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Janet C. Stevens
Honorable Elizabeth Welch



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Thursday, January 22, 2009
9:00 a.m. - 1:00 p.m.
Jury Conference Room (B 148)
Marion County Courthouse
100 High Street NE
Salem, Oregon 97301

AGENDA

1. **Action Item:** Approval of the Minutes of PDSC's November 20, 2008 Meeting (*Attachment 1*) Barnes Ellis
2. Review of PDSC Service Delivery Plan for Marion County (*Attachments 2, 3*) Hon. Jamese Rhoades
Richard Condon, JAC
Paul Lipscomb, MCAD
Tom Sermak and board
Member, PDMC
3. Defense Representation in Drug Courts (*Attachment 4*) Barnes Ellis
Ingrid Swenson
4. Continued review of PDSC Service Delivery Plan for Representation in Death Penalty Cases Matt Rubenstein
OPDS staff
5. OPDS Monthly Report OPDS Management
Team

Please note: Box lunches will be provided for Commission members at 12:00 p.m.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting, to Laura Weeks at (503) 378-3349.

Next meeting: The next meeting of the commission is scheduled for March 12, 2009 from 9am to 1pm at a location to be announced in Clackamas County.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Thursday, November 20, 2008
9:00 a.m. - 1:00 p.m.
Room 102, Oregon State Library
250 Winter Street, NE
Salem, Oregon 97301-3950

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
John Potter
Chip Lazenby
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Peter Gartlan
Becky Duncan
Amy Jackson

Agenda Items No. 1 Approval of Minutes of PDSC's October 17, 2008 Meeting

[Tape was not recording for the first part of the meeting. The minutes of the October 17,

Agenda Item No. 2 Defense Representation in Drug Courts

[Alex Bassos, Gary Berlant, Robert Hutchings and Phil Swogger testified about defense participation in drug courts. The tape was not recording for this portion of the meeting. A summary of their remarks at the hearing and in telephone conversations after the hearing were used to prepare these minutes.]

Phil Swogger is the principal attorney assigned to the drug court in Marion County. He is with the Marion County Association of Defenders (MCAD). The court initially limited participation to those charge with "stand alone" possession of controlled substance (PCS) cases involving first time offenders. There were a lot of such cases. Originally, cases that included allegations of child endangering or neglect (exposing children in the home to drug related activity, for example) were not considered appropriate for drug court but they are now as the district attorney has gradually expanded eligibility criteria. Delivery of controlled substance (DCS) charges are still not eligible for drug court although probation violations in which DCS is the underlying charge are eligible. Successful completion of drug court allows a defendant on probation to avoid revocation and the imposition of a prison sentence. In Marion County potential drug court cases may be identified by the court, by assigned counsel or by the probation officer. Weekly court appearances are required in the first phase of the program. Participation in Narcotics Anonymous (NA) or Alcoholics Anonymous (AA) meetings is required. (There are no secular alternatives in Marion County but Mr. Swogger

has never received a request for one.) Approximately 85% of participants complete the program.

The attorney who is initially assigned to the criminal case generally recommends to the defendant whether or not he should have a trial. If the client does not want a trial, counsel then discusses possible plea agreements, including participation in drug court for those who are eligible. Defendants who are interested in considering drug court are invited to observe the court for up to five weeks before they make a decision about participating. Clients who decide to participate agree to have a stipulated facts trial if they are terminated from drug court.

Mr. Swogger is paid a flat monthly fee for his services in drug court. Mr. Swogger maintains an office and staff. He believes staff is necessary to meet the needs of these clients.

Mr. Swogger believes that only very experienced lawyers should be assigned to drug court. He also recommended that clients be permitted to discuss the case individually with an attorney after discovery has been provided before they are required to make a decision about whether or not to participate in drug court. He recommended that the Commission not support drug court participation by defense counsel if clients are required to plead guilty to multiple felonies in order to participate when they would be required to plead to fewer charges if they agreed to a plea bargain, as was reported to be the case in Umatilla County.

In general, Mr. Swogger believes that drug court works to the advantage of his clients and he has very high job satisfaction from his work in this program.

Gary Berlant – Josephine County

Gary Berlant, with the Southern Oregon Public Defender Office in Grants Pass, participated in the formation of the Josephine County drug court twelve years ago and provided defense representation in that court until very recently.

In contrast to the practice in Marion County, the Josephine County program targets relatively high level offenses and the defense is continually pushing to broaden the list of eligible offenses. Property offenses are being added, but not person offenses. Originally a guilty plea was not required for participation in the court and the defendant agreed to a stipulated facts trial instead. Now each case is negotiated separately into the court. With more serious charges, the district attorney sometimes demands a plea to at least one count that will not be dismissed upon successful completion of the drug court so that if the defendant is charged again in the future he or she will not be eligible for treatment as a first time offender. Under the current system, defendants' exposure is more limited if they fail to complete the program since agreements have already been made about which counts will be admitted and which dismissed.

When the court was started the emphasis was on getting clients into the program and treatment without delay. Complete discovery was not available and the cases had not yet been presented to a grand jury. Their approach has now changed. Defendants are not rushed into a decision and defense attorneys urge them to agree to participate only after they have enough information to make an informed decision. If an investigation is necessary in order to assess the likelihood of prevailing at trial, the defense can take the time to complete an investigation. If, however, the defendant decides to challenge the admissibility of the evidence or pursue other pretrial motions, the state will not agree to drug court participation.

At first, since defendants were not on probation, they had to agree to supervision as a condition of their "release agreements." After the court had been operating for some time, the probation department felt that it needed to have authority to do home visits, to put detainers on defendants, to put them in custody under certain circumstances and to conduct

searches of their persons and residences. They pushed for supervised probation in every case but in simple possession cases conditional discharges are still sometimes available.

After issuing a request for proposals to provide drug treatment services, the workgroup selected Choices as the sole provider. Clients are also required to participate in a 12 step program. In Josephine County there are secular alternatives to NA and AA programs. When a defendant enters the drug court he or she signs releases and waivers so that all treatment and compliance information can be shared with the team. The court and all the parties have been very conscientious about not letting information go any farther than the team. There is no formal agreement with the state that prohibits the state from using incriminating statements by the defendant against him or her in another proceeding but early in the process the district attorney assured the drug court team that there would be no such use and there has not been.

Once a person enters the program there is a 14 day trial period during which he or she may opt out. The most common reason for termination from drug court is a new person or property offense in which there is a victim. Participants who have dropped out and resumed drug use are not necessarily terminated. Even after an absence of more than a year some clients have been accepted back into the program. Some clients drop out more than once. If the treatment provider is willing to continue working with the person, generally they can remain in the program. A jail term is not the first option for non-compliance but can be imposed if other sanctions are ineffective.

With respect to participants who are not U.S. citizens, the current drug court attorney, Joe Maier, tries to work with the district attorney's office to modify the charges so that the defendant's immigration status is not negatively affected.

Attempts to transfer a drug court participant from one court to another have presented difficulties. Josephine County has often been the receiving court. If someone wants to transfer to the Josephine County program, the person must follow Josephine County rules. The court then reports to the home court. It has been difficult to transfer someone out of Josephine County because the programs in other counties are less intensive and may not want to accept clients with serious charges. Josephine County won't allow its drug court clients to transfer until they are well integrated into the program.

Gary received his training in drug court representation by visiting other sites with team members. They observed their courts and heard from their counterparts in those courts. The national association has annual meetings that include a lot of training and sharing of information. In the past, grant funds were available to pay for their whole team to attend these meetings. Now, only the judge's way is usually paid. When Joe Meier took over as the drug court defense attorney, Gary was able to train him. There is a need for more training on drugs, drug testing, drug treatment, etc. Recently the local team had an expert come in and make a presentation on urinalyses testing.

The Josephine County Drug Court currently serves 50 clients. The workload is approximately the equivalent of a half time caseload. In addition, a legal assistant, Casey Black, serves as staff to the drug court.

Gary believes that each program is unique but that there are some common values that could be identified for defense participation. Defense guidelines would help to empower defense representatives in the planning of these courts, especially if they had been endorsed by the district attorney's association. Guidelines might include the following requirements: that defense counsel is an experienced defender, that there is only one assigned defense attorney in the court, that the rules regarding drug court eligibility are not too rigid but are left up to the team, that there is a policy-making steering committee that is independent of the treatment team, and that appropriate compensation is paid so that clients receive adequate representation.

Alex Bassos – Multnomah County

Alex Bassos is the attorney supervisor of the Special Courts Section at the Metropolitan Public Defender Office in Portland (MPD). One of those special courts, the STOP program, is the oldest drug court in Oregon and the second oldest in the country. Currently there are approximately 240 clients in the court. MPD provides services to the court in addition to the representation of clients. Its staff provides the initial orientation for all potential drug court clients and the MPD legal assistant who staffs the court is the person who generally calls the case during drug court proceedings. Mr. Bassos does not believe MPD's performance of these administrative functions is confusing to clients and he believes it allows MPD to have more influence in the proceedings.

Only PCS cases are eligible for drug court diversion in Multnomah County. Manufacturing (MCS) and DCS cases, property offenses (even though they are closely associated with drug abuse) and probation violations are not eligible. (Cases involving only drug residue amounts were previously handled in STOP court but due to the high volume of these cases they are now referred to the community court.) Drug court participants are required to waive indictment on felony charges and plead guilty. Some defendants are first time offenders; some have long criminal records. Since eligibility is largely charge-driven, most candidates can be identified by the time of arraignment. This accelerates the process so orientation usually occurs the day after arraignment. While there is an effort to get defendants involved in drug court as soon as possible following arrest, they can get more time to consider whether they want to participate or not. There is also a 14 day trial period after starting drug court when the defendant can decide not to participate without penalty. Not many participants are terminated from drug court. Drug court lasts 12 months or longer. The average is 14 months. Some participants are there for three or more years if they are not able to get their addiction under control. The sanction for non-compliance is usually sitting and watching drug court proceedings. This is called a "sit sanction." Jail is rarely used as a sanction except when the client needs "detox" and a bed at the Hooper Detox Center is not available. Jail sanctions are authorized under the conditional discharge statute. InAct, a program sponsored by the Volunteers of American (VOA), is the sole treatment provider for court participants. Participation in twelve-step programs such as NA or AA is not required. Most people have to go through a matrix program that involves mandatory activities seven days a week. There is not much communication between the attorney and the client between court hearings. The attorney gets the treatment provider's report just before court so there is usually no opportunity to discuss it with the client before the court hearing. In the near future STOP attorneys will have direct access to VOA's data bases.

MPD receives a flat fee for its work in the STOP court.

At MPD the trial assistant assigned to drug court usually remains in that position for two or three years. Only experienced felony attorneys are assigned to STOP. Training for lawyers new to drug court includes a review of drug court materials and a discussion of how a "collaborative court" such as STOP works. Training about drug treatment and testing is not necessary in Multnomah County since there is only one provider and one treatment model in use. It would be beneficial for drug court attorneys from around the state to be able to get together for joint training sessions. A break-out session at OCDLA's annual conference might be the best forum for such training.

Bob Hutchings – Lane County

Bob Hutchings, with Public Defender Services of Lane County, is the principal drug court attorney in Lane County. Most drug court cases in Lane County are PCS cases, many of which involve only possession of residue. The district attorney does the initial screening. If the DA approves, a paper is put in the file and the court notifies the defendant at arraignment

that he or she appears to be eligible for drug court. The defense attorney then meets with the client and discusses the client's options. If the defendant agrees to participate in drug court he or she completes a petition that includes a stipulation to facts that would establish the charged offense. There is a two week trial period. Absence from treatment can result in termination from the program. An absence of thirty days resulted in the termination of two participants recently. Bob believes clients should be given at least 90 days before they are terminated. The minimum length of stay in the program is nine months. Most clients will be terminated if they are not in compliance after 18 months. Transfers between drug courts could occur more often if there were a statewide agreement between courts.

Bob is part of the Oregon Association of Drug Court Professionals but there are very few other defense attorneys involved. Bob also sits on the Chief Justice's Advisory Council. He would like to see the Commission develop some standards regarding the training and experience defense attorneys should have in order to represent clients in drug court. The Commission should also look into the operation of juvenile drug courts.

Standard of Representation

During his presentation to the Commission, Gary Berlant noted that defense attorneys in drug court cases are not permitted to advocate for what attorneys believe to be in their clients' best interest. The defense attorney is required to explain the evidence and the options to the client and let the client decide what is in his or her best interest. The other presenters agreed.

Alex Bassos said he does not believe that attorneys in drug court necessarily face a binary paradigm – an either/or situation. They can be both collaborative and adversarial, as needed, on behalf of their clients. There are occasions when one approach is more appropriate than the other not only in drug court representation, but in any type of criminal proceeding. “Collaborative” can simply mean “treatment focused” and does not mean that the defense attorney should merely acquiesce in what the court and the state believe is the correct approach.

Agenda Item No. 3

Review of PDSC Service Delivery Plans for Baker, Grant/Harney, and Malheur Counties

Ingrid Swenson summarized the testimony and other information provided to Commissioners at the August 2008 hearing in Baker City. She said that of the counties under review Grant and Harney appeared to have the greatest need for additional attorneys although all of them faced similar challenges in attracting new attorneys. She recommended that the Commission defer a decision about creating new incentives until after the 2009-11 PDSC budget is approved and the Commission has been made aware of other possible funding priorities.

Commissioners discussed the need for expanded use of video technology, the difficulty public defense offices have in providing insurance coverage for employees, the need for public defense offices to have stable income to cover overhead even though the caseload might fluctuate substantially, and the added cost of representing prison inmates.

Ingrid Swenson will speak with the Chief Justice about convening a group to explore expanded use of video technology. Lane Borg informed the Commission that the Multnomah County Bar Association has a program available to lawyers in all parts of the state, that offers group insurance coverage. One limitation for offices in remote areas is that there may be no preferred providers in those areas. Providing more stable funding for public defense offices in the region and providing additional compensation in prison cases are both matters that should be considered in the next contract cycle.

Commissioner Welch noted that the problems described in eastern Oregon were similar to those which came to the Commission's attention in other counties as well, such as Coos and

Curry and suggested there might be a need to look at the irreducible minimum that is needed to function as a public defense provider

MOTION: Shaun McCrea moved to approve the Baker County report; Chip Lazenby seconded the motion; hearing no objection, the motion carried. **VOTE 5-0.**

MOTION: Shaun McCrea moved to approve the Grant/Harney Counties report; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

MOTION: Shaun McCrea moved to approve the Malheur County report; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 4

Final Approval of PDSC Service Delivery Plan for Jackson County

Chair Ellis noted that the Commission had approved the proposed service delivery plan for Jackson County at its previous meeting but had requested an amendment to clarify that representation in juvenile dependency cases sometimes requires attorneys to perform functions more commonly associated with social work than with legal representation.

MOTION: Shaun McCrea moved to approve the amendment; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0,**

Agenda Item No.

OPDS Monthly Report

Ingrid Swenson reported that the Oregon Criminal Defense Lawyers Association would be sponsoring two legislative measures that would affect PDSC. One would provide for salary parity between public defense attorneys and government attorneys. The second would require the district attorney to file written notice of intent to seek the death penalty, allowing the defense an opportunity to persuade the state not to seek death. She also noted that state agencies had been asked to propose five percent reductions in their 2007-09 budget allocations and a 1.2 percent reduction in the current quarter-biennium.

Kathryn Aylward said that agencies had been advised that 1.2% would be deducted from their General Fund appropriations in mid December. For OPDS's operating units it would amount to a deduction of approximately \$156,000. The agency has sufficient vacancy savings to cover that amount. In the Public Defense Services Account the reduction would amount to approximately \$2.4 million. She will be discussing with the Legislative Fiscal Office whether it would be appropriate to use 09-11 biennium funds to cover the balance of any current biennium costs that wouldn't be expended until the new biennium.

Rebecca Duncan discussed the Appellate Division's preparation and presentation of oral argument in the United States Supreme Court in the Ice case. She said that another petition for certiorari had been filed in a non-unanimous jury verdict case.

Kathryn Aylward reported that, on the recommendation of the Key Performance Measure Coordinator for the Department of Administrative Services, one of PDSC's proposed new measures had been amended to delete Contract and Business Services Division data and would instead measure only the median number of days for the Appellate Division to file an opening brief.

MOTION: Shaun McCrea moved to adjourn the meeting, Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, November 20, 2008
9:00 a.m. - 1:00 p.m.
Room 102, Oregon State Library
250 Winter Street, NE
Salem, Oregon 97301-3950

MEMBERS PRESENT:

Barnes Ellis
Shaun McCrea
John Potter
Chip Lazenby
Hon. Elizabeth Welch

STAFF PRESENT:

Ingrid Swenson
Kathryn Aylward
Paul Levy
Peter Gartlan
Becky Duncan
Amy Jackson

**Agenda Items No.
1 and 2**

[Tape was not recording for the first part of the meeting. The minutes of the October 17, 2008 meeting were approved but the vote was not recorded (Agenda Item No. 1). Alex Bassos, Gary Berlant, Robert Hutchings and Phil Swogger testified about defense participation in drug courts (Agenda Item No. 2). A summary of their remarks at the hearing and in telephone conversations after the hearing is provided in lieu of a transcript.]

Phil Swogger - Marion County:

Phil Swogger is the principal attorney assigned to the drug court in Marion County. He is with the Marion County Association of Defenders (MCAD). When the court was initiated the only cases eligible for drug court were "stand alone" possession of controlled substance (PCS) cases involving first time offenders. There were a lot of such cases as a result of a police "knock and talk" initiative. Officers knock on the doors of residences where drug activity is suspected and talk with anyone who opens the door. This often leads to the observation of drugs or drug paraphernalia in plain sight. Mr. Swogger said that in the early days, he recommended drug court to only approximately half of the individuals who were eligible because the court was not appropriate for defendants who were charged only with misdemeanors or who were not addicts. Originally, cases that included allegations of child endangering or neglect (exposing children in the home to drug related activity, for example) were not considered appropriate for drug court by the district attorney. There are still no written criteria for admission to drug court but the district attorney has gradually expanded eligibility criteria. He and others have recognized that the drug court can deal successfully with a variety of defendants. Delivery of controlled substance (DCS) charges are still not eligible for drug court although probation violations in which DCS is the underlying charge are eligible. Successful completion of drug court allows a defendant on probation to avoid revocation and the imposition of a prison sentence. Because of the fact that many PCS cases

include child endangering or neglect charges, there are often three courts (drug court, criminal and juvenile court), and sometimes three attorneys, involved with drug court clients. The program generally lasts for 12 to 16 months. Weekly court appearances are required in the first phase of the program. Participation in Narcotics Anonymous (NA) or Alcoholics Anonymous (AA) meetings is required. (There are no secular alternatives in Marion County but Mr. Swogger has never received a request for one.) Approximately 85% of participants complete the program.

Mr. Swogger attended a week-long training at the National Drug Court Institute's (NDCI) annual convention this past summer. NDCI offers training in many relevant areas including understanding the nature of addiction and different approaches to addiction treatment.

In Marion County potential drug court cases may be identified by the court, by assigned counsel or by the probation officer. The attorney who is initially assigned to the criminal case generally recommends to the defendant whether or not he should have a trial. If the client does not want a trial, counsel then discusses possible plea agreements, including participation in drug court for those who are eligible. Defendants who are interested in considering drug court are invited to observe the court before they make a decision about participating. They can observe for five weeks or more and are also invited to talk to staff about the program. Clients who decide to participate agree to have a stipulated facts trial if they are terminated from drug court. If they are admitted, they are required to pay \$10 per week to help cover the cost of treatment. There is significant community support for the drug court. Mr. Swogger, for example, serves on the board of a non-profit organization, Road to Recovery, which uses contributions to purchase extraordinary treatment services. There are many volunteers who provide transportation, food, etc. to those who need it.

Mr. Swogger is paid a flat monthly fee for his services in drug court (and in the mental health court in which he also the assigned attorney.) Mr. Swogger maintains an office and staff. He believes staff is necessary to meet the needs of these clients.

Mr. Swogger believes that only very experienced lawyers should be assigned to drug court. In order for a drug court to succeed the assigned judge needs to be an advocate and the lawyers need to abide by that judge's rules. He also recommended that clients be permitted to discuss the case individually with an attorney after discovery has been provided before they are required to make a decision about whether or not to participate in drug court. He recommended that the Commission not support drug court participation by defense counsel if clients are required to plead guilty to multiple felonies in order to participate when they would be required to plead to fewer charges if they decided on a plea bargain rather than drug court, as was reported to be the case in Umatilla County.

In general, Mr. Swogger believes that drug court works to the advantage of his clients and he has very high job satisfaction from his work in this program.

Gary Berlant – Josephine County

Gary Berlant, with the Southern Oregon Public Defender Office in Grants Pass, participated in the formation of the Josephine County drug court twelve years ago and provided defense representation in that court until very recently. Two years were spent planning for the court and Mr. Berlant was a member of the planning team. He had a significant amount of input but did not control the decisions that were made. It is assumed that a drug court cannot operate without the participation and support of the district attorney although Mr. Berlant believes that the court has the authority to operate a drug court without such support.

In contrast to the practice in Marion County, the Josephine County program targets relatively high level offenses and the defense is continually pushing to broaden the list of eligible offenses. Property offenses are being added, but not person offenses. Originally a guilty plea

was not required for participation in the court and the defendant agreed to a stipulated facts trial instead. Even when there were multi-count indictments it was the state's practice to dismiss all charges upon successful completion of the program. For those who failed, however, the factual stipulations permitted their conviction on all counts. Now each case is negotiated separately into the court. With more serious charges, the district attorney sometimes demands a plea to at least one count that will not be dismissed upon successful completion of the drug court so that if the defendant is charged again in the future he or she will not be eligible for treatment as a first time offender. Under the current system, defendants' exposure is more limited if they fail to complete the program since agreements have already been made about which counts will be admitted and which dismissed. There can be, for example, a plea and sentence on one count with supervised probation, an agreement to dismiss some charges at the outset and a stipulation to facts on others that will then be handled by the drug court.

When the court was started the emphasis was on getting clients into the program and treatment without delay. Complete discovery was not available and the cases had not yet been presented to a grand jury. Their approach has now changed. Defendants are not rushed into a decision and defense attorneys urge them to agree to participate only after they have enough information to make an informed decision. If an investigation is necessary in order to assess the likelihood of prevailing at trial, the defense can take the time to complete an investigation. If, however, the defendant decides to challenge the admissibility of the evidence or pursue other pretrial motions, the state will not agree to drug court participation. When the defendant is not certain if he wants to contest the charges, the defense will proceed to file any appropriate motions. An arguably meritorious motion may improve the defendant's bargaining position. If, however, he chooses to litigate the motion, the state will withdraw its approval of drug court participation.

At first, since defendants were not on probation, they had to agree to supervision as a condition of their "release agreements." After the court had been operating for some time, the probation department felt that it needed to have authority to do home visits, to put detainers on defendants, to put them in custody under certain circumstances and to conduct searches of their persons and residences. They pushed for supervised probation in every case but in simple possession cases conditional discharges are still sometimes available. Currently, the defense is able to negotiate the charges.

Prior to establishing the Josephine County court, the planning group reviewed several programs in California and Oregon and ultimately modeled their court after the STOP program in Multnomah County. After issuing a request for proposals to provide drug treatment services, the workgroup selected Choices as the sole provider. Choices has been very flexible in meeting the needs of the court and in providing intensive treatment services. Clients are also required to participate in a 12 step program. In Josephine County there are secular alternatives to NA and AA programs. When a defendant enters the drug court he or she signs releases and waivers so that all treatment and compliance information can be shared with the team. The court and all the parties have been very conscientious about not letting information go any farther than the team. There is no formal agreement with the state that prohibits the state from using incriminating statements by the defendant against him or her in another proceeding but early in the process the district attorney assured the drug court team that there would be no such use and there has not been.

Once a person enters the program there is a 14 day trial period during which he or she may opt out. Anyone who opts out is required to pay a \$100 fee. Those who remain must pay a program fee of \$500. Payments are made monthly. The most common reason for termination from drug court is a new person or property offense in which there is a victim. Participants who have dropped out and resumed drug use are not necessarily terminated. Even after an absence of more than a year some clients have been accepted back into the program. Some clients drop out more than once. If the treatment provider is willing to continue working with

the person, generally they can remain in the program. A jail term is not the first option for non-compliance but can be imposed if other sanctions are ineffective.

With respect to participants who are not U.S. citizens, the current drug court attorney, Joe Maier, tries to work with the district attorney's office to modify the charges so that the defendant's immigration status is not negatively affected.

Attempts to transfer a drug court participant from one court to another have presented difficulties. Josephine County has often been the receiving court. If someone wants to transfer to the Josephine County program, the person must follow Josephine County rules. The court then reports to the home court. It has been difficult to transfer someone out of Josephine County because the programs in other counties are less intensive and may not want to accept clients with serious charges. Josephine County won't allow its drug court clients to transfer until they are well integrated into the program.

Gary received his training in drug court representation by visiting other sites with team members. They observed their courts and heard from their counterparts in those courts. The national association has annual meetings that include a lot of training and sharing of information. Grant funds used to pay for their whole team to attend these meetings. Now, only the judge's way is usually paid. When Joe Meier took over as the drug court defense attorney, Gary was able to train him. There is a need for more training on drugs, drug testing, drug treatment, etc. Recently the local team had an expert come in and make a presentation on urinalyses testing.

The Josephine County Drug Court currently serves 50 clients. The workload is approximately the equivalent of a half time caseload. In addition, a legal assistant, Casey Black, serves as staff to the drug court.

Gary believes that each program is unique but that there are some common values that could be identified for defense participation. Defense guidelines would help to empower defense representatives in the planning of these courts, especially if they had been endorsed by the district attorney's association. Guidelines might include the following requirements: that defense counsel is an experienced defender, that there is only one assigned defense attorney in the court, that the rules regarding drug court eligibility are not too rigid but are left up to the team, that there is a policy-making steering committee that is independent of the treatment team, and that appropriate compensation is paid so that clients receive adequate representation.

Alex Bassos – Multnomah County

Alex Bassos is the attorney supervisor of the Special Courts Section at the Metropolitan Public Defender Office in Portland (MPD). One of those special courts, the STOP program, is the oldest drug court in Oregon and the second oldest in the country. Currently there are approximately 240 clients in the court. MPD provides services to the court in addition to the representation of clients. Its staff provides the initial orientation for all potential drug court clients and the MPD legal assistant who staffs the court is the person who generally calls the case during drug court proceedings. Mr. Bassos does not believe MPD's performance of these administrative functions is confusing to clients and he believes it allows MPD to have more influence in the proceedings. The Court has been evaluated on more than one occasion, most recently in April of 2007 in a study performed by NPC Research of the court's operations and outcomes over a 10 year period. One conclusion of the study was that the incidence of re-arrests for drug court participants within the five-year period following the initial drug court hearing was 30% less than that of offenders who were eligible for the court but did not participate.

Only PCS cases are eligible for drug court diversion in Multnomah County. Manufacturing (MCS) and DCS cases, property offenses (even though they are closely associated with drug abuse) and probation violations are not eligible. (Cases involving only drug residue amounts were previously handled in STOP court but due to the high volume of these cases they are now referred to the community court.) Drug court participants are required to waive indictment on felony charges and plead guilty. Some defendants are first time offenders; some have long criminal records. Since eligibility is largely charge-driven, most candidates can be identified by the time of arraignment. This accelerates the process so orientation usually occurs the day after arraignment. Orientation is done by MPD staff. While there is an effort to get defendants involved in drug court as soon as possible following arrest, they can get more time to consider whether they want to participate or not. There is also a 14 day trial period after starting drug court when the defendant can decide not to participate without penalty. If a defendant decides not to participate in drug court, a “quick plea” can be arranged which results in 12 months probation with “drug package” conditions but no jail time. The standard plea offer after that includes a two-day jail sentence and 18 months probation. Most of those who decide to enter the drug court are addicts and most of them are seeking treatment rather than trying to avoid a sentence. In other counties, such as Washington County, drug court is a very attractive alternative to someone who may be facing a lengthy prison sentence if convicted. Not many participants are terminated from drug court but the sentence for those who are is generally 10 days jail with no credit for time served and 18 months probation. Drug court lasts 12 months or longer. The average is 14 months. Some participants are there for three or more years if they are not able to get their addiction under control. The sanction for non-compliance is usually sitting and watching drug court proceedings. This is called a “sit sanction.” Jail is rarely used as a sanction except when the client needs “detox” and a bed at the Hooper Detox Center is not available. Jail sanctions are authorized under the conditional discharge statute. InAct, a program sponsored by the Volunteers of American (VOA), is the sole treatment provider for court participants. (When the program was initiated the only treatment available was acupuncture.) Participation in twelve-step programs such as NA or AA is not required. Most people have to go through a matrix program that involves mandatory activities seven days a week. There is not much communication between the attorney and the client between court hearings. The attorney gets the treatment provider’s report just before court so there is usually no opportunity to discuss it with the client before the court hearing. In the near future STOP attorneys will have direct access to VOA’s data bases.

MPD receives a flat fee for its work in the STOP court.

Although Alex doesn’t necessarily agree that defense representatives should be involved in deciding which categories of offenses are eligible for drug court, he would like to see lower level property crimes included.

At MPD the trial assistant assigned to drug court usually remains in that position for two or three years. Only experienced felony attorneys are assigned to STOP. Training for lawyers new to drug court includes a review of drug court materials and a discussion of how a “collaborative court” like STOP works. Training about drug treatment and testing is not necessary in Multnomah County since there is only one provider and one treatment model in use. It would be beneficial for drug court attorneys from around the state to be able to get together for joint training sessions. A break-out session at OCDLA’s annual conference might be the best forum for such training.

Bob Hutchings – Lane County

Bob Hutchings, with Public Defender Services of Lane County, is the principal drug court attorney in Lane County. In addition to his work in the drug court he carries a small Measure 11 caseload. Most drug court cases in Lane County are PCS cases, many of which involve only possession of residue. The district attorney does the initial screening. If the DA

approves, a paper is put in the file and the court notifies the defendant at arraignment that he or she appears to be eligible for drug court. The defense attorney then meets with the client and discusses the client's options. If the defendant agrees to participate in drug court he or she completes a petition that includes a stipulation to facts that would establish the charged offense. There is a two week trial period. If the defendant decides against drug court participation the plea offer is usually 10 days in jail (or an alternative sanction) and 18 months supervised probation. Clients who continue in drug court pay a weekly fee of \$10. Absence from treatment can result in termination from the program. An absence of thirty days resulted in the termination of two participants recently. Bob believes clients should be given at least 90 days before they are terminated. The minimum length of stay in the program is nine months. Most clients will be terminated if they are not in compliance after 18 months. Transfers between drug courts could occur more often if there were a statewide agreement between courts.

Bob is part of the Oregon Association of Drug Court Professionals but there are very few other defense attorneys involved. Bob also sits on the Chief Justice's Advisory Council. He would like to see the Commission develop some standards regarding the training and experience defense attorneys should have in order to represent clients in drug court. The Commission should also look into the operation of juvenile drug courts.

Standard of Representation

During his presentation to the Commission, Gary Berlant noted that defense attorneys in drug court cases are not permitted to advocate for what attorneys believe to be in their clients' best interest. The defense attorney is required to explain the evidence and the options to the client and let the client decide what is in his or her best interest. The other presenters agreed.

Alex Bassos said he does not believe that attorneys in drug court necessarily face a binary paradigm – an either/or situation. They can be both collaborative and adversarial, as needed, on behalf of their clients. There are occasions when one approach is more appropriate than the other not only in drug court representation, but in any type of criminal proceeding. "Collaborative" can simply mean "treatment focused" and does not mean that the defense attorney should merely acquiesce in what the court and the state believe is the correct approach.

Agenda Item No. 3

Review of PDSC Service Delivery Plans for Baker, Grant/Harney, and Malheur Counties

- 28 Chair Ellis Why don't we go ahead and start with the review of the delivery plans for the eastern Oregon regions of which there are three plans, but they do have a lot in common.
- 45 I. Swenson What would be helpful, Mr. Chair? Do you want me to just remind you of the circumstances in these counties?
- 51 Chair Ellis What I would like to do is turn to page – let me see if I can find the correct page. Why don't you go ahead and summarize and I'll find it.
- 1:39 I. Swenson We were in Baker City and we were looking at the three districts out there, four counties, and Malheur County is the biggest of those. It has a population of about 34, 000 and it is almost as big as the other three combined. I was surprised to see the population numbers for Grant and Harney Counties. I included the '05 data in the first report and this time I used the '07 data. Each of them had lost a thousand people in population. They had gone from 7,000 to 6,000 in both of those counties in that two year period. The total population in Grant and Harney Counties is 12,000 and then it is about 12 or 13 in Baker County - very small populations and huge geographic areas and the struggle, of course, is for all systems to

provide adequate services for that population. I think I put Baker first in your report. Judge Baxter is the judge there. They have two drug courts, an adult drug court and a juvenile drug court out there. They use theirs for high risk folks. They have a total of 50 clients, a little different than Multnomah County with their hundreds. It is not yet 50 but they are aiming towards 50. Matt Shirtcliff is the DA for Baker County and he testified at the hearing you had. They do a lot of video arraignments and a lot of video appearances. Plea hearings are typically done through video broadcasting. Attorneys manage to appear at shelter hearings there. They don't have that many of them so that makes it a little bit easier. In some major counties we still haven't gotten there yet. In this county they routinely appear at dependency hearings. They are not present for delinquency preliminary hearings, however. One of our contract providers there is Dan Cronin. His office is actually in Canyon City but he practices almost exclusively in Baker County. That is because he is Judge Cramer's brother-in-law and he can't practice in his own community. In his opinion, the public defense system in eastern Oregon is disintegrating. He has watched it over a long period of time and he feels that they don't have the numbers of people they need to do the work properly even though the caseload itself isn't large. We heard from members of the consortium out there - Gary Kiyuna, Ken Bardizian, Krishelle Hampton, and Bob Whitnah - and I understand that we have lost a provider since Krishelle Hampton and Bob Whitnah have joined into a single firm.

- 5:03 Chair Ellis Did that in any way help on her insurance issues? She had a big cost for that.
- 5:11 I. Swenson I hope so. Amy Jackson was going to let me know that and maybe she has talked to her about insurance, I don't know. Have you had a chance to do that, Amy?
- 5:16 A. Jackson No. She hasn't gotten back to me.
- 5:22 I. Swenson Yeah, so not sure. Maybe so. That was an expense that they thought would be easier to afford if they were together. Judge Baxter said that structurally the system is working well with a consortium and individual providers as needed. They do a lot of telephone and video work. Not everyone is satisfied that that is the equivalent of a physical appearance. Judge Baxter said that he was very satisfied with the quality of representation. We heard some concerns in the delinquency area, but in the dependency area attorneys were reported to be meeting regularly with clients, including child clients. That was good to hear. In our statewide survey, the results for Baker County indicated a pretty similar assessment at the end of 2007, essentially saying that the quality of representation overall was good.
- 6:17 Chair Ellis In view of the testimony we heard about coverage and how difficult it is to get new, younger defense providers in the eastern Oregon counties, do you think we are at a point that we ought to actively consider an incentive program? It would be us committing to a certain amount of compensation to try and attract a qualified defender from the valley to go over there?
- 6:57 I. Swenson I would certainly want Kathryn to comment on that. The timing, obviously, isn't good in terms of the state budget outlook. Of the four counties we visited, at least my conclusion based on what we heard was that Grant and Harney are in the greatest need of additional resources. They are having the most difficulty covering the current caseload. In Baker and in Malheur I think they are looking ahead and saying, "What are we going to do when we lose these people?"
- 7:34 Chair Ellis They look to the left and the right and they are getting older.
- 7:38 I. Swenson Exactly. Their concerns are a little bit in the future but they know that something needs to happen. They would like to be bringing in new people now. They are not able to do it, but at least at the point that some of the current providers decide to retire, there will be a need for more people to be there. Whether we can bring them in now and have them supplementing coverage while they are learning is the question. I recommend that you defer that decision and take a look at it when our new budget is approved and you are aware of all the other

priorities that people will be asking you to consider, and decide where in that list these needs go. I don't think it is more urgent than that except possibly in Grant or Harney.

- 8:25 Chair Ellis There was a sentence on page 14 that I didn't parse, or wasn't able to parse. It is right in the middle of the page. It says, "In juvenile delinquency cases lawyers are properly challenging competency to proceed in some matters." Help me understand that. What are we talking about?
- 8:49 I. Swenson I apologize, Mr. Chair. In our site review process one of the issues we commonly look at in terms of juvenile delinquency representation, and this is sort of shorthand for that, is a lot of counties bring juvenile delinquency charges against children 12 and under as well as some very immature 12 year olds and above. One thing lawyers should at least consider in all of those cases is whether the youth is actually competent to proceed.
- 9:21 Chair Ellis Oh, whether the child is competent.
- 9:22 I. Swenson Exactly.
- 9:22 Chair Ellis Alright. I read that and I thought there was a word missing. Now I understand. This was the page that had the footnote on "best interest" that I referenced earlier, although this wasn't drug court it was juvenile, but the same issue, I think.
- 9:40 I. Swenson I think it is. The ethical rules are not different in drug court than they are for other kinds of criminal cases, so your point was certainly well taken this morning about whether there is authority to act in the client's best interest under the existing ethical rules and I think there is not. It is also not there in delinquency cases in my judgment. OPDS has taken the position that the bar standards set forth the appropriate analysis of these kinds of issues in juvenile delinquency cases. You may handle a case differently when your client has diminished capacity but the other rules apply so best interest representation is not appropriate in delinquency cases.
- 10:39 Chair Ellis If we could go over to page 23, this is where we list the four topics for action. I guess I want to know if there is anything more to report on any of those. The video technology was something the Chief sort of offered to take on. I don't know whether anything has come of that.
- 11:08 I. Swenson I was informed that he has undertaken to convene such a group, but I don't think it has actually happened yet. I need to contact him and see where he is in the process.
- 11:29 Chair Ellis And on insurance pooling, Commission Potter indicated that he would be looking into that and I am sure he is ready to make a detailed report.
- 11:40 J. Potter Well, in light of the time...
- 11:44 Chair Ellis It does seem to me, what little I know about it, that there may be a way to have a risk pool that would be a lot broader than just the two or three lawyers in the eastern Oregon counties. Certainly there would be a benefit if there could be a broader risk pool. I do think this is something if John wants to head it up, or you want to undertake it, we ought to be looking at. If there is a way to make a cost-saving benefit available to defense providers we ought to be looking for it.
- 12:30 I. Swenson I'm not sure structurally how that would happen under the auspices of PDSC. We did talk a little bit about Bert Putney's thought about regional defenders. One of the purposes he said was that a regional defender could provide a larger pool of employees for whom insurance would be more affordable. I am not sure it is a PDSC function. Kathryn, do you have any thoughts about that?

13:07 K. Aylward My recollection is that insurance companies generally set the conditions of what they would consider a pool. It is not in their interest - I don't know, we didn't have much luck with that in terms of identifying a group simply by occupation, or the fact that you happen to contract with the state, that wasn't ...

13:30 Chair Ellis ...enough of a linkage.

13:30 J. Potter It was on my list to follow up on that. It is still on my list. I have not done so. We looked at this a number of years ago, OCDLA did, and ran into the same kinds of roadblocks that Kathryn is talking about. That doesn't mean that things haven't changed or our numbers haven't grown. I will take another look. I'll move it up on the agenda.

13:57 Hon. Elizabeth Welch Insurance is available through the Oregon State Bar. I never used it because I ...

14:07 Lane Borg Multnomah Bar Association.

14:10 Hon. Elizabeth Welch Multnomah, not Oregon State? Not anymore? Okay.

14:13 S. Gorham The Multnomah County Bar Association lets you be a member basically just to get the insurance. It is a pretty good deal.

14:20 Hon. Elizabeth Welch So Multnomah County Bar has insurance that these people could theoretically use?

14:26 G. Hazarabedian Any lawyer can join that association from whatever county they are in and get that health insurance.

14:30 Hon. Elizabeth Welch Does it cover staff, too?

14:32 Lane Borg Yes. If you are a law office, and I was talking to Guy Walden last week - at Metro it is not an issue because we have insurance through our office - and he said that one of the benefits that they offer is that if you are an attorney, and you could be an attorney anywhere in Oregon, you could get it for your staff. One of the limitations for remote areas might be that if they are under a preferred provider there might not be a Kaiser clinic, for example. That is the bigger issue. It is available. That might be a way for them to offer it to both themselves and their staff.

15:23 Chair Ellis I think item three is kind of self-explanatory but item four, any further thoughts, Ingrid, on the issues there?

15:43 I. Swenson Well, maybe there are some other approaches than the ones we talked about at our meeting. Essentially the need is for a fixed income and the caseload is not fixed. We either disconnect those two things which may not be the most advisable way of allocating public defense funds, or you provide a little bit of both which we referred to as "sharing the risk." That was the approach that the Commission discussed at the previous meeting. I think Kathryn suggested that it was reasonable in some circumstances to look at a fixed monthly amount regardless of caseload, and then perhaps a small additional sum for cases on top of that so that monthly income wasn't completely disconnected from caseload. On the other hand, there would be some assurance that you would have enough monthly income to meet your overhead.

16:50 Chair Ellis Is this something you think we need to address now, or is that something that should wait until contract renewal?

- 17:02 I. Swenson I think it is something that should wait until contract renewal unless, in the meantime, these contractors approach us and say, “We can no longer manage under the circumstances.” If that were the situation then we would have to deal with it immediately. I don’t think we are there with any of our contractors at this point.
- 17:18 Chair Ellis On a related issue, we heard testimony from some of those eastern Oregon areas where state prisons are sited, that the cases that arise out of the prison tend to be much more time consuming than other cases. Is that something, again, we ought to just put on Kathryn’s plate at the time of contract renewal?
- 17:48 I. Swenson Well, probably so. I think the discussion centered around the fact that there already has been a recognition that a caseload involves more time depending on the prison case mix, and that they simply need to make sure in their contract negotiations that they make that clear, that the cost for this percentage of the caseload is going to be significantly higher and therefore their case rates generally have to recognize that. I think contractors in that particular county know how to approach the issue in the next contract negotiation cycle. Maybe after the Commission establishes its priorities in the next cycle we will do a better job of publicizing those so that people will say, “I do prison cases so I should ask for a differential.” Mr. Chair, I gave you an email from Janet Stevens because she couldn’t be here today. I had asked her if she had any further thoughts for the Commission. She put those in this email. Essentially she is thinking we should revisit the loan repayment/loan forgiveness possibility as one approach to attracting lawyers to these less populated areas.
- 19:33 Hon. Elizabeth Welch My impression from what you have said is that the Commission might decide to adopt a “share the risk” approach or something similar to that and putting that concept together is not a particularly challenging proposition, is that fair?
- 19:54 K. Aylward It isn’t, because in reality what happens is that our office is busy, contractors are busy, it gets down to the wire and even when we talk in negotiations about different methodologies, both sides tend to say, “You know what? Let’s just sign another contract and we will deal with it later when we have more time.” It will be easier to actually make the change. It is not that either side is resistant. This time if the RFP goes out sooner and if there is a bid that says, “I would like a different approach - this flat rate and this smaller amount per case,” we have no problem with that.
- 20:40 Hon. Elizabeth Welch My impression is that compared to eight or 10 other counties in the state the issues in Harney and Grant are only more dramatic rather than unique. We hear the same issues in lots of places. Maybe my numbers...
- 20:59 Chair Ellis Coos and Curry.
- 21:02 Hon. Elizabeth Welch It is not purely an eastern Oregon issue. I just wonder if there couldn’t be some sort of effort to put together a way of looking at the absolutely, irreducible minimum resources that are necessary in order to serve a court or a system, whatever the terminology is that you want to use. In other words, if you are going to function you have to have at least X number of lawyers per square inch, whatever it is, and what the cost differential might be in applying that to two or three different places just to see what it looks like.
- 21:43 I, Swenson I think Kathryn and her staff have certainly done that on a case-by-case basis, but you are thinking of a more systematic approach?

21:53 Hon. Elizabeth Welch
I am not trying to second guess anybody but it just seems like it is a fundamental problem that we hear about constantly so that if we could be more ready to deal with it.... I am thinking of the morale issues that we hear about and read about all the time. You would like to just practice law but you are chasing your tail all the time. You don't actually have the things you need.

22:28 Chair Ellis
Any other questions or comments on the Baker County report? Is there a motion to approve the report?
MOTION: Shaun McCrea moved to approve the report; Chip Lazenby seconded the motion; hearing no objection, the motion carried. **VOTE 5-0.**

22:56 Chair Ellis
The next one is Judicial District 24 which is Grant and Harney. There is a typo on page 15 in the heading. It should be "August 14, 2008." Any comments you want to make, Ingrid, on this one?

23:29 I. Swenson
I think there are concerns about the quality of representation in that district that are different from the ones in the other two counties that we looked at. It may just be a reflection of the fact that there aren't enough providers there. It may not be fair to judge quality in the way we do because everybody who made negative comments about quality issues always added that the lawyers just have too much to do. They understand why they can't be doing X, Y, and Z.

24:10 Chair Ellis
The reference on page 14, picking up on the quality issue, in the paragraph at the bottom of the page about an hourly attorney from outside the county who should not be permitted to handle public defense cases - "He is incompetent." Those are pretty strong words.

24:29 I. Swenson
They were strong words.

24:31 Chair Ellis
This isn't a place to get into individual issues but is that being addressed?

24:37 I. Swenson
It has been.

24:43 Chair Ellis
That sounds like termination with extreme prejudice.

24:47 I. Swenson
Well, without talking about individuals, in this particular circumstance there were a number of significant concerns that came to our attention at approximately the same time and really for the first time. The combination of all of those concerns led us to limit the work of this particular lawyer, and to agree with the lawyer that certain mentoring and training and so forth would be required before any additional case categories were approved for him.

25:29 Chair Ellis
This is a very minor point but I was struck by the fact that on page 13, Markku Sario, receives one rate for Grant County cases and a higher rate for Harney County cases. Then on the next page the opposite appears to be true for Gordon and Mallon. Maybe it has to do with where they are located. I don't know.

25:52 I. Swenson
Exactly.

25:59 Chair Ellis
There is a logic?

25:57 I. Swenson
There is indeed a logic.

26:08 Chair Ellis
Any other comments or questions on the Grant and Harney County report?

26:19 I. Swenson I just want to add that I did hear from John Lamborn. I have sent copies of this report to all the people that we spoke with and heard from at the Commission meeting and John was among them. He certainly disagreed with some of the concerns expressed about the quality.

26:41 Chair Ellis In juvenile?

26:41 I. Swenson Yes, in particular in juvenile cases. It is always hard. You have very few providers and it could be that people are focusing on the weakest of those providers, or not. I tried to assure him that none of this was directed at him in particular, but the comments were what they were in terms of either “most” or “all” of the attorneys.

27:09 Chair Ellis If there are no other questions or comments, is there a motion to approve?
MOTION: Shaun McCrea moved to approve the report; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

27:25 Chair Ellis On to Malheur. Any comments you want to make, Ingrid. This was the one I got in trouble over by calling it a suburb of Boise.

27:58 I. Swenson We certainly did hear that the competition from Idaho is significant in terms of recruiting lawyers. It may not be a suburb, but it is a magnet for lawyers and for investigators as well. As the Chair mentioned, the only real difference here – I think that although the Rader firm would like to add another associate the need for additional attorneys is less significant here – was that they were concerned about the prison cases. You heard quite a bit about that and that was the main distinction between their caseload and that of the other providers.

28:44 Chair Ellis Snake River is in Malheur, right? Any questions or comments on the Malheur County report? Is there a motion to approve? **MOTION:** Shaun McCrea moved to approve the report; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. Final Approval of PDSC Service Delivery Plan for Jackson County

29:11 Chair Ellis On Jackson County my memory is we approved and then Commissioner Ozanne had one change he wanted to see. What we are seeing is that one change on the page that is attached here?

29:26 I. Swenson That is correct, Mr. Chair. I did send that to the Jackson County folks and I received no comment about the amendment which essentially is the piece about expectations for lawyers and whether this is social work or legal work.

29:48 Chair Ellis And the answer is “yes.”

29:49 I. Swenson The answer is, it may not matter if it is what you are supposed to do.

30:00 Chair Ellis It is a binary paradigm. Any questions or comments on the amendment to the Jackson County plan? If not, is there a motion to approve that? **MOTION:** Shaun McCrea moved to approve the amendment; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0,**

Agenda Item No. OPDS Monthly Report

30:37 Chair Ellis Okay. I think we are now at the next item which is the OPDS Monthly Report.

30:46 I. Swenson Mr. Chair, I was going to inform the Commission that there are two Oregon Criminal Defense Lawyer’s Association legislative concepts which would affect PDSC. As I understand it, the organization intends to pursue both of these. The first one has to do with providing compensation for public defense lawyers commensurate with their counterparts in

government service, so a parity proposal. Secondly, on the death penalty they have decided to go forward with a statutory amendment requiring the DA to file written notice of intent to seek the death penalty.

- 31:39 Chair Ellis Is that the same as the Washington procedure that we heard about last meeting?
- 31:43 I. Swenson It is a notice provision. I don't know if the OCDLA draft has been prepared yet and I don't know what, if anything, it does about treating life versus 30 years.
- 31:58 Chair Ellis I thought the logic of the (inaudible) statute was to have a period of time before ...
- 32:04 I. Swenson That is exactly what it is. It is a requirement that the state cannot file a notice of intention to seek the death penalty
- 32:14 Chair Ellis Until a certain period. Okay, so it is very parallel to what Matt talked about.
- 32:21 I. Swenson Yes. The Commission is well aware that the voters have passed Measure 57. You had asked us in our budget narrative to talk about the potential impact of that. We had previously been asked to do a fiscal estimate of the impact, a fiscal impact estimate, and at least for the current and next biennium it remains to be seen whether there will be significant cost additions. They don't appear to be major at this point.
- 33:08 K. Aylward Our fiscal impact statement said "indeterminate." The only portion of it we could determine was section 10 where you actually could quantify it. That was somewhere around \$75,000 for a full biennium, but that was just the portion that we actually could take a stab at and the rest of the facts we said, "it depends."
- 33:31 Chair Ellis When does that become effective?
- 33:33 I. Swenson January 1.
- 33:39 Chair Ellis As we all read in the paper this morning, apparently someone came up a billion dollars short of what the prior estimate was. I am sure it is too soon to tell but is there anything we should be thinking about there?
- 34:01 I. Swenson The details will obviously be the important part. Kathryn and I are scheduled to meet, along with all the other agency folks, with the Governor and his staff the week after next once his budget is released, and talk about the implications and their expectations.
- 34:21 Chair Ellis But that is the budget for the next biennium.
- 34:23 I. Swenson Correct.
- 34:23 Chair Ellis The report I was reading this morning was an effort to cut this biennium.
- 34:32 I. Swenson Right. I think it is \$146 million dollars short, which isn't that huge a percentage of the current state budget, but obviously would have an impact.
- 34:40 Chair Ellis But it is a significant part of the budgeting remaining between now and the end of the fiscal year.
- 34:49 I. Swenson Yes, and agencies had been asked to propose five percent reductions in order to deal with the shortfall in this biennium. We have now been instructed to discuss a 1.2 percent reduction for the current quarter. We will respond to those. As you know from the budget narrative, in terms of the account, our response is generally that at a certain point if we run out of money we can't appoint attorneys from that date forward. Then with respect to our operating budget,

of course, we look for whatever savings there might be. There could be savings in services and supplies.

35:37 Chair Ellis But in terms of actual dollars the operating budget is tiny compared to the fund budget.

35:47 I. Swenson It is. Some of the impact is nevertheless felt in the operating budget, but it is the numbers.

35:57 Chair Ellis He wasn't able to make it here today but do you know if the Chief is thinking about anything similar to what happened in 03?

36:06 I. Swenson I don't know but Becky Duncan is here. She attended the governor's public safety meeting. I don't imagine there was any discussion about that.

36:18 B. Duncan No.

36:22 I. Swenson Discussions are ongoing.

36:26 Chair Ellis I was pretty sure it would be too soon to know what all it might be. Any other ...

36:37 I. Swenson Maybe Commissioner Lazenby has some news.

36:39 C. Lazenby There are three segments of this. There is a five percent cut in the current year for the remainder of the biennium and then a 1.2 cut in the spending for the coming quarter. When is DAS telling you that you have to firm up the five percent? When is that happening? Kathryn?

37:05 K. Aylward The first exercise that was given to all state agencies about two weeks ago was this: "What if we had to take five percent of your total budget, what would like that look like?" I think that was in preparation for a bad revenue forecast. Now that there has been a bad revenue forecast what they are actually saying is, "Forget about the scenario 'what if.' We know we are going to take 1.2 percent and we are going to take it out of general fund money mid-December. You can kiss it goodbye." That is when you are going to start implementing whatever cuts are necessary for 1.2. One point two percent for the entire biennium, obviously, when it is implemented in the last quarter, represents nearly four times as much, nearly a five percent cut in just those remaining six months.

37:50 Chair Ellis Why isn't it eight times?

37:54 K. Aylward We are calling it a quarter but it is half a year. A quarter of the biennium. We actually have six and a half months to implement it. For our operating units that is about \$156,000 they would take mid-December out of our bank account, and about \$2.4 million out of the Public Defense Services account. This just came out yesterday and I have a call in to LFO to discuss how that would happen, what would happen. It is early still. I think the Commission is aware of the fact that we continue to expend funds for this biennium after June 30. We call it the "tail." We will await LFO's response on whether it would be appropriate to simply use that tail money. In other words, if you needed \$2.4 million in your bank account to get the remaining bills paid could we just say, "Okay, sorry, July 1 we are going to switch over to new biennium money." LFO may say, "Next biennium is going to be even worse and we actually need you to make cuts." I think at that point we would say, "Well, then we need to be told how. Which of those constitutional provisions would you like us not to meet." I don't know but I think in our case I don't know that there is a lot that we could do in the next six and a half months to save up that \$2.4 million.

39:47 C. Lazenby Then you go into session in, what, six weeks, seven weeks, something like that?

40:00 K. Aylward As far as our operating budget is concerned we do have sufficient vacancy savings to come up to that figure.

40:09 Chair Ellis Even with all those new appellate lawyers?

40:12 K. Aylward We can certainly economize in the next six and a half months to come up with that amount of money.

40:23 C. Lazenby One hundred and fifty-six thousand, that number?

40:27 K. Aylward Yes.

40:27 Chair Ellis Anything else?

40:30 I. Swenson I did attach a copy of Becky Duncan's article in the OCDLA newsletter on *Ice*. She is here if you have any questions for her.

40:43 Chair Ellis Thank you, Becky. I thought it was a good article. I enjoyed reading it.

40:45 B. Duncan It was a great experience. Peter Gartlan, and I, and Ernie Lannet, our attorney on the *Ice* case, went out to Washington. We did three moots courts in Washington in preparation for the argument. I think the argument went well. The justices were all where we expected them to be in terms of their positions. We felt good about that. I will make no prediction about the outcome. I do think we will get an opinion sooner rather than later, probably by January.

41:15 Chair Ellis If it is authored by Justice Scalia you don't need to read further and if it is authored by Justice Breyer you don't need to read further.

41:26 B. Duncan Just because we do have the luxury of a lot of cases interpreting *Apprendi*, if the division of the justices holds then things look good for Scalia or Thomas writing the opinion and Breyer writing a vigorous dissent. That was a great experience, just to update you on our U.S. Supreme Court practice. We have another petition for certiorari that will be heard in conference by the Court in the next couple of weeks. It involves a challenge to Oregon's current practice of allowing non-unanimous verdicts, 10-2 jury verdicts. There was a similar petition out of Louisiana that was recently denied. It was denied this fall but that case may have had procedural obstacles and that may have been the reason for the denial.

42:19 Chair Ellis They decided a case in that area 30 years ago. Has there been anything that causes you to think that it is an issue they are interested in?

42:33 B. Duncan There are a couple of things. I think part of the opinion was based on an assumption that basically in Oregon there was like a directed verdict option, that you could make a motion to the judge for a judgment notwithstanding a jury's verdict. That was an assumption that the court made that is not true. I think that would be a reason for the court to revisit it. There are members of the court, Kennedy in particular, who have written that they think *Apodaca* was wrongly decided. I think the time is right. A lot of that decision is based on assumptions about jury dynamics that more recent social science doesn't support. I think there is a chance. If we had to put odds on it I would say it would be like a 50/50 chance.

43:26 Chair Ellis And Oregon is one of two states?

43:29 B. Duncan One of two.

43:28 Chair Ellis This is like *Ice*. Do you think they are really going to take cases where the impact is so limited?

43:37 B. Duncan That would be a reason for them to not take it - to let these two states continue to exist as laboratories and that is not that big of a deal.

43:51 Chair Ellis We are used to having at least one case in the Supreme Court every year. Any other questions? I think that completes the formal agenda.

44:11 K. Aylward Mr. Chair, there is one thing that I must tell you because I am going to do it and you need to know it.

44:16 Chair Ellis This is not an action item.

44:24 K. Aylward At our last meeting the Commission saw our Annual Performance Progress Report. It is basically the summary of our Key Performance Measures. After that was submitted I was contacted by the Key Performance Measure Coordinator for DAS who said he wanted to discuss one of the proposed measures. I met with him on Monday and we discussed it. His recommendation, and I am happy to follow it and would recommend it to the Commission, is about one of the Key Performance Measures that was a composite measure of the median number of days to file the opening brief and how quickly my division paid bills or approved expenses. We thought a composite measure would work and he said, "I don't know how you are going to calculate that and it is probably not a good measure. Why don't you get rid of the two that are in your division and just leave the one that is the median number of days." I would like to change our Annual Performance Progress Report to show that that is what we are asking for approval of. It goes in your budget binder.

45:38 I. Swenson If you recall the measures in Kathryn's division are at a very high level in every report. It isn't a measure where you will ever be likely to see a change.

45:51 K. Aylward We are exceeding our targets in those measures anyway.

46:00 Chair Ellis Based on your introduction I believe we are just here to listen.

46:05 S. McCrea We didn't hear you asking for permission.

46:12 K. Aylward I was ordered by DAS to say that.

46:17 Chair Ellis Any other topics? If not, I would entertain a motion to adjourn.
MOTION: Shaun McCrea moved to adjourn the meeting, Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting adjourned.

Attachment 2

Marion County Update – Summary of Information from Previous PDSC Hearings and Interviews with Marion County Stakeholders¹

A. July 28, 2005 - Staff reports and testimony at the July 28, 2005 hearing produced the following information.

The Marion County Association of Defenders (MCAD) had 55 active members; Steve Gorham was spending approximately 70% of his time as the executive director. The consortium had a nine member board which was chaired by Richard Cowan. It also had a quality assurance committee. New members were recruited by “word of mouth” and the board decided whether to accept new members. All new members were required to submit a “mentoring program” but no description was provided. Court appointments were made on a rotational basis, based on separate lists for aggravated murder, murder, felonies, misdemeanors, and Spanish speaking clients. MCAD urged that the advantage of this system is that it promotes early personal contact between the assigned attorney and the client. The attorney of the day receives all the cases on the attorney’s assigned date. MCAD announced that it was moving to increase the executive director’s and the board’s control over the admission of new members and to improve monitoring and enforcement of performance requirements (although the board members with whom OPDS staff had met had not been enthusiastic about any changes to MCAD’s organizational structure and in their responses to the questionnaire from OPDS reported that they were functioning well and that their work was as good as, or better than, that of any other contractor in the state.)

The Juvenile Advocacy Consortium (JAC) had 12 members, two of whom had been added recently, and the Commission was informed that it would be adding three more to cover the growing caseload. In the OPDS report it was noted that JAC’s answers to the questionnaire reflected a serious commitment to juvenile law practice, rigor in the selection and mentoring of new lawyers, pride in the quality of its lawyers and willingness to consider changes. Because of the small size of the group, it operated largely on a consensus basis. The consortium had no formally designated administrator but Richard Condon was primarily responsible for negotiating and administering the public defense contract. The consortium reported that it would be working on creating a more formal structure and written policies and procedures. JAC does not seek to match clients with attorneys, except with new or inexperienced members. All members, except new ones, receive an equal number of cases. JAC was not planning to implement an attorney evaluation process or a more formal recruitment process. The small size of the consortium allows members to observe the work of other members on a regular basis. Periodically judges, DAs, DHS and probation staff are asked for

¹ Original reports and attachments may be reviewed on the OPDS website under “Reports and Publications.”

comment on the quality of attorneys' work. In the past the group has offered to mentor a member whose performance has been questioned. If the attorney does not agree to participate that attorney's name will not be included among consortium members in the next contract.

Judge Pamela Abernethy testified that she had been assigned exclusively to the juvenile court for the past four years. She said she was very pleased with JAC's work; all of the attorneys are dedicated to juvenile law and to serving the interests of their clients. She said there is an obvious need for more lawyers and it would be good to have more Spanish speaking attorneys with multi-cultural backgrounds, but she didn't know whether the attorneys could survive with smaller caseloads. They are specialists and they might not be able to continue to specialize in juvenile law if they had fewer cases. She recommended that the consortium create a ten-year plan to meet the needs of an expanding caseload.

Judge Albin Norblad testified that he had handled many termination of parental rights cases and agreed that JAC attorneys provided excellent representation.

Dick Condon said that JAC knows that it needs to bring in younger and more diverse lawyers and will need to add more structure as it grows. He feels that currently it can function adequately through its committees. The consortium is considering adding a business lawyer to its board.

Presiding Judge Paul Lipscomb said that he agreed that the work of JAC lawyers was excellent and that its size was just about right for its operations. It was still small enough to be operated on a largely informal basis. He felt that the Marion County criminal defense system needed more structure, however. He said the current decentralized system used by MCAD could not ensure either operational efficiency or consistent quality. In criminal cases the county needs a modified MCAD with a case rate system and a more tightly organized consortium with stronger supervision, quality assurance processes, etc., or a public defender office. His preference would be for the latter.

Steve Gorham noted that with a separate docket for each judge, scheduling would be a problem for any type of provider.

Judge Terry Leggert testified that the quality of defense had declined in the county, probably due to an increase in caseload. She said that many of the most experienced lawyers had stopped taking criminal cases and some had moved to JAC. Some MCAD lawyers were over their heads and the mentoring program was not working. She noted that it was hard to communicate with MCAD lawyers who had no staff and who did not respond to messages from the court. She recommended that an outsider be brought in to train and monitor quality because it would be too difficult for colleagues to monitor each other.

B. Additional Interviews and August 11 Meeting- After the July 28, 2005 meeting OPDS staff interviewed additional witnesses, including ten of the fourteen judges, the trial court administrator, drug court staff, EDP staff, MCAD board members and the MCAD executive director, MCAD attorney members and JAC attorneys, other criminal defense attorneys in the county, the district attorney and his senior staff, the sheriff and corrections staff, CASA volunteers and CRB members.) The conclusions drawn from these interviews were:

- (1) that JAC is well regarded, providing above average to excellent representation, although a few minor complaints were received and a number of interviewees said that more lawyers were needed, especially more Spanish speaking lawyers;
- (2) MCAD has some excellent experienced lawyers; MCAD attorneys contribute to the development of justice policy in the county but on average the level of quality has slipped in recent years. MCAD has become too big; it can't address problems; remedial efforts have been inconsistent and ineffective. Opinions of Marion County judges vary considerably. The DAs provided a short list (similar to that of others) of underperforming lawyers and criticized the attorney of the day program because they believe that too many inexperienced lawyers are getting complex cases that they are not able to assess well. They expressed a concern that some lawyers are going to trial just to get more money. OPDS acknowledged that "Methods of compensating lawyers under PDSC's contracts create economic incentives and disincentives to advancing the interests of clients who are confronted with the choice of proceeding to trial or accepting a plea bargain." Many commentators noted that, although the Marion County docketing system does ensure that one judge will handle a case from beginning to end, the lack of a central docket and the location of the annex are major problems.

The report concluded that JAC's representatives had made it clear that they would like to preserve their organization but were willing to accept direction and guidance. MCAD, on the other hand appeared resistant to change and oversight based in part on the circumstances that existed when MCAD was formed and fear that PDSC wanted to get rid of MCAD. MCAD was asked to make a follow-up presentation at August 11 PDSC meeting.

At the August 11 meeting PDSC directed MCAD to address: (1) Management authority regarding the adding and removal of members, establishing and implementing qualification standards, practice requirements, and sanctions for substandard performance; (2) What changes had been made to the attorney manual; (3) Provide details about the mentoring program; (4) Identify MCAD's view of a meaningful quality assurance process; (5) Can MCAD reform its heavy due process model and come up with a workable sanctioning and removal process; (6) How does MCAD monitor performance besides receiving complaints from judges? (7) State whether MCAD was considering any changes to its board's structure? (8) Provide an inventory of active members and their

caseloads; (9) Describe how MCAD is saving the state \$300,000? (10) Explain why a trainer is needed in addition to current staff.

At the August 11 meeting Judge Joseph Guimond testified that a public defender office would undermine MCAD. MCAD needed to improve however. Courtland Geyer, representing the District Attorney, said MCAD allows inexperienced lawyers to handle complex cases. The attorney of the day assignment process aggravates the problem. Dick Cowan and Steve Gorham testified.

C. October 21, 2005 to January 2006 - At its meeting on October 21, 2005 PDSC adopted a service delivery plan for Marion County based on four principles:

- (1) To promote quality and cost-efficiency it is necessary to have more than one provider.
- (2) Marion County is an appropriate site for a public defender office
 - “(a) overseen by a board of directors constituting a representative group of local citizens and officials,
 - (b) managed by a professional manager with a commitment to promoting the quality and cost-efficiency of the state’s entire public defense system,
 - (c) staffed by a corps of full-time public defense attorneys and support staff who are accountable for their performance and conduct through an employer-employee relationship, and
 - (d) supported by effective and cost-efficient management practices and quality assurance and training programs that, (i) promote the interests of the justice system and the entire community in Marion county, and (ii) serve as models for other public defense providers across the state.”
- (3) There will always be a significant role for qualified consortia or private attorneys in Marion County to handle a major portion of the county’s public defense caseloads.
- (4) MCAD will be able to continue serving as a major public defense contractor if its membership and management accept the commission’s role, are willing to address problems, especially problems of management, oversight, accountability of lawyers; assignment of cases based on skill and recruitment, training, retention and removal of consortium attorneys.

PDSC adopted two components of a service delivery plan:

- (1) Establish a high-quality, cost-efficient public defender office in Marion County (6 to 10 full time public defense lawyers). PDSC resolved to review and evaluate the operations of the new office after its first 18 months of operation, getting input from its board of directors, the circuit court and other key stakeholders, in order to determine if the office’s mission, operations and capacity should continue or be changed.
- (2) Provide MCAD with the opportunity to strengthen management and operations over the coming year (under a one year contract) and

determine whether the contract should be renewed. MCAD was instructed to submit a progress report by August 1, 2006.

D. January 2006 to October 2007 - On January 12, 2006 PDSC approved several amendments to the service delivery plan and was informed that seven or eight community members had been recruited with the assistance of Commissioners Brown and Greenfield to serve on the steering committee to establish the public defender office. This group worked with OPDS to identify an initial board of directors for the new office. The first organizational meeting of the board occurred on September 25, 2006. The initial chair was John Hemann, of Hemann, Robertson, Jennings, Comstock & Trethewey, PC. Members of the initial board were Scotta Callister, Bob Cannon, Bill Copenhaver, Teresa Cox, Michael Muniz and Walter Todd. The Board of Trustees met regularly thereafter and began recruiting for an executive director in November, 2006. Tom Sermak, formerly of the Public Defender Services of Lane County, was selected as the executive director in January of 2007. The office was incorporated as a nonprofit corporation, a mission statement and strategic plan were developed, office space and equipment acquired and staff recruited throughout the first half of the year. The office opened on April 2, 2007. A preliminary agreement was reached with OPDS and the Public Defender of Marion County began accepting court appointments in July of 2007.

In the meantime, on April 13, 2006 MCAD presented its first update to PDSC Chair Barnes Ellis, noting that MCAD had changed its bylaws and added three outside members to its board, one appointed by the presiding judge of Marion county, one appointed by Willamette U College of Law, and one appointed by the Marion County Bar Association. MCAD also reported that it had reorganized into workgroups that meet at least twice a month. Every MCAD member belongs to a workgroup of seven to nine members. Each group includes attorneys with varying amounts of experience. They discuss case strategies, exchange ideas and tips, provide training, mentoring and general support. Any concerns regarding an attorney's performance are discussed and resolved.

In a June 14, 2006 letter to Chair Ellis, MCAD reported that Steve Gorham had served on the public defense diversity task force and that he and Olcott Thompson had attended the OPDS consortium work group. MCAD had added three new members and had implemented an education plan. MCAD reported that it would be revamping the "attorney of the day" approach to case assignment.

E. October 12, 2007 - OPDS reported to PDSC at its October 2007 meeting that a contract had been approved for PDMC for the period of July 2, 2007 through December 31, 2007 and that PDMC had submitted a response to the RFP for contracts in the 2007-09 biennium. PDMC informed the Commission that it planned to conduct performance reviews of all attorneys and staff members each year, that it was receiving appointments in a large variety of

cases, approximately 40% of which required interpreters. The office had two staff members who spoke Spanish. There were four attorneys in the office and a plan to add four more. The office was developing an employee manual and a client feed-back form. The executive director was meeting weekly with the Board of Trustees. It was also reported that the office was receiving good cooperation from MCAD.

MCAD reported that it had created a judicial liaison position to actively solicit performance information from judges. There had been some performance issues. Judge Leggett had declined to appoint one MCAD attorney to any new cases and the attorney resigned. Another attorney was arrested for the sale of cocaine. He was taken off all of his cases the next day. MCAD had developed an education plan and a communication plan. Olcott Thompson informed the Commission that "Because of [the litigation initiated by former MCAD members] we have really been able to see where our problems were, not only identifying somebody who really wasn't doing the job, but then taking the steps necessary ... to either get them to be able to do the job or say, 'We are sorry you have to leave.' "

Steve Gorham proposed that PDSC limit the percentage of cases to be assigned to the public defender office to 20 or 30% of the total criminal caseload. Chair Ellis responded that the public defender office first needed to obtain its "critical mass" and, once it had done so, the future of the both groups would depend on performance.

F. Current updates:

JAC – In interviews with OPDS staff, CRB representatives Tom Carranza and Molly Steinbacher said that over the last three years, the attorneys' attendance at CRB hearings had improved. Most of the attorneys participate by conference call if they can't be physically present. In the experience of these CRB staff members, JAC attorneys are more knowledgeable about their cases than attorneys in other counties where they have worked. They are really pleased with all the attorneys. They use the board effectively as a way to advocate for their clients. Only one attorney doesn't attend very often but usually sends a letter. A number of lawyers also write to the CRB after reviews asking for additional recommendations, making suggestions about findings, etc. The attorneys also appear to work well with the CASAs and maintain good communication. There are not enough lawyers to handle all the cases, however.

The Marion County CASA program was also asked for comment regarding the delivery of public defense services in juvenile dependency cases and reported that CASA volunteers identified several consortium attorneys who did not visit their child clients at all or who had only occasional five-minute meetings with clients usually just before a court hearing. They said that eight of the attorneys make a concerted effort to have more contact than this and these lawyers do the

best work. Lawyers do a good job of advocating for the client's express wishes but they often know what those wishes are only from reading reports prepared by others rather than from meeting with the client. Some CASAs see little evidence of preparation by the attorneys beyond having read the CASA and DHS reports. Attorneys rarely seem to have independent sources of information. The CASA spokesperson said she was not aware of any case in which an attorney had conducted an independent investigation.² Children over twelve years old seem to fall through the cracks. Their attorneys do not appear to be helping them to access independent living programs or to be working on transition planning. In permanency hearings it is rare for an attorney to be the one who proposes and outlines an alternative plan. CASA staff did say that attorneys had been working more closely with CASA volunteers than they had in the past. All of the attorneys appear to have too many cases and this may prevent them from seeing their clients as often as they should.

Based on observations Commissioner Welch made during the course of a recent judicial assignment in Marion County, she and OPDS's executive director met with JAC members to discuss their work and how they are able to manage their relatively high caseloads³. A summary of the discussion and of Commissioner Welch's observations are included as Exhibit A to this document.

Richard Condon will be presenting additional information to the Commission on January 22.

MCAD – A number of the judges have reported continuing improvement at MCAD. The new director, Paul Lipscomb, is seen as dedicated and responsive. The workgroup approach to quality assurance appears to be working in most cases. Performance problems are directed to the attorney's group and the group then works with the attorney to address the issue. The number of attorneys not performing adequately has been significantly reduced. It was reported that complex cases are now being handled by experienced attorneys. Paul Lipscomb and a member of the MCAD board will provide additional information to the Commission at the January 22 meeting.

PDMC – The public defender's office received appointments in 1,877 cases in calendar year 2008. (MCAD was appointed in 6,319). The office has established a presence in Marion County. While the substantive legal work of the office is said to be good, there have been on-going issues related to the deployment of the office's attorneys, timely appearances at court hearings, office

² OPDS's non routine expense data base disclosed only four requests for funds for investigation services in delinquency cases and four requests in dependency cases in Marion County over the period of the last two years.

³ In 2007 JAC received appointment in 8,195 cases, which amounted to 603 cases for each of the 13.6 attorney FTE positions and 455 cases for each of the 18 attorneys. (These attorneys had fewer cases per FTE than Jackson and Linn County juvenile attorneys, but more than the attorneys at the juvenile consortia in Lane, Clackamas and Multnomah Counties and two non-profit juvenile contractors in Multnomah County.

management, and adequate training of new attorneys. Tom Sermak and one or more of the members of the Board of Trustees will be present at the January 22 meeting to discuss the work of the office and the steps that are being taken to address concerns identified by the judges.

OPDS staff will report on additional information received in interviews scheduled for the week of January 19, 2009.

Exhibit A

Best Practices- Marion County

The defense consortium serving in Marion County Juvenile Court has an excellent and well deserved reputation. Based upon my observations serving as a Plan B judge in Marion County for a total of about 3 ½ weeks in the past two years, there are a few features of their work that are worthy of examination.

- The attorneys have seen their child clients in dependency cases and appear to have depth about their clients' needs and circumstances.
- The attorneys are available almost without exception for future reviews in the case that are set at the end of hearings.
- The attorneys who will be representing the parties in a case are themselves present at the shelter hearings and are able to effectively begin the process of representation with their client from the outset.
- The consortium has 18 members, they meet regularly, and they are seasoned practitioners. They are all solo practitioners.

The consortium members are very committed to the importance of meeting and being in touch with their child clients. That is clearly their first priority.

They attribute their ability to do effective work for their clients generally to the fact that they represent both parents and children in dependency cases. They feel that the mix of advocacy gives them balance and perspective. Because they are all solo practitioners, they have fewer conflict problems. They are able to cover for each other because the consortium is fairly big and because they have worked very hard to be supportive of each other and the effectiveness of the consortium.

A system has been set up in Marion County which allows the lawyers to know which of them will be covering shelter hearings on each day for the next 90 days. That allows them to keep their schedules free on the days they are to cover shelter hearings. They are able to meet with their clients prior to the shelter hearings. They receive discovery at 11 am and the shelter hearings begin at 1:30. They are able to speak in depth with their clients before the hearing and to establish understanding and expectations with their clients. They are able to advocate for services for their clients and for their clients' positions from the outset.

Attorney availability at future reviews is attributed to the consortium members' ability to cover for each other when scheduling conflicts arise. In my observation, there is not an excessive amount of covering for others that happens and the lawyers have been well briefed on the case.

Special System Issues

There is a consistent policy in the district Attorney's office in Marion County of charging parents with relatively minor crimes when children are taken into custody due to their parents neglectful conduct or due to parental use of illegal drugs. Thus there is a very

significant percentage of dependency cases in which there is a pending criminal charge against the parent. This creates a number of difficult issues for counsel and for families. Due to high percentage of Hispanic families in the Marion County system, the shifting practices of INS as to what kinds of offenses people are deported for is a factor on the future for these families.

The relationship between the Marion County Juvenile Court and the CRB is a possible area for some role clarification which could conserve resources for all concerned. There is little cancellation of CRB reviews even in cases where the court is actively reviewing the matter.

Betsy Welch

Richard Condon was asked to provide additional information about how cases in Marion County were scheduled since the system appeared to permit attorneys to be present for most of the scheduled hearings in their cases. He provided the following information:

1. A shelter calendar is prepared for each month by the consortium and provided to the court. The calendar indicates which attorneys will be available on each shelter hearing day.
2. Settlement conferences are scheduled in court at the time of the shelter hearing when counsel is present.
3. Attorneys attend CRB reviews when they can but because of limited notice they are frequently scheduled for court hearings at the same time. If the first review could be scheduled in the courtroom, attorneys could attend more regularly. If they are not able to attend in person, attorneys sometimes instruct their clients about the procedure and what they should say in their own behalf.
4. The process for scheduling permanency hearings is currently in transition and a resolution is not expected until Judge Abernethy returns.

Attachment 3

[Note: To see JAC's responses to the original questionnaire please go to the PDSC website: www.opds.state.or.us, select "Reports and Publications." The responses appear at pages 123-149 of the "Marion County" document.]

JAC Responses to Questionnaire for Consortia and Boards: 2009 Update

Questions 1 and 2

Since the last time we addressed these questions, the Juvenile Advocacy Consortium did adopt formal By-Laws, a copy of which I have attached. Pursuant to the By-Laws we established a Board of Directors consisting of the five senior affiliates listed. The responsibilities of the Board of Directors include the authority to decide most of the business affairs of the consortium, and to delegate to committees of affiliates functions related to training, quality assurance, evaluation of affiliate work, recruiting, and other consortium business. Our intention at the time of the creation of our By-Laws was to include on the Board of Directors a "lay" member, preferably, though not necessarily an attorney with business and other experience. We have not yet filled that position, as a particular candidate we had desired became unavailable. We still intend to fill that position.

We also established at the same time a form of JAC Affiliation and Independent Contractor Agreement, a copy of which I have attached.

Our board meets approximately every other month, and to date has dealt primarily with staffing, quality assurance concerns, and financial matters.

Question 3

I was appointed administrator of our consortium by a vote of the senior affiliates. Since April, 2008 I have been compensated \$2,500.00 per month for this role. The duties of the administrator currently are to serve as the liaison between the consortium and the Juvenile Court, the Juvenile Department, the Department of Human Services, the Citizen's Review Board, CASA and the PDSC. I receive and distribute input to the Board of Directors and all affiliates regarding all matters of JAC business, and often direct discussions, along with our various committee members, at the six monthly JAC meetings.

There is currently no formal evaluation process of the administrator, although I receive frequent "constructive suggestions."

Question 4

My current duties as administrator involve approximately 10 to 20 percent of my overall work load, and while there is no particular limitation on that work load, our group has continued its tradition of using committees to study and make recommendations to the Board with respect to most essential functions of the Consortium.

Questions 5-12

To date administrative demands have not been inconsistent with either the Board's or my availability due to case load concerns. This is partially a result of the somewhat limited functions of the administrator vis-a-vis the Board and our various committees, which no doubt perform many of the functions a full time administrator might address in a different organization.

The requirements for and process for applying for membership have not changed since 2005. We have however added four positions since 2005 and now consist of 18 attorneys. We continue to recruit, as we expect we will experience retirements, the need to handle a potentially fluctuating caseload, and hope to include members with more spanish language capability, domestic relations expertise and potentially immigration expertise. Our most recent additions have included one fluent spanish speaker and one attorney with very substantial domestic relations experience.

Our mentoring system is essentially the same since our last report. We have weekly meetings of the 11 senior affiliates, and bi-weekly meetings of the entire group. In addition to the "hands on" mentor provided in the training of new attorneys through the committee process, the larger attorney meetings provide a forum to discuss cases, questions and problems between all JAC attorneys.

Question 13

Our process for assigning cases has changed since our last report to the commission. For delinquency cases, misdemeanor and lesser felonies are handled primarily by a group of six of our most recent additions. I direct court staff to distribute that case load roughly equally to those six. Other felonies are primarily handled by the 11 most senior affiliates and three other consortium attorneys with very substantial criminal experience. Ballot Measure 11 cases involving 15 year olds are handled by four of our affiliates with the most criminal experience.

The dependency case load is assigned through a different process, whereby we provide to the Juvenile Court "shelter calendars" that advise the court of the names of three attorneys who will be available each day of the month to handle the 1:30 p.m. shelter hearings (for mother, father and children). By keeping track of cases handled on an ongoing basis, the number of shelter days attorneys sign up for is varied in order to achieve a rough balance in case numbers among all attorneys handling dependency cases.

Question 14

The shelter calendar appointment process was a substantial improvement in the appointment process. Attorneys are available at court to consult with clients from the moment they first appear at shelter hearings in their cases. This has led to a quicker and more efficient process of connecting attorneys and clients from the beginning of the case, and made overall resolution of the cases more efficient since the settlement conferences that follow shelter hearings are now more substantive and successful, since the attorneys have typically had at least two chances or

more to meet with the clients prior to each settlement conference.

Question 15

Yes. It has been the policy of the Juvenile Court and of the Juvenile Advocacy Consortium to maintain the same representation of clients who return to the Juvenile Court on subsequent matters.

Question 16

The Juvenile Advocacy Consortium does not have a standardized procedure for identifying conflicts, however the Juvenile Court staff have been extremely helpful in providing historical representation information to attorneys in the process of assigning attorneys at shelter hearings. Each attorney does however continue to perform their own conflict checks upon assignment.

Question 17 and 18

Our regular meetings have been discussed above. We do use two email listserv tools for regular communication within the group.

Question 24

We require attorneys as part of their affiliation agreement with JAC to notify our administrator of any bar complaints. We have had no occasions of attorneys being disciplined by the Oregon State Bar. As administrator, I am notified and monitor weekly all complaints received by the Bar regarding all public defense services providers. Again, there have been no complaints that have required our organization's attention as a result.

Questionnaire items not specifically mentioned herein remain essentially unchanged since our last report.

BYLAWS OF JUVENILE ADVOCACY CONSORTIUM

ARTICLE I: Name

The name of this entity is Juvenile Advocacy Consortium (hereinafter referred to as "Consortium").

ARTICLE II: Purpose

The purpose of this Consortium has been and will continue to be to:

1. Provide representation to indigent children and parents in juvenile proceedings in Oregon courts;
2. To advocate for children and parents in other forums;
3. To educate the public and professionals about juvenile justice issues;
4. To acknowledge and develop common interests with other agencies, organizations, institutions and individuals concerned with youth and their welfare in the community;
5. To serve as a consortium or group of attorneys/affiliates formed for the purpose of submitting proposals to the Oregon Public Defense Services Commission in response to the Commission's request for proposals and to collectively administer the public defense case load assigned by the Commission.

ARTICLE III: Offices

The Consortium shall conduct business with the State of Oregon, by and through the law office of the currently elected senior affiliate/administrator, as time to time designated by the Board of Directors and more fully described in the organizational minutes for the Consortium.

ARTICLE IV: Affiliates of the Consortium

Section 1. Affiliates. Affiliates of the Consortium shall be those attorneys who meet the following requirements:

1. Are active members and in good standing with the Oregon State Bar;

2. Have an interest in children and parents involved in juvenile proceedings;
3. Carry liability (malpractice) insurance through the Oregon State Bar Professional Liability Fund of at least the minimum limits required by said organization;
4. Have been approved by the Board of Directors for the Consortium to receive case assignments from the Consortium.

The Board may organize and authorize one or more committees to identify and select proposed affiliates for approval by the Board.

Section 2. Senior Affiliates. Senior affiliates of the Consortium shall be those attorneys who meet all of the requirements described in Section 1 above, and who meet the time, duration and technical requirements that will be specified by the board and any committee appointed by the board of directors. The board of directors will identify existing senior affiliates in the Consortium's organizational minutes and modify the list of senior affiliates from time to time thereafter.

Section 3. Training of Affiliates. The board of directors shall set all policies for the training of affiliates and the evaluation of affiliates' work. The board shall also establish regular meetings of affiliates.

ARTICLE V: Board of Directors

Section 1. Duties. The affairs of the Consortium shall be managed by its board of directors. The board of directors shall be the governing body of the Consortium and will have the authority to manage all business, financial, professional, and other affairs of the Consortium, and to form committees for any purpose that the board deems appropriate, including but not limited to the training of affiliates, quality assurance, evaluation of affiliate work, recruiting, liaison functions, and all other Consortium affairs.

Section 2. Number. The number of board members will ultimately be six (6), consisting of five (5) Consortium senior affiliates (voting members) and one (1) non-affiliate member (non-voting). The initial five (5) senior affiliate members of the board shall be:

1. Richard Condon;
2. John Jensen;
3. Jeanean Craig;
4. Dora Lutz; and
5. Phillip Wiseman.

No later than December 31, 2006, the above directors will select a sixth (non-affiliate) member to serve on the board, who shall serve in a non-voting advisory capacity.

Section 3. Term. A board member shall serve until one of the following occurs:

1. The board member resigns from the board;
2. The board member no longer qualifies as a senior affiliate of the Consortium; or
3. The board member is removed from the board by a majority of the voting board members.

Section 4. Removal. Any board member may be removed, with or without cause, at a meeting called for that purpose, by a majority vote of the voting board members then in office.

Section 5. Vacancies. Vacancies on the board of directors shall be filled by a majority vote of the number of voting board members then on the board of directors. With the exception of a single non-affiliate lay member, all board members must qualify as senior affiliates as described in Article V above. The board shall select candidates to fill the vacancy amongst the senior affiliate non-board members.

Section 6. Quorum and Action. A quorum at a board meeting shall be a majority of all board members in office. If a quorum is present, action is taken by a majority vote of the directors present.

Section 7. Regular Meetings. The board of directors shall hold meetings every other month, except during the months of June, July, and August. Additional meetings may be scheduled as needed.

Section 8. Annual Meeting. The annual meeting of the board of directors shall take place during the first two weeks of February of each year, at a time and place designated by the board. All qualified affiliates will be notified and invited at least two (2) weeks in advance.

Section 9. Meetings by Telecommunication. Any meeting of the board of directors may be held by telephone or telecommunications, as long as all board members can hear and communicate with one another.

Section 10. No Salary. Board members shall not receive any salaries for their board services, but may be reimbursed for expenses related to board services.

Section 11. Action by Consent. Any action required by law to be taken at a meeting of the board, or any action which may be taken at a board meeting, may be taken without a meeting if a consent in writing, setting forth the action to be taken or so taken, shall be signed by all board members.

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**ARTICLE VI:
Officers**

Section 1. Titles. The officers of the Consortium shall be the Administrator and the Secretary. These officers shall be elected at the Consortium's annual meeting in February, or at such other time as the board may determine. The officers shall take office in the month following their election and will serve a two (2) year term, or until their successors are elected. An officer may be re-elected without limitation on the number of terms he/she may serve. Nominations for officers will be made by the nominating committee. The current Administrator and Secretary shall serve as non-voting members of the nominating committee.

The director of the nominating committee shall notify the board of directors two (2) months prior to the scheduled election that the nominating committee is accepting nominations for officers. Only senior affiliates will qualify to serve as an officer of the Consortium. Those who qualify as senior affiliates will be identified by the board and recorded in the minutes for the Consortium.

Section 2. Vacancy. A vacancy of the office of Administrator or Secretary shall be filled not later than the first regular meeting of the board of directors following the notice of the upcoming vacancy.

Section 3. Other Officers.

3.1 The board of directors may elect or appoint other officers or agents as it shall deem necessary and desirable. Such officers shall hold their offices for such terms and have such authority and perform such duties as shall be determined by the board of directors.

3.2 Committee chairs shall be appointed annually by the board of directors. Committee chairs may be reappointed without limitation on the number of terms he/she may serve.

Section 4. Administrator. The Administrator shall see that all orders and resolutions of the board are carried into effect. The Administrator shall have any and all powers and duties as may be prescribed by the board of directors.

Section 5. Secretary. The Secretary shall have overall responsibility for all record keeping and, if the Administrator is unavailable, all Consortium funds.

**ARTICLE VII:
Committees**

Section 1. Nomination Committee. The nomination committee shall be a standing committee. The purpose of the committee shall be to recruit and receive nominations for positions on the board of directors and officers of the Consortium. The board shall

designate how many members are to serve on this committee and the committee shall report to the Administrator.

Section 2. Standing Committees. The board of directors may establish, by resolution, standing committees. The chairpersons and members of such committees shall be appointed by the board.

**ARTICLE VIII:
Indemnity**

To the extent it is able, the Consortium shall indemnify any director or officer, or former director or officer of the Consortium, against expenses and liabilities actually and necessarily incurred by him/her in connection with the defense of any action, suit or proceeding in which he/she is made a party by reason of being or having been such director or officer, except in relation to matters as to which he/she shall be adjudged in such action, suit or proceeding to be liable for gross negligence or misconduct in the performance of a duty.

JAC AFFILIATION AND INDEPENDENT CONTRACTOR AGREEMENT

This agreement is entered into this _____ day of _____, _____, between the Juvenile Advocacy Consortium (hereinafter "JAC") and _____, Attorney at Law (hereinafter "affiliate").

1. PARTIES

- (A) **The Juvenile Advocacy Consortium** (hereinafter "JAC"), an affiliation of attorneys organized and administered to provide representation to indigent children and parents and juvenile proceedings in Oregon Courts and to submit proposals to the Oregon Public Defense Services Commission in response to the Commission's request for proposals and to collectively administer the public defense caseload assigned by the Commission.
- (B) **The Affiliate**, a lawyer licensed to practice law in the State of Oregon, who is qualified under the qualification standards for court-appointed counsel to represent indigent persons at State expense, as more fully described by the Oregon Public Defense Services Commission, and who affiliates with JAC as an independent contractor as defined herein.

2. PURPOSE OF AGREEMENT

The purpose of this Agreement is to set forth the terms and conditions by which Affiliate will perform legal services in Marion County pursuant to a contract (hereinafter "State Contract") between JAC and Oregon Public Defense Services Commission (hereinafter "OPDS"). Both parties agree to be bound by and subject to the terms, covenants and conditions of the State Contract or any contract extension entered into between JAC and OPDS.

By signing this Agreement, Affiliate acknowledges receipt of the State Contract, a copy of which is available through the JAC executive director. To the extent that the terms of this Agreement are inconsistent with the State Contract, the terms of the State Contract are controlling. Affiliate agrees to be bound by all policies, rules and procedures of JAC as existing or hereafter amended or promulgated. By signing this Agreement, Affiliate agrees that all representations submitted to JAC or OPDS, as required by OPDS, are true and accurate. Affiliate acknowledges that any misrepresentation is material to this Agreement and shall void this Agreement.

3. AGREEMENT

This Agreement outlines how JAC will work with Affiliate to fairly administer the representation of indigent parties before the Oregon Courts, as provided for under the terms of the State Contract. Therefore, during the term of this Agreement, JAC and Affiliate agree as follows:

- (A) JAC will assign indigent case to Affiliate and pay Affiliate's reasonable attorney fees, subject to the terms, covenants and conditions set forth herein.
- (B) Affiliate agrees to provide legal representation of indigent parties subject to the terms, covenants and conditions set forth herein.

4. TERM

The term of this Agreement shall be from the date it is signed until the termination of the then current State Contract. Any extension of the State Contract shall not automatically extend this Agreement. This Agreement shall only be extended if an extension of this Agreement is entered into in writing between JAC and Affiliate. This agreement may be terminated as specified herein.

5. ASSIGNMENT OF CASES

JAC shall assign cases to Affiliate pursuant to a policy developed by the JAC Board of Directors, hereinafter "Board". Affiliate shall be qualified under the *Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense*, as promulgated and adopted by the Oregon Public Defense Services Commission and administered to OPDS.

6. COMPENSATION

The affiliate shall be paid as determined by the Board. In addition to providing legal representation, Affiliate agrees to the following:

- (A) Affiliate agrees to submit case count data in the format designated by the Board and in the timeframe set by the Board.
- (B) Affiliate agrees to submit additional statistical data as requested by the Board.
- (C) JAC will pay Affiliate as soon as administratively practicable. The Board may authorize the suspension of payment until Affiliate complies with (A) and (B) above. All payments due to Affiliate under this Agreement are contingent upon receipt of funding by JAC under the State Contract.
- (D) Affiliate agrees that any information contained in any case count report (printed, electronic or otherwise) is true and accurate. Affiliate agrees not to accept direct or indirect compensation for these services, other than as is approved by the Court or authorized by contract under ORS 151.460.
- (E) All experts and investigators used by Affiliates must have prior OPDS approval, and shall be paid directly by the State of Oregon. JAC is not responsible for said costs.

7. PROVISIONS OF SERVICES

Affiliate shall provide effective assistance of counsel for each appointed party. As an independent contractor, Affiliate shall exercise his or her independent professional judgment in carrying out the responsibilities of each appointed case.

Affiliate shall provide said services in person and not through an associate or agent unless otherwise provided in the State Contract or a policy developed by the Board. Secretaries, interpreters, paralegals, law clerks or legal assistants do not satisfy the "in person" requirement. However, Affiliate may arrange for other Affiliates of JAC to provide services to parties as set forth herein.

The Affiliate's services are to be in person, but may be delegated to another JAC Affiliate if the undersigned Affiliate is on vacation, ill or otherwise unavailable for a period not to exceed fourteen (14) consecutive days. In this event, the Affiliate may designate another JAC Affiliate to carry out Affiliate's duties required by this Agreement for the purposes of receiving cases, unless objected to by the client, including the coverage of all court appearances and the interview of clients.

If Affiliate has a direct conflict of interest in particular case, Affiliate shall notify JAC and the Court immediately, and Affiliate shall be responsible to find another JAC affiliate to substitute as counsel. Another Affiliate may not be designated to cover trials, substantive motions or any contested hearing unless a formal order of substitution or association of counsel is approved by the appropriate court. Any additional circumstances that may necessitate substitute counsel must be approved by the JAC Board or its executive director.

8. STANDARDS

The affiliate is solely responsible for the following:

- (A) Remain a member in good standing of the Oregon State Bar;
- (B) Maintain an office in Marion County and in the City of Salem;
- (C) Maintain professional liability insurance as required by the Oregon State Bar and Oregon Revised Statutes;
- (D) Maintain additional liability insurance as required by the State Contract with JAC, naming JAC and the State of Oregon as "also insureds" or "additional insureds";
- (E) Pay his/her own Oregon State Bar dues and any other dues that may be incurred in the ordinary course of the Affiliate's practice; and

- (F) Provide his/her own office equipment, office staff, supplies, operating expenses and overhead items, including but not limited to letterhead, telephones, business cards, advertisements, pleading paper, etc.

It is the express intent of all parties to this Agreement that Affiliate is not an employee of JAC; rather, the Affiliate is an independent contractor as defined under applicable state and federal law.

Affiliate agrees that he/she will not use Affiliate's membership in JAC in any advertising or solicitation.

9. VOLUNTARY SUSPENSIONS

Affiliate may voluntarily suspend his/her participation in the case assignment rotations as set forth below:

- (A) Notice of voluntary suspension must be given to the JAC executive director prior to the commencement of the voluntary suspension period. Affiliate will not receive makeup cases, but will be reinstated into the rotation upon the end of the voluntary suspension.
- (B) Leaves of absence may last no longer than six (6) consecutive calendar months, renewable upon written request to the JAC executive director.
- (C) As provided by this section, Affiliate's services may be delegated to another JAC Affiliate. If Affiliate is unable to perform his or her duties because of illness, Affiliate shall designate another JAC affiliate to carry out his or her duties required by this Agreement, and agrees to participate in a back-up system for emergency representation for other JAC affiliates if necessary.

10. MEETINGS

From time to time, JAC will schedule a meeting of all Affiliates. Unless otherwise announced by JAC, all such meetings are discretionary except the annual mandatory meeting. JAC will make every effort to set said meetings with sufficient advance notice and at such time and place to minimize inconvenience to Affiliates' schedules.

11. ASSIGNMENT

Due to the unique skills and abilities of Affiliate and the requirement that Affiliate give personal attention to each client appointed hereunder, this Agreement and the duties hereunder are not assignable by Affiliate, except as specifically allowed under the Agreement or the State Contract.

12. COMPLAINTS OR CLAIMS

If Affiliate receives notification that a complaint or malpractice claim has been filed against her or him with any state or federal court, any administrative agency, the Oregon State Bar any other state bar association to which the Affiliate is a member, or the Oregon Professional Liability Fund, the Affiliate shall immediately notify JAC in writing of the existence, substance and results of said complaint or claim. Affiliates do not have to notify JAC of frivolous complaints. For the purposes of this paragraph, a frivolous complaint is defined as:

- (A) A complaint that does not require a written response; or
- (B) If a bar complaint, one that has not gone beyond bar counsel's initial review.

If JAC receives a complaint concerning the services of Affiliate under this Agreement, Affiliate shall be notified and the complaint shall be handled under the rules developed by the Board to address quality issues, including but not limited to mentoring programs or additional training requirement.

13. TERMINATION OF AFFILIATION WITH JAC

JAC shall monitor case assignment and performance by the Affiliate.

Affiliate may terminate this Agreement by providing written notice to the JAC executive director. Said termination shall be effective upon receipt of said notice by the executive director.

If, in the sole discretion of the majority of senior affiliates of the JAC, it is decided that any affiliate shall no longer provide services under the contract, JAC may terminate the agreement at any time.

In the event of termination of this Agreement by JAC, Affiliate shall continue to complete cases previously assigned to Affiliate, or shall cease such representation and cooperate with substitution of other JAC affiliates, in the sole discretion of the Board.

Upon termination, JAC shall have no obligation to make any further payment to Affiliate.

14. STATE CONTRACT

Affiliate shall cooperate with and assist JAC in complying with the terms, conditions and obligations of the State Contract. Affiliate further agrees he/she will not in any manner hinder, frustrate or interfere with the effective performance of the terms, conditions or obligations of the State Contract.

15. ARBITRATIONS

Any disagreements under this Agreement, or between JAC and Affiliate, shall be decided either informally or, if an informal agreement cannot be made, by binding arbitration as follows:

- (A) Arbitration is mandatory.
- (B) Arbitration shall proceed under UTCR 13.100 then existing, or its equivalent.
- (C) The parties shall agree on a single arbitrator from a list provided by both parties. Should the parties be unable to agree on a single arbitrator, each party shall choose one representative, and these two representatives will choose the single arbitrator.
- (D) The decision of the arbitrator shall be subject to the State Contract.
- (E) The costs of said arbitration shall be borne equally by the parties. Each party shall be responsible for its own attorney fees, if any. No attorney fees shall be awarded by the arbitrator and, if awarded, shall not be enforceable. No prevailing party fees or costs shall be awarded by the arbitrator and, if awarded, shall not be enforceable.

16. DUES AND ASSESSMENTS

Affiliate agrees that, subject to policies developed by the Board, reasonable dues, fees or assessments may be levied against the Affiliates.

17. INDEMNIFICATIONS

Affiliate shall save and hold harmless JAC, its officers, agents, board of directors and employees from all claims, suits or actions of whatever nature resulting from or arising out of the activities of Affiliate or its employees under this Agreement.

18. NON-COMPETITION

While affiliated with JAC, Affiliate shall not engage in any activity during the term of this Agreement which works to the detriment of JAC. Specifically, Affiliate agrees not to engage in any activity which negatively affects JAC's financial interests, including but not limited to competitive bidding for services provided by JAC under the State Contract with OPDS. While affiliated with JAC, Affiliate will have access to information proprietary to JAC. It is the intent of JAC that this information not be used to the detriment of JAC by one of its own Affiliates. Affiliate shall not reveal financial information regarding the operation of JAC, except as authorized or required by law. Any action in violation of this clause shall result in the immediate termination of Affiliate's Agreement with JAC.

19. MERGER

This Agreement contains the entire agreement between the parties and supersedes all prior agreements, written or oral. If any part of this Agreement is held to be unenforceable, the balance of this Agreement shall remain in full force and effect.

DATED this _____ day of _____, _____.

AFFILIATE

Printed Name: _____

DATED this _____ day of _____, _____.

JUVENILE ADVOCACY CONSORTIUM

By:

Printed Name: _____

Title: _____

Attachment 4

Agenda Item 3:

Excerpts from standards and treatises on the role of defense attorneys in drug courts and the interests of defendants that should be protected

1. Qualified representatives of the defense bar should meaningfully participate in the design, implementation and operation of the court including the determination of eligibility and the selection of service providers. (The defense should ensure that those accepted into the court reflect a cross section of the whole population of those who are similarly situated. Racial or gender disparities should be identified and challenged. (ACCD: “Ten Tenets of Fair and Effective Problem Solving Courts” (ACCD))
2. Defense counsel should be meaningfully involved in developing the policies and procedures that ensure confidentiality and address privacy concerns. (ACCD)
3. PD as participant in planning and operation of drug court: The public defender has an institutional role in drug court – to ensure that court is designed and operated to service interests of clients, ensure their rights are fully protected and advanced and promote recovery. The PD shall cooperate with others to promote recovery through a coordinated response. The PD should strive to ensure that defender is involved in planning for the court; if court is designed or operated without PD participation, the PD should strive to be included in future planning and operation. Before supporting a drug court the PD should attempt to ensure that all major policy issues of importance to the defense are resolved. The PD should strive to resolve issues in a way that is beneficial to participants. With respect to each issue the PD will have to gauge whether something less than the optimum still provides a better alternative than traditional local practices. Some of the Issues to consider:
 - a. Pre-adjudication v post-adjudication and legal benefits of successful completion. The ideal program is a pre-adjudication, diversionary drug court that results in dismissal with no stipulated facts or evidence, no waiver of jury trial, no guilty plea. It may be necessary to agree to waive a speedy trial and a preliminary hearing.
 - b. With voluntary and involuntary terminations, the PD should strive to see that no negative consequences result. “A drug court should not punish a participant’s failed attempt at completion.”
 - c. Eligibility – PD should promote broad eligibility without sacrificing likely success of participants

- d. PD should support early intervention but without sacrificing the client's legal rights and with adequate time to consult.
 - e. The PD should support voluntary participation by the defendant and voluntary continuation.
 - f. The PD should strive to protect the client against use of statements made in drug court as evidence outside of the drug court setting. Defense counsel should create a record to ensure that all promises of benefits are legally enforceable, e.g. through a signed agreement with the prosecutor. The defendant should not be required to waive the right to have a hearing before another judge if defendant terminated from program. The PD should protect the client's confidential information. (Note: Federal law prohibits the disclosure (or re-disclosure) of "the identity, diagnosis, prognosis or treatment of any patient" by "any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States." 42 USC Sec 290dd-2 (2002). (Because of breadth of the language, this prohibition applies to virtually every drug court program.) Attorneys are included in the prohibition against disclosure. Any person who violates the section is subject to a fine. Defense attorneys should be involved in the design of "waiver" documents and in the client's execution of any waiver document.
 - g. The PD should advocate that costs and fees not be unduly burdensome.
 - h. The PD should promote effective evaluation and monitoring of the court's performance measured by agreed-upon criteria, including e.g. completion rates, failure rates and recidivism rates.
 - i. The PD should continue to strive to make the court better and guard against prosecutorial dumping of otherwise weak evidentiary cases into drug court.
 - j. The defense should advocate that credit be given on any ultimate prison sentence for days spent in jail as a drug court sanction. (National Drug Court Institute monograph (NDCI))
4. There should be resource parity between the prosecution and defense with respect to access to grant funds and other resources for training and staff. (ACCD)
 5. Participation by the defendant must be voluntary (ACCD)
 6. The accused should have the right to review with counsel before deciding whether to participate in the court the program requirements

and possible outcomes, and counsel should be given a reasonable amount of time to investigate before advising the client how to proceed. (ACCD)

7. The accused should be able to withdraw from the court within a reasonable time without prejudice to his or her trial rights. (ACCD)
8. The defendant should be protected against self incrimination. (ACCD)
9. No policy or procedure of the court should compromise counsel's ethical responsibility to zealously advocate for the client, to obtain complete discovery, to challenge evidence used against the client in the drug court or the findings made by the court, or to recommend alternative treatments or sanctions. (ACCD)
10. Constitutional rights of defendants must be protected. Examples of concerns include implications for First Amendment freedom of religion of mandatory participation in AA/NA 12 step programs that require commitment to the existence of a supreme being; due process right to notice, hearing and fair procedure in termination/revocation proceedings; due process right to fundamental fairness in procedure for testing of drug court participants for drug use; due process right to impartial judicial officer in termination proceeding. ("Ethical Considerations for Judges and Attorneys in Drug Court Cases," National Drug Court Institute, May 2001 (NDCI))
11. Defense attorneys' ethical obligation of competence includes a duty to explore disposition without trial, a duty to become familiar with all sentencing alternatives, a duty to obtain a thorough understanding of the drug court model and court practices and to participate in interdisciplinary training regarding substance abuse and treatment and locally available treatment options. (NDCI)

Missouri Guidelines - for adult drug treatment courts (summary)

12.2 - Public defender has dual roles: attorney for the client, participant in the planning and operation of the court.

12.3 – primary role is as attorney for the client, maintaining the traditional defense attorney function of protecting the client's legal interests while adding promotion of client's physical and mental well being and client's interest in recovery. Although the defense strategies used in drug court may be nontraditional, the PD is not a guardian *ad litem* but is the attorney for the client. The attorney's ethical duties remain the same. The public defender should not

participate in proceedings regarding defendants who are not PD clients and should not advise those defendants.

At the Initial consultation the attorney should meet the client in a private setting before the client has to decide if he or she is going to participate. At that meeting the attorney should:

1. review the eligibility documents and complete the client interview form
2. give the client a copy of the discovery and review discovery and the charges with the client
3. discuss the drug court program – its nature, purpose, rules regarding eligibility, fees, the nature of a therapeutic courtroom, staffings, and adversarial as opposed to non-adversarial processes
4. review the drug court contract and related documents
5. discuss the consequences of complying with or failing to comply with drug court rules, including any system of graduated sanctions, rewards, the nature of proceedings to impose sanctions or terminate
6. explain the legal consequences of successful completion or voluntary or involuntary termination
7. explain the requirement that the client waive preliminary hearing, speedy trial, jury trial, or stipulate to facts or evidence or plead guilty prior to entering drug court and any other rights the client will give up.
8. explain the role of the public defender in court and in staffings and that counsel may request the client's permission to agree to or not oppose imposition of certain sanctions and possible disclosures of attorney-client communications in the course of representation.
9. explain the nature and extent of any investigation or other trial preparation to be done
10. discuss whether pretrial motions may be litigated
11. review the client's alternatives to drug court, the likelihood of success, the advantages and disadvantages; offer advice on whether the client should enter drug court (based on client's legal interests and interest in recovery)
12. if sufficient legal protections exist, encourage the client to be open and truthful to judge and staff re substance use
13. secure an informed and voluntary decision from client as to whether he or she wishes to enter drug court, explaining that entry includes acceptance of role of public defender as explained
14. explain it is client's decision to enter and to remain.

In addition, it is the duty of counsel to:

1. consult with client as necessary
2. maintain a complete file
3. review the discovery. If no opportunity before client enters, the public defender should reserve the client's right to withdraw after entry and not lose any rights

4. investigate as necessary to allow the client make an informed decision and to preserve exculpatory evidence in the event of termination
5. Be prepared for all drug court proceedings; present all beneficial information that is permitted; advocate on behalf of client when it is appropriate and reasonable to do so
6. Avoid conflicts but be aware that representation of one drug court clients is usually not directly adverse to the interests of others.

It is also the duty of counsel to obtain adequate training in the following areas:

1. cultural competence – “culture” refers to a set of customs, beliefs, ideals, linguistic practices, and institutional practices deployed within and, in many instances, peculiar to a given community. In drug court, some of the cultures are professional ones (police, judge, prosecutor), institutional culture as it affects treatment options for the client; lifestyle culture includes demographic markers, family circumstances.
2. treatment issues: the nature of addiction, the spectrum of treatment options (including self-help options), alternatives to drug court, success rates of various programs, treatment of coexisting disorders, net widening, links between domestic violence and substance abuse, use of drug court clients as informants
3. reliability limits of individual drug tests (e.g. potential false positive readings, the standard error of measurement, exceeding minimum testable quantity, poor lab procedures
4. protection of due process rights
5. confidentiality protections for drug records, medical records, etc.