

Members

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



Ex-Officio Member

Chief Justice Thomas Balmer

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

Thursday, June 19, 2014
9:00 a.m. – 12:30 p.m.
Mt. Bachelor Village
19717 Mt. Bachelor Village
Bend, Oregon 97701

MEETING AGENDA

- | | |
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| 1. Action Item: Approval of minutes - PDSC meeting held on May 15, 2014 (<i>Attachment 1</i>) | Chair Ellis |
| 2. Appellate Division History; Juvenile Appellate Section Report | Peter Gartlan
Shannon Storey |
| 3. Padilla Project Update | Alex Bassos
Lane Borg |
| 4. Capital Resource Center | Jeff Ellis |
| 5. OCDLA Lobbyist Introduction | Lane Borg
Angela Wilhelms |
| 6. OPDS Recommended Policy Option Packages; Discussion and Review (<i>Attachment 2</i>) | Nancy Cozine
Angelique Bowers
Contract Providers |
| 7. Action Item: PDSC Approval of Policy Option Packages for the 2015-17 biennium | Commission |
| 8. Key Performance Measures – Trial Level (<i>Attachment 3</i>) | Nancy Cozine
Paul Levy
Contractors |
| 9. OPDS Monthly Report | OPDS Staff |
| 10. Executive Session* | Commission |

***Executive Session:** *The Public Defense Services Commission will meet in executive session at approximately 11:45 p.m. The executive session is being held pursuant to ORS 192.660(2)(f).*

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

Next meeting: September 18, 2014, Office of Public Defense Services, Salem, Oregon. Meeting dates, times, and locations are subject to change; future meetings dates are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, May 15, 2014
10:00 a.m. – 2:00 p.m.
Oregon Judicial Department
Oregon Room
1133 Chemeketa St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
John Potter
Janet Stevens
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine
Peter Gartlan
Paul Levy
Caroline Meyer
Ernie Lannet
Angelique Bowers
Amy Jackson
Billy Strehlow
Cecily Warren

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

Vice-Chair McCrea offered congratulations to Barnes Ellis, in honor of his 50 year membership with the Oregon State Bar.

Agenda Item No. 1 Approval of minutes – PDSC meeting held on April 17, 2014

MOTION: Commissioner Potter moved to approve the minutes; Vice-Chair McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 4 Capital Costs and Non-Capital Caseload Trends

Billy Strehlow reviewed filing trends demonstrated in Attachment 2. He explained that, in capital cases, costs spike several years after the cases are filed, as the cases go to trial. Chair Ellis asked whether filings variations are due to changes in policy. Chair Ellis noted that,

historically, death penalty cases cost about one million dollars per month, and asked whether that has changed. Mr. Strehlow indicated that for the last four years costs have been hovering right above or below a million per month, are now spiking a bit, but that he expects it to flatten out again, or perhaps increase slightly.

Mr. Strehlow went on to explain the trends in statewide, non-capital contract caseload, where there has been a decrease of less than one percent, making it relatively stable. He also pointed out that this graph demonstrates credits claimed under contracts for all case types, and noted that the decline is in dependency and delinquency cases, not criminal cases. He explained that dependency and delinquency cases contribute about 50,000 cases per year, while the adult criminal cases run at about 100,000 per year, and that adult criminal cases cost more than dependency cases.

Agenda Item No. 2

Justice Reinvestment and Reported Crime Update

Craig Prins, from the Criminal Justice Commission, presented information regarding Justice Reinvestment, HB 3194. He explained that the federal government has assisted 17 states with justice reinvestment, which uses sentencing changes to control prison growth, and create savings that can be invested in local community or county criminal justice systems with a goal of reducing crime and overall costs. He began by explaining that caseload trends are different from the prevalence of crime, that caseload tends to stay fairly flat, and that he does not expect justice reinvestment to impact felony caseloads.

The CJC gave small grants to counties in September and October of 2013 which, if successfully implemented, should reduce the prison population by using more community based sanctions and lowering recidivism. Mr. Prins then reviewed "The Violent Crime Index" and the "Property Crime Index," neither of which include drug crimes. He first reviewed the four cities over the size of 100,000, which account for about 40% of all crime in Oregon. In 2013, Portland's violent crime rate decreased by almost 5%; Salem was down over 9%; and Eugene was down 6%. Gresham was up 24% for violent crime, but had the most significant decrease in property crime.

Chair Ellis asked Mr. Prins whether there is a correlation between demographic data and crime rates. Mr. Prins indicated that the censuses projects a 1% growth in the "at risk for crime" age group, those between ages 18 and 35, and that the number of young men continues to drop. He speculated that one of the reasons why the nation's crime has dropped is that the nation is aging, but also noted that a multiplicity of factors drive crime. He also explained the "hierarchical rule," which means that only the most serious crime reported is recorded, so when a property crime occurs with a violent crime, the incident will be reported as a violent crime. Mr. Bender asked whether there was information about why Portland's violent crime rate dropped so significantly. Mr. Prins explained that much of the gang crime has been controlled through effective policing in Portland, but that in Gresham, the city planning makes effective policing very challenging.

Mr. Prins returned to discussion of Justice Reinvestment, and the requirement in HB 3194 for a risk assessment of each offender to help determine appropriate conditions of probation. Mr. Borg commented on the fact that use of pre-sentencing risk assessments is controversial within the defense community, and that many will likely choose to opt out of the risk assessment. Mr. Prins expressed a desire to work with the defense community to plan trainings on how to effectively use the risk assessment process. Mr. Prins continued to explain the programs implemented in different counties, and several people from the audience commented on risk assessment and its use in their Oregon counties.

Agenda Item No. 5

Appellate Case Filings, Opinions, and Backlog Trends

Peter Gartlan introduced Ernie Lannet, a chief deputy in the appellate division, indicating that Ernie would be talking about the work of the appellate division. Mr. Lannet explained that he would be offering information about the criminal section, which constitutes the majority of the appellate division, and that Mr. Gartlan would follow up with some information about the juvenile appellate section.

Mr. Lannet started with a broad overview of the division, in which there are 37 attorneys, and 10.5 legal support staff. The division processes about 1,600 case assignments, with about 1,100 notices of appeal filed per year. He explained that sometimes OPDS lawyers do not file a notice of appeal in every case - some are state's appeals, and in others there is a statutory bar or no colorable claim of error. Mr. Lannet indicated that criminal section appeals account for about 40% of the Court of Appeals' caseload. He went on to explain the structure of the appellate division, with the Chief Defender, three Deputy Chief Defenders, and six teams of Deputy I and II lawyers each lead by Senior Deputy Defenders. Commissioner Potter asked about the death penalty team. Mr. Lannet responded that this team meets as needed, and has the capacity to handle about two cases at any given time. Mr. Lannet summarized the types of cases handed in the criminal division and the internal processes for moving cases through the system.

Mr. Lannet noted that since about 2008, the appellate division has been hovering around 230 days to filing of the opening brief, but that the division is now in a position to start making some advances. He showed a graph demonstrating that in June 2012, the division was assigning outside counsel to a few hundred cases during the year because the division didn't have the capacity to handle them. Now, only cases with a conflict of interest are assigned to outside counsel and the appellate division is on target to file over 800 briefs during the fiscal year, which will be a first for the office. The criminal division received additional attorneys in 2011 and lost seven attorneys to retirement or private practice; the division also lost one attorney to the bench prior to 2011. He explained that these were significant losses because these were fully trained lawyers who were high producers. He noted that it takes a lot of training for newly hired attorneys, and that there have been 14 new hires, the most recent two in December, 2013, and February 2014. With 13 of 34 attorneys having less than three years of experience, the division has is spending significant time training lawyers to handle the caseload and understand the issues. He expressed confidence that the division is now ramping up to capacity, and that there will be more filings as the attorneys gain experience. Mr. Lannet noted that the office does its best to accomplish staggered hiring so they can give personal attention to each new lawyer. Mr. Gartan works with new lawyers for three months and then a chief deputy works with them for three months. Once attorneys are through the trial service period, they work with a senior attorney. He explained that the office's ability hold production steady while eliminating its reliance on assigning outside counsel, while also training so many new attorneys, should mean that with these attorneys fully trained the production level will increase over time.

Chair Ellis asked what the office does to monitor performance of more experienced lawyers, and what is done if a lawyer is burning out. Mr. Lannet explained that there are annual reviews and everyone's performance is monitored and discussed, and that the appellate division lawyers remain interested and dedicated. Chair Ellis also asked whether promotions were based upon years of experience or merit. Mr. Lannet said that promotions are merit-based, but that experience is necessary in order to demonstrate a familiarity with the case law.

After hearing about the process, Chair Ellis noted that if the backlog could be reduced, it would make it much easier for the attorneys to process the cases more immediately. Mr. Lannet agreed. Chair Ellis asked a series of questions about how OPDS case processing time and personnel capacity matches up with the state's numbers. Mr. Lannet explained that the processing time is similar, but that the personnel resources are harder to estimate because cases can be assigned to lawyers in a variety of work units at the Department of Justice. Chair Ellis noted the fact that in addition to having a larger pool of lawyers to draw from, the DOJ

lawyers get paid more than OPDS lawyers. Mr. Lannet agreed, and pointed out that while OPDS must process 1,600 cases each year, the DOJ is usually just responding to merit briefs, which reduces their work to responses in only about 700-800 cases per year.

Mr. Lannet concluded by again emphasizing that while it takes a few years just to get people up to speed, the fact that the office has been able to add positions and hire people who are really excited about the work, means we can expect to continue reducing the time to filing of the opening brief.

Agenda Item No. 3 Charging Practices Following *Benoit* and Implementation of HB 3194

Chair Ellis welcomed District Attorneys Rod Underhill and Walt Beglau, and Deputy District Attorney Adam Gibbs, who runs the misdemeanor unit in Multnomah County. Mr. Underhill began by continuing the discussion regarding HB 3194, which is being implanted in Multnomah County through the Justice Reinvestment Committee, a subcommittee of the Local Public Safety Coordinating Counsel. Voting committee members include Mr. Underhill, Lane Borg, Judge Waller, Judge Franz, members of law enforcement community, and the Department of Community Justice - Scott Taylor and Ginger Martin.

Multnomah County received \$3.165 million dollars (out of an available \$15 million for the state), and the goal is to reduce the prison population. The focus is on tier two, Ballot Measure 11 level offenses and gun minimum cases, and on responsibly reducing state prison costs while simultaneously achieving a positive local public safety impact. Decisions will be made based upon risk assessment, professional judgment, accountability, and victim impact.

District Attorney Underhill noted that Multnomah County's portion of the Department of Corrections population includes 80% who are sent as part of this initial sentence, and 20% sent as a result of a revocation proceeding. The Justice Reinvestment Program is intended to impact both of those populations. Mr. Underhill indicated that this has been a tremendously collaborative effort with some more adversarial conversations on specific topics. He noted that there have been about fifty planning meetings, each one lasting an hour or two in duration, over the course of a year. One of the primary areas of discussion has been on the importance of the district attorney's professional judgment in the process, as well as victims' wishes, in addition to the risk assessment. He emphasized the fact that if a decision rests exclusively upon a risk score, there is no need for the district attorney; as a result there were many conversations about the critical component of the professional judgment in making the decision. He concluded by remarking that many district attorneys are very curious and intrigued about this model, and whether it can help create better decisions.

District Attorney Beglau talked about how Marion County is doing with implementation of House Bill 3194. He explained that the target group for Marion County is non-violent property offenders driven by substance abuse, and the goal is shorter prison interventions. He noted that the length of stay on identity theft has gone down about eight months, and the length of stay on robbery in the third degree is also down, as well as prison sentences for drug offenses. Marion County's model also has a team to make decisions, including the Board of Commissioners, Sheriff, District Attorney, and other stakeholders. They are supporting reentry, the Marion County Work Center, which is the step down from jail around treatment and work, and the "416" program, where nonviolent property offenders that are high and medium risk are given a downward dispositional departure and receive a core of local supervision programs. Of the first 53 individuals, 41 succeeded; 12 were revoked. He indicated that Marion County alone will probably save 120 prison beds in just a two year period.

District Attorney Underhill concluded the discussion on HB 3194 by mentioning that with additional people in the community rather than in prison beds, there is the potential for additional appointments of counsel for probation violation proceedings, and that the

Commission should keep an eye on whether that impacts public defense costs. District Attorney Beglau noted that in his county and across the state, marijuana is a wild card. He suggested that as laws change around possession and use of marijuana, there could be an increase in other crimes such as driving under the influence of intoxicants, or other crimes, and that this is another area to monitor.

Deputy District Attorney Gibbs provided history regarding the *Fuller/Benoit* decisions, which requires the state to provide appointed counsel, jury trials, and to prove beyond a reasonable doubt in misdemeanor cases that are reduced to violations. Now, rather than charge certain types of misdemeanor charges as violations, they are charged as misdemeanors at arraignment, where the defendant is given discovery and a plea offer that allows them to resolve the case in community court. Defendants are given time to meet with their lawyers during the week following the arraignment, and the following week, they return to community court and can either accept the offer or opt to take the case to trial as a crime. Defendants who agree to community court and successfully complete their obligations will end up with dismissals. Others will end with sentences of discharge after they have completed a treatment obligation, or for some a community service obligation. He indicated that a large portion of defendants are accepting community court offers to get violation treatments and go into community court, as opposed to taking their case to trial as a crime. He shared that, from what he observes, attorneys assigned to community court are being run ragged because their client population exploded. These are cases that were formerly reduced to violations at arraignment, so attorneys were never appointed.

Chair Ellis thanked Mr. Beglau, Mr. Underhill, and Mr. Gibbs for their participation in today's meeting.

Agenda Item No. 6

OCDLA Pay Parity Committee

Lane Borg described the genesis of the OCDLA pay parity committee, which was created to address some of the challenges that arose following distribution of the policy option package funding. He indicated that the pay parity committee was comprised of private practitioners, consortia, and public defenders, and that Lynne Dickison was the chair of the committee.

Lynne Dickison introduced herself as a small law firm owner and part of the Portland Defense Consortium, which has been contracting with the state for 10 to 15 years and includes about five different law firms, each of which has a practice of about 90 to 95% public defense work. She described the composition of the pay parity committee and thanked John Potter, Lane Borg, and OCDLA for convening the group, as well as the members of the group for their involvement. The group met many times, and through very hard work, finally created a position statement that the OCDLA board accepted it in its entirety, and adopted it with a unanimous vote. She noted that the position statement is part of the PDSC meeting materials and that is presented to the Commission for their consideration.

Mr. Borg asked that, in addition to the conclusions and recommendations, the Commission should be looking at the fact that the whole system is underfunded. He noted that whether providers are making it work though pushing the limits of caseload, by private practitioners subsidizing public defense with private cases, or creating efficiencies through large public defense offices, there needs to be a longer discussion about what is fair compensation for public defense providers. He and Ms. Dickison suggested that the *Wilbur v. Mt. Vernon* case tells us that we have to look at caseloads, and how high caseloads impact the system.

The Commission engaged in a lengthy discussion about how to address the funding needs of consortia groups that have shifted to an almost exclusively public defense caseload, and how the economics of the consortia model do not necessary fit this shift. Commission members expressed concern regarding the request for more funding of overhead costs, noting that in the past these costs were subsidized by private firms by taking private cases.

Agenda Item No. 7

Regional Stabilization Policy Option Package; Draft

Nancy Cozine introduced the policy option package discussion with a clarification that the policy option packages do not include discrete overhead funding. She indicated that there are many discussions that need to happen before overhead funding is a realistic possibility, but did note that OPDS would be looking at this component as part of the dependency pilot program, and that the Commission might be able to apply what is learned through the pilot program to other case types in the future. She also commented on the fact that with no further sentence reform on the horizon, and an increased knowledge of the negative impact of prison time for some individuals, public defense providers need to be fully investigating not only the facts of the case, but the circumstances of their clients, so that defenders are effectively preventing unnecessary use of prison beds.

Caroline Meyer provided an overview of the policy option packages and Angelique Bowers discussed limitations within the executive branch, where agencies will be asked to limit policy option package requests to no more than 20% above of their 13-15 legislatively approved budget. She noted that the full package, as presented today, is 24% above the PDSC 13-15 legislatively approved budget for the professional services account.

Chair Ellis asked for clarification about the methodology, asking whether the package includes giving everyone the highest case rates in a particular region. Ms. Meyer confirmed that higher rates were built in for all provider types. Ms. Meyer explained that the second step involved increasing case rates to allow for increased compensation, but also to reduce caseloads where necessary, with a goal of getting providers to a point of where they have reasonable caseloads and are within 5 percent of what district attorneys salaries.

Chair Ellis asked whether it would be better to break it out between the component that is trying to compare with DAs, and the component for reducing caseloads. Ms. Cozine stated breaking it out is difficult because people make staffing changes mid-contract cycle (which impacts the number of cases assigned to each lawyer), and much of the adjusting would be in response to the proposals submitted during the next contract cycle. Chair Ellis asked about the accuracy in the calculation of caseload standards. Ms. Cozine responded by indicating that the Oregon State Bar standards are quite old, from the mid-1990's, and that in the coming months and perhaps years, there is interest in reexamining Oregon caseload standards in light of current performance standards.

Commissioner Welch asked whether the amount requested for the dependency pilot expansion assumes a reduced caseload. Ms. Cozine answered that it does not, and that if package number one was granted, it would reduce the amount necessary for the dependency package.

Chair Ellis requested information regarding the rationale behind hourly rate increases, noting that there is not a consistent percentage increase for each hourly provider type. Ms. Cozine explained that those increases were based very simply upon what was requested last time, and upon what competing rates are in other jurisdictions.

Chair Ellis asked about the case management system concept. Ms. Cozine and Ms. Meyer explained that some providers specifically mentioned the benefit of bulk purchasing for things like case management systems so that they are not all paying separately at a private law firm rate. Ms. Cozine noted that OPDS is investigating several systems and hopes to find something that can capture useful data points. Mr. Hazarabedian suggested that something like this could potentially save a lot on IT costs now paid to programmers to keep older databases going, and on programming to capture the relevant data points. Commissioner Lazenby asked whether a new system could work with the new eCourt system. Ms. Cozine indicated that it would be a possibility with the right system.

Chair Ellis asked whether the PLF and bar dues component would be for consortia and private firms people only, pointing out that public defender offices had alternative liability insurance. Ms. Meyer stated that it would be for all providers. Ms. Cozine noted that the Commission may well decide to eliminate this component, but that it was a request made by providers at regional meetings. Commissioner Welch suggested that OPDS try to collect data demonstrating turnover in public defense. Commissioner Potter suggested that the PDSC spend some time discussing the service models across the state, in preparation for legislative session. Commissioner Stevens agreed that it would help to spend some time on how the PDSC can educate legislators regarding public defense costs, and why the need is so great. Ms. Cozine reminded Commission members that the budget binder would include a narrative portion explaining each component, and why it is necessary.

Commission members suggested that what is presented as the regional stabilization package be divided out into discrete requests that are similar in nature: hourly providers, case management, etc. Commissioner Potter suggested removing PLF and bar dues since providers are already covering that with the current case rates. Jennifer Nash requested that OPDS ensure that the first component include rate increases for providers in all counties.

Agenda Item No. 8

OPDS Monthly Report

Monthly report items will be carried to the June meeting.

MOTION: Commissioner Potter moved to adjourn the meeting; Vice-Chair McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting adjourned

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, May 15, 2014
10:00 a.m. – 2:00 p.m.
Oregon Judicial Department
Oregon Room
1133 Chemeketa St. NE
Salem, Oregon 97301

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

STAFF PRESENT: Nancy Cozine
Peter Gartlan
Paul Levy
Caroline Meyer
Ernie Lannet
Angelique Bowers
Amy Jackson
Billy Strehlow
Cecily Warren

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

Agenda Item No. 1 Approval of minutes – PDSC meeting held on April 17, 2014

0:13 Chair Ellis We will call the meeting to order. I understand that Vice Chair McCrea has an issue she wishes to present.

0:18 S. McCrea I do. Thank you, Barnes. You know 50 years is a long time. At least it seems like it until, like me, you hit your 50th birthday, okay it has been a few years back, but then it doesn't seem like such a long time. But 50 years is a long time to be practicing law. There is a reason why we call it "practicing law" because it is like what Gertrude Stein said about Oakland, California. "There is no there, there." Practicing law you never get there. You just have to keep working at it. And yeah there are some of those fabulous days where you have an incredible win and for maybe 10 seconds you feel like you can walk on water. Then you have those days where it is the agony of defeat and you throw your books across the room and you

think I am never going back to the office again, so in practicing law the fact that someone has had the patience and the perseverance and the persistent to go for 50 years is something pretty important and significant. It is fitting that we recognize and congratulate Barnes on his 50 years of practicing law. Congratulations, Barnes. The best part is now you won't have to pay Oregon State Bar dues because after 50 years you don't have to pay anymore. So please join me in congratulating Barnes.

- 2:02 Chair Barnes So I had a wonderful law partner for many years named Manley Straher. He use to show up at bar conventions with his old guitar and he would be dressed up in a very ragged tuxedo. He would play songs. The one song that you remind me of is "Fifty Years in the Wrong Profession." But thank you.
- 2:40 S. McCrea That is from everyone. I was just the presenter.
- 2:44 Chair Ellis Alright. Moving right along. The minutes of the meeting of April 17, 2014. Are there any other additions or corrections to the minutes? If not, I would entertain a motion to approve.
- MOTION:** John Potter moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**
- 3:07 Chair Ellis Craig Prins?
- 3:07 N. Cozine We are still awaiting his arrival. We are prepared to proceed with capital costs and non-capital caseload trends.
- Agenda Item No. 4 Capital Costs and Non-Capital Caseload Trends**
- 3:23 Chair Ellis Okay. I saw Billy was here.
- 3:32 B. Strehlow Chair Ellis and members of the Commission. This is Attachment 2 in the handout. I hope you have had a chance to look over this. I have just a couple of observations and then will open it up for questions from you. So the trial level capital expenditures the one observation that I would like to make there is if you look down in the bottom right corner there, it says "trial level cases filed." So you will see in 2010 there were 23 filed, but then less in the following year and more in 2012 and then less in 13. What I would like to point out as far as these expenses go is the life span of these cases. You will see at the latter part of 2011, you will just see it start to spike right up as we would anticipate at about 18 to 24 months some of these are going to trials. That is where a significant amount of expenses are incurred. Then you will see the number of cases filed in 2012 was quite a bit more. Now as we are seeing at the end of 13, toward the end of that graph, you have been reading in the news about some of the cases that are in trial right now. There is a correlation but it is far apart.
- 5:03 Chair Ellis Is the variation in filing just you know compost happens, or are there changes in charging policy?
- 5:11 B. Strehlow No changes in charging policy that I am aware of. There are very few of them and that is what you get. A lot in one year and less in another.
- 5:27 Chair Ellis So Kathryn Aylward use to always tell us that it is a million dollars a month for capital. Is that still where we are?
- 5:34 B. Strehlow You are looking at the same graph that I am. It is just hovering right above or below a million a month there.
- 5:45 Chair Ellis So I don't have to recalibrate.

5:50 B. Strehlow This is a graph over a four year period, a little slightly over a four year period. We are just now seeing at the end of that graph those costs starting to spike a little bit. If I were to run this a year from now I would expect that graph to actually flatten out or even increase as a result of that.

6:13 Chair Ellis Okay.

6:13 B. Strehlow Moving on to the statewide, non-capital contract caseload. A couple of observations here. That first graph you will see that it does over that four year period show that there is a slight decrease. I would like to point out that decrease above or below zero a month is less than one percent. It is pretty stable even though you see the trend line sort of going down slightly over that period of time.

6:44 Chair Ellis This blends felony and misdemeanor?

6:47 B. Strehlow Correct, and juvenile.

6:49 Chair Ellis And they are not weighted by seriousness. It is just number of filings?

6:54 B. Strehlow Raw number of filings. Credits claimed under a contract really is more specifically.

7:00 Chair Ellis That would weight it then.

7:08 B. Strehlow That is true depending on the number of incident dates within a case. It is not just number of cases. A lot of times it is but there are certain exceptions.

7:18 Chair Ellis Is there some factor that causes what looks like seasonality?

7:27 B. Strehlow Absolutely. You can even look at the statewide one and see it to some degree. If you look at November and December you will just see it low in each of those couple of months there. Then you will see sort of the rebalance a couple of months after that typically. In the statewide one you don't see it quite as much, but certainly when you look at the adult criminal it becomes more apparent there, especially when you look at the felony and misdemeanors broken down. You really notice it there.

8:02 Chair Ellis What causes that?

8:02 B. Strehlow I think it is just vacations. It could be vacations of core staff. I think also there might be some changes in law. If you look at the felony graph on the next page there you will see a spike in January through March. So not only do you have that sort of rebalance of the November, December filings being low for vacations and whatnot. Then you have that rebalance in January through March, but that is also the same point at which Yamhill went underneath contract. So the private bar that they claimed in the previous two years then came underneath the contract. We did see a little bit of that there. I should mention this doesn't include private bar numbers. But the private bar numbers are just slightly more than one percent of our entire caseload. I put in the private bar numbers and it changed nothing. Everything looked the same.

9:11 Chair Ellis When you refer to vacations is that the DAs taking vacations. Our people never do. Just for the record.

9:21 B. Strehlow It is just across the system. The whole system slows down during that time period.

9:27 Chair Ellis These are not done on a new filing basis. They are done on a cumulative caseload as of any particular time.

- 9:39 B. Strehlow The adult criminal is on a filing. They are able to claim the credit when they are appointed to that case and the delinquencies are the same way. The dependency caseload is a little bit different in that they can claim a credit when they are appointed to the case, but then there are subsequent credits that they can claim as they have post-dispositional review hearings, or if it goes to termination they can claim the credit there. That is not necessarily on an as filed basis.
- 10:08 Chair Ellis I did notice that both delinquency and dependency seem significantly down. Is there an explanation for that?
- 10:24 B. Strehlow You know the Commission has heard testimony over the last couple of years about DHS changing their policy as far as keeping kids in the home and not going to dependency as quickly. Differential response is starting up but we are not seeing much of that. Although you look at the end of these graphs for dependency and that is pretty low. That could be a result of differential response just in those couple of months there. That is hard to tell yet.
- 10:53 N. Cozine I think they did a pilot differential response in Multnomah County that drove case numbers down in that county rather significantly. Lane County has challenges as well. I think some of the economic circumstances around the state are driving those numbers down. We have some jurisdictions where that is not the trend, but as you see statewide it is clearly the trend. There are three counties that are just now starting out differential response. That is Lane, Lake, and - I'm sorry I can't remember the third county. But we anticipate that we will actually see further decline in those counties as differential response rolls out.
- 11:45 B. Strehlow One other thing, and just another observation, we see this sharp decline in those delinquency and dependency caseloads and yet we see the caseload flat overall. So dependency and delinquency accounts for about 50,000 cases a year. The adult criminal is running about 100,000. It doesn't take much to balance that and same thing with the cost of those cases too. Even if an adult criminal case costs one dollar more than any dependency case, we are going to see an increase in the cost as a result of that. It is quite likely that in a lot of cases the adult criminal do cost more than the dependency cases. Questions?
- 12:40 Chair Ellis Got any? Thank you. That was very helpful. So what would you like to do next?
- 12:54 N. Cozine Mr. Prins is here and prepared to proceed. I think we will turn down the lights.
- Agenda Item No. 2 Justice Reinvestment and Reported Crime Update**
- 13:01 C. Prins Turn the house lights down.
- 13:03 Chair Ellis Camera, lights, action.
- 13:08 C. Prins Thank you. Mine is a Power Point presentation. Nancy asked me to look at some of the Justice Reinvestment, HB 3194, and kind of where we are with that. It really requires a PowerPoint. I am Craig Prins from the Criminal Justice Commission. Nancy asked me to present on how things were going with House Bill 3194 and with a mind to how would impact some of the things that we are talking about as far as case filings and things like that. I have given this presentation about 75 to 85 times. So if you want to interrupt me it won't throw me off. If you have any questions go ahead and ask them and I will see if I can respond. Justice reinvestment was a national initiative. I came and spoke to this group before we had the bill. The concept is the federal government has assisted now 17 states in doing justice reinvestment, which is nothing other than trying to make some sentencing changes to control prison growth. That will have some savings. Take the money that is avoided from having to put that into the operational budgets of the prison. Invest that in the local community or county criminal justice systems. Hopefully that will have us have less crime in our communities at less cost.

14:45 Chair Ellis Is this the outgrowth of the commission that the Chief Justice headed?

14:50 C. Prins It is. That is the one that I was thinking of, Mr. Ellis, that we came and presented about. It is the 2011-2012, Chief Justice De Muniz and that group. Part of all legislative activity is you take this and you get this. That is what happened and we had a bill pass in July. This is to kind of go over where we are with the bill that was past that was really started by that process.

15:22 Chair Ellis Okay.

15:22 C. Prins These are kind of the questions is what is it? How will it impact my caseload? How will it impact the county in which I work? How will it impact crime in my community? How will it impact my client? This is charts. I apologize. You are focused on how many cases you will have. What is your felony caseload going to be? I want to make clear that caseload is pretty different from prevalence of crime, so caseload tends to stay fairly flat. While we have been seeing arrest rates drop, charge rates drop, this is over the long term, but conviction rates have been fairly steady. Convictions are based upon the size of the system. It is a capacity to convict. There are always going to be more crimes that occur that are not reported, etc., and those things. When I talked to Nancy, I think most of justice reinvestment will not impact the number of felony caseloads. Are Rod and Walt going to talk about that? But as you delve into that keep in mind that you have kind of arrest rates going kind of down, charge rates. To my mind there haven't been big changes in felony convictions, but Nancy monitors that much closer than we do because it is much more of what your mission is making sure you have budget to provide defense. The justice reinvestment really is to control prison growths. Most felons even are sentenced to probation or local control to a sentence of less than 12 months. I think last time I checked it was probably 70 to 75% of felons are sentenced to probation. Most of those are drug possessions. That has always been kind of the grist of the mill. Those are not the focus of justice reinvestment. The focus of justice reinvestment is really looking at how we use our prison system as a response because that part of the system is the most expensive and we have most resources in it. The last part of justice reinvestment is my agency's role is really to monitor how it is going, but also to administer local grants. So we made small grants to counties in September and October of 2013. They are intended to be in the future outcome based that if successfully implemented these local programs we should need less prisons. You will have more community based sanctions and you will have lower recidivism. That is really our part in this. Does anyone have questions just on the overview of what is justice reinvestment? Okay. So the goals of these grants and the goals of our part is public safety. We tend to monitor crime by the uniform crime reports. Those are offenses made known to law enforcement. Again, we think that is a better measure of prevalence of crime then arrests. Arrests are basically pretty much focused on what you are going to target locally. What the officers are going to target. We tend to use uniform crime reports to measure that. The other goal of our grants is to provide local accountability, so local programs, local continue of sanctions and services, so that in say a county that resource is poor like Curry County or Coos County. They will say, "What am I going to do with this guy. I don't really have anything in the community that I can send him to that I feel confident in. I am really set with this probation that doesn't have much too it." This is kind of from a state's perspective or prosecutor's perspective. "Probation with not much to it versus prison. I feel like I don't really have that many options in between." So this is the goal is to have accountability in local sentences and services, reduce recidivism, and then decrease utilization of imprisonment at the Department of Corrections. So the bill passed in July, 2013. So the first goal is to look at crime rates and Nancy wanted me to look at crime rates. This is not felony filing. This is uniform crime reports. This is the way the FBI has measured crime in our country since the 30s. You look at what is called, "The Violent Crime Index" and the "Property Crime Index." I can go through the details but the violent crime index is basically what you would think it is. It is homicide, aggravated assault and violent rape and robbery. The property crime is theft, motor vehicle theft, and a non-home burglary. So crime rates so far in 2013, we just have the ...

20:32 Chair Ellis I take it drug offenses go in that latter category?

20:30 C. Prins No. Drug offenses do not. Because drug offenses are really based upon - if you think about it no one reports a drug offense to the police, usually. It is really based upon enforcement how many drug arrests you are going to have and have many drug convictions you are going to have. So this is just violent and property crimes.

20:55 Chair Ellis So drugs don't...

20:55 C. Prins The FBI has never used that because there is so much variation, if you think about it, in the states of how we address drug crimes. It really would not be a good way to manage - I think the thought is they don't think of that the same way as a citizen is calling and saying a crime has occurred.

21:20 Chair Ellis But when in your earlier slide you talked about capacity, the drug enforcement must absorb a lot of that capacity.

21:31 C. Prins Yes. For all of these arrests and convictions most of that is where the system is going to put its capacity. That is what I am saying. That is not the way to measure the prevalence of what folks think of as crime. So we use the FBI reports for that. Does that make sense?

21:45 Chair Ellis Yes.

21:47 C. Prins We have four cities over the size of 100,000 and we get reporting on those first. These are usually about 40% of all crime in Oregon. You can see that Portland in 2013 was down in violent crime 4%, almost 5%. Salem was down over 9%. Eugene was down 6%. Gresham was up 24% for violent crime. So of those four the average, and, of course, Portland drives most of that because it is the largest, reported UCR violent crime is down 2.5% and property is down 2.7%. Does that seem wrong to you. It is okay if it does because most of us focus on what we do have and we have plenty of crime to work with. The media is going to say that crime is going up. Most citizens think that crime has gone up this year over last year, so if this seems out of whack it is okay.

22:41 G. Meyer It is odd to me that Gresham should have the greatest drop in property crime and yet the most notable increase in violent crime.

22:58 C. Prins Oregon has traditionally had lower violent crime. That is a great segue. Gresham is really bucking the state trend, but Gresham has had increasing crime for the last several years. This is the long-term look at crime in American and in Oregon since 1960. We have been below the national average. We are the black line for that whole time and you can see from the mid-80s and 90s all indicators show that this is where crime started to drop in the whole country. It has dropped 50%. It is like tell us why crime dropped, right? Yeah, right. I am going to explain it with one word. I can definitively tell you why crime dropped in Oregon. It is because crime dropped in Portland. I am kidding, but...

23:58 Chair Ellis They use to tell us that the demographic that really drove crime data was male youth between 18 and 25. You could just chart it like that. Has there been a shift in the percent of the population that fits that?

24:18 C. Prins Yes. There is a 1% growth in what we would call the at-risk for crime age group is what you are thinking of between 18 and 35. One percent growth a year is what the censuses project. We are aging as a population just like most places. That is a favorable measurement. The number of young men continues to drop. I would say that is certainly one of the reasons why the nation's crime has dropped is our nation is aging.

24:48 Chair Ellis Now the pro Measure 11 advocates would say it is all this incarceration we have done that has driven that.

24:53 C. Prins Yes. Study after study has looked and there is some effect of that. It is not the cause of this. We have presented this again and again. New York had the same crime drop we did while using less prisons, so they reduced their prison use. We have had crime drop when we have had less prison. We have had crime increase when there is more prison. We tend to make a very strong link, like it is a causal link, I pull this lever and have more prison and crime is going to drop. It is not that simple. It is much more complicated than that. Bill and Lane? Bill you go first because you work for the legislature. No offense Mr. Borg.

25:33 Bill You saw the recent article (inaudible).

25:43 C. Prins Let's be honest. Crime is complex. Crime is a community thing. It has a multiplicity of factors that go into crime and anyone who says it is the thing that I did and the lever that I pulled is probably looking at it a little too simplistically. All these things have something to do with it, but remember none of the experts were predicting this crime drop. Lane.

26:02 L. Borg Just to clarify, when a crime is reported isn't it you characterize the incidences. You are going to go to the most serious. So like in Gresham if what we are seeing are thefts that are being characterized as robberies, you are going to be a violent Category 1 crime as opposed to a property crime.

26:23 C. Prins You are absolutely right. It is called the "hierarchically rule." That is the way that they do it. If there is a robbery and a theft they will characterize it as a robbery. That is a good point. So this is property crime in Oregon. We have always been above. So Gail, to your point we have always been above the national average in property. We have always been below the national average in violent crime. You can see we blipped up slightly then the national average on property, but we have had a very large drop in this decade in property crime too. We are below the national average in violent crime. Then we are about 22 in the state. That is where we are with crime rates. Same reason why did crime drop in Oregon? Because it dropped in Portland. I am being kind of facetious. That is actually true.

27:06 S. Bender I know you are being facetious, but do you have any explanation as to why the drop in Portland was so much greater?

27:18 C. Prins I do, Steve. I will send you the article. I think it is a combination of policing. It is a combination of the reduction of gangs. Portland had a very high crime rate in the 80s. It was right there with Detroit. So Portland is not as much like Detroit now. I hope there is no one from Michigan. We love Detroit. There are neighborhoods in Gresham that are not set up well. It is not how a planner would set up for a low crime neighborhood. I am thinking of the Rockaway neighborhood where you have TriMet. You have no single family housing. You basically have a methadone clinic where you can give your blood and multi-family housing with a lot of activity. It is a really challenging area to police and have a good response to.

28:22 G. Meyer And the gangs really have shifted from Portland to Gresham.

28:27 C. Prins We often get into why enforcement here just pushes it out there that is not the case. You can see that there has been study after study that shows crime actually drops around those areas too. We don't just push crime out. We can suppress it with policing and I think you can see that. That is crime rates. How will all of the 3194 stuff affect your cases? I think the way it will affect the cases is really like the kind of thing that Lane has been working in Portland. Our grants are designed specific in legislation to assist the local systems to assess offenders. Assess their likelihood to recidivate. Assess them for what is driving their criminality. Have a plan for probation or supervision that is based upon that assessment. It should be driving special conditions more. Multnomah County has been working on a project like this for I

want to say a year now, Lane. I think a shift in criminal justice is a shift towards using data and analysis to make decisions. It is slow. It will happen and it is happening slowly. There is always, of course, you are going to have a part of this is about accountability and there is going to be low risk offenders who have a very low likelihood to recidivate that very much need to go to prison. That is always going to happen. It is very hard for our system to understand that we are going to change incrementally about how we use evidence and data. I shouldn't say evidence. Data and actuarial studies, but we are always going to have to have judges and lawyers talk about the morale accountability or the culpability of a case. That is not something that an actuarial study can do. But what an actuarial study can do is it can say this person already has a very low likelihood to recidivate. Studies have shown if we put a lot of conditions on this type of offender it actually leads to worse outcomes. We want to be really careful of that with this type of offender. I think that is what my thinking is 3194 is going to change that whole thing. Assessment and evaluation will be more important in how we process individuals. Lane, do you want to comment on that?

- 30:48 L. Borg I think just because it is being somewhat controversial within the defense community.
- 30:59 C. Prins It is.
- 30:59 L. Borg We are trying to convince the judges that the customer here is the defendant. If the customer does not have a good experience in this process they will avoid it. They will opt out. That is what we were going to is an opt out system, but I am hopeful that we will see that people are getting the question of how could they be successful in the community under what conditions. I think if we start doing that then more of our clients are going to benefit and be successful.
- 31:32 C. Prins Greg is on my commission and I have talked to Nancy. There are national folks who have been doing this, of course, for years that have training on how you successfully get your client through this system and how you do with this new environment. I would love to work on some of that training with you all.
- 31:55 G. Meyer When you talk about a statewide level, which counties are assessing the offenders prior to the sentencing decisions? Which counties are doing what 3194 requires, which is have them assessed after the judge (inaudible).
- 32:06 C. Prins It doesn't say when the assessment is to happen in our section of the bill. It just says to assess offenders. It doesn't say pre or post trial, but then the conditions section is talking about the conditions. I think Marion does some of this with certain property offenses. The assessment is we think this guy is one we would give probation. Do you, the probation officer, think you have a successful program for them? They call it the 416 pilot project. Yamhill does it because they have been working on evidence based decision making for about four years. My perspective on the Multnomah plan is that there is going to be looking at having some LSCMIs and other assessments pre-trial. Those three counties are the ones.
- 32:56 L. Borg Actually pre-judicial settlement conferences. One of the reasons for this is because we recognize that the adjudication drives the outcome. I give Rod credit for this in Multnomah County. We are looking at Ballot Measure 11 offenses in this process. I am not sure Marion County and Washington County are considering Measure 11 cases. They are using the tier two Measure 11 cases to say, "We can put this into this process with no guarantees ahead of time, so the DA is not committing to probation, but we will have that conversation with a risks needs assessment completed."
- 33:42 G. Meyer What is the resistance in other counties to doing it that way? To using the assessment even in advance of negotiating and settling.
- 33:49 C. Prins There is resistance to all change, Gail. There is probably more resistance here than anywhere. You will have resistance. The DAs will have resistance. Every county is different. Every

one of us is different. None of us like change. Having to establish a new competency with a new thing. There has been a fear that a number is going to drive the census. I think that is the number one concern is that a computer is going to say "blurb" and we are going to say "probation." It can never be like that. It can never be like that. It should be information about an individual and trying to go from a system that is kind of - it is not individual based in the way we have thought about sentencing. We have thought more about uniformity I would say. That is probably the biggest change. I don't know Greg or Nancy? Greg first because he is my commissioner Nazi.

- 34:53 G. Hazarabedian I have been analyzing this when speaking to defense communities the same way we thought about drug courts when they started. We thought what is this kum ba yah stuff where we are all going to agree with the DA and get treatment for the client. Where is the adversarial advocacy? Where is defending the person's rights? Many of us were wary of drug courts. Now none of us are wary of drug courts. I think that this assessment piece, as a piece of a rational sentencing process, is going to go the same way that the drug court went. We are going to see clients get the treatment that they actually need, rather than the prison that they don't need.
- 35:30 C. Prins Yeah. I went to a conference and Greg has been to some of our conferences. Many states are doing this pre-adjudication. There are ways you can do that to make sure you keep your client's privacy and constitutional rights. I just think it is going to be slow and incremental like most change. It will be different in different counties. I think this will be the biggest part of 3194 for you all. Hopefully we will have some more resources in the community and we will have assessments about is this kind of a good fit for this. Is this a better fit than prison, I think, and then what conditions make sense? Let's just not rattle off the ones that make sense up front. Let's let probation and those folks who have actually spent time with them try to do that. I think that is the biggest challenge. Nancy.
- 36:32 N. Cozine So as the agency that funds requests for non-routine expenses for lawyers, and this question may be for both you and Lane, as you are launching this in Multnomah County. With the emphasis on pre-sentencing risk assessment it seems logical that there would be an increase in the number of requests for evaluations pre-sentence by the defense bar, specifically for the LSCMI.
- 37:06 L. Borg And you would be wrong. We talked about this because we have been having this conversation for over a year. I consulted Paul on some of the parameters because that was one of the questions early on in the Multnomah County justice reinvestment. Why can't we just get OPDS to take all of these? It was like sure, but then the defense attorney has complete control about whether you see it or not. That is what we are funding. It is an aid to the defense attorney in doing their qualification in representing their client. Now not every sex case in Multnomah County has a psychosexual, but a significant number of them do and the contemplation is that when it is a psychosexual case we have already been paying them for - it is probably going to be status quo and stay the same. Built into the justice reinvestment money that on a limited number of cases if the judge or the DA is saying, "I think we need a psychological evaluation to help us understand what is going on with this client in a settlement discussion." All of this is being framed around the settlement like we have statutes to protect settlement conversations. Then they would be set aside money for the court to pay for those assessments. Then those would be available, but it has to be a voluntary part of the process and they would be available like PSI.
- 38:32 N. Cozine Would you not have violated your other ethical obligations to determine whether or not there would be a negative outcome?
- 38:43 L. Borg Maybe. We don't know until - to put some scale on this we are contemplating as many as 70 people a month that might be identified as eligible for the 3194 justice reinvestment program. We have funded about 12 or 15 evaluations for the entire group. I would contemplate they

are going to know either because of prior hospitalization records or other things. You might see that they say I want an evaluation done ahead of time. And LSCMI is not something – that is going to be done by DCJ because the statute already requires them to do. What Multnomah is doing is so much more in depth. So we can give an actuarial assessment with a SID number, and no interview, looks at the criminal factors. That is the first step. It is like the triage. If your client comes up low risk on that, I would want to hammer that if I were counsel for that client. Then the LSCMI is what the supervision folks will do immediately after conviction anyways. That is usually like an hour interview. This is nothing like a full psychosexual. This is really trying to get a base. It is very different from the Multnomah one. The Multnomah one is to me a uniquely deep – how deep they are going to get. I think there are more issues around that.

- 40:18 J. Stevens Can I ask a question?
- 40:19 C. Prins Yes.
- 40:19 J. Stevens As the non-lawyer in this room. I don't have a clue what you are talking about. Would you mind defining the alphabet?
- 40:31 C. Prins What we are talking about is if you get insurance.
- 40:34 J. Stevens I mean what is LSCMI?
- 40:37 C. Prins These are initials for different assessments of what supervision conditions are needed.
- 40:45 J. Stevens Right. But what do the initials stand for?
- 40:46 C. Prins Tom. What is LSCMI.
- 40:50 T. Sermak Level of Services/Case Management Inventory.
- 40:59 C. Prins Thank you, Tom.
- 40:59 T. Sermak I am not done yet. It is an assessment that measures the risks and needs factors of late adolescent and adult defenders.
- 41:10 J. Stevens Thank you.
- 41:11 C. Prins Okay. Go ahead, Lane.
- 41:13 L. Borg I think this is important to say because this is something that the defense needs to remind people of every single time. The LSCMI is a widely used tool in Canada and the United States that has been validated for recidivism. It is not validated for length of stay. The two drivers for prison are who goes to prison and how long they go to prison. Because the LSCMI has nothing to do with whether you should be getting a long or short prison sentence, versus low risk might deserve a long prison sentence because of other factors. If we get into this, it gets away from what Craig is talking about.
- 41:49 C. Prins It is good.
- 41:48 L. Borg Computer button pushing and saying here is our answer.
- 41:53 C. Prins It is an assessment of which clients are the most likely to do well on probation and which conditions would lead to the best results on probation. That is what it is. It is really for your clients where this guy might get a dispositional departure to probation on this identity theft. How do I articulate that would be reasonable to do that in that kind of thing. I think there is a

lot of room for how you navigate your client through this system. I think it is coming and I think it is something we can really partner together. I think it is going to be important. Tom.

42:36 T. Sermak

You mentioned the 416 program in Marion County. They actually target - it just goes with property offenders. It addresses the sentencing requirements of Measure 57, which are property sentences where you get enhanced sentences. They actually target high risk, high need individuals. People who would otherwise go to prison will get shifted into the 416 program as an alternative. Then they tailor fairly intensive probationary conditions and they are going to be monitoring to make sure that instead of sending this person, we gave them the treatment they needed to avoid recidivism.

43:29 C. Prins

That is a great point. This is a project that we funded. We gave \$500,000 to get it started. Tom and Lane went to Reno to a conference to hear about this. Walt Beglau and Sheriff Meyers did. Yes, it is designed for those who are medium to high risk. We wanted to pay for supervision of those clients because you don't want to be paying for low risk clients to have all these services. Hopefully if they come up low risk they would also be more inclined to get probation, but the money is for the services for those who are medium to high risk. That is where we think we can be more successful. Nancy, how much time do I have? So crime continues to be down in Oregon. That is not attributable to 3194. It is too early to say something like that, but crime continues to be down. We have the lowest violent crime rate since 1966 in Oregon. Tell that to your neighbors and they will say, "No we don't." That has much to do with media coverage of crime and not prevalence of crime. We talked about recidivism and how this is going to affect your client. Then one of the goals is this actually going to control prison use and control the number of people in prison. What we are doing on that is my office looked at where do inmates get sent to prison from? I think that was fairly poor grammar there. So 62% of the prison inmates are from the five big counties, Lane, Marion, Clackamas, Multnomah and Washington. So we meet with the public officials from those counties and we tell them how is it going? You are using more prison for these types. Less for this, etc. We do that in each of these regions to kind of make sure we are on top of how it is going. We do these called "RIC meetings." It is regional implementation of counsel. So we meet with them and we show them how is it going. There is a Portland Mercury article about this. We thought there would be bigger impacts on drug offenders who are manufacturing or delivery of drugs. One of the parts of House Bill 3194 gave judges more discretion. One of the pieces of Measure 57 got knocked out that a person with a prior conviction could get probation still on a delivery or manufacture. So far we haven't seen the impacts that we were expecting on that. We think that once we get some of these programs up and running so the judge and the DA know about the program, and the know about an assessment that says this is a good program for this type of client, we think that we will have better outcomes on that. Also, I will show you - the timber counties are relying on prison more, right. They don't have that many options. We are working with that individually with counties and regions to see where they are going. Statewide we are down by 23 intakes. This is the prison forecast pre-3194. This is the estimate my office made in the hurly burly of the session trying to figure out how many fewer beds Department of Corrections would need so that they can do their budget in June, July. This is only looking at this biennium. This is July 1, 2015. The difference between the purple line and the green line is 700 beds. It is significant. So how are we doing? This black line is the actual number of prisoners. We are not seeing all of the impacts that we had expected, but we are seeing kind of half empty, half full. So we are about 200 beds already lower than our pre-3194 forecast. Every six months the forecast gets updated. Greg is on the forecast advisory committee with me. We do that every six months. This is really what hurt our estimate is in November and December we usually see a downturn in the number of people going to prison. This year, for whatever reason, it was an upturn, a substantial one, so that really got us off to a not so good start. We are seeing now that it is starting to come down. This is the April, 2014 forecast. When the forecasters looked at that they still think we are going to get within 80 beds of our original estimate, which I would pretty much be really happy and ecstatic with that. We would have eliminated the need for about 600 beds. That is the most recent forecast. Long term this what

Mr. Ellis was talking about. The whole demographics drive crimes, drives the forecast. So we had been modeling it that way. The red line is you are going to have 1% more young men in Oregon and so are just trending that the population of prisons would go up with that. But the gray dotted line is convictions and prison intakes for men in that area because violent crime is down and all these things have actually been trending down. You have the big demographic number says 1% more a year. The last five years of the actual how many guys are going to prison for those crimes is down about the same. So what the forecast advisory committee has said we think the safest thing to do is say it is just going to be constant at where it is today. They changed the intakes to say we think it is going to be fairly constant for the next 10 years because we have these two different predictors. So the long term forecast is very encouraging. The green is pre-3194. It is the April, 2013. The red is the 10 year forecast for the Department of Corrections. You can see that long term because of that adjustment of the intakes to male for person crimes, it really only increases about 3% over the next 10 years. We have never seen a forecast like that before. It means that we wouldn't need to build Junction City. It means that the discussions, if this holds, will be much more about how to use the prisons rather than when are we going to build the next one. That is very encouraging. I hope we can see that. Then usually people ask which counties are doing less prison and which are doing more. So Lane and Klamath are using more prison right now. We are working with them to see if we can get some resources to them and try to see if we can pilot project some of the things that have worked in Marion and other places. Some of these are so small a lot of this is just variance. If you send a few more sex offenders to prison in 2013, then you did in 2012, it will look like you have this big increase. It is just the normal variance of counties. So when you get to small counties you don't really look at it. Multnomah has 92 fewer to prison since 3194 when you compare it to the same amount of time pre-3194. That is really encouraging.

51:45 G. Meyer

Do you think that difference is just with DA charging?

51:50 C. Prins

I don't know. It is complicated. There are just fewer people going to prison for sex crimes and person crimes is a big part of it. A big part of it, Gail, has nothing to do with 3194 and part of it does. It is different in every county. Michael and I can show you each county what we have heard from them. We try to ask what is going on. Why would this be happening? Sometime it is just real clear. In a small county they are like, "Yeah. I sent four guys to prison for forcible rape and they each got 30 years. That is why I am using more prison." I don't know. We try to give the data and then they give us feedback. Then we say, "I noticed you had more for this crime. Is there something that we could partner and talk about?" I think I already hit these. This is when we get hit with all the questions. Assessment will be key. How do we navigate our clients through that will be key. I think there is a need training and there is an opportunity for training on this. So many states are already doing this. These are the crimes that are up. Delivery of meth and delivery of heroin. I want to make it clear that is not just people being sent directly from court. That is also more people getting revoked for those crimes. It is usually about 80% go directly to prison from the courthouse. About 20% go because they got revoked on those specific crimes because it is a presumptive prison, dispositional departure. Those are where we try to target those non-violent drug and property offenders. That is kind of the goal of the bill and that is where we think we can still have some impact. Do you have questions? If you have questions later I am happy to try and answer them. I have my phone and email. I think this PowerPoint will be available to folks, Nancy? I can send it out. Thank you for the time. I really appreciate talking to people who understand and look at this on the ground. I really would ask for feedback too of like what are you seeing happening. That is really valuable. If you have any feedback then let me know.

54:29 Chair Ellis

Thank you, Craig. So are Rod and Walt here?

54:39 N. Cozine

They plan to arrive at 11:15. Between 11:15 and 11:30.

Agenda Item No. 5 Appellate Case Filings, Opinions, and Backlog Trends

- 54:48 Chair Ellis Okay. So we will go to Item 5. Bon Jour. Do we get more PowerPoint?
- 55:25 E. Lannet I haven't done this yet so I might get thrown off. I will try to answer any questions you have when they come up. I am Ernie Lannet. I am a chief deputy in the appellate division.
- 55:40 Chair Ellis These chairs are traps for the unwary.
- 55:48 P. Gartlan Ernie is going to carry the ball on this. I am turning it over to someone from the 21st century.
- 56:03 E. Lannet We were asked to kind of give an overview of the caseload that AD has been managing. I am just going to be talking about the criminal section which is the majority of the office. Pete is going to follow up with some information about the juvenile appellate section which is specific to them. So what I wanted to do is take an opportunity to remind or inform the Commission about what the attorneys in the appellate division do. What kind of caseload we have been looking at and the efforts that we have made to improve the system, which in this case would be trying to get cases through the system. So in the criminal section we have 37 attorneys. We share one staff person with JAS. That is why we have 10 ½ legal support staff. We have about 1,600 case assignments a year over the last few years. That means when cases get referred to the office, intake has looked at them and has determined there is a case to assign to an attorney. Now we file notices of appeal in about 1,100 cases per year. The difference between the two is there are some cases that we get where we are not filing notices of appeal. We get a few dozen or five or six dozen state's appeals over the year. That would be an example. Other ones there are statutory bars to filing notices of appeal. We get a lot of referrals on guilty pleas and no contest pleas. We have to identify a colorable claim of error. Some kind of discrete legal error in the sentence before we can file a notice of appeal. Many times we are unable to do so. But between our notices of appeal just the criminal section accounts for about 40% of the Court of Appeals' caseload. That is the based on the numbers that they presented at the latest budget. We have Pete, Chief Defender. I am one of three chief deputies. Shawn Wiley is in charge of outreach and Josh Crowther, who I think spoke a few months ago, is personnel. I handle operations. A lot of my job duties are working with the incoming cases and dealing with the caseload. We roughly have about a half caseload. That's not quite accurate since Josh Crowther has just recently been doing a death penalty case, so he has been on that full time for the last year. When one of those comes in the office it pretty much takes over the attorney's job for about a year for briefing. We employ a team structure with our attorneys. They are led by senior deputy defenders. They are the ones that have the most experience in the office. We have six teams. Each is led by a senior deputy. These teams meet weekly to discuss issues and moot cases for argument. They also do the editing for the deputy defender's briefs. We have a very strong regiment. Everything gets edited before it goes out of the office. The deputy defenders are either Deputy I's or Deputy II's. Deputy I attorneys deal with misdemeanor cases and simple felony cases. Sometimes a lot of them are with single issues, a motion to suppress was denied, and that gets flagged as it comes in. Between the seniors and the deputies these attorneys have full caseloads. This is separate from the juvenile appellate section. There are five attorneys and one and a half support staff. They are doing the dependency and termination of parental rights. They employ similar structures and processes, but because they are on an accelerated briefing schedule, there are quite a few differences.
- 1:00:15 J. Potter So do you have a death penalty team anymore?
- 1:00:18 E. Lannet We do. It meets as needed. We basically decided that capacity wise we could only have about two cases open in the office at any particular time. With an office of 35 attorneys, having one attorney off a caseload is such a big impact. We have one lead attorney and a second chair, or sometimes two people to assist with the briefing. They meet as necessary and talk about issues that are coming up.

1:00:51 C. Lazenby

And who does the initial screenings of intake.

1:00:55 E. Lannet

That comes to me. So I look at the cases coming in and kind of gauge how the complexity of the issues that have been identified in the referral. How many days the trials took and keep an eye out for issues that we may want some of our more experienced practitioners working on. The types of cases that we handle are misdemeanor and felony convictions. That is whether they arise from bench trial, jury trial, guilty plea, no contest, and then also conditional guilty pleas, probation violations, revocation orders, and contempts of court. We don't see those as much but we do get them. Then we handle state's appeals too when the person is eligible. Those usually arise from a demurrer, suppression of evidence or sentencing issues. We also have five or six dozen parole and post-prison supervision cases come in. These are under judicial review and final court orders. It might be based on PPS conditions upon release or a murder review hearing. It is a pretty specialized practice but we have managed to get those going to the whole office so everyone is working on them. We have one person who is kind a point person. He doesn't have a team but he is a resource and some significant experience in that area, but we are trying to get all of the attorneys working on those cases. Then, of course, the capital cases go directly to the Oregon Supreme Court. I should say with the direct appeals, state's appeals, judicial review, all those generally start in the Court of Appeals with some exceptions. But then they may end up in the Oregon Supreme Court. I am the one that ties Pete's record for losing in front of the United States Supreme Court. That does happen, but it is not our bread and butter. Then there are some miscellaneous cases, DNA testing appeals for people who have already been incarcerated. Then we have seen some crime victim's rights appeals that go straight to the Oregon Supreme Court. So when we look at our caseload what we have been measuring is our Key Performance Measure 1, which is the median number of days to file the opening brief from the record settlement. So that is basically how long the transcript has been prepared, it's in our office, the attorneys have time to read the transcript, do the research, prepare the brief and then have it filed. You can see back in 2005, we were fairly broken. It was taking 333 days, median days, to file the brief. That is how long it was sitting in our office. Since 2008, we have been hovering around 230. We are in a position now, despite this kind of trend, I believe we are on the cusp of making some real advances to that. So one of the questions we get most often from our client is how can an appeal take two years. It is really our median filing date accounts for about a quarter of that time. The state's filing time accounts for about another quarter of that time. Then the other half of the time is kind of built into the process with the court. So let's say with a client's being sentenced today. Let's say this court even gets it judgment signed and entered on the same day. That doesn't always happen. We see temporary sentencing orders and we see judgments being prepared days or weeks after sentencing. Sometimes they are not entered for several more weeks. What we need is a judgment to be entered into the register. Then we have a notice of appeal due date in 30 days, with an exception of 90 days in certain cases when it is not the defendant's fault personally and there is a colorable claim of error. So we don't know if a case is started though until we see some sort of referral from the outside. Generally we get online case referrals from the trial attorneys. For example, I have a real punctual attorney who is letting us know about it on the same day. We also get mail from clients who are in the intake process at Coffee Creek. We get a lot of requests from them. Sometimes we get referrals from trial counsel when the client changes their mind or there was a misunderstanding about whether they wanted to appeal. We have an intake clerk who then opens a file and checks for a judgment, then forwards it to me for assignment and then we have a notice of appeal filed. That triggers a due date for the transcript of 30 days. Now in this case we again have the transcript being filed on time. That does not always happen. It is not unusual at all to get extensions from the transcribers especially in long trials. We can see upwards of six months or more. The Court of Appeals has been really cognizant of it the last few months. We are seeing a little more control over that to try to get those in. By statute the record settles 15 days later. That is the beginning of our KPM calculations. There are other things that could happen like a motion to correct the transcript or a notice that they missed the

proceeding in a late transcript for somebody who has already been designated. That doesn't happen often.

1:06:43 Chair Ellis Ernie, on the record settlement does the trial level lawyer look at the transcript?

1:06:50 E. Lannet No.

1:06:50 Chair Ellis How do you know whether it is accurate or not?

1:06:59 E. Lannet We have our designation and we have it come in and we have a secretary review it to make sure that we have what we designated as far as all the hearings. As far as the accuracy it is just the capacity. We don't have the ability to have trial attorneys look them over. We have professional transcribers that sign the affidavit that it is official and becomes the official record. Issues do come up with the records. Our clients often see the transcripts eventually and they might bring something to our attention. It is very rare that there is a problem with the transcript that it is critical to an issue that matters on appeal. But basically we have to check them in and make sure the days are there.

1:07:54 Chair Ellis So if the situation arises that you don't catch it because there is nobody reading the transcript for accuracy, and we get into the briefing and maybe the client brings it up but there is a missed transcription. Is there any way to correct it?

1:08:10 E. Lannet There is. By statute you can do a motion for late correction of the transcript. There is a process. It is something that does come up and it is handled through motions at that point.

1:08:31 Chair Ellis Okay.

1:08:32 E. Lannet So we have here we are in to February of 2015, we filed our opening brief. If necessary the attorney can take a 35-day extension if they need it and a 5-day extension, but there is a no further extension date by 250 days. That then sets the state's brief due at 210. Their median filing date has been 210, 209, 211 for the last six years. Their majority of cases are right at that first due date. They are not taking extensions but they are not getting them in much earlier than that. It takes about three months for the case to come up on the docket. No so long ago that was seven months. We have come down quite a bit recently. So we have the case being argued and submitted, or it is submitted on the briefs without oral argument. If the court is going to issue an AWOP, an affirmed without opinion, we usually get those within about three weeks after the case submitted. Otherwise, it is under advisement for a written opinion. We see those anywhere from six weeks afterwards to sometimes more than a year afterwards. It depends on whose chambers it goes to and where they are at and whether there is a dissent that needs to be addressed. Let's say we have three months before we get the written opinion. Now we are at February, 2016. The petition for review is due in 35-days. We have a similar agreement where we can take a 35-day extension if we need and then a 14-day extension with the Oregon Supreme Court to file petition for review.

1:10:25 Chair Ellis What criteria do you apply in deciding whether to file a petition?

1:10:34 E. Lannet There are a few things. One is if the client wants it, it gets filed. If we have written an issue to the Court of Appeals and they disagree and the client wants us to pursue in the Supreme Court then we will file a petition for review. Other than that we look at cases at this stage and we have some idea of what the Supreme Court might be interested in. We have some idea sometimes whether our client wants the additional delay to go through this process, or whether they are ready to go to PCR and get the claims that they wanted to get litigated in the first place finally addressed. So we will send a notice to the client with the decision saying, "Here is my recommendation. If you disagree let me know." We give them a few weeks to let us know by mail whether we are intending to file petition for review but they are done with it, they let us know and we won't file it. If we can see that this is not a case that the court is

likely to take review of and we don't see any federal claims that need to be exhausted for federal habeas purposes, then we may send them a letter saying, "They disagree. We have this additional process. Let us know if you are interested."

- 1:11:54 Chair Ellis What percent of your cases decided in the Court of Appeals with an opinion do you seek review?
- 1:12:06 E. Lannet I would probably say the majority. I think there are more petitions for review filed than not.
- 1:12:15 P. Gartlan If we prevail we don't file.
- 1:12:15 S. McCrea That is good.
- 1:12:23 Chair Ellis I should have said adverse opinion. Thank you.
- 1:12:31 E. Lannet So to finish up the process. It usually takes about two to four months for the Oregon Supreme Court to let us know whether they are going to exercise their discretionary review of the case. If review is allowed there is a new briefing schedule. It is going to be in the courts for another one to two years. Otherwise the appellate judgment enters in 35 days and hopefully the case is remanded, but more often than not the judgment is entered, and the PCR and habeas clock starts when that appellate judgment is issued. So that is the process. Like I said, we look at just this one part of it that we have the most control over, which is how long it is taking our attorneys to get to that case. There are a couple of factors that drive that. First, like how can it take seven months to file a brief? It is because we work on a first in, first out system. So when a case comes in it is going to be briefed when it is the oldest case. We are going to address all the cases that came in before it. I pulled up tallies for Neil Byl, one of our excellent defenders. These are the cases he has open right now that need something filed. Either a petition for review or some kind of miscellaneous filing, a notice of appeal, or we are waiting for the transcript, or it is set for briefing. If you look at the top three there those are where we are waiting for a transcript or even the notice of appeal is due. So the case comes in and I decide it needs to go to Neil. "Here Neil. Here is a new case. Please brief it after the other 23 that I gave you."
- 1:14:26 Chair Ellis This just sounds like a peristalsis problem. If you could reduce that backlog once, then you could get on a much shorter cycle from that point on.
- 1:14:36 E. Lannet Absolutely. Some of the gains that we made were doing that when we dropped down from 333. We had to put on the emergency brakes and we had cases that had been in the office for 200 days. We had a lot of attorneys working really hard and filing a lot of briefs to make those advances. We also said if we want to make this whole, we can't brief these cases. We have to send them out and send them to an overflow panel.
- 1:15:13 Chair Ellis Is there a way to quantify comparisons between your office and the AG's office on time for filing and extensions sought?
- 1:15:29 E. Lannet As far as how long?
- 1:15:29 Chair Ellis Right.
- 1:15:32 E. Lannet Their internal processes are completely different in some ways. From what I understand the supervisor there says that this looks like a 10 hour case and marks it as such. They assign it to an assistant attorney general and they can only spend 10 hours on it. We haven't taken that approach.

1:15:54 Chair Ellis That doesn't quite answer my question. That might explain that they don't seek that many extensions, but is there a way to compare where we are in terms of delay in the system and seeking extensions versus where they are in delay?

1:16:10 E. Lannet Yes. That would be the median filing date. Their median filing date is 210 days. To go back to where we are right now we are at about 230. So our briefs are generally getting in about 20 days longer in the process.

1:16:31 Chair Ellis But intuitively I would think the respondent in the briefing process should take less time than the opening.

1:16:38 E. Lannet Absolutely. It is a system driven by timelines and some of those are identified by the court. When we need 210 days as an initial brief due date the court has given us that. They also give that to the state. I think human nature kicks in and they address the cases based on the timelines they are given.

1:17:07 Chair Ellis So I missed that. If we get an extension automatically then the other side gets that when their time comes?

1:17:13 E. Lannet We have an agreement with the courts, where our cases they know with the caseload that we are working at that we need a 210 day brief due date. By rule for civil cases and criminal cases in the private bar, there is 49 days. So we are getting that initial seven months to file that brief. The state has the same agreement. It was kind of a part and parcel for us getting that agreement. The state gets that 210 days and they are using all of it.

1:17:54 P. Gartlan In all likelihood their attorneys are probably in a similar position with respect to here's a new case. Please file this new brief after you have finished the other 20 cases that are on your caseload.

1:18:09 Chair Ellis So next time you appear, I want to hear that they are complaining that we are filing too fast for them to keep up with us.

1:18:14 E. Lannet I will get Matt Lysne in here. I am sure I can get him to say that.

1:18:17 C. Lazenby Do they have roughly the same amount of attorneys working on this caseload. There is a lawyer on the other side of each of these cases. Do they have more staff than you or less?

1:18:28 E. Lannet I am not sure what their personnel numbers are right now. As the Attorney General's office, they have attorneys who kind of bridge between working on land use cases and criminal cases, or dependency and delinquency cases, and criminal cases.

1:18:52 Chair Ellis They do the PCR piece which you don't do.

1:18:54 E. Lannet It is hard to get hard numbers from them about how many attorneys are working on criminal cases because they move around. I would say roughly they probably have about the same pool that they can draw on, much bigger pool actually, but the ones that they do call on.

1:19:17 Chair Ellis But they get paid more.

1:19:19 E. Lannet Yes.

1:19:20 P. Gartlan Another aspect to remember is that we are dealing with 1,600 cases a year in intake. We end up filing between 700 and 800 what we call merit briefs a year. That means that the AG only has to respond to cases that we push forward which is 700 plus. Does that make sense? We have to address 1,600 that end up in intake.

1:19:49 Chair Ellis You have to sort out which of the 1,600 become the 700.

1:19:52 P. Gartlan Right.

1:19:57 E. Lannet So one of the prime drivers of the system is the assignments that we have. You can see here that in June, 2009, we were looking at a huge bump in the number of cases coming. Part of that was driven by House Bill 3508, which created a procedure for reducing good time. That created a lot of litigation and a lot of appeals that we didn't know what the Supreme Court would ultimately decide. They ultimately decided that these are non-appealable orders, but they really skewed the system for awhile. Then you can see that cases coming out has flattened out a bit. It is right now around 1,600 for the last three years. Actually what we just talked about is the more important factor of how many notices of appeal that we are filing. Those are the cases that get to the point that we have a transcript. An attorney is reviewing that and deciding which issues to raise, or whether they are going to have to resolve the case through a *Balfour* brief, which is basically a brief that sets out some procedural aspects of the case and the statement of facts, but doesn't raise any claim because there is no non-frivolous claim to raise in the case. Then, again, this is a little over inclusive and under inclusive because there is that whole category of cases where we are not filing a notice of appeal. You can see that they generally track each other. So one of the levers that we can pull that we talked about was reverting cases. You can see here that until June, 2012, we were reverting a few hundred cases because we just didn't have the capacity to do that. We couldn't do the cases. Fortunately by this time we had gotten to a point where we could send cases out upfront. Before there were times when we had to look at the cases that we had in the system that were aging and decide how many can we realistically do and send those out. You can see that the number of briefs that we are filing is going up. Right now we are projected to file over 800 briefs. I think that would be a first for our office in one fiscal year. From July, 2009, to now, or the end of this fiscal year, there was that initial bump of several hundred cases more than usual coming through the system. We were given five criminal section attorneys funded through a request we made at that point. I am not saying that the intake was going to be coming down like that, but at the same time we lost seven attorneys, not including one that we lost to the bench before that.

1:23:28 Chair Ellis Ms. Duncan.

1:23:28 E. Lannet Yes. These losses are significant. The attorneys that leave for retirement and the ones that leave for the private sector, are generally fully trained and high producers ready to move on. But it is a significant loss because it is such a specialized area of practice. It takes a lot of training for newly hired attorneys. We have made 14 new hires. The most recent two in December, 2013, and February of this year. That is quite a large project to get an attorney trained so they can handle the caseload and understand about the issues. Right now we are a very young office. We have 13 attorneys out of that 34 with less than three years of experience. For me what this means is we are having attorneys right now that are ramping up to capacity. I think we are going to see a lot more filings from the office. The way we do our hiring is we hire staggered. We don't bring a whole bunch of people on at once. They need the personal attention with this practice. Pete works with them for three months and then they go to a chief deputy to work with for three months. Then once they are off of their trial service period, they get passed on to a senior attorney to work with.

1:25:04 Chair Ellis What do you do with the other end of the spectrum? Say you have an attorney who has been there for a long time and is kind of burned out and not producing terribly well. They have sort of lost the fire that may once have burned.

1:25:24 E. Lannet We have addressed that. We have our annual review process where we do annual evaluations. The number of briefs that someone is doing is looked at and discussed with them. Part of it comes kind of at case assignment too. You know not to send someone 20 sex abuse cases in a row. That will crush their soul. You have to be looking at variety to keep them interested.

That is something that we look at informally that way. But as far as if someone is really facing challenges on production we will see that within a few months. We are constantly tracking someone's production. There would be meetings with that attorney to ask what is going on.

1:26:21 P. Gartlan During the annual review if we notice something that requires monitoring or check in, we will do a check in. If it needs to go beyond that then we will have more regular kind of supervision, one on one, for awhile.

1:26:44 E. Lannet Luckily we have a group of attorneys that is interested and dedicated. To go back to the Attorney General's Office, I think if you compared the spark between the offices it is really noticeably. Until June we were in a position where we had to revert. At this point we are maintaining our median filing date.

1:27:17 Chair Ellis What does the word "revert" mean?

1:27:17 E. Lannet Revert means when we have a case that is referred to us and we can't do it either because of conflict or we don't have the capacity. That is when we send them out.

1:27:29 Chair Ellis So it goes to a contract attorney?

1:27:30 E. Lannet Yes. I guess just to recap the steps we have taken to kind of stay where we are at. We have managed to keep our ground despite having the very significant turnover of attorneys. And starting with several hundred cases in the system when we made the request, we kind of attribute it to the training that we have taken on with the new attorneys to bring them up to speed. I think we have done a very good job of getting them up to speed. Another one is using the team structure where we rely on senior attorneys. They provide a lot of guidance for attorneys and being huge resources for them. We are not an office of individual offices. There is always someone you can go to for advice. Frankly, with the editing, the work does get scrutinized before it goes out. Then one useful aid that we have had is through Westlaw we have implemented a brief bank where our cases are added to a database that our attorneys access when they do Westlaw services. They can see whether similar issues or the same issue has been briefed recently. They can access that argument immediately and not have to recreate the wheel. I think Pete has shared with the Commission. We have the joy of working with our employee manual and getting a lot of the frequent questions answered on paper. Our attorneys will find a consistent answer for frequently arising issues. I think that has really helped them. Again, they can work more efficiently. That resource actually has a lot that can offer them on a day to day basis. Finally, about two and half years ago, we started looking at readjusting the caseloads about every three months. One of the things that happens to an attorney caseload is they might get review allowed in a case. Then suddenly that is going to be a huge drag on their production. Transcripts might not come in when we expect them. There might be delays. Even though we try to equally distribute the cases, there is an imbalance sometimes. We look to get those oldest cases spread out. In the short term it pushes up our median filing date because it means we are working on the oldest cases. We see it as a long term if we get those cases addressed then we can move on as office. Then we are all working on cases that are newer. We don't have aging cases in our office.

1:30:31 Chair Ellis You described earlier seniors, deputies, and so on. When you - I will use the word "promote" someone. How much of that is longevity and how much of that is merit?

1:30:46 E. Lannet It certainly is merit. The longevity piece, I think, comes into play only to the extent that they have to demonstrate a familiarity with the case law, with the practice, and I think it is so particularized you will almost have to be in the office to pick that up. Pete might have some more comments about that. There are actually two things. One is going from Deputy I to Deputy II. So is this person ready to work on more complicated cases and longer transcripts. But the move from Deputy II to Senior is really more a job description change. We are

looking for a lot more mentoring ability, communication ability, editing, and facilitation of the team meetings. There is a bit of a different kind of skill set for that one. We wouldn't promote someone who was not an excellent Deputy II to a senior. There is a difference between being a great brief writer and great attorney, to being someone who can convey that information to newer attorneys. We have already talked about our annual evaluations and doing reversions as cases have come. Not having to be in a position of biting off more than we can chew. This is my last my slide. I am just about done and out of here. This gives you an idea of what we are looking at month to month. If you look at the top end of the bar those are cases that are over 180 days old that are in the office and need to be briefed. Then right under are cases over 150 days. If we don't file anything from January to February, we would have 170 cases that are over 180 days. We are always looking at keeping ahead of the snowball that is coming behind us. To work down that median filing date...

- 1:33:04 Chair Ellis Is that part of the glacier analogy?
- 1:33:11 E. Lannet Yeah. Hopefully I have given you a bit of an overview about what we are looking at with the caseload. We are in a position right now where we have the number of attorneys that we haven't had because of the change over and trying to fill those five new positions. The point in time they have been in the office at this point, I think we are going to see a....
- 1:33:38 Chair Ellis But it is still a very strong buyer's market? The last I heard you got a lot of applications for a few positions.
- 1:33:52 E. Lannet Yes. I think we have shown quite a bit of care in bringing on people that we think will be a good fit and be really excited about the work for at least a few years. It takes a few years just to get up to speed. We certainly want them to contribute to the mission of the office for some amount of time before, well, we're fine letting them go after a few years. (laughs)
- 1:34:23 Chair Ellis Any other questions for the AD? Thank you. Rod and Walt, are you okay if we take about a 10 minute break? Do you still have time?
- 1:34:35 R. Underhill Absolutely. I won't sneak out.
- 1:34:35 Chair Ellis Okay. We are going to take 10 minutes and then we will get to you guys.
- (Break)
- Agenda Item No. 3 Charging Practices Following *Benoit* and Implementation of HB 3194**
- 1:35:28 Chair Ellis Rod Underhill and Walt Beglau, if you want to step forward.
- 1:35:38 R. Underhill Can I ask that Adam Gibbs join us. He is a prosecutor in my office. He runs our misdemeanor unit.
- 1:35:59 Chair Ellis Welcome. Thank you all for coming. The topic is charging practices following *Benoit* and implementation of HB 3194. We are now experts on 3194. You know we have had that background.
- 1:36:20 R. Underhill It is alright maybe that is the place to keep going and talk about what Multnomah County is doing with Lane Borg as one of the group. I can go into detail about that if you want, or we can move into the *Benoit* conversation. What would you like, Mr. Chair?
- 1:36:39 Chair Ellis Let's spend about five minutes on 3194 and then get into *Benoit*.
- 1:36:52 R. Underhill Because you are experts then I will move to the 400 series as far as what we are doing. You heard the genesis support for 3194 and no doubt from Craig you saw some statistics and how

that is working. A good chance you talked about the RIC, the Regional Implementation Committees.

1:37:13 Chair Ellis

We even learned what LSCMI stands for.

1:37:15 R. Underhill

You did. Well you are ahead of me at least from a few months ago. Well we in Multnomah County have our LPSCC, our Local Public Safety Coordinating Counsel, and out of that we have a subcommittee known as the Justice Reinvestment Committee. There are a number of attendees and we have about seven voting members. Myself, Lane Borg, here, obviously, from Metropolitan Public Defender's Office is on that subcommittee and is a voting member. Then we have Judge Waller and Judge Frantz are almost always there, as are members of law enforcement community, Department of Community Justice, Scott Taylor and Ginger Martin. I could keep going, but will stop. We have a very robust, engaged group of folks and having a talk, first, about what to do with the money that was allocated to Multnomah County specifically. There were 36 counties that received a portion of the \$15 million that was in the justice reinvestment pot. For Multnomah County that slice of the pie, if you will, was right between 21 and 22%, in other words \$3.165 million dollars. I didn't bring the breakdown with me but I can summarize it. The breakdown as a result of coming up with what we think would be a good model for assessing cases in a better way. We have come up with a schematic, and I will attempt to summarize it. This is an attempt to have better informed decision making. In other words, there are going to be some in categories of offenses. We are really talking about the prison population more. We are hyper focused not on the homicides, not your aggravated murders, because they are just going to be prison conversations. Generally not on the tier one, Ballot Measure 11 types of offenses, summarizing it by saying Rape in the First Degree, Assault in the First Degree, they are also typically going to be prison conversations. Where we are going to get the most robust conversation are those tier two, Ballot Measure 11 level offenses; also on gun minimum cases. Anybody who is looking at a presumptive prison term that falls into, oftentimes we negotiate for a resolution other than prison and this conversation and what we put together will sometimes result in a conversation of how much prison? It could very well be less. It is based on this foundation that that is our target for now making the greatest impact and going along with the spirit of 3194, which is to responsibly reduce state prison costs while at the same time, if we can pull it off and we think we can, simultaneously having a good local public safety impact. Being responsible in our back yards as well as saving the state money as part of that gathering more information. You mentioned it, Mr. Chair, and that is the LSCMI. Weaving in a risk needs assessment tool so that it can be used by the practitioners to be one of the variables to inform us about what is a responsible way to resolve a case. We have come up with a schematic, kind of a visual. I can describe it to you a little bit. On the top of it is professional judgment. All of us practitioners are always going to gather all the information that we can. We are going to weave that into our professional judgment in an effort to make the best decision on behalf of our client in a situation involving a member of the public defender's office or other defense attorney. The court is going to want make their best judgment and, of course, the prosecutor as well. Then we look at other things that are in that continual. There is oftentimes in resolving these cases an accountability piece. There is a victim input and impact piece we need to listen to, ask for, and make sure that we are hearing. Then there is the risk and needs assessment piece. The static and at times dynamic tool is looking at the actuarials tell us and can they be of any value to us and help inform us. Then there is the offense base assessment and as I touched on the needs base aspect of things. So we can put these all together. Everything I have just said has subparts and subcategories to it. We put it all in the pot and we twirl it around and come up with the best professionally informed judgment that we can make as a system about this person. I am being a little simplistic and maybe a little overly dramatic, but this person does need to go to prison when we have done this assessment and here is the resolution that we suggest in a pretrial offer. Then there is another category of cases that are - this person is going to go into the local community on supervision. They are going to have these terms and conditions of probation. Then we have a lot in the middle. They are harder. Where individuals could argue both sides

of the argument about what is an appropriate resolution. That is area where we are really trying to drill down. Have conversations about seeing if the risk assessment tool and have a needs analysis can better inform to identify what is available in the community. We have got buy in and support, if that is the right phrase, certainly support and buy in as well from the Department of Community Justice. Kind of beefing up some of their work at the very front end of a probation. We have got a period of 120 days of intensive based supervision. Weekly the plan is that everybody in the MCJRP, Multnomah County Justice Reinvestment Project, everybody is going to fall into this category of 120 days, at least, of a high intensive supervision so that we can get them on the right track. Because one of the things and I suspect but haven't been here, but I have talked to Craig a lot and listened to him, is that one of the things that we need to keep an eye on is not just the first sentences but second sentences as well. He probably told you that out of 100% of the people that are in our Department of Corrections, 80% went there directly as a result of a first sentence. Indictment, negotiation, trial, and went to prison. But 20% went there as a result of a revocation proceeding. They were put on probation. They found themselves outside of compliance and got revoked and sent to prison by a judge. We want to address both levers. Impact both the first sentences, and impact in a positive way those second sentences. How to best impact the second sentences at 20%. Let's get them on the right track right away. We should expect some bumps in the road.

- 1:44:32 Chair Ellis This sounds more collaborative than adversarial. I am interested in your observation on that.
- 1:44:37 R. Underhill It has been a tremendous collaborative effort with pockets and periods of adversarial conversations as we should have. You can probably just picture it some prosecutors and some sheriff deputies and law enforcement sometimes disagreeing with Lane Borg, or Lane Borg disagreeing with me.
- 1:44:57 Chair Ellis Hard to imagine but it probably could happen.
- 1:45:03 R. Underhill At the same time it has been extremely collaborative. I didn't count the meetings but we have probably met 50 times, Lane? Fifty different meetings all of an hour or two in duration over the course of a year.
- 1:45:29 Chair Ellis I think before this happened a lot of people predicted that the prosecution community would resist it and think this is an intrusion on their prerogative and they would fight it. It doesn't sound like that is what happened at least in Multnomah.
- 1:45:47 R. Underhill Chair, you have hit the nail on the head as far as some of my candid hesitations being careful. I don't want to highlight any one thing versus another, but there is some being careful about things and the notion of the professional judgment always being the centerpiece of how we resolve a case was critical to me in that we don't overemphasize one aspect of our assessment for a just result over another. Just to pick them apart. Tease them apart. That we don't overemphasize a static/dynamic actuarial tool and just do what the tool says. Why need us if we are just going to do that. Just plug in these factors into tool and it spits out a result. And likewise I will take on another aspect. The constitution of Oregon requires us to seek and listen and evaluate victim input and impact. It doesn't say that they make the decision either. That their voice is the decision for what is going to happen in a case. Nor should we be so myopic as to look at just the offense, and depending on the mitigation or aggravation of a certain offense that is the end of the conversation. I could keep going but I will interrupt myself. That professional judgment is a hallmark of what I really wanted in there and was centerpiece. With that I have some hesitation about what we have done, as far as inserting the LSCMI static/dynamic tool to this conversation. It wasn't designed as a sentencing tool. However it has some value in that area, but its design was outside of the sentencing conversation. It was more for what level of supervision an individual should receive, low, medium, or high. So it is not without some hesitation and some risk. I can't say that every prosecutor in the state is necessarily patting me on the back, right, with some of the choices

we have made, but a lot are. They were very curious and intrigued about this as a model that can help create better decisions.

1:48:30 Chair Ellis

Any questions on 3194? Do you want to add to the dialogue?

1:48:39 W. Beglau

Certainly. Mr. Chair, Commission, thanks for having me here. My name is Walt Beglau. I serve as the Marion County District Attorney. I appreciate the invitation. What I think I would add to these comments is that 3194 has allowed the communities to be very entrepreneurial in some of the aspects of community based training. Relative to that bill, the Marion County experience is that we are starting to see that we are hitting on the mark relative to the different statutory legislative elements that were outlined in the bill. A couple of examples are length of stay on identity theft has gone down about eight months. Our length of stay on robbery in the third degree has gone down. I think our other drug offenses - I don't know if Michael Schmidt is here to correct me if I am wrong, they are down about 12 individuals going to prison on that. So we are starting to see some of that alignment. The target has been in Marion County non-violent property offenders driven by substance abuse and shorter prison interventions. We have made three primary investments in Marion County and it is centered around a team, again, like Multnomah County that has our Board of Commissioners, Sheriff, District Attorney, and other stakeholders. So there is a lot of communication at a government level in implementing these three pieces. One is reentry, so we have given most out of these dollars to that. Two, we are beefing up our Marion County Work Center, which is the step down from jail around treatment and work. Most of that is going to come from transitional leave. I think that is where the heavy hitting is going to come in prison beds as that start to take root, the transitional leave, and the third, which I wanted to highlight the most for you today, is a program that we call "416." What 416 is, is we are taking those nonviolent property offenders that are high and medium risk after a process of assessment. Not sending them to prison. Doing downward dispositional departures and wrapping a core, local supervision program around them. The elements of it include assessment, supervision, and treatment. What we have found is what you all know is they are all addicted to methamphetamine. The first iteration of 416 in Marion County, every one of them had a meth problem. But, of course, it is poly substance driven and we know that heroin and prescriptive drugs are driving a lot of what we are seeing kind of in the new landscape of public safety. So I have a flow chart but it just makes my head spin. Bottom line it is just based on good relations, strong commitment between parole and probation and sheriff, and our office, and as Rod mentioned that discretion needs to be retained as you use some of these other tools in your tool box around assessment. We do use the LSCMI. The district attorney in Marion County, we are kind of the gatekeepers of the program. We all have a good handshake around that. I see Tom is here. That allows us to keep this program moving forward. What are our outcomes? We did it with leftover stimulus money from the year before. So between July of 12 and 13, we did this kind of on our own. We did 53 individuals. Forty-one succeeded. I think we revoked 12 that year. That process is an ongoing process. This year with these reinvestment dollars we are 46 to date from last July 1. We have revoked four. I think we are going to meet our mark under the contract or the agreement of 60. If you do the math you can see as we tend to succeed with this program, Marion County alone will probably save 120 prison beds in just a two year period. That is kind of the heart of what we are doing right now. It is great to hear from some of the other counties. The regional team of Metro we have been communicated. I think we are going to be getting together again real soon. Craig has been helpful in dedicating Michael to work through some of these different ideas. I think, again, you are going to see some creative entrepreneurial efforts coming out of 3194. Again, thanks for having me here.

1:53:54 Chair Ellis

Thanks for your input. I really appreciate having prosecutors come to a defense meeting. I think 10 years ago that was not the way that one side related to the other, but it has been. Your predecessor, Mike, was a big part of that. Did you want to talk about *Beniot*.

1:54:20 R. Underhill Sure. If I might, Chair, two quick points before moving on to *Beniot* on the 3194. Just things that this group should help us keep an eye on. This notion if we have 100 people, 100 individuals charged with these offenses and let's just say yesterday, round numbers, 50 of them went to prison and 50 did not. If tomorrow 40 go to prison and 60 don't, we are going to have 10 more, who aren't in prison, in the community at a snapshot of time. Right? Some of those people may engage in behavior that brings them back before the court. Some form of an allegation of a violation of probation. We just need to keep an eye on that as it impacts indigent defense. We may see some impact there. Those 10 in my example were not in prison. They were in our local community. If they are doing things right then all 10 are going to be successful.

1:55:32 Chair Ellis But reality is that probably won't happen.

1:55:32 R. Underhill You will see a few. That is just an area to keep an eye on and we will all watch. The other good news piece, and it is still a work in progress, but out of our pot of money that I referred to, \$50,000 has been set aside in a fund for the sometimes occasion when - I will just be kind of literal. Let's say that Lane has a case where he believes his client needs - or I'll pick on Jon. So Jon has a case. He comes to me and he says, "Hey, I have got somebody who could benefit from a psychological examination. Here is what I am seeing. We are working on coming up with a list of mutually agreeable to both sides, state and defense, of an assessment that can be done by Dr. Jones. Dr. Jones would do an assessment on whatever issue it is that we have identified. That report would be shared to the parties. Not for Jon's eyes only unless and until he decides to release that in some other fashion, but release to the parties. Dr. Jones would give that assessment to Jon, to me, and to the court to help us resolve our issue. To help us try to come up with that informed decision. So \$50,000 set aside not to take or replace indigent defense and what is being done right now. But on these occasions we hope it will be used when we can have a meeting of the minds that Dr. Jones can help us all to get to a good place. That might lighten some of the load a little bit. We are going to see how that gets used in this biennium to see whether that is going to be something that we seek next biennium.

1:57:25 N. Cozine Can I ask one question?

1:57:26 Chair Ellis Yes.

1:57:26 N. Cozine So statewide we are seeing a trend that an increase in filings of felony and misdemeanor adult charges. There is this push to really look at the way that we are using prison beds and to divert appropriate people of the prison system and into the probation system. So I am curious about whether or not, as this conversation proceeds, you think it will have any impact on charging incidents at the front end. I realize that is very speculative and we are early in the process, but given county resources, and what I estimate to be an increase in county resources really statewide - I think we are coming out of the recession at the county level - what do you see in terms of charging at the local level in your counties?

1:58:24 R. Underhill I think of the 3194 affected population as - I tried to summarize it. It is a little more detailed than how I summarized it. That is little bit hard to make adjustments to the policy decisions of how to charge a Robbery II, or a Kidnap II. Certainly one could. You could do that. But where we mostly see adjustments of policy, as least in the district attorney's office in Multnomah County, are primarily misdemeanors. Fifteen thousand misdemeanors get issued each year. There is much more ability to have flexibility in that front end with those kind of offenses as opposed to a drive by shooting. A drive by shooting where a house was shot up with a firearm. A little less flexibility, or willingness really. I haven't thought much about that question, Nancy. It is something we will keep an eye on it and see. I only say what I say is to think it is going to be a little harder to make adjustments in the catchment area of 3194 offenders and behaviors than in other areas.

- 1:59:40 C. Lazenby You both mentioned a little bit earlier and I think Rod you said some of your brethren may be rather less enthusiastic than maybe others. Are we going to see that have an impact on our budgets as we go forward in terms of the amount of defense that we have to fund in areas where people aren't being as progressive as you are in this area? Maybe that is more a question for Craig.
- 2:00:17 R. Underhill Good question, Chip. Maybe I can clarify a couple of thoughts. The Oregon District Attorney's Association as an organization, individuals within the organization, and then as an organization supported 3194. That was very significant for us. Now I would be out of school to talk about individual district attorneys, but I can say that it was very well supported amongst the ODAA. I might add the Chief's association and the Sheriff's association joined with us in that support of 3194. There is very serious buy in. What I meant to be talking about with my comments is the controversy of inserting a risks need tool, the LSCMI, into a sentencing conversation. That is a little unique. Not a little unique in Oregon, it is a little unique in the country. That comes with more controversy. I haven't gone around and taken a vote of the 36 of us. I can just tell kind of anecdotally that that is riskier. It comes with controversy and a little bit of let's see how this goes. I am stepping up and willing to be the guinea pig on that. That is what I meant to say. Now to get to the other parts of your question. I think and Walt will say his piece, but here is a desire by the district attorneys. We want to be part of the solution. We see the money at the state conversation. We see the prison conversation. We wanted to robustly get involved and roll up our sleeves and get our working gloves on and help. So that is what we did as far as support of it. Since August 1, when it became effective until today, we have fits and spurts of kind of measurable success. Walt will tell me, "you're not carrying your weight on these drug offenses." I will say, "Yeah. Well look at your robberies." We can have that talk amongst ourselves because we want this to work.
- 2:02:45 W. Beglau I tend to agree. When I look into the 3194 crystal ball, I think we are going to meet the mark. It is going to be achieved through a balance of local culture and infrastructure and that is why you will see different programs. But I think there is generally a positive energy from the district attorneys behind all of this and doing good things at a local level. To answer Nancy's question, I think just generally it is very static statewide in terms of prosecutions and case filings given that resources are generally stable. That said that stability is not present in your timber revenue counties. That is a difficult question to answer where we are going from that. There is one other dynamic that I was going to mention or two. One, case filings you will see went up for me, for example, around substance abuse on heroin. We had so many people dying in Marion County. So we challenged our policy relative to that dynamic to try and rescue those individuals and we actually did. So you will see prosecutors make local adjustments and you will see those isolated policy decisions come forward based on local decision making. The other thing is marijuana. I think marijuana is a wild card. We don't know where we are all going to be in Oregon on that, right? When I look at some of these other counties you might see some going down if it is legalized or whatever. But if we see driving under the influence increase because of more use or other crimes, wherever you land on that could be a dynamic around case filings by prosecutors in Oregon and other states. That is just a thought I had before I came here today.
- 2:04:46 R. Underhill Okay. Now to move over to the *Fuller/Beniot*. So reintroducing Adam Gibbs. Adam has been with the office a number of years. He is the supervisor in charge of our intake division. That is our screening. We issue in Multnomah County of the 20,000 filings per year, right about 15,000 of them are misdemeanor and 5,000 are felonies. So Adam has his finger on the pulse of a lot of what we are talking about. He doesn't issue all 15,000 himself. I am sure it feels like that some days, but he does have a finger on some of the policy adjustments and things that we have done at least. Both before and then kind of subsequently, so he is a good person to help with that.
- 2:05:34 Chair Ellis Adam, welcome.

2:05:34 A. Gibbs

Thank you. Mr. Chair, Commission, please interrupt as you have questions in specifically what you are interested in. I can give you an overview of where we both were before and after *Fuller/Benoit* in terms of the effects on our office. A lot of what we have been looking at in our own analysis of the effect has understandably been on the effects on our operations, which for a number of reasons don't track directly to the effect on indigent defense operations with respect to this policy change. The conversation on this for us really starts in about 2010. At least for Multnomah County we made a policy decision to start charging many cases we formerly charged as misdemeanors as violations. Using our statutory authority to in some cases straight up issue them as violations at the time we screened it, or in other cases to reduce them to violations at the time of first appearance at the arraignment. I don't have exact numbers for you today, but that had a substantial impact on case filings. Not in terms of the number of cases that were filed. We were still issuing the same number of cases that we were before roughly, but many of them were going as violations and, therefore, were not getting appointed counsel and were not requiring our deputy's time to conduct jury trials. They were being tried like traffic tickets in a much more expeditious fashion. That all went along fine and well in terms of our office re-reached equilibrium in terms of the caseload we could manage with that change until June of 2013, when the *Fuller/Benoit* decisions came down granting defendant's - the opinion is somewhat vague, but in many cases the rights to appointed counsel and to jury trials and to proof beyond a reasonable doubt as opposed to a preponderance on these violation cases that we had elected to reduce to violations from cases that began as crimes. This required a substantial reevaluation of our policies. Since these policies to charge all of these cases as violations from the outset had been a labor and cost saving policy decision made in our office to address funding issues and things of that nature, and if we were going to suddenly lose all the benefit of that decision in terms of the effect it was going to have in our office. In fact in our county we did probably three, four, maybe five full jury trials on violations on cases that were pending in the system at the time this decision came down. It was feeling our way around a bit. No one from the court down to defense knew quite what was going on, but we had a few of those trials. It was our sense, both from the input we were getting from the court and, of course, from our own internal policy discussions that was not something that could continue in terms of what we were looking at. We made the policy to effectively stop issuing cases as violations and to stop reducing them to violations at the time of charging. There were some minor exceptions to that in terms of certain city code crimes under the Portland under the Portland City Code and Gresham City Code that we dealt with. But those aren't particularly relevant to policy discussions. They represent a very small portion of cases. What we do instead is we run a community court in Multnomah County that both MDI and Metro staff from the defense side. We resolve a lot of low level misdemeanors through community service or treatment options at an early stage. Defendants agree to go into the court to plea in. Some of them if they successfully complete their obligations will end up with dismissals. Others will end with sentences of discharge after they have completed a treatment obligation, or for some a community service obligation. That had been an option that was available in violation cases as well under our former pre-*Fuller* policies. What we elected to do was to charge what we refer to as *Fuller* cases, these cases that were violations pre-*Fuller* as crimes. At the time of arraignment my deputy, who is in court, will hand a pretrial offer to the defense attorney who is doing the arraignment, indicating that they are eligible for a pretrial offer to plea to a violation as a sort of lesser included offense by stipulation of the criminal charge if they accept the offer to go into community court and resolve the case in an expeditious fashion in that manner. So from our offices perspective, the effect of *Fuller* was fairly negligibly because we still had to review the cases whether or not we were going to issue them as crimes or as violations. We still had to assemble the files. We still had to arraign the defendant. We are finding that a large portion of those defendants understandably, I imagine, are accepting those offers to get violation treatments and go into our community court, as opposed to taking their case to trial as a crime. It is a logical, sensible decision. So we are not seeing in our office a huge impact in our misdemeanor trial until in terms of post-*Fuller* cases that are going across the street. We have two different buildings. They go across the street when they get sent trial out of my

area. What I imagine, as I said in my opening remarks, we don't really track the effects that it might have on indigent defendants. But from what I am observing from the attorneys on the defense side who are assigned to community court, they are being run ragged because suddenly their client base has just exploded. Because those cases that we formerly reduced to violations at arraignment never got attorneys. They were in community court representing themselves almost always. They were told you have got to enter a plea and do some community service and it can get dismissed by the court and no defense attorney is involved. Now they get counsel appointed at arraignment. Often they get arraigned in community court. They get set a date a week out. They have a chance to meet with counsel. They come back and decide if they want to enter community court. So our indigent defense attorneys and I am sure that Keith Rogers or Lane Borg will speak more directly to those issues that their attorneys are facing in those courts. They have to meet with these clients. Have to advise them of the circumstances and the situations as to what to do. They generally, I am expecting, are counselling them to enter community court because of the various options. Most of them are entering community court.

2:12:40 Chair Ellis Once that agreement is made does counsel drop out?

2:12:48 A. Gibbs Well counsel drops out at the time of plea but that doesn't change much. There is always a defense attorney in community court either from Metro or MDI. I suppose the attorney is still representing them through completing their community court obligations. I would expect as a practical matter that there is very little attorney involvement in that. It is an odd program. It is not really a diversionary program. It is of sorts.

2:13:22 Chair Ellis Do you share discovery before the decision is made?

2:13:25 A. Gibbs Yes. We will hand over discovery at the time of arraignment to the public defender that is arraigning them. I will get emails or calls from defense attorneys saying, "You have got to look at this. Something crazy happened on this case." I will look at it. So they are reviewing that and that is certainly something that they have to do. These are often very minimal discovery cases. They are one page police report vandalism cases, or public intoxication type things. Yes, they are getting discovery and have to review that with their clients. Again, to the extent that their clients are taking the time to meet with them.

2:14:06 Chair Ellis Okay.

2:14:08 R. Underhill When the *Fuller/Benoit* cases came down it was almost like a fire alarm. Again, I am exaggerating, but collaborative meetings. It was Lane. Nancy came up no less than a handful of times at least and Keith Rogers and others. As we got together in Judge Frantz's and Judge Waller's courtrooms to begin to walk through this. Adams summary of the impact on the district attorney's office is that lens it comes from. It is accurate to say that in putting all of this together and the adjustments to the policy, I think it was a broad conversation some of which we were just the *Fuller/Benoit* decision in a nutshell just always, requires, appointment of counsel whether they are charged with a violation or a crime at these levels. Our decision to do this versus that is a little bit outside of what is required by the decision. If somebody is charged with a particular offense then they are going to get counsel whatever that charge level is. The other thing that we sometimes see is there is this debate about what is within the *Fuller/Benoit* thinking? Theft II absolutely is, but is offensive littering? There is a difference of opinion about that. Is offensive littering within the *Fuller/Benoit* parameters meaning right to jury trial, right to counsel, right to proof beyond a reasonable doubt, or is it outside of it? There is some grayness there. We don't have perfect clarity on that. The bench, and members within the bench, will make decisions about their interpretation of that and either appoint counsel or not. So there is some grayness of that. Some are crystal clear. Were we able to answer some of the questions at least?

2:16:12 Chair Ellis Yes. Other questions? Well thank you all. That was very helpful. It was good to see you. Okay. Why don't we get our meal and be talking at the same time. We can talk and chew at the same time. The OCDLA Pay Parity Committee. Lane and Lynne?

Agenda Item No. 6 OCDLA Pay Parity Committee

2:18:32 Chair Ellis So Lane and Lynne do you have a batting order?

2:18:40 L. Borg You know what the topic is. I will just introduce it. My name is Lane Borg. Today I am here before you as the president for OCDLA for the next four and one-half weeks. And to some people that is a great relief.

2:18:58 Chair Ellis And who is counting anyway.

2:19:00 L. Borg Some issues came up in that we decided in January, really, I guess it was at the December board meeting that happened in January, to appoint a pay parity committee to address some issues that we saw coming out of the requirements of the POP from the legislation session, and how it had to be implemented and some of the challenges that it presented. I felt, and the board agreed, that this would be the right thing to do is appoint a committee and try to get representation from private practitioners, consortia, and public defenders. We had a union member on that and then also Bend, valley, across the mountains, all over the state. They had the challenge of being geographically diverse and different schedules. They met a number of times and I will let Lynne address that. Lynne was the chair of that committee. They did a hell of a lot of work in a fairly short amount time to gather some important information. With that I will turn it over to the chair of the committee.

2:20:04 L. Dickison I am Lynne Dickison. I have a little law firm in Portland, Dickison Law, but I am part of the Portland Defense Consortium. That is a group of about five different law firms. Jon Martz is president of the Portland Defense Consortium. We have Ron Fishback's group. Andy Kohlmetz's group. Ernie Warren group, Gayle Kvermland, Jon's group and my company. They are a consortium. We are not a public defender office per se; although I think all of our members do about 90 to 95% indigent defense work. We have been contracting with the state for at least 10 to 15 years. I have personally only been a member for about four years. I have worked for other people such as Angel Lopez. I have to first of all give my appreciation to OCDLA for their involvement with the pay parity and their involvement in getting it up and running. There was some, I think, resentment with what happened with the POP last year from people who are not in a public defense organization. That resentment was heard by OCDLA. Therefore they, in the form of John Potter and Lane, floating the idea of getting this pay parity committee together. The pay parity that we were referring to is pay parity between public defense providers. As I said John Potter and Lane floated the idea of pay parity. The pay parity is parity between public defense providers. We had the ideal of parity between public defenders and the district attorney's office but that is an ideal. That is something we will work towards next. The pay parity committee was formed to gain parity between public defense providers. The notion of this committee was put out in late December, early January. Folks put their name in for that. They were selected. We have a number of people who appeared at all of our meetings. We had Eve Oldenkamp. She was a liaison from OCDLA to the pay parity committee. We had Elizabeth Baker, Cathy Berger, Ann Christian, James Comstock, Eric Deitrick from MDI, myself, Doug Engle, Jennifer Nash who is here today as well, Tom Sermak and Jon Weiner. All these folks appeared at least six times over the last four months to get numbers crunched, to get ideas together and figure out what we needed to do to present to OCDLA as a whole. We had some very acrimonious meetings. They were difficult. I am brand new at any of this governmental political stuff. I was probably not the most effective chairperson, but we all muddled through and everybody worked with me. I have to say that I can't thank OPDS enough for the loaning and eventually taking over of Caroline Meyer. She helped us so much with figures and caseloads and what case analysis we should look at and what monies were allocated to each case level. I can't thank Ann Christian

enough. She worked very, very hard with us and she is not even really associated with any of us anymore. She works up in Washington State now. But she was for a long time with OPDS and she was tremendously helpful. John Potter came to every meeting we had. We had our first meeting January 13. We had two in February. We had two in March. The last in April. At the last meeting, and the meeting before that, we had a little subgroup that broke off. Ann Christian working on the numbers with Eric Deitrick and Jon Weiner and they worked separately to devise a pay parity position which we worked together on at our last committee meeting. Then after we had a position statement we forwarded that to OCDLA. That is what was produced at the OCDLA last board meeting. I was on speaker phone through that and there was very minimal discussion. The OCDLA board accepted it in its entirety. We were very, very pleased. I think that position statement correctly states and correctly pulls in the opposition that had developed after the POP and the pay raises through the POP. I think all of the divergent people are together now and behind this position statement and I think the bottom line here aptly represents equal pay for equal work. That is simply what we are trying to get to. So that had been presented to the OCDLA board. They passed it unanimously. We are here today and you have a copy of the position statement.

2:26:08 L. Borg

Thank you. The only thing that I would want to add to that is that one of the things that has come out in the report and I hope you all get a chance to sort of look at it. Obviously there are conclusions and recommendations, but it is really the beginning of a longer conversation about how we move forward and how we look at that. The thing I appreciate about the information that they gathered is the recognition. One, as Commissioner Potter pointed out at the last Commission meeting is the reality is the whole system is underfunded. Whether you are making it work through pushing the limits of caseload capacity, or in the case of private practitioners you are really subsidizing indigent defense by what paying clients would pay you and support that. There is really a lot of information that came out in discussion in this process that I hope the Commission is able to process and talk about and over the next six months or so and really evaluate. One of those is we make a value and I agree with that, but the value that - and Chair Ellis and I have sometimes debated this point at various meetings, but a healthy system has a mix of public defenders and private office - in this case assigned counsel coming together as consortia. What we need to be looking at when we talk about - and we have different definitions of pay parity. For me what I am looking at is what does Lynne take home to live on? What is her salary? I know that is the incorrect term when you are a solo practitioner. What is your take home? What is your living wage? Recognizing that in my office I can probably since I am the largest provider in the state, I can probably work better with the model we have been using of counting cases and things averaging out. Because in 16,000 cases, one case taking a long time is going to be evened out over the sea of cases that I have. I can take efficiencies to an extreme level where I can put 60 caseloads in roughly 36,000 of rented space in two counties. So I can get a lot of efficiencies where I can maximum salaries to people and Keith Rogers can do that. A lot of the public defenders can do that. Smaller offices can't do that. For Lynne to take home the type of pay scale that major felony attorneys are taking, and she should at least be taking home that, is going to mean that she has to take in a lot more income because it is little more economically efficient system. Those are the types of things we need to be looking at going forward. If we want this healthy system of the mix, we have to recognize that however it gets paid for, what she needs to get to have a take home salary comparable to my major felony attorneys is going to be different. People shouldn't be upset about that.

2:29:16 Chair Ellis

You made a phrase in there that I want to understand. Something about economically efficient. Is part of what you are saying in the consortium model you have multiple overhead centers?

2:29:26 L. Borg

Right.

2:29:27 Chair Ellis

I understand the unit rule and why we have consortiums and all of that. Is that what you were referring to?

- 2:29:36 L. Borg For 90 people downtown I have roughly three and half receptionists FTE that can cover all of them. If you had four or five people you are still going to need that one front office person. You are not going to get the level of efficiencies that you need. What I am trying to say is we need to recognize - at least when I say equal pay for equal work, we have got to figure out a way so that at the end of the day the lawyers doing the work, the investigators doing the work, the legal assistants doing work, are able to take home a living wage, or able to take home a fair wage and recognize that the overhead is going to be different. I can get much better efficiencies with the size that I have. But we don't want everybody to be a Metropolitan Public Defender around the state. That has been pretty clear. We are not here to debate that point. I am just saying that we recognize that. The other thing that I hope you read in this report and Lynne is absolutely right. I don't want you to think it was adopted with no conversation because we didn't really pay attention to it. We actually had this on our agenda every board meeting through this year. Lynne, to her credit, appeared either by phone or in person at every one of those board meetings and gave us an update of what was going. So we were tracking and following what had happened. You can see in here that you cannot have a discussion about pay parity without now having a discussion about caseloads. The *Wilbur* and *Mt. Vernon* cases are telling us that we have got to look at what caseloads are and that is why it includes an analysis of if we applied those standards what would the FTE look like in terms of doing the work. So moving forward, I hope that what this starts is a further conversation about pay equity. About recognizing at the end of the day it is getting the workers the money they deserve for the work that they are doing. That is not always going to be the same unit costs for me and that is okay. Also, we have got to address caseloads. If we don't pay attention to that we start balancing it on just upping caseloads and that becomes a problem for us.
- 2:32:02 L. Dickison One of the things that I also think Lane has the advantage of given his organization, he has control of the coverage of many of the specialty groups which the consortia don't do. I do the community court that Mr. Gibbs talked. I do that one afternoon a week. That is part of my contract with PDC. But for the most part, the specialty courts, the Drug Court, Stop Court, Start Court, they are provided by the public defender's office. So they get an additional funding in that aspect than consortia.
- 2:32:41 Chair Ellis I do want to commend the process you have been following. It is so much better than once every biennium high, shrill, argumentative kind of thing. You have been developing information. You have been doing it in a good lawyer like way and that is really helpful.
- 2:33:03 L. Dickison It has certainly opened my eyes. I think all the consortium, at least that I have talked to, appreciate learning. We didn't know a lot before and now we have learned a lot.
- 2:33:18 S. McCrea I have a question and I may be sorry I asked this. Okay, so, I want to commend you too. I know this has been a really long process and a lot of work was put in by everybody. I appreciate it. We all appreciate it. My question is the report recommends equal pay for equal work. But what I think I am hearing you say, Lane, is that it is not going to equate into equal dollars because of differing needs and economic efficiencies.
- 2:33:55 L. Borg Right.
- 2:33:53 S. McCrea Okay. I just wanted to make sure that was what I was understanding.
- 2:33:59 L. Borg I will say as I understand equal pay for equal work, what are the people taking home at the end of the day. That is require transparency and looking at all this stuff and really getting into the weeds of these things to make sure that recognizing there are going be differences because of different inefficiencies and how much your overhead, but I feel that we need to have the goal being that Lynne is a major felony attorney, assigned counsel, there is absolutely no reason why she shouldn't be making at least what my major felony attorneys are making. If

she can make more that is great. But what I am hearing from a lot of the consortia attorneys is now what they are saying is they would like to make what my misdemeanor lawyers are.

2:34:47 Chair Ellis

So, Lane, are you appearing here as head of MPD, or as head of OCDLA?

2:34:55 L. Borg

I appear in front of you as the president of OCDLA presenting the pay parity committee. I guess we have glossed over this a little bit. The effect, and I think the board is somewhat aware of it, the effect on the indigent defense community starting about last year at this time when the budget was approved and then we start hearing about how the POP was mandated was really by the way it was written and by the legislative mandate of that was. It had a divisive effect on the community. I am not saying that was the only thing. There were other issues and discussions that went on. I felt and John felt, and this was about the time of the Benson conference last December, that one of the ways that we needed to address it is rather just say let's meet with you, let's just get a group together that is as diverse as we can get within our community to talk about this and to raise these issues. To gather information and to present a recommendation frankly with the goal saying what we need is a unified voice. OCDLA should be speaking with a unified voice because the issues are not as divergent. There was divergence in how the POP was implemented because of the mandates of the law. That should not be controlling us going forward. We need to find a way to come together and say that this is what we stand for and this is what we are going to lobby for. What I haven't said is that at the last full board meeting I chaired earlier this month, we have now hired and engaged a fiscal lobbyist. This is not that inconsistent on what you are going to hear on a statewide POP. Whatever that ends up being to lobby for that kind of continuity and consistency. Not necessarily consistency all around the state, but at least regionally addressing these issues.

2:36:54 C. Lazenby

That is sort of the question that lurks out there. Having watched this issue for a little bit of time, as you know, about getting adequate resources into the system for compensation for the lawyers that provide these services. I thought that what happened with the POP this last time was a conjunction of some very rare stark alignments. You had a democratic legislature that was open to this. You also had a very interesting presentation from a political standpoint that showed this remarkable disparity between the lowest paid prosecutor and the highest paid public defender. Even the most conservative members of the legislature could look at that and say, "That is just not fair." That is a unique, political, underlining basis on which this ended up occurring. When I look at the recommendations that have come out of here, it is what we have been saying for 30 years. We need more money in the system. Everybody goes down the street and goes into that building and says, "We need more money in our system." So how do we get that unique alignment around the issue of more funds to support consortium lawyers that will resonate in the same way that it resonated this last time which I think was a unique circumstance. Just going and saying we need more money...

2:38:27 L. Dickison

We have an answer

2:38:27 C. Lazenby

I always say answer three lawyers a question and you will get 17 different answers. Go ahead.

2:38:36 L. Dickison

What our focus as a consortia will be it to explain to the legislature that we are small businesses. We support the community that they represent. We employ in our small businesses that vote for them. It is in their best interest to work for us to get us valid and keep us alive. Now we can go in there if we need to and, of course, this will be after cooperation and discussion of the lobbyist, but the consortium can certainly go in there and provide the same information, Mr. Lazenby that was provided last time between the public defender and the district attorney's office. We can do that. Unfortunately, between consortia Measure 11 felony lawyers and public defender misdemeanor lawyers and show the disparity. Right now we are paid less - from the figures that I have seen, I pay myself less than somebody doing misdemeanors in Lane's office. We can show that in a graph if need be. That will be after

we talk with the lobbyist and figure out what is needed. We can certainly do a valid, vivid description as you request.

2:40:01 L. Borg

My answer kind of echo's that. I will now take off my hat as OCDLA president and say as the head of Metropolitan Public Defenders, the graph that we produced for the hearing that became the focal exhibit of everybody's discussion going to up and through the legislature, I do believe that a comparable impact statement like that can be made. Some of the things that I learned through this process is that the Jon Martz's, many of the consortia members that were referenced earlier, are functionally 100% public defender work. But what we have to do then, and I know this is going to be a little bit of a new thing for some of the people in the consortia. If we can get over the notion on the transparency and say open it up. I will give you a quick example. John did this at the last Commission meeting when he talked about his rough numbers on what he had. He talked about X number. I forget exactly what it was, but he said he had \$25,000 in overhead that is his half of the share. I have been in private practice and was for 13 years. I think that is pretty accurate. That is about what it takes to run a small office with a couple of lawyers in Portland in the billing he is in. Then he said he was taking home, I think, about \$50,000 he was able to take home. Well we can look at that and say, "Okay. He is grossing in this much money. "Then we have to look to see if that is what we see from the contracts. I think the case can be made that is at the end of the day if he is taking home \$50,000 and doing major felonies, or primarily major felonies, as 100% of his work that is unfair. That is just as unfair as what I was able to present to the legislature last year where we went over the course of my career and so far behind. It went from about 4% behind the DAs to 41% behind the DAs. I think those graphs can be made. I think the monster of evidence can be made. It will require that consortia open up enough to be able to say, "Hey, this is what is going on in my economics." I think the case can be made that they deserve more money that way.

2:42:21 J. Stevens

Can I ask a question? If I were an eastern Oregon conservative legislator, which I will never be, I would say all well and good, but the idea behind consortia was that these people would get a substantial part of their income not doing working for the state, but doing work on their own. It is not the state's problem if they haven't done that, or if they are not doing that. Again, I don't disagree with you. I think you could make a good argument. It is not the idea behind consortia initially that 90% of their work be done for the state.

2:43:05 L. Borg

I think that is certainly going to be an argument that comes up. I think that the response is the reality is they are doing it. I don't want to just quickly blame the judges. Sometimes I do that. I have not practiced in Deschutes County. I have done a lot of western and northwest corner of the state counties in my private practice.

2:43:26 J. Stevens

Well we are the liberal county.

2:43:27 L. Borg

I talk to my colleagues over there. I think more and more what we are seeing and the pressure on indigent defense attorneys, whether they are assigned counsel or in a public defender office, but the judges kind of feel like they own you. Your docket gets filled up. If they know they can schedule you for this. I don't know if this is being used out there but I know in Multnomah County they have replaced misdemeanor probation with defense attorney supervision. They just keep setting up and continuing over further proceedings. You come back and tell us if the client has done what they are supposed to do. I suspect in other counties you are getting the same kind of process where judges feel that they own you. They set the schedule like they need to set and you are doing it. Whether that is the reality that they are not getting other outside work it is something worth investigating. Why isn't that happening? The reality is they are doing 90% or better.

2:44:30 C. Lazenby

I think that is an important piece to develop as you go forward with the legislative persuasive piece. I listened to what both of you said. I feel like I am gravitating toward being the bad guy on this consortia business. I am really not trying to be. A lot of my friends do consortia.

I listened to you talk about the way you can marshal your resources in terms of having static lawyers who can't do anything else. It is a big organization. It is funded to do that. Then I will have my friends at PDC say, "Well, we are virtually a public defender right now. All we do is criminal defense and it is all court appointed. "I am going to step back from my personal affection for those folks and say, "So why am I paying higher overhead for you, when we are paying lower overhead for people that do this as a matter of course?" From a business standpoint that is the argument. That is what you are going to hear down the street from more conservative business people. "Why are we paying a higher overhead for you when these guys are doing it on a much bigger level and doing it much more efficiently." I haven't heard an answer to that question.

2:45:39 L. Dickison

We are going to have to look into that. I know that although you say they are doing it at a much high level, I know that our consortium covers more Measure 11 cases than they do a year. We do 67% to their 30%. I would have to look at the figures again. We do a lot more heavy duty cases than the public defender's office does. So that is one reason. We carry the weight on our shoulders. The second reason and I am sure this is going back to the first discussion about consortium is that you have to have a built in firm. You have got to have somebody there that can accept any kind of conflict cases or co-defendant cases or whatever. You have to know those people. You have to trust those people. Those people have to be able to try those cases. That is what we provide. We provide the backup.

2:46:30 L. Borg

The other part of it is that is a value that this Commission has adopted - not invented because it was part of the 10 best practices of healthy public defender offices. As I have gotten to know a little bit being involved in trying to form this national organization, National Association for Public Defense, we are not that different than a lot of states. We are actually pretty close percentage wise with Massachusetts in terms of what percentage is provided by institutionalized public defenders versus assigned counsel. We call them "consortium." There they call the "assigned counsel" or "office of assigned counsel." It is roughly 30/60. Then there are private firms that fill in the gap. As I understand it the Commission has adopted that as a value. We want consortia. We want this group as a contrast to public defender offices to have a healthy system. As the head of Metro I want it too. In a healthy system my lawyers can see that as an option for themselves. You know I want to go out in private practice. I want to experience that. That becomes for them to go and it should be a place for them to go. But it really goes back to a value that this Commission has adopted that is consistent with best practices around the country for indigent defense systems.

2:48:00 S. McCrea

I think what Chip is saying is we have to convince the legislature of that. Because the push back that we are going to get from the conservative eastern Oregon legislators, for example, is going to be well if they are de facto public defenders, why doesn't the Commission just change its policy and go mainly to a public defender system. We are not disagreeing with anything you guys are saying. We just have to be prepared to answer that. I am not sure we are there yet. We step up this policy. We can change the policy.

2:48:J. Martz

I can answer that for you. It is real simple. I will just use Multnomah County. The bottom line is Lane has a good organization. They can't do it all. They have conflicts. One of the reasons that we came into existence was to deal with the conflicts. The second thing is when state agencies go looking for outside contractors, okay, they go through a bidding process. Hopefully they want to save a dollar. They also want to get the best bang for their buck. So to kind of paraphrase an old movie, the PDC, we are the pros from Dover. We have an average experience of over 20 years per member. You want our services you have to pay for it. We handle the cases very efficiently. It is kind ...

2:49:26 S. McCrea

You are preaching to the choir here, John. I am not disagreeing with you.

2:49:28 J. Martz

This is the pitch to the legislature. This stuff costs money.

2:49:34 S. McCrea I agree with that.

2:49:35 J. Martz You have been getting away with murder for decades here. You have been getting some of the best legal talent in the state, both in the public defender sector and in the consortium sector and you are not paying for it. It is time to pay the bill. We are not asking for a huge thing. We are not asking to get rich here. It is irrelevant, as far as I am concerned, what somebody makes on the side. When I put on that public defender hat, I need to get compensated. It is just that simple. If you go to the legislature and say we want a state public defender system, they are going to look at all that money going out for PERS and the benefits. No way are they going to fund that. This is the model that we have. This is the model we need to fund. If they keep this up - the other thing we have going is God bless this state. We are not Arkansas. You get to a certain level you have to be qualified at each level you move up. That is what ensures the quality. That is what ensures the justice. That is what keeps the PCR rates. That is what keeps a lot of the appeals low is you get the talent in there. You have to pay for it. If you don't, you are going to drive the experience from the field and you want Arkansas or you want Alabama, fine, say so.

2:51:05 S. McCrea That is the thing. You make good points. I think one that you left out is what we keep talking about here on the Commission which is the graying of the defense bar. That is unless you, legislature, step up and do something now we are going to end up being Arkansas. Nobody is going to be able to do this work because they are not going to be able to afford to. I think that is a really important point. I am not disagreeing with anything that you are saying. This is not my personal opinion. I am just sort of playing devil's advocate because these are issues that are going to come up. Maybe the legislature says, "Okay. Maybe not a state public defender. But maybe we don't want to deal with consortium overhead. So we go to the federal model where we have various panels." In Oregon we are one district but we have three areas, Portland, Eugene, and Medford. So we have a panel of private paid attorneys on an hourly rate for each of those. Then we don't have to deal with those.

2:52:08 J. Martz Pay me \$90 bucks an hour. I am yours.

2:52:14 S. McCrea I am just saying these have got to be things we are focused on. We have to think them through to be able to talk to the legislature.

2:52:25 J. Martz I appreciate your input and the push back. I know, especially Mr. Lazenby, you are coming from a good place. You are pushing us because a lot of us haven't been through this before and we may find ourselves in front of a legislative committee having to answer these kind of questions. I would rather get my trial prep now.

2:52:59 S. McCrea With a friendly audience.

2:52:57 J. Martz Then walk in and just get a face full. We have to think about these things and come up with these answers. I think we can do it.

2:52:58 Chair Ellis There is a question over here.

2:52:58 G. Meyer Very great questions. For those of you who haven't met Angela Wihelm, she is the newly hired fiscal lobbyist for OCDLA. This is her first meeting and she is getting saturated.

2:53:10 C. Lazenby Welcome aboard.

2:53:12 G. Meyer Everybody is right. This is the push back. Why should we have to pay a higher quantum of overhead for the consortia when we can have a lower quantum of overhead for PD.? I am curious to hear Lane say that nationally having a balance business models is considered a best practice in the delivery of these systems. What I want to ask particularly is why that is better versus having multiple, silo public defender offices each of which could handle the conflicts.

- 2:53:47 L. Borg I have seen an analysis of the multiple, silo public defenders. The only one I am aware of off the top of my head is King County. As some of you may know they have a union thing.
- 2:54:07 G. Hazarabedian Actually, California has a county public defender and then the county conflict public defender.
- 2:54:12 L. Borg I wanted to answer Commissioner's McCrea question. At least my experience of being the big office is just opposite. Rural and conservative don't want big state solutions.
- 2:54:32 S. McCrea Whatever example. Whomever.
- 2:54:32 L. Borg What I am saying is I tried to get into Clark County to make a bid on Clark County. It was the local practitioners and the judges that convinced the contract authority not to do it because they didn't want an institutional office. They liked these little offices doing it. They wanted a local feel to that. I think that is why it is important to make the message that these are local businesses in your community that you are supporting.
- 2:55:04 C. Lazenby We have traveled all around the state. I think in those areas where the local lawyers are basically doing a public defense function as consortia and have other businesses going, we were not going to argue about that. The difficulty then becomes to try to make an argument that that is a statewide system that should exist. I think that works most effectively as an outgrowth of local things. The other thing, John, I want to get back to what you said. I probably wish I could turn the tape off but I can't. I appreciate what you said. I agree with what you said about the importance of quality representation, but I think my memory is that the value of adequate public defense services only became a viable political commodity when we drove the system over the cliff and it died in 2003. When it came back they had this enormous amount of cases that had to get processed through the system. So while all those people are gone, while I watch what goes on down the street there is an institutional memory in the legislature that we have to fund it because if we don't something bad happens. That is different from we want quality representation.
- 2:56:29 J. Martz You are correct. We can go that way because the end result is if you keep underfunding it that is what is going to happen. You are not only going to drive the experienced from the field, but you are not going to attract the new. The bottom line is we are constitutionally mandated. You are going to have to deal with this. When you are dealing with the same business model Lynne and Lane are right. The mixed system is the way to go. The public defenders perform a lot of functions that consortiums aren't able to do like the specialty courts. Lane has also put together a public defense library. You can go to online and take a look at. They perform a lot of educational functions for both new lawyers and experienced lawyers and they are very great about sharing thing. The other thing is we still provide a bang for the buck in that the legislature is not paying for an institutional entity. They are not paying us PERS. They are not taking care of our benefits. We take care of that ourselves. So they are still getting a bang for the buck. If they want to go that way we can paint the bleak scenario. If you keep underfunding us it is going to hit the fan. I would rather try and stay positive but there is that negative connotation that if you don't fund this it falls apart.
- 2:58:04 L. Borg Something I would like to say and incorporates some involvement for any PD and some discussions around some interesting things around caseload and really what does *Wilbur* mean as we move forward. As I mentioned earlier you can't have a discussion about pay parity without talking about caseload also. I am struck by some comments that I heard from outsiders. I wish I was the person who offered this and invented it, but we are troubled - we talk about quality and what we offer and what we do and I agree. Just because we lower caseloads and add money doesn't guarantee that we are going to have better quality. We have to face that reality. It is not just if I double the salary of my lawyers and cut their caseloads in half that all of sudden they are going to be smarter, better, more courageous, whatever. But I

think the reverse is true. If you overload cases and you underpay people there is no hope of getting quality. You have no hope of a sustainable system. In reference to Commissioner's McCrea's comment about the panel like that, it would be a question that they would look it. In my opinion that becomes like a pendulum swinging. We don't like the grass is greener over here. Let's go over there. I think a reason why the federal panel has worked so well in this state is in large part due to the stalwartness of Steve Wax insisting that they were going to pay certain amounts and pay certain things and do that. When you look at the panel model in Texas and other states where they are capping amounts on cases. They are arbitrarily coming and saying you can never get more than \$9,000 for a case on those scale of cases that is very limiting. They are getting what they reap. They are getting poor quality.

2:59:55 Chair Ellis Lane, I think the federal panel differs materially from what has emerged in our state system. I think all of the members of that federal panel that I am aware of have a significant private practice. The federal appointments

3:00:14 L. Borg Not all. I would say it is maybe 50/50.

3:00:17 Chair Ellis But what has happened, and we have all watched it emerged, is the consortia members have become - you used the number 95%, a very, very high percentage. I think that is different, at least my understanding of many of those on the federal panel.

3:00:41 L. Borg Thank you.

3:00:45 Chair Ellis Any other questions? Thank you both. Very helpful. A nice segue, Caroline.

Agenda Item No. 7 Regional Stabilization Policy Option Package; Draft

3:00:59 N. Cozine Chair, can I make a few remarks?

3:00:59 Chair Ellis Yes.

3:00:59 N. Cozine I timed these two subjects together, or presentations together, for a specific reason. This Commission just had a discussion about consortia overhead. Certainly in the model that you are going to hear about is what this strives to do is just pay the same case rate in criminal cases. The issue of overhead I think is still a good conversation in this one meeting to have. The discrete coverage of overhead for providers is not something that we tackled in this policy option package and for a variety of reasons. There are still a lot of discussions that need to happen before we can get to that point. We are, however, in our pilot program looking at that as a cost driver for our dependency providers. So as we move into this pilot program we can talk about what we are learning from that kind of caseload approach as compared to case rate approach. The other piece that I wanted to mention is that when we talk about quality it is important, I think, to remember what is happening at the state level in terms of the discussion around prison beds and the cost of prison beds. There was a lot of discussion in 2007 until now about sentence reform, and what we should be doing as a state to drive down the prison population. Where we have landed is this justice reinvestment. I don't think there are any discussions about further sentence reform on the horizon. What that means is that our defender community is really the last line of defense. If we want to really be effective in our justice reinvestment, the defense population has to be doing a very good job. The way that I look at our criminal justice system, you know you have roughly four possible outcomes. You could have a dismissal. You could have probation. You could have jail or prison. The prison inlet use to be relatively small, but as we developed our criminal laws that inlet has become bigger and bigger and bigger. It is very easy for people to fall through into that sentencing category. What is required to prevent that from happening is very effective defense work that digs into not just the facts of the case, but the circumstances of that individual defendant. If our defenders don't have time to do that and to present to the court adequate information, the court is not in a position to properly evaluate really who

belongs in what category. And so, as we have developed data around who is going to prison, who is going to jail and what the impact of the sentences are, for some people extended prison sentences actually increases their chance of recidivism. When we look at the information that is now available to us as a state, we know more about why quality is important. We have legislators who know more about why quality is important. So when we talk with the legislature we really, I think, need to be talking about public defenders because we handle the majority of criminal cases, as the critical filter in that court process between determining who is going to land where. That is not something that has been the focus of the conversation in terms of our communication with the legislature. We haven't had that opportunity. We haven't had that data.

3:04:54 C. Lazenby

When you said public defender people we will think MDI and MPD. I think that if you start talking to the legislature and this is just a guess, I think if you start talking to the legislature about publicly funded defense providers regardless of whether they are in a PD or whether they are in a consortium. So they start viewing that as the function they really are funding within the court system. Maybe we could have an internal conversation that resolves the adequacy of compensation as we do contracts. That might get us to where we are getting more funds coming in to that function. Right now this warfare through the terminology that we use is creating – I think we are eating our young. We really are. That is what I have been kind of arguing for as this issue has come forward. There is a real danger if we don't do it very deftly and with a lot of deliberateness. Maybe we have to start talking about it that way so we capture everybody in that function. I don't know if that was jibber jabber. I thought it was good jibber jabber.

3:06:17 N. Cozine

Yes. I think in all of our written materials we usually say "public defense providers" because we do have a variety of types. There may be a reason to even rethink whether or not we should be using this terminology, or maybe using something else.

3:06:34 Chair Ellis

Okay. Proceed.

3:06:34 C. Meyer

Chair Ellis, members of the Commission. Attachment 4, Item 7, the Regional Stabilization Policy Option Package. You have been hearing about this for quite some time at the last several meetings. This document, Attachment 4, is really a culmination of weeks, actually months worth of workup. It is a little bit simplistic to say that this represents everything that we have done. What we hope to provide is a good summary of what this policy option package entails. Before I get into explaining what we have done in terms of the different items, Angelique Bowers - even though I am the only one on the agenda, she is a huge part of this. It has been a very, very collaborative effort. Several times today you have referred to collaborative efforts and I was just thinking this really is the epitome of collaboration. It is everybody from Nancy, Paul, certainly Angelique and I and the contract analysts. It has been a lot of work behind the scenes and probably a few sleepless nights for Nancy and Angelique. I am going to provide a little bit of information about the different steps. I think because of the lateness of the hour we have lost some of our providers. I think the idea is for us to present what is here, then answer any questions that you have, and then get input. I know the last piece from the parity committee covered some of that. I am going to let Angelique talk to you a little bit about what is at the bottom of this in terms of the policy option summary, before I get into the rest of this.

3:08:25 A. Bowers

We start out talking about target goals for where you would like to see the policy option package. The Executive Branch they are required to stay within 20% of their 13-15 legislatively approved budget for their policy packages. So our agency, your Judicial Branch, does not have to keep to the 20%. So the decision today, I think, is whether there are pieces of this policy package that should go forward, or whether all of it should go forward. The way we have it presented today with everything here, we are at 24% of our 13-15 legislatively approved budget.

- 3:09:03 J. Potter Where does that stand historically in the last few sessions. The 20% policy option package limit. Has that been higher or lower in the last few sessions for our office? It strikes me that it is higher than normal, but that just may be me not understanding what has happened in the past. But a 20% policy option package on top current service level seems pretty decent.
- 3:09:45 A. Bowers Without looking at the actual dollars, I would say that in the past you have probably been under the 20% only because this policy option package is ...
- 3:09:59 J. Potter Is a big one.
- 3:09:59 Chair Ellis Yeah. We have done bite size.
- 3:10:05 C. Meyer So with that in mind we will go through what is here and then answer any questions. Feel free to interrupt me as we go through. The next item is the piece that you have heard a lot about in terms of how do we get rates consistent amongst providers within each county. I know there was discussion and the information presented by the parity committee would really have been statewide rates. If everybody statewide went to the same rate what would it be. We sort of decided early on at least with what we know about regional rates and the different needs in each region that that was a little bit too simplistic. We really need to have rates consistent within the county, so our package certainly is based on that. But then within that county what would it take to get all providers to the same case rates. Keeping in mind that before we could start we had to remove pieces that we already decided from the last session with the funding we received. So it was taking out the 5% S and S. That was already factored in as a line item. We had to then take it out of the rates. So the bottom line didn't change but the rates did decrease slightly. Then we had to take investigation out because not every contractor currently has investigation in their contract. So if we took that investigation piece out of the rates and put it in as a line item that is another adjustment to case rates. So once we had done those two pieces, we could look at what would it take to get everyone the same case rate?
- 3:11:55 Chair Ellis But I assume when you did that you took the highest case rates and moved everybody who was below it up. So if I am a legislator why don't I say, "Why don't you just reduce that high one and then you will get equality."
- 3:12:15 C. Meyer I believe from the parity committee perspective, I believe they didn't do those first two pieces. They just took the highest rate and said what if we bring everybody up there. Interestingly, in the end Angelique and I looked at that and we weren't really too far apart. The end result was actually pretty close, but we really had to do those other pieces. Again, I don't want to get into the weeds too much, but I am happy to tell you more if you want us to.
- 3:12:39 N. Cozine Could I chime in too. In response, the legislature made a decision to give us funding for a policy option package that did allow an increase for our public defender offices.
- 3:12:52 Chair Ellis Correct.
- 3:12:52 N. Cozine This first, this line one, is really what brings the consortia up to those rates. If the legislature were to ask why don't we just bring everyone back down, it would, in essence, be eliminating the POP that
- 3:13:04 Chair Ellis Retreating from what they just did.
- 3:13:04 N. Cozine Exactly. So the line one is really just creating the stable rates that we were given last session for public defender offices to all of our providers.
- 3:13:19 Chair Ellis And it is not just consortia, but also the private firms?

3:13:19 N. Cozine Correct.

3:13:25 C. Meyer All contract providers. Item 2 refers to increasing case rates, but also reducing caseloads. You have certainly heard a lot about that, about crushing caseloads, and we can't just continue to infuse money into the system without looking at that. Providers have been really good about working with us and getting us full time equivalent numbers. It became real clear to us in the middle of this process that we did not have good FTE numbers for our contracts. We needed to have those current and accurate, so providers responded very quickly with those numbers and that was a huge piece of what went into this. Contractors are currently giving us more information about salaries for salaried employees and what we are referring to as "contract funds for non-salaried employees" which is essentially most of the consortia attorneys. Again, this goes back to what Lane and Lynne were talking about. We are really trying to get there. We still have a lot of work to do, but we are really trying to draw a better comparison across providers of how close are folks to the DA's office. So on number two, that amount of money would really get us within about 5% of where the DA is in each of the counties.

3:15:51 Chair Ellis So I thought there were two components in Item 2. The DA disparity and then the national standard caseload disparity, right?

3:15:04 C. Meyer You are right. It is.

3:15:04 N. Cozine It is interesting. As we pulled together the information it became clear to us that we did have some groups where in order to make sure that providers had adequate compensation, caseloads are well above what you would see under the national standards. So in those areas what we would like to do is to make sure that they are able to add attorneys so that they don't suffer.

3:15:33 Chair Ellis It shouldn't be compensation increase for the provider, it ought to be more providers.

3:15:37 N. Cozine Right. We have some providers that are going to fall in that category. What they really need is more lawyers to handle these cases so that they don't have to suffer an economic hit to add lawyers. We hear about how difficult that can be for some providers.

3:15:50 Chair Ellis Wouldn't it be better to break it out between the component that is trying to compare with DAs, and the component that is trying to say we need more money for more lawyers to reduce caseloads?

3:16:03 N. Cozine Well in an ideal world it might be better. I don't think we are there yet. I think we know we have a mix. We are doing our best to communicate with our providers about where they land on that. Most of them already know. But to break it out into that fine of degree is difficult because people make changes mid-contract cycle. Much of it would be kind of the proposal we get in heading into the next contract cycle. We just can't accurately predict that right now. We have other providers who have lots of lawyers. They don't have a caseload problem. They truly have a big compensation problem, especially if their private cases are dipping and they can't sustain themselves. So much of this is a dynamic and fluid situation as charging practices change in individual counties. As consortia groups add or lose lawyers, I think we do a better service to our providers if we actually build in that flexibility and then apply it to the situation that we see when we head into the contract cycle in 2016.

3:17:15 Chair Ellis How confident are we that our calculation of caseload is made on the same basis as these national standards purport to be?

3:17:28 N. Cozine That is a very good question. We have from the Oregon State Bar standards a very old system.

3:17:37 Chair Ellis This is the 2000 report?

3:17:37 N. Cozine This is what is on the Oregon State Bar website. It is a case weighted system that was created in the mid to late 1990s. I think it bears looking at. We would like our public defense advisory group to have a subcommittee to actually look at what Oregon standards ought to be now. That is a big undertaking. National standards, again it is sort of the best we have available now and we are doing our best to work with our providers to get more accurate information so that we can adequately assess that. It is not a direction that we have really gone in the past, at least not to the degree that we are going now. So I think we have a lot left to learn.

3:18:31 Chair Ellis Okay. That is a big number, \$21 million, and I think it lacks granularity. The way it is, it's such a big, single number, but we are trying to address at least two, maybe more, problems within it. I think it will sell a lot better if we break it out and get more detail.

3:19:03 N. Cozine I am pretty confident that it is the two issues. I mean I am confident. It is the two issues. We know it is those two issues. It is the compensation piece and it is the caseload piece. My concern is simply that we truly have existing providers now who will make changes. That is why we had to update our FTE numbers because what was submitted in the proposals was already out of date. So is it just really hard to identify caseload versus pay increase without knowing exactly what the proposal could be. That being said, what we can say is we expect this many felony cases and this many misdemeanor cases. When we look at caseload and that standard is available to us. We figure out the number of lawyers that is required to handle that caseload in each jurisdiction. That's how we get the number, so it is a firm number.

3:19:59 Chair Ellis Is there redundancy between one and two? Let me explain what I am getting at. In one, \$7.3 million dollars goes into the system to increase rates. In two, we are saying we want to increase rates compared to DA. Did we adjust in two on the assumption that we got the money from one? Or is it the same money asked twice?

3:20:31 A. Bowers We did. When we did the calculation we started after we got everyone consistent within the counties and that was our starting place too with the comparison with the DA's office.

3:20:37 N. Cozine I will note that we actually met with our legislative fiscal office analyst before we built this package so that we could address the level of granularity that we wanted. This actually does do this. He wanted the granularity between getting everyone to same rate and then creating the parity. So we were really able to work with him on the granularity piece, but that \$21 million was actually arrived at in a very careful manner in terms of comparing the FTE in a public defender office with...

3:21:22 Chair Ellis To the same experience equivalency in the DA.

3:21:22 N. Cozine Exactly. To literally build the dollar number that would be required to get them up to parity in this next contracting cycle. That number was built into the rates.

3:21:36 Chair Ellis Did you just go salary to salary? Or did you go salary to salary plus benefits? Because a lot of the DAs get quite a lot of benefits.

3:21:36 N. Cozine We are not in a position yet where we can get to the benefits. That is the other thing about this number, it doesn't include benefits. We are really still just striving for salary. I think any attack on this being too big of a number has a pretty quick response that it doesn't even have benefits built in here yet. We would have to have a very big package to actually get to the benefit piece.

3:22:10 Chair Ellis Okay.

3:22:10 Hon. Elizabeth Welch Nancy, on the dependency pilot expansion does that also assume that the reduced caseloads in Item 2 occur.

3:22:23 N. Cozine There is some potential overlap there. We will have to work with LFO. If we were to get package #1, we would be able to reduce some of the requested in package #2.

3:22:45 C. Meyer So No. 3 is just mileage. I think that is self-explanatory. We talked about those counties that really need to be paid extra for mileage so they are not eating up their case rates just traveling to and from the courthouses and visiting their clients. Number 4, contract administration. I know you have heard about that a lot as well. We have very few providers now who actually have a line item for contract administration. I believe consortia do something within existing contract funds to provide for that contract administration. This would actually provide 2% to each non-death penalty contract, trial level contract, for administration in the next contract cycle. Number five looks kind of complicated but it just lines out the different amounts for increased hourly rates. With the exception of death penalty, it is really the same package that was presented last biennium. The same methodology in the target rates. We got very little and we are thankful for what we got, but it was just a very small portion of what was requested.

3:23:57 J. Stevens This is the newspaper editor coming out. Are you talking about raising rates from the existing 98 to a new 125?

3:24:03 C. Meyer Yes.

3:24:03 J. Stevens Can I make a suggestion? Are you allowed to say "to 125 from 98?" It is easier to understand if you put the number you are going to first.

3:24:20 C. Meyer Okay.

3:4:21 J. Stevens This is what I do all day long. You never can misunderstand that.

3:24:35 Angela Wilhelm Can you explain the difference in the case rates increases? I understand No. 1 and 2. How are they different from the increases in five? Are the ones in five not assumed in....you might want to clarify that.

3:25:07 C. Lazenby So if you were to add up everything in five, it is really a subsection of the 21?

3:25:24 Chair Ellis So I tried to see what system you were using and I was unable to. There is no fixed percentage going on here. Different categories have different percentages increased. What was the logic behind that?

3:25:40 C. Meyer With the exception of death penalty, which I don't believe was included in the last biennium, the rest was exactly what we requested last biennium. So I guess the question would be what our methodology was last time.

3:25:58 A. Bowers The way this was calculated I just took a quarter worth of expenditures and we figured out all the hourly rates and how much we have spent on each different rate and then adjusted that.

3:26:15 Chair Ellis I see how you get from 5(a). That is a \$27 increase. I can see how you get to the \$2.5 million, but how did you decide to seek roughly 27% on A, but D it is only \$5 against \$40, which is like 8%.

3:26:48 A. Bowers It is just because of the volume of the expenses that we are seeing at each different hourly type.

3:27:00 N. Cozine I think what you are asking is what is the policy behind more of an increase to death penalty providers. The death penalty providers at the federal level are receiving significantly more than the Oregon providers. It is really the competition. What is driving people out of doing state level work? Where we see the biggest risk is for very experienced death penalty providers who could earn almost twice as much in the federal system at the current \$95 an hour rate. If we want to keep them as Oregon providers it is important that we start making their rates more competitive. At \$125 we are still not really very competitive, but it brings us a lot closer. Their rate in the federal system is not less than \$175. I think it is more but the number is escaping me at the moment. I can have it for you in a moment.

3:27:56 S. McCrea I don't know because I don't do the death stuff. The regular rate is \$126.

3:28:04 J. Potter So these are market driven rates in your estimation. They are not ratios or cost of livings. It is just what you believe the market needs in order to keep people.

3:28:11 N. Cozine Yes. The hourly rate increases that you see last time are the ones we tried for. Excuse me, the other hourly rates other than death penalty are the ones that we tried to get last time and did not. We got a one dollar increase. We are still working on what we already asked for last time. We have those providers working with us.

3:28:35 A. Bowers Nancy the federal rate is \$173.

3:28:37 N. Cozine Thank you. The rate is \$173 for capital defense work.

3:28:45 Chair Ellis What is number six?

3:28:45 C. Meyer Number six is the case management system. One of the things that we heard about in our regional meetings is providers would really appreciate bulk purchasing of a case management system. Right now many different systems are being used. Some are more effective than others. One of the things that we are really looking for is a case management system that can give us the data points that we want going forward. Trial rates for individual lawyers. The kind of data that would help us measure quality assurance, but also a system that allows them to do all the things they need to manage their caseloads. This is what it would cost to provide a license. We are looking at two different systems right now. We haven't settled on one. This wouldn't necessarily impose something on providers. There is a little bit of a gray area in how willing would they be to use this system, but that is what it would cost for licenses for all the FTE attorneys and staff for all of our current contractors.

3:29:47 Chair Ellis And you have cleared this with Cecily?

3:29:52 C. Meyer Yes.

3:29:56 Chair Ellis One would like to think that if we went to a uniform case management system that there would be some savings. Have you tried to quantify those? Is this number net of those?

3:30:11 C. Meyer Currently we are not providing anything for case management. We are not funding case management systems for providers. This would certainly be new money in that respect. Yes we would love for them to see savings.

3:30:26 N. Cozine It is a savings in a sense that if they went out to purchase the product that we are looking at they would be charged a higher price.

3:30:41 Chair Ellis I understand that. We have 100 providers and you don't want a 100 different systems.

3:30:47 N. Cozine But they are going to get a better price. We have already talked to two different providers who are willing to give us a reduced rate for all of our providers interested in having it. That is still more expensive than having nothing.

3:31:03 J. Stevens Can you make the argument that it is valuable to the system and to our office to have everybody on the same plate?

3:31:10 N. Cozine Yes.

3:31:10 J. Stevens Okay.

3:31:10 N. Cozine There are efficiencies that are captured when you have the same case management system. One of them being very simple. If we had a case management system in our office that Cecily knows well and administers, she can then be a technology resource to all of our providers statewide so that they can manage their case management system effectively. The other advantage, of course, is that if we had a system that has good data sharing components and we have configured a system that has all the data points we want, it is very easy for our providers to use the case management to do their day to day work. They don't have to enter something into some separate Excel spreadsheet and then send it to our office. They just generate a report. They upload it. We pull it off. Then we can merge all the data to get accurate figures for the state. That is where there is an incredible advantage. Legislatures do want aggregate data information. We struggle to provide it. Even basic things like FTE.

3:32:20 G. Hazarabedian Mr. Chair, I would suggest that there will be economies larger or smaller for various contract providers. Some of us with the bigger offices have our own databases. If we were to switch to this model we would potentially save a lot of our IT costs that we are now paying programmers and such to keep those databases going. The smaller groups may not have sophisticated databases. I know what the labor is that is involved in extracting all the data to report to the state on a monthly or quarterly or half-yearly basis. So there would be a lot of efficiencies to every type of contractor. The money we are paid by case would be going more toward paying our people rather than toward paying an extra level of technical support. That is one way to look at it.

3:33:10 C. Lazenby Will we be able to use such a system to mine data out of the eCourt system too?

3:33:12 N. Cozine I think if we get data from the eCourt system it would be through a separate data dump that we can then merge with our data and actually create some meaningful outcome based conclusions. But the other piece of this is that we have been talking to the judicial department about being able to do a data push so that our providers aren't having to do double data entry. So you could get things like court dates. You could even get judgments that are actually automatically pushed into our system. They are already working on creating these data pushes, so adding our providers into that mix is a distinct possibility. We are excited about the potential.

3:34:05 Chair Ellis Okay. No. 7.

3:34:03 C. Meyer Seven, again, is pretty self-explanatory. Bar dues and PLF. That is another thing we have heard about from regional meetings. Those would be helpful to have. Those continue to be more expensive and costly. This would provide, again, just based on the FTE numbers that were provided to us, this is the amount it would take.

3:34:21 Chair Ellis Is this for consortia and private firm people only?

3:34:26 C. Meyer It would be everybody. It would be for all contracts including death penalty.

3:34:30 Chair Ellis I assume that public defenders pay their employees bar dues already.

3:34:35 C. Meyer I think most of them likely do. My understanding is we would be providing this. Are you thinking we should not?

3:34:50 Chair Ellis I am just trying to process what we are doing here.

3:34:53 N. Cozine All providers are paying it out of case rates. This came up at all of our regional meetings that the payment of PLF and bar dues and then beyond that, CLE costs are going up for providers. It becomes a harder cost to bear. This does not include CLE money. That was something that we felt was a little beyond our reach this time. This Commission may well decide that that is a component that you don't want to include in the package. I think as Angelique pointed out we are 4% over our target in terms of trying to create a package that is within that 20% range. But we are not tied to the 20% range like the executive branch is. It is a policy decision for this group to decide whether or not there are components of the draft package that should come out. I will say that from the regional meetings certainly line one, two, and three, and then the hourly rate increases would probably be of utmost importance to our providers. You will note that in line two of the regional stabilization package, our eastern providers, for the most part, did not meet the level of need for either caseload reduction or compensation increases. That is only true if they get that mileage cost reimbursement because of the way that visiting their clients eats into what they have available. I would submit to you that thought as you look at these amounts. You may want to hear comments.

3:36:43 Chair Ellis Okay.

3:36:43 C. Meyer The next little piece is for the dependency pilot program. That would just be the cost to expand additional counties. We received funding to provide for two to three counties this biennium. This would be an expansion to that. We are happy to answer any questions that you have.

3:37:05 Hon. Elizabeth Welch Mr. Chair, I have a comment that isn't about this. I read the OCDLA package a few times and I thought it was really good. It wasn't necessarily their charge to themselves, but I think it's a very important element to the success of any of this. Not suggesting that you don't know more about how to deal with our legislature, thank God, than I do. There is an assumption whether it is quality of representation or cost that there are going to be a lot of people that look at all of this and say, "So what. If they don't like what they are getting paid they can go and get another job." Underlying a lot of the discussion is this isn't right. We are going to lose people. We are unable to attract people. This is all kind of captured in little pieces in here. An effort to actually quantify and talk about how do we know that we are not getting people to do this kind of work. How do we know that? How do we even maybe begin to measure it? How many people have left because they couldn't make it? Because otherwise it just kind of sounds like whining rather than saying that this is really happening. There are implications to this. It is sort of the impact of it in the final analysis beyond quality of representation. I know it would be hard and a lot of work. My guess is it might be very fruitful.

3:39:21 Chair Ellis I assume these are biennial numbers? Two years?

3:39:30 N. Cozine Yes.

3:39:30 Chair Ellis Any other thoughts or questions or comments?

3:39:36 J. Potter In listening to this and listening to the pay parity committee for the last six months and listening to the discussion here, there were a couple of items that were raised that the pay parity committee didn't take a look at. We started to answer them and Lane started to answer one of the questions. Jon was asking the question about really the service delivery models

that we have adopted. We have made some conscious choices to adopt service models of public defenders and consortiums and private lawyers. But as the esteemed eastern Oregon conservative said we may well get questions from legislatures that say, "Those are interesting models. But why aren't you doing it this other way." It may be that we want to take a hard look at that. So using Multnomah County, why aren't we having multiple public defender offices then? Why not have four public defender offices rather than two and not do a consortium? We have got to be prepared to answer that question, I believe. I think a legislature would ask it. Why don't we have public defenders in eastern Oregon and we are only using consortiums in certain counties. There are answers that we can give. I am just suggesting that we may want to have a Commission meeting that focuses on the strategic political aspects of whatever we are going to propose in the way of a POP. If I was a legislator and I was looking at this and I didn't know about this industry, I would be asking those questions and I think we have to be prepared.

3:41:17 J. Stevens

I think particularly if I was a legislator and didn't know anything about this, I would be particularly flabbergasted by the idea that public defense providers need \$21.5 million more dollars right now, please, and the total all together was going to be \$45 million dollars. We need to really be able to justify that. That doesn't mean that I think it is a funny number. It isn't, obviously, but we need to be able to explain to people who one, don't know and understand the system and two, many of them don't really care much. They don't come here and do these meetings, and they don't read about it. All they know is that the office is working fine and that everybody seems to go to jail on time. That is really all they care about. You need to explain why they are interested in this. Why they need to be interested in this and why these numbers get them where they will feel better about going home at night.

3:42:27 Chair Ellis

Thank you.

Agenda Item No. 8

OPDS Monthly Report

3:42:33 Chair Ellis

I think our final item is the monthly report. We have done AD.

3:42:46 N. Cozine

At our June meeting we are going to present our final policy option package. In terms of expiration this is really for this Commission to look at what the raw numbers are associated with the requests that we had at the regional meetings. When we actually prepare our budget request we have budget narratives that go into exactly why each component of the policy option package is there. So we will be preparing that. You probably won't see that until closer to September or October. That is when we have historically submitted that to the Commission. But as we move towards June where we present to this Commission final numbers on the policy option package, if there are components that you think ought not to be in there, we should know that now so that what we present to you in June is what you expect to see.

3:43:48 J. Stevens

I think Barnes hinted at the idea that if you take the \$21 million and divide it into its two components you would be better off.

3:44:00 Chair Ellis

I would feel better about that.

3:43:56 J. Stevens

I think it is more sellable as two separate components. If for no other reason you may get part of it instead of none of it. Excuse me. I have a meeting in Bend in three hours. So I am out of here.

3:44:21 Chair Ellis

Good luck.

4:44:24 Hon. Elizabeth
Welch

I agree.

3:44:26 J. Potter Is it feasible?

3:44:32 N. Cozine We can look at it. Again, it will be an estimate based on what we have now.

3:44:48 J. Potter Right. If you qualify with that and we know that going in. Certainly this FTE experience based on RFPs of a year ago and current FTE estimates today, significant changes in lots of contracts. So you might expect that there will be changes in a year from now. At least you would have stated that and we can break the numbers out and I think there is some value in it.

3:45:17 Hon. Elizabeth Welch I am disinclined to say something is a good idea and it is not a good idea in terms of the substance. It is my sense that the regional stabilization package there is a matter of keeping faith with the defense bar and presenting this whole thing. Is that fair?

3:45:37 N. Cozine I think it is fair. I think the defense bar is behind all of these pieces. However, I think that the policy decision of scaling it back to 20% is understandable. If we wanted to scale it back to meet where the executive branch is at we could do that. I suspect that the defense bar would understand that as long as we chose strategically. I think if the Commission directed us to take out consistent case rates we would have a big problem on our hands.

3:46:03 J. Potter But you could take a look at PLF and bar dues. Because part of the argument there is it is an allowable expense today. Contractors are paying for it or not at their own discretion with the funds that they have. That might be one that you could pull out and you would have less push back.

3:46:27 Chair Ellis I also wondered is it really true that all of those items one through seven are part of the regional stabilization? I am looking at the capital contract changes. They all look to me like they are statewide and not regional.

3:46:47 N. Cozine You are right. That piece could very easily be pulled out into a separate, discrete policy option package.

3:46:52 Chair Ellis I think I would. The same on the case management system. That is different in kind than these others.

3:47:14 N. Cozine I actually think of that as regional stabilization because it is part of what providers are feeling...

3:47:11 Chair Ellis Well it might give us the data. But it's a different kind of request.

3:47:25 N. Cozine The thing is, our providers are feeling like they don't have the technology they need in their offices. They don't have the technology support that they need in their offices. So it really does feed into for them creating the kind of stability that they want. Especially as we move into an eCourt environment.

3:47:38 Chair Ellis But it kind of gets away from the theme that we have got some providers, same locality, higher comp. It does seem to be kind of a separate concept.

3:48:04 J. Potter Have you gotten any feedback from contractors? This was sent to contractors. I know I sent it to contractors. It is on websites. Is anybody calling or emailing and commenting on the numbers themselves?

3:48:16 N. Cozine The only responses I have received have been favorable.

3:48:27 J. Nash I have a question. I am Jennifer Nash from Benton County. My understanding is that No. 1, stabilizing case rates within counties, are only for counties that have multiple providers. Is that right?

3:48:40 J. Potter What are you saying Benton County?

3:48:42 J. Nash I'm saying, as you may remember from my presentation at the April meeting that Benton County has the highest cost of living outside of the Portland area, but we are the only provider in the county. And to Item 2, we actually thought that our caseloads were too high, and we added a lawyer this contract but got no additional funds. So we reduced our caseload, but we also reduced our money because we added ourselves a lawyer and basically paid for that out of our own pocket. We didn't get any increase in case money. We were flat this time. We are in a position where we have providers that are anywhere from 70 to 95% public defense providers. So those of us who take more private cases can subsidize our office overhead more and the people who don't, can't. So from our perspective I would like to see maybe one and two combined a little bit differently and broken out a little bit differently so that we are really looking at increasing money, not just within counties where you have multiple providers, but also in counties where they have demonstrated a need for higher case rates like our county.

3:50:12 C. Meyer It does provide funding for every county. So what we did for a county like Benton where there is one provider - any county where we couldn't compare it because there was no PD there, which is the majority of our counties, we looked at DA's salary in a neighboring county that was similar. So we would have looked at DA salary for a county that was similar to Benton. We would have found a county that had a PD. Right now those are the only rates that we have to compare to in terms of the salary. We've got information for PD salaries. That is what we would have done, and the rates would have come up to that. You would be getting an increase in your rates.

3:50:44 J. Nash Based on another county that has a public defender office?

3:50:45 N. Cozine But that would have actually been in line two, right?

3:50:46 J. Nash That's what I'm wondering, if it's line two?

3:50:58 C. Meyer I am sorry. I am combining the two.

3:51:05 N. Cozine Your increase would come in line two.

3:51:11 J. Nash To make things a little more complicated for you in the next month, that perhaps some of those numbers can get teased out a little bit more so it isn't just Lane, Marion, Multnomah County, Josephine County, or counties that have a public defender's office are getting changed. But counties where there really is a demonstrated need based upon data that can be shown about the need in the county for increased case rates.

3:51:44 Hon. Elizabeth Welch But isn't that the first part of two?

3:52:47 N. Cozine That is the first part of two, talking about two again. One of the reasons that - I would love to be able to tease out case rate increases versus caseload decreases, but the challenge is that it is by provider. We couldn't even break that out by county. So in other words, you may have one county with multiple providers and one of them has a caseload problem, the other one has a compensation problem. So truly, it is at the provider level and not at the county level. That is what makes it really impossible for us to split. It depends on who puts in a proposal during the next cycle. We have to have the funding to be able to create the right caseload with the right number of lawyers handling the cases. The best we can really do is to say that this is

how many cases we expect coming into the county. This is what it would cost to fund those cases at the level the DA is funded.

- 3:52:47 J. Potter Is it true, as Jennifer said at one moment in her talk, that this number one only applies to counties that have multiple contracts?
- 3:53:00 N. Cozine Yes.
- 3:53:00 J. Potter So how many counties have just one contractor? We know Benton County does. Malheur County and Klamath County. Clackamas County. How many counties would not be affected by this and should that be our number one priority. If number one only affects a certain number of counties, but number two affects all counties, might it be reversed? Might we want to make number two number one.
- 3:53:30 N. Cozine We can't do it that way. Number one is the precursor to figuring out what it requires to get everybody up to the PD parity rate. We initially had it all as one. But we were asked to split that out by LFO so that they could see what would happen if we brought everybody first up to the PD rates in the counties where they have a PD. Then, secondly, what is it going to cost to get everybody else up there. It was split out at the request of LFO. I think we have limited flexibility there in how we can present that.
- 3:54:08 J. Potter So that is only eight counties that have PDs.
- 3:54:15 Chair Ellis Ten.
- 3:54:15 J. Potter You have 10 PD offices, but you have two in one county. So let's say nine counties that would be affected by number one.
- 3:54:33 N. Cozine We can spell that out. We can put the same footnote in on line one that we put in on line two that specifically talks about which counties that is affecting.
- 3:54:44 Chair Ellis On your question, Nancy, the 20% versus the 24%. I am reluctant not to let the legislature see what full response would be, but I am also reluctant to suggest that we are so different from executive branch that we are not affected. So can we break it out into two columns? Full and then reduced and prorated to conform to the 20%.
- 3:55:20 N. Cozine We will do two recommendations, one at the 20% and one at the full.
- 3:55:28 Chair Ellis Reality is they are probably only going to look at the 20 and not the 24, but I don't want them not to know that 24 is what it would really require.
- 3:55:33 N. Cozine I think we can present both to this Commission. Ultimately, I think this Commission has to decide between one of the two. If you chose the reduced package then we could certainly say to the legislature this is what it would really cost as a demonstration. I think we ultimately have to make a selection for what is going in the budget binder.
- 3:56:00 Chair Ellis Is that enough guidance?
- 3:56:02 N. Cozine I think so.
- 3:56:02 Chair Ellis Be careful what you ask for. Anything more to report on the monthly?
- 3:56:11 N. Cozine We have been meeting every month and giving you updates. If you would like to hold off and hear an update in June, we could absolutely do that.

3:56:23 Chair Ellis

I think I detect consensus. Anything else that anybody wants to bring up for the good of the order? If not, I would entertain a motion to adjourn.

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

Meeting adjourned

Attachment 2

Public Defense Services Commission 2015-17 POLICY OPTION PACKAGE OPTIONS

POP#100 - Consistent Rates & Mileage for Public Defense Contractors

Consistent Case Rates in Each County ¹	\$ 7,386,495
Mileage ²	\$ 161,700
Package Total	\$ 7,548,195

POP#101 - Public Defense Contractor Parity

Increased Case Rates and Reduced Caseloads ³	\$21,574,168
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POP#102 - Contractor Quality Assurance

Compensation for Contract Administration/Quality Assurance	\$ 3,727,040
Case Management System	\$ 898,900
Package Total	\$ 4,625,940

POP#103 - Provider Hourly-Rate Increases

Increased hourly rates ⁴		
a. Capital Contract Attorneys; to \$125 from \$98 per hour	\$2,586,240	
b. Capital Contract Mitigators; to \$70 from \$62	\$ 325,056	
c. Hourly Attorneys, Capital Lead Counsel; to \$95 from \$61 Capital Co-Counsel; to \$70 from \$46	\$1,172,021	
d. Capital Hourly Investigators; to \$45 from \$40	\$ 445,768	
e. Non-Capital Hourly Attorneys; to \$70 from \$46	\$3,675,134	
f. Non-Capital Hourly Investigators; to \$35 from \$29	\$1,357,463	
Package Total		\$ 9,561,682

¹ This funding will give public defense providers consistent rates within each county. All contractors were compared to the public defender in their county. For counties without a public defender, rates were compared to a similarly situated county's public defender rates. The following contract entities did not need rate adjustments: Baker, Gilliam, Grant, Harney, Hood River, Lincoln, Malheur, Sherman, and Wasco.

² Funding for mileage was included for the following regions: Eastern, North Coast, Central, Southern Oregon, and the Willamette Valley.

³ This funding will reduce disparity between public defense provider and district attorney salaries and reduce caseloads that are above Oregon and National standards. Contract entities in the following counties may not have met criteria demonstrating significant need: Baker, Crook, Gilliam, Grant, Harney, Hood River, Lincoln, Malheur, Sherman, Union, Wallowa, and Wasco

⁴ Hourly public defense providers were not included in POP#100 or POP#101, both of which provide increases for only non-capital trial-level contract providers.

POP#104 - Juvenile Dependency Improvement

Clackamas	\$ 1,992,406
Multnomah	\$ 3,654,141
OPDS Program Administration & Quality Assurance	\$ 313,870
Package Total	\$ 5,960,417

POP#105 - Employee Compensation ORS 151.216(1)(e)

Compensation plan changes to bring agency into compliance with ORS 151.216(1)(e)	\$ 1,544,492
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POP#106 - Office Space

Additional space to eliminate office-sharing and use of file rooms and client conference rooms as offices	\$ 448,117
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Total Policy Option Packages		Percent Above LAB
Professional Services Account:	\$48,956,532	21%
Office of Public Defense Services:	\$ 2,306,479	13%

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Case Management Systems - Supplemental Funding	\$ 898,900
Package Total	\$ 4,625,940

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a. Capital Contract Attorneys; to \$125 from \$98 per hour	\$2,586,240	
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f. Non-Capital Hourly Investigators; to \$35 from \$29	\$1,357,463	
Package Total		\$ 9,561,682

¹ This funding ensures consistent case rates for public defense providers within each county and among similarly situated counties. The following contract entities did not need rate adjustments: Baker, Gilliam, Grant, Harney, Hood River, Lincoln, Malheur, Sherman, and Wasco.

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POP#104 - Juvenile Dependency Improvement

Clackamas	\$ 1,992,406
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Package Total	\$ 5,646,547

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Compensation plan changes to bring agency into compliance with ORS 151.216(1)(e)	\$ 1,544,492
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Additional space to eliminate office-sharing and use of file, storage, and client conference rooms as offices	\$ 448,117
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Total Policy Option Packages		Percent Above LAB
Professional Services Account:	\$48,956,532	21%
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Attachment 3



To: Co-Chair Devlin; Co-Chair Buckley

From: Nancy Cozine, Executive Director

Date: January 21, 2014

Re: PDSC Key Performance Measures – Report to the Legislature

Request

Currently, the Public Defense Services Commission has three Key Performance Measures: Commission adherence to best practices of boards and commissions; median days to filing of the opening brief in appellate cases; and customer satisfaction. The agency's Annual Performance Progress Report for Fiscal Year 2012-13 is attached for reference. The Commission requests permission to continue these three measures, with one modification to the appellate KPM. The Commission further requests permission to submit in the agency request budget new KPM proposals that will offer a meaningful measure of trial court representation.

Background

In July 2013, the Oregon Legislature passed the Public Defense Services Commission budget bill, House Bill 5041-A, with a request that the agency “review its KPMs and to report to the Legislative Assembly during the 2014 Session on the outcome of this review and on any proposed revisions to its KPMs that would better measure the effectiveness and efficiency of the agency's programs.”

The Public Defense Services Commission and staff at the Office of Public Defense Services have been diligently examining existing KPMs and exploring possible new KPMs.

Suggested Change to Appellate KPM

The current appellate KPM targets 210 days as the median date following record settlement for filing the opening brief in agency appeals. The time to filing of the opening brief is an important measure, as delays in the appellate process can adversely impact the agency's clients, who are often incarcerated during an appeal, and others involved in the case, and cause injury to the integrity of the criminal appellate process. For several years the criminal appellate attorneys at OPDS have been working toward the goal of filing within 210 days of record settlement, and in 2013 reached the median filing date of 223 days. While the goal of 210 days was not met, OPDS believes that with the elimination of furlough days and filling of positions that were temporarily held vacant in order to meet the 3.5% holdback in 2011-13, it will reach the 210 target in 2014 (this assumes that the agency will not have to again hold vacant positions in order to manage budget reductions). Given the systemic importance of reducing delays, the likelihood of reaching the 210 day target in 2014, and the beneficial effect of having and achieving a landmark

goal, the agency would like to reduce the KPM target to 180 days in order to better serve clients, the judicial system, and the citizens of Oregon.

Trial Level KPM Discussions

The Commission is aware that the existing KPMs do not provide a measure of the quality of representation at the trial court level, and is very interested in adopting a KPM that will provide such a measure. Possible KPM measures explored by OPDS staff and the Commission since July 2013 include:

- Number of hours of attorney training
- Substitutions of attorney
- Peer reviews completed
- Post-conviction relief claims involving public defense providers
- Number of failures to appear
- Continuances in dependency cases
- Number of public defense cases in which the lawyer is present at the client's first appearance in dependency and criminal cases
- Number of delinquency cases in which a lawyer is appointed when the petition is filed
- Length of time between lawyers' appointment and the first client visit
- Frequency of client communication
- Contractor adherence to Best Practices for Oregon Public Defense Providers
- Number of cases per attorney

Challenges

While each of the potential trial level representation measures has some bearing on trial court case outcomes and quality of representation, no one measure is in and of itself indicative of quality services, and at this point, there is no available means of collecting the data necessary for implementation of a statewide measure. Unfortunately, current court and provider data systems are not structured to capture the data necessary to measure suggested performance criteria.

Plans for the Future

Three factors should increase the agency's ability to develop and begin measuring trial court outcomes within the next several months.

First, OPDS is in the process of increasing its ability to collect and analyze data. After a decade without dedicated on-site information technology (IT) expertise, the agency developed a Research and Information Technology Director position, which was filled on January 13, 2014. One of the agency's expectations for the person in this role is development of data sets to support new KPMs. While OPDS uses one case management system for appellate cases, that system has not been significantly updated in many years and must be modified in order to adopt new appellate KPMs. Additionally, contract providers across the state do not use a standard case management system. OPDS began discussions regarding uniformity in data collection during the Public Defense Management Conference in October 2013, and expects to continue working with

providers to support their increased need for electronic case management and data collection. The agency is now exploring available case management systems, and hopes to help public defense providers acquire case management systems that collect standardized information. Additionally, the agency is exploring other ways to effectively collect and analyze relevant data.

Second, full implementation of the Oregon eCourt Case Information (OECI) System could provide the agency with data that is helpful in assessing outcomes in public defense cases. The court's current system, OJIN, does not allow OPDS to sort cases. OJIN statistical reports available on the OJD website include all cases within a particular case type, and it is not possible to separate public defense cases from privately retained cases for meaningful analysis. The new OECI System should have more ways to filter data so that public defense cases can be analyzed separately from cases in which the attorney is privately retained, and with a full time research and IT person on staff, the agency expects to have more capacity to explore possible data sharing and analysis opportunities.

Third, there are efforts at the national level to develop reliable measures of representation at the trial court level. The National Legal Aid and Defender Association established a Research and Data Advisory Committee for the purpose of developing specific measures, and the Office of Public Defense Services is participating in the work of this Committee. The first phase of this grant-funded project will be completed in June 2014, and should yield some helpful information about what data points are necessary to complete specific measures that are indicative of quality representation.

With these pieces currently in progress, the agency intends to dedicate available resources to development of critical foundational structures necessary for data collection and analysis. Once the foundational structures are in place, the agency will be able present to the Legislature new KPMs specifically targeting trial level representation, and expects to have made enough progress toward that goal to have new targets identified for inclusion in the 2015-17 agency request budget.