staff that wishes to give it. It can be done on a no name basis or a name basis, however they feel, but it that gets sent to me and I distribute it to the commissioners. I can't remember how we did that. That is helpful input for us. I think there is probable in the archives what Kathryn used to collect information. If you have any doubt in your mind what to ask, why don't you email me, but if you are comfortable you are pretty sure you know what we ought to be asking then go ahead and ask it.

2:29:03 P. Levy Barnes, if I am remembering correctly, I think staff were invited to contact you directly.

2:29:12 Chair Ellis Yes. Also true. I think it is helpful to you, Nancy, to get an annual pulse.

2:29:27 N. Cozine Yes. I agree.

2:29:29 P. Levy Are you done? John, are you there? Can you hear me?

2:29:34 J. Potter Yes.

2:29:40 P. Levy As far as the ED review you also solicited input from the provider community.

2:29:50 J. Potter Yes. Do you want me to do it again?

2:29:53 Chair Ellis Yes.

2:29:59 J. Potter Okay.

2:29:59 N. Cozine Alright. We will put that on the January agenda assuming we can collect the information and have it in a reasonable format. Also taking into consideration what will be happening on the 17th.

2:30:12 Chair Ellis Now that does take a chunk of time.

2:30:13 N. Cozine It does.

2:30:15 Chair Ellis What we have done in the past, and I think it is a good idea, we get a few minutes separately with each of your direct reports.

2:30:28 N. Cozine Yep.

2:30:28 P. Levy Which have increased expeditiously since last time.

2:30:33 Chair Ellis But the good news is some of them having been direct reports all that long. I think that still is a good idea for us to do.

2:30:42 N. Cozine So we will take that into consideration. February is session so we don't have a meeting scheduled. March we have identified as a time for a retreat. I don't know if you think tackling a ED review and a retreat in the same stretch is too much.

2:30:59 Chair Ellis I think we can do that.

2:31:01 N. Cozine Okay. We will try to get it into January unless the Judiciary Committee presentation ends up taking on a life of its own, in which case we will adjust as necessary.

2:31:15 J. Potter Is the March retreat the 20th?

2:31:17 Chair Ellis I can't remember.

2:31:30 N. Cozine March 16th is our next Commission meeting. Let me look. Yes. March 20th.

2:31:58 J. Potter Where are we retreating too?

2:31:59 N. Cozine We haven't identified yet. Did you have a preference?

2:32:03 Chair Ellis John, it is like the Korean War, we don't retreat we just advance in a different direction.

2:32:16 N. Cozine John, do you have something in mind?

2:32:19 J. Potter I don't have anything in mind. I know that when we used the Oregon Garden it was a nice place. It got us outside of Salem, but it is still very close to Salem. It may be a place that you want to consider.

2:32:46 J. Stevens You could come over here and go skiing.

2:32:50 S. McCrea That is true, Janet.

2:32:53 Chair Ellis Will you be sure in that same email that you are sending to alert everybody to that date.

2:33:00 N. Cozine March 20th?

2:33:00 Chair Ellis Yes. I hope I am alright.

2:33:14 J. Potter I would just like to say for the record that I believe this is first time I have ever had to join a meeting by telephone conference. I have a new appreciation for those who have had to do it in the past. I am willing to contribute a \$100 to a new phone system for OPDS.

2:33:36 P. Levy John, I don't think it is our phone system or hardware or the software that we are using here. I think it is the conferencing service that we use.

2:33:51 J. Stevens It is always bad. It is worse today, but it is always bad.

2:33:59 S. McCrea It does help when you guys speak up.

2:33:59 P. Levy What? In the materials for the next meeting we will provide you this opinion from earlier this month from the Western District of Washington, finding that two municipalities north of Seattle systematically and deliberately denied criminal defendants the assistance of counsel through their contracting choices in establishing their public defense system. If you have five more minutes I will preview it for you. I know you will want to read this. You will see that this does not look anything like our system. It is valuable opinion nonetheless.

2:35:00 Chair Ellis Who is the judge who authored it?

2:35:05 P. Levy I don't have it with me. You will see. The main reason for this denial of the right to counsel was the caseloads that were imposed on two lawyers that were providing all of the services. The result was that there was no opportunity for clients to consult with lawyers outside of the courtroom. There was no investigation. There was no legal analysis. It was a plea mill and nothing more or less than that. The lawyers were closing 1000 cases plus a year. There is some interesting language that I wanted to highlight you from the opinion that will resonate if nothing else does in this case. That is that the court found that intentional choices made while negotiating the public defender contracts and allocating funds to the defender system, left the defenders compensated at such a paltry level that even a brief meeting at the outset of the representation would likely make the venture unprofitable and the cities knew it. It does cause one to pause about when you are contracting and what choices you are leaving your

contractors with at the end of the day. The remedy here was injunctive relief. The court essentially took control of the public defender system there. It has for three years subject to possibly being extended. Among other things ordered the hiring of a person called a “public defender supervisor” who is supposed to make it all better. How exactly that will happen is unclear, but among the things the supervisor should do is collect data on the following: the frequency of use of investigators and experts; motions filed and outcomes; frequency of dismissals; frequency of conviction on lesser included offenses; number of court jury trials. There were no trials in the system that the court found to be a violation of the right to counsel. We will have that in your materials at the next meeting. If there is additional discussion then we will look forward to that.

2:37:54 S. Gorham

Mr. Chair, Steve Gorham again, to think about when you are looking at that opinion is how we do EDPs, Early Disposition Programs, which you might, at some point compare to a (inaudible).

2:38:12 P. Levy

Yes. Neither Mr. Gorham or myself is the first person to draw that connection.

2:38:23 Chair Ellis

Okay. On that cheerful note is there anything else? Anything anybody wants to say for the good of the order?

2:38:33 J. Stevens

Happy Holidays.

2:38:33 Chair Ellis

I would entertain a motion to adjourn.

MOTION: Shaun McCrea moved to adjourn the meeting; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Meeting adjourned

Attachment 2



Oregon State Bar Bulletin — DECEMBER 2013

December Issue

Legal Heritage

Humble Roots:

Chronicling the State Public Defender's Office

By Marc D. Brown

Larry Aschenbrenner recalls coming to Salem in February 1964 as the first State Public Defender. As he explains it, he was told to go see the "space man." The "space man" was the person who found office space for state agencies. Aschenbrenner needed space for the newly created State Public Defender office. The "space man" found him an office in the State Office Building



(now known as the Justice Building) at the corner of Court Street and 12th Avenue in Salem. That agency, now the Appellate Division of the Office of Public Defense Services (and located across the street from that original office), celebrates its 50th year on Jan. 1, 2014.

Although the office is only 50 years old, court-appointed counsel in Oregon dates back to statehood. In Oregon, all courts "have inherent power to appoint counsel for an indigent person accused of a crime when it is established that a need for counsel exists(.)" *State v. Delaney*, 221 Or 620, 641, 332 P2d 71 (1958). Indeed, that inherent power included the power of the Oregon Supreme Court to appoint appellate counsel in a criminal case when the need for counsel exists. *Id.* However, it does not appear that the courts, either trial or appellate, exercised that power regularly, if at all.

In 1955, the legislature had authorized the appointment of counsel in circuit court when a criminal defendant was "without funds and unable to retain his own counsel." ORS 135.320 (1955). Pursuant to statute, when the accused is charged with a misdemeanor and enters a guilty plea, the county was required to pay appointed counsel \$5 for a misdemeanor with a not-guilty plea, the county was required to pay \$10 per day for not more than two days in any one case, a guilty plea in a felony case required the payment of \$15, a not-guilty plea in a felony case required a payment of \$15 per day for not more than three days in any one case, and for any

degree of manslaughter or murder, the county was required to pay "a sum not exceeding \$150, that to the court seems reasonable." ORS 135.330 (1955). Until 1983, the county was responsible for indigent defense services.

Several attorneys practicing in the late 1950s and early 1960s remember the local judges having a list of all attorneys in the county and simply appointing the next attorney on the list, whether or not that attorney had any criminal law experience. Barnes Ellis, a longtime proponent of public defense in Oregon, recalls the scene at the Portland Municipal Court in the old Portland Police Headquarters (now the offices of Stoll Berne). According to Ellis, several older attorneys would hang around the court, and a judge, looking for an attorney to appoint, would simply walk out to the hallway and choose one.

Although the legislature created the State Public Defender's office in 1964, the role of that office was to act "as attorney at any stage of a proceeding before any court, including the Oregon Supreme Court, for an individual who is being deprived of his liberty in the custody of the warden of the Oregon State Penitentiary or of the superintendent of the Oregon Correctional Institution, and the proceeding is other than" a habeas corpus proceeding or a proceeding for criminal or civil contempt of court. ORS 138.770 (1963). Because the court system had not yet been unified and each circuit and district court was under the authority of the county in which it was located, the legislature was limited in what it could do regarding appointed counsel at the trial level.

In the 1963 session, the legislature created the "Public Defender Committee" and provided that the committee appoint a public defender, determine policies and procedures for the performance of the defender's functions, determine standards of eligibility for the defendant and deputies, and approve a budget for the office. ORS 138.730 (1963). The first committee included Roy Shields (founding partner of Cosgrove Vergeer Kester), Wallace P. Carson (Salem attorney and father of former Chief Justice Wallace Carson Jr.), Robert W. Chandler (editor and publisher of the Bend *Bulletin*), Robert B. Frazer (editor of the Eugene *Register-Guard*) and Orval N. Thompson (Albany attorney). In the 1963-1965 biennium, the legislature budgeted \$35,000 for the office and \$149,422 for the following biennium. The Public Defender Committee created the following mission statement for the office:

It is the Public Defender's primary responsibility to ensure that no indigent inmate of the Oregon State Penitentiary or the Oregon State Correctional Institution is deprived of the right to a constitutional and fair trial.

Aschenbrenner, one of 36 applicants for the position of public defender, grew up in Oregon, graduated from University of Oregon Law School in 1957 and, by 1964, had been in private practice, had sat as a Grants Pass justice of the peace and had served as the Josephine County district attorney. Once appointed as public defender, Aschenbrenner hired Gary Babcock as his deputy and sent word to the inmates at the Oregon State Penitentiary and Oregon State Correctional Institution (the only two prisons in Oregon at the time) that the office was available to represent inmates in post-conviction relief proceedings.

In 1964, unlike today, the post-conviction relief statutes provided no time limit for filing a petition. ORS 138.510 (1963). Within a short period of time, the office had received two to three thousand requests for assistance. He and Babcock went to the prisons every day to talk with inmates. Many of the cases involved inmates who pleaded guilty without being advised that they had a right to an attorney. Those cases, Aschenbrenner recalled, were the easy ones to win.

Other cases proved more challenging. For example, Elmer Collins, an inmate at the Oregon State Penitentiary, sent a letter requesting assistance to the Public Defender's Office on April 20, 1965. Collins was serving a 20-year habitual offender sentence based, in part, on a prior rape conviction in Oklahoma. Collins claimed that his twin brother committed that offense and he had been misidentified as the perpetrator. Aschenbrenner was skeptical but, on further investigation, discovered that Collins did, in fact, have a twin brother. When Aschenbrenner located Elbert Collins, he was surprised to discover that Elbert and Elmer were identical. Ultimately, Elbert confessed to the Oklahoma crime. The problem for Aschenbrenner was that he had no authority to ask to vacate the Oklahoma conviction. However, he discovered that African Americans had been excluded from the Oklahoma jury, a practice that the Oklahoma Supreme Court had since banned. An Oregon Supreme Court decision, won by Gary Babcock, held that a person could challenge a habitual offender sentence on the grounds that one of the prior convictions was void. *Clark v. Gladden*, 247 Or 629, 432 P2d 182 (1967). Aschenbrenner won a reversal of Collins's habitual offender sentence on the grounds that the Oklahoma conviction was void.

During his tenure as public defender, Aschenbrenner and several other Oregon attorneys volunteered with the American Lawyers Committee for Civil Rights Under Law. In November 1967, Aschenbrenner tendered his resignation to the Public Defender Committee to become general counsel for the American Lawyers Committee for Civil Rights Under Law in Jackson, Miss. The commission appointed Gary Babcock to succeed Aschenbrenner. Babcock served in that position from 1968 to 1990.

Six years after Aschenbrenner's departure, a Willamette Law student named Paul De Muniz interned with the Public Defender's Office. The office, then located in the Bureau of Labor and Industries Building, had three very popular internship positions for second-year law students (primarily, according to De Muniz, because the internships paid a stipend). De Muniz recalled that on his first day, he went from never having a law job to being given a transcript and told to write a brief. One of the cases De Muniz briefed while at the office, *State v. Nicholson*, involved a manslaughter conviction from Multnomah County. Robert Cannon, a deputy public defender, asked De Muniz if he would like to argue the case before the court of appeals. After the client agreed to allow De Muniz to argue the case, the office petitioned the court to allow him to appear on the client's behalf. Under the student appearance rule, the presiding judicial officer had to consent to the appearance of any student before the court. This was the first time the court of appeals was asked to allow a student to appear. Much discussion ensued about the constitutionality of allowing a student to argue a case. Chief Judge Herbert Schwab asked for the brief, read it and signed the order. On the first day of his third year of law school, De Muniz argued *State v. Nicholson* before the court of appeals. Defendant prevailed on appeal. 19 Or App 226, 527 P2d 140 (1974).

Throughout his third year, De Muniz continued to work at the office part time. The summer after De Muniz graduated, the legislature agreed to fund a fifth attorney position in the office, and Babcock offered that position to De Muniz. They carved out an office space from the library, hired another secretary and De Muniz began his legal career as a deputy public defender. By the time he left 18

months later, De Muniz had argued and won two cases at the Oregon Supreme Court. *State v. Valdez*, 277 Or 621, 561 P2d 1006 (1977); *State v. Smith*, 277 Or 251, 560 P2d 1066 (1977). (On a side note, opposing counsel in *Smith* was Kevin Mannix, then an assistant attorney general.)

Sally Avera served as the third public defender from 1990 to 1999 and was followed by David Groom, who served as the public defender from 1999 to 2003 and was, technically, the last person to oversee the State Public Defender's Office. In 2003, as part of a reorganization of indigent defense, the legislature merged the Indigent Defense Services Division of the Judicial Department (itself created in 1983 when the state took over indigent defense as part of the consolidation of the court system) with the State Public Defender's Office to form the Office of Public Defense Services (OPDS). The Public Defender's Office became the Legal Services Division and later the Appellate Division. Peter Gartlan became the chief public defender after the merger and remains in that position today.

OPDS is now overseen by the Public Defense Service Commission. The executive director is appointed by the commission to manage both the Appellate Division and the Business Services Division (formerly Indigent Defense Services). The latter is given the task of contracting with trial level public defenders and setting performance standards.

From its humble roots, the Appellate Division now employs 43 attorneys and provides representation in direct appeals in criminal cases, appeals from adverse rulings of the Board of Parole and Post-Prison Supervision, and appeals from juvenile dependency and the termination of parental rights.

ABOUT THE AUTHOR

Marc D. Brown is a deputy defender with the Oregon Office of Public Defense Services in Salem.

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Attachment 3

1 necessitating injunctive relief. Defendants took the position that, whatever defects may have
2 existed in their public defense systems before 2012, they have taken significant steps to improve
3 the representation provided, including contracting with a different law firm to provide defense
4 services, hiring additional public defenders, and paying them more. The Court must determine
5 whether a constitutional right has been violated, whether the Cities are responsible for the
6 violation, and what the appropriate remedy is.

7 **FINDINGS OF FACT**

8 Plaintiffs have shown, by a preponderance of the evidence, that indigent criminal
9 defendants in Mount Vernon and Burlington are systematically deprived of the assistance of
10 counsel at critical stages of the prosecution and that municipal policymakers have made
11 deliberate choices regarding the funding, contracting, and monitoring of the public defense
12 system that directly and predictably caused the deprivation. The period of time during which
13 Richard Sybrandy and Morgan Witt (hereinafter, Sybrandy and Witt) provided public defense
14 services for the Cities was marked by an almost complete absence of opportunities for the
15 accused to confer with appointed counsel in a confidential setting. Most interactions occurred in
16 the courtroom: discussions regarding possible defenses, the need for investigation, existing
17 physical or mental health issues, immigration status, client goals, and potential dispositions
18 were, if they occurred at all, perfunctory and/or public. There is almost no evidence that
19 Sybrandy and Witt conducted investigations in any of their thousands of cases, nor is there any
20 suggestion that they did legal analysis regarding the elements of the crime charged or possible
21 defenses or that they discussed such issues with their clients. Substantive hearings and trials
22 during that era were rare. In general, counsel presumed that the police officers had done their
23 jobs correctly and negotiated a plea bargain based on that assumption.² The appointment of
24

25
26 ² When asked to explain why there were so few trials during his tenure as public defender, Mr. Witt essentially said that trials were unnecessary because “we all knew where we were going.”

1 counsel was, for the most part, little more than a formality, a stepping stone on the way to a case
2 closure or plea bargain having almost nothing to do with the individual indigent defendant. To
3 the extent that “adequate representation” presumes a certain basic representational relationship,
4 there was a systemic failure in the Sybrandy and Witt era. Adversarial testing of the
5 government’s case was so infrequent that it was virtually a non-factor in the functioning of the
6 Cities’ criminal justice system.

7 This situation was the natural, foreseeable, and expected result of the caseloads the
8 attorneys handled. Sybrandy and Witt, both of whom also had private practices (Mr. Witt spent
9 only 40% of his time providing public defense services), each closed approximately 1,000 public
10 defense cases per year in 2009, 2010, and 2011 and often spent less than an hour on each case.
11 Although both counsel testified that they did not feel rushed or overworked, it is clear that, in
12 light of the sheer number of cases they handled, the services they offered to their indigent clients
13 amounted to little more than a “meet and plead” system. While this resulted in a workload that
14 was manageable for the public defenders, the indigent defendants had virtually no relationship
15 with their assigned counsel and could not fairly be said to have been “represented” by them at
16 all. The Cities, which were fully aware of the number of public defenders under contract,
17 remained wilfully blind regarding their overall caseloads and their case processing techniques.
18 The City officials who administered the public defense contracts did not feel it was necessary for
19 them to know how many non-public defense cases Sybrandy and Witt were handling, the
20 number of public defense cases they were assigned, or even whether the defenders were
21 complying with the standards for defense counsel set forth in the Cities’ own ordinances and
22 contracts. Even when Sybrandy and Witt expressly declined to provide basic services requested
23 by the Cities – such as initiating contact with their clients and/or visiting in-custody defendants –
24
25
26

1 the Cities were not particularly concerned.³ Eric Stendal, the contract administrator for the City
2 of Mount Vernon, testified that as long as things were “quiet and good” and there was no
3 significant increase in the costs the Cities incurred for their public defense system, defendants
4 were happy with the arrangement and continued to contract with Sybrandy and Witt.

5 After this lawsuit was filed, Sybrandy and Witt were no longer willing to provide
6 public defense services for the Cities. The Cities issued a request for proposals and ultimately
7 hired Mountain Law to provide the necessary services. Mountain Law came on-line in April
8 2012 with two attorneys. The evidence regarding initial caseloads varies significantly: the
9 Cities negotiated the new public defense contract on the assumption that over 1,700 cases would
10 be transferred from Sybrandy and Witt during the transition period, but Mountain Law’s
11 caseload statistics show that it was assigned approximately 1,100 cases. Whatever the true
12 numbers, it is clear that by the end of May each of the two public defenders was handling well
13 over 400 cases. By the end of 2012, Mountain Law had added a third attorney and another 963
14 cases. The Cities were kept apprised of these numbers. They were also aware that, on June 15,
15 2012, the Supreme Court of Washington established 400 unweighted misdemeanor cases per
16 year as “the maximum caseload[] for fully supported full-time defense attorneys for cases of
17 average complexity and effort,” assuming a “reasonably even distribution of cases throughout
18 the year.” Because the 400 caseload limit would not be effective until September 1, 2013,
19 neither Mountain Law nor the Cities were particularly concerned that Michael Laws and Jesse
20 Collins were each handling over 500 cases at any given time between April and August 2012.
21 The mantra during that period and continuing through trial was that Mountain Law would
22

23 ³ While negotiating the public defense contract in 2008, Mr. Sybrandy notified the Cities that
24 “[t]here is much in the proposed contract which is not possible for us to comply with, at least at the level
25 of compensation we have proposed.” Tr. Ex. 36. Rather than raise the level of compensation to obtain
26 the level of services required under Ordinance 3436 and, by extension, the standards endorsed by the
Washington State Bar Association for the provision of public defense services, the Cities simply struck
or ignored requirements related to, among other things, client interactions and reporting/monitoring.

1 continue to work toward the 400 annual caseload limit by adding attorneys as needed. As of the
2 time of trial, Mountain Law had added two additional attorneys (one in August 2012 and another
3 in March 2013), presumably reducing the per attorney caseload to some extent. The
4 preponderance of the evidence shows, however, that Mountain Law continues to handle
5 caseloads far in excess of the per attorney limits set forth in the Supreme Court's guidelines.⁴

6 The Court does not presume to establish fixed numerical standards or a checklist
7 by which the constitutional adequacy of counsel's representation can be judged. The experts,
8 public defenders, and prosecutors who testified at trial made clear that there are myriad factors
9 that must be considered when determining whether a system of public defense provides indigent
10 criminal defendants the assistance required by the Sixth Amendment. Factors such as the mix
11 and complexity of cases, counsel's experience, and the prosecutorial and judicial resources
12 available were mentioned throughout trial. The Washington Supreme Court took many of the
13 relevant factors into consideration when it imposed a hard cap on the number of cases a public
14 defender can handle over the course of a year:⁵ the 400 caseload limit applies as long as counsel
15

16 ⁴ The parties generally agree that the Standards for Indigent Defense adopted by the Washington
17 Supreme Court provide a sort of best practices to which the Cities aspire. The evidence in the record
18 strongly suggests that, even with the addition of Sade Smith and Stacy DeMass to the public defender
19 ranks, defendants still run afoul of the per annum limitation. The question is not whether, on any
20 particular day, a public defender has more or less than 400 open cases. No attorney can reasonably be
21 expected to handle 400 criminal cases at once. Pursuant to the Standards, the goal is to have no more
22 than 400 cases assigned to each public defender over the course of an entire year, with the assignments
temporally spaced so that he or she can give each client the representation that is constitutionally
required. Mountain Law opened 2,070 cases between April and December 2012 – even if all four
attorneys had been on board during the entire period (and they were not), they would have far exceeded
the Supreme Court's guidelines.

23 ⁵ The Washington Defender Association ("WDA"), a statewide organization of public defenders
24 and public defender agencies that first proposed the caseload limits, argues that:

25 Caseload levels are the single biggest predictor of the quality of public defense
26 representation. Not even the most able and industrious lawyers can provide effective
 representation when their workloads are unmanageable. Without reasonable caseloads,

1 handles only misdemeanor cases, is employed full-time in public defense, is handling cases of
2 average complexity and effort, counts every matter to which he or she is assigned to provide
3 representation,⁶ is fully supported, and has relevant experience. Where counsel diverges from
4 these assumptions, the caseload limit must be lowered in an attempt to protect the quality of the
5 representation provided.

6 While a hard caseload limit will obviously have beneficial effects and the
7 Washington Supreme Court's efforts in this area are laudable, the issue for this Court is whether
8 the system of public defense provided by the defendant municipalities allows appointed counsel
9 to give each case the time and effort necessary to ensure constitutionally adequate representation
10 for the client and to retain the integrity of our adversarial criminal justice system. Mount
11 Vernon and Burlington fail this test. Timely and confidential input from the client regarding
12 such things as possible defenses, the need for investigation, mental and physical health issues,
13 immigration status, client goals, and potential dispositions are essential to an informed
14 representational relationship. Public defenders are not required to accept their clients'
15 statements at face value or to follow every lead suggested, but they cannot simply presume that
16 the police officers and prosecutor have done their jobs correctly or that investigation would be
17 futile. The nature and scope of the investigation, legal research, and pretrial motions practice in
18 a particular case should reflect counsel's informed judgment based on the information obtained

19
20 even the most dedicated lawyers cannot do a consistently effective job for their clients.
21 A warm body with a law degree, able to affix his or her name to a plea agreement, is not
22 an acceptable substitute for the effective advocate envisioned when the Supreme Court
23 extended the right to counsel to all persons facing incarceration.

24
25 WDA 2007 Final Standards for Public Defense Services with Commentary at 13
26 (<http://www.defensenet.org/about-wda/standards>).

⁶ If the Cities adopt a numerical case weighting system that recognizes the greater or lesser
workload required for various types of cases (and therefore more accurately estimates workload rather
than just case counts), the Supreme Court's standards would limit each public defender to 300 weighted
misdemeanor cases.

1 through timely and confidential communications with the client. A failure of communication
2 precludes the possibility of informed judgment. If actual, individualized representation occurs –
3 as opposed to a meet and plead system – the systemic result is likely to be more adversarial
4 testing of the prosecutor’s case throughout the proceeding and a healthier criminal justice system
5 overall. Again, no hard and fast number of pretrial motions or trials is expected, but when the
6 number of cases going to trial is both incredibly small (in absolute and comparative terms) and
7 wildly out of line with the number of trials that occurred in nearby (and sometimes overlapping)
8 jurisdictions, it may be, and in this case is, a sign of a deeper systemic problem.

9 A number of defendants’ witnesses, including former Pierce County Executive and
10 Prosecutor John Ladenburg, pointed out that the adequacy of counsel cannot fairly be judged in a
11 vacuum: the Court must also take into consideration the resources available to the other side. If,
12 in a time of fiscal constraint, the prosecutor is also overwhelmed and/or the municipal jail cannot
13 accommodate any more inmates, the resulting plea offers are likely to be as good as or better
14 than the public defender could negotiate even if he or she spent untold hours on legal research
15 and investigation.⁷ The Court does not dispute the fact that many, if not the vast majority, of the
16 plaintiff class obtained a reasonable resolution of the charges against them. The problem is not
17 the ultimate disposition: if plaintiffs were alleging that counsel had affirmatively erred and
18 obtained a deleterious result, the Sixth Amendment challenge would have been brought under
19 Strickland v. Washington, 466 U.S. 668 (1984), rather than Gideon v. Wainwright, 372 U.S. 335

20 _____
21 ⁷ It is clear from the testimony of a former city attorney assigned to prosecute misdemeanor
22 cases for one of the municipalities that the people of the City received even more ineffective
23 representation than the individuals charged with crimes. There is no constitutional right regarding the
24 quality of the people’s lawyer, however, and the Court is not in a position to address the negative
25 impacts that budgetary constraints have had on any part of the criminal justice system other than the
26 provision of indigent defense. While the city attorney’s willingness to grant overly-lenient plea
agreements may explain Sybrandy and Witt’s determination that investigation, research, and
communication were unnecessary impediments to the expeditious resolution of their cases, it does not
excuse their consistent failure to establish a meaningful attorney/client relationship with the people they
represented.

1 (1963). The point here is that the system is broken to such an extent that confidential
2 attorney/client communications are rare, the individual defendant is not represented in any
3 meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.
4 Advising a client to take a fantastic plea deal in an obstruction of justice or domestic violence
5 case may appear to be effective advocacy, but not if the client is innocent, the charge is
6 defective, or the plea would have disastrous consequences for his or her immigration status. It is
7 the lack of a representational relationship that would allow counsel to evaluate and protect the
8 client's interests that makes the situation in Mount Vernon and Burlington so troubling and gives
9 rise to the Sixth Amendment violation in this case.

10 Given the fiscal constraints imposed on both sides of the criminal justice equation
11 in Mount Vernon and Burlington, it is not surprising that the Mountain Law attorneys had to
12 adopt some of the same time-saving and "efficient" case management practices that dominated
13 the Sybrandy and Witt era in order to handle the caseload they inherited in April 2012 and the
14 additional cases that have been assigned to them each and every month thereafter. The evidence
15 is clear that Mountain Law, while more willing to conduct an initial interview with their clients,
16 is simply unable to do so in a majority of cases. Although Mountain Law staff schedule a
17 meeting with the client as soon as the case is assigned, the attorneys' courtroom and other
18 commitments often make it impossible to hold the meeting before the client's first appearance.
19 Thus, the public defenders often meet their clients for the first time in the courtroom, sometimes
20 with a plea offer already in hand. At that point, there is really no opportunity for a confidential
21 interview, the client may or may not understand the proceedings, and the public defender is
22 unprepared to go forward on the merits of the case. The client is given a choice between
23 continuing the hearing so he or she can meet with the public defender or to accept whatever offer
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1 happens to be on the table.⁸ While there is some evidence of investigations, legal research, and
2 an uptick in the number of cases set for trials in Mount Vernon and Burlington since Mountain
3 Law took over, the numbers are still shockingly low. Mr. Laws apparently spoke to only three
4 or four witnesses in the whole of 2012, a review of fifty Mountain Law case files showed no
5 documentation of any legal analysis or research, and there is evidence of only one pre-trial
6 motion and five or six trials in 2012.

7 The Court finds that, as of the date of trial, the representation provided to indigent
8 defendants in Mount Vernon and Burlington remains inadequate. The Court would have to
9 make several unsupported assumptions regarding Mountain Law's ability to clear the backlog of
10 cases it inherited, the distribution of cases within the office, counsels' experience and
11 proficiency, and the number of new cases opened each month to conclude that the defenders'
12 current caseloads allow the kind of individualized client representation that every indigent
13 criminal defendant deserves and on which our adversarial system of criminal justice depends.
14 Even if the Court were willing to make those assumptions, there is no evidence that Mountain
15 Law has rethought or restructured the case management procedures that were developed during
16 the first few hectic months of its contract with the Cities. Rather than providing an opportunity
17 for a representational relationship to develop and following up as appropriate given the facts of
18 each case, Mountain Law allowed the massive caseload to determine the level of representation
19

20 ⁸ Defendants made much of the fact that other professionals involved in the criminal justice
21 system – the judges and prosecutors – did not see anything wrong with the representation provided in
22 any particular case. As the Court has already noted, the result obtained in an individual case would
23 likely appear reasonable, especially when the client assures the presiding judicial officer that he or she is
24 making a knowing and informed decision to plead guilty. But what the judges and prosecutors had no
25 way of knowing was whether the client ever had a chance to meet with the public defender in a
26 confidential setting, whether the attorney conducted an investigation or knew anything about the case
other than what was in the charging document and/or police report, or whether a meaningful
attorney/client relationship actually existed. No indigent criminal defendant testified that they enjoyed a
representational relationship with Sybrandy, Witt, or Mountain Law, despite having positive things to
say about certain conflict counsel and/or the Skagit County public defenders.

1 that would be afforded and has continued those practices even after adding additional attorneys.
2 The Court’s findings should not be interpreted as an indictment of Mountain Law,
3 its attorneys, or their legal acumen. The Court is encouraged by some of the changes Mountain
4 Law is making in Mount Vernon and Burlington: the public defense system is definitely
5 trending in the right direction, and the Court sees great promise in Mountain Law’s dedicated
6 young lawyers. By accepting a contract with the Cities of Mount Vernon and Burlington,
7 however, Mountain Law became embroiled in an ongoing debate regarding the adequacy of our
8 public defense systems in times of fiscal constraint and the meaning of the right to counsel fifty
9 years after it was promised in Gideon v. Wainwright, 372 U.S. 335 (1963). Although the right to
10 the assistance of counsel regardless of economic status is established by the Constitution,
11 legislative enactments are required to ensure that the right is maintained, and funding limitations
12 imposed over the past few years are having a cumulative and adverse impact at both the state and
13 national levels.⁹ In the State of Washington, there are undoubtedly a number of municipalities

14
15 ⁹ The federal judiciary’s system of indigent public defense services, long considered the gold
16 standard in the United States, has been adversely affected by successive years of reduced budgets and
17 the 2013 sequestration cuts. For the first time, federal public defenders were forced to take furlough
18 days, making them unavailable to their clients and unable to attend court hearings. More cases were
19 shifted to private lawyers, whose pay was reduced and delayed in an effort to cut costs. On November
20 6, 2013, fifty-eight Members of Congress sent a letter to the Speaker of the House and the Minority
21 Leader indicating their grave concern that the underfunding of public defense at the federal level was
22 placing the Sixth Amendment right to counsel in jeopardy ([http://quigley.house.gov/uploads/
23 FederalDefenderLetter1.pdf](http://quigley.house.gov/uploads/FederalDefenderLetter1.pdf)).

24 At the intersection of staggering caseloads and insufficient resources we even find federal courts
25 struggling to justify procedures that simply do not hold up under constitutional scrutiny. For instance,
26 United States Magistrate Judges in Arizona faced with an explosion in the number of illegal entry cases
across the Mexican border started doing “mass” plea proceedings with up to seventy defendants
pleading guilty at the same time. United States v. Arqueta-Ramos, 730 F.3d 1133, 1135-36 (9th Cir.
2013). During one such hearing, there were fifteen defense attorneys present, each representing
between three and five defendants. Id. at 1136. The court advised the large group of defendants of their
rights and then questioned them in groups of five, collectively asking questions to ascertain whether
they understood their rights and the consequences of pleading guilty. Id. at 1139. The Ninth Circuit
Court of Appeals struck down the court’s collective group questioning because the court did not address
any defendant personally during its advisement of rights or the small group questioning. Id. (“We act

1 whose public defense systems would, if put under a microscope, be found wanting. As defense
 2 counsel rightly pointed out, this is a test case that cannot properly be laid at Mountain Law's
 3 door. It was the confluence of factors in place in Mount Vernon and Burlington in 2011 - long
 4 before Mountain Law began providing public defense services - that brought the Cities to the
 5 attention of the ACLU and prompted this Sixth Amendment challenge.

6 CONCLUSIONS OF LAW

7 A. Right to Counsel

8 The Sixth Amendment to the United States Constitution provides that "[i]n all
 9 criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for
 10 his defense."¹⁰ Such assistance is vital to the proper functioning of our criminal justice system:
 11 in the absence of adequate representation, the prosecution's case may not be subjected to
 12 meaningful adversarial testing and the defendant may be unable to assert other rights he may
 13 have or to pursue valid defenses. U.S. v. Cronin, 466 U.S. 648, 654, 659 (1984). See also
 14 Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases,
 15 of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and
 16 educated layman has small and sometimes no skill in the science of law. If charged with crime,
 17 he is incapable, generally, of determining for himself whether the indictment is good or bad. He
 18 is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial
 19 without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the
 20 issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his
 21 defense, even though he have a perfect one. He requires the guiding hand of counsel at every

22 _____
 23 within a system maintained by the rules of procedure. We cannot dispense with the rules without setting
 24 a precedent subversive of the structure." (quoting United States v. Roblero-Solis, 588 F.3d 692, 693 (9th
 Cir. 2009)).

25 ¹⁰ Plaintiffs have also asserted a claim under Article I, Section 22 of the Washington State
 26 Constitution. Because the parties did not offer any evidence or legal argument peculiar to that claim, it
 has not been separately analyzed.

1 step in the proceedings against him. Without it, though he be not guilty, he faces the danger of
2 conviction because he does not know how to establish his innocence.”). The United States
3 Supreme Court has determined that the right to counsel is “fundamental and essential to a fair
4 trial” and applies in both federal and state proceedings. Gideon v. Wainwright, 372 U.S. 335,
5 343-44 (1963) (“[I]n our adversary system of criminal justice, any person haled into court, who
6 is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.
7 This seems to us to be an obvious truth.”).

8 Despite the broad language of the Sixth Amendment, Powell, and Gideon, it was
9 not until 1972 that the Supreme Court made clear that the right to counsel extends to all cases in
10 which the accused may be deprived of his liberty, whether characterized as a felony or a
11 misdemeanor. In Argersinger v. Hamlin, 407 U.S. 25, 33 (1972), the Supreme Court noted that
12 the legal and constitutional questions involved in the prosecution of petty offenses are not
13 necessarily any less complex than those that arise in felony cases. In addition, the sheer volume
14 of misdemeanor cases may give rise to unique procedural challenges that threaten the fairness of
15 the criminal justice system:

16 The volume of misdemeanor cases, far greater in number than felony prosecutions,
17 may create an obsession for speedy dispositions, regardless of the fairness of the
18 result. . . . An inevitable consequence of volume that large is the almost total
19 preoccupation in such a court with the movement of cases. The calendar is long,
20 speed often is substituted for care, and casually arranged out-of-court compromise
21 too often is substituted for adjudication. Inadequate attention tends to be given to
22 the individual defendant, whether in protecting his rights, sifting the facts at trial,
23 deciding the social risk he presents, or determining how to deal with him after
24 conviction. . . . Suddenly it becomes clear that for most defendants in the criminal
25 process, there is scant regard for them as individuals. They are numbers on
26 dockets, faceless ones to be processed and sent on their way. The gap between the
theory and the reality is enormous. . . . One study concluded that misdemeanants
represented by attorneys are five times as likely to emerge from police court with
all charges dismissed as are defendants who face similar charges without counsel.

Id. at 34-36 (internal quotation marks and citations omitted). The Washington Supreme Court

1 recognized the primacy of the Argersinger decision in McInturf v. Horton, 85 Wn.2d 704, 707
2 (1975), overruling an earlier opinion that held there was no right to appointment of counsel in
3 misdemeanor prosecutions. See also Washington Criminal Rule for Courts of Limited
4 Jurisdiction 3.1 (“The right to a lawyer shall extend to all criminal proceedings for offenses
5 punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or
6 otherwise.”).

7 Mere appointment of counsel to represent an indigent defendant is not enough to
8 satisfy the Sixth Amendment’s promise of the assistance of counsel. While the outright failure
9 to appoint counsel will invalidate a resulting criminal conviction, less extreme circumstances
10 will also give rise to a presumption that the outcome was not reliable. For example, if counsel
11 entirely fails to subject the prosecution’s case to meaningful adversarial testing, if there is no
12 opportunity for appointed counsel to confer with the accused to prepare a defense, or
13 circumstances exist that make it highly unlikely that any lawyer, no matter how competent,
14 would be able to provide effective assistance, the appointment of counsel may be little more than
15 a sham and an adverse effect on the reliability of the trial process will be presumed. Cronic, 466
16 U.S. at 658-60; Avery v. Alabama, 308 U.S. 444, 446 (1940).

17 **B. Municipal Liability under Section 1983**

18 Under 42 U.S.C. § 1983, a municipality is a person and may therefore be liable for
19 a constitutional deprivation. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
20 2006).¹¹ Although a municipality may not be sued under § 1983 simply because an employee
21 inflicted constitutional injury, where the injury is the result of a policy or custom of the
22 municipality, the injury-generating acts are “properly speaking, acts of the municipality – that is,
23 acts which the municipality has officially sanctioned or ordered.” Pembauer v. City of
24 _____

25 ¹¹ Plaintiffs are not suing the individual public defenders for the way in which they performed a
26 lawyer’s traditional functions (a claim likely precluded by Polk County v. Dodson, 454 U.S. 312, 325
(1981)).

1 Cincinnati, 475 U.S. 469, 480 (1986) (internal quotation marks omitted). Discrete decisions by a
2 government official with ultimate authority over the matter in question generally give rise to
3 official municipal policy for purposes of § 1983. Id. at 480-81.

4 The Court finds that the public defense system in Mount Vernon and Burlington
5 has systemic flaws that deprive indigent criminal defendants of their Sixth Amendment right to
6 the assistance of counsel. Although counsel are appointed in a timely manner, the sheer number
7 of cases has compelled the public defenders to adopt case management practices that result in
8 most defendants going to court for the first time – and sometimes accepting a plea bargain –
9 never having had the opportunity to meet with their attorneys in a confidential setting. The
10 attorney represents the client in name only in these circumstances, having no idea what the
11 client’s goals are, whether there are any defenses or mitigating circumstances that require
12 investigation, or whether special considerations regarding immigration status, mental or physical
13 conditions, or criminal history exist. Such perfunctory “representation” does not satisfy the
14 Sixth Amendment. See Strickland, 466 U.S. at 691 (counsel have a Sixth Amendment duty to
15 conduct a reasonable investigation or to make a decision, based “on informed strategic choices
16 made by the defendant and on information supplied by the defendant,” that a particular
17 investigation is unnecessary); Cronic, 466 U.S. at 658-60; Avery, 308 U.S. at 446; Powell, 287
18 U.S. at 58 (“It is not enough to assume that counsel thus precipitated into the case thought there
19 was no defense, and exercised their best judgment in proceeding to trial without preparation.
20 Nether they nor the court could say what a prompt and thorough-going investigation might
21 disclose as to the facts.”); Hurrell-Harring v. State of New York, 930 N.E.2d 217, 224 (N.Y.
22 2010) (recognizing that “[a]ctual representation assumes a certain basic representational
23 relationship,” such that the failure to communicate and/or appear at critical stages of the
24 prosecution may be reasonably interpreted as nonrepresentation rather than ineffective
25 representation).

26 Having found that plaintiffs’ Sixth Amendment rights were violated, the Court

1 must determine whether the Cities are responsible for the constitutional deprivation. Plaintiffs
2 have shown that the constitutional deprivations at issue here were the direct and predictable
3 result of the deliberate choices of City officials charged with the administration of the public
4 defense system. Intentional choices made while negotiating the public defender contracts and
5 allocating funds to the public defender system left the defenders compensated at such a paltry
6 level that even a brief meeting at the outset of the representation would likely make the venture
7 unprofitable. And the Cities knew it. When Mountain Law took over the public defense
8 contract, the Cities estimated there would be approximately 1,700 cases transferred from
9 Sybrandy and Witt and yet chose a proposal pursuant to which they would pay only \$17,500 per
10 month. That works out to \$10 per case for April 2012, with the per case rate reduced in future
11 months by each additional case assigned to Mountain Law. Mountain Law had (and still has)
12 every incentive to close cases as quickly as possible and to minimize the time spent on each
13 case. While every attorney, whether privately or publicly retained, must be cognizant of costs
14 when choosing a course of action, defending an indigent criminal defendant – any indigent
15 criminal defendant – on \$10 per month inclusive of staff, overhead, and routine investigation
16 costs makes it virtually impossible that the lawyer, no matter how competent or diligent, will be
17 able to provide effective assistance.¹²

18 Legislative and monitoring decisions made by the policymaking authorities of the
19 Cities ensured that any defects in the public defense system would go undetected or could be
20 easily ignored. Despite receiving monthly reports listing case assignments, types of cases,
21 dispositions, and hours worked on each case, the administrators made no effort to calculate the
22 number of cases assigned to Mountain Law or to evaluate the nature or extent of the services
23 provided under the contract. After this litigation was filed, the City of Mount Vernon twice
24

25 ¹² The Court recognizes that approximately 1,100 cases were transferred from Sybrandy and
26 Witt to Mountain Law, making the actual pay per case closer to \$16 for April 2012. Nevertheless, the
conclusion that the Cities knowingly underfunded their public defense system remains inescapable.

1 amended its ordinance related to the provision of public defender services, both times removing
2 what little “teeth” the previous ordinances had. For example, in January 2012, the City
3 jettisoned its previously acknowledged obligation to develop “a procedure for systematic
4 monitoring and evaluation of attorney performance based on published criteria” in favor of a
5 newly-found concern that such monitoring and evaluation “is not practical nor consistent with
6 attorney/client privilege nor the constitutional rights of indigent defendants.” Tr. Exs. 45 and
7 147. In November 2012, Mount Vernon deleted references to specific duties of the public
8 defenders, redefined “case” to exclude from the caseload calculation matters that would clearly
9 count toward the 400 unweighted limit under the Supreme Court’s Standards for Indigent
10 Defense, and removed the requirement that the public defenders report hours worked on and the
11 disposition of each case.

12 The Court finds that the combination of contracting, funding, legislating, and
13 monitoring decisions made by the policymaking authorities for the Cities directly caused the
14 truncated case handling procedures that have deprived indigent criminal defendants in Mount
15 Vernon and Burlington of private attorney/client consultation, reasonable investigation and
16 advocacy, and the adversarial testing of the prosecutor’s case. The Cities are therefore liable
17 under § 1983 for the systemic Sixth Amendment violation proved by plaintiffs. See Miranda v.
18 Clark County, 319 F.3d 465 (9th Cir. 2003) (finding that county could be liable for constitutional
19 deprivations arising from funding and case assignment policies); Clay v. Friedman, 541 F. Supp.
20 500, 502, 505-06 (N.D. Ill. 1982) (finding that administrative head of public defender’s office
21 could be liable for non-representative decision-making and that county could be liable for
22 promulgating policies and customs that led to the constitutional deprivation).¹³

24 ¹³ To the extent Gausvik v. Perez, 239 F. Supp.2d 1047, 1065 (E.D. Wash. 2002), stands for the
25 proposition that hiring an independent contractor, such as Mountain Law, to provide public defense
26 services discharges a municipality’s Sixth Amendment obligations, the Court finds it unpersuasive and
unsupported by the cited authorities.

1 **C. Injunctive Relief**

2 Plaintiffs have succeeded on the merits of their claim, establishing both a systemic
3 deprivation of the right to the assistance of counsel and the Cities' responsibility for the
4 deprivation.¹⁴ In order to obtain injunctive relief, plaintiffs must also show irreparable injury
5 and the inadequacy of available legal remedies. Sierra Club v. Penfold, 857 F.2d 1307, 1318
6 (9th Cir. 1988). This burden is easily met here. A system that makes it impossible for appointed
7 counsel to provide the sort of assistance required by the Sixth Amendment works irreparable
8 harm: the lack of an actual representational relationship and/or adversarial testing injures both
9 the indigent defendant and the criminal justice system as a whole. The exact impacts of the
10 constitutional deprivation are widespread but difficult to measure on a case by case basis,
11 making legal remedies ineffective. See Walters v. Reno, 145 F.3d 1031, 1048 (9th Cir. 1998).

12 This Court has broad authority to fashion an equitable remedy for the
13 constitutional violations at issue in this case. Swann v. Charlotte-Mecklenburg Bd. of Educ.,
14 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district
15 court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent
16 in equitable remedies."). The Court has considered whether merely declaring that a
17 constitutional right has been violated would be enough to work a change in defendants' conduct,
18 such that affirmative injunctive relief would be unnecessary. Having carefully considered the
19 testimony of the Cities' officials and reviewed the recent legislative and contractual
20 developments, the Court has grave doubts regarding the Cities' ability and political will to make
21 the necessary changes on their own. The Cities' unwillingness to accept that they had any duty
22 to monitor the constitutional adequacy of the representation provided by the public defenders,
23 their steadfast insistence that the defense services offered by Sybrandy and Witt were not just

24
25 ¹⁴ In Farrow v. Lipetzky, 2013 WL 1915700 (N.D. Cal. May 8, 2013), the case defendants cite
26 for the proposition that a federal court has declined to use its equitable powers to monitor a public
defense agency, the court found that no Sixth Amendment violation had occurred.

1 adequate, but “outstanding,” their surprisingly slow response to the pendency of this litigation
2 and the Supreme Court’s adoption of specific caseload limits, and their budgetary constraints all
3 lead to the conclusion that a declaration will not be sufficient to compel change.

4 The Court is sensitive to the Cities’ interests in controlling the manner in which
5 they perform their core functions, including the provision of services and the allocation of scarce
6 resources. Having chosen to operate a municipal court system, however, defendants are
7 obligated to comply with the dictates of the Sixth Amendment, and the Court will “not shrink
8 from [its] obligation to enforce the constitutional rights of all persons.” Brown v. Plata, __ U.S.
9 __, 131 S. Ct. 1910, 1928 (2011) (internal quotation marks omitted). A continuing injunction is
10 hereby entered against defendants as follows:

11 – Within seven days of the date of this Order, the officials charged with
12 administering the public defense contracts in Mount Vernon and Burlington and all full- and
13 part-time public defenders in those municipalities shall read the Washington Defender
14 Association’s 2007 Final Standards for Public Defense Services with Commentary
15 (<http://www.defensenet.org/about-wda/standards>).

16 – The Cities of Mount Vernon and Burlington shall, within thirty days of the date of
17 this Order, re-evaluate their existing contract for the provision of public defense in light of the
18 Court’s findings and ensure that the document encourages and is no way antithetical to a public
19 defense system that allows for private attorney/client communications at the outset of the
20 relationship and the ability to follow up as appropriate given the circumstances, including the
21 client’s status, input, and goals. While the standards adopted by the Washington Supreme Court
22 and the experiences of the Washington Defender Association will undoubtedly inform any
23 evaluation of the adequacy of defendants’ system going forward, the constitutional benchmark
24 cannot be reduced to a number, and the Court declines to adopt a hard caseload limitation. The
25 critical issue is whether the system provides indigent criminal defendants the actual assistance of
26 counsel, such that defendants have the opportunity to assert any rights or defenses that may be

1 available to them and appropriate adversarial testing occurs.

2 – The Cities shall hire one part-time Public Defense Supervisor to work at least
3 twenty hours per week. The Public Defense Supervisor may be either a contractor or a part-time
4 employee, but the funds for this position shall not come out of the existing budget for public
5 defense services. The parties shall have sixty days from the date of this Order to reach
6 agreement on selection of a Public Defense Supervisor. The Public Defense Supervisor will be
7 part of the attorney/client confidential relationship between Mountain Law and its clients, but
8 will not be part of the Mountain Law firm. The Public Defense Supervisor may not have worked
9 previously for the Cities, Mountain Law, Baker Lewis, or any of the Cities' witnesses or
10 attorneys. The Public Defense Supervisor must have a minimum of five years of experience as a
11 public defender, including jury trial experience. If the parties fail to reach agreement within
12 sixty days from the date of this Order, each side shall submit the names and resumes of two
13 candidates willing to serve as the Public Defense Supervisor to the Court, which will then select
14 the Public Defense Supervisor.

15 – The duties of the Public Defense Supervisor shall include:

16 1. Supervision and evaluation of whether the public defenders are making contact
17 (in-person or by phone) in a confidential setting with each new client within 72 hours of
18 appointment. If contact cannot be made within that time period, the Public Defense Supervisor
19 shall document the reason(s) for the failure and whether an opportunity for confidential
20 communications occurred prior to the client's first court hearing. The Public Defense Supervisor
21 will also take steps to ensure that the public defenders perform the following tasks when they
22 first meet with a client following a new case assignment: (i) advise the client of the right to jury
23 trial and right to a speedy trial; (ii) advise the client of the elements of the charge and that the
24 prosecutor must prove each element beyond a reasonable doubt to obtain a conviction;
25 (iii) advise the client of the right to present a defense; (iv) advise the client that it is solely the
26 client's decision whether to accept or reject any plea offer; and (v) discuss with the client any

1 potential witnesses or avenues of investigation.

2 2. Monthly supervision and evaluation of the first contact with clients,
3 documenting whether the public defenders are determining if each client: (i) appears competent
4 to proceed with the court process; (ii) has a sufficient literacy level to understand written court
5 documents such as the guilty plea form and sentencing orders; (iii) needs an interpreter; and
6 (iv) is a non-citizen in need of expert immigration advice from the WDA or another source.

7 3. Monthly supervision and evaluation of whether the public defenders are
8 responding appropriately to information provided by the client and discovery obtained in each
9 case, including pursuing additional discussions with the client, investigations, medical
10 evaluations, legal research, motions, etc., as suggested by the circumstances.

11 4. Establishing a policy for public defenders to respond to all client contacts and
12 complaints (including jail kites), including the length of time within which a response must
13 occur. The Public Defense Supervisor shall review any and all client complaints obtained from
14 any source and the public defender's response. Use or non-use of any particular complaint
15 process shall in no way be considered a waiver of the client's rights. The Public Defense
16 Supervisor shall establish a process for clients to pursue a complaint if the Public Defense
17 Supervisor fails to resolve it to the client's satisfaction.

18 5. Monthly supervision and evaluation of whether the public defenders are
19 appropriately using interpreters and translators before any decisions are made by the client.

20 6. Supervision and evaluation of courtroom proceedings to ensure that the public
21 defenders are fulfilling their role as advocate before the court on the client's behalf.

22 7. Supervision and evaluation of whether the public defenders are fully advising
23 clients of their options regarding possible dispositions, including information on treatment
24 services, any options for a less onerous disposition based on treatment, explanations of plea
25 offers, the consequences of a conviction, conditions that are normally imposed at sentencing, any
26 applicable immigration consequences, and any other consequences about which the client has

1 expressed concern.

2 8. Supervision and evaluation of whether the public defenders are maintaining
3 contemporaneous records on a daily basis showing the amount of time spent on each task for
4 each case, recorded in tenth-of-an-hour increments.

5 9. Quarterly supervision and evaluation of whether cases are being allocated to
6 each public defender fairly and in consideration of existing workloads, the seriousness of the
7 charge(s), any factors that make the case more complex or time-consuming, and the attorney's
8 experience level.

9 10. Quarterly selection and review of fifteen randomly chosen files from each
10 public defender to ensure that the necessary tasks are being performed and documented, with
11 appropriate time being spent on each task. The Public Defense Supervisor shall conduct a
12 quarterly meeting with each public defender to advise how their performance can be improved
13 based on the file review.

14 11. Collecting data on a quarterly basis showing: (i) the frequency of use of
15 investigators and expert witnesses; (ii) the number of motions on substantive issues that are filed
16 and the outcome of each motion; (iii) the frequency with which cases are resolved by outright
17 dismissal or a nonconviction disposition; (iv) the frequency of pleas to a lesser charge; and
18 (v) the number of trials (broken down by bench vs. jury trials) conducted and the outcome of the
19 trials.

20 12. Conducting a quarterly analysis of whether the Cities' public defense system
21 (i) provides actual representation of and assistance to individual criminal defendants, including
22 reasonable investigation and advocacy and, where appropriate, the adversarial testing of the
23 prosecutor's case and (ii) complies with all provisions of the public defense contract and all
24 applicable provisions of the Cities' ordinances and regulations. The Public Defense Supervisor
25 shall meet with the officials charged with administering the public defense contract to advise
26 how the Cities' performance can be improved based on the quarterly analysis.

1 13. Submission of biannual reports to the parties explaining: (i) whether all of the
2 duties specified above have been performed in the most recent six-month period, and if not, why
3 not, including a specific discussion of each duty that has not been performed and the Public
4 Defense Supervisor's recommendations for how to achieve compliance; (ii) whether the Cities'
5 public defense system (a) provides actual representation of and assistance to individual criminal
6 defendants, including reasonable investigation and advocacy and, where appropriate, the
7 adversarial testing of the prosecutor's case and (b) complies with all provisions of the public
8 defense contract and all applicable provisions of the Cities' ordinances and regulations, and if
9 not, why not, including a specific discussion of each item where the Cities fall short and the
10 Public Defense Supervisor's recommendations for how to achieve compliance. The Public
11 Defense Supervisor shall submit his or her first report to the parties six months after the date of
12 this Order. The Public Defense Supervisor shall continue to submit a report every six months
13 thereafter for a period of 24 months or until the Court orders otherwise.

14 – Twelve months, 24 months, and 34 months after the entry of this Order, the Cities
15 shall provide fifty case files, randomly selected by the Public Defense Supervisor, to plaintiffs'
16 counsel so that they may evaluate the Cities' compliance with this Order and whether the Public
17 Defense Supervisor is properly performing his or her duties. This Court shall retain jurisdiction
18 over this case for three years from the date of entry of this Order, and this injunction shall
19 remain in effect for that period. However, if the Public Defense Supervisor's annual reports
20 show prior to that date that the system provides indigent criminal defendants actual
21 representation by and assistance of counsel, such that defendants have the opportunity to assert
22 any rights or defenses that may be available to them and appropriate adversarial testing occurs,
23 defendants may petition the Court to dismiss the case and terminate the injunction at that point in
24 time.

25 – If plaintiffs believe that the Cities' efforts to provide an adequate system of public
26 defense are not trending in the right direction or a dispute arises as to compliance with the

1 injunctive provisions of this Order, plaintiffs' counsel shall notify defendants in writing of any
2 objections they have regarding the Cities' efforts or compliance. Within fourteen days of receipt
3 of the objections, the parties shall meet and confer to discuss and attempt to resolve the dispute.
4 If the parties are not able to resolve the objections, plaintiffs may file a motion seeking
5 appropriate relief. The motion shall be noted for consideration on the third Friday after filing,
6 the motion and opposition pages shall not exceed 24 pages, and the reply shall not exceed twelve
7 pages.

8 **CONCLUSION**

9 It has been fifty years since the United States Supreme Court first recognized that
10 the accused has a right to the assistance of counsel for his defense in all criminal prosecutions
11 and that the state courts must appoint counsel for indigent defendants who cannot afford to retain
12 their own lawyer. The notes of freedom and liberty that emerged from Gideon's trumpet a half a
13 century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that
14 reduce the promise to a hollow shell of a hallowed right.

15
16 Dated this 4th day of December, 2013.

17 
18 Robert S. Lasnik
19 United States District Judge
20
21
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Attachment 4

**PUBLIC DEFENSE CERTIFICATE OF ATTORNEY QUALIFICATION
FOR NON-CAPITAL CASE TYPES**

Name: _____

Bar Number: _____

Address: _____

Vendor or Tax ID#: _____

Email: _____

Foreign language fluency in: _____

Phone Number: _____

Years of Experience:

Fax Number: _____

Practice of Law _____ Criminal _____

Cell/Pager: _____

Juvenile _____ Appellate _____

For appointments in the following county(ies): _____

TRIAL LEVEL

APPELLATE LEVEL

- Murder
 - Lead Counsel
 - Co-counsel
- Major Felony
- Lesser Felony
- Misdemeanor

- Murder
 - Lead Counsel
 - Co-counsel
- Major Felony
- Lesser Felony
- Misdemeanor

- Juvenile Delinquency
 - Major Felony
 - Lesser Felony
 - Misdemeanor
- Juvenile Dependency
- Juvenile Termination

- Juvenile Delinquency
 - Major Felony
 - Lesser Felony
 - Misdemeanor
- Juvenile Dependency
- Juvenile Termination

- Civil Commitment
- Contempt
- Habeas Corpus

- Civil Commitment
- Contempt
- Habeas Corpus

- Post-Conviction Relief
 - Murder
 - Other Criminal

- Post-Conviction Relief
 - Murder
 - Other Criminal

Please check only one box below:

I certify that I have read the PDSC Qualification Standards for Court-Appointed Counsel (Rev. 12-21-13) and that I meet the requirements of those standards and wish to be listed as available to accept appointment to the case types checked above. If I have checked any case types because I believe I possess equivalent skill and experience, pursuant to Standard III, section 2.B, I have submitted supporting documentation and explained how I am qualified for those case types.

or

I certify that the above-named attorney will be working at a public defense organization as described in Standard III.2.C, which has provided the information required under Standard V.3.B.

Signature

Date

Submit signed certificates together with the supplemental questionnaire and any supporting documentation to: mail@opds.state.or.us

SUPPLEMENTAL QUESTIONNAIRE TO CERTIFICATE OF ATTORNEY QUALIFICATION

If this questionnaire does not address important aspects of your experience, please feel free to attach additional information. If more space is needed to answer any of the questions below, please do so on additional pages.

1. Name (please print):
2. Date admitted to Oregon State Bar:
3. Oregon State Bar number:
4. Number of years and location(s) of legal practice in Oregon:
5. Number of years and location(s) of legal practice outside Oregon:
6. What percentage of your present practice involves handling criminal cases? juvenile cases? (or other cases as appropriate, such as civil commitment, habeas corpus, post-conviction relief)
7. What percentage of your present practice involves handling public defense cases?
8. Briefly describe the nature and extent of your work experience in the area(s) of law which you have certified and any related areas of law.
9. Before which courts and judges have you regularly appeared in case proceedings which you have certified?
10. What has been the extent of your participation in the past two years with continuing legal education courses and/or organizations concerned with law related to the case types you have certified?
11. List at least three names and addresses of judges and/or attorneys who would be able to comment on your experience in handling the case types you have certified.
12. List the most recent two cases by county and case number that have been tried and submitted to a jury, or if the attorney is certifying qualification for juvenile delinquency or civil commitment cases, tried and submitted to a judge, in which you served as counsel or co-counsel.

13. Have you ever been convicted of a crime? If yes, please provide the crime(s) of conviction, date and jurisdiction. (Do not answer yes or provide information for convictions that have been expunged or sealed.)

14. Are there any criminal charges currently pending against you? If yes, please identify the charges, the jurisdiction and the status of the proceedings.

15. Is there any complaint concerning you now pending with disciplinary counsel of the Oregon State Bar, or otherwise pending formal charges, trial or decision in the bar disciplinary process?

16. Has the Oregon Supreme Court, Oregon State Bar or any other bar association ever found you in violation of a Disciplinary Rule or Rule of Professional Conduct? If yes, please describe the violation and provide the date of decision.

17. Has a former client ever successfully obtained post-conviction relief based on your representation? If yes, please describe and cite to opinion, if there is one.

I certify that the above information is true and complete.

SIGNATURE

DATE

Attachment 5



Oregon

Office of Public Defense Services

1175 Court Street NE
Salem, Oregon 97301-4030
Telephone (503) 378-3349
Fax (503) 378-4462
www.oregon.gov/opds

Proposed Revision to the Public Defense Services Commission Legal Representation Plan for Death Penalty Cases

January 14, 2014

Presented by Paul Levy, General Counsel

The Office of Public Defense Services recommends that the Public Defense Services Commission (PDSC) adopt the following new language as an additional paragraph to Section 2 of the PDSC *Legal Representation Plan for Death Penalty Cases* (the current plan is attached):

Regardless of whether formal legal proceedings have been commenced or the state has affirmatively declared that the death penalty will be sought, the Office of Public Defense Services may assign qualified counsel to represent any financially eligible person who is in custody and may face a possible sentence of death. For purposes of determining financial eligibility, the Office of Public Defense Services may presume eligibility for detained persons, subject to verification by court personnel upon the commencement of any formal legal proceedings.

Discussion:

The PDSC is obligated to provide cost-efficient public defense services consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice. ORS 151.216(1)(a). PDSC is responsible for establishing policies, procedures, standards and guidelines for, among other things, the appointment of counsel, the determination of financial eligibility, and the performance of counsel. ORS 151.216(f). At its June 14, 2007 meeting, the PDSC recognized the American Bar Association *Guidelines for the Performance of Defense Counsel in Death Penalty Cases* (Revised 2003)[hereafter *ABA Guidelines*] as a national standard of justice for death penalty cases, and obligated the Office of Public Defense Services (OPDS) to fulfill its obligations as the Responsible Agency under those guidelines¹. The proposed revision to the Commission's *Legal Representation Plan for Death Penalty Cases* is recommended so that the OPDS may continue to fulfill its obligations under the *ABA Guidelines*.

¹ The full report of the Commission's consideration of the delivery of services in death penalty cases is available at <http://www.oregon.gov/OPDS/pages/pdscreports.aspx>.

The overarching objective of the *ABA Guidelines* is “to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.” Guideline 1.1 *Objective and Scope of Guidelines*². Significantly, the guidelines “apply from the moment the client is taken into custody...”. *Id.* The objective and scope of the *ABA Guidelines* were changed with its 2003 revision to add the words “from the moment the client is taken into custody,” replacing language that made the guidelines applicable to “cases in which the death penalty is sought.” The purpose of the change, according to a history of the 2003 version of this guideline, was to “make explicit that [the] Guidelines also apply to circumstances of an uncharged prisoner,” and “apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought.” *Id.*, *History of Guideline*.

The OPDS has encountered circumstances on a number of occasions when persons who are already in custody on an unrelated matter are accused of having committed an aggravated murder in Oregon but are not promptly charged with the new offense. OPDS recommends adoption of the new language proposed above in order to make clear its authority to assign counsel to the accused in these circumstances. As explained further in the history of the *ABA Guidelines*, the early days and weeks after a detained person is accused or suspected of having committed a capital offense can be critically important to the outcome of the case. Defense counsel may be able to identify and preserve information regarding guilt or sentencing that could become unavailable later, and may be able to provide information to the prosecution that persuades it not to seek the death penalty. “Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought.” *Id.*

The OPDS proposal includes a provision that permits OPDS to presume financial eligibility of a detainee who may face the death penalty, subject to subsequent verification through normal court procedures upon the commencement of any formal legal proceedings. This presumption appears fully warranted. OPDS is not aware of a single capital case within the past ten years in which the defendant was *not* financially eligible for appointed counsel.

² The entire ABA Guidelines, with commentary, are available at http://www.americanbar.org/groups/committees/death_penalty_representation.html.