

**Members**

Barnes H. Ellis, Chair  
Shaun S. McCrea, Vice-Chair  
James M. Brown  
Henry H. Lazenby, Jr.  
John R. Potter  
Janet C. Stevens  
R. Jon Yunker



**Ex-Officio Member**

Chief Justice Wallace P. Carson, Jr.

**Executive Director**

Peter A. Ozanne

**PUBLIC DEFENSE SERVICES COMMISSION**

**Public Defense Services Commission Meeting  
Thursday, March 11, 2004**

**12:00 noon to 5:00 p.m.**

*(Lunch available for Commission members at 11:45 a.m.)*

Benton County Courthouse  
Courtroom Number 2  
120 N.W. Fourth Street  
Corvallis, Oregon

***(Please note the special time and location)***

**Agenda**

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| 1. <b>Action Item:</b> Approval of Minutes<br><i>(Attachment 1)</i>   | Barnes Ellis                                    |
| 2. Discussion of a Service Delivery Plan<br>for Lane County<br><i>(Attachment 2)</i>                            | Barnes Ellis<br>Kathryn Aylward                 |
| 3. Discussion of Public Defense Service<br>Delivery in Benton, Lincoln & Linn Counties<br><i>(Attachment 3)</i> | Barnes Ellis<br>Peter Ozanne                    |
| 4. OPDS's Monthly Report<br><i>(Meeting Handouts)</i>   | Peter Ozanne<br>Peter Gartlan<br>Ingrid Swenson |
| 5. <b>Action Item:</b> Approval of Amended<br>Compensation Plan<br><i>(Attachment 4)</i>                        | Kathryn Aylward                                 |
| 6. Next Steps & New Business  | Barnes Ellis                                    |

*Next PDSC Meeting:* *Thursday, April 8, 2004; 9:00 a.m. to 1:00 p.m.  
Salem, Oregon  
(Location to be announced)*

PUBLIC DEFENSE SERVICES COMMISSION

February 12, 2004  
 Lane County Courthouse, Courtroom 307  
 Tapes 1, 2, 3 and 4

MEMBERS PRESENT: Barnes Ellis  
 Shaun McCrea  
 Janet Stevens  
 John Potter  
 James Brown (by phone)  
 Chief Justice Wallace P. Carson, Jr.

STAFF PRESENT: Peter Ozanne  
 Kathryn Aylward  
 Peter Gartlan  
 Rebecca Duncan  
 Lorrie Railey  
 Ingrid Swenson

TAPE 1, SIDE A

002 Chair Ellis Calls meeting to order at 11:00

**Agenda Item No. 1 Approval of Minutes**

003 Chair Ellis First item on the agenda is the approval of minutes.

014 Chair Ellis Is there a motion to approve the minutes.  
**MOTION:** S. McCrea; so moved; J. Stevens: 2nd  
**Vote 5-0**, hearing no objection, the motion **CARRIES**

019 Chair Ellis Peter you want to proceed with Item No. 2, the announcements and updates?

**Agenda Item No. 2 Announcements and Updates**

Before we begin with the status report, I do want to mention the failure of Ballot Measure 30 and the dilemma it poses for us. The dilemma is that people want to know what our plans are and are calling for action now. Yet even worse case—if we don't receive \$7 million from the Emergency Board that we are going to be asking for in July and if we are cut permanently as a result of Ballot Measure 30 by \$9.9 million—as disastrous as that is, the actual damage won't occur until 2005. There are a lot of variables, but people want to know what our plan is now. One of my highest priorities is to begin presentations and communication with individual legislators in a matter of a week or two. Before then, we are going to develop talking points because one of the important things that we need to do is agree on what we are saying both in regards to what is going to happen and what we are going to do about it. Jon Yunker wasn't able to come to this meeting but, as you all

know, he brings a lot to the experience to this process and has advised us as we proceed with this process. One of the concerns relates to is our discussions here at the Commission, concluding that the Commission doesn't have the authority to create what has been called the "glide path" to stretch our budget to the end of the biennium by dispersing funds to contractors at a reduced rates or focusing our funds on certain cases. Essentially, the same kind of approach the Chief Justice and his colleagues on the Chief's Budget Reduction Advisory Committee were able to employ last biennium. We need to anticipate the concerns over our limited authority and capacity to solve the consequences of the cuts to our budget. What do we anticipate is going to happen and what are we going to do about it? Our message has to be clear and straight forward to legislators and those with little experience with criminal justice issues, but fairly nuanced for audiences like district attorneys. Ultimately, my desire is to avoid what often happens between law enforcement and the defense community—pointing fingers at each other in front of the legislature or other public forums. So one of our messages will be to work together with district attorneys to develop mitigation strategies upon which we can all agree. I am hoping we can have constructive conversations among ourselves and perhaps in a forum convened by the Chief Justice or perhaps the Governor. Everywhere I go I make sure to say that the Commission, while having primary obligations to deliver quality services cost-efficiently, is also very concerned about its role in promoting public safety. If we are seen as an obstacle to public safety our very existence will be jeopardized. I wanted to raise this Ballot Measure 30 issue, and we will be coming back in virtually every meeting in the coming months to discuss it with you.

- 131 Chair Ellis If you think of the caseload generation as kind of a three-legged stool, you have the DA's, the court and ourselves. Two of those may have the ability to scale down crime. I don't see how we do.
- 136 P. Ozanne That's true. As I have said in all of the reports, we are the recipients of other people's decisions. We receive cases that are generated by prosecutors' filings and by the definitions of crime in the criminal code. But in my judgment, I think we need to be careful about pointing fingers in public.
- 151 Chief Justice Carson Prepare your script in anticipation of the argument that lawyers ought to volunteer pro bono.
- 153 P. Ozanne That is exactly the kind of thing we have to anticipate in our talking points.
- 164 P. Ozanne I'll turn it over to Pete Gartlan.
- 169 P. Gartlan Good morning. For the record Pete Gartlan with the Legal Services Division. My handout today is a status report on the backlog of the Legal Services Division. The Legal Services Division considers a case is part of the backlog if it is over 210 days old from record settlement. Our goal is to reduce that. Obviously if you look at the chart you can see we reached the highest backlog in September, 2003 of 219 cases. The first figure is 64, those are cases that were over the 300 days old, the second bar of 155, those are cases between 210 and 300 days. So the total of 219 is all the cases that were over the 210 days old. The

reason why that was so high is that we had five attorney vacancies in June, July and August. We filled those vacancies and, as you can see, the backlog is coming down. In October we had a rather large internal case reassignment to address the older cases, reassigning cases to attorneys who were in a position to take them. We tried to level off everybody's caseload. We have an intermediate goal of filing briefs within 250 days. Our long range goal is to get the delay down further than that. We have projected as of this month or early in March that close to half of our attorneys will be in a position to reach that goal. As you can tell from the graph the trend is downward. So if everything remains the same we are progressing in the right direction.

- 206 Chair Ellis Is that because of the filling of vacancies?
- 207 P. Gartlan Mostly because of the vacancies and the reassigning of cases. We are also closely monitoring people's production. We met with everyone in January individually and went over their projected goals in order to attain the office goal of filing briefs within 250 days. Some of this would be out of our control in the future if the caseload goes up or if we have to divert resources elsewhere—for instance, for death penalty appeals. That could affect the Court of Appeals backlog. This graph just relates to Court of Appeals' cases.
- 224 Chair Ellis So the cases don't hit this list until they are 210 days old. We probably have a window on the filing velocity of several months. Is there any shift in filing frequency either up or down?
- 231 P. Gartlan So far it looks very steady. We don't have exact numbers. We could prepare a chart that tracks cases between 50 and 210 days old. But as to the velocity, whether or not it has increased or decreased over the last several months, my perception is that it has remained steady.
- 236 Chair Ellis When in this timeframe did we start offloading some cases to contractors?
- 239 P. Gartlan There is a contract with the Oregon Appellate Consortium and that began in 2003.
- 242 Chair Ellis So some of the downward trend is attributable to that?
- 243 P. Gartlan Yes. Definitely.
- 244 Chair Ellis The contract cases are not included in your data?
- 245 P. Gartlan Correct. Those cases that have been contracted out are not on this chart. This is just backlog in our office. It does not reflect the age of cases for the contractors.
- 250 Chair Ellis I understand there was a recent meeting with Judge DeMuniz. Can you tell us about that.
- 252 P. Gartlan I met with Judge DeMuniz and Justice Gillette and they expressed their concerns about the length of time our office is taking to process death penalty cases. What we are doing in response is to recruit people in the office who are available, interested and capable of working on death penalty cases. What happened is that I made a decision last year that

we wanted to address the Court of Appeals backlog. That was the elephant in the room that needed to be addressed first. So, we used to have three senior deputies devoted to death penalty cases. The one attorney left, Mary Reese. I made the decision not to place another death penalty attorney in that vacant position. I made that position a complex deputy position to work on the Court of Appeals' caseload. So that affected the rate of briefing the death penalty cases. Now we are going to have to divert some resources back to death penalty cases. We will do that by having other people available to at least do preliminary work on the death penalty cases and then hand them over to other attorneys in order to get them on a faster track.

- 278 J. Potter You have one attorney on death penalty cases now?
- 279 P. Gartlan Two. Dan Maloney and Eric Johansen. We also intend to rotate them out because they both have been in death penalty positions for a couple of years. From what we can tell, it looks like it is not a position that somebody should be in for more than three years.
- 284 Chair Ellis Because of stress considerations?
- 286 P. Gartlan Yes. So we are in the process of developing other people to assume those positions.
- 289 Chair Ellis Is death penalty a type of case that in your mind lends itself to outsourcing?
- 291 P. Gartlan Yes, I think it could be possible. That is perhaps one option—to out-source one case depending upon the availability of an attorney.
- 296 Chair Ellis Was there any implication you got from Justice Gillette that he thought the delay in death penalty was technical?
- 301 P. Gartlan I don't think so. I certainly hope not. We do have attorneys appointed to death penalty appeals but the delay is due to the need to work on the cases that came in before them.
- 318 Chair Ellis I hear what you are saying. Justice Gillette didn't say it, you don't believe it is true and it is certainly not a policy of the office. But it is just a potential challenge somebody might make.
- 322 Chief Justice Carson Well the people at 2605 State Street raise it quite often—the defendants themselves. Particularly the ones who contact the court frequently that say we are delaying. So there are those who are critical of the delay and occasionally an Oregonian article will appear.
- 330 J. Potter How many people on death row now?
- 332 P. Gartlan Approximately 20. I don't know the exact number right now. I know that there are 49 cases at the trial court level that are charged as death penalty. So the potential is there for more death penalty cases coming into the office. That is why I mentioned earlier that there are some factors that are out of our control.

- 340 S. McCrea How many death penalty appeals are in the office right now? How many need to be briefed right now?
- 345 P. Gartlan There are two that are not being briefed right now. They are two cases that are backed up behind two cases that the death penalty attorneys are working on now. There are also various other death penalty appeals in stages where the brief has been filed, the state has filed their brief and the attorney may be preparing a reply brief. There may be a case that was decided and the attorneys are now preparing a petition for cert. in the U.S. Supreme Court. I know the common perception is that our death penalty attorneys are working on just one case, but that is not true. They are working on multiple cases in different stages of the appellate process.
- 365 S. McCrea So we sidetracked you. Was there more that you wanted to say about the meeting with Judge DeMuniz and Justice Gillette?
- 370 P. Gartlan No. Other than I got the message and we are responding. We will address the court's legitimate concern.
- 374 S. McCrea So what you are saying to us is that, if we are going to have to divert resources to death penalty cases, our backlog is probably going to go up in other areas because we are going to have to use more people to try and get the really intense cases done. Is that the message?
- 379 P. Gartlan Yes, that is certainly the potential. I wanted to warn the Commission about that prospect.
- 380 Chair Ellis Was Judge DeMuniz okay with that?
- 383 P. Gartlan Justice DeMuniz's concern is with the Supreme Court caseload. Judges in the Court of Appeals is concerned about the Court of Appeals' caseload. Our job is to be concerned about all the caseloads and we are responding as best we can under the circumstances. I think both courts' concerns are legitimate. We are not happy with filing briefs after 300 days, so our goal is to get the filings down to around 250 days and we won't stop there. We are addressing what we can with the resources we have.
- 398 Chair Ellis What is the delay factor on the part of your counterparts, the AG's office?
- 399 P. Gartlan It is anywhere from nine months to 12 months. So they don't take as long as we do, but it is considerable.
- 404 Chief Justice Carson My colleagues reported that it was a good meeting.
- 417 B. Duncan Good morning. I would like to talk for a few minutes about what the Legal Services Division is doing with performance evaluation management. I have been working at LSD with a committee of our staff to develop a performance evaluation system. You have a handout entitled "Office of Public Defense Services Legal Services Division Performance Management Plan." This is the product of our committee. And we thought it was important to include volunteer members of our staff on the committee to develop a performance evaluation plan

because it is more formal than had been instituted at LSD before. We thought the members of our staff would provide us with valuable insights and ideas about what we would want to evaluate and how we would want to evaluate it. Also we thought it was very important that our staff had confidence that the performance management evaluation process was a well-intentioned and fair. The primary contribution of our committee members is Part 2 of the performance plan that you have before you. This is a sample of what we have created for the different categories of positions in our office. This is the performance criteria for attorneys. We identified the different work areas that our attorneys do, from briefing and drafting of legal documents to oral arguments. Then we identified the basic standards of performance that we would expect of all of our attorneys. We think that this document will be useful for all of our attorneys. It can serve as notice to all of our staff of the very basic standards that we expect. Also they will be able to use the standards to identify areas where they are doing well or areas where they need improvement.

**TAPE, SIDE B**

001 B. Duncan

That is the performance criteria set forth in Part 2. The process that we will use to evaluate our employees is set out in Part 1. Basically, when the plan is fully implemented each employee will do a self-evaluation and the supervising attorney and secretary will do an evaluation. Those evaluations will be collected by a member of the administration, either Pete or me. We will review that information and then hold a evaluation and planning session with individual attorneys in which we will review what they have done in the past year and set performance goals for the coming year. An additional component is quantitative data, which we will provide to our attorneys. That data will include, at a minimum, the number of briefs or petitions that have been filed in the past evaluation period, the number of cases on their backlog, the number of cases they have filed, and the age of the cases they are filing. So the attorneys will have a sense of how they are doing and we will give them their own personal information in the context of our office averages. So after we collect the information we will meet with our attorneys once a year including follow-up if there are areas in need of improvement. This is a more formal process then exists in LSD right now, so we will be going into it in phases. We propose in March that we will have all of our employees do a self-evaluation with the benefit of the quantitative data that I mentioned. Then the attorney will meet with Pete and me and then there will be a planning session where they can set goals. In October we will do our first 360 degree review where we will follow this process and get feedback from the attorney, the supervisor, the secretary, compile it all and do a yearlong evaluation. So these are the steps we are taking and the steps we hope to take in the coming months to improve the supervision of our attorneys.

035 Chair Ellis

What has been the response from your employees?

036 B. Duncan

Well, we had a number of people volunteer to be on the committee to help develop the performance criteria. And we were lucky because some of the employees had supervisory roles in other positions they had held before coming to our office. But there definitely was some apprehension: "what will be done to us?" So we thought it was important to include anyone who was interested in planning. The performance criteria we have identified are definitely a product of the

employee committee. So the employees have some ownership of the process.

- 043 Chair Ellis My bet is that there is a bigger complaint that “I never get feedback” than the complaint that “I get too much.”
- 044 B. Duncan On a parallel track with our efforts to reduce the backlog, we have been monitoring caseloads very closely since September. In January, Pete and I met with every attorney in the office to talk about the status of their individual caseload, to identify a goal for them to meet and what needed to be done to meet that goal. We also gave them quantitative data for 2003 about their caseloads. Every response we got when giving them the data was that they were pleased to have it and they would like more information about how they are doing in comparison to others in the office. We are in the process of trying to extract that information from the database, which we have been unable to do without additional programming.
- 062 Chair Ellis I think this is great. Any comments?
- 063 J. Potter I just have one small comment on the list No. 3. If I were designing this I would separate the two sentences out so that you have a No. 4. So you are asking the employees to identify ways in which the Division’s management could help the employees meet those goals. So it stands alone and looks like you really do care.
- 068 B. Duncan That is a good suggestion. Because this is something more than we have done in the past, we recognize that this is a work in progress and one of the things we hope during our initial six months of trying this out and going just with the self-evaluation and management evaluations, we are going to be evaluating the evaluation process and the committee understood that too. So they understand that we are making a sincere effort and that we are receptive to suggestions that they may have to improve the evaluation process.
- 075 J. Potter When you do an announcement for an attorney position does it mirror the kinds of things that you are asking here in terms of briefing, drafting and oral argument?
- 076 B. Duncan We have not done so in the past because this performance criterion did not exist.
- 077 J. Potter Seems like this is a wonderful job description to use.
- 080 B. Duncan That is one of things that our staff did not have—job descriptions like this. They would like to know exactly what is expected of them.
- 084 S. McCrea I just want to commend your committee for all the hard work they have put into this. I think it is good to have this, to see how it is going to work. It is going to be interesting to see how people respond if they want to do written responses, if they don’t agree with the analysis or how it functions. I can see that a lot of thought and effort went into this. Good job.
- 088 B. Duncan The employees who volunteered really brought a lot to this.

- 090 Chair Ellis Good for appellate lawyers too. Readable English.
- 091 B. Duncan Thank you.
- 093 K. Aylward I also included in your handouts graphs of what our division has prepared for the public defense analysts and the accounts payable staff. We just felt that if we handed it out at this meeting that you would have time to look at it and by the next meeting you could have suggestions. Both of these graphs were generated by the employees that hold those positions. Lorrie Railey provided input on the accounts payable staff and I worked with the analysts to discuss where the emphasis might be changed. For example, in earlier drafts the analysts had weighted things like showing up on time. I said I care less about that. I don't care if you show up on time. I'm more interested in the quality and integrity of the work. That was well received so we shifted some of the weight in these charts. If you would just have a look at this material between now and the next meeting and if there is anything you would like us to do or change let us know.

**Agenda Item 3: Review and Approval of Preliminary Agreements**

- 158 K. Aylward There are three preliminary agreements listed on Attachment 2. The Umpqua Valley Public Defender in Douglas County: you may recall that the other three Douglas County providers had taken a four to six percent reduction because caseloads in general had come down. So that was very straightforward for them as well. The Public Defender Services of Lane County: we have reached preliminary agreement that has a three percent caseload increase in their contract. David Carlson, who provides services in Malheur and Baker: you see a large 32 percent reduction in his caseload because the post-conviction relief cases were moved to Mike Mahony, who now has a contract which you approved in December. So that accounts for this change. In addition to these preliminary agreements that I haven't listed here are all of the Multnomah agreements that we have reached since the meeting last month. I took it to mean that we should proceed and enter into contracts, so I haven't actually listed them here for formal approval. We have reached agreement with all of the Multnomah providers whose contracts were expiring, except MPD for which I think we will have an agreement soon.
- 183 Chair Ellis Are there any comments or questions?
- 184 J. Potter Kathryn, as you were talking to all these contractors did you address the issue of what might happen come April or May or March when we hit a wall. The contract might need to talk about that. Is that something that is still subject to further negotiations?
- 180 K. Aylward I don't think anybody is comfortable with the prospect of the contracts needing to be altered. There is language in the contracts that says, if there is decreasing caseload, the contracts will be modified with 60 days written notice. I think most of the contractors are hoping for the best. I personally don't think the analysts in our office get a lot of pressure to predict the future or explain or give guarantees, so not a lot of people have asked about that. I think that maybe they just don't want to hear what the answer might be. In terms of the contract we do have the funding-out clause in all the contracts. In addition, the

Multnomah contractors now have the 90-day clause that if the Commission decides to make a change then they're given 90 days notice of what to expect.

206 J. Potter I think the Chief certainly made it clear to this Commission and I think most of contractors understand that it will clearly be different this time than last time. But the difference is yet to be fully fleshed out. I know in talking with Peter that the process will take place over the next 9 months or 12 months. But everybody should be on notice that it will be different. Even though it may end up looking the same when we get down to it, it's possible if we run out of money that this time we will run out of money for all cases and not just for some cases, if I understand the Chief's position correctly.

220 Chair Ellis Any other comments or questions?  
**MOTION:** J. Potter; so moved, S. McCrea: 2<sup>nd</sup>  
**VOTE: 5-0**, hearing no objection, the motion **CARRIES**

**Agenda Item 4 Introduction to Review of Public Defense Service Delivery in Lane County**

227 Chair Ellis I think we are up to Item 4.

228 P. Ozanne We are devoting today's meeting to hearing from members of the Lane County legal community about the delivery public defense services in the county. This is an effort on the Commission's part to do some comprehensive planning. We are meeting in Corvallis next month. The report today addresses some general comments about the planning process and some specific comments about conditions in Lane County, including findings of your staff. Those findings will certainly be supplemented today by comments and discussions. Perhaps the Commission will instruct the staff to do further research and investigation. I think at the end of the meeting or at a subsequent meeting the Commission will deliberate and give directions to staff about any changes that should be implemented.

278 Chair Ellis I did want to say by way of background that Lane County has been very much involved with the process that brings us here. We had a two-year period of a study commission from 1999 to 2001 and Ross Shepard was vice-chair of that group. Judge David Brewer from Lane County, who is now at the Court of Appeals, was a valued member of the Commission, as was Shaun McCrea and John Potter. I remember in those years that we wanted to meet in Eugene because that is where everybody came from anyway.

291 S. McCrea But we never did.

292 Chair Ellis We never did but we are doing it now. That study commission lead to a presentation to the 2001 Legislature and a bill passed creating this Commission. But we really had a two-year transition period where we didn't really have control until last July, when we took over the responsibilities of the Indigent Defense Services Division of the State Court Administrator. And it took a lot work to get the Commission and OPDS up to speed. We obviously had a search for the position of Executive Director, which was a key part of the program. And we are very happy with the way that played out. So now we are really in the first biennium with the Commission process up and running and fully

integrated with two divisions that were previously separated. The divisions are now fully staffed and able to do what I think was the vision of the Legislature. We are really trying to be effective in working with local communities to plan the way trial level services are delivered. So it is that spirit that we are here today.

I think I can say that a couple of things are clear. One is that both the Commission and the Legislature, when it enacted the legislation creating the Commission, looked at, but never showed much interest in, moving to the kind of system in which the state employs attorney FTE who provide the service. I think it was clearly the consensus of the study commission that one of the strengths of the Oregon experience in the 35 or 40 years since Gideon v. Wainwright, has been the use of a contract system as the basic tool for provision of trial level services. So that is not a topic of debate. What is a topic of debate is to try to work with the concept of the contract system to make it the very best we can, both in terms of the quality of service and the cost-effectiveness of the service and the whole way the contract system works. So we are very interested in hearing from you folks here, including your observations of the system that we now have, which is described in the staff report, and any suggestions you may have about changes in the system. We are here with open minds..

**Agenda Item 4(A): Discussions with the Defense Bar**

- 364 P. Ozanne I'm sure there are some who people who wanted to speak, so I would just invite anyone to speak.
- 367 Brian Cox For those of you who don't know me, my name is Brian Cox. I have been a practicing lawyer in this county for about 14 years. I am on the court-appointment list. I focus my practice on major felonies and Measure 11 work. I also do post-conviction and appellate work. I am here as a representative of the group of lawyers who make up the private defense bar, the people who are working as contractors on the court-appointment list. I hope to provide the Commission with some insight and a united voice as to what some of our impressions and what some of our preferences are as far as supporting and meeting the goals of the Commission. I would like to start by saying I think to a person the private bar and lawyers we have spoken with support the Commission's goal of assuring delivery of quality public defense services in a cost-efficient manner and maintaining the quality of the system as it relates to the defendant's being represented, the tax payers who are footing the bill and the attorneys who are providing the services. With that in mind, I think Peter Ozanne's report does a pretty good job of identifying the factors in this county and describing the existing system. As it sits right now, our existing system for work that doesn't go to Public Defender's Office goes out a number of ways, primarily by the court-appointment process. There are really three components. There is the juvenile work that is handed off to the juvenile consortium or Public Defender's Office. And other than the issues I understand exist amongst those groups, we don't see any push from the private bar to change that process. The other two portions I would address are the caseload and court-appointed work and the murder list. Presently, the murder list is under private contract, not on the present court-appointment list. And in broad terms or in summary

at this point, I will explain that it is the desire of several members to put that back into the court-appointment process.

I would comment on a point that is raised in the report to the Commission that indicates that there is a belief that aggravated murder cases compromise an attorney's ability to maintain other kinds of practice. Based on that, there was a decision made to support specialized aggravated murder practices. I would just have the Commission know, and there will be some other lawyers commenting specifically on those issues, that we probably have a half dozen lawyers who are in their own practices and are seeking that kind of work, who have experience doing that kind of work under past court-appointment lists. So that suggest or seem contrary to the conclusion that handling those types of cases shuts down a practice. There are lawyers who have done it and are actively seeking it. With that in mind, what prompted our group to start voicing our interests was really a couple of things. One is that there was a perception in the past that, with the reductions in money we were seeing coming about, there might be a push to move to a consortium.

**TAPE 2, SIDE A**

001 Brian Cox

One of the things we have learned in this process and in conversations with various people is that the Commission was looking at all kinds of policies, including the existing court-appointment process. In our county, the court itself has apparently retained some oversight authority in that process. But I understand that the appointment process itself is done by a verifier through David Factor's office. I also understand that he has listened and taken a look at some of the issues that were raised at a previous meeting in the county. A delivery model, other than a consortium or court-appointed list, is simply private contract lawyers, which is not an issue that received much support among our group. So, among our group the final analysis was to say that the ideal situation would be to operate under a court-appointment process that follows some of the suggestions set out in the report. And that is basically a tuned-up court-appointment list, which has a clearly systematic and transparent mechanism for appointment. Keeping in the mind some of the goals of the group of lawyers that I am talking about, which is to provide legal services and to get a broad range of cases available to be able to train younger lawyers, and have them gain the kind of experience and be as inclusive as possible in that process. And there would remain flexibility in our individual practices. The court-appointment process seems like the best route for us to follow. We would as a group support some tweaking of that process, but I expect that is tweaking that would be fairly easy to do and something Mr. Factor can accomplish. There have also been recommendations for more rigorous and verifiable requirements to receive court-appointments. And, because in this county the court has retained some oversight, it is our belief that oversight could address that issue also. We have had some conversations and I had a chance to speak with Ross Shepard about an idea of an advisory panel of local counsel who are not on the court-appointment list. They would make recommendations to the courts, and then the court itself could act upon those recommendations. That way the courts are getting independent advice that they can rely upon. That also relieves concerns about who likes who or who doesn't like who, which is one of the issues that comes out of our discussions.

- 031 S. McCrea So Brian, would this advisory panel be like the federal panel?
- 032 Brian Cox Yes, and you could take a similar approach in addressing existing concerns about lawyers' competency.
- 037 Chair Ellis At the present time is there a qualification requirement, other than being admitted to practice law, to get on the list?
- 039 Brian Cox The real answer is that the qualifications are whatever the statutory qualifications are for getting an indigent defense contract. But the process for doing that is you sign a statement that says you want to handle this level of cases and you are qualified to do so. That seems to be the beginning and end of the process. From my perspective, there is a little difference, but as far as true qualifications, people either changing levels or people who are entering the criminal defense bar for the first time, I don't think there is anything other than a law degree.
- 046 Chair Ellis Of those currently on the list, would you say that most of them are called specialists in criminal defense law?
- 052 Brian Cox I would say, as an educated guess, that we probably have one-third of the lawyers on that list who do nothing or nearly nothing other than criminal defense work. Of the remaining two-thirds, I think maybe a third or more have practices in which criminal work is less than half of their practice. My practice is similar to that. I think criminal practice approaches half of what I do, but court-appointed work represents less than a third of my practice.
- 061 Chair Ellis What is the other third? You have one third of what I would call specialists and one third has a criminal practice of less than half.
- 063 Brian Cox Right, and the other third I would say is truly a mixed practice. Some of those lawyers are practicing "door law"—taking whatever comes in the door. Some of them simply have a mix of what is mostly criminal defense, divorce work and closely-related areas of practice.
- 069 Chair Ellis You said the court has retained some oversight, but the real appointment is made by court staff.
- 071 Brian Cox That is correct. There are really two ways appointments occur in this town. There are probably more, but there are two primary ways it occurs. The first primary way is that the person applies for appointment and qualifies and gets on the list. The verifier's office goes down the list and calls the next lawyer on the list and asks if they will accept the case. I think that is how the vast majority of the court-appointed cases occur.
- 076 Chair Ellis It is done on a rotating basis?
- 077 Brian Cox Presumably yes, and the list is actually a number of sub-lists, depending on the qualification levels. But for the individual case, it goes to the next lawyer on the list.
- 080 Chair Ellis So as things are now, as far as you are aware, there is no attempt to match the kind of case, in terms of degree of difficulty or things of that

kind, with a particular lawyer appropriate for that case? It is whose next up on the list?

- 084 Brian Cox Primarily, yes. The process of individual matching is fairly rare. I personally experience it once or twice a year, when I get a call from a Presiding Judge about a particularly troublesome case or issue. And others I am aware get the same kind of phone calls. But those are usually problem of solving issues. As far the general process, the qualification analysis appears to stop with misdemeanor, minor or major felonies, whatever the category of case is.
- 091 Chair Ellis But that is self-declared by the lawyer?
- 092 Brian Cox Exactly. That is a self-declared qualification and there is no follow-up with anybody looking at it saying, "Yes, Brian Cox is qualified to try a felony case or he is not, he shouldn't be doing it." At that point, the court simply leaves it to the bar and that doesn't happen. There have been a few instances where I think the judges have had conversations with local practicing lawyers, who they were withdrawn from the lists. But I can only think of twice when that has occurred.
- 099 Chair Ellis I thought one of the points you were making is that you thought the list approach was good in terms of attracting and training younger lawyers?
- 102 Brian Cox That is correct.
- 103 Chair Ellis I'm interested how you see that process working?
- 104 Brian Cox Because, if you have an attorney who is newly admitted to the practice of law, the fact that they have a law degree (inaudible) --- that is entry level work and it is the work that is commensurate with experience and it is work that lends itself fairly well to training. You are still talking about lawyers who are on their own and who must have motivation and commitment to learning.
- 113 Chair Ellis Except I think you already said there is not really matching with cases.
- 114 Brian Cox Well I agree. When I say that, I am saying that for the new lawyers they are only going to be on the misdemeanor list. So I'm saying that handling misdemeanors as a broader category is appropriate for that level of experience. Breaking it down to the types of misdemeanor cases, I agree with you, there is no matching of lawyers with cases. "Hey you get this case" that has a lot of legal issues and requires somebody with some sense of what this kind of case is about versus the lawyer on a first case.
- 122 Chair Ellis Is there any mechanism, of what I will call mentoring, where more experienced lawyers work with the less experienced lawyer?
- 125 Brian Cox The only mentoring that I am aware of is co-chairing on murder cases. Beyond that, there has been an informal process. Our county has a criminal defense bar that tends to expand and contract. One of the primary things that it does is share information and mentoring. The Public Defender's Office is a good resource for guidance, information and technical knowledge. And then there is a strong tradition in Lane County's private bar to provide support and assistance to pretty much

- any lawyer who asks for it. Beyond that, there is no mentoring that I am aware of for bringing along new lawyers.
- 138 Chair Ellis You used the phrase in your opening comments that I want to be sure I know what it means. You said that the group is working under contract on a court-appointed list.
- 140 Brian Cox When I say “working under contract” what I mean is that each individual is on a contract with the state, not provider contracts.
- 143 Chair Ellis Alright, so it is the straight \$40 an hour reimbursement process.
- 144 Brian Cox I would suggest that, when we talk about these lawyers, one of the important things is cost-efficiency. When we look at the commitment to cost-efficiency, I would have everybody recognize that these lawyers are working for \$40 an hour.
- 149 Chair Ellis Who reviews and approves the compensation?
- 150 Brian Cox Unless it has changed recently, the process that is used now is that the court-appointment bills go to the Presiding Judge, who actually has her clerk review the bills, at least for a first cut review, and then they get signed or not signed. I don’t know if there is another process.
- 155 Dave Factor That is no longer true. All the bills go directly to the Commission.
- 157 Chair Ellis So the work is performed and then the bill is sent to Salem and these fine people get to process it. One of the themes I think I was getting from your comments is that you individually, and at least the group that you were describing, resist the idea of a consortium? We have found consortia working very effectively in a number of other places, so I am interested in your thinking. If I read you right, why do you react negatively to that?
- 166 Brian Cox I will comment that I think that is about the only point in the report that was overstated, resistance to a consortium. In fact, people recognize the advantages of a consortium as a delivery model both to the state and to the practicing lawyer. The disadvantage that we saw to a consortium—whether you talk about a consortium that basically runs parallel to the Public Defender’s Office and picks up everything else, or whether you are talking about a consortium that parses out part of the criminal defense caseload—either way, one of the disadvantages that we see with that model is it creates an exclusive environment by its very nature. If, in our view, you are going to set up a consortium based upon a contract with the state, unless it is going to be an open hourly contract, you have to be able to at least have control over your volume, your caseload, your number of people who are going to be doing it.
- 182 Chair Ellis It does concentrate the work.
- 184 Brian Cox I fully understand why the court desires it—to say, “we want to pick a group of maybe a dozen or 15 lawyers and make a consortium” because my belief is what will occur at that point is that they will take experienced lawyers who know how to run their practices. They will get a more efficient model, but that will slight some of the development

of a lot of other lawyers and the restrictions on income will have a lot of effect on those lawyers.

- 191 Chair Ellis I'm very interested, you say it would deter younger lawyers. One argument would be that Lane County Public Defender is an terrific place for turning out new lawyers. And I assume some of those people go back into the private bar with the benefit of that training. That gives us a lot of comfort because we know that is done is a environment of experienced lawyers working with the inexperienced lawyers. We have nothing but very positive things to say about that process. Doesn't that happen here? Those lawyers get to a point that they would like to have their own practice and move into the private bar with the training?
- 204 Brian Cox I agree with you completely regarding your observations about the lawyers coming out of the Public Defender's Office. If you talk about the people who are out in their own practices, whether they hang their shingle out their first day out of school or whatever, that is the group that I was addressing and they are people who are left out and won't be brought along. The experienced lawyers will be out getting retained cases, but new lawyers will get very little of that.
- 212 Chair Ellis Does the second part of your comment apply to the economics of the individual lawyer, which you think is at a disadvantage? I am curious about that because they have been there for a long time and have felt really badly about \$40 as hourly compensation. A lot of providers believe that doing the work under contract on a unit basis is actually more advantageous economically than the hourly rate with a single appointment. You seem to be leaning the other way and I'm curious why.
- 222 Brian Cox No, I'm not going the other way. I agree with your analysis. We have taken a look at it, we have put out a proposal, and we have picked the numbers apart. I fully believe that we could set up and operate a consortium that would result in the lawyers belonging to that consortium making more money. Not a lot more but more money. So I agree with your premise when I say that.
- 230 Chair Ellis The other piece we are often told is that the consortium providers really like the certainty of the income coming in as a way to manage their overhead. They like that security of the monthly check.
- 237 Brian Cox That partly answers the question that you asked me: "How does it depress the work of other lawyers not brought into the consortium?" You take whatever that number of lawyers is and assume a certain percentage of those lawyers take a fair portion of their income from court-appointed work. That work would dry up for them if they are not included in the consortium. That is what I was referring to when I said "depressed income" if you are talking about a truly market model. But that is not what we are talking about. We are talking about things like bringing along other lawyers and also keeping a balance of private practitioners.
- 249 Chair Ellis Are there any law firms that contract here in the county?
- 251 Brian Cox No, not that I am aware of. But I'll use my firm as an example because I am one of the few lawyers here who is a member of a firm and does

court-appointed work. I crunch numbers on my cases and I will use an example to tell you what I am talking about. Let's say I do a court-appointed Measure 11 case that becomes a complicated case and produces 300 hours worth of work by the time I am done. I will get paid the enhanced rate of \$50 an hour, which means I will get \$15,000 for that case. And though \$15,000 sounds like nice change in my wallet, if I take that same amount of time and assume I could have worked half as hard getting paid for half that amount of time at my rate my net loss exceeds my income, when you take what it costs me to run my firm. The cost for running my firm is higher per hour than I get paid by the state per hour. When I do court-appointed work there is a net loss for every hour I work. I don't know if that is true for everybody, but I know it comes pretty close to being true.

- 270 Chair Ellis So why do you do it?
- 271 Brian Cox Public service, and because it has some intangible benefits, some of them personal. And because when I started I was a new guy. You get the training, you get the experience, you come along and you build your own practice.
- 276 S. McCrea I have a question for you, Brian, On page 12 of the report, and I'll read it: "On the other hand, the judges and prosecutors we spoke to without exception supported the elimination of the current court-appointment process and the establishment of a consortium of a smaller more qualified group of lawyers . . ." and on and on. Their reasoning apparently is that the Public Defender's Office, in general, provides high quality legal services efficiently, by comparison to a substantial number of the attorneys on the appointment list, who are ineffective and appear spend too much time and energy on routine or inconsequential matters. So my question is, and by this question do not think that I have made up my mind or have a point of view, because I am really just playing devil's advocate here: We have had the court-appointment list for a long time. Given the criticism that we see on page 12, why should we keep the court-appointment list?
- 291 Brian Cox I'll answer that question directly because the fix is simple. To the extent that there are some deficiencies in the services being provided which have been identified here, the fix is easy. There is court oversight that is not being exercised. There is qualification oversight that is not being exercised. And exercising those processes will solve the problem. So the answer to question, why not go to a consortium, why keep the present court-appointment process, is because the present process is the most inclusive process in the sense that it provides lawyers with the greatest long-range planning and development of skills. The present process can be made to be transparent and systematic pretty easily, and the inefficiencies identified here can be solved by oversight of the lawyers here.
- 309 S. McCrea Would you agree that there are people on the list now that are not providing adequate representation?
- 311 Brian Cox Yes.
- 312 S. McCrea And would you agree that the list should be made smaller.

- 314 Brian Cox I would agree that the list should be monitored. I recognize the result is likely to be that a couple of lawyers would get dropped off the list, and maybe a couple of lawyers would get dropped down in qualifications.
- 317 S. McCrea That would be the purpose of having the advisory committee—to basically decide who is going to be on the list and whose is not?
- 319 Brian Cox That, and to remove the onerous burden on the judges or the implication that a judge is either not giving appointments or that they are giving too many appointments because of their interactions with attorneys.
- 323 S. McCrea What about this contention: that attorneys on the appointment list appear to spend too much time and energy on routine or inconsequential matters? How do you respond to that?
- 327 Brian Cox I have seen it happen.
- 328 S. McCrea You have seen it happen?
- 329 Brian Cox Yes, and the example is a case that is going to 35-day call three times in a row because defense counsel can't get a response out of the DA's office. But that is just one example. Sometimes you will see criminal defense lawyers asking for a postponement of 35-day call because they need further investigation on the case. Unless the case is really weird, everybody knows it should have been done weeks ago. But you don't see very much of that kind of problem. You can usually tell, as an experienced lawyer sitting in the courtroom, when you hear somebody saying, "I need three weeks to get ready for this Theft 3 case" without further explanation, you know that lawyer is just not there yet.
- 340 Chair Ellis How do the lawyers on the list do investigation? Do they do it themselves or do they have access to investigators?
- 342 Brian Cox Well the answer is yes to both. You take a risk when you do it yourself if you are a witness and they call you up, I get the information from you as a witness, but I can't testify if you say something different on the witness stand. I am at a disadvantage. As far as getting an investigator in felony Measure 11 work, it is fairly simple because it is almost a given that it is needed in those cases. You apply for it. Some changes in that application process are creating some problems right now, but that is something I think I can solve by talking to OPDS.
- 350 Chair Ellis When you apply for investigation expenses, do you have to go back to the court to get approval to obtain an investigator?
- 351 Brian Cox Yes. If I get appointed on a case today and we will just say it is a Measure 11 case, an Assault I case. The first thing I will do today is send a fax to the DA's office asking for discovery. When I get that discovery—so here is the first delay of the case—I count the witnesses and see what I need to do to make some guesstimate as to how many hours of investigation I need. My view is, in many of those cases where I know I need an investigator, I could just as well close my eyes and say, "Give me \$500 to get started," but we can't do that. Once I have identified that information, then I submit a written request for court-appointed fees to PDSC. And I get authorization or I don't for

those fees. Once I get those fees authorized, then I get my investigator out interviewing the witnesses. In criminal defense, the delay in providing discovery and then the processing time for reading discovery and making a request, that can amount to the delay between the time the person is charged and the time you can start doing substantive investigation. Because we are dealing with criminals and quite often their friends are criminals, we lose witnesses because of that delay. It happens commonly in my experience.

375 Chair Ellis If you were impoverished and you were accused of a crime, would you yourself rather have someone from the Public Defender's Office or take your chances on the appointment list?

380 Brian Cox I know virtually all the lawyers in both systems and the answer is, it depends on who I get, not on which group. I agree with all the statements about the quality lawyers at the Public Defender's Office. I tell my clients repeatedly that some of the best lawyers in the county are in that organization. I will tell you the popular perception is quite a different matter.

385 J. Potter The clients' perception?

386 Brian Cox Yes, the clients' perception is quite a bit different than that.

388 Chair Ellis What is the clients' perception?

389 Brian Cox They don't think they are getting quality lawyers if the Public Defender's Office is representing them. And that is an unfair characterization. They believe that they are getting something less.

399 Chair Ellis Other questions? You volunteered to be first. It is like the first witness at a trial. You will probably get a lot more questions than anybody else.

401 J. Potter Just a comment about something that Barnes said about the training of lawyers, and about the Lane County lawyers going to the Public Defender's Office and then leaving and going to private practice: I have been in this county a long time and I don't see that happening very often. It is different here than it is in Multnomah County, where there is turnover. There are very few lawyers coming out of the PD's office. One or two have come out and then they have gone back to the PD's office. So that is not really a great training ground.

410 Brian Cox Not a great transition ground.

411 J. Potter Well, it is a great training ground but they stay there.

Let me just pick up on some of Shaun's questions. And let me preface it by saying that she hasn't made up her mind and neither have I. But I will tell you that sitting here listening to your comments, and then reading the comments in the staff report, I would be hard pressed to say the system should stay exactly the same. I don't think you are arguing that, but let me try to find out what you are arguing. We talked about tuning up the system. What I heard was an idea that you haven't really fleshed out—the notion of an advisory panel. Let's talk about that. If you were king and you could set up the court-appointment system

starting July 1, what would you do? Would you erase the list and have everybody reapply, and go through an advisory panel that makes recommendations to the court and the court develops the list?

- 427 Brian Cox How I answer that question, and I'm at risk of maybe not being representative, but I think what I am saying is . . .
- 428 J. Potter I'm sure if you are at risk somebody will tell you.
- 429 Brian Cox As far as the juvenile segment of the caseload, I would leave it as is. As far as the murder list goes, I would change the way it is being done, put it on a true court-appointment list, get the people who are qualified to be on that list, and start that rotation process through that list as straight court-appointed work. For the existing court-appointed work, whether I would restart the qualification from scratch and then run with a tuned-up system, or whether I would just take what we have today and then go through a review process that says "yes," "no," "yes," "no," on who stays on our qualification list, to me it is just a variation of one or the other to get to the same end: creating a system where the rotation through court-appointments is fair, balanced and transparent. One of the things that throws off that appointment process is the in-court appointments that are done. They tend to fall on just a few individuals. So for some people, for me, I'm glad that happens. I'm not really out there looking to get court-appointments. But for people who are really trying to make it as far as economics are concerned –
- 453 J. Potter Explain that to us. An in-court appointment, meaning that the judge has a case and looks out and sees a qualified lawyer and says –
- 457 Brian Cox Right, either a withdrawal has occurred or a defendant who is hard to get into court is there. Either way, there is a need for immediate appointment. Judges need the flexibility to do that on the spot, but when they appoint that way it tends to be to one or just a few individuals.
- 465 Chair Ellis What happens here when there is a Friday night arrest? Does that defendant stay unrepresented until some time on Monday?
- 468 Brian Cox Yes. They have been reviewed for appointment prior to that by the custody referees office. That office may have even done the paperwork to get court-appointment. But until they appear in court, and appear in front of somebody there is not going to be an appointment. When that appointment occurs, usually what will happen is there is a phone call to that lawyer's office saying, "Will you take it?" or "You got it!" We take everything that comes in. It is automatic in our office.
- 480 Chair Ellis I take it that is not true of everybody. So there could be another day or more that goes by before representation occurs.
- 483 Brian Cox And the court has tried at times to do appointments at arraignment, so that the people can be linked with their lawyers right there. And it is a great idea, but in practice I don't know if it works well.
- 487 Laura Fine I wonder if it is possible sometime to hear from Dave Factor, the trial court administrator, because he can address this specific question about how cases are appointed. As we have indicated, I am an attorney in

private practice and we don't exactly know how some of the decisions are made. It might be helpful at this point or soon to hear from Mr. Factor to clarify this.

- 495 Chair Ellis Fine with me. Brian did you have more that you wanted to share.
- 500 Brian Cox No, I think I have answered the question. But the model we would have the Commission adopt would be something that leaves the juvenile practice alone, that puts the murder cases on true court-appointment rotation, and that has the private defense bar on a court-appointment rotation. And that all of those systems would have a qualification process and all of them would have a process that is systematic, fair and transparent. That is really our message.
- 506 J. Potter Mr. Chair, I guess it is the details of the system of qualifying for court appointments that I am interested in, because the solution that you indicated is simple with court oversight. But it appears that we don't have strong court oversight. If you are correct, if the DA's are correct and if the judges are correct, there are people on the list that shouldn't be there and we should be removing them right now. The court might, but they haven't done it. So if that hasn't worked, what system can we put in place that will work? It seems to me, Brian, that it is an issue of who wants to bite the bullet on this. Who wants to be the bad guy. Should we set up an independent group that advises the court, or is the court going to do it on their own? Is someone on the Commission or on OPDS's staff going to get involved in it?
- 527 Brian Cox My suggestion would be to pick a local volunteer group of attorneys—maybe a judge member, a local bar member who is not on the court-appointment list, and somebody else. I would assign them the task of looking at the qualifications of every lawyer who is on the list to make sure they are qualified, as well as future lawyers and lawyers applying to move up in qualifications on the list—and to respond to any complaints as to the quality of legal services and report back to the court and let the court take action. Then the court can always say, “We are taking action based on the recommendations of this panel.”
- 541 J. Potter Isn't it reasonable for us to have that firmly in place, to understand what that process will be? If a group comes in to set up a consortium, they are going to have some standards. I am assuming that they are going to be selling the notion that what we are going to get is the best lawyers in Lane County outside of the PD who are going to be in this consortium, and here is how we determine that. By the same token, if we decide to go with the court-appointment list it seems like we, the clients and the community need to know that this is going to be a good system, and that we are not going to have the complaints because there are people on the list that shouldn't be.
- 554 Brian Cox To answer your question, I think all those processes can be built in, whether it is simply grafting the same type of evaluation process onto the new process. We have seen some of the most successful consortiums in the state. I think we can take that kind of objective standard and have it adopted by a committee of independent lawyers who would apply the standard.

567 Chair Ellis Thank you for your input. I don't know if we have 20 more with as much to say as you do, or none. So stick around and we will see where we go.

575 Dorothy Morey My name is Dorothy Morey and I am an attorney in Eugene. I graduated from law school in 1982 and went into solo practice here in Eugene and have been here ever since. I have done court-appointed work since the day I hung out my shingle and I had some prior practice at the DA's office. I was also one of the people who kind of started the consortium idea here in Eugene. When we wanted to invite people to a meeting and see how they felt, I went over to the custody referee's office to get the court-appointment list because at that time the appointments were made by the custody referee. I have done this periodically over the years in other situations when we needed to know who was on this list. But I was told at this time that they weren't free to give me that information and I never did get a list from the custody referee's office. I went to the court administrator's office where they handle the payments and got a list from them, although at that time the court administrator wasn't involved in making the appointments. There were 72 names on the list. It included people who were dead or who hadn't taken cases in years, who were public defenders or district attorneys. It wasn't a good list. One of the stumbling blocks that the consortium ran into at the beginning was that we wanted to put together a list that included all of the people. But we could never find out exactly who was on the list. I don't really think that has changed because I recently went to get another list from the court administrator's office. With the addition of a few 2002 bar numbers, it was basically unchanged. I don't know if you are familiar with the process of getting on the list, but every year we had to file a certification that said that we did fit the qualifications of the statute. The initial certification had to get judges or other qualified attorneys to say that you could do the work you were asking to do and what you said you were qualified to do. After you originally got on the list, you never had to repeat that part of it unless you wanted to move up into different areas—every time you wanted to go from misdemeanors to felonies or to major felonies.

**TAPE 2, SIDE B**

001 Dorothy Morey I think the problem with the current list is that it contains people who at some point in time have never gotten weeded out in the last four years.

005 Chair Ellis So let me ask what happens then. If appointments are being made on a rotating basis and these no longer active names come up, does that cause a big delay before you get to somebody who is willing and able to take the case?

009 Dorothy Morey My personal opinion is that there is a list somewhere that people are getting appointed from, but I don't know who is on it. What I really want to talk to the Commission about are feelings, because I am a woman and I can do that. I really want you to think about how what you are doing is affecting what goes on in the bar here. When I first became a lawyer, I didn't know squat. Tom Fagan of the Public Defender's Office was my mentor for the first year. He offered to do that. and it was a godsend because there weren't that many attorneys doing criminal defense work who were in solo practice. But the thing

about the Lane County Bar, you can call anybody at any time and ask them a question, and they will stop what they are doing and answer it. You can corner them in the halls in the middle of a trial and they will stop and talk to you. I call people, people call me. I don't think that has changed over the years. We have always felt as a group that what is going on right now is really divisive. People are hurting. They are suspicious of each other.

- 025 Chair Ellis When you say, "what is going on," what are you referring to?
- 026 Dorothy Morey What started going on was when there was no work, when the courts were closed and people here felt like we really had no voice. We know that we have a voice, but you know I'm not really sure that we know what to do with it. Because what I hear loudest and clearest is that, even if people who came into the consortium reluctantly and said, "Well, if there is no other way and we have to have some sort of a consortium down here to keep the practice going," people are going to chafe inside of that and it is not going to be the same feeling that we have had before. What people really want is to be able to feel that there is a list that is well constructed, that they are on it in the appropriate places, and that they will get their share of the cases that are out there. There has been talk about having experienced attorneys only on the list. Since I was once not an experienced attorney and have dealt with inexperienced attorneys since then, I think there is a real advantage to keeping inexperienced attorneys in your midst. As someone who once believed, the first year I was practicing, the only reason you did that was because you didn't realize it couldn't be done—I think that is what new attorneys give you. As long as you keep new attorneys asking you the questions that you have forgotten that need to be asked, you have a really good mix in your group. We still have them here in Eugene. Every year, new attorneys come out, they find out your phone number, they ask you questions and they keep you thinking. The list was working until recently. It is not now.
- 051 J. Potter So why do you think that is? Why is it not working now and it was before?
- 053 Dorothy Morey Well from the size of the list and the people I know who are on it, I think it just hasn't been weeded out and I think there is a natural weeding out process. Some of the best criminal defense lawyers in Eugene are on the list. Some of the defense attorneys in Lane County have left the list. People come and people go. It just happens, and the list has continued growing. I think it hadn't been weeded out in those earlier years because we had to ask each time which list did we want to be on.
- 059 Chair Ellis What is your response or observation to the point that someone made, that criminal defense is very specialized area of the law? It is like tax or securities. You really have to know the specialized components of the practice. That means that you need to be going to criminal defense CLE's. Which somebody who only has 10% of their practice of criminal law won't do, but somebody who is specialist in criminal defense will do. What is your reaction or thought to this comment, that's it not a particular good use of the funds we are charged with administering? Including lawyers for whom criminal defense is just a

relatively small percentage of their practice? What are your views on that?

- 075 Dorothy Morey Well, I think that Brian Cox has a criminal defense practice as a small percentage of his practice and I would never hesitate to give the state's money to him for his representation.
- 077 Chair Ellis So you think there is nothing to the point I was asking?
- 080 Dorothy Morey When I first started practicing law, I did a lot of family law and I was a general practitioner. I wanted money and if it walked in the door I took it.
- 083 Chair Ellis But did you say that you came out of the DA's practice also.
- 084 Dorothy Morey Well, as a third year student I had had several trials under my belt by working in Douglas and Josephine County. But I got down to family law and criminal defense law and, you know, you can't really keep up in both of them and do an adequate job. And I loved the criminal defense practice, though don't ask me why. So everything else went by the wayside. What I do that is not court-appointed work at this point in time is mostly criminal defense.
- 093 Chair Ellis So you fit the profile of a specialist?
- 094 Dorothy Morey We can't say we are specialists, but yes –
- 095 Chair Ellis I can say it. My question really is: do you have a reaction to the argument that, given the complexity of criminal law and the need for staying current on very complicated, difficult issues, the indigent defense system ought to be moving towards specialists and not generalists for whom criminal defense is 10% or less of their practice.
- 101 Dorothy Morey I think that, pushing against that, even if your whole practice doesn't consist of criminal defense, by going to a few well-chosen OCDLA seminars. you can keep up-to-date, revved up and inspired and all that. Specializing in a way is a good thing, but you need offsets. When you get your mind in one channel, you aren't as good. I don't do just criminal defense. I also do civil commitments and things like that, which gives me a chance to go somewhere else. I think that, just because someone doesn't do their whole practice as criminal defense, doesn't mean that they can't be just as good a lawyer if they are interested in criminal defense. I think initially you have people who come in and don't know whether they are interested or not. They do it for a few years and they drop off because they really don't like it. But I think anybody that stays with it because they do have an interest in it, you don't have to be a specialist to be good at something you enjoy.
- 118 Chair Ellis Do you think we should be perceived as the client of last resort, in the sense that the state's defense money ought to be available for lawyers who don't have successful practices elsewhere and need the work.
- 122 Dorothy Morey I keep my overhead low. My home expenses are not high, I'm not putting anybody through college. So I probably don't make nearly what a lot of the attorneys in town do. But I have been doing this for

- 20 years and I consider myself successful. I do it by doing the kind of law that I want to do, even though it isn't lucrative.
- 128 John Potter On weeding out the list, you said the weeding out the list is necessary. And as far as I can tell, this is a theme here.
- 131 Dorothy Morey It is critical.
- 132 J. Potter So, how would you go about weeding out the list? Now I'm talking about the existing list that people are saying has some people on it who shouldn't be on it. Then I will ask you about new lawyers coming on the list. But let's just focus on the process that would you initiate to get this list weeded out.
- 135 Dorothy Morey First, I would take the list and tear it up. Then I would go out and say, "If are qualified to do this and you are still interested, here is the form to fill out and send back." And, if the judges or other people feel that there are unqualified people on the list, I don't see anything wrong in asking people to verify that they are qualified by having fellow attorneys or judges say that they can do the job. I don't think that anybody here would object to doing that and it would give you a list of people who really are interested.
- 145 J. Potter So they start over and fill out a form that you agreed on would be a good form for the purpose of figuring out whether they are qualified, and you would send it to who? Would you subscribe to the idea that Brian has, of a committee before it goes to the judges, or would you send it directly to the judges? Or to David Factor?
- 150 Dorothy Morey I guess I thought the idea was going to be to have someone other than the courts do the appointing. But maybe that is in the future. I like the idea of having a qualifying committee because I am sure Dave Factor doesn't know half of us and he isn't in the courtroom. The statute came out, which we call minimum standards, and frankly I think everybody is a moving target.
- 159 J. Potter The other issue is bringing new people on—having a way to allow folks, like you were saying you were when you started out to practice law. I think that is one of the convincing or strong arguments for a court-appointed system. It does allow that to happen, but we still have a need for qualifications and training. So what would you do to convince this body, that says, "This is how we go about helping train, mentor, qualify lawyers"?
- 168 Dorothy Morey I guess if you just wanted to formalize the system that we would give everyone a mentor when they first started out. I think the other way is the way I was dealt with when I first began. I remember a few times when the custody referee would call and say, "There was somebody here who doesn't qualify financially for court-appointment, but he could pay you if he gets out of jail." I had a few trials that I didn't get paid for, but you have to put yourself out so people can see what you can do.
- 181 Chair Ellis Thank you. I appreciate your input.
- 182 S. McCrea I would like to hear from Mr. Factor.

- 184 Dave Factor My name is David Factor. I am the court administrator here in Lane County. I've heard a lot of discussion today about the list and the qualifications. I just wanted to point out, in the first place, that the qualifications for people to be court-appointed attorneys are established by policy. This is the document that talks about being qualified and certified. It does not really require approval of anybody. It requires an attorney to submit certificates saying that they have the qualifications for the type of case they are applying for. If they so certify, they are on the list. I think historically in this court, those certificates were sent up to the presiding judge to determine whether we should add the person to the list. Then they got added to the list. That is still the policy. The other way to get on the list is, if you don't meet those qualifications, by showing that you have substantial and significant experience and skill equivalent to the qualifications listed below. There is not really an opportunity, the way I read that, for the court to say "yes" or "no, you can't get on the list." So it seems to me there is some opportunity to work on these qualifications and determine how you get on the court-appointment list in the first place. There is a section in here that talks about maintenance of the list. There is one small paragraph at the very end of the policy statement which talks about, if the State Court Administrator, and that now would be the PDSC, or the court find facts that call into question the attorney's ability to provide adequate assistance, then the attorney may be removed from the list, suspended, until the State Court Administrator is satisfied that the attorney is able to provide adequate assistance. So really, the way it reads now, the standard is that the Public Defense Services Commission ultimately has the authority to determine qualifications and who stays on the list or who is removed from the list, and the best the court can do is temporarily suspend somebody if they believe that attorney is not currently qualified.
- 222 Chair Ellis That is an obvious disconnect. I don't think anybody in this room thinks it's credible that either our staff or this group in Salem, or wherever else it may be, is in any position to evaluate quality.
- 228 Dave Factor I don't disagree with that, but I think what that calls for is a policy document, and the work of the Commission is to amend the current policies and come up with qualifications. I don't know if this is unique situation in Lane County versus the rest of the state. There needs to be standards and qualifications for lawyers doing work in public defender offices and consortia.
- Anyway, how the list has worked here in Lane County, to give you a little bit of information: In calendar year 2003, we had about 7,000 criminal cases filed in this county. That number in 2002 was a little bit higher. Sixty-seven percent of the criminal cases that came to arraignment went to the Public Defender's Office. Twenty-six percent went to court-appointed attorneys, and about 410 of those cases went to private lawyers. So the bulk of the work is going to court-appointed lawyers, whether it is out of the Public Defender's Office or on the list. And the list takes about 26% of the cases. There is nothing to indicate that that has changed significantly.
- 250 Chair Ellis How does that play out? The list only gets those that Lane County PD either has a conflict on or –

252 Dave Factor Lane County PD, under the structure of their contract, breaks it up into weekly and monthly allotments. They take as many cases in a week or in a month as they can, until they tell us that they have reached their monthly quota. Then we start appointing lawyers from the list. Or, if there is an apparent conflict, we will appoint a lawyer on the list rather than the Public Defender's Office. Bu we rely on the Public Defender's Office to tell us if they have a conflict and we need to appoint somebody else. There is some confusion about the quality of the list or the existence of the list.

I have a list. This is the list. The confusion comes mostly from my office. The woman that sits in my front office collects the certificates of qualifications from the lawyers, and has done so for a number of years. She maintains basically a drop file where those certificates go. If you took that file and went through it you would find lawyers who are dead, lawyers who are no longer in practice, lawyers who have moved, lawyers who no longer take court-appointed cases. That is not the active list from which we appoint lawyers. It is just a file of people who have filed certificates over the years. The active court-appointment list is this list. We maintain a small database. There are 39 lawyers currently on the list, and that list captures whether they are qualified, the level of cases they are qualified to do, and any special notes or comments that either they provide to us or that we want to maintain, such as they are qualified to do co-counsel in murder cases or they have said they will do certain types of major felonies. Or they will do major felonies but they don't want any sex abuse cases, or they don't want any Measure 11 cases, those kinds of comments.

287 Chair Ellis Is that list available to the public?

288 Dave Factor I don't see why not.

289 Chair Ellis I don't either, but we had one witness who said it was hard to get.

290 Dave Factor I was asked about it in the meeting that Peter held and I said I would get it and here it is.

292 John Potter Can I laminate it.

294 Dave Factor The process that we currently use, and I think this came up because historically the list is managed by an individual who worked at the jail, court staff, but who was housed and worked at the jail. And she just had a rolodex file of lawyers who were on the list. She would call and cajole them to take cases, and she spent an awful lot of time trying to get lawyers to take the cases that were available for appointment. We moved the location of where that work happened back to the courthouse, to the criminal operations unit, a couple of years ago. Since that time, we have linked that work up with the same staff who prepare our criminal arraignment documents. What they do is they just go through the list and they will put on the docket for the court staff and the judge the name of the lawyer who is next on the list. And we announce at arraignment the lawyer who will be appointed to that case. Given, of course, that the person qualifies and judge orders appointment.

313 Chair Ellis At that point there is no contact with lawyer to be sure the lawyer is available?

314 Dave Factor No. They have told us they are accepting appointments and they get one. They move to the bottom of the list and they work their way back up. If the client fails –

316 Chair Ellis Do you get many instances where the call is made and the lawyer says, “Oh I’m too busy”?

317 Dave Factor We used to. We are not making those calls any longer.

318 Chair Ellis What does that mean?

319 Dave Factor If they call us or send us a letter saying, “I don’t want to take cases for awhile,” then we will remove them from the active list until they let us know that they want back on the active list. If they are on the active list, we are assigning them cases.

338 S. McCrea We interrupted you. Do you have more to add?

339 Dave Factor If at arraignment the person fails to appear, that lawyer doesn’t get that appointment. They just go back on the list and they work their way back up the list. So it evens itself out. There was a big gap during March through June, actually through the end of the 2003 calendar year, with what we all call the “bubble cases.” The Public Defender’s Office never reached their quota from September through December, so there weren’t appointments to be made to the private bar. The opportunities for appointment were a lot less. I think that has enhanced the perception that something funny is going on with how people get appointed.

348 Chair Ellis I am going to speak theoretically, and I don’t mean to accuse anybody of anything. When the study commission was taking testimony on the different models of defense delivery, one argument against the appointment system is the fear of padding, wasted time. And the argument was, when you do the work under contract, either with a consortium or law firm or PD, that this incentive isn’t there.

358 Dave Factor It goes in the opposite direction.

359 Chair Ellis Alright. Somebody could argue that there is a risk of corner cutting. The question I want to ask is, given the dependence we have in this county on the appointment process, what observation do you have as to the mechanism to manage against padding, and who is in a position to supervise or observe what is going on?

367 Dave Factor Well, I think the closer you are to it, the better able you would be to know what a case is worth in a particular jurisdiction. So that doesn’t speak to the individual facts of a particular case. It is maybe ironic or maybe just the way it is that the oversight has moved from the local court. Bills are submitted directly to the Commission. So there was an opportunity locally. The bills would come in and staff would review them—at least routinely, through accounting, adding up the numbers to see at least that the numbers matched, and then sending them up to the presiding judge for signature. Depending on who the presiding judge

was at the time, they would spend more or less time trying to look at the bills before signing them. And sometimes questions were raised about how many hours were billed in a particular case.

- 393 Shaun McCrea One of the things I notice when I attend sentencing and lawyers are on a court-appointed case, the judge will routinely say, “Mr. so and so, Mrs. so and so, how many hours do you have in.” because there is some obligation for the defendant to pay back the court-appointed fee if they can. I guess I am wondering if, as a practical matter, the defense attorney says, “I have 12 hours in” on some case, whether the judge, who has done many of these cases and thinks it should be maybe three hours, could say something, or at least ask whether there are special circumstances here?
- 403 Dave Factor I think it would be the unusual case where the judge would, if the judge thought there was a question. They would then put in the judgment the client’s obligation to pay the 12 hours. I think the question that you raise is the foundational question about why the Commission was created in the first place. You take judges out of that position of having a conflict, or at least what they view as a conflict, and holding the purse strings and trying to run a fair and impartial trial.
- 413 S. McCrea I’m just wondering, knowing the Lane County judges, I guess I can ask them that.
- 415 Dave Factor I think it very rarely happens in the way you describe it. My experience is that the lawyers in the courtroom will typically understand the number of hours, so that the client doesn’t get hit with a judgment for money that will probably never be collected in the first place.
- 427 Chair Ellis I would be interested in your answer to this question. Assuming that filings stay about constant at the 7,000 level, and assuming Lane PD stays at 2/3 the volume. Do you have a view on FTE measurement of full-time lawyers? How many full-time lawyers would be needed to pick up the 26% that goes to the list?
- 440 Dave Factor I could probably figure something out, but I don’t have it now. You would probably want to talk about what is an appropriate caseload for someone to carry under full-time contract. The question would be, is it a split caseload, is it a mixed caseload, is it a major felony or a misdemeanor caseload.
- 448 Chair Ellis The caseload that is currently going to the Public Defender’s Office.
- 449 Dave Factor That is all mixed.
- 450 Chair Ellis So it is the residual caseload.
- 451 Dave Factor Yes. There is still an evenly mixed bunch of cases. So the question is, how many lawyers and how many cases, how are you going to split it up? You could look at the Public Defender’s Office and try and figure it out: you know, if 150 or 300 per lawyer per year is the right number – that is probably too high—but maybe 200 a year, it would probably give you some indication of how many lawyers you would need.

- 458 J. Potter Could you just really thumbnail it and say, “Well, the Public Defender is doing 2/3 and we are talking about 1/3; the Public Defender has 20 lawyers this will take 10 lawyers? That is overly simplistic I’m sure, but is it in the ballpark.
- 461 Ross Shepard I have staff dedicated directly to those cases.
- 462 J. Potter You also have investigator and such. It depends on how they are staffed, I suppose.
- 486 John Potter Do you agree with the assertion that has been made that there are people on the list who shouldn’t be on the list?
- 487 Dave Factor I think the comment made about my ability to observe and not being the courtroom was correct. That is not my bailiwick. I’m not in the courtroom watching and I don’t know who the good lawyers are.
- 492 Chair Ellis Have you fully voiced the skepticism you have about some of the lawyers’ observations?
- 495 Dave Factor I think they had a question about the list being fair and transparent. I am happy to share this list with anybody who wants to talk about it. And I’m in a position now to do that. I don’t think I was before when I was at the meeting that Peter held in Ross’s office. I didn’t have this background that I do now about how it had been managed in the past. I am confident that it is managed fairly, consistently and that the cases are being assigned on a rotational basis, that there is no favoritism, that there is no conspiracy to appoint the good lawyers and not the bad lawyers. There is, however, the perception that there are lawyers appointed from the bench by judges in the courtroom under fairly rare circumstances. I think it was properly characterized as situations where an attorney has withdrawn or a defendant who has been on bench warrant status shows up. They have a warrant and the judge says, “Mr. or Mrs. So and So, are you available for an appointment, please take this case,” and they hook up the lawyer with the defendant right there. That just makes sense from an administrative standpoint, to get that person hooked up with their lawyer instead of waiting for us to tell them who the next person on the list is and wait while they are contacted.
- 534 Chair Ellis Do you have any observations on pros or cons of forming a consortium versus maintaining of the 39 lawyers on the list?
- 540 Dave Factor I think I will sidestep that one as well. For court staff from an operations standpoint, it would be a little bit easier to manage a consortium. But what has been removed from court staff now is the managing of the bills, the managing of the motions and orders and all the other stuff that went along with managing the defense before, which is now in Salem with the Commission. So there has been some relief to us by putting that load on the Commission. So what is to be gained from a consortium versus the list isn’t as great as perhaps it was before. From a purely operations standpoint, it would still be a lot easier just to appoint a consortium and let the consortium figure out which lawyer is going to take which case.
- 562 Chair Ellis Any other questions? Thank you.

- 571 Terry Gough My name is Terry Gough and I am a criminal defense lawyer and have worked the last 25 years in Lane County. I come before you today to talk about the murder contract. I believe I share with about four or five other people who routinely got appointed to murder cases a lot of dissatisfaction. One day we were on the list and the next day there was a contract out there. Many of us didn't even know this was going to happen until it was over. If there has to be a contract they should give notice to all of the people who are qualified to do it. I know there are about five of us who are very interested in doing it. But I would prefer that we go back to the old way in this one particular area of appointing attorneys. I think what you do when you do that is you get some new vigor and enthusiasm. You get one case every year or year and a half and you are pumped up. It is a big case and you will do your very best for it. Whereas if you are on a contract, I think it becomes old news. And while you have the advantage of knowing what it is going to cost you, at the same time there is a tendency at least in some instances under these contracts that you are going to get paid the same no matter how much work you put into it. I certainly don't want to disparage all of the attorneys under contract. Many of them I'm sure work just as hard, whatever they are doing to get paid. I think there are others that don't.
- 620 Chair Ellis But isn't there a counter argument? You say you have fresh enthusiasm because you know you get this once in awhile. But don't you have to reinvent the wheel?
- 623 Terry Gough Well not after 30 years, Mr. Ellis. You have to keep current on the law. But I don't think you have to reinvent the wheel. You go to seminars on death penalty work and things like that, but I don't see it as a reinventing of the wheel.

**TAPE 3, SIDE A**

- 001 Terry Gough I am venting my frustrations about being excluded. If there are any questions you would like to ask me, I'll try to answer them.
- 003 John Potter When did the contract process take place on the murder contract?
- 004 Terry Gough I honestly don't know. Again, it is a lack of information. I can't tell you, but I wish I could. What I am seeking is an open process, kind of a competitive bidding if you will. It would be better for the state, more bang for the buck, and a competitive process where you have a real choice. I feel like I am somewhere out there on the margin and not being made aware of what is going on. The feeling is not unique to me. It is kind of like what happened, where did those murder cases go?
- 013 J. Potter I think that is an easy one for us to figure out—to figure out when it took place, what happened and under what circumstances. I am sure the Commission is of the opinion that it should be an open process, a bid process, and there should be adequate notice.
- 016 Terry Gough I am sure that it is a fixable issue in the future.
- 017 J. Potter One question you mentioned, are there multiple appointments at one time by a judge. And you gave an example of the PD office being

conflicted, someone sitting in the courtroom and that person got a case out of order. But give us as example of multiple appointments?

- 019 Terry Gough Well, what happened is that one defendant had six cases that the Public Defender's Office got. That was a new case, so it is six appointments but only one individual. I didn't mean to misrepresent that, but I have observed, and have been told by others who have observed, that people are getting some appointments in court, which is fine if that is efficient to give to an attorney right away.
- 028 J. Potter You heard David Factor say he thought the process was fair and there wasn't any favoritism being shown by the judges.
- 029 Terry Gough I don't know if you can call it favoritism or not. I couldn't point to certain instances where a judge has their favorite man or favorite woman. It just seems like two or three get it. There could be 15 or 20 attorneys, and two or three of them seem to get the appointments out of the courtroom, not off the list. As far as I can tell, the list now being done through the verifier is going fairly normally.
- 041 Tom Sermak Mr. Chairman. Would you like a little more background on how cases get appointed in court? It almost always happens in what we call the criminal call process here. Dave Factor and I were discussing it in the hallway and I wish he were here.
- 045 S. McCrea Do you want to go get him?
- 046 Tom Sermak Sure.
- 047 Chair Ellis We will put you on right after Mr. Sabitt.
- 048 Mark Sabitt I have a contract to do murder and aggravated murder work in four counties, including Lane County. It is a half-time contract. I would like the Commission to understand clearly how the RFP came out, what process I went through in applying for that contract, and the way the cases come to me out of Lane County under that contract. I submitted a proposal in September of 2003 in response to a RFP that came out at that time. As far as I know mine was the only proposal.
- 056 Chair Ellis What was the lead-time, do you remember?
- 057 Mark Sabitt Three months. I think it came out in June – no I'm sorry it came out in September and perhaps my proposal was submitted around December. That sounds more like it.
- 059 Chair Ellis Was the RFP reasonably well publicized, or was it by stealth?
- 060 Mark Sabitt I think it was posted in the courthouse and it came to my attention in that way.
- 063 Chair Ellis Maybe we should do a better job about getting that RFP posted?
- 064 Mark Sabitt Well, apparently some attorneys are of that opinion. At that time, there was a current contract here in Lane County and other counties as well. And there was confusion about the budget when it came time to hand out contracts. So my 2003 proposal was put on hold for a period of

time although I believe in July of 2003, when I ultimately I got the contract, mine was the only proposal that was before the Commission. So I have had the contract since July of 2003. It came up for competitive bid again in September of 2003. I resubmitted my proposal. But I believe the Commission also entertained at least the ability of others to submit proposals in September of 2003. My contract covers four counties, Lane, Linn, Benton and Douglas. I currently have five murder cases going in various stages of activity or inactivity. One of those is a Lane County case. I have a case in Linn County that is a simple murder case, which is up before the Court of Appeals. I have a case in Douglas County that I have co-counsel on, which is scheduled for trial this May. I have a case in Klamath County that is pending sentencing. It is an aggravated murder case that I have co-counsel on. I have a case in Jackson County that is also an aggravated murder which I have co-counsel on as well. I have one case in Lane County. It is an intentional murder case, which originated January 1 of this year. My understanding is there are currently four murder cases pending in Lane County. I have one of those. Two of those I think the Public Defender's Office has, and one of them a private attorney has who was appointed when I turned down the case and the Public Defender's Office turned down the case. I think that just happened a few weeks ago. There is a perception I think that there are a number of murders that the contract or contractors are taking which somehow is cutting other qualified attorneys in Lane County out of the loop in getting murder appointments. But 2003 was a very sparse year for murder in Lane County. I got one murder case in Lane County in 2003 and it was an aggravated murder case. I had co-counsel in that case. But there weren't many murders in Lane County in 2003. As far as my contract and the cases I have, the process is that a murder case comes up and a defendant requests counsel and he can't afford counsel. The Public Defender's Office I believe gets the call first and perhaps they alternate: the PD gets the call first on one and then I will get the call first on the next. The Public Defender's Office gets the call first, if it doesn't want the case they will call me. Or if the Public Defender's Office is too busy and doesn't have qualified attorneys to take the murder at the time, they will call me. If my schedule is occupied, they will call the presiding judge, I believe, and ask who to appoint off the list. The last murder that came up was just a couple of weeks ago. I declined that case because I am way too busy. I believe that case went to a private bar attorney but I would have to check OJIN to know for sure. I'm not sure what the process was for that private attorney to get the case—whether it came from the presiding judge or just came from a spot off the list when the court employee checked the list and made the call for that case.

- 116 Chair Ellis Are you a sole practitioner?
- 117 Mark Sabitt No, I have a partner.
- 119 J. Potter You picked up cases outside the four counties? The Klamath case?
- 120 Mark Sabitt The four counties are what the contract specified although, if they need an attorney in another county, they will often call. Jackson County as well. Both those cases originated because there were contractors who were lead counsel in those cases who called me and asked me to be co-counsel.

- 123 Chair Ellis How long have you practiced criminal law?
- 124 Mark Sabitt I have practiced criminal law since 1989 in Oregon and criminal law is my primary practice. It is about 80% of my practice. I am on the Federal Criminal Justice Panel and I do some federal criminal work, but most of my work these days is homicide cases.
- 135 Chair Ellis Thank you.
- 140 Tom Sermak Tom Sermak, Lane County Public Defender's Office. At arraignments at 8:30 in the morning, the verifier's office is open in the basement of the courthouse. When a case is appointed and a person is assigned an attorney, they go to the verifier and then come back into court and the appointment is made, as Mr. Factor indicated. As it happens, the verifier's office is not open at 3:30 p.m. when criminal call occurs. It almost always happens that an attorney has a conflict and has to withdraw. The court then grants the motion, allowing the attorney to withdraw. The procedure would be that the client that just lost his lawyer because of withdrawal would then go to jail to the verifier. They can do whatever process they have there to find out who the new lawyer is, and then the assigned lawyer's name would somehow be indicated back to the court. The judges have found, and I think quite properly, that it is a lot simpler to appoint a lawyer and then advise the verifier, especially in cases where the financial information is still current. Quite frankly, Mr. Gough's observations and the others is correct, the process is fairly arbitrary. I mean the judges don't have a list and they look around. I don't think anybody is playing any kind of favorites or anything like that. But it is a fairly arbitrary process when it is left up to the judges. But it almost always happens only at criminal call and only because it is extraordinarily more convenient for the court to have it done that way.
- 167 J. Potter Of the 7,000 cases that get appointed, how many of them go through this process?
- 170 Tom Sermak I would say maybe 1/10 of one percent of the initial appointments happen that way. And the only way that would happen is if the person showed up in criminal call and said, "I thought I was going to be able to get a lawyer but I can't, I lost my job," or somehow convinces the judge that he would qualify. And then an attorney might be appointed there. Maybe one case in a 1000, you would see that happen.
- 177 J. Potter That is a different number now. One in a 1000, 1/10 of one percent?
- 180 Dorothy Morey John, since it is us he is talking about, we are really talking about what percentage of 26 percent.
- 183 Tom Sermak The vast number of cases where that happens it is due to a reappointment. Somebody is withdrawing and a person has had a lawyer.
- 187 John Potter We are still talking 70 to 100 cases, is that what you are talking about?
- 189 Tom Sermak That might be a little bit light. There might be a few more than that over the year. But it is not very many at all. Most withdrawals take

place at 8:30 a.m., and they go through the regular verification process at that point.

- 192 Jeff Johnson In my experience I go to most 35 day calls – three 35 day calls a week—and it usually happens a little more than once at every 35 day call on average. Most attorneys here would probably agree to that, so it is probably four to five cases every week.
- 201 Chair Ellis We are doing this backwards. You want to give us your name?
- 202 Jeff Johnson Jeff Johnson, a criminal defense attorney and I also do juvenile law. I started in general practice but narrowed down to criminal law, in part, because, frankly, I like the camaraderie of Lane County defense bar and the communications and contacts I have with Lane County District Attorney’s Office. For the most part, the Lane County District Attorney’s Office attorneys are very amicable in their relations with defense counsel. I like that aspect as opposed to certain other types such as family law work. Attorneys are not always very amicable to each other. So I have essentially narrowed down to criminal law.
- 220 Chair Ellis Would you say that 80% of your practice?
- 222 Jeff Johnson The court-appointment work would be 80%. But I also do juvenile court-appointments and, while those court-appointments are less frequent, they tend to involve more time. I spent nine years in the District Attorney’s Office prosecuting cases in criminal and civil divisions of the DA’s office and have been in private practice now almost nine years. One of the things that I feel I ought to point out to you is that when you are looking at the case numbers and the relationships between the cost associated with an individual case prosecuted by the DA’s office and defended by the PDs’ office is that, to some extent and this may true in juvenile as well as criminal law, you get the case because it is very complicated or a defendant or client can be difficult. There has been more than one occasion where caseworkers from the Dept. of Human Services have remarked to me, “Well, that attorney’s let that case go in a juvenile law case because then it is going to go to trial and it is going to take a long time.” And that may influence decisions for criminal law as well. To the extent that that occurs, it would mean the private practitioner would actually be taking some more difficult cases and more often probably difficult clients. With respect to county wide figures, I’d like to point out that while I was with the DA’s office. and I think the Lane County District Attorney’s Office prides itself on being one of the most aggressive DA’s office in the state, that was repeated to me many, many times while I was in the DA’s office and I think it is probably borne out by the number of Court of Appeals’ decision. There are probably a disproportionate number of those decisions arising out of Lane County, in part because of the aggressiveness of the prosecution in this county.
- 278 Chair Ellis When you say aggressiveness, it is not just in their decisions to charge or how they charge, but all the way through the case?
- 280 Jeff Johnson All the way through the case. It is evident throughout the case.
- 299 Chair Ellis Where is this taking us?

- 300 Jeff Johnson This is just an example of the degree to which the county DA's office is aggressive and that adds up to additional costs.
- 317 Chair Ellis Do you have any observations on the issues we have been talking about?
- 320 Jeff Johnson To some extent, I think a lot of the lawyers who are on the court-appointed list probably are, a good portion of them are specialized. I would say probably 2/3.
- 325 Chair Ellis A little different number than we were getting earlier. I think we heard 1/3.
- 327 Jeff Johnson Well, of course, I don't know everything that every other attorney in town does. I was a little surprised to hear the number 39. I thought the truly active number on the list was closer to 30. But now it might include some recent graduates and a couple of court clerks have recently been added.
- The FTE change with respect to whether the percentage of cases that could be covered by the Public Defender's Office could be covered by a particular corresponding percentage of attorneys in the private bar: I think you probably can't correspond their caseload to the private bar for the reason that Ross indicated. They have additional support staff that covers a lot of the work that they do. And the other aspect is that they do a lot of probation violations and pick up a lot of minor cases. These probation violation cases, in particular, add a lot to their caseload count in terms of numbers and cases, but they are some of the most simple cases and some of the least costly cases. I think it is very rare for me to charge more than \$160 for a probation violation case, but I get very few of them because virtually all of them are done by the Public Defender's Office. There was a question about the rotation of appointments by judges. I think that has been adequately answered and I really don't have anything else to add.
- 371 Chair Ellis Thanks Jeff. It is been suggested to me that we have been going since 11:00 and it is now 2:00. What is our lunch opportunity?
- 377 P. Ozanne Well, we have Doug Harclerod waiting to testify, and I warned people that we would be eating brown bag lunches in front of people.
- 387 Chair Ellis I'm going to suggest that we take a break not to exceed 15 minutes and we may be eating while you talk.

**Agenda Item 4(B) Discussions with the District Attorney's Office**

- 399 Chair Ellis (Meeting resumes meeting at 2:20 p.m.) So far, we have been told your office is aggressive. Do you want to respond to that?
- 400 Doug Harclerod Damn right. Yeah, I think we are aggressive, but we are also fair from my viewpoint. But let me just give you a picture of what you are looking at here. There are actually about 8,000 criminal cases a year. In addition to those criminal cases, there are 2,800 probation violations filed every year. There are 440 restraining order violations filed. There are 300 delinquency petitions and 300 dependency petitions out of the juvenile department, so that is 600 out there. That sort of gives

you a feel for the volume that comes through here if you are going to give those cases individual attention. Although I think we tend to be much more a MASH unit around here, both the defense and the prosecution, than like a hospital. In that sense, we try to run a mass process.

I will be brief here and say that I like the public defender situation, I think it works well. You get good people for the most part, just like they would say for our office. They know what they are doing, they move them pretty fast, they can make the decisions and because they do it all the time in the system. So I like that system. Regarding the court-appointed attorney system, I think generally that is not as efficient. Although that varies with the lawyer of course, and we have suggested in the past that somehow there needs to be a screening in the qualifications on that. You get that in the Public Defender's Office and I think you get in the DA's office, but I don't think you get that in the private sector, so somehow you need to screen. I think that \$40 an hour for those people is an embarrassment to the State of Oregon and it should be raised. It is not the first time I have said that. So do we have our individual battles? Of course we do. What I really wanted to tell you about that unless you have some questions –

- 443 Chair Ellis Go to your point and the key is the word efficiency. I am interested in both that word and the word quality. Can you compare the experience you observed on cases handled by the PD versus private bar appointments?
- 454 Doug Harclerod Overall on the efficiency aspect of it, the Public Defender's Office is more efficient I think. They are there everyday.
- 458 Chair Ellis Because they are available at the inception and appointment at arraignment?
- 459 Doug Harclerod Oh yeah. We have quick disposition programs. They know what cases are worth. They do it so much, just like our lawyers do it so much, and I think there is quicker dispositions in that area. Not that they give away the farm. I don't think they do and I don't think we do either. So I think it is more efficient as a general rule. That is not to say there aren't some private lawyers who are pretty efficient in the way they handle their business. But overall I would say that the PD is more efficient.
- 468 Chair Ellis How would you compare the consistency of the cases handled by the PD office and private?
- 472 Doug Harclerod I don't have a thought about that. Paul might have a thought about that. We have one of our senior lawyers here.
- 477 Chair Ellis Yeah, I am interested in consistency.
- 480 Paul Graebner In the quality of the lawyers?
- 481 Chair Ellis Right.
- 482 Paul Graebner My observation is the PD is more consistent.

484 Doug Harclerod I agree. Paul is one of our senior lawyers and has been around for a long time. He will speak right up if I say something that is wrong.

489 Chair Ellis About efficiency, I am trying to understand how that plays out. We discussed a little while ago that the point of appointment, particular at arraignment, is more efficient. Where else are you seeing efficiencies?

495 Doug Harclerod I think the PD has a rather large individual caseload looking for appropriate resolution. As soon as they can get it, rather than spending lots of hours on cases, maybe they don't need as many hours put into them as it moves through the system. And I think they have collectively a better knowledge about what a case is worth. That is not to say that the private practitioners who do a whole lot of criminal work don't have that. This is very anecdotal. They get paid by the hour. The PDs don't get paid by the hour. There is a difference here. You say someone is making a mere \$40 an hour, they need to bill every minute. Seems like a goofy system to me.

515 Chair Ellis The PD has staff investigators.

518 Doug Harclerod They do have some but I don't think they have that many.

520 Chair Ellis What is your sense as to how the private bar's handling of the investigative process compares in both quality and time efficiency?

524 Doug Harclerod I don't have a good sense of that.

525 Paul Graebner I think with the individual appointments, 90 percent of the people have been doing a pretty good job out there.

541 Doug Harclerod I think this may well affect the indigent defense fund. I brought a one-page handout down here. This is what I gave out at a staff meeting last week. Budget briefing No. 2, you know don't worry a whole lot about these numbers. We are in Round 2 of a 10 rounder in the county budget process. I had to submit budget cuts totaling \$1,064,000. You can see that our current service level is \$5,660,000, so that is 18 or 19%. The real guts of this is down at the bottom, which is what does it mean in the criminal division. It means we will lose six lawyers, give or take. We only have 24 in the criminal division. So what that means, if something close to this occurs, we are not going to do 8,000 next year. We are going to do something less. We already are plea bargaining 98% of these cases. We only tried 120 cases last year to a jury and about 40 to a judge, which means that we got rid of everything else. The standard of reasonableness is going down for a whole variety of reasons. Not enough jail space. You give a lawyer two cases a month to get ready for a trial. You give them 30, 40, 50 cases a month they can't go to trial. So we get punished to go to trial. I'm not saying anything the criminal defense bar doesn't know around here. We are out personed. But if this happens, you are going to have fewer indigent defense cases to appoint and you are going to save money. You know what the real problem is in the criminal justice system is: we have too many police. If we didn't have all these police we wouldn't have all these defendants. No jail space problems, that kind of wakes everybody up a little bit, we get a few laughs and we move on. That is just a heads up. We are in Round 2. But I do have a thought that misdemeanors could all be done in municipal court.

610 S. McCrea So then we would have appeals to circuit court?

611 Doug Harclerod Well not very many. It is a \$200 non-refundable fee. That will stop most of them. You put barriers in the way of people getting to the courtroom, it stops them from coming. That is all I have to tell you. I won't take a lot more of your time.

618 J. Potter Can you weigh in on this issue that we are looking at: whether or not we should have the current court-appointed system or switch to another system such as a consortium.

623 Doug Harclerod Could I weigh in, sure. Our experience with the juvenile consortium is that it works really good. That is what I hear. We have one lawyer out there who practices against all of those lawyers. The consortium works pretty well.

635 S. McCrea As I understand it, because I don't really do much juvenile stuff, the juvenile experience is different because it is more like mediation where you want to sit down with the other attorneys and work out what is best for everyone. But we are in what you say is an adversarial system, and I guess one of the concerns I have is getting too institutionalized--getting too much where a case is coming up with Joe this week, but you've got another case next week, and you don't want to antagonize him because you know because this case is not that good but the one next week is really good and so you want to do a tradeoff kind of thing. So my concern is not getting into too much of an institutionalized situation, where people aren't looking at the best interests of the client, even if it is not what the opposing party wants.

661 Doug Harclerod What do you think about that Paul?

662 Paul Graebner Well, I'm not involved in the juvenile courts, but I think the PD system is going to be as good or better than the private practitioner system.

666 S. McCrea Why do you think that is?

667 Paul Graebner I guess I am referring to the 10 percent of the individuals attorneys.

**TAPE 3, SIDE B**

001 Paul Graebner There hasn't been any oversight from what I can tell, so you have that 10 percent and ten percent can wreak havoc with the system.

003 S. McCrea Are you familiar with the Federal court-appointed system and the oversight that happens there.

004 Paul Graebner I know there is a lot more oversight, but I am not familiar with all the details. I think 90 percent of the practitioners are doing a good job and are conscientious. But when you have 10 percent who aren't, that can cause problems.

010 Chair Ellis You said that you had 24 lawyers in the criminal division. I assume that covers a range of experience?

011 Doug Harclerod Yes.

- 012 Chair Ellis Of the lawyers in your firm, do most of them start with you as recent law graduates?
- 013 Doug Harclerod Yes.
- 014 Chair Ellis So you get very little lateral entry with experienced attorneys?
- 015 Doug Harclerod Get? I don't want any. It doesn't happen because my belief on this is promotion from within is a real good management tool. If you hire right and then move people up, you get a better quality product.
- 019 Chair Ellis What is your turnover experience?
- 020 Doug Harclerod Occasionally, we have somebody leave. I either help them leave or they leave themselves. It doesn't happen very much.
- 022 Chair Ellis Most of the lawyers in the criminal division, would you describe them as career prosecutors? Or do good young lawyers come in and get five or six years experience and then they go out on their own?
- 023 Doug Harclerod That is not our history. The history is the people come and they like the work and the environment and they don't leave. I am very worried about that though because our beginning salary is \$42,000 a year with a good benefit. Our top end is \$84,000, but we only have a few of those spots at the top. So the promotional opportunities become less in a shrinking office than in a growing office, and we are shrinking. We lost two lawyer positions last year. The other thing is the thing I have been selling for years: we have good insurance and we have an excellent retirement plan. And the Legislature just screwed up my excellent retirement plan argument in a big way. So there is some concern amongst my lawyers who have got 10 and 15 years about whether they can afford to do this job anymore in the future. That is a problem.
- 038 Chair Ellis One of the issues we feel we need to keep our eye on is where will new defense lawyers come from with sufficient training and experience to be qualified. One obvious source is the prosecutor's office, and another source is the PD office. I am hearing from both of you that you guys have such great shops that nobody ever leaves.
- 044 Doug Harclerod It isn't that nobody leaves, but there aren't a lot that leave. Over the years our turnover rate is pretty low.
- 047 Chair Ellis What advice would you give us in terms of how to structure a system that invites younger lawyers' interest and obtain some experience, but not at the expense of clients.
- 051 Doug Harclerod That is a mentoring process and a training process and you have to compete at some level. It is important for people to like the work. I teach one night a week at the law school and I tell the students there that, whatever you do, you are going to do it for a long time, and so when you get up in the morning, you want to say, "I get to go to work," not "I have to go to work." We all say, "I have to go to work," but the vast majority of time you need to say, "I get to go to work." They need to like the work but you can't punish them so badly on the financial end

of it that they can't afford to do the work. And Oregon is moving in that direction in indigent defense, and in others way too. If you want to train public defenders and prosecutors and go into that as a career. And I think experience equates to value, generally speaking. You have to have a program to train them and mentor them and give them dollars and cents and a benefit package that allows them to do what most of us do, which is have families and raise kids, go to baseball games and that kind of stuff. You can't kill them with the workload. I mean this is a problem on both sides.

- 069 Chair Ellis What is your experience with the younger lawyers you hire as to the debt load they bring with them.
- 070 Doug Harclerod Periodically, I am happy to sign a form that says that they have worked for us for a year and that they can get 20% off of their loans. Some of them come here with significant debt from law school. I haven't surveyed each one of our lawyers on how much debt they are trying to pay off.
- 076 Chair Ellis From your position right now, do you view it as a buyer's market or a seller's market for young lawyers entering the criminal justice system?
- 077 Doug Harclerod Well, the only experience I have is in the DA's office and I get resumes all the time.
- 080 Chair Ellis So you don't have to actively recruit?
- 082 Doug Harclerod We get resumes all the time. Periodically, we get resumes when we have a job opening. We get lots of candidates for that job opening almost all the time, so we get to select and choose. We don't have any trouble filling positions. Our problem the last couple of years has been we haven't had any positions to really hire anybody.
- 087 Chair Ellis You mention the entry compensation. Do you know how that compares to the entry level compensation at the PD's office.
- 088 Doug Harclerod It is probably higher. It has always been a little bit higher than them. But what I would tell you is a beginning police officer who is 21 or 22 years old with a two-year degree from our local community college is making about the same money to start, and they get overtime. So they make more than our beginning lawyers. We have these lawyers with six months, or a year or two years experience advising these police officers on what is a good search and what is a bad search. And the police officer is making a lot more than they are, and they are a lot younger as well because they have two years of college versus seven. I am not impressed. It is trouble.
- 096 Chair Ellis I want to thank you for your support in the Legislature last year. We appreciate that. We found ourselves in the same boat.
- 099 Doug Harclerod The system doesn't work without all the components playing.
- 100 Chair Ellis Any other questions for Doug?
- 101 J. Potter Can I go back to the 10 percent comment. Just assuming that 10 percent is the right number, whatever the number is, that these folks are

- milking the system. We are assuming by that that maybe they are not the best of the lawyers because they are taking a lot longer.
- 101 Paul Graebner Motion practice that is not getting any results.
- 108 J. Potter So is that a lawyer function? A quality of law function? What I am trying to get at is, what method would you use to screen or provide oversight and try to minimize that?
- 113 Paul Graebner I don't know. Right now it is not uncommon to have frivolous motions filed and then someone will plead out the day of trial or right before. I assume that the practitioner then puts in the bill for those motions, which were never even heard by a judge. So you don't have a judge now that is looking at that bill.
- 123 Chair Ellis Have there been post-conviction cases in this county based on incompetent defense counsel?
- 124 Paul Graebner Yes.
- 125 Chair Ellis Any pattern to that?
- 126 Paul Graebner Oddly not. The post-conviction cases tend to be against some of the best lawyers in the community. And frankly a lot of the post-conviction cases are against retained counsel. When someone thought they were going to buy themselves the best lawyer in town and they were going to buy their way out of a situation by coming up with a hot shot lawyer in their mind by paying for that lawyer, they end up getting convicted and get a sentence commensurate with their crime and go to prison. In my experience, those are the ones who are much more apt to file post-conviction.
- 135 Ross Shepard Might I add a footnote to that. I believe the correct statement is to say that there has not been a post-conviction petition granted for a Lane County Public Defender client in the history of the organization. There may be one case that was a technical sentencing adjustment back in the 1970's.
- 143 Chair Ellis Can the same be said the private bar cases?
- 144 Ross Shepard I don't think so.
- 145 Paul Graebner I don't see a correlation between the post-conviction relief cases people are filing, the attorneys that are getting the post-conviction claims and their level of competence.
- 146 Chair Ellis Any other questions?
- 148 S. McCrea Tell me about the frivolous motions. What do you see being filed?
- 149 Paul Graebner There have been questions that have come and I obviously don't want to –
- 150 S. McCrea I understand –

- 151 Paul Graebner These are filed where just about everyone who practices criminal defense in this room would agree that this is a motion that they themselves wouldn't file because it wouldn't go anywhere.
- 158 Chair Ellis Thank you we appreciate it. Peter, we have a window before the judges arrive.
- 159 P. Ozanne I told them we were going to start at 3:00 p.m., but we can get them now or we can take a break.

**Agenda Item 4(C) Discussions with the Circuit Court**

- 172 Chair Ellis Well, thank you folks for coming.
- 173 Judge Bearden Thanks for having us. Judge Leonard wanted to join us, but he is still tied up in a hearing that got pretty contentious. And we were going to ask Judge Henry to join us, but she is in trial. So we are what is left over.
- 176 Chair Ellis We are very happy you could do it. I think you know what we are doing. We are trying to get as good an understanding as we can as to how the defense appointment system is being handled here. We are looking for suggestions about how that could be improved or changed, and we taking input from anybody who cares to give it to us. We have had quite a bit of good comments from many of the defense lawyers, we have had the DA's office here, and then we want to hear from you folks on the court. So if you want to comment to start with, that would be helpful.
- 186 Judge Bearden I have been tied up with so many matters today that I don't really know what has already been said, and I don't want to cover ground that has already been covered.
- 187 Chair Ellis Take your chances.
- 188 Judge Bearden I am happy to direct my comments in any particular areas you want to hear about.
- 191 Chair Ellis Let me focus this a little bit. Lots of discussion has occurred about the appointment list. We think we have an understanding now that is a shorter list than many thought it was. And it has been cleaned up so some of the issues regarding the list are hopefully resolved. But some of the questions involve the consistency of quality of attorneys and whether there are really any meaningful criteria for admission to the list, other than a law license; whether there is any ability of the courts to match up the difficulty of a case with the competence of the lawyer being appointed; whether there is any method of supervision, either mentoring of younger lawyers or supervision of the lawyers that are appointed; whether, with the shift in the way payment is now made, which comes out of Salem from people who don't have any ability to observe the lawyers, that has created a problem; and whether there is any method of monitoring if the level of hours is really consistent with the level of need for hours. These are some of the questions we are asking. And I think the alternative to the list as it is presently structured, we are hearing there are two: one is to keep the concept of the list, but tighten it up a lot; the other is the notion that perhaps there

should be formed a consortium of the lawyers who would specialize in criminal defense.

223 Judge Bearden

Okay, I'm sure I'll forget some of the questions as we go through them. I'm speaking for myself only, but I know my views are shared by a lot of my colleagues because this has certainly been a topic of discussion among the judges at meetings and more informally as well. We don't feel we have any control over who comes on the list. If you meet the statutory criteria, we feel pretty much like we don't have the authority to keep you off. In my current position of presiding judge, I have knocked somebody off the list for a period of time because of a drug or alcohol problem that was affecting that person's work. And that was basically only after talking with the lawyer and telling the lawyer what steps I wanted him to take before the lawyer could get back on the list. Frankly, I was not convinced that I had the authority to knock anyone off the list, even though he had shown up in court reeking of alcohol and under the influence of alcohol, and I find that fairly intolerable. I think that, ever since the lawsuit was filed many years ago in this county in federal court when a lawyer was removed from the list, we have all been pretty gun shy about taking someone off the list, even someone we felt was grossly incompetent. And my concern is really always with the client. I want the client's to have competent representation and I don't feel like under the current way we are structuring things that I can offer that assurance. I have seen a lot of instances where I feel we are just begging for post-conviction relief when lawyers make mistakes. I did, everybody does when they are representing clients. But when I see a lawyer over and over again who is obviously even to the most casual observer not competent to be representing a client in the way clients have to be treated. I have seen lawyers abuse the billing system. I think that over the years various judges sitting in the presiding judge's seat, dealing with situations where they thought lawyers were abusing the trust of the court, have taken more or less strenuous action. But the last time – of course I don't handle the bills anymore – but the last time I suspected there was something wrong, even a little casual investigation on my part to verify something that didn't look right to me, yielded an objective source that told me the lawyer wasn't being honest. And I brought the lawyer in, showed him what I understood to be facts, showed him his affidavit, handed him his bills back and said, "You can resubmit these if you want to but I am not signing them," and he said, "Oh, I must have made a mistake," and that issue went away. You know, it is a situation that doesn't happen very often. It is a very small group of people who would abuse the trust of the court, but they shouldn't be doing the work. There is no way to police the system the way it is now that I have discovered. I don't have the time – well I don't get the bills anymore – but I didn't have the time to micromanage that situation. It's just that, if something really looked wrong to me, then I would take a little time and try and figure it out. But I don't want to be in that position where I have to worry about that. I know I shared with Mr. Ozanne and have shared with Ann Christian my concerns about a couple of lawyers who were asking for investigators in situations where I thought it was grossly inappropriate. When you have a failure to appear charge and you are asking for \$2,500 for investigation, a little red flag goes up in the back of my mind saying. "What the heck! What is there to do?" It is the most obvious ones that catch your attention, and the overwhelming majority of lawyers are honest, hard-working

and competent in their representation. But we don't have any effective method of quality control under the current system in my opinion. I would like us to move toward a system that polices itself better. Peter knows, and some of you may know, I sure know Ms. McCrea knows, that I was a member of a consortium for a time in practice. And there was some self-policing that went on in that group and there was a strong commitment by the leaders of that group to assure quality representation. I think that it is a lot easier to manage quality than the situation we have got now. I realize that, depending on who forms the consortium, there is going to be people who are in and people who are out. That is always the situation and the results may be harsh for individual lawyers. This is not a popular position with the bar, but what I'm looking at is overall quality of the product that we put out, which is legal services to these defendants. And I want the highest possible quality and I also want the best possible price—not just in terms of the upfront costs, but the hidden costs later on with post-conviction relief and other problems that come from poorer quality of representation. If you have poorer quality lawyers, the cases are more likely to get tried, they are more likely to end up in various kinds of squabbles down the road, and that is not good for anybody. Frankly, it is not good for the profession. It is certainly not good for the client.

339 Judge Rasmussen

We have many thoughts and so many things we have talked about over the last number of years on this topic. I have on many occasions covered Judge Bearden's job. I'm not sure the Chief should hear this though. I have on many occasions been confronted with the stacks of bills to approve for lawyers, and it is quite amazing how much people are billing in obviously fairly routine kinds of cases compared to other lawyers. One of the troubling things about that responsibility going to Salem is that modest level of review that we were giving it at this level is lost. I think, because it is in Salem, the knowledge of lawyers and which lawyer it is most likely to occur with is lost. And to me, that makes the self-policing function of a consortium even more important. Because the efficiencies that the lawyers will have to bring to the process will drive the self-policing. We also talked a lot about whether a lawyer is qualified for a certain kind of case and we tend to think in terms of years of experience and whether or not a lawyer has tried a certain number of Class C felonies. But really, many times in the appointment process—and there are occasions when I make appointments directly because I am doing arraignments or in court and the occasion calls for it—I am looking for a personality match that the appointment process, when done in the abstract, doesn't really bring into the process at all. With difficult clients, you are looking for a certain personality mix for that to work because many of the withdrawals are because of a personality conflict and are often a lack of client control. And I think that a consortium can at least bring that perspective to the appointment process. There are, in addition to that kind of quality control issue, the issue about mentoring that you raised, which I think is very important. There are occasions when it is clear that someone is having quality control problems. There is no systematic training, there is no systematic program, there is no systematic mentoring, and I think a consortium would allow for new lawyers to be introduced into the system and have the older lawyers to rely on and maybe try cases with and maybe be encouraged by those more experienced lawyers. That kind of experience would be helpful to the new lawyer in learning how to handle certain kinds of cases. I

think there are very significant hidden costs here. I know that there are attorneys using motions to postpone cases that we would rather not grant because we essentially feel that the prima facie case for post-conviction relief has just been made on the record. We don't want to postpone the case, but that is the situation. I think there are some very significant hidden costs that can be addressed by a consortium system that has some of these review, mentoring and educational structures built in. Judge Bearden and I have talked a lot about what possibilities a consortium idea brings in terms of post-conviction relief representation. There are some opportunities in that department that I would very much hope you will look into, though we haven't handled many because we don't have many in Lane County, but they create tremendous animosity. I think it is much better to approach post-conviction cases from a regional standpoint. There are some real efficiencies to be gained by a consortium.

- 452 Chair Ellis Do you have any observations about why the defense bar here has resisted moving a consortium.
- 454 Judge Rasmussen I think lawyers being somewhat conservative by nature and none of us care terribly for change. It makes people nervous.
- 462 Judge Bearden I think that almost surely if there is a consortium, there will be people who get left out. So when people are talking about it, they have that real possibility that they might not be one of the people who are on the inside of it and I understand that. I practiced law for 20 years and I understand that this is a very highly competitive town for lawyers. But it is not a concern for me in my current role. It can't be. I was thinking while Judge Rasmussen was talking, and I agreed with everything he said, when I have a problem with a lawyer in the PD's office or a problem with a lawyer in the juvenile consortium, I know who to go to, and I know they will get the mentoring or the supervision or the help that they need for whatever the problem is. If it is a personal problem, a martial problem, a substance abuse problem, I know that – if they are just not showing up for court on time – whatever the problem is, and if it is affecting their clients, and I go to talk to Mr. Shepard or I go to talk with the juvenile consortium leaders, it is going to get handled. And fortunately, that actually happens very rarely because they are largely self-policing, self-mentoring. If problems come up that they don't know about, then they seem receptive to hearing about them and we can deal with them and make sure that the product, legal services, is good and at a predictable, reasonable cost. I can't do that with private parties. It is just ad hoc. It's calling them in and I am not their probation officer. I can't police those lawyers and make sure the ones that are having problems are doing what they ought to do. It's just not manageable. The truth is, actually, for the people who put the consortium together, there are huge efficiencies. They can bid out at a price and make a lot more money for themselves because of the built-in efficiencies that they will have from carrying a predictable caseload. It can't be more efficient to have the system the way it is now for anybody really. It is just a question of who is going to be in it and who is not. If it wasn't broke you shouldn't be fixing it. But it is.
- 518 Chair Ellis You're telling us it is.
- 519 Judge Bearden I think it is.

520 Chair Ellis I'm also hearing you say that the idea of keeping the list, to try to fix the list system, is a pretty difficult thing.

524 Judge Bearden Who is going to police it?

525 S. McCrea Well, that was one thing that I was going to ask you. It has been a while now, but you were on the Criminal Justice Act federal court-appointment list.

527 Judge Bearden I was for awhile.

528 S. McCrea Yes, and there is oversight in that system through the Federal Defender and through a selection committee.

531 Judge Bearden Yes, and it is very hard to get on.

532 S. McCrea It is hard to get on and there are qualifications. You have to reapply every two years. I am hearing you and Judge Rasmussen say the concern is, number one, quality, which I think we all agree about, and then, the self-policing and the oversight.

539 Judge Bearden Mentoring.

540 S. McCrea Mentoring, right. Which is something that happens in the federal system because a new attorney now has to have an established panel attorney as a mentor when they're doing their first case and on down the line. And I guess what I am wondering is it seems to me that this word "efficiency" has been used a lot this afternoon, not just by you two, but by a lot of different people. And while we have difficulties with the court-appointment list, and we are sort of herding cats if you will, and you don't have the time to be dealing with 30 cats running in different directions. That is a down side. But it is also one of the sort of the positive things in the sense that we have people who bring a new perspective or a different way of looking at a case. And while we had Mr. Graebner in here talking about how there is maybe 10 percent of the court-appointment list who may file frivolous motions, but that 90 percent were very good. I tried to get a sense from him of what the motions were because, as a retained attorney, I file motions that the DA's office always thinks are really stupid.

562 Judge Bearden But they are very well thought out.

563 S. McCrea Well, they are always stupid until you have the judge saying, "You're right, Ms. McCrea." or the Court of Appeals or whomever, so there is sort of a difference there. My question to you two is, are you firm on it, is time to break from what we have had as tradition? Do we really need to throw the baby out with the bath water, so to speak? Is there any room in the way we see things to set up maybe a consortium system and have a very small or smaller court-appointed list that would follow maybe a model of what the federal court-appointed list would be? And try that out and see if there would be the oversight and the self-policing type of things to maintain the possibility of the creative influx of ideas from different lawyers.

- 586 Judge Rasmussen I really think it is time to make this change. I think it is really an ideal time to make this change. I believe the consortium is the model to use. I don't view that system or model as not being able to bring in new people and not being able to stay vibrant. In fact, it probably has some distinct advantages over most of the other systems in being able to do that because you can move cases around within the consortium and people will have some incentive to learn, so that they will be the person who next time gets that difficult case. Or maybe the person who is an expert in difficult clients. I think this is the time. These kinds of fiscal crises and these kinds of legislative mandates create opportunities and this is the direction to go.
- 617 Judge Bearden I agree with Judge Rasmussen. And I would just add that I have talked with the lawyers here and on the list. I know Mr. Ozanne has. They have shown no inclination for doing the dirty work, frankly. That is kind of a harsh thing to say, but I haven't heard anyone say, "Well, we can set up a system and police ourselves." I haven't seen leadership emerge from the bar on this list to show me that anybody is willing to do what it would take to make that happen. I agree with Judge Rasmussen. I think it is time. I'm not telling you it is an easy job to do—to police a group like that, or to set this up. But I have seen no leadership stepping forward to seriously address any of those concerns.

**TAPE 4, SIDE A**

- 001 Judge Bearden You need someone to run a consortium who can do that tough work. I agree with Judge Rasmussen that, because of a number of factors, this is the time. If we are going to make a change, we need to go ahead and make it. And I agree that a consortium can be a very vital thing. A consortium actually wouldn't be that different from what the federal panel is now as I understand it. And a consortium could take over a lot of the functions that are now handled elsewhere by others that don't need to be. The assigning out of cases is a uniquely wonderful thing to have the consortium do, and also the internal billings. Wouldn't you love to stop looking at the requests for investigation and all the bills and just let it all be done by people in these consortia? I have seen it. I can tell you that it is a lot of hard work and it is lot of hard work that should be done by them because they have the opportunity then to be more effective.
- 016 Chair Ellis A lot of the consortiums have managers doing a lot of that activity.
- 017 Judge Bearden Right.
- 018 Chair Ellis I know as a lawyer, I'm no good at managing and paperwork and all that stuff. I would be happy to have someone else do that.
- 024 John Potter Can I approach this a little differently. Let's set aside our positions just for a moment. Against the back drop that there are 80 or 90 contracts in this state, and every kind of service delivery system that you can think of is being offered by contract in Oregon. In this county, I think you would agree that the Lane County PD does a good job, but in other counties they don't. In other counties, they have consortiums that have had to be disbanded because they hadn't done a good job. So forget the system delivery. Is there a way we can come up with common denominators or a set of common denominators that makes public

defense work effective. What kinds of things have to be in place, regardless of the system, in order for it to work?

- 033 Judge Rasmussen I hadn't thought about that.
- 034 John Potter I think it is a personality driver. The PD's office, in which you have a strong leader or a common manager, or you have a consortium who doesn't have, like Judge Bearden had when she was in a consortium, a good manager of the consortium. So you have different personalities. And so what I am trying to assess, is there some way that we could come up with these common denominators? Is there something that would help guarantee that, no matter what the system is, we could achieve a better delivery product than we now have.
- 045 Judge Bearden I think you are right about it being driven by who is running the organization. If we didn't have Ross Shepard running the Public Defender's Office, and we fill in the blank with someone who can't do what he does, then obviously the product that the office puts out wouldn't be as good.
- 049 Judge Rasmussen I think to some extent it can be a matter of us setting standards. Quite frankly, it is a matter of the market place telling us whether it is working or not. Because if they don't start delivering a product to the court in terms of what lawyers come into court with, and if those folks aren't doing a good job in court, then eventually there is going to be another round of contract negotiations for a replacement consortium. That is my complaint about bills: when from one party you will get a bill for 75 hours and from another 10 hours, and the cases are essential the same case. We absolutely have no control.
- 065 Chair Ellis There is even less ability to check the bills, since they now go to Salem.
- 066 Judge Rasmussen That is exactly my point, if you don't have any way to monitor that and if you don't have an idea of how many hours that would take locally.
- 068 J. Potter I guess the reason I asked the question is that, if there is a change to be made, this is a good opportunity to do it. The stars are right. We change to a consortium model and what criteria do we feel would be necessary to make sure that it works, so that after two years we don't come back and say, "You know, these folks who are in this consortium are not doing a good job," and then we are going to scratch our heads and say, "What did we miss?" "We thought we were setting up a consortium and what criteria did we miss here?"
- 082 Judge Bearden Maybe you set up a way so you can investigate who those people are. You might ask the people in the know whether it is judges or Mr. Shepard or other lawyers or the DA's office lawyers. Or you could set up minimum criteria and make the consortium come up with a list about how they are going figure who is competent to do various kinds of things. Make sure there is plenty of education and mentoring. I don't know if they still do it in the federal system, but they used to once a month put on a CLE. But none of those things will save you from a bad manager. If you pick the right manager, based on the information that you get from the people who know that person then, it will help.
- 093 Judge Rasmussen Thank you for having us.

095 Chair Ellis Thank you for coming.

096 Judge Bearden I have something shortly, but I can stay another five minutes or so if you need me.

097 Chair Ellis Any other questions for Judge Bearden? Thank you.

100 Chief Justice Carson Thank you for letting us use your courtroom.

101 Chair Ellis Ross, you were going to give us any insights.

104 Ross Shepard Thank you. Let me suggest that the Commission embark on a modest experiment here. I think that, just because we are from Lane County we merit an experiment. This is a unique jurisdiction.

106 J. Potter You are an experiment.

107 S. McCrea I don't like where this is going at all.

108 Ross Shepard This is unique jurisdiction and every county is of course unique. But Lane County is a wonderful place to practice law. It is generally very cooperative. It is civil, it is professional and it is different in that regard. I feel blessed to be allowed to have a professional career here. But I think these comments carry over to the private bar and the criminal bar itself. It is something of a cohesive body because people do all know each other and they are supportive. They also all know they have the PD's office to help them if need be. So I am going to suggest, as already has been iterated eloquently by Ms. McCrea, that we follow the federal system—that we take the current list of 30 lawyers and you establish or you delegate to me or somebody here in Lane County to pick three respected non-partisan attorneys that would agree to watch over the list. The initial task would be to gather the list and ask the lawyers if they still want to be on it. It might have to be a difficult decision that would have to be made right there: are there some lawyers, the 10 percent that Mr. Graebner alluded to in Lane County, who should not be doing this work? I'm on the federal oversight committee also that helps Steve Wax figure out who the lawyers should be to practice in federal court. We could chose either to remove the lawyer if the incompetence is blatant, or to find a regimen of mentoring for the lawyer or reassign the lawyer by type of case that the lawyer is allowed to do, I mean there is lots of flexibility that would be available. That would then be your accountability. I'm not certain exactly how this would work by going through the statutes. But if this three person oversight committee would have the authority to remove people from the list or if it came to that, by some sort of a judicial order, I'm not sure what the answer to that is. But either way, it can be done expeditiously, and I think you could have some confidence that what had been done was proper and called for. You end up then with 27 lawyers. I think that both of these judges would probably agree that the 27 who were left should be doing some sort of court-appointments. And the oversight committee could handle all sorts of things. Billings, if someone is billing 300 hours for a Class A misdemeanor, something is wrong. At the very least, the oversight

panel would only have to meet maybe twice a year, three times a year. The federal panel meets once a year I think.

- 153 S. McCrea I think it is once every two years.
- 156 Chair Ellis What are the advantages that you are proposing over a consortium of the kind that Judge Bearden proposed.
- 160 Ross Shepard Well, the bar list will allow new lawyers to engage in this kind of practice, and I suggest here in Lane County that is extremely important. My office, even with the reputation that it has, is not able to attract a great deal of interest with young, recent law graduates. They are just not inclined to want to do it. I don't generally hire people directly out of law school. I would rather have someone with two or three years of experience who knows how to do it.
- 170 Chair Ellis You think the open bar list has more promise for mentoring new entry lawyers than a consortium?
- 172 Ross Shepard I do, because I think you are going to end up choosing eight or 10 lawyers that have eight years experience and then these young lawyers are shut out. There aren't any cases available for them to do.
- 174 Chair Ellis Well, what is to prevent a consortium because it makes economic sense to them to have younger lawyers at a lower cost to them?
- 179 Ross Shepard These lawyers are generating a certain amount of income per lawyer, so I think they will be watching out for their own and are not going to want intruders.
- 182 Chair Ellis I would think there would be a lot of ways you could structure a consortium that would allow for entry-level lawyers under supervision.
- 183 Ross Shepard I think the senior lawyers are not going to want the young lawyers coming in and taking the income. I think there will be financial jealousy there.
- 186 Chair Ellis Well if that is true, you wouldn't have young lawyers going into private practice. The private firms wouldn't hire younger lawyers. I don't understand.
- 190 S. McCrea With the consortium, you have a set amount of the pie and these guys are not all in one firm, so what the younger lawyer brings in doesn't go to the more experienced lawyer. That person gets that amount of money, and the more experienced lawyer is not going to want to part with anymore than he or she has to because they want to protect their piece of the pie. If you are getting \$385 per case, they want to be able to process as many cases as they can so they get as much as the contract as they can. So with the new lawyer it is not like having an associate where you can have them working on some parts of the case, where you are the senior lawyer and you are generating the income and the client is coming to you and they are actually assisting you. Here, it's like you have somebody else who is supposedly doing the work on his or her own and getting the income on his or her own, and there is nothing in it for you except maybe you are providing somebody an opportunity. That's what I think the concern is. I think your concept

that there has to be a way to build this in somehow is a good idea. I think we are all in agreement on the idea that we need to have an avenue for encouraging, supporting and mentoring young criminal defense lawyers, if we are going to have some in the future. But I'm just not sure that the consortium is a way to do that, or exactly at this point how we would do that.

- 211 Ross Shepard Going back to the oversight, if there were difficulty, or if not the CLE presentations here in Lane County conducted by the Chair of the Lane County Bar's Association, and until the crash last spring it met routinely and was there every month, and anybody that wanted to was allowed to attend. Either a lawyer in trouble or all of these lawyers could be mandated to appear at a certain number of those per year.
- 221 Chair Ellis Who is issuing that mandate?
- 222 Ross Shepard Perhaps the three-person oversight committee certainly could, Mr. Chair, if the lawyer was exhibiting signs of a problem. Young lawyers could do second chair cases with lawyers in my office. That could be institutionalized. I think that there are safeguards that would address the concerns that the judges have. But you know it seems to be these concerns are directed at maybe three or four or five lawyers here in Lane County.
- 233 Chair Ellis I'm sitting here still stewing about the entry level mentoring issue. And Jim can give more detail on this, but at MPD there is a bar lawyer program for a period of time where the younger lawyers in big firms who weren't getting trial experience and wanted it were loaned to MPD. And they get the trial experience under supervision of the MPD lawyers. We are here designing a system for the county as a whole. Why not maybe work with your office as a place to make available an opportunity for younger lawyers who really want to learn the ropes in criminal defense to do it and do it with your lawyers helping and supervising them?
- 247 Ross Shepard I think that is a great idea. It seemed to be though that the Commission had drifted away from using the established PD's office as the lynchpin within a jurisdiction.
- 250 Chair Ellis Well, I'm not quite sure where you are getting that idea.
- 251 Ross Shepard Well good, I misread that because we are there as a known resource. There may be some financial impact with that.
- 254 Chair Ellis I understand, but one of the arguments for the PD is that you do perform both a CLE function and a mentoring function within the bar as a whole.
- 257 Ross Shepard Bob Homan was here, and I was going to say that people not only from Lane County, but from all over the State of Oregon, use him as a resource, and we are glad to do that.
- 260 Chair Ellis Any other thoughts you want to share with us, Ross?
- 261 Ross Shepard No, just that general idea.

- 262 Chair Ellis Any questions?
- 261 J. Potter I am trying to figure out why Lane County is different and unique. In this particular narrow area where we are talking about the court-appointment list, I think I may have come up with one potential explanation. There are three law schools in the state. People who graduate from this law school tend to want to stay in Lane County and a lot of them get their feet wet by getting into criminal law. If you graduate from Willamette, no one wants to live in Salem so they move. If you are in Lewis and Clark, Portland has got lots of different types of delivery systems and you can get court-appointed cases and you can join a consortium. But Lane County is different in the sense there aren't many opportunities and I think we do have to take a close look at this issue. How do we get new lawyers, if we form a consortium? And I say that with the experience that Peter and Ingrid and I had in Lincoln County, where there is a hybrid consortium of a half dozen attorneys who are basically all independent contractors. They formed together to make a consortium. But we talked to them about bringing in new lawyers and they said, "Sure, we will gladly take a new lawyer in just as long as you give us more money to fund the new lawyer to take more cases." What we need to figure out if we go with the consortium is how do you incorporate new lawyers into a consortium in a county that has lots of new lawyers? Now it is not the same in Benton County, where there aren't many new lawyers, or Klamath County, but Lane County is different in that way.
- 289 Ross Shepard Not only lots of young lawyers, but aging defender's office, and that is a fact.
- 290 J. Potter There may be lots of job openings soon.
- 291 Chair Ellis Okay thanks. Anyone else want to share any thoughts with us? On behalf of the Commission, I thought this was a very valuable day for us. It was really very helpful to hear from the people directly involved to get a sense of the issues here. We really appreciate the interest and input and we will give it due consideration. Thanks a lot.

**Agenda Item 4(D): Discussion by the Commission**

- 300 Chair Ellis Any other business for us.
- 303 J. Potter Do we have a timeframe for this.
- 304 Chair Ellis Let's talk about that. Peter and I were talking at the recess. Part of me thinks that it is not a good idea to take 15 minutes right now for our discussion. I think people may want to digest what we have heard and think about it. I would like to see the first hour or so of the meeting we are going to have in Corvallis in a month devoted to trying to work through the input we have had here today and see where that takes us. Does that work?
- 313 P. Ozanne Three counties will be the subject of next report for the Corvallis meeting. Most of the subjects won't be very controversial, although one may well be. We could reserve an hour or so for the Commission's discussions regarding Lane County, and try to limit the amount of regular business that we present to the Commission in Corvallis.

- 320 Chair Ellis One thing I would like to try and do, and I hate to keep burdening our staff. This is going to fall somewhere between Kathryn and you, Peter, maybe Ingrid. If we could have staff put together the pros and cons with regard to the proposals and arguments that we have heard today—both the pros and cons of the current system and how it might be modified, and the pros and cons of the consortium approach, which I think is the alternative that was mentioned most frequently. I think that would sharpen people’s thinking. Does that sound doable?
- 333 K. Aylward I would love to do that, because I kept quiet today –
- 334 Chair Ellis Kathryn, I would be happy if you would do a first draft of that. I’d be quite happy to review and react to it before we distribute it.
- 340 S. McCrea I would too. I could react to it.
- 341 K. Aylward There were some things that came up today where clearly people weren’t fully aware of the situation. And there were some things that were said that the data doesn’t support. I would like the chance to fill in the gaps with regard to some of the perceptions. I just didn’t feel it was appropriate during this meeting.
- 347 Chair Ellis I don’t think you need to feel constrained by the fact that something wasn’t said here at the meeting. Add whatever you think will be helpful to the Commission.
- 349 S. McCrea Lorrie had a concern about whether you guys were going to be able to respond. Of course, we want all the data and want to hear from everyone.
- 351 P. Ozanne I tried to made it clear in the report that it was a reflection of perceptions in the county, which might or might not be valid.
- 352 Chair Ellis I think it was a real tribute to your work, Peter. Not too many people took issue with it.
- 356 S. McCrea I just have so many thoughts and things I need to process.
- 357 Chair Ellis You don’t have to wait, go ahead.
- 358 S. McCrea No. I’m saying I kind of need to think about it because we heard a lot of things and there were a lot of good points made. Things that I hadn’t thought about and things that I had thought about that were presented in a different way.
- 363 Chief Justice Carson I would urge that economics influence what the bottom line dollar amount is.
- 368 P. Ozanne I’m very interested in that, Chief, because I would like to see this process, in part, be one of the examples we show the Legislature and the Emergency Board about how the Commission is trying to promote cost-efficiency. I would like to have cost-efficiencies come out of this process as well as quality.

- 375 Chief Justice Carson And one other thing with regard to the judges, in particular. Now that the judges have been dealt out of the billing review, I think we have a real problem.
- 384 J. Potter Is the format the same for next meeting? You said we would need about an hour. Were you considering this type of format or figuring the normal time?
- 386 P. Ozanne People will probably want to come and testify with regard to at least one county. I'm not sure about the other two. I want to extend an invitation, but also make it clear that we are not going to remodel their counties.
- 396 J. Potter Well, I was going to suggest that this be this format again. I think we will need the time.
- 398 S. McCrea We can even add an hour if we can get Barnes to give us a break earlier.
- 401 Chair Ellis Any other business?  
**MOTION:** S. McCrea; so moved; J. Potter: 2<sup>nd</sup>  
**VOTE: 3-0 (No quorum)** hearing no objection, the motion  
**CARRIES**

Meeting was adjourned at 3:50 p.m.

**Members**

Barnes H. Ellis, Chair  
 Shaun S. McCrea, Vice-Chair  
 James M. Brown  
 Henry H. Lazenby, Jr.  
 John R. Potter  
 Janet C. Stevens  
 R. Jon Yunker

**Ex-Officio Member**

Chief Justice Wallace P. Carson, Jr.

**Executive Director**

Peter A. Ozanne

**PUBLIC DEFENSE SERVICES COMMISSION**

March 3, 2004

## MEMORANDUM

TO: Public Defense Services Commission Members

FROM: Kathryn Aylward, Director  
 Contract and Business Services Division

RE: Public Defense Service Delivery in Lane County

In reviewing service delivery in Lane County, the Commission heard testimony at a meeting held in Eugene on February 12, 2004. The discussion primarily involved the pros and cons of changing to a consortium model versus keeping the present court-appointment list of private bar attorneys. Generally, the private bar favored retaining the court-appointment list and provided suggestions as to how that delivery system could be improved. The judges felt that a consortium model would be the preferred delivery system. The district attorney's office, at a minimum, said that some attorneys should be removed from the court-appointment list and noted that the juvenile consortium worked well.

Selection of attorneys for court appointments

Representatives from the private bar, the district attorney's office and judges all testified that there are individuals on the present court-appointment list who should not be receiving court-appointments or are under-qualified for certain case types.

Brian Cox suggested that a local review panel, similar to the federal panel, could make recommendations to the court regarding attorney qualifications and provide ongoing review of attorney performance as needed. Judge Bearden was not convinced that she had the authority to exclude or remove an attorney who met the minimum requirements.

Consortium pros: Assuming a consortium is formed that includes only well-qualified attorneys, this would eliminate the need for a review panel or judicial involvement in selection.

Consortium cons: Once a consortium has been formed, the PDSC and the court have little influence on membership.

Specialization

The current court-appointment list includes attorneys for whom public defense varies from their entire practice to a small portion of their practice.

Consortium pros: If a consortium were formed, the presumption is that the available workload would be handled by a smaller number of attorneys. The attorneys in the consortium would develop and maintain an expertise in public defense and could develop efficient case management procedures due to the volume and predictability of the caseload. Judge Rasmussen countered the argument that a consortium would inhibit professional development by pointing out that the ability to assign cases within a consortium would encourage members to develop an expertise with certain types of cases or clients.

Consortium cons: Dorothy Morey and Brian Cox each testified that the exclusive nature of a consortium would limit the ability of new attorneys to enter the field of public defense, would limit the development of existing providers to gain further experience, and would exclude those attorneys who chose to have a mixed practice. They thought that the current system provided better long-range planning.

#### Mentoring and training

Presently, there is no structured mentoring or training of attorneys on the court-appointment list. Due to the collegiality of the local bar and the acknowledged expertise of the public defender office, many attorneys felt that there was assistance available.

With a consortium, existing members could be required to provide mentoring and training, and less experienced attorneys joining the consortium would have more formalized access to assistance. If the court-appointment list were retained, the PDSC could add a mentoring component for inclusion on the list; new attorneys seeking to be added to the court-appointed list could be assigned a mentor.

#### Administration

A consortium would be required to have an administrator who, at a minimum, is the group's representative in communicating with the courts and our office. In addition, a strong administrator will structure a consortium so that there are bylaws or other agreements that clearly address such issues as: how the caseload is divided among members; how to divide payment if a case is substituted internally; how to admit new members and remove existing members; what will happen to an attorney's existing workload in the event of death or illness; how will funds be dispersed among members; and how will administration be funded.

Consortium pros: For Judge Bearden, ease of administration was one of the strongest arguments in favor of a consortium. If there is a problem with an attorney at the public defender's office or in the juvenile consortium, one call to the administrator assures that the problem will be resolved.

For OPDS, it is easier to process one payment per month than to review and pay hundreds of individual bills, although this is somewhat offset by the need to review the monthly caseload reports.

Consortium cons: Administration is not free. With an hourly paid consortium, such as the Yamhill

County consortium, the cost for administration of the 28-attorney contract is \$107,000 per year.

#### Case assignment

With the current system, cases are assigned by rotation from lists for each case category (major felonies, minor felonies, misdemeanors, etc.). A small percentage of cases are appointed from the bench without adhering to the rotation either when an attorney has not appeared or when a substitution is necessary.

Existing consortia vary in their method of case assignments: some provide a list of members to the court and the court goes through the rotation; in others, a consortium staff person keeps the list of members and assigns the cases by rotation and then notifies the court; and some consortia assign court days to their members on which the attorney accepts whatever is scheduled for arraignment. In the interest of fairness to members, consortium administrators generally do not influence the workflow.

Consortium pros: Assuming a consortium does not just hand the court a list, it is easier for the court to simply appoint the consortium. If a substitution is required due to a conflict, the court does not have to be involved. In addition, with unit-based contracts, OPDS only pays for one credit regardless of the number of times a case may be substituted within a consortium rather than having to pay for work duplicated by a subsequent attorney. And although it doesn't happen often, a consortium can match a particular case or client to the attorney best suited for the need.

Consortium cons: There is a potential that the court or OPDS may not agree with case assignments. For example, a consortium may decide that all of its members will be assigned Measure 11 cases; if the court-appointed system is maintained, entry onto the Measure 11 list could be strictly limited to only the most experienced attorneys.

#### Accountability

Both Judge Bearden and Judge Rasmussen expressed concern over the inconsistency of attorney billings, the potential for padding bills, and the inability of OPDS to be able to determine if the number of hours billed is appropriate. The district attorney's office thought that the motion practice of some attorneys caused additional, unnecessary hours to be billed. The private bar agreed that sometimes inexperienced or inefficient attorneys spend more time on cases than should be necessary.

As Judge Rasmussen pointed out, it is clearly not a good use of resources to have one attorney bill 75 hours and another attorney bill 10 hours on essentially the same case. And there is no advantage to the attorneys because they are each still earning \$40 per hour.

I believed the judges envisioned a consortium of hourly paid attorneys whose hours would then be reviewed by the consortium administrator. This kind of oversight would add to the cost of administration and would not necessarily produce the desired result. Perhaps the issue of inconsistent billing and review of bills could be resolved by moving to unit-based compensation.

Unit-based pros: For OPDS, the costs are more predictable. Certainly an established monthly payment under a contract is predictable, but even a court-appointed list with established case rates

improves predictability.

For attorneys, there is an in-built advantage that encourages and rewards efficiency. The inexperienced attorney who spends ten hours on a \$300 misdemeanor is earning \$30 per hour; the experienced attorney who spends six hours is earning \$50 per hour.

Unit-based cons: The risk with case rates is that there is an incentive to spend as few hours as possible on a case. This increases the need to have some kind of supervision. In addition, because rates are based on averages, an attorney would need to have a significant number of cases to avoid the risk of getting a case that required an unusually large number of hours.

#### Expenses and preauthorization

Prior to July 1, 2003, the courts reviewed requests for preauthorization of non-routine expenses in non-Measure 11 cases. The courts also reviewed all billings subsequently submitted for authorized expenses. Now both of those functions are handled by OPDS.

Judge Bearden expressed concern that it may be difficult for OPDS to know which expenditures are necessary and appropriate for a case, and difficult to verify that the billed services were actually provided. Again, I believe the assumption was that a consortium would assume those responsibilities.

There are only two consortia (Marion and Yamhill counties) that process their own expense requests and payments. The obvious benefit is that the consortium administrator is doing the work instead of OPDS. The downside is that there is a loss of control and a loss of statewide consistency.

OPDS understands and shares Judge Bearden's concerns and we are working to put systems in place to improve expense review and payment. We are developing a peer review for authorization and are asking attorneys to assist with confirmation that services have been provided.

#### Financial implications

As discussed above, the consortium model entails additional administrative costs. Some consortia have negotiated an annual amount for administration in addition to the case costs. Other consortia hold back a percentage of the case value for administrative costs. Some administrators are only responsible for negotiating the contract and then distributing the monthly payments to members. Other administrators are more heavily involved and are half to nearly full-time administrators.

Although some attorneys may be billing for too many hours, the aggregate data for Lane County indicates that we are paying less per case than typical case rates provided under consortium contracts. Perhaps that is why we now have concerns about quality.

Depending on the structure of a consortium and the requirements the Commission may establish, administration will be at least \$100,000 per year. In addition to the time spent by the consortium

administrator, there would need to be a staff person to track and distribute the cases and payments, and to liaise with the court and our office.

Both Judge Bearden and Judge Rasmussen discussed the costs to the clients of inadequate counsel and the potential future costs of post-conviction relief. Our data on post-conviction relief is tracked by the county of filing, not the county of the underlying case, so it is difficult to estimate what those future costs may be. Paul Graebner of the district attorney's office commented that many post-conviction cases tended to be against some of the best lawyers in the community. In any case, if the overall quality of representation in Lane County has diminished, we would expect to see an increase in post-conviction relief cases.

Representation in a death penalty case requires the most highly qualified attorney, and it requires a significant time commitment from that attorney. Not surprisingly, the best attorneys were often the busiest and it became problematic for our office and the courts to provide death penalty coverage, especially in less populated counties. Our solution, over ten years ago, was to issue an RFP for death penalty contracts. The contracts essentially "buy" the attorney's time (usually between half-time and full-time) so that there is an attorney available when needed. The contracts also allow the contractor to provide representation in murder cases and serious felony cases to supplement their workload as the death penalty need fluctuates.

#### Murder representation

Several private bar attorneys testified that they perceived a change in how murder cases were appointed and wanted to return to a rotation of local attorneys.

There is one half-time death penalty contractor who provides services in a region that covers Lane, Linn, Benton and Douglas Counties. In the latter three counties, local contract providers exclude murder cases from their contracts; therefore, the regional death penalty contractor would routinely be called upon for murder cases in those counties.

Since late 1999, when the first death penalty contract that included Lane County began, there have been 18 murder cases filed: six cases were assigned to Lane Public Defender (one case was later substituted to private bar); six went to private bar attorneys, and six were handled by the death penalty contractor. The impression that murder cases no longer go to private bar attorneys is primarily due to the dwindling number of murders.

Year	Number of Murder Filings in Lane County
2000	8
2001	5
2002	3
2003	1

It would be our preference to reserve a death penalty contractor's time for aggravated murder cases and have non-aggravated murder cases handled by a small number of exceptionally qualified hourly paid attorneys.

There was some testimony at the meeting that the bidding process for an aggravated murder contract was not competitive, not sufficiently publicized, and did not provide enough lead time. The current contract was entered into pursuant to an RFP that was issued on September 5, 2003. The RFP was: posted on our website; advertised in the OCDLA bulletin; posted on bulletin boards in the courthouse; and direct mailed to anyone who had asked to be on our mailing list (which included the person testifying). The deadline for submission was October 6, 2003. We received two proposals for a death penalty contract in Lane County.

Barely having sufficient work to keep one half-time death penalty contractor busy, only one contract was awarded.

**OPDS's Report to the Public Defense Services Commission:  
The Results of OPDS's Investigations in Service Delivery Region 4  
(Benton, Lane, Lincoln & Linn Counties)**

**Part II: Benton, Lincoln & Linn Counties  
(March 2004)**

Introduction

Since the completion of its Strategic Plan for 2003-05 late last year, the Public Defense Services Commission (PDSC) has focused on strategies and initiatives to accomplish its primary mission of ensuring the delivery of quality public defense services in the most cost-efficient manner possible. Recognizing that quality legal services promote cost-efficiency by reducing legal error and the resulting delays, appeals and other costly remedies, the Commission has concentrated on strategies that will improve the quality of the state's public defense delivery system and the legal services it delivers.

Foremost among those strategies is what the Commission refers to as its "service delivery planning process." This report represents an initial step in that process. It is the second part of a two-part report on the condition of the local public defense delivery systems in Service Delivery Region 4 of the state, which includes Benton, Lane, Lincoln and Linn Counties.

The Commission's last monthly meeting was held in Eugene on February 12, 2004. The Commission's next meeting will be held in Corvallis on March 11, 2004. Both meetings are being held for the purpose of hearing from all interested parties regarding the state of the public defense delivery system in the four counties in Region 4. This second part of OPDS's report on Region 4 focuses on staff findings and preliminary recommendations regarding the service delivery systems in Benton, Lincoln and Linn Counties.

PDSC's service delivery planning process has four steps. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they deliver in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services. Second, starting with preliminary investigations by its staff at the Office of Public Defense Services (OPDS) and a report like this, which will be provided to public defense attorneys, contractors and other interested members of the criminal justice system in the region under review, the Commission will review the condition and operation of local public defense delivery systems and services in a region, including holding public meetings in the region to provide opportunities for all interested parties to present their perspectives and concerns to the Commission. Third, after considering OPDS's report, any responses to the report and input from its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may simply confirm the quality and cost-efficiency of the

public defense delivery system and services in that region. It may also take advantage of opportunities for change or for confronting specific challenges in the region in order to improve the quality and cost-efficiency of the region's public defense services. In any event, the Commission's Service Delivery Plans will (a) take into account local conditions, practices and resources unique to a region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, revise relevant terms and conditions in public defense form contracts. Finally, at the direction of PDSC, OPDS will implement the strategies or changes proposed in a plan on a specific timetable that will depend on the content of that plan.

Because critical steps in PDSC's service delivery planning process have yet to be completed, this report's findings and preliminary recommendations may be reconsidered or revised, depending upon new information presented to the Commission at its February and March meetings in Eugene and Corvallis, deliberations and decisions of PDSC following its meetings in Region 4, and any additional research and investigation that may be ordered by the Commission. Furthermore, any Service Delivery Plan that PDSC develops over the coming months in Region 4 will not be the "last word" on the service delivery systems in that region or on the quality and cost-efficiency of the region's public defense services. The state's current fiscal crisis and resulting limitations on PDSC's current budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and public defense contractors, and the wisdom of not trying "to do everything at once," all place constraints on the scope of this first round of the planning process in Region 4, or in any other region of the state. Indeed, PDSC's planning process is an ongoing and dynamic one, calling for the Commission to return to each region of the state over time in order to develop new Service Delivery Plans or revise old ones. The Commission may also return to some regions of the state on an expedited basis in order to take advantage of unique opportunities or address acute problems in the region.

### Background

The 2001 legislation creating the Commission was premised on a policy, supported by most judges and the defense community, that the public defense function should be separated from the judicial function. This approach, considered by most commentators and authorities across the country as a "best practice," is intended to avoid the inherent conflict in roles when a judge, who serves as the neutral arbiter of legal disputes, also selects and evaluates one side in an adversarial proceeding. Thus, under the 2001 legislation, the Commission, not the courts, has the primary responsibility for the provision of competent public defense counsel. As a result, the Commission is committed to undertaking strategies and initiatives to ensure the competency of legal counsel.

However, in the Commission's view, minimum competency of public defense counsel is not enough. As it declared in its mission statement, PDSC is dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

PDSC's range of strategies to promote quality and cost-efficiency. Service delivery planning is one of the most important strategies that PDSC has undertaken in recent months to promote quality and cost-efficiency in the delivery of public defense services. However, it is by no means the only strategy.

In December 2003, the Commission directed OPDS to form a Contractors Advisory Group, made up of the heads of public defense contractors from across the state. The group is advising OPDS on the development of standards and evaluation methods to ensure the ongoing quality and cost-efficiency of the services and operations of public defense contractors, and to improve those services and operations through peer review and technical assistance processes. The Contractors Advisory Group is also participating in the development of a new process for qualifying individual attorneys throughout the state who wish to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations, management practices and legal services of those offices.

Indigent defense task forces of the Oregon State Bar have repeatedly highlighted unacceptable variations across the state in the quality of public defense services in juvenile cases. As a result, PDSC has commenced a statewide initiative to improve juvenile law practice, in collaboration with the state courts. The Commission recruited an experienced juvenile defense attorney to serve as OPDS's General Counsel and to take the lead in this initiative.

OPDS, in accordance with PDSC's Strategic Plan, is examining options for a systematic process to address complaints about the performance of contractors and the legal representation of attorneys, as well as for a new organizational structure to deliver legal services in Post-Conviction Relief cases.

The Commission is also concerned about the "graying" of the public defense bar in Oregon. Due to the commitment of those engaged in this work and an increasingly competitive legal market over the past several decades, more and more lawyers are spending their entire careers in public defense law practice and in the private practice of criminal, juvenile and family law. In some areas of the state, most members of the defense bar are approaching retirement, with no process in place for finding replacements. As a result, PDSC is seeking ways throughout the state to attract and train younger lawyers in public defense practice.

"Structure" versus "performance" in the delivery of public defense services. OPDS submits that PDSC's service delivery planning process is aimed primarily at reviewing and improving the "structure" for delivering public defense services by selecting the most effective combination of organizations in a county to provide those services. On the other hand, most of the Commission's other quality assurance strategies and processes,

described above, focus primarily on “performance” in the delivery of legal services in order to ensure that lawyers and managers in public defense organizations are delivering those services efficiently and effectively. This distinction is not always easy to make, since the concepts obviously overlap and influence each other. For example, nearly everyone agrees that the quality and cost-efficiency of public defense services depend primarily on the skills and commitment of the attorneys and staff who perform those services, as well as on the provision of sufficient public resources to attract such talent. However, experienced public defense managers and practitioners and the research literature on “best practices” recognize that attention to the structure of service delivery systems contributes significantly to the quality and effectiveness of public defense services.<sup>1</sup>

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles and responsibilities of PDSC, OPDS and public defense service providers in this planning process—and in the overall management and operation of Oregon’s public defense system. A collegial, volunteer “board of directors” like PDSC, whose members are chosen for the variety and depth of their experience and sound judgment, and who conduct their business in public meetings with the support of professional staff, is best able to address systemic, “macro” policy issues, like the proper structure of state and local service delivery systems. OPDS, on the other hand, is frequently in the best position to address performance issues, under the direction of the Commission. Performance issues usually involve individual lawyers and contractors, specific management practices and unique circumstances that raise operational and management questions, rather than policy issues. Public defense providers have committed themselves to assisting OPDS and the Commission in the development and implementation of credible standards and processes to ensure performance. As independent contractors, they are in the best position to manage their offices’ specific methods of service delivery and ensure the quality of the legal services they provide.

Because of the significance of the distinction between structure and performance, and the differing capacities of PDSC, OPDS and contractors to resolve questions involving the two concepts, this report will usually recommend assigning PDSC the task of addressing structural issues with policy implications and assigning OPDS the task of addressing performance issues with operational implications. The report will also identify the issues that call for the input and assistance of contractors and practitioners.

The organizations operating within the structure of local public defense delivery systems. The choice of organizations to deliver public defense services most effectively has been the subject of a decades-old debate between the advocates for “public” defenders and the advocates for “private” defenders. PDSC has repeatedly emphasized that it has no interest in joining this debate. Instead, it wishes to concentrate on finding the most effective combination of organizations for each region of the state from among those types of organizations already established and tested in Oregon.

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<sup>1</sup> Indeed, debates over the relative effectiveness of public defender offices and “private appointment” systems have gone on for years. See, e.g., Spangenberg and Beeman, “Indigent Defense Systems in the United States,” 58 Law and Contemporary Problems 31-49 (1995).

The Commission is also not interested in developing a “one size fits all” model for organizing the delivery of public defense services in Oregon. Instead, the Commission recognizes that the local organizations currently delivering services in Oregon’s counties have emerged out of a unique set of local conditions, resources, policies and practices, and that a viable balance has often been struck locally among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of scarce taxpayer dollars for public defense services. Therefore, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to proposals. As one of the largest purchasers and administrators of legal services in the state, the Commission is committed to ensuring that both PDSC and the taxpayer are getting competent legal services at a fair price. The Commission does not see its role as simply continuing to invest public funds in whatever local delivery system happens to exist.

Therefore, PDSC intends, first, to review the service delivery system in each county and develop its Service Delivery Plans with local conditions, resources, history and practices in mind. Second, in conducting these reviews and developing plans that might change local delivery systems, the Commission is prepared to recognize the efficacy of the local organizations that have emerged to deliver public defense services in a county and leave that county’s organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations may be. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in a county or region is necessary to advance the mission of Oregon public defense, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering potential changes in a local service delivery system.

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of the relative advantages and disadvantages. This discussion of the relative features of these organizations is by no means exhaustive. It is simply intended to highlight the kinds of factors that the Commission is likely to take into account in reviewing the structure of any local service delivery system.<sup>2</sup>

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<sup>2</sup> Although OPDS solicited input regarding these descriptions of public defense organizations from our Contractors Advisory Group, we did not receive that input in time to include it in this report prior to the release of Part I of the report. OPDS expects that members of the Advisory Group and others in the defense community will have additions or amendments to these descriptions to propose, which can be included before the release of Part II of this report.

Over the past two decades, Oregon has increasingly delivered public defense services through a state-funded and state-administered contracting system. As a result, most of the state's public defense attorneys or the offices in which they work are independent contractors operating under contracts with PDSC, including the following types of public defense organizations:

- Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of its public defense services. The offices share many of the attributes one normally thinks of as a "Public Defender Office," especially the "defining characteristic" of a public defender office: an employment relationship between the attorneys and the office.<sup>3</sup> The attorneys in these offices in Oregon are full-time specialists in public defense, who are dependent on this work and not allowed to engage in any other form of law practice. However, the state's public defender offices are not government agencies staffed by public employees. They are not-for-profit corporations overseen by boards of directors and managed by administrators who serve at the pleasure of their boards.

While some of Oregon's public defender offices operate in populous counties of the state, others are located in less populous counties. In either case, OPDS expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, and to administer specialized internal training and supervision programs for attorneys and staff and provide effective defense representation in each forum in which they practice, including specialized court programs such as Drug Courts and Early Disposition Programs. As a result of these expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations in their counties, including paralegals, investigators, automated office systems or personnel hiring and management processes.

Because of the professional management structure and specialized management staff in most public defender offices, PDSC looks to the administrators of the offices as well as to others to advise and assist the Commission and OPDS. Boards of directors of public defender offices, with management responsibilities and fiduciary duties required by Oregon law, offer PDSC another effective means to (a) communicate with local communities, (b) enhance the Commission's policy development and administrative processes through access to the expertise on the boards and (c) ensure the quality and cost-efficiency of the services provided by their offices.

Due to the frequency of cases in which public defender offices have conflicts of interest resulting from cases with multiple defendants, involving former clients or for other reasons, no county can operate with a public defender office alone.<sup>4</sup> As

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<sup>3</sup> Spangenberg and Beeman, *supra* note 2, at 36.

<sup>4</sup> *Id.*

a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other providers who must operate effectively in their counties.

- Consortia. A “consortium” refers to a group of attorneys or law firms who agree to submit a proposal to OPDS in response to an RFP and to handle a public defense caseload together if they are awarded a contract with PDSC. The size of consortia in the state varies from a few lawyers or law firms to 30 lawyers or more. The organizational structure of these consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with group practice, without the interdependence and conflicts of interest that arise from membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for membership, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as provisional membership and apprenticeship programs for new attorneys.

Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and wish to continue practicing criminal law under contract with PDSC. Many of them received their training and gained their experience in public defender or district attorney offices and larger law firms.

In addition to this access to experienced public defense lawyers, consortia offer OPDS and PDSC several administrative advantages. If the consortium is reasonably well-organized and managed, OPDS has fewer contractors or attorneys to deal with and, therefore, can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar’s “firm unit” rule, conflict cases can be efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys in the county who can handle the cases. Finally, if a consortium has a board of directors, particularly with members who possess the independence and expertise of directors on public defender boards, then PDSC can realize the same benefits described above, including more opportunities to communicate with local communities and access to additional management expertise and quality assurance processes.

The participation of law firms in a consortium may make it more difficult for an administrator or members of a consortium to monitor and manage cases and the performance of lawyers in the consortium. This potential difficulty stems from the

fact that internal assignments of a portion of a consortium's workload among attorneys in a law firm may not be evident to the consortium or within its ability to influence. Finally, to the extent that a consortium lacks internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services a consortium delivers, such as (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) PDSC's certification process to qualify for court appointments.

- Law firms. In addition to participation in consortia, law firms handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defenders offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals to OPDS in response to an RFP. Furthermore, law firms generally lack features of public accountability, like a public defender office's board of directors or the more arms-length relationships between independent consortium members. Thus, PDSC may have to rely solely on its own assessments of the skills and experience of individual law firm members, along with the external methods of training, standards and certification mentioned above, because the management structures, organization and operations of law firms are relatively inaccessible to public scrutiny.

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. The observations simply suggest that PDSC may have less influence on the organization and structure of this type of provider for the purposes of ensuring quality and cost-efficiency as easily as with public defender offices and well-organized consortia.

Finally, due to the Oregon State Bar's "firm unit" rule, when one attorney in a law firm has a conflict of interest, all of the attorneys in that firm have a conflict. Thus, unlike consortia, law firms offer no administrative efficiencies to OPDS in handling conflicts of interest.

- Individual attorneys under contract. Individual attorneys efficiently provide a variety of quality public defense services under contract with PDSC, including in specialty areas of practice like aggravated murder cases and in geographic areas of the state with limited supplies of qualified attorneys. Given the potential influence stemming from the power to evaluate and select attorneys individually, and the one-on-one relationship and direct lines of communications between the attorney and OPDS inherent in this contractual arrangement, the Commission can ensure meaningful administrative oversight and quality control over individual attorneys under contract. Those advantages obviously diminish as the number of attorneys under contract with PDSC increases.

This type of provider offers an important though limited capacity to handle certain kinds of public defense caseloads or deliver services in particular areas of the state. It offers none of the administrative advantages of economies of scale, centralized administration or ability to handle conflicts of interest associated with other types of organizations.

- Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as “overflow” from other types of providers. However, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, closely monitored and administered qualification process for court appointments, which is capable of verifying the attorneys’ satisfaction of requirements for relevant training and experience.

#### OPDS’s General Observations in Region 4

During December 2003 and January and February 2004, OPDS visited all of the counties in Region 4 at least twice, Benton County three times and Lane County five times. Members of OPDS’s staff met with virtually all of the public defense contractors and other interested public defense attorneys in each county of the region. Since PDSC’s foremost obligation is to ensure the cost-efficient delivery of competent legal services to public defense clients, OPDS also sought relevant information in each county from as many other credible sources as possible, including judges of the Circuit Court, attorneys in District Attorney’s Offices, staff of local probation or community corrections offices and representatives of Citizens’ Review Boards.

As a result of those visits, OPDS is able to offer the following general, though not particularly surprising, observations:

- Public defense caseloads, with increasing numbers of more serious felony cases, have become more demanding and complex over the past several years,<sup>5</sup> making public defense practice an increasingly difficult way to support a law practice.
- Prosecutors’ charging and negotiation policies and practices vary widely from county to county, making the level and variations in public defense expenditures dependent on these policies and practices, as well as on crime and arrest rates.
- The nature and extent of the courts’ docket management practices vary from county to county, affecting the time and expense involved in handling public defense cases.
- Everyone we interviewed in the four counties of Region 4 expressed appreciation for the visits by OPDS and the special attention from the Commission that those visits represented, making this effort worthwhile for its own sake.

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<sup>5</sup> This trend, reported by most public defense attorneys in the region, is independent of a similar development caused by cuts to the 2001-03 indigent defense budget and the resulting actions by the Chief Justice and his Budget Reduction Advisory Committee during the last four months of the 2001-03 biennium.

## A Demographic Snapshot of Benton County

With a 2001 population of 80,000, Benton County is the eleventh largest county in Oregon.<sup>6</sup> As the home of Oregon State University and a site for the operations of several high technology firms, the county ranks first in the state in terms of the education level of its residents, with 26 percent possessing a bachelor's degree and 21 percent with professional or post-graduate degrees. Benton County also has a relatively low high school dropout rate of 4.1 percent, the 26th lowest of the state's 36 counties. As a result, the county has one of the lowest unemployment rates in Oregon, one of the highest proportions of professional, scientific and management positions in its workforce, and the fourth highest per capita income in the state.

Despite the presence of a university that draws students from around the world, Benton County's population is not particularly diverse. Non-white and Hispanic residents make up 13.2 percent of the county's population, compared to 16.5 percent for Oregon and 23.5 percent for Multnomah County. However, the county has a relatively high percentage of individual residents living in poverty at 14.6 percent (compared to 11.6 percent for Oregon and 12.4 percent for the United States).

With just over 21 percent of its population 18 years of age or younger, Benton County's "at risk" population, which tends to be more involved in criminal and juvenile offenses, is the second lowest in the state. The county's index crime rate in 2000 ranked tenth in the state at 42.5 per 1,000 residents (compared to the state's crime rate of 49.2 per 1,000 and Multnomah County's at 75 per 1,000). Its rate of juvenile arrests ranked 26th at 41.4 arrests per 1,000 (compared to Oregon's rate of 53 per 1,000).<sup>7</sup>

The public defense caseload in Benton County is approximately one percent of the statewide total (compared, for example, to Lane County's 10 percent of the statewide total).

## OPDS Findings in Benton County

A major challenge to the effective delivery of public defense services in Benton County is the county's unusually contentious "culture" of criminal law practice. Most of the individuals we spoke with in the county described a level of animosity between attorneys in the District Attorney's Office and attorneys in the Benton County Legal Defense Corporation, the Commission's consortium contractor, which far exceeds the normal bounds of vigorous advocacy in an adversarial process.

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<sup>6</sup> This demographic information was compiled by Southern Oregon University's Regional Services Institute and appears in the Institute's Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

<sup>7</sup> "Index crimes" are those crimes reported by the Oregon State Police in Oregon Uniform Crime Reports and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft and arson. Oregon: A Statistical Overview at p. 122.

The animosity between Benton County's prosecutors and defense attorneys, which has apparently existed for years, manifests itself most notably in emotional outbursts and unprofessional exchanges between counsel in the courtroom, filings of numerous bar complaints, breakdowns in communication between counsel, and refusals to fully cooperate with the Circuit Court in the administration of justice. Despite widespread disagreement among the region's defense bar with some of the policies and practices of the District Attorney's Office, criminal defense attorneys from outside Benton County, who handle cases in the county, do not seem to experience or become involved in such problems. On the other hand, observers of Benton County's criminal justice process note that all the participants in the process—not just the county's criminal defense bar—have contributed to these problems. Over the years, several judges in the county have attempted to mediate some of the disputes among the parties or exert some control over the behavior of attorneys on both sides, apparently without much success.

Several observers noted that some members of the consortium are skilled and experienced advocates who produce successful results for their clients, including an increasing rate of success in pretrial motion practice. Others emphasized the potential leadership skills of several consortium members.

However, as a result of its discussions with the defense consortium's attorneys and others in Benton County, OPDS also identified some apparent problems in the administration of the consortium and the performance of its attorneys. Based upon the experiences of the Indigent Defense Services Division (IDSD) in the past and reports from some of the people whom OPDS interviewed, the consortium apparently does not have a reliable process for responding to or resolving complaints regarding the performance of its members. Our discussions with the consortium also raised some quality assurance issues. For example, OPDS received reliable complaints that members of the consortium in juvenile proceedings failed to contact their clients during the course of their representation and failed to confer with their clients prior to taking positions on their behalf. During OPDS's meeting with the consortium in December, its members defended these practices despite the ethical obligation to communicate with a client in preparation of the defense in a juvenile case.

There also appears to be an absence of explicit safeguards against breaches of confidentiality and conflicts of interest in one of the consortium's law offices. That office is shared by five members of the consortium, who apparently discuss their cases, case strategies and potential dispositions among themselves on a regular basis, notwithstanding their representation of clients with adverse interests.

#### OPDS's Preliminary Recommendations regarding Benton County

Obviously, neither the Commission nor the defense consortium can or should assume the entire responsibility for changing the culture of criminal law practice in Benton County. And the responsibility for the problems of animosity and contentiousness among the criminal law practitioners in the county does not rest entirely with the county's defense

attorneys. Nevertheless, members of the Benton County Legal Defense Corporation appear to have contributed to these problems in the course of their dealings with prosecutors and the court. PDSC should put the consortium on notice that unprofessional conduct directed toward the court or the consortium's courtroom adversaries will no longer be tolerated.

The Commission should direct OPDS to meet and confer with the members of the consortium regarding these issues of professionalism and the administrative problems and quality assurance issues noted above. OPDS should attempt to collaborate with the consortium to develop remedial strategies to address all of these problems and issues. The remedial strategies should include outside technical assistance through a consulting relationship with an experienced consortium administrator from another county. OPDS should be directed to report back to the Commission on the consortium's progress in addressing these problems and issues at PDSC's regular meetings in May and September 2004. In the event OPDS reports that members of the consortium are unwilling or unable to cooperate in this process, the Commission should authorize OPDS to explore all available options for improving the delivery of public defense services in Benton County.

#### A Demographic Snapshot of Lincoln County

Lincoln County's population of 44,500 makes it Oregon's 17th largest county. With 12.4 percent of its adult population possessing a bachelor's degree and 8.4 percent with post-graduate and professional degrees, the county falls somewhat below that state's higher education levels (which is 16.4 percent for B.A. degrees and 8.7 percent for post-graduate degrees). On the other hand, the proportion of high school graduates in its population is above average at 29 percent (compared to a state average of 26.3 percent). But the county also has the fourth highest high school dropout rate in the state at 8.4 percent (compared to the state average of 6.7 percent).

Though Lincoln County's unemployment rate generally falls below at least ten other Oregon counties, that rate has averaged two percentage points above the state average in recent years. The county has a relatively low proportion of professional and management workers in its labor force at 6.2 percent (compared to a state average of 8.9 percent). It ranks 13th in per capita income among Oregon's counties at \$18,700 (compared to the state average of \$21,000).

Lincoln County's percentage of non-white and Hispanic residents at 12 percent makes it the tenth most diverse Oregon county, but still places it below the statewide average of 16.5 percent. With 14 percent of its residents living in poverty, the county has an above-average poverty rate (compared to the statewide average of 11.6 percent).

The county's "at risk" population of residents 18 years old or younger is 21.4 percent, the third lowest in the state, just ahead of Benton County. However, its index crime rate of 53 per 1,000 residents is the fifth highest in the state (compared to the statewide average of

49 per 1,000). On the other hand, the county's juvenile arrest rate is only the 5th highest at 67.6 per 1,000 residents (compared to a state average of 53 per 1,000).

Lincoln County's public defense caseload represents two percent of the state's total caseload.

### OPDS's Findings in Lincoln County

PDSC's public defense contractors in Lincoln County regard themselves as members of a consortium and, in significant respects, operate that way (such as dividing up their total caseloads and reallocating their workloads and revenue). However, they submit separate bids to PDSC as independent contractors, and apparently lack any formal structure or rules that legally obligate themselves to each other. In the face of ongoing difficulties in obtaining compliance with administrative requirements among these contractors, IDSD contracted with and compensated one of its contractors in the county to perform administrative duties for the others, thereby perpetuating the sense that the group operates as a consortium.

Despite the contractors' independent status and sometimes competing bid proposals, IDSD and Lincoln County's public defense contractors appear to have successfully worked out reallocations of their caseloads and revenue in the past. During OPDS's meeting with the contractors in December, they expressed overall satisfaction with their public defense practices and their relationships with "Salem" and each other.

The one area of uncertainty appeared to be the group's commitment or capacity to recruit and train new attorneys in the practice of criminal defense law. The members of the "consortium" voiced concerns over losing misdemeanor and other less serious cases to new attorneys, making their caseloads "heavier" with more serious felonies and, as a result, less manageable and cost-effective. They did offer somewhat vague assurances that new attorneys would be brought into their separate law firms in the normal course of their ongoing operations.

The judges whom OPDS met with and the District Attorney in Lincoln County expressed satisfaction with the quality of public defense representation in the county and their working relationships with PDSC's contractors. They also emphasized the depth of skill and experience of those attorneys, which obviously represents a valuable asset to the county, but which also confirms the trend of a "graying" of the criminal defense bar that Lincoln County, as well as the entire state, is now facing.

### OPDS's Preliminary Recommendations regarding Lincoln County

There appear to be no reasons for PDSC to make any changes in Lincoln County's public defense delivery system during this planning cycle. The county has a close-knit legal community and an effective criminal justice system in which all of the participants appear

satisfied with how public defense services are currently delivered in the county. Furthermore, the current service delivery system appears to have served the interests of the state in providing quality, cost-effective public defense services.

However, one aspect of the county's service delivery system calls for the Commission to begin a process of planning for the future. Lincoln County, like many counties in the state, has a criminal defense bar of advancing age with no systematic "succession plan" for encouraging of new attorneys to enter the practice of criminal defense law in the county. As in many less populated areas of the state, the addition of new contractors can obviously impact the caseloads and the revenue of existing contractors in Lincoln County, which must be taken into account. Nevertheless, PDSC has an interest in ensuring the availability of public defense attorneys in the future by promoting opportunities for new lawyers to practice criminal defense law in less populous areas like Lincoln County.<sup>8</sup>

The Commission should request the current public defense contractors in Lincoln County to develop a succession plan, collectively and in collaboration with OPDS, to promote the entry of new lawyers into the practice of criminal defense law through the county's existing service delivery structure. During the next contracting cycle, and subject to the review and approval of the Commission, the contractors' succession plan should be incorporated, or otherwise account for, in the terms of their contracts. In the event that the plan does not meet with PDSC's approval, the Commission should consider options for changing the organization or structure of Lincoln County's service delivery system during the next service delivery planning cycle in order to promote the entry of new lawyers into criminal defense practice in the county.

### A Demographic Snapshot of Linn County

Linn County is the eighth largest county in Oregon with a population of over 103,000. The county ranks 31st in the number of residents with college degrees at 9.1 percent and 28th in the number of residents with post-graduate and professional degrees at 4.3 percent. The county does have an above-average proportion of high school graduates at 33 percent (compared to the state's average of 26 percent), though its high school dropout rate is the seventh highest in the state at 7.6 percent.

The county has a relatively small proportion of professionals and managers in its population, ranking 23rd in the state with 5 percent (compared to a state average of 9 percent). It also has below average per capita income of \$17,600 (compared to the state's \$21,000).

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<sup>8</sup> PDSC has already adopted strategies to expand these opportunities in its 2003-05 Strategic Plan. See Goal #4 at page 9 of the Plan: "Create incentives for the provision of public defense services in areas of the state experiencing a shortage of such services," and the strategies that follow. Although Lincoln County does not appear to be facing an immediate shortage of public defense services, as members of its criminal defense bar begin to retire or move into other practice areas as their careers progress, the county's officials and local bar may need to consider the kinds of strategies the Commission has identified in its Strategic Plan.

Linn County has had unemployment rates higher than the state's average over recent years by about two percentage points, but below at least a dozen other Oregon counties. On the other hand, it has the eight lowest poverty rate in the state, with 11.4 percent of individual residents living in poverty (compared to Coos and Josephine Counties, for example, with 15 percent).

Linn County's non-white and Hispanic population is relatively small at 8.8 percent (compared to the state's average of 16.5 percent). However, with 26 percent of its population 18 years of age or younger, the county has the 13th highest at risk population in the state. It also has the fourth highest index crime rate (at 53.2 per 1,000) and the sixth highest juvenile arrest rate (at 83 per 1,000).

The public defense caseload in Linn County is approximately three percent of the statewide total.

### OPDS's Findings in Linn County

Linn County's criminal defense consortium, the Linn County Legal Defense Corporation, and its juvenile defense consortium, the Linn County Juvenile Defense Consortium, have apparently had a long and productive relationship with IDSD. With the exception of recent increases in the complexity of cases along with decreases in available funding, the consortium members OPDS met with in December expressed satisfaction with their practices and a continuing willingness to "go the extra mile" for their clients and the state's public defense system.

The judges and the District Attorney in Linn County consistently expressed satisfaction with the quality of public defense representation in the county. All of the participants in the county justice system seem to feel that everyone is doing their jobs and performing their respective roles in the system effectively.

However, attempts to establish and maintain an Early Disposition Program (EDP) in Linn County have apparently been unsuccessful. Reasons offered for the program's failure in the county varied from prevailing judicial policies and practices to prevailing prosecutorial policies and practices. In any event, the process of designing EDPs in the county has apparently not involved defense attorneys or acknowledged a formal role for them, which might explain why these programs could not operate effectively in resolving criminal cases.

### OPDS's Preliminary Recommendations regarding Linn County

In general, Linn County's public defense delivery system appears to be providing quality services cost-efficiently. Certainly, the public officials and attorneys with whom OPDS spoke consistently expressed satisfaction with those services, as well as the performance of PDSC's contractors in the county. Therefore, the Commission should not consider any significant changes in Linn County's public defense system at this time.

However, in the event that public officials in Linn County decide to establish and maintain another EDP, the Commission should direct OPDS to work with the Circuit Court, the District Attorney's office and the county's criminal defense consortium to develop a new EDP in Linn County that includes formal participation by public defense attorneys.<sup>9</sup>

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<sup>9</sup> OPDS understands that the Oregon Criminal Defense Association has agreed to develop statewide standards for the proper role and participation of defense attorneys in EDPs. Subject to the Commission's approval of those standards, OPDS's efforts to help in the development of an EDP in Linn County or any other county of the state should ensure the program's compliance with those standards.

**OFFICE OF PUBLIC DEFENSE SERVICES  
COMPENSATION PLAN**

Effective: March 1, 2004

CLASSIFICATION TITLE	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9
Accountant 1	2431	2544	2664	2791	2925	3061	3208	3369	
Accountant 2	2664	2791	2925	3061	3208	3369	3530	3699	
Accountant 3	3208	3369	3530	3699	3877	4065	4265	4476	
Accounting Tech 1	1708	1780	1857	1948	2017	2116	2207	2320	
Accounting Tech 2	2017	2116	2207	2320	2431	2544	2664	2791	
Accounting Tech 3	2207	2320	2431	2544	2664	2791	2925	3061	
Business Services Manager (PEM/D)	3720	3903	4099	4308	4523	4745	4978	5229	5486
Chief Defender	5386	5651	5936	6229	6532	6859	7206	7564	
Chief Deputy Defender	5127	5386	5651	5936	6229	5632	6859	7206	
<b>Compliance Specialist</b>	<b>2431</b>	<b>2544</b>	<b>2664</b>	<b>2791</b>	<b>2925</b>	<b>3061</b>	<b>3208</b>	<b>3369</b>	
Contract & Business Services Director	5386	5651	5936	6229	6532	6859	7206	7564	
Deputy Defender 1	3320	3484	3652	3832	4020	4222	4437	4659	4887
Deputy Defender 2	3832	4020	4222	4437	4659	4887	5127	5386	
Executive Assistant	2921	3062	3223	3383	3546	3720	3903	4099	
Executive Director	5763	6048	6342	6659	6996	7344	7703	8088	8487
<b>Legal Counsel</b>	5127	5386	5651	5936	6229	5632	6859	7206	
Legal Secretary	2017	2116	2207	2320	2431	2544	2664	2791	
Legal Secretary Supervisor	2483	2607	2733	2874	3009	3154	3320	3484	
Office Assistant 2	1442	1503	1572	1641	1708	1780	1857	1948	
Office Specialist 1	1641	1708	1780	1857	1948	2017	2116	2207	
Paralegal	2431	2544	2664	2791	2925	3061	3208	3369	
Public Defense Analyst	3504	3678	3863	4055	4258	4472	4694		
Senior Deputy Defender	4222	4437	4659	4887	5127	5386	5651	5936	

Bold: New classifications or title