

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 18, 2015
9:00 a.m. – 12:30 p.m.
Mt. Bachelor Village
Summer Twilight Room
19717 Mount Bachelor Drive
Bend, Oregon, 97702

MEETING AGENDA

- 1. **Action Item:** Approval of minutes - PDSC meeting held on March 19, 2015
(Attachment 1) Chair Ellis
- 2. Representation of Veterans
(Attachment 2) Jess Barton
William Brown
- 3. Parent Child Representation Program Update
(Attachment 3) Amy Miller
- 4. National Trends in Public Defense
Establishing Caseload Standards
(Attachment 4)
Right to Counsel in Delinquency Cases
(Attachment 4A) Paul Levy
- 5. Lane County Courthouse – Planning for a New Building
(Attachment 5) Nancy Cozine
Lane County Practitioners
Commission Members
- 6. Legislative & Budget Update
(Attachment 6) Nancy Cozine
- 7. **Action Item:** Approval of Final Service Delivery Plan for Marion County
(Attachment 7) Commission
- 8. **Action Item:** Approval for Executive Director to secure personal services contracts
(Attachment 8) Nancy Cozine
- 9. December PDSC Meeting Date; proposal to Reschedule to 12/10/15 Chair Ellis

10. OPDS Monthly Report

OPDS Staff

- Management Training
- Criminal Appellate Section Update
- Juvenile Appellate Section Update
- Financial Services Update
- Contract Services Update

Please note: 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 Al'Omrani at (503) 378-3349.

Next meeting: July 30, 2015, 10 a.m. – 2 p.m., at the 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, March 19, 2015
1:00 p.m. – 4:00 p.m.
Oregon Civic Justice Building
790 State Street
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Chip Lazenby
Shaun McCrea
Per Ramfjord
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine
Paul Levy
Amy Miller
Carolyn Meyer
Billy Strehlow
Angelique Bowers
Peter Gartlan
Ernest Lannet
Tyson McLean

The meeting was called to order at 1:00 p.m.

Agenda Item No. 1 Approval of Minutes – PDSC meetings held on January 22 and February 11, 2015

Shaun McCrea moved to approve the minutes; Judge Welch seconded the motion; hearing no objection the motion carried: **VOTE 5-0**

Agenda Item No. 2 Report on Annual Statewide Public Defense Survey

Chair Ellis called the meeting to order and asked Paul Levy to present information regarding the Annual Statewide Public Defense Survey. Mr. Levy indicated that this is the eighth year the survey has been conducted and the survey is sent to judges, district attorneys, and citizen review board coordinators. He indicated that because the survey is now an established practice, the number of respondents has increased and the feedback has improved. Mr. Levy explained that analysts follow-up with respondents, especially when they have comments that are concerning, but that overall satisfaction with public defense services is good.

Agenda Item No. 3 Marion County Service Delivery Review

Nancy Cozine began by reminding Commission members of the testimony provided by stakeholders and providers in Marion County during the last Commission meeting. She indicated that Tom Sermak and John Weiner were in attendance, and available to provide any addition information if the Commission had questions. Ms. Cozine noted that, overall, people are pleased with public defense in Marion County, and that the public defender office has grown and is in the process of further developing its capabilities. She also noted the improvements being made at MCAD. Mr. Sermak and Mr. Weiner were invited to provide information about their respective entities.

Mr. Weiner shared that the MCAD board has now hired him as the Executive Director. He indicated that the number of MCAD attorneys actively taking cases is around 30, and he is working with the group to move toward more specialization in case assignments. Mr. Weiner explained that in Marion County, it is difficult to get a non-Ballot Measure 11 plea offer when a Measure 11 is charged, and that the conviction rate in those cases is much higher in comparison to other counties. He is hopeful that the recently establish CJAC committee will be helpful in addressing this issue.

Chair Ellis asked Mr. Weiner and Mr. Sermak how they felt about the allocation of cases between the two groups. Mr. Weiner and Mr. Sermak both agreed that at this point in time, the balance is working, though Mr. Sermak expressed an interest in taking more cases in the future, and in establishing specialty court positions within the public defender office. Mr. Sermak said that his office cannot increase caseloads and still meet standards for representation, explaining that even simple cases are becoming more complicated and time-consuming. Mr. Sermak described his efforts to create more management positions as the size of his office increases.

Chair Ellis asked Mr. Weiner about training for younger attorneys in the MCAD group. Mr. Weiner replied that there are five such lawyers, and the consortium paid for them to attend the National Criminal Defense College training. They each have a mentor and he tries work with each of them on at least one felony case to give them more exposure before they take those cases on their own. Mr. Weiner also hopes to visit Willamette to recruit recent graduates.

Chair Ellis concluded by saying that things seem to be going well. He suggested that the OPDS analysts have a plan for shifting caseload in the future, and to examine specialty court assignments. He also encouraged MCAD to continue moving toward specialization in the case assignment process.

Agenda Item No. 4 SB 471 – Right to Counsel in Conservatorship and Guardianship proceedings

Amy Miller summarized SB 471, which creates the right to court appointed counsel at state expense under certain conditions in guardianship and conservatorship proceedings. Ms. Miller let the Commission know the bill is now in the Ways and Means Committee. Chair Ellis asked whether the PDSC would be given appropriate funding if the bill were passed. Ms. Miller explained that the agency provided a fiscal impact statement and that the Legislative Fiscal Office and the Legislature would make that determination. After a short discussion, Chair Ellis urged Ms. Miller to watch the bill closely and report any changes to the Commission.

Agenda Item No. 5 Commission Approval of Request for Proposals – Contract Services

Caroline Meyer presented the Request for Proposals (RFP) for contracts beginning in 2016 and requested Commission approval of the document, with leave to make non-substantive

changes if necessary prior to issuing the RFP in early May. She explained each of the four pieces of the document, and provided details about changes made since the last RFP. Chair Ellis asked if the RFP was already on the website. Ms. Cozine responded that it is on the website as part of the meeting materials, and the materials are sent electronically to all existing contractors. Ms. Meyer went on to remind the Commission about their earlier discussion regarding educational requirements, and their consensus that all providers need to demonstrate continuing education related to their public defense work. The last change Ms. Cozine noted was the format of the appendix, which now requires lawyers to disclose caseload and non-public defense work obligations so that the agency can better estimate time dedicated to public defense work. Ms. Meyer made one last comment, noting that the agency would be changing the format of the contract from two columns to a single column.

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

Agenda Item No. 6

PDSC Training: Oregon Government Ethics Law

Paul Levy provided an overview of Oregon government ethics laws related to public officials. He reminded Commission members that he first presented on this topic in December 2010, and has done so annually since then. He noted that though the law hasn't changed since 2010, changes are possible during this legislative session. Mr. Levy summarized some of the proposed changes. He noted that each public official is responsible for determining the extent to which various provisions apply, and that acting in accordance with a formal advisory opinion can help mitigate punishment, but there are no safe harbors. Mr. Levy concluded with a summary of the law related to gifts and conflicts of interest.

Agenda Item No. 7

Budget Update

Nancy Cozine provided a budget update. She expressed gratitude for broad participation and support during the PDSC budget hearings, which were held in front of the legislature on March 10th, 11th and 12th. Among those who presented were Chair Ellis, Chief Justice Balmer, Vice-Chair McCrea, consortium members, Aaron Knott on behalf of Attorney General Rosenblum, the Oregon District Attorneys Association, judges, the Oregon State Bar (by letter) and a CASA representative.

Ms. Cozine noted the changes in the composition of the Public Safety Subcommittee; the co-chairs are now Representative Williamson and Senator Shields, and other members include Representatives Barker, Gorsek, Kreiger, and Whisnant as well as Senators Bates, Shields and Winters. Chair Ellis was pleased with how the budget presentation went and how much support and interest people exhibited.

Agenda Item No. 8

OPDS Monthly Report

Nancy Cozine began the OPDS Monthly Report by saying that when Peter Gartlan retires at the end of March, the entire management team will have management training together – in June.

Mr. Gartlan provided an update regarding work in the appellate division, which included five arguments before the Oregon Supreme Court, and six briefs (after being asked to appear as amicus in one case). He noted that attorney evaluations will be complete by the end of March, and that several attorneys in the office will be presenting at the Oregon State Bar CLE in April. He also noted that the office is hoping to take a juvenile delinquency case sometime soon. Ernest Lannet, incoming Chief Defender for the Criminal Appellate Section, explained his plan to select a new deputy chief defender.

Caroline Meyer introduced Tyson McLean as the new contract analyst, saying that he brings a focus on data analysis. Angelique Bowers ended the update by noting that the financial services unit posted an open accounts payable position and hopes to have it filled by the first part of May.

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

Meeting adjourned

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, March 19, 2015
1:00 p.m. – 4:00 p.m.
Oregon Civic Justice Building
790 State Street
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
Per Ramfjord
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine
Paul Levy
Amy Miller
Carolyn Meyer
Billy Strehlow
Angelique Bowers
Peter Gartlan
Ernest Lannet
Tyson McLean

The meeting was called to order at 1:00 p.m.

Agenda Item No. 1 Approval of Minutes – PDSC meeting held on January 22 and February 11, 2015

0:07 Chair Ellis We will call the meeting to order. The first items are two sets of minutes, January 22 and February 11, 2015. Are there any additions or corrections to the official minutes? If not I will entertain a motion to approve. **MOTION:** Shaun McCrea moved to approve the minutes; Judge Welch seconded the motion; hearing no objection the motion carried: **VOTE 5-0**

Agenda Item No. 2 Report on Annual Statewide Public Defense Survey

0:36 Chair Ellis Paul, the Statewide Public Defense Service.

0:41 P. Levy Alright, thank you. So I was thinking of maybe just finding the recording of the last seven times I've reported on this survey and playing that for you. What you have looks very much like what you have seen before. This is our eighth survey and what you see are the outcomes for the questions where we ask people to rate or rank how the services are being provided statewide. Again, we ask judges, elected DA's, citizen review board coordinators; these are

employees of the Oregon Judicial Department, and the Judicial Department heads. We got pretty average responses to the survey.

- 1:53 Chair Ellis Average in terms of the number of respondents?
- 1:56 P. Levy Number of respondents, in compared to previous years, although, it's generally improved among judges and now there are some ups and downs. I think we get pretty good responses because we have the routine now of following up with respondents who make comments and whom we can identify or make a pretty good guess at and we follow up with them when they have made comments that are concerning. Over all what we are told from what you see here is that there is overall satisfaction with the services and we can see in some areas to the extent that these results are reliable. Just one or two respondents in changing from one category to another in some instances can change the percentages pretty significantly. There has got to be a caveat with this, but there is overall satisfaction. People seem to think that in some areas that we are improving and that caseloads are generally too large or are tending towards being too large. And as with past surveys what are most helpful to us are the comments. I included the death penalty comments in the materials you have and then we have about 200 other comments that come in, in response to various other questions. The questions of 'do you have concerns, do you question the competence of any particular provider' and then the question at the end of the survey, 'just tell us generally about...'
- 3:50 Chair Ellis Is there a backstory to comment 25? It says, 'Other than Metropolitan Public Defenders, the death penalty attorneys are pretty good.' Now that did surprise me.
- 4:04 P. Levy And the reason that we didn't include all 200 comments is because those tend to identify and talk about particular people and there is usually a back story to virtually every comment. I'd say the back story to that comment you will get perhaps later this year when you visit Washington County where you will hear no doubt that MPD is not universally loved in that county by all of the judges. So there, on the other hand there are other comments from judges in Washington County about death penalty cases that say on the survey that you have, and I can identify them for you, that the representation in that county is very good.
- 5:02 Chair Ellis MPD used to not take DP cases but they started three years ago?
- 5:10 P. Levy Oh I think it's longer than that and they handle those cases...
- 5:16 Chair Ellis In both Multnomah and Washington?
- 5:19 P. Levy Well they handle them in both those counties but we will also ask them to handle cases elsewhere as well. Clackamas County I think they have one, or Clatsop County. We're satisfied that they're providing good representation.
- 5:40 Chair Ellis What about the comment about that? 'How many out of town attorneys over work the cases...'
- 5:51 P. Levy Well there is a back story to that one too, and I think that comment is in reaction to a particular case where there was a very aggressive lawyer from out of town, this was a comment from a Lane County judge, rubbed a lot of people the wrong way but evidently not the jurors who returned the verdict of not guilty.
- 6:27 Chair Ellis I was going to say somebody's obstructionist may be someone else's hero...
- 6:34 P. Levy So what we are doing as we have done with past surveys, the analysts, myself, Nancy, and now also Amy Miller, will be meeting and going through all of the comments and deciding which ones need follow up, who will follow up on those, we will be sharing...

6:59 Chair Ellis The follow up goes both to the provider and to the commenter?

7:02 P. Levy Yes, and we do follow up with the providers.

7:07 Chair Ellis And the comments are identifiable, do you know the source?

7:13 P. Levy I, we can sort...we ask people to name them, give them the option to provide the name. So, where they do so, we can identify the name too, the survey responses. We can filter by county and position and in some instances get a pretty good idea who is making the comment.

7:36 Chair Ellis And your overall perception is the level of positive has remained high and consistent over the past few years?

7:46 P. Levy I think it's fair to say that there is overall satisfaction with how services are being provided. There is some reason to think that it is improving in both criminal and juvenile, and there is every reason to think that there are lawyers in virtually every county about whom somebody has a concern. We are trying to deal with those concerns where we can.

8:19 P. Ramford Has the survey itself changed over time? Have you added or deleted questions to it?

8:25 P. Levy It hasn't and I think I need to in part apologize to you because a year ago you suggested that we do change the survey and in light of the fact...(interruption) Was there an upset in one of those brackets? We, you suggested that in light of the fact that the comments seem to be the most useful portion of the survey, that we put more emphasis on receiving those. We could change the instrument, the only thing to be said for continuing it as it is that we can look at past surveys.

9:20 P. Ramford I'm not suggesting that that's not a good idea, but I also thought again that I guess I'm consistent at least. I thought again that the comments were helpful and I also thought, I was wondering whether there is in the overall questions just a simple question of what can be done to improve public defense services in your area. Whether or not there is an emphasis on trying to get comments on that or something like, 'of the following three things what do you think is the most important to improve; quality of public defense services, training, caseload, compensation.' Certain issues are reoccurring and to some extent I think that type of information would be useful for us and for you in trying to figure out where to put the emphasis.

10:18 P. Levy We can certainly, without changing these areas where we want to see if there, we can certainly add more opportunity to comment. The last question that we do ask is meant to capture much of what you're suggesting. 'Provide any comments, concerns or suggestions that you may have about the quality of public defense representation.' It's fairly open ended. We get really good responses to that. I would be somewhat concerned of just sort of offering a 'choose one of these categories' because...

11:00 P. Ramford That may be, but I think sometimes the heavier question says 'what can be done to improve' may generate more of a response than the question that says 'please provide any comments on a broad range of issues.'

11:12 P. Levy I think that's a good point and if I'm here a year from now I hope I'm able to report on that question.

11:22 Chair Ellis Any other comments or questions?

11:24 S. McCrea Paul, does your statement about following up with providers relate to the responses to question number eight which is at page five, 'do you question the competence of any public defense attorneys in your jurisdiction who provide representation in criminal cases.'

11:38 P. Levy Yes. Yes. We follow up with that and then at the end of the survey, that's question number 30, there are provider specific questions and we do follow up with those.

11:53 S. McCrea I know there's probably a back story, and it specifically says yes 'please describe your concerns,' but it's pretty significant when a third of the 36 respondents say, 'Yes.'

12:06 P. Levy It is, and I will only note this, that that percentage has been getting smaller over the survey, but that it's also not, given the number of lawyers out there, the hundreds of lawyers out there, it's not too surprising that there would be lawyers about whom there are concerns. We have a responsibility to act on that where we find out about it.

12:42 S. McCrea Absolutely. It's just that the way the question is phrased, 'question the competence' it's...

12:49 P. Levy Yeah.

12:50 S. McCrea Kay, good. I'm glad you're going to follow up.

12:53 P. Levy Absolutely. Judge Welch...

12:54 J. Welch Made no decision to statistically comment on anything, it's not a subject...(inaudible) My impression here reading this is that the ratings for lawyers in juvenile court looks like it's up. It seemed liked it a bit stronger than in the other categories.

13:17 P. Levy It has, especially from when we first did this survey, and I'm not sure if you can tell that here, it has improved over time.

13:32 J. Welch It's nice to see those changes.

13:36 P. Levy But that said, I think in virtually every county there are real concerns about lawyers providing representation in juvenile cases that we need to work on. And caseloads, we are told in both the comments and on the survey that you see here as well that caseloads are a concern.

Agenda Item No. 3 Marion County Service Delivery Review

14:05 Chair Ellis Okay. Thank you. Nancy do you want to, going to be pointing us on the Marion County Service Delivery Review. Bring us up to where we are and what you need from us and we will see where the discussion goes.

14: 27 N. Cozine Alright. Thank you Chair Ellis, members of the Commission. Nancy Cozine and this is the time for the Commission to discuss the Service Delivery Plan for Marion County. You'll recall at our last meeting we had testimony from stakeholders in Marion County as well our providers in Marion County. Today Tom Sermak and John Weiner are present if you have additional questions for them. As summarized in the report, I think it sounds like everyone in the county is pleased with the direction that the providers have taken in this county. We have a public defender office that has grown and you hopefully read the follow up letter from Mr. Sermak in which he offered additional explanation about the steps he's taking to further develop his office.

15:13 Chair Ellis It's kind of like drinking from a fire hose to read that letter.

15:20 N. Cozine So really the question for the Commission today is, are there recommendations that you would have for these groups as they continue to move forward in the development of their consortium and public defense office and then is there any direction you would want to give to us as we head into contracting for the next cycle.

15:42 Chair Ellis Let me suggest that the kind gentlemen come up, because you guys are the ones that really know the stuff. I didn't mean that [earlier] comment in a disrespectful way. I was just surprised at how much you can compress (inaudible)...

16:07 T. Sermak It didn't occur to me that it might be disrespectful until you said that Mr. Chair.

16:12 Chair Ellis I had a couple of questions since I reread our stuff. Are you permanent yet John, or are you still in the....

16:22 J. Weiner I was made permanent about a week ago. They popped the question.

16:26 T. Sermak Oh congratulations.

16:27 Chair Ellis That's good. I feel good about that. The second question, it's a little unclear to me the size of your group. At one point it said 41, at one point it said 38. Which is...

16:44 J. Weiner It would be probably and couple less than that now. I think I wrote that, if I recall, it was October or something like that. We've had a few attorneys for one reason or another that have left. Really the number of attorneys all together I believe at this point is going to be 34-35, but the number of attorneys actively taking cases on a day to day basis would be fewer than that. So, probably even a few less than that, probably right around 30 I would say. That includes mental health court, drug court, murder cases. There are some of us that take primarily murders and don't do attorney of the day type work, so probably closer to 30 in terms of being actively involved.

17:26 Chair Ellis Is there still a group that are members but really aren't taking cases from the consortium?

17:32 J. Weiner don't take many, they may take what's called an EDP day once in a while. They make take, some people only do murders.

17:44 Chair Ellis Just asking, I'm not prejudging this, but is that healthy for the consortium to have that cluster that are members but not really taking cases?

17:57 J. Weiner Well, I think that having more members in general, all the things being equal, we found to be useful. You don't, I wouldn't say that out of all the 30 members, for instance, I don't think that all of them you would want handling murder cases. So we have probably for our five members that primarily take murder cases. One good example is Walter Todd. Walter Todd...

18:26 Chair Ellis inaudible

18:27 J. Weiner Yeah, and so we're really fortunate. He's not going to take a theft II case, but we're really fortunate he's willing to take murder cases and we have lesser forms of that if you will. Other than that we have some people that the other kind of major group would be people that don't take a lot of cases but it's still good when we need, if I need, they take 30-40 cases a year and we have a day that comes up. It's good because if left to their own devices what will happen is the MCAD attorneys, six or seven of them may want to try to you know, more aggressive and want to eat more than the others if you will. So it's good for to have a safety belt as long as...

19:07 Chair Ellis Okay, so long as you are conscious of it and looking at it to make sure that yes, that continues to be healthy, we have ebbs and flows. Some experienced lawyers that take particularly challenging cases and the like. So the one area that I came away, that I know there is a challenge given that two locations for assignments are made (inaudible). But, it sounds to me that your case assignment tends to be on who's day is it and not so much on the severity of the case and sometimes there are specialized areas like your sex abuse I, where the DA side of the

equation, their assigning people based on experience and special knowledge for what's relevant. And I have the feeling that you're not yet able to do that. You tell me.

- 20:10 J. Weiner Well I wasn't, able at all until about a week ago and now I have a little bit more footing than I had before. The MCAD attorneys are very attached to the idea at being there at arraignment and establishing that relationship at the beginning. That's a great thing but there's a price for that. I think that the attorney of the day system is archaic. I think that there is a better way to do it and that's one of the things that I plan on building that in somewhat into our RFP, to our response, because I think...
- 20:45 Chair Ellis I would encourage you to work on this because MCAD has made such really excellent strides in the last seven years that I don't want to somehow get in the way of that, but I think to go to the next level, this is an area that you should focus on.
- 21:05 J. Weiner I think that, I mean one of the things I'd like to do is have sort of a Ballot Measure 11 team if you will, people who do the major personal felonies and I think that we get, the number of cases we have there's probably four or five full time positions, people that do almost all of that. So I plan on building that in, because I do agree. It is an advantage that the DA has when I go in and I've only done one fifth of my cases of my career might have been drug cases and somebody else has done nothing but that for the last five years, that's an advantage. You know, by the time I get to the officer in the motion to suppress hearing it's done two months ago. That DA had that person saying or doing whatever they needed to do to try to kill my chances, you know. It is really hard, I agree. Specialization is a really good thing and we plan to go in that direction and that probably means moving away from the attorney of the day.
- 22:00 Chair Ellis I don't pretend to have an answer but apparently the data is that the conviction rate in Measure 11 cases in Marion County seems to be high statistically relevant to the rest of the state. Your colleague gave some learned commentary and maybe the data is improving some in the last couple years. Do you have any comment you want to make as to why is this related to charging decision, is it related to something unique in the demographics of Marion County, because they are different?
- 22:39 J. Weiner I don't think that, I wasn't anticipating that we would be discussing this, but I did look before the last meeting at those statistics and what I got, came away was that when we go to bat if you will, when we go to trial in Marion County we do pretty well relative to much of the state. So, it's not that, it's not that we can't try those cases. It's that, I believe, in Marion County if you are charged with a Ballot Measure 11 offense the chances are greater that the District Attorney is not going to move away from that. In other counties I believe there is more of a, and I practiced in many of the counties...
- 23:15 Chair Ellis The charges that comprise non Measure 11...
- 23:20 J. Weiner Yeah, you may start with an assault I and we go down to an assault III or something in another county, but there are some counties, and Marion County is one of them, that's tough and if they're going to charge it, they generally, it's hard to get them to come out of it and I'm hoping that one of the things that we have in Marion County, and I think Tom was a big catalyst in getting us to establish CJAC committee. That's one of the things I think we both are going to be...one of our first assignments for the CJAC committee from Judge Rhoades was to give a list of maybe the three things that we'd like to first see addressed and certainly one of them is that certainly that I think is of concern to the commission that high conviction rate for Ballot Measure 11 is a serious issue and we'd hope to have everybody tackle it and if the District Attorneys at the table which must be at these meetings, hopefully if it is a charging decision thing, we'll be a position to exert some influence on that.
- 24:15 Chair Ellis Kay John, I'm going to ask you a question. Each of you gets to answer it separately and I recognize the thin ice egg shell type of question. There obviously is a limit of what percent of

case load in this county that a public defender can handle because they do have the conflict issue that you don't, but I'd like each of you to comment whether you think the allocation between you is where it should be or whether you think one should go up and another down or vice versa. I know this is not easier (inaudible) but you go ahead.

25:03 J. Weiner

Okay. So, I believe at this point that homeostasis is maybe the best idea. I wouldn't clamor for a greater case share because I think that the PD's office, and you've expressed that you'd like the PD's office to grow some, but I don't know at this juncture that they think they've had a harder time maybe I think last time we talked about this I said that I believe that these two organizations have opposite their two ends, two sides to the same coin. They've got a little too much turnover and we perhaps don't have enough and I think those things are working themselves out and it may come to in two years or four years when it becomes obvious that a realignment of the numbers could make some sense. But I think MCAD, since MCAD is making some big changes right now, from my perspective we need a bit of predictability. I would ask for the opportunity to make some of those changes particularly in the Ballot Measure 11. That's a good place to start with the specialization. So, I think that given the fact that these two organizations have these challenges, it seems like homeostasis right now for at least the next contract period would make some sense.

26:20 Chair Ellis

Tom?

26:23 T. Sermak

I don't, as I've expressed I think every time I've been asked this question by the Commission, I do think that the public defender's office in Marion County should grow at a measured pace over time and as I indicated at last month's meeting I do believe that the next logical step is for the public defender's office to take a dominant role in the specialty courts which we have not done in the past because that is separately contracted for by MCAD as I understand it. That system was working adequately. I think Mr. Phil Swogger has been doing that job for a number of years. I do think that is another logical step. I believe that a natural progression will be to increase the size of this office. My goal during my tenure has been to have a measured increase in size that was both financially supportable and maintain the quality of representation that we pride ourselves on providing. So, I want to grow, I don't want to, and again you've probably heard me say this before too, when you are compensating public defense on a per case basis then the one thing that we don't have a way of taking into consideration at this time is the increased complexity in the cases and they are getting overall more complex. An example, I was before the legislature on behalf of the OPDS budget last week I think it was, I made the point then and I make it here. Even the simple cases are getting more complicated. If you have a robbery III case there's a good chance you are going to review hours and hours of video surveillance video. Sometimes the surveillance camera that's over the self-checkout line at a Wal-Mart proves to be the thing that convinces the jury that your client is in fact not guilty of that theft in the second degree or theft in the third degree. All of this makes it more complex. There is no way to increase that. The way I get more money is by taking on more cases. I can't do that and meet the qualification standards for representation and a reasonable case load. But, and that has been my goal, I want develop my office so that we can increase in efficiency in handling cases so that I can ethically take on more cases per lawyer and that takes time. When you develop the infrastructure that is necessary to support that both in space and in equipment on the budgets that we have, the limited budgets that we have, you have to be cautious. That dove tails quite nicely with my other goal which is to not upset the criminal justice system in Marion County and if MCAD reduces in size...

29:45 Chair Ellis

You did that, that's over with.

29:47 T. Sermak

Yeah, and it was a little rough go there in the beginning. So I think an orderly progression. I do believe though that getting larger is going to be important. I don't want to do it at the expense of MCAD. They have been most accepting of us on a personal level in Marion County but I think it is going to ultimately necessary for...

30:13 Chair Ellis What I don't have a good sense in your, for your agency, is middle management and I did understand it's been for a number, you've done frankly a wonderful job in total including your training younger lawyers coming in and that's a big part of why you've been successful but I haven't, and maybe it's there and I just don't know it, seen a merge a tier of longer tenure experienced lawyers filling in as kind of middle management. Has that happened or?

30:55 T. Sermak It, Mr. Chair, it is happening. That may be my naiveté as an administrator, but it's been my position that an office of our size really can't support middle management. The more time you put into administration you put lower management, you put less time into caseload. I do have a very competent office manager now who has taken over and who has been a great help to me.

31:23 Chair Ellis But not a lawyer?

31:36 T. Sermak She is not a lawyer. We are developing a management structure on the attorney side, the service provision side. I think now we are just big enough to do that. When you've got ten lawyers, or when you've got eight lawyers it's a big job to try to be the only administrator doing that but you really can't justify having somebody supervise four lawyers. At ten we are right at that point where I believe we can and should expand our middle management and we are taking steps to do that. We have a sort of make shift position now that is neither fish nor fowl. I don't have an assistant administrator or assistant director but I do have a lawyer who has undertaken, as I put in my letter, undertaken a lot of managerial responsibilities and administrative responsibilities. I think that's going to expand in the next contract period and beyond but as we grow larger then it becomes, that economy of scale makes it in my opinion rightly or wrongly, at this point it is both necessary and possible to develop middle management to a greater extent than we have in the past.

32:43 Chair Ellis My last question for you John, I was pleased to see this effort to have some of the younger lawyers go to the NCDC. Does that come out of the consortium budget?

32:56 J. Weiner Yes.

32:57 Chair Ellis So, instead of a charge to them personally it's a consortium...

33:00 J. Weiner Yes.

33:01 Chair Ellis Well I think that's a really good approach.

33:05 J. Weiner Thank you.

33:07 Chair Ellis Other questions or comments from commissioners?

33:10 S. McCrea I have a comment. Actually two for you Tom, not to take away from you John. But, number one, your presentation at the legislature last week before the Budget Committee was very effective.

33:20 T. Sermak Thank You.

33:21 S. McCrea Thank You for your efforts in that. Number two, as somebody who has practiced in this county and for some reason I continue to take cases in this county and I'm not sure why, I totally agree with your analysis on Ballot Measure 11 because if I take a case in this county I come in here knowing that I'm going to have to try the case and it causes me to hesitation and I think about It every time because I just cannot deal with these people. They just will not negotiate. I totally agree with you and I am happy to see that maybe Walt is maybe working

on that and maybe there will be some modifications but if I take a case in Marion County I just know I have to go to trial.

34:04 Chair Ellis

(inaudible)

34:06 C. Lazenby

I appreciate you trying to (inaudible) but are you being successful at bringing in newer younger lawyers with Dr. Taylinn (inaudible), are you reaching out to Willamette to try to bring law students in to get them into the business? Are you seeing your average age drop? These are sort of combative questions, yet the same issue.

34:29 J. Weiner

So, what we added five new members, younger attorneys with probably one to four I think years experience in criminal law. So those are the people that we paid for their training. So that was my effort, to answer your question directly, to bring down the average age. The idea is that I'm trying to take, they each have a mentor, and I'm trying to take cases with each on myself, felony cases to co-counsel just to give them more training and more exposure before they finally take felony cases. That part I think we've done a good job and as maturation happens and we have more spots open up I would look to do that and develop more from within instead of just maybe hiring people that can take A felonies now. The other part I think we can try to do a better job with and I would hope to make some progress this year, would be to go to Willamette. Do things like that and get people from the ground up, so that when you graduate from law school that maybe going straight into indigent defense is something that you might think about and that's what I did. I came straight out of law school and went of counsel with somebody into an MCAD I think my first year and then took some cases and Muni court and that's how you do it if you're not going to be in a public defender's office or DA's office but you want to be in indigent defense. That second part I think we can work at.

35:57 Chair Ellis

Were about to end open discussion among commissioners, but before we do that do either of you have something you want to leave us with?

36:11 T. Sermak

No Mr. Chair, I don't. Thank you though.

36:15 J. Weiner

No, we just appreciate the opportunity.

36:16 Chair Ellis

Thank You both.

36:24 Chair Ellis

I have such vivid memories of working for ten-eleven years or so. It is so impressive to see the two agencies, both are healthy, both are I think are providing good quality service. They are relating to each other, they are relating to the broader criminal justice community I think in campaign with them. Let's engage with that...(Inaudible) full time ED so my feeling is this is a very healthy county. On the issue of whether there should be some change in the allocation, I don't think we need to decide that today. I don't think if we go towards change its going to be radical in the near term, but I would ask that the analysts think about it and when you come back to us with the plan, be thinking whether it's the right mix or if there should be some adjustment. Tom raised the question of how specialty courts are being handled. I don't know enough about that to weigh in on it, but Caroline if you could kind of keep that thought in mind. I thought MCAD appears to have reduced some of its and I don't want to say there were bad performers but not as active members, which I think is the right thing for them to do and I did not get a sense, I do think MCAD could well move in the direction of not making just rolodex appointments but trying to get the cases both the complexity and specialty more in the hands of those that are better prepared to handle them. But, I think John has just got in the position and I would certainly give him a year to work on that before it shows up as a criticism. That was sort of my reaction. Anybody else's thoughts on this?

38:58 S. McCrea

I agree with you. Yeah, it's just amazing how far it's come and the changes both internal and external in Marion County public defense.

39:12 Chair Ellis Mr. Lazenby?

39:14 C. Lazenby Chair Ellis?

39:16 Chair Ellis Anything you want to add?

39:18 C. Lazenby No, I agree.

39:19 P. Ramfjord I want to say as somebody who is relatively new to the commission and wasn't involved in the earlier session, reading this report was very gratifying thing to see in terms of the progress that had been made, and overall I would agree that overall the (inaudible) report suggests that public defense services are very healthy in this county and that was a good thing to see.

Agenda Item No. 4 Senate Bill 471 – Right to Court Appointed Counsel in Guardianship and Conservatorship Cases

39:40 Chair Ellis Great. Alright, sufficient? Alright. So then, we go to Senate Bill 471 and Amy do you want to walk us through what is going on there?

40:00 A. Miller Thank you Chair Ellis, Vice Chair McCrea, members of the commission. The purpose of this agenda item is to provide a brief update on Senate Bill 471 which is the bill that would create a right to court appointed counsel under certain conditions at state defense in guardianship and conservatorship proceedings. At the last commission meeting it was at the Multnomah County. There was a discussion that ensued among the members of the commission about this bill and Nancy had indicated that we would keep you informed as to the status of this bill. She asked me to pull together a brief presentation which is included in your materials but there is really no update other than what is in the presentation. The bill has been rotated by the Ways and Means Committee. It's been there, as Judge Welch pointed out, nearly a month and I will be happy to answer questions and will of course provide more information to you if there are any changes.

40:56 Chair Ellis The obvious question I have is if this comes to pass and there is this provision that the court can tell us 'fetch me a lawyer,' what is the budget protection we have that they're not just going to add that to what we already do without significant budget support?

40: 18 A. Miller Chair Ellis, members of the commission. We've been asked to provide a fiscal impact statement and as has the judicial Department regarding this bill. We provided that information. The position from the LFO office at this point is that more fiscal analysis is required and that is as much as I'm aware of. I don't know that there is any guarantee and I do not know what other discussions have been happening.

41:43 Chair Ellis But they'll go through different committees, the substantive bill in one committee and the appropriations through another...

41:48 A. Miller The substantive bill has been heard already on the Senate side so it's going to be referred to ways and means and the financial piece of it will have to be worked up there.

41:46 Chair Ellis Alright, well please, watch this carefully. It's one of those feel good bills that people might say 'yeah that's good' but then forget to fund it and that would be a disaster.

42:19 A. Miller I am doing so and if there is any change I will by all means report back to you.

42:13 Chair Ellis Judge Welch did you want to comment on this?

42:15 J. Welch Nothing to say. Thanks Amy.

Agenda Item No. 5 Commission Approval of Request for Proposals – Contract Services

- 42:23 Chair Ellis Alright, Caroline.
- 42:45 C. Meyer I'm going to talk about the RFP and we sent out a revised document which you probably noticed was at least twice as large as the original. Does anyone need a printed copy?
- 42:55 Chair Ellis I'll contest that is what I noticed. It's not like I really read it in detail to figure out why.
- 43:01 C. Meyer Yes, we all acknowledge that this is sort of the first time, certainly my first time for being sort of in charge of the RFP process, so it has been a little bit of an eye opener. So yes, a much larger document and what we recognized is that we were missing the portion for death penalty mitigators, certainly the application for that and the RFP instructions are somewhat different and then we also were missing the two page application for existing contractors. Many of the forms that attach to both, they're the same for both existing contractors and new contractors that would be fitting. But, the existing contractors which represent the very large majority of the providers that respond to the RFP, we pared that down several years ago and I know the Commission was involved in that. We know we agreed that there wasn't a reason to require the same level of detail. So I'm just going to go through attachment six and again I have printed copies of the newest version if you'd like them. There's four different pieces, I'm actually going to keep a copy just to make sure I've got the right one. There's really four pieces to the RFP. There's just the general information and if you follow along the table of contents it's pretty clear. Part two is the proposal instructions and requirements. Part three is the actual application summary and again both for new and existing contractors. The existing contract application is at the very end of that section. Part four, the last section is the actual model contract terms and these are the model contract terms that were revised slightly in conjunction with testimony here over the last three meetings I believe it was. There is one, in addition to part of the model contract terms, the very last page of the model contract terms, is a one page document entitled 'Specific Terms' and although the document in the RFP is generic it ultimately gets, it mirrors what is in each individual contractor's, you know they have specific provisions that apply to their contract. It may reference a specialty court item in one county but it's essentially that one page that actually refers to the conditions for individual contractors. You won't see...
- 45:38 Chair Ellis Why is this dated next January?
- 45:42 C. Meyer Because that's when the new contracts will start. So we're heading into what we refer to as the RFP contracting cycle which starts with the issuing of the RFP, but the new contracts don't go into effect until January 2016 and then will be in effect through the end of 2017. Just a couple of, in terms of substantive changes, just wanted to call your attention to and certainly something that contractors I think some are aware of, but we have in terms of CLE requirements you may recall that we have a new key performance measure that was discussed a few meetings ago with you all that requires all contractors to have 12 CLE hours annually. Prior to that, what's in the current contract is 16 hours every two years for juvenile contractors and that was adjusted to be 12 credits annually for all contractors both criminal and juvenile. If you have a mixed practice then it's a mixture of that. So, we adjusted the contract, the RFP and the contract language to mirror that requirement. The other thing that we did is we changed question two slightly in the application and I apologize, in the email version I can refer to the page number but unfortunately because the different documents have different page numbers. Question two in the application for existing contractors comes right after, its application page 16 in your materials. Question two was revised to reference section seven of the general terms. You may remember that Paul Levy had spent a considerable amount of time revamping that entire section. It was really the biggest change in the general terms, just to make it more clear what the contractor's obligations under the contract were. So, we revised our question two just to essentially ask, just rephrase that question to reference the new section seven. Essentially we are asking for the same information just worded a little

differently. And then, just a couple of process changes; in 2013 we had two separate response times. We gave death penalty contractors a few extra weeks to respond because, if you may remember we were requiring some additional information from them in terms of letters of reference, considerably longer requirement of information that we were asking for. This time we were asking them just to update that if they haven't already provided those responses and were giving everyone an additional two weeks to respond. So essentially, they have eight weeks to respond to the RFP instead of the previous six weeks. So, we felt like it was reasonable to have everyone respond at the same time.

- 48:52 Chair Ellis Has this been made available to providers, so if they have comments on core (inaudible) or the content, they can make it?
- 49:01 C. Meyer Well I know we have providers in the room and certainly I would hope they would asked to be heard if they have concerns or questions. We didn't send it out separately; I mean they get copies of the commission materials.
- 49:14 Chair Ellis Is it on the website?
- 49:17 C. Meyer We do not yet have it on the website because it's not issued. We would do that once we issue it.
- 49:22 Chair Ellis Once it's issued its sort of official and frozen?
- 49:27 C. Meyer Right.
- 49:29 Chair Ellis You feel you've done enough to be sure if there's...
- 49:32 C. Meyer Well, we've discussed it at the PDAG meeting, certainly time line. Actually the additional two weeks was a result of providers at the PDAG meeting saying it would be nice to have a little bit of extra time. But I believe, and Nancy may add, but I believe we talked, because there are not really any substantive changes I don't know that...feel free to chime in here.
- 49:55 N. Cozine Chair Ellis, members of the Commission. The RFP and the contract are available on the website as part of this meeting's materials. They are not posted yet as a separate document. We do now send all of the commission meeting materials out to every single existing contractor. So, everyone should have had a chance to read it and there may well be comments. I think that the one provision that generated the most commentary during our KPM discussion was the educational requirement and I think there was some discussion among commission members as to whether or not it should be a contract requirement in addition to a KPM or not.
- 50:36 Chair Ellis I think I remember; we did discuss that.
- 50:40 N. Cozine Right, so we put it into the contract and I think the Commission's feeling was that it was rather critical that providers demonstrate that they are getting adequate education in the areas of practice related to their public defense work. Other than that, I don't recall specifically getting any kind of feedback regarding concerns. I do think it would be appropriate to simply ask if there's anyone in the room who wishes to comment.
- 51:08 Chair Ellis We will do that. I will say as a general matter, my current job; I work for an agency that is forever responding to RFPs both through various U.S. Government agencies and European agencies. This is so much more readable than those are that I just wanted you to know. This looks pretty good.
- 51:34 C. Meyer Good, well I certainly can't take credit for that but it's nice to know that it's legible. That's certainly the intent.

51:41 Chair Ellis Do you need a formal approval from us on this?

51:44 C. Meyer We do need, yes. This in an action item, and the only other thing I was going to say about the schedule was just obviously you can see that we have back at the first or second page listed the schedule, issuing on May 1st which is really similar to what we've done in the past, first week of May. I mentioned that we extended the response time and then the analysts will present, you mentioned the statewide contracting plan, we will be presenting that to you in July in the Executive session. And, we recognize that's fairly ambitious because we'll have about a month from the time we get responses back to put our plan together, but we are certain we can do that. Then, we will bring them back to you after having negotiated them at the October meeting for final approval.

52:29 N. Cozine I thought it would also be appropriate. We made one change in the RFP that has not been discussed which is that historically we've asked providers to estimate the amount of time in terms of FTE that they would spend doing public defense work and, at least during my tenure, the questions that I've received from lawyers about that is exactly what is our measure of FTE? If you base it on a 40 hour work week, that's really not realistic for many lawyers. Many lawyers put in more than 40 and so what we were finding was that the estimates that different contractor administrators would put in, there's was just significant inconsistency and if we define it as a 40 hour work week it just doesn't line up well with the different practice...

53:17 Chair Ellis I'm assuming most of the employed lawyers are exempt.

53:21 N. Cozine They are and that's why it's really difficult to line it up to an FTE kind of model. So, we took a different approach this year and we've asked contract administrators to provide us with a breakdown of how many cases will be assigned per lawyer so we can get a better sense of how they will be dividing up the work in their group. Then, we've also asked for disclosure of any other compensated work that members of a group are committed to doing throughout the contract cycle so that we have a sense of how much time people are dedicating to work other than public defense work. This is a shift. It's different than what we've done in past years and it is something that has not yet been thoroughly discussed by this Commission and among contract providers because it is part of the RFP as opposed to part of the contract. I wanted to bring that to your attention because it is a little bit different.

54:14 C. Meyer Can I just make one other point? In terms of approval, the one thing that we would like to have, and I think we've done this in the past, certainly we want the approval on the entire RFP document with the understanding that we may reformat it to fit within, I know Cecily is working on trying to reformat it into single columns. There may be some shifting of page numbers, if we find an ORS that needs to be updated, just so that we'd have the flexibility to do that.

54:37 Chair Ellis The answer is yes from me. Before I let you go I will also announce, is there anyone in the audience that wants to make any comments on attachment 6. Okay, is there a motion to approve, on the recommendations that Caroline has described? **MOTION:** Per Ramfjord moved to approve the second action item, the Request for Proposals (RFP); Shawn McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.** Great, Thank you.

55:12 C. Meyer Thank you.

Agenda Item No. 6 PDSC Training: Oregon Government Ethics Law

55:17 Chair Ellis Alright, moving right along, Paul...

55:22 P. Levy Are you ready to move along?

55:24 Chair Ellis Yes. I am ready to be educated on ethics law...

55:30 P. Levy Well, most of the commissioners do not need to be educated because you've heard from me at least as of December 2010 and I have put in your materials my outline from that presentation without change because there really have been no changes to the Oregon Government Ethics Law since...

56:03 Chair Ellis Now, make it clear. December 2010 was when you first presented us with the law?

56:08 P. Levy Yes.

56:09 Chair Ellis And you've done this with us, I think almost annually since then.

56:12 P. Levy Well, there have been some updates I think. This was sort of the major presentation. I have updated you on other aspects of government law, public meetings law especially. What I have for you today is going to be a more comprehensive presentation that I've done, if I have done something since 2010. The point I want to start with is the law hasn't changed since then. My outline references the publication of the Oregon Government Ethics Commission which is a guide for public officials. It has not changed; it is still on their website since October of 2010. There will likely be some changes as a result of the legislature that is in session now. They're not likely to change much of what I've outlined here. The changes that may come out of this legislature concerns the way the commission is constituted right now. The governor names all of the commissioners on the Oregon Government Ethics Commission. Governor Kate Brown will be proposing or has proposed that some of those positions be appointed by other entities and that would be the biggest change to the Commission. As you probably know the Commission now has to suspend any investigation that it is undertaking if there's a criminal investigation and there is a proposal to change that. The Commission has this process where if it gets a complaint it does an investigation to determine whether it should do an investigation and that first investigation takes quite a long time. There may be some efforts to tighten up the time line and if you go to the Commission's website to try to find either a formal advisory opinion of the Commission or a staff advisory opinion, good luck! I think there will be an effort to make that more useful and accessible. Then there are some other tweaks to the law that are in the works that I may touch on as I go through this outline. To review or to begin, the Oregon Government Ethics Law applies to any person, public official and that includes any person who is serving the State of Oregon and of course it includes volunteers, and you all are serving the State of Oregon and are public officials subject to this law. One of the proposed changes is to make clear that the Governor's partner or spouse *is* a public official. I won't comment on whether the former person in that role was serving the State of Oregon because that is apparently the subject of some dispute. One of the key provisions of the law is that each public official is personally responsible for figuring out what his or her duties are and responsibilities and to adhere to that. This is probably more relevant to employees of a state agency. People from time to time come and ask me whether they can accept a gift or do something and I offer my opinion but I say, my opinion is really of no value here; if I'm wrong there are no safe harbors. And if you were to ask my opinion, I would offer it, you'd still get into trouble likely if you followed why I had to say. There is no cover. The only cover that there is, is that if you ask for a staff advisory opinion and you adhere to that and that opinion is wrong then that's mitigation when it comes to your punishment. If you get and act in accordance with a formal advisory opinion of the Commission and they still find that you did something wrong, they can't impose punishment. So that, I'm sure, is very reassuring to know. As I said, the Oregon Government Ethics Commission is the body that enforces this law through these advisory opinions and investigations and fines and penalties where they find violations. The commission is also responsible for enforcing the lobbying laws and receiving registrations for lobbyists and they're also interestingly responsible for enforcing the Executive Session provisions of the public meetings law. The Attorney Generals' office publishes a very good Public Records Manual but it's the Oregon Government Ethics Commission that enforces the Executive Session provisions. One of the pieces of legislation that's sailing through, at last I saw, this legislature is to actually give the Ethics Commission

rule making authority with respect to the Executive Session provisions. They don't have that now and they want it and it looks like they're going to get it.

- 1:02:43 C. Lazenby (inaudible) all the agencies or just for state agencies?
- 1:02:48 P. Levy It's for all public bodies.
- 1:02:55 Chair Ellis one of the things is that we ought to be mindful of, I can see gifts, while nobody has offered me one...
- 1:03:06 P. Levy Alright. Well, I was going to filibuster until it was time for the party but I will move right along.
- 1:03:11 Chair Ellis That's what I would prefer.
- 1:03:15 P. Levy I will skip the parts that I find absolutely fascinating. But I will share this with you, because it is fascinating; there is an effort to, from the counties, to also give local bodies the authority to say who is and who is not part of the media that can sit in during the Executive Sessions. As you know Mr. Chair from reading the...
- 1:03:44 Chair Ellis I know we always say that, and I keep hoping nobody will stay.
- 1:03:48 P. Levy and nobody does, but apparently...
- 1:03:50 Chair Ellis Does social media...?
- 1:03:51 P. Levy Yeah, so apparently anybody in the county who has a smart phone considers themselves to be part of the media. There is some concern about that, but there's also concern about letting every county commission decide who gets to consider themselves media, so I don't know where that's going. Alright, the provisions of this law that you need to be concerned about; the biggest provision that public employees and other public officials needs to be concerned about is the cornerstone provision which is that a public official cannot benefit by virtue of the position as a public official privately either by financial gain or avoiding some financial detriment in a way that would not be available to that person but for holding the public position; and if that sounded like a mouthful I pretty much just was reading what the provision says. That principle is articulated in our own agency probably most prevalently with a rule that says you can't use government property for personal purposes. You can't use the computers and the phone and you can't run a private business out of your office except for de minimus permissible uses. The heart of the law really are all of the exceptions to that. There are the obvious exceptions; I can receive a salary, you can receive reimbursement for your expenses, you can receive honoraria and awards for your service and the biggest exception to the rule that you can't personally benefit in a way that's not available to anybody else who is not a public official is that you can receive gifts and this is how the law works. You get to receive gifts and the world of gifts is really what this law is concerned about and what makes it a little mind boggling at times. Gifts, there are two, the best way to think of it are there are two types of gifts. There are gifts that are received from persons who have an administrative or legislative interest in your decisions and those gifts you may not receive one of those gifts. Say a contractor here has a very nice watch that they found in a drawer that they swear is worth 49\$. You can receive that, but if its 51\$ you can't. So, you cannot receive from a single source with a legislative interest gifts valued at 50\$ or more. If the person has no legislative or administrative interest in your decisions you can receive unlimited gifts from that source. If the source of the gift has an administrative or legislative interest, not only can you not receive 50\$ or over 50\$, I'm not quite sure remembering which...any case, that person can't offer you a gift greater than 50\$. That's also prohibited by the law. Then, the real heart of this law are all the exceptions to the definition of gifts that apply to persons or entities that do have legislative or administrative interests. So, that's what I have listed here. That's all of the

statutory provisions and accompanying administrative rules concerning when you can and cannot get lodging and travel expenses, meals, entertainment, all of this stuff that may value and usually does value over 50\$. Admission to programs, all of these exceptions to the gift requirement which constitute the biggest section of this law apply to sources who do have administrative or legislative interest.

- 1:09:16 Chair Ellis So, notwithstanding your disclaimer earlier, if any of us had something that raised the question in our mind, a conflict of interest, you would be available to give your opinion granted the time saying this won't protect you, but here's where the statute and this is what I think....
- 1:09:41 P. Levy I would be, yes. I would be happy to offer my opinion and it would be at least, I would at least look at the law again before I gave because it's the kind of thing where you really have to look and carefully.
- 1:10:00 C. Lazenby Now Paul, there used to be, before 2009 I'm assuming (inaudible), there used to be a sort of mini safe harbor provision for public officials if they were acting under the advice of counsel. Now they can show that they have talked to a lawyer, the lawyer had given them a reason opinion that they felt was within (inaudible), you still can be brought in front of the government ethics but the sort of mitigating factors, sort of a mini safe harbor, are you saying that's gone?
- 1:10:30 P. Levy I ask myself that very question the other day when I was preparing for this.
- 1:10:39 C. Lazenby (inaudible) either one of you knew the answer to this.
- 1:10:42 P. Levy I convinced myself that I was thinking of the provisions on Executive Session for which there is that mini safe harbor. I could not find it in the existing law now, but I'd be happy to look again. So, I do want, since I have the sense that the Commission may not find this as fascinating as I do...
- 1:11:10 Chair Ellis We have been just thirstily wanting to get educated so you can check the box where you educated the Commission.
- 1:11:20 P. Levy Well the education is not done.
- 1:11:25 Chair Ellis some of us are (inaudible)
- 1:11:29 P. Levy A couple other things I just want to point out, because yes what are the sections that you really need to know about. The other areas in which you can sort of specially get something that is not available somebody else, if you are alleged to have violated the ethics law you can set up a legal defense fund and I'm sure that's very good news. The other areas that both public employees, commissioners, and others need to worry about are the conflict of interest provisions. The conflict of interest provisions are making this distinction between potential and actual conflicts of interest. Potential are where there could be a conflict, actual there would be a conflict, this is all out of the law and the manual, and the response of employees and others depend on whether there is an actual or potential conflict. For employees you need to put in writing to your supervisor that you have a conflict. For commission members, for potential conflicts, and a potential conflict you simply have to say 'I may have a conflict here' and carry on with business as usual. For actual conflicts, a commissioner with an actual conflict needs to announce the conflict and then refrain from further participation in the item...
- 1:13:19 Chair Ellis Just for the record, Commissioner Lazenby has been very consistent as espoused work for one of our contractors and then that contractors contract comes up, you've been very consistent in both flagging in and recusing it.

- 1:13:37 P. Levy He has been exemplary.
- 1:13:39 S. McCrea That's no safe harbor for you...
- 1:13:40 C. Lazenby And rife with conflicts.
- 1:13:45 P. Levy So, the only inception to participation by conflicted members, and it doesn't really apply to this body, we haven't had it come up, is where you need a certain number of votes in order to take an action on an item.
- 1:14:05 Chair Ellis Alright, well thank you very much Paul. This has been very nice.
- 1:14:10 P. Levy Well I had more, but I, could I just end with some good news? Not that I'm ending. But, so far the legislature has not changed the provisions that might apply to this Commission concerning statements of economic interest. In 2010 they required that the Executive Director file those statements and they are always adding others to that list but thus far have not added commissioners to the list of people who need to file those. Thank you.

Agenda Item No. 7 Budget Update

- 1:14:42 Chair Ellis Nancy, you want to report on the budget?
- 1:15:07 N. Cozine Chair Ellis, Commission members. Our budget hearings were held on March 10th, 11th and 12th and they went very well. They began with an introduction from Chair Ellis and chief justice Balmer. I think that it was a wonderful beginning to three days of very positive testimony. Vice Chair McCrea came and offered her prospective as a Commission member and a practicing attorney. We had consortium members and leaders who testified about the difficulties of running a private consortium that took public defense work and current case rates. We had public defense providers. We also had support from Attorney General Rosenblum, the Oregon District Attorneys Association, judges, the Oregon State Bar and even a CASA representative.
- 1:15:57 Chair Ellis You had two recovered clients who had really compelling stories, I thought that very powerful.
- 1:16:05 N. Cozine We did. We had two clients who came and really, I think the entire room was very moved by their stories and actually quite impressed by who they were and what they had to say and what they'd done to restore their lives. One was actually a foster care child who is now 28 and still very connected with the lawyer who represented her when she was a child which was quite impressive and the other was a father who had really turned his life around and credited his lawyer in the juvenile dependency system as a person who really made it possible for him to be a father to his children. He acknowledged his past mistakes and also explained he didn't know he could do it, and his lawyer in addition to advocating for him really helped him believe in himself. It was quite moving. I think the legislators really appreciated it. The composition of the committee has changed pretty significantly from last session. So, the co-chairs, I think as I had said before, were Representative Williamson and Senator shields. Representative Williamson was not available but Senator Shields did a wonderful job with the committee. His leadership was very positive. We still have Representative Barker who has been a long time very interested in public defense and his daughter has been a prosecuting attorney. We've had very good meetings with him. Representative Gorsek is new to the committee. He is a retired law enforcement officer and he lives in the Troutdale area. He now teaches criminal justice and was quite eloquent during the hearings about his belief that you really do have to put all the system partners on equal footing in order to get positive outcomes, so that was very encouraging. Representative Krieger out of Gold Beach has a significant interest in dependency law and was really also a very great member of the

committee. He had a special moment with Judge Selander who testified in support of our budget and in support of the Parent Child Representation Program and it turns out they've known each other for 40 years. It was really quite a moment.

1:18:30 Chair Ellis

both went along and you could tell this was meaningful to both of them.

1:18:35 N. Cozine

It really was. Representative Whisnant out of Bend was there and he again, just very supportive and Senator Bates from Medford, he has previously been on the Human Services Subcommittee of Ways and Means and so also has a strong interest in the dependency area. Senator Winters who has always been on the committee and again has significant interest and of course Senator Shields, I didn't mention this aspect earlier but he has a significant interest in the dependency area. So, the committee was very engaged and I think that all three days went quite well. I understand that we will likely be asked to come back for what they call 'phase two' so, that will be another opportunity to talk about our policy option packages. At this point in time, we seem to be experiencing a lot of support in the building and I think cautious optimism is sort of the mantra for right now. But, everything seems to be moving along.

1:19:39 Chair Ellis

I want to commend you personally. I thought you stage managed this in a very effective way and I thought there was just a lot of genuine good comments both from the witnesses and from the legislators; quite encouraging.

1:20:00 N. Cozine

Thank you. I felt really fortunate to have so much support both from within our own organization and externally as well. So, thank you.

1:20:12 Chair Ellis

Do you want to move to the Monthly Report? We have a two hour cross examination for Mr. Gartlan.

1:20:23 P. Levy

I am interrupting the program. I just want to make clear that Mr. Lazenby is absolutely correct, we are back on the public Government Ethics Law, under the penalty provisions of the law it said a civil penalty may not be imposed if the violation occurred as the result of the governing body of the public body acting upon advice of the public body's counsel. I do invite you to ask for my advice on this.

1:21:06 N. Cozine

Moving back quickly to budget, I did want to let the Commission know because I remember shared if this had happened in February or not, but that we for this current biennium had a short fall of about 3.5 million dollars and that was a consequence of a few different factors. One was a shortfall in the ACP revenue, that's the Application Contribution Program, that's our other fund account that is funded through application fees and contribution amounts from defendants that the court orders to pay. In the last budget cycle we were getting about 4 million dollars a year total. The majority of it goes to the Judicial Department. A small bit of it comes to us; revenues have just been down. We are only accumulating about 3.5 right now per biennium. So, there needed to be a shift over to some general fund. We had had higher than expected expenditures in death penalty cases and we also had some contract overages that needed to get paid out. So, all told that was about 3.5 million dollars and that was appropriated by the legislature in a bill, and I apologize for forgetting the date but we feel very fortunate that we got that restoration. That will allow us to finish this biennium without any significant hardship, so I wanted to let you know about that.

Agenda Item No. 8

OPDS Monthly Report

1:22:34 Chair Ellis

So, Monthly Report?

1:22:38 N. Cozine

Yes, were getting ready for a major transition, again! We have Mr. Gartlan who will be retiring and we have sped through the agenda so we'll have some time to maybe visit with

him prior to the official reception starting later today. Ernie Lannet has been shadowing Pete and he sat in on all the budget hearings...

- 1:23:01 Chair Ellis that's different than stalking?
- 1:23:03 N. Cozine It is different, thankfully! So, you'll hear from them momentarily. That's all going well. We have management training scheduled actually for the entire management team. It's scheduled out a little bit into June so that we have time to identify the new management team in the appellate division. So that is exciting I think for all of us, and I would like you to have a few updates from others. Two other things I wanted to mention though; we have our June meeting coming up in Bend that is held in conjunction with the annual conference. My understanding is that the resort is already booked so I am working with Laura to figure out whether or not we need to book rooms off site or on site and we will keep you posted on that. Another question for this Commission; I was speaking with someone recently whose on a commission where they use I-pads and it got me thinking. We may actually have an opportunity to have older iPads at a low cost and I am wondering if that is something that this commission would like to start using. It would alleviate the necessity of copying, compiling and copying hardcopy materials and sending them out. It would also allow us to if there is some kind of Power Point presentation or some kind of video presentation that we want to offer to you, you could actually have it loaded on your iPad so that we can do things that are a little bit more dynamic, but I think that it's probably best if we are all on the same page so to speak. I think it would be difficult to have some people paper based and other people electronically because the processes in our office really would be easier to set them up if they are all the same way so I wanted to throw it out there as an option. It is not a necessity but, just a possibility.
- 1:25:10 Chair Ellis So, if you're devoted to your smaller unit [phone] can you get the same materials there?
- 1:25:15 N. Cozine You can, but it would be very hard to read I think.
- 1:25:19 C. Lazenby We'll go blind.
- 1:25:21 N. Cozine You could go blind.
- 1:25:22 P. Ramfjord You know I will say, I am on the Board of Governors, and they distribute their information electronically and certain members use that. But, it is on the website and it is extremely easy to use and extremely very effective way of distributing information. So, I am not sure that commission members need to have iPads or even to do it that way, but I think that even if we just opted in, maybe you want to materials electronically or do you want them you know on paper. Frankly, the volume of the materials for the Board of Governors is also significantly greater. So, it's a really great way to get the materials. So, what I would say is that any move towards doing in that manner would be great as far as I am concerned. I have my iPad; I would use it that way as opposed to reading a piece of paper.
- 1:26:31 N. Cozine Well, another thing we could do is we could set it up as a drop box so that everyone can access it and then it has bookmarks so you can easily move from one piece to the next.
- 1:26:45 P. Ramfjord That's how it works.
- 1:26:46 N. Cozine And it could be one where it is an opt in, where some people prefer to have the paper and other people prefer to access it electronically. I just wanted to have a discussion since we are at that juncture.
- 1:27:02 S. McCrea Well, commissioner Lazenby usually has his iPad and is using it. I have my iPad, but you notice I bring my paper because I like being able to flip back and forth, but you sent us the materials electronically and I save them that way and then shred the paper after the meetings. So, my environmental self says 'yes, we should be doing it electronically.' My lazy selfish

self says 'I'd like to have it on paper.' So, I can maybe retrain. I could certainly start using my iPad.

- 1:27:43 P. Ramfjord Part of the benefit about having it set up the right way is that is very very easy to flip back and forth like from the agenda, to the items, the items to sub-items. I mean if it's done in a drop box way or in this other way, its frankly even easier.
- 1:27:57 N. Cozine Right, and my concern with just putting it, just making it accessible as a PDF is that it makes navigating very difficult and cumbersome where as if its separate attachments or even a bookmarked PDF it's a little bit easier.
- 1:28:11 P. Levy This is bookmarked.
- 1:28:16 Chair Ellis Okay, we'll think about it.
- 1:28:17 N. Cozine Alright. Thank you. With that, Mr. Gartlan.
- 1:28:37 Chair Ellis Historical moment. How many times do you think you've presented?
- 1:28:45 P. Gartlan Fifty.
- 1:28:46 Chair Ellis I thought it was quite a bit more. It's been, we average 9 meetings a year, 10 years, and I think you've presented at most of them.
- 1:28:56 P. Gartlan If I weren't elsewhere, Virgin Islands. Bon Jour Mr. Chair, good day rest of the committee. First item, we had a busy week. Last week we had five arguments in the Oregon Supreme Court.
- 1:29:18 Chair Ellis Really? That's a lot.
- 1:29:20 P. Gartlan Each argument was by a different attorney with different experience levels and we had another case where we were asked to appear as amicus and so we actually had six briefs before the Oregon Supreme Court last week.
- 1:29:40 Chair Ellis Are they clustering their criminal cases or they're just showing more interest in criminal...
- 1:29:49 P. Gartlan I think, I don't know if they're showing more interest. I know there certainly comfortable. There are several justices who practice criminal law so they're comfortable with criminal law. But, I think kind of as a complement to our office, last week was the week where the court went around to the law schools. So, our cases are on the docket before every law school that might have factored into the way the docketed the cases. Also, within the last two weeks the Supreme Court issued an opinion where they asked us to appear as amicus and in the opinion identified our brief which was by somebody with about two years' experience in the office and called it excellent and helpful and ended up the court went the way the brief asked the court to go on every point. Within the office we are also in the process of evaluations. We are just about, I would say about 70% finished. We will be completed by the end of this month. I guarantee you I will be complete by the end of this month. We have several attorneys in our office who will be presenters at our Oregon State Bar presentations in the month of April on criminal law and juvenile law. And finally, a couple of internal changes structurally; we will begin to take juvenile delinquency cases on a limited basis soon. We have just set up a notice of appeal and we are going to be taking in some cases and we've created and identified a team of attorneys that's composed of both from the juvenile section and from the criminal section. So, we will get the benefit of both areas, both backgrounds and we will start to address the juvenile delinquency cases in appeal. I think as Nancy mentioned earlier, there will be some personnel changes and promotions next month and perhaps Ernie would like to talk to that or perhaps not.

1:32:16 Chair Ellis The king is dead, long live the king.

1:32:18 E. Lannet Long live the king. Chair Ellis, members of the commission. It will be my distinct honor to try to fill Pete's rather large shoes when he leaves here. We've had a lot of good time to talk in this transition period and he has given me a lot of good guidance to make that next step. I am very excited, but it will be very bittersweet with Pete's departure. He's been the office, from its founding...

1:32:49 Chair Ellis He has been kind of milking it.

1:32:52 E. Lannet Yeah, I know. I think this is stop three on a ten stop tour or something like that. But, we do hope to have a, with the change in my position there's going to be a vacancy in the management team. We hope to post that internally, try to get a candidate from the ranks of the office and there'll be looking into other personnel changes throughout the month of April. So, we hope to get everything squared away and fill our vacancies hopefully, have things announced in May.

1:33:30 Chair Ellis Well, your position, that you've had held has become a hot bed of job opportunity. Judge Duncan had that position not too long ago.

1:33:42 E. Lannet Right, right. So, I think they'll be some interest in...

1:33:49 Chair Ellis Okay, any other questions for our defenders?

1:33:57 P. Gartlan It's been a pleasure.

1:33:58 Chair Ellis Great, well we'll talk a little bit later. We appreciate how you've managed your own exit and transition; that's a mark of a really great participant and you do that in a gracious and nice way. Thanks.

1:34:16 P. Gartlan Thank you.

1:34:19 Chair Ellis And, we will also do this later but, you've done a really excellent job here for quite a long time. You should feel good. You're leaving with a lot of good behind you.

1:34:36 P. Gartlan Thank you. It's a major change and I have had plenty of help over the years. But, there'll be more speechifying and folderol later.

1:34:49 Chair Ellis And it'll be mixed as you know.

1:35:05 C. Meyer Chair Ellis, members of the Commission. I just wanted to, I am happy actually, to share that we too have filled our vacancy on the contract side. I think last month I mentioned that we were doing a final interview, in fact we had someone in our midst at the last Commission meeting visiting and he's here with us today as a new hire. So, we have Tyson McLean as a new contract analyst with an emphasis on research. He comes to us from the State of Montana; he moved here with his family, he was a statistician for the Montana Board of Crime Control. So, we are very excited...

1:35:35 Chair Ellis does he have a geographic area?

1:35:38 C. Meyer He will not have, unlike the previous position, he will not have counties. He will not have a contract load. His emphasis will be on, he's certainly helping with the case load data review, and certainly moving forward, a research focus dealing with new data that we hope to be getting and I think we are right there in getting more case information from the state wide Odyssey system. So, we are very excited about the potential for that position.

1:36:10 Chair Ellis Angelique, what's up?

1:36:12 A. Bowers Real quickly, in the accounts payable unit, we have a vacancy now. So, that position was posted yesterday and it closes April 8th, so we're hoping to get somebody in the first part of May.

1:36:21 Chair Ellis Good luck.

1:36:23 A. Bowers Thanks.

1:36:26 Chair Ellis Okay, anything else?

1:36:30 N. Cozine I think that concludes the agenda. I have one favor to ask after the meeting of all the commission members, but I think we are done. I apologize that we're ending so early and you know, its sunny Salem.

1:36:43 Chair Ellis You know, we had an option, and we could've had Levy stay up here for another (Inaudible-Laughter)...anything for the good of the order from the audience? If not, I would entertain a motion to adjourn. **MOTION:** Shaun McCrea moved to adjourn the meeting, Per Ramfjord seconded the motion; hearing no objection, the motion carried: **VOTE 5-0**

Meeting adjourned

Caroline Meyer introduced Tyson McLean as the new contract analyst, saying that he brings a focus on data analysis. Angelique Bowers ended the update by noting that the financial services unit posted an open accounts payable position and hopes to have it filled by the first part of May.

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

Meeting adjourned

Attachment 2

MEMORANDUM

TO: Public Defense Services Commission
FROM: Jesse Wm. Barton
William B. Brown, PhD
SUBJECT: Standards & Training for Servicemember-Defendant Cases
DATE: June 9, 2015

In recognition of the fact that Oregon has by far and away the highest known veteran-imprisonment rate in the nation (see attached graph), we respectfully ask the Commission to adopt two policy proposals addressing court-appointed counsel representation of what the federal Department of Veterans Affairs calls “justice-involved veterans,” and what the criminal code would call “servicemember-defendants.”¹ The two policy proposals are:

1. The mandatory adoption by indigent-defense providers of a best-practices model for representing servicemember-defendants.
2. Setting minimum qualification standards for attorneys who would represent indigent servicemember-defendants in felony cases carrying potential sentences of presumptive or mandatory imprisonment.

Our primary motivation for making these proposals is our concern that Oregon having the nation’s highest known rate of veteran imprisonment is a consequence of the state’s “courtroom actors”—judges, prosecutors, and defense lawyers—lacking an understanding of, or appreciation for, the unique factual and legal issues that arise in servicemember-defendant cases.

Given our positions in the criminal-justice system, as a practical matter our influence is limited to the criminal-defense community. It is because of that, and because the vast majority of that community’s client base is indigent, we are taking our proposals to the Commission.

1. Mandatory Adoption of Best-Practices Model.

In 2010 and 2011, OCDLA sponsored or co-sponsored day-long CLEs designed to train criminal-defense lawyers on the rudiments of representing servicemember-defendants. Since May 2012, OCDLA has had a wiki page on its Library of Defense designed to provide criminal-defense lawyers information about the rudiments of representing servicemember-defendants. *See also* Barton, *Home Free: New Performance Standards For Combating Veteran Prosecution &*

¹ Under ORS 135.881(4), “servicemember” means a person who currently is serving in the active-duty military, the reserves, or the National Guard; or a person who previously served (a veteran) and who received an honorable discharge, a general discharge under honorable conditions, or a discharge under other than honorable conditions. It does not include a veteran who received a bad conduct or a dishonorable discharge (either of which requires a courts-martial conviction).

Colloquially, we refer to servicemember-defendants as “veteran-defendants.”

Incarceration, The Oregon Defense Attorney, Nov./Dec. 2014. Nevertheless, anecdotal evidence indicates that a substantial portion of the criminal-defense bar may not have adopted and apply practice standards that meet the requirements of representing servicemember-defendants.

Most significantly, those requirements include the formation of culturally competent multi-disciplinary teams committed to the identification, investigation, and use of defense and mitigation strategies unique to servicemember-defendant cases. These strategies would be based primarily on the effects of training and inexperience in the military culture and total institution,² post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), and moral injury.

To ensure this basic level of representation, what first is needed is a Commission policy requiring indigent-defense providers to adopt and adhere to a best-practices model for representing servicemember-defendants. Adopting and adhering to a best-practices model also would ensure that indigent-defense providers meet Commission-mandated performance standards.³

ORS 151.216(1)(f) authorizes the Commission to

“[a]dopt policies, procedures, standards and guidelines regarding:

“ * * * * *

“(G) Performance for legal representation[.]”

Pursuant to that authority, the Commission has adopted “Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense.” Commission Standard III.5 provides:

“Subject to the provisions of Standard V, the appointing authority shall appoint only those attorneys who:

“ * * * * *

“Have read, understood and agree to observe applicable provisions of the current edition of the Oregon State Bar’s Performance Standards for Counsel in Criminal * * * Cases.”

In 2014, the Board of Governors approved an overhaul of the bar’s performance standards. The overhaul includes a series of standards proposed by the bar’s Military & Veterans Law Section relating to the representation of servicemember-defendants.⁴ As mentioned, under Commission Standard III.5, indigent-defense providers who contract with the PDSC are

² For an example of a successful formation and use of a culturally competent multi-disciplinary team, see Reese, *Beautiful Words: State v. Robert Helmick*, The Oregon Defense Attorney, Sept./Oct. 2011. For further information about culturally competent multi-disciplinary teams, see Brown, *et al.*, *The Perfect Storm: Veterans, Culture & the Criminal Justice System*, 10 Justice Policy Journal (Fall 2013). For further information about the military culture and total institution, see Brief of *Amicus Curiae* The Bunker Project, *State v. James Anthony Harrell*, 353 Or 247, 297 P3d 461 (2013) (SC No. S059513).

³ Because the vast majority of criminal defendants are represented by indigent-defense providers, their observance of this best-practices model eventually could set the criminal-defense community’s standard of care for retained and indigent cases alike.

⁴ Before the overhaul, the only standard that expressly addressed the representation of

contractually obliged to adhere to the bar's performance standards relating to the representation of veterans.

The first of these performance standards is Standard 2.2, whose implementation item 6 states:

“During an initial interview with the client, a lawyer should:

“a. Obtain information concerning:

“ * * * * *

“2) The client's history of service in the military, if any;

“3) The client's physical and mental health, educational and military services records[.]”

A 2013 survey conducted by the Pacific Policy Research Institute (PacPRI), and endorsed by the OCDLA Board of Directors, established the need for this standard. The survey results disclosed that the majority of OCDLA members were not taking steps to identify and confirm which of their clients are servicemembers. Specifically, the PacPRI survey results disclosed that “[j]ust over 43 percent of the defense attorneys who responded to the survey said they ask clients during intake whether they are veterans. Less than half of the respondents said they were familiar with the process of obtaining military records or V.A. [federal Department of Veterans Affairs] records for a veteran client.”

Melody Finnemore, *Basic Training: Military & Veterans Law Section Seeks Better Education, Training & Engagement for Attorneys as Veterans' Demand for Legal Services Grows*, Oregon State Bar Bulletin (Oct. 2013). As previously mentioned, anecdotal evidence indicates that some substantial number of indigent-defense providers still are not taking steps to identify which of their clients are servicemembers.

Next, Standard 8.1, implementation item 1 states:

“In every criminal * * * case, a lawyer should:

“ * * * * *

“b. Be aware of the client's relevant history and circumstances, including prior military service;

“c. Understand and advise the client concerning the availability of * * * diversion agreements (including servicemember status)[.]”

This standard pertains to: (i) Senate Bill 999 (2010), which expanded district attorney diversion authority for a wide variety of crimes involving servicemember-defendants; and (ii) House Bill 2702 (2011), which modified the state's DUII-diversion statutes to include flexibility

servicemember-defendants was one that sought to protect against applications of the federal Lautenberg Act. That act prohibits certain persons convicted of domestic-violence crimes from possessing firearms; falling under it would end a military career. *See Rogers, Unintended Consequences*, Oregon State Bar Bulletin, July 2006. The current standards replicate the pre-overhaul protections. For example, implementation item 4 of Standard 1.2 states: “Lawyers should * * * be familiar with other non-penal consequences of a criminal conviction * * *, such as those affecting * * * opportunities for military service[.]” *See also* Standard 6.1 (implementation item 9); Standard 8.1 (implementation item 2).

so military service would not interfere with servicemember participation in DUII diversion programs.

Standard 8.1's implementation item 4 states:

“In advocating for the least restrictive or burdensome sentence or disposition for a client, a lawyer should:

“ * * * * *

“c. Obtain from the client and others information such as the client's * * * current or prior military service.

Commentary to this standard states:

“The proliferation and significance of collateral consequences of * * * criminal * * * adjudications also require an informed, vigorous and coordinated approach to sentencing and disposition. It is now better understood that the non-penal consequences of a conviction or adjudication, such a[s] * * * opportunities for service in the military, may be of greater significance to a client than the time he or she spends in custody or out of the home. Some of these consequences may be triggered by the offense of conviction * * * , while others may be triggered by the duration or conditions of sentencing or disposition. The lawyer is now obligated to understand these consequences and conduct the defense in order to avoid or mitigate their impact.”

This standard and its commentary encompass Senate Bill 124 (2013), which made servicemember status an explicit mitigating sentencing factor. *See also* OAR 213-008-0002(1)(a)(J).

Again, a Commission policy requiring indigent-defense providers to adopt and adhere to a best-practices model for representing servicemember-defendants would simultaneously improve the quality of representation provided by indigent-defense providers, and meet Commission-mandated performance standards. In essence, the model would require indigent-defense providers:

- To identify who are their servicemember-defendant clients.
- To obtain those clients' military records, VA records (when available), and other relevant information. With those records, counsel may determine the extent to which they should form culturally competent multi-disciplinary teams in pursuit of defense and mitigation strategies based on their clients' military service—including by taking advantage of statutory mechanisms such as those created by SB 999, HB 2702, and SB 124.⁵
- To avoid collateral consequences that could prohibit further military service.

⁵ As a practical matter, counsel may not determine which clients' cases warrant forming culturally competent multi-disciplinary teams.

2. Qualification Standards for Servicemember-Defendant Cases.

As previously mentioned, our primary motivation for these policy requests is addressing Oregon's dubious distinction of having the nation's highest known veteran-imprisonment rate (see attached graph). In recognition of that, our position is that only attorneys who meet minimum qualification standards should be allowed to represent servicemember-defendants who are facing felony charges that carry presumptive or mandatory sentences of imprisonment.

The minimum qualification standards would be met by:

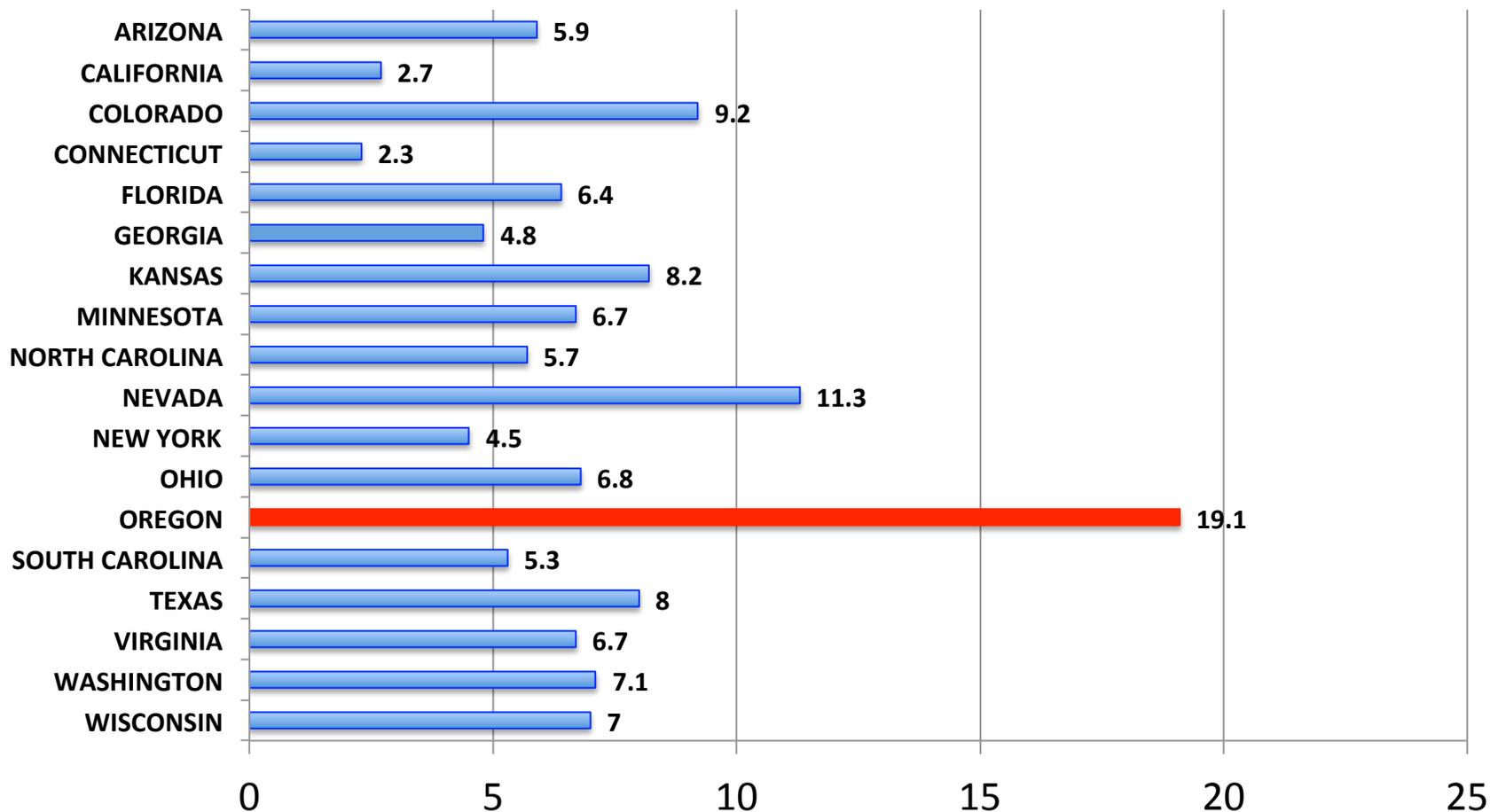
1. Having previously represented at least one servicemember-defendant who faced felony charges that, upon conviction, would carry presumptive or mandatory sentences of imprisonment, **and**, in the course of that representation, the attorney identified, investigated, and used defense and mitigation strategies based on such things as training and inexperience in the military culture and total institution, PTSD, TBI, and moral injury; **or**
2. Having attended a comprehensive CLE designed to train criminal-defense lawyers about the rudiments of representing servicemember-defendants of the sort that OCDLA sponsored or co-sponsored in 2010 and 2011.⁶

Finally, we appreciate your consideration of our proposals and will be available to provide any additional information about them that you may require.

⁶ Owing to its brevity, our upcoming breakout session would not meet this qualification standard.

PERCENTAGE OF VETERANS IN STATE PRISON POPOULATIONS

Randomly Selected States – 2013 Study



Brown, W., Stanulis, R., Theis, B., Farnsworth, J. and Daniels, D. (2013). "The Perfect Storm: Veterans, culture and the criminal justice system." Justice Policy Journal, Vol. 10, Number 2 (Fall)

Attachment 3

Parent Child Representation Program, 10 month update



**AMY MILLER
PCRPP MANAGER
OFFICE OF PUBLIC DEFENSE SERVICES**

Parent Child Representation Program



- **Legal representation for parents and children to promote outcomes consistent with Oregon policy (as stated in ORS 419B.090)**
 - Each child has a right to safety, stability, and well-being
 - Each parent has a liberty interest in directing the upbringing of their children
 - Strong preference that children live in their own homes with their own families
 - When not possible for children to be reunited with their parents or guardians, the State of Oregon has the obligation to provide an alternative, safe and permanent home for the child

Parent Child Representation Program



- Modeled on Washington State Parent Representation Program, which has been shown to be a cost-effective program that reduces the time children spend in foster care.
- **Goals**
 - Competent, effective legal representation for parents and children at all stages of the case including shelter hearings.
 - Reduce the number of children in foster care.
 - Reduce the time to achieve permanency for children.
 - Increase the number of safe reunifications with parents.

Parent Child Representation Program



- **Launched in August 2014 – Linn and Yamhill counties**
 - Reduced caseload: No more than 80 cases
 - Enhanced oversight by OPDS
 - Multidisciplinary training and support
 - Partner collaboration and system improvement
 - Independent social work assistance: Case managers in 10-15% of cases

Monitored Requirements



- **Discovery review and client contact prior to shelter hearings**
- **Advocacy for clients at all court hearings and case-related meetings**
- **Initial client interviews completed within 72 hours of appointment**
- **Compliance with performance standards, including independent investigation**
- **Lawyer staff to facilitate client contact**
- **Increased client contact**

Results



- **Improved shelter hearing representation**
 - Attorneys appointed & present at all shelter hearings
 - Attorneys effectively advocating at shelter hearings
 - Effect of shelter hearing representation
 - ✦ “overall more effective and easier for parents to understand”, Judge Murphy, Presiding Judge, Linn County
 - Statewide, parents and children continue to be unrepresented at shelter hearings
 - ✦ 8 counties rare or never (24%)
 - ✦ 8 counties representation inconsistent

Results



- **Caseload**
 - Decrease of 7% since start of PCRCP
 - ✦ Linn: 4%
 - ✦ Yamhill: 18%
 - Reasons for declining caseload
 - ✦ Fewer filings as a result of DHS policy changes
 - ✦ More effective advocacy
 - ✦ Caselaw narrowing the permissible scope of juvenile court involvement
 - Statewide filings
 - ✦ Downward trend since 2005
 - ✦ Lowest level reached in 2014?
 - 19% increase in dependency filings in Q1 2015 (as compared to Q1 2014)
 - 23% increase in TPR filings during same period

Results



- **Regular independent investigation**
 - OSB Performance Standard 5 (Investigation): “thorough, continuing and independent review and investigation of the case”
 - ✦ Obligation to investigate continues throughout the life of the case
 - Appropriate use of investigator within first 60 days
 - ✦ Increase from 6% (August 2014) to 28% (February 2015)
- **Effective use of time**
 - Track attorney time and activities
 - Target 1/3 of overall time spent in each category: with clients, in court and/or meetings, case preparation and analysis
 - Average attorney time (August 2014-March 2015)
 - ✦ Client Contact 31% of total time reported
 - ✦ Court/Meetings 37% of total time reported
 - ✦ Case preparation and analysis 32% of total time reported

Results



- **System change at local level through partner collaboration**
 - Quarterly agency-level partner meetings
 - Regular county partner meetings
- **Program & Attorney Survey (April 2015)**
 - Courts, CRB, DOJ, Prosecutors, CASA, Other service providers
 - 55 responses
 - Current practice in the county and whether practice has improved since the PCRCP launched
 - Findings
 - ✦ Attorneys providing competent & effective representation
 - ✦ Noticeable improvement in advocacy since the launch of the PCRCP

Impact of Case Managers



- **107 clients served since December 2014**
- **Successes**
 - Contributed to dismissal of dependency case by assisting client with custody paperwork
 - Enabled children to remain in-home by collaborating with local agencies to avoid eviction for parent client
 - Empowered client to obtain housing voucher; reunification likely in near future
 - Delayed TPR trial through support & empowerment of client entering residential treatment; extended in-home visits occurring
 - Guided parents on appropriate visitation techniques; visitation observation notes improved as a result
 - Maintained placement by assisting foster parents in obtaining necessary medication for youth entering foster home
 - Located out-of-county treatment program for parent client which allows placement with children
 - Ensured DHS is making reasonable efforts through identification of alternative service providers/plans

Client Story



See Handout

Next Steps



- **Formal evaluation**
 - ABA Evaluation Tool: Indicators of Success for Parent Representation
 - ✦ Suggested indicators to measure impact of practice change
 - ✦ Indicators are both qualitative & quantitative across three categories
 - Infrastructure
 - Advocacy
 - Well-being/safety/permanency
- **Client satisfaction survey**
 - Started May 2015
- **Expansion if funding permits**

Challenges



- **Identifying & understanding external impacts**
 - DHS Differential Response Rollout: Linn April 2015; Yamhill post 2016
 - Caselaw
 - ✦ Jurisdictional timelines (*DHS v W.A.C.*, 263 Or App 382(2014))
 - ✦ Motion practice (*DHS v J.B.V.*, 262 Or App 745 (2014))
- **External data**
 - Ability to audit performance through available data
 - Examining impacts through external agency reports
- **Influencing culture**

Appendix



- **The Lawyer's Role in Oregon Juvenile Dependency Proceedings**
- **Court of Appeals Opinions**
 - *DHS v W.A.C.*, 263 Or App 382(2014)
 - *DHS v J.B.V.*, 262 Or App 745 (2014)
 - *DHS v A.B.*, 217 Or App 354 (2015)
- **PCRPP Handouts**

**Petition filed alleging that a child
is within the jurisdiction of the
court under ORS 419B.100**

Child may have been previously removed
from the home or may be residing in the
home pursuant to a safety plan

Factors which lawyers should consider throughout the case:

- *The client's decision-making capacity as it changes over time (particularly relevant to the child client) (Lawyer for Child Perf. Std. 1A.,1B. & 2A.)*
- *Cultural competency (Lawyer for Child Perf. Std.2C., Lawyer for Parent Perf. Std. 2H.)*
- *Developmentally appropriate representation and trauma-informed practice (Lawyer for Child Perf. Std. 2C.)*
- *Unique issues of incarcerated parents (Lawyer for Parent Perf. Std. 2J.)*
- *Educational, mental health and health needs (Lawyer for Child Perf. Std. 2G.)*
- *Expanding the scope of representation and taking action on collateral issues when appropriate to address client needs: custody issues, school related issues, crossover with the delinquency system, SSI and public benefits, paternity, administrative challenges to DHS findings of abuse and neglect, developmental disability qualification (Lawyer for Child Perf. Std. 2I., Lawyer for Parent Perf. Std. 2K.)*

Shelter Hearing

Must be held within 24 hours of child removal

Evidentiary Hearing: can the child be returned home without further danger of harm?

Reasonable Efforts: DHS efforts to prevent the need for removal and make it possible for return

Dependency petition filed with allegations against parent

Lawyer Role

Obtain and review discovery: shelter report, police report, prior child welfare history (Perf. Std. App. C.(A)(1) & D.(A)(1))
Interview client prior to hearing: purpose of hearing, placement preference, caution the client about self-incrimination, inquire into other available relatives or safety service providers (Perf. Std. App. C.(A)(2) & D.(A)(2))
Assist client in exercising his or her right to an evidentiary hearing (Perf. Std. App. D.(A)(4))
Identify and assess legal issues: jurisdictional sufficiency of the petition, appropriateness of venue, paternity, ICWA, notice, reasonable efforts to prevent the need for removal, removal not in best interest of the child (Perf. Std. App. C.(A)(5) & D.(A)(5))
Argue for temporary orders: visitation, safety plan, placement, services, continued school placement (Perf. Std. App. C.(A)(3-4) & D.(A)(7))
Review order with client to discuss judicial review and appeal (Perf. Std. App. C.(A)(5) & D.(A)(9))
Review consequences with client of not abiding by order (Perf. Std. App. C.(A)(5) & D.(A)(10))

Lawyer Role

Obtain and review discovery: shelter report, police report, prior child welfare history (Perf. Std. App. C.(A)(1) & D.(A)(1))

Interview client prior to hearing: purpose of hearing, placement preference, caution the client about self-incrimination, inquire into other available relatives or safety service providers (Perf. Std. App. C.(A)(2) & D.(A)(2))

Assist client in exercising his or her right to an evidentiary hearing (Perf. Std. App. D.(A)(4))

Identify and assess legal issues: jurisdictional sufficiency of the petition, appropriateness of venue, paternity, ICWA, notice, reasonable efforts to prevent the need for removal, removal not in best interest of the child (Perf. Std. App. C.(A)(5) & D.(A)(5))

Argue for temporary orders: visitation, safety plan, placement, services, continued school placement (Perf. Std. App. C.(A)(3-4) & D.(A)(7))

Review order with client to discuss judicial review and appeal (Perf. Std. App. C.(A)(5) & D.(A)(9))

Review consequences with client of not abiding by order (Perf. Std. App. C.(A)(5) & D.(A)(10))

Client Interview/Home Visit

Required within 72 hours of appointment for children (Lawyer for Child Perf. Std. 2A.)
and within 72 hours when feasible for parents (Lawyer for Parent Perf. Std 2A.)

Describe role of attorney (Lawyer for Child Perf. Std. 2B., Lawyer for Parent Perf. Std. 2C.)

Visit child client in child's environment (Lawyer for Child Perf. Std. 2A)

Counsel client about all legal matters related to the case: allegations against the parents, rights of parents, steps to promote reunification (Lawyer for Parent Perf. Std. 2C.)

Identify pressing needs/barriers (Lawyer for Child Perf. Std, 2G., Lawyer for Parent Perf. Std. 2C.)

Develop case timeline (Lawyer for Parent Perf. Std. 2D.)

DHS Child Safety Meeting(s)

Engage family members and service providers in safety planning decisions

Lawyer Role

Advocate for client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)
Advise and assist client regarding the role of DHS and Juvenile Court process
Cooperate and communicate with professionals to learn about client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)
Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)
Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

Lawyer Role

Advocate for client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Advise and assist client regarding the role of DHS and Juvenile Court process

Cooperate and communicate with professionals to learn about client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)

Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)

Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

Pre-trial Conference

Parties negotiate language of allegations in petition

Parent admits or denies allegations in dependency petition

Lawyer Role

When appropriate, prepare and participate in settlement negotiations to resolve the case quickly. Sources for Child Pet. SA, IC, Lapses for Pet. SA, IC, Review and Develop legal and fact arguments including discovery, investigative reports, witness case law, and the children code Pet. SA App. C.0015 C.0016
Create client & informed of and understand nature, obligation and consequences of decision Pet. SA App. C.0015 C.0016
Review orders with the client and advise the client regarding how to appeal or post the order Pet. SA App. C.0016 C.0015
Present trial methods agreed as appropriate Pet. SA App. C.0015 C.0016

Lawyer Role

When appropriate, promote and participate in settlement negotiations to resolve the case quickly (Lawyer for Child Perf. Std. 6C., Lawyer for Parent Perf. Std. 6C.)

Review and prepare legal and fact arguments including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C.(B)(1) & D.(B)(1))

Ensure client is informed of and understands nature, obligation and consequences of decisions (Perf. Std. App. C.(B)(3) & D.(B)(3))

Review orders with the client and advise the client regarding issues for appeal or post-trial motion(s) (Perf. Std. App. C.(B)(4) & D.(B)(3))

File post-trial motion(s)/appeal as appropriate (Perf. Std. App. C.(A)(1) & D.(B)(4))

Independent Investigation

Thorough, independent review and investigation of the case

- Obtain and review case file and all relevant documents, photographs, pleadings, records, reports, and recordings
- Contact and interview other parties and witnesses
- Legal research and review
- Utilize experts where appropriate
- Work with investigators and social workers to prepare the case

Develop case theory and strategy

Counsel the client well before each hearing, in time to use client information for the case investigation

Ongoing obligation throughout life of case

(Lawyer for Child Perf. Std. 5, Lawyer for Parent Perf. Std. 5)

Jurisdictional Hearing

Trial to establish that grounds do/do not exist for DHS and court involvement

Preponderance of the evidence standard

Rules of evidence apply

Lawyer Role

Review and prepare legal and fact arguments including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C, IR(C) & D, IR(E))
Require opening and closing statements, direct and cross examination plans (Perf. Std. App. C, IR(C) & D, IR(E))
Prepare parent/client to testify with a focus on the impact of potential criminal liability (Perf. Std. App. D, IR(Z))
Ensure client is informed of and understands the nature, obligation and consequences of his or her disclosure (Perf. Std. App. C, IR(C) & D, IR(E))
Review orders with the client and advise the client regarding issues for appeal or post-trial motions (Perf. Std. App. C, IR(A) & D, IR(Z))
File post-trial motions/appeal as appropriate (Perf. Std. App. C, IR(T) & D, IR(A))

Lawyer Role

Review and prepare legal and fact arguments including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C.(B)(1) & D.(B)(1))

Prepare opening and closing statements, direct and cross examination plans (Perf. Std. App. C.(B)(2) & D.(B)(2))

Prepare parent client to testify with a focus on the impact of potential criminal liability (Perf. Std. App. D.(B)(2))

Ensure client is informed of and understands the nature, obligation and consequences of his or her decisions (Perf. Std. App. C.(B)(3) & D.(B)(3))

Review orders with the client and advise the client regarding issues for appeal or post-trial motion(s) (Perf. Std. App. C.(B)(4) & D.(B)(3))

File post-trial motion(s)/appeal as appropriate (Perf. Std. App. C.(A)(1) & D.(B)(4))

Disposition Hearing

Court rules on placement of child, case plan, services, timelines, and consequences of non-compliance
Date is set for permanency hearing (1 year)

Lawyer Role

Present a disposition plan on behalf of client, advocating for least restrictive disposition possible (Perf. Std. App. C.02)(1) & D.02(4)
Move for dismissal of the jurisdictional petition when appropriate (Perf. Std. App. C.02)(1) & D.02(1)
Respond to inaccurate or unhelpful information presented by other parties (Perf. Std. App. C.02)(1) & D.02(1)
Make appropriate motions (placement, visitation, services) (Perf. Std. App. C.02)(1) & D.02(1)
Identify and present all mitigating factors (Perf. Std. App. C.02)(1) & D.02(1)
Ensure client is informed of obligations and consequences (Perf. Std. App. C.02)(1) & D.02(1)
Explain client's rights and possibilities of post-trial review(s) and the right to appeal (Perf. Std. App. C.02)(1) & D.02(1)

Lawyer Role

Present a disposition plan on behalf of client, advocating for least restrictive disposition possible (Perf. Std. App. C.(C)(2) & D.(C)(4))

Move for dismissal of the jurisdictional petition when appropriate (Perf. Std. App. C.(C)(1) & D.(C)(3))

Respond to inaccurate or unfavorable information presented by other parties (Perf. Std. App. C.(C)(3) & D.(C))

Make appropriate motions (placement, visitation, services) (Perf. Std. App. C.(C)(5) & D.(C)(5))

Identify and present all mitigating factors (Perf. Std. App. C.(C)(4) & D.(C))

Ensure client is informed of obligations and consequences (Perf. Std. App. C.(1)() & D.(C)(5))

Explain client's rights and possibilities of post-trial motion(s) and the right to appeal (Perf. Std. App. C.(C)(5) & D.(C)(5))

Review Hearing

Lawyer Role

Independent investigation review file, interview witnesses, obtain discovery (Part 244, App. C D(2) & D(4)(B))
Prepare for and make appropriate motions. Seek jurisdiction to continue placement, visitation services (Part 244, App. C D(3) & D(5))
Consider adoptions, written report (Part 244, App. C D(8) & D(9))
Prepare specific findings and orders that advance the client's position, services, education, visitation (Part 244, App. C D(10) & D(11))
Engage in communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Part 244, Lawyer for Parent Part 244)
Police order with client for access to many times, rights and obligations (Part 244, App. D D(4))

Court reviews child's conditions and circumstances
Court determines whether to continue jurisdiction and wardship
Court may order modifications in care, placement, and supervision
Review hearings continue to be held periodically (every 3-6 months) throughout the life of the case

Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Perf. Std. App. C.(D)(2) & D.(D)(1))

Prepare for and make appropriate motions (basis for jurisdiction to continue, placement, visitation, services) (Perf. Std. App. C.(D)(3) & D.(D)(2))

Consider submitting a written report (Perf. Std. App. C.(D)(3) & D.(D)(2))

Request specific findings and orders that advance the client's position (services, education, visitation) (Perf. Std. App. C.(D)(4) & D.(D)(3))

Regular communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

Review order with client to discuss statutory time-lines, rights and obligations (Perf. Std. App. D.(D)(4))

DHS Family Decision/Youth Decision/ Oregon Family Decision- Making Meetings

As needed - Ongoing

Lawyer Role

Advocate for the client's wishes regarding the safety plan (Lawyer for Child Ref. Std. 4A, Lawyer for Parent Ref. Std. 4A)
Advise and assist the client regarding use of DHS and Juvenile Court process
Cooperate and communicate with professionals to learn about the client's progress and their views of the case (Lawyer for Child Ref. Std. 4C, Lawyer for Parent Ref. Std. 4C)
Advocate for services and visitation as appropriate (Lawyer for Child Ref. Std. 4E, Lawyer for Parent Ref. Std. 4E, 4F)
Identify family members and professionals who may be or become a resource (Lawyer for Parent Ref. Std. 4A)

Lawyer Role

Advocate for the client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Advise and assist the client regarding role of DHS and Juvenile Court process

Cooperate and communicate with professionals to learn about the client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)

Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)

Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

Citizen Review Board

every 6 months child is in foster care unless
waived in favor of court review

The review board must prepare a written report that addresses: whether efforts to avoid placing the child outside the family, to reunite the family, or to achieve permanency were reasonable

Document other problems, solutions or alternatives recommended by the board

Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Prof. Std. App. C D021 & D026)
Present information supporting child's position and defend her position and taking the necessary steps to achieve best outcome plan in a timely fashion (Prof. Std. App. C D026 & D028)
Prepare for and make appearance at evidentiary hearings for jurisdiction to continue, placement, visitation services (Prof. Std. App. C D025 & D026)
Consider submitting a written report (Prof. Std. App. C D025 & D026)
Respond to the findings and orders that advance the child's position (adoption, reunification, visitation) (Prof. Std. App. C D024 & D023)
Maintain regular client communication before hearings in when significant change of circumstances occur (Prof. Std. App. C D023)
Represent child's best interests (Prof. Std. App. C D023)

Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Perf. Std. App. C.(D)(2) & D.(D)(1))

Present information supporting client's position and whether parties are taking the necessary steps to achieve the chosen plan in a timely fashion (Perf. Std. App. C.(D)(3) & D.(D)(2))

Prepare for and make appropriate motions and arguments (basis for jurisdiction to continue, placement, visitation, services) (Perf. Std. App. C.(D)(3) & D.(D)(2))

Consider submitting a written report (Perf. Std. App. C.(D)(3) & D.(D)(2))

Request specific findings and orders that advance the client's position (services, education, visitation) (Perf. Std. App. C.(D)(4) & D.(D)(3))

Maintain regular client communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

Review order with the client to discuss statutory time-lines, rights and obligations (Perf. Std. App. D.(D)(4))

Lawyer Role

Take particular care in preparing to ensure the lawyer is well acquainted with case history and files involving the family (Perf. Std. App. C.(E) & D.(E))

Conduct an independent investigation (Lawyer for Child Perf. Std. 5, Perf. Std. App. D.(E)(2))

Present evidence on what the permanent plan for the child should be including whether to continue a plan of reunification, a motion to dismiss, or implementation of a permanent plan (Perf. Std. App. C.(E)(3) & D.(E)(3))

Adequately and zealously present the client's position, including witness testimony (Perf. Std. App. C.(E) & D.(E)(3))

Request specific findings and orders that advance the client's position (specific extension of time for reunification if appropriate and services and progress required during that time) (Perf. Std. App. C.(D)(4) & D.(E)(4))

Carefully review the order with the client and discuss the client's option to review including appellate review of any final orders ((Perf. Std. App. C.(D)(5) & D.(E)(5))

Achieve permanent plan: reunification, adoption, guardianship, another planned permanent living arrangement

Lawyer Role

While the permanent plan is being implemented, the lawyer will:
Actively represent the client in court hearings and CRB reviews (Lawyer for Child
Perf. Std. 4A, Lawyer for Parent Perf. Std. 4A.)
Participate in CHS or other service provider meetings and engage in case planning
(Lawyer for Child Perf. Std. 4E, Lawyer for Parent Perf. Std. 4E.)
Continue to investigate the case (Lawyer for Child Perf. Std. 5, Lawyer for Parent
Perf. Std. 5.)
Continue to have regular, ongoing client contact (Lawyer for Child Perf. Std. 2A,
Lawyer for Parent Perf. Std. 2A.)

Lawyer Role

While the permanent plan is being implemented, the lawyer will:

Actively represent the client in court hearings and CRB reviews (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Participate in DHS or other service provider meetings and engage in case planning (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.)

Continue to investigate the case (Lawyer for Child Perf. Std. 5, Lawyer for Parent Perf. Std. 5)

Continue to have regular, ongoing client contact (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

Lawyer Role

Zealous and meticulous investigation and preparation (Perf. Std. App. C.(F)(1) & D.(F)(1))

- Thoroughly review entire record of the case
- Completely investigate the case with an eye toward issues unique to termination such as adoptability of the child and best interests of the child
- Prepare detailed chronology of the case
- Research applicable statutes and case law
- Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents
- Subpoena and carefully prepare client and witnesses
- Evaluate evidentiary issues and file motions as appropriate

Meet with the client to discuss the petition, consequences and alternatives (Perf. Std. App. C.(F)(2) & D.(F)(2))

Prepare opening and closing statements, trial memorandum, witness cross and direct testimony, responses and offers to stipulations of fact and regarding evidence, issues to preserve for appeal

(Perf. Std. App. C.(F)(3) & D.(F)(4))

Consider and discuss the possibility of an appeal and, if appropriate, timely and thorough facilitation of the appointment of an appellate lawyer (Lawyer for Child Perf. Std. 9A.-B., Lawyer for Parent Perf. Std. 10A.-B.)

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of H. C.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

W. A. C.,
Appellant.

Washington County Circuit Court No. J120453;
Petition No. 01J120453M;
A154075

In the Matter of M. C.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

W. A. C.,
Appellant.

Washington County Circuit Court No. J120454;
Petition No. 01J120453M;
A155310

Eric Butterfield, Judge.

Argued and submitted March 7, 2014.

Christa Obold-Eshleman argued the cause and filed the brief for appellant.

Erin K. Galli, Senior Assistant Attorney General, argued the cause for respondent. On the brief were Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Inge D. Wells, Senior Assistant Attorney General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

NAKAMOTO, J.

Judgment in A154075 reversed and remanded; order in A155310 reversed and remanded with instructions to enter an order setting aside the October 2012 judgment.

NAKAMOTO, J.

In this consolidated juvenile dependency appeal, father challenges (1) a March 2013 judgment asserting jurisdiction over his two children, and (2) an order of the juvenile court denying his motion to set aside an earlier, October 2012, judgment in which the court had asserted jurisdiction over father's children based on mother's admissions to allegations in the petitions. As explained below, we conclude that the juvenile court abused its discretion in denying father's motion to set aside the October 2012 judgment; further, we agree with father that the evidence was legally insufficient to support jurisdiction over his children. Accordingly, we reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

We briefly describe the family and the undisputed facts leading to the family's involvement with the Department of Human Services (DHS) and then describe the procedural history of the dependency cases below, as well as father's two appeals. Later, as we consider each of father's assignments of error, we discuss other relevant facts in light of applicable standards of review.

We take the following facts from the record. Mother and father, who began their relationship in 2003 when they were living in Texas, have two children, H and M. Mother gave birth to H in 2004, and mother and father married later that year. M was born in 2008. The family continued to live in Texas until 2010, at which point father moved to Oregon in search of employment. Mother remained in Texas with the children until 2011, when she and the children joined father in Oregon. DHS first became involved with the family in August 2012 after receiving information that a domestic violence incident between the parents had occurred while M was home; H was not home at the time of the incident. Father was later arrested and charged in connection with the incident.

DHS filed petitions in September 2012 alleging that the children were within the jurisdiction of the juvenile court under ORS 419B.100(1)(c). In the amended petitions,

DHS alleged that the children were within the court's jurisdiction on the following grounds:

"A. The mother was subjected to domestic violence by the father and the mother is unable to protect the child from exposure to father's domestic violence without DHS intervention.

"B. The mother is aware of the allegation against the father, that they [*sic*] cannot safely parent the child, but has done nothing to assert custody of her child.

"C. The father *** has a pattern of domestic violence against his current partner, which he has committed in front of said child and if left untreated, interferes with his ability to safely parent said child.

"D. The child's sibling has been exposed to domestic violence by the father.

"E. The father has engaged in a pattern of domestic violence with others with whom he has had a relationship, he has not successfully engaged in treatment of this conduct, and he is currently in a relationship with the child's mother.

"F. [The father] is said child[']s legal father as he is listed on said child's birth certificate."

The juvenile court held a shelter hearing, after which it granted DHS temporary custody of the children. The shelter order directed the parties to appear at a status conference in October 2012; the court scheduled the contested jurisdictional hearing for November 2012. In the meantime, DHS placed the children with mother.

Both mother and father appeared with counsel at the October 2012 status conference. DHS informed the court that mother was prepared to resolve her allegations through admissions. As to father, DHS alerted the court that father's criminal case was pending and that his trial was scheduled for early November 2012. Accordingly, DHS represented that it and father had agreed to request that the court convert the November 2012 contested jurisdictional hearing to a second status conference, explaining that "depending on how the criminal case—if it goes to trial, and depending on the resolution of that, that would impact how the juvenile

case would resolve.” After confirming that all of the parties agreed to convert father’s contested jurisdictional hearing date to a second status conference, the court granted the parties’ request.

The focus of the status conference then turned to mother’s admissions. DHS told the court that mother was admitting allegations A and B, as well as a new allegation, G, which stated that “Mother has mental health issues [which,] if left untreated[,] [a]ffects her ability to parent child.” After accepting mother’s admissions, the court asked DHS about disposition and then found the children within the jurisdiction of the court. In the judgment, the court placed the children in the legal custody of DHS and in the physical custody of mother and ordered mother to comply with the conditions set forth in her action agreement. The October 2012 judgment did not address the allegations against father. The judgment directed that there would be a review hearing held under ORS 419B.449 on February 25, 2013; a permanency hearing under ORS 419B.476 was scheduled for September 2013. At DHS’s encouragement, mother moved with the children back to Texas in mid-November 2012.

Father’s contested jurisdictional hearing was not held until March 2013. Between the October 2012 status conference and the March 2013 contested hearing, father was acquitted of the criminal charges associated with the August 2012 incident. At the time of the contested hearing, mother was still living in Texas, but Texas Child Protective Services (Texas CPS) had removed the children from her care and placed the children with their maternal grandmother, who also lived in Texas. Both mother and the maternal grandmother testified telephonically at the hearing. In its opening statement, DHS expressed that “[t]his case is about domestic violence, and the issue is whether or not the domestic violence presents a current threat of harm to these children.” After the first day of the hearing, however, DHS filed amended petitions adding allegation H, which alleged that “Father is aware of mother’s mental health issues which if left untreated [a]ffects her ability to parent her children and has failed to protect said child and said child’s sibling from mother.” At the close of the evidence, DHS moved to

dismiss allegation E, which alleged that father engaged in a pattern of domestic violence with others with whom he has had a relationship. Accordingly, DHS's closing argument focused on allegations C, D, and H relating to domestic violence and father's protection of the children.¹

At the end of the hearing, the juvenile court indicated that it was asserting jurisdiction over the children again, stating that "we'll establish the jurisdiction over the children as to father on F and H only." The court concluded that DHS had failed to prove allegations C, D, and E, which had alleged that father had a pattern of domestic violence against mother and other partners, and that the children were exposed to domestic violence by father. Before adjourning to allow the parties to discuss a recommended disposition, the court stated:

"Just for purposes of your conversations, so that you have some idea of where I am coming from, it's appalling to me that [father] has allowed his children to be affected, to the degree that they have, by their mother. But that's it."

After the recess, the court held a dispositional hearing. The court then ordered that the children remain in substitute care in Texas and ordered father to participate in parenting classes, "with a focus on mental health issues and domestic violence issues." The court stated, "I understand that the findings from the Court were that domestic violence allegations weren't proven. Although there certainly is some concern there, legitimately."

The March 2013 jurisdictional judgment reflected the court's ruling. In the form judgment under a section labeled "Petition Allegations Contested and Proved" the court wrote "F, H." In the section labeled "Petition Allegations Contested and Not Proved," the court wrote "C, D, E." In a section labeled "Petition Allegations Admitted," the court repeated mother's October 2012 admissions to allegations A, B, and G—though the court did not discuss those admissions at the hearing. In April, father filed a timely appeal challenging the 2013 jurisdictional judgment.

¹ The parties did not discuss allegation F because it alleged father's status as a legal parent. It does not appear from the record that the court ruled on DHS's motion to dismiss allegation E.

In August 2013, while father's appeal of the 2013 jurisdictional judgment was pending, father filed a motion with the juvenile court requesting that the court set aside the 2012 jurisdictional judgment. The court considered father's motion at an emergency hearing. At the time of that hearing, father's children were still living in Texas with their maternal grandmother. At the hearing, in addition to arguing father's motion to set aside, father's counsel sought to have the children returned to his custody.

Also at the hearing, father sought to clarify what services he was required to engage in under the 2013 jurisdictional judgment, given that the judgment reflected that DHS had failed to prove that he had engaged in domestic violence. As noted, despite the failure of proof on allegations C and D in the 2013 judgment, the court had ordered father to participate in parenting classes with a focus on domestic-violence issues. Pursuant to that order, father had been participating in an "Allies in Change" class, which is a 52-week class geared toward perpetrators of domestic violence.

At the end of the hearing, the court denied father's motion to set aside the 2012 judgment, but it ordered that the children be returned to father by the end of the month. The court also ordered that father's attendance for the remainder of the "Allies in Change" class be discontinued because those "services are inappropriate given the jurisdiction," explaining that the court's order "in regards to his action agreement was confusing."

Father then timely appealed the court's denial of his motion to set aside the 2012 judgment. We issued an order consolidating father's appeals. In October 2013, while father's appeals were pending, the juvenile court terminated the wardships and dismissed the cases.²

² DHS filed a notice with this court arguing that the termination of the wardships and dismissal of the cases rendered father's appeals moot because father had failed to identify any collateral consequences of the jurisdictional judgments. Citing *State v. S. T. S.*, 236 Or App 646, 238 P3d 53 (2010), father responded that the jurisdictional judgments contained findings that father had engaged in domestic violence, which would have a negative affect on father's DHS record, as well as the negative social stigma of having a finding on the record that father had perpetrated domestic violence. DHS then filed a second notice with this court, arguing that father's appeal of the motion to set aside is moot only if we affirm the 2013 judgment, apparently arguing that, because the 2013 judgment contained

II. ANALYSIS

A. *Father's appeal of the order denying his motion to set aside the 2012 jurisdictional judgment*

We first address father's appeal of the juvenile court's denial of his motion to set aside the 2012 jurisdictional judgment because it provides helpful context for our consideration of father's challenge to the 2013 judgment. Father asserts that the juvenile court abused its discretion when it denied his motion to set aside the 2012 jurisdictional judgment, arguing that the court lacked authority to assert jurisdiction over his children before he had had a hearing to challenge the allegations in the petitions.

We review a juvenile court's denial of a motion to set aside a judgment for abuse of discretion. *Dept. of Human Services v. A. D. G.*, 260 Or App 525, 534, 317 P3d 950 (2014). "If the court's decision was within the range of legally correct discretionary choices and produced a permissible, legally correct outcome, then the court did not abuse its discretion." *State ex rel Juv. Dept. v. D. J.*, 215 Or App 146, 155, 168 P3d 798 (2007). We review the underlying legal questions for legal error. *A. D. G.*, 260 Or App at 534.

A juvenile court's authority to set aside a judgment is set forth in ORS 419B.923. Under that statute, a juvenile court "may modify or set aside any order or judgment made by it." ORS 419B.923(1). "Reasons for modifying or setting aside an order or judgment include, but are not limited to" clerical mistakes, excusable neglect, and newly discovered evidence. ORS 419B.923(1)(a) - (c). In *A. D. G.*, we concluded that the authority of a juvenile court to set aside a judgment under ORS 419B.923 is broad and is not limited to the circumstances enumerated in the statute. 260 Or App at 536, 539. We also considered in that case whether the juvenile court's denial of the mother's motion to set aside was an abuse of discretion. In *A. D. G.*, the parties disputed "whether ORS

the same implied findings as the 2012 judgment, any error in the 2012 judgment is harmless if the March judgment is affirmed. We conclude that father's appeal is not moot because the collateral consequences associated with findings of domestic violence in a jurisdictional judgment are sufficient to render this a live controversy. *S. T. S.*, 236 Or App at 653-54. Furthermore, because we reverse the 2013 judgment, DHS's harmless error argument is inapplicable.

419B.819(7), which governs the effect of a parent's failure to appear for any hearing relating to a [termination of parental rights (TPR)] petition, permitted the juvenile court to enter a default TPR judgment against mother." 260 Or App at 540. We concluded that ORS 419B.819(7) did not authorize the court to enter a default judgment against the mother in that case and that, because "[t]hat same legal error was the basis for the juvenile court's decision to deny mother's motion to set aside the default judgment *** the court's ruling was not within a range of legally correct choices and constitute[d] an abuse of discretion." *Id.* at 547. Thus, under *A. D. G.*, if the juvenile court in this case was not authorized to enter the 2012 judgment, and if the court relied on that legal error in denying father's motion to set aside, the court's ruling is not within the range of legally correct choices and its denial of father's motion would constitute an abuse of discretion.

We turn now to the arguments father made to the juvenile court in conjunction with his motion to set aside. Father argued that the 2012 judgment of jurisdiction and wardship was improvidently entered. According to father, mother's unilateral admission to alleged wrongdoing by both father and mother—including that "mother was subjected to domestic violence by the father"—should neither conclusively establish facts nor determine the sufficiency of the allegations to establish subject matter jurisdiction of the juvenile court under ORS 419B.100, before father was given an opportunity to contest the petitions. Father asked the juvenile court to rule that his children should not have been adjudged to be within the jurisdiction of the court, made wards of the court, and committed to the custody of DHS before the contested jurisdictional trial, and, therefore, to set aside the 2012 judgment. He argued that the juvenile court's assertion of jurisdiction based on mother's admissions was inconsistent with the procedural rights afforded parents in the juvenile code, as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

At the August 2013 emergency hearing, when the court considered his motion to set aside, father argued that a court cannot assert jurisdiction over children until both parents' contentions concerning the jurisdictional petition have been resolved. Instead, father argued, after mother made

her admissions, the court should have continued temporary jurisdiction over the children and made any determination of “full jurisdiction” only after father’s contested jurisdictional hearing. That way, father explained, the court could address mother’s admissions that “actually don’t end up ultimately correlating with what was found in the hearing[.]”

DHS agreed that “there was no jurisdiction on the father at the hearing at the end of October” but expressed concern about “calling it partial jurisdiction or something like that[.]” The court asked DHS about father’s motion, and the following colloquy occurred:

“THE COURT: So [counsel for DHS], what is your position on [father’s] request to set aside the October 31st, 2012 order? I frankly don’t see the issue with that order.

“[DHS COUNSEL]: I think we’re—I think I agree—I do agree with [father] that it has nothing to do with jurisdiction regarding father. I don’t want to set aside [mother’s] jurisdiction.

“THE COURT: As do I, but it seems to me like it only applies to the mother.

“[DHS COUNSEL]: I completely agree with that.

“THE COURT: Okay.

“[FATHER’S COUNSEL]: And Your Honor, there is no jurisdiction without both parents. So we’re saying that there can’t be jurisdiction taken at the time of mother but still continued temporary jurisdiction. While her admissions are accepted by the [c]ourt, jurisdiction comes when both parents have finally resolved their cases.

“THE COURT: All right. Very good. Well, I’m going to deny the motion to set aside that particular order, and I’m sure you will pursue that by a different avenue.”

On appeal, father again argues that the juvenile court erred when it made findings of fact, adjudged father’s children to be within the jurisdiction of the court, made them wards of the court, and committed them to the legal custody of DHS, all before father’s contested jurisdictional hearing. He contends that the juvenile code contemplates a single judgment of jurisdiction, based on the totality of the conditions and circumstances of *the child*, not on a division

of proof as to each parent. Father further argues that the assertion of jurisdiction without a hearing interfered with his fundamental right to parent his children and implicates the Due Process Clause of the Fourteenth Amendment. Father also raises the same constitutional concerns with the court's assertion of jurisdiction based on mother's unilateral admission to allegations that he contested. Under father's view, mother's admissions were simply evidence that should have been considered at father's contested hearing to determine whether, under the totality of the circumstances, there was a basis for the court to assert jurisdiction over the children.

For its part, DHS concedes that the entry of the 2012 judgment was erroneous and agrees with father that the juvenile code does not contemplate a separate jurisdictional judgment for each parent. Like father, DHS argues that "[i]n all juvenile dependency cases arising under ORS 419B.100(1)(c), the inquiry is whether the *children's* condition or circumstances endanger their welfare," citing *Dept. of Human Services v. S. P.*, 249 Or App 76, 84, 275 P3d 979 (2012), and states that "if a child has a parent capable of caring for him safely, juvenile court jurisdiction is not warranted." DHS limits its concession to the circumstances in this case, in which both parents were served with summons and were present at a hearing, and one parent sought to contest the jurisdictional allegations. For the reasons stated below, we agree with father and accept DHS's concession.

The juvenile code provides that, under ORS 419B.100(1)(c), a juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and "[w]hose condition or circumstances are such as to endanger the welfare of the person[.]" As we have explained, the statutes in the juvenile code "contemplate that ORS 419B.100(1)(c) brings *the child* whose condition or circumstances are as described in the statute within the jurisdiction of the court[.]" *S. P.*, 249 Or App at 84 (emphasis in original). We have also recognized that "jurisdiction 'over a child' under ORS 419B.100(1)(c) is often the result of the conduct, condition, or circumstances of one or both parents; thus, the courts sometimes refer to jurisdiction 'as to' or 'with respect to' a particular parent." *Id.* at 85 n 10.

However, the “juvenile court’s focus at the hearing on jurisdiction is on *the child’s* conditions or circumstances at the time of the hearing and whether the totality of those circumstances demonstrates a reasonable likelihood of harm to the welfare of the child.” *Dept. of Human Services v. C. F.*, 258 Or App 50, 54, 308 P3d 344, *rev den*, 354 Or 386 (2013) (emphasis in original). Accordingly, ORS 419B.100(1)(c) requires the juvenile court to consider *all of the facts presented in the case* before it. *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 652-53, 853 P2d 282 (1993).³ After looking at all the facts, if the court finds that there is a reasonable likelihood of harm to the welfare of the child, the court may take jurisdiction. *Id.* at 653.

The juvenile code recognizes that a parent has a right to deny the allegations in the petition, and the code requires that, when allegations are contested, the court set the case for a hearing within 60 days of the petition being filed. ORS 419B.305(3), (1).⁴ At that hearing, “[t]he facts alleged in the petition showing the child to be within the jurisdiction of the court as provided in ORS 419B.100(1), unless admitted, must be established by a preponderance of competent evidence.” ORS 419B.310(3).

A juvenile court’s determination that a child is within the jurisdiction of the court affects the rights of the parents. When a juvenile court asserts jurisdiction over a child, that child is made a ward of the court. ORS 419B.328(1). Once a child is made a ward of the court, it is the court that decides who will have legal custody of the child based on its determination of what is in the best interest and welfare of the child. “[T]he juvenile court may direct that the ward remain in the legal custody of the ward’s parents, or it may direct that the ward be placed in the legal custody of a relative, a foster home, or DHS.” *Dept. of Human Services v. S. M.*, 355 Or 241, 246, 323 P3d 947 (2014) (citing ORS 419B.331; ORS 419B.337). In turn, whomever the court

³ In *Smith*, the Oregon Supreme Court interpreted *former* ORS 419.476(1)(c) (1991), *repealed by* Or Laws 1993, ch 33, § 373, which was the predecessor to ORS 419B.100(1)(c).

⁴ Under ORS 419B.305, a court may continue a petition beyond the 60-day period upon written order supported by findings of good cause.

awards legal custody of the child also has “physical custody and control of the ward.” ORS 419B.373(1). Attendant to that custody and control is the authority to authorize ordinary medical treatment, and in emergencies, the authority to authorize surgery and other extraordinary medical care. ORS 419B.373(4). Those are just some of the many consequences inherent in a court’s assertion of jurisdiction over a child that demonstrates that a finding of jurisdiction interferes with a parent’s right to direct the custody and control of the child. The juvenile code and our case law require that, before the juvenile court can so interfere, it must determine that jurisdiction is warranted. That determination requires the court to consider all of the facts in the case before it and to consider whether, under the totality of the circumstances, the child’s welfare is endangered.

Accordingly, we hold that a juvenile court cannot assert jurisdiction over a child based on the admissions of one parent when the other parent has been served and summoned, appears, and contests the allegations in the petition. In such a case, the juvenile court can only assume jurisdiction over the child after a contested hearing on the allegations denied by the other parent. If it were otherwise, a juvenile court could assert jurisdiction over a child and make the child a ward of the court, depriving one parent of legal and physical custody of the child, without a determination that that parent cannot safely parent the child.

Here, that is precisely what happened. Mother admitted allegations in the complaint that were phrased in terms of her conduct. Father did not admit to any of the allegations, and the court set a contested hearing to consider those allegations for a future date. However, the juvenile court asserted jurisdiction and made the children wards of the court before adjudicating the allegations against father. We agree with DHS that, if a child has a parent who appears in the proceeding and is capable of caring for the child safely, juvenile court jurisdiction is not warranted and that, unless and until DHS proved that neither parent who appeared could safely parent the child, the court could not enter a jurisdictional judgment. The proper procedure in those cases is for the court to receive the one parent’s admissions and delay making a jurisdictional determination until

after the contested hearing. Accordingly, the juvenile court erred when it asserted jurisdiction over the children prior to father's contested hearing.

The court relied on that legal error in denying father's motion to set aside the 2012 jurisdictional judgment. In considering the motion, the court expressed its belief that the 2012 judgment applied only to mother and that it had nothing to do with jurisdiction regarding father. As explained above, however, the 2012 judgment brought the *children* within the court's jurisdiction, which is appropriate only after a determination that, under the totality of the children's circumstances, their welfare is endangered. Because the 2012 judgment was entered before father had a chance to contest the allegations of the petitions, the judgment was not based on the totality of the children's circumstances. Because the juvenile court lacked authority to assert jurisdiction over the children before father's contested hearing, and because it relied on that error in denying father's motion, we conclude that the juvenile court abused its discretion when it denied father's motion to set aside the 2012 judgment. Accordingly, we reverse the trial court's order denying father's motion to set aside and remand with instructions for the court to enter an order setting aside the 2012 judgment.

B. *Father's appeal of the 2013 jurisdictional judgment*

We turn to father's appeal of the 2013 judgment, in which the court asserted jurisdiction over his children based on the allegations against him. Father's challenge to the 2013 jurisdictional judgment is two-fold. First, father challenges the sufficiency of the evidence to prove allegations A and H in the petitions. Second, father argues that the juvenile court erred in asserting jurisdiction over his children because the totality of the circumstances in this case do not demonstrate a current threat of serious loss or injury to the children that is likely to be realized.⁵ For the reasons that follow, we agree with father that jurisdiction was not warranted in this case.

⁵ In his appeal of the 2013 judgment, father also argues that the court erred in unconditionally admitting father's psychological evaluation that contained hearsay. We reject that assignment without discussion.

The parties have not requested *de novo* review, and we decline to conduct such a review in this case. See ORS 19.415(3)(b) (in nontermination cases, we have discretion to exercise *de novo* review). Accordingly, “we view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court’s disposition and assess whether, when so viewed, the record was legally sufficient to permit that outcome.” [*Dept. of Human Services v. N. P.*](#), 257 Or App 633, 639, 307 P3d 444 (2013).

Father challenges the sufficiency of the evidence to prove allegations A and H in the petitions. When a party challenges the sufficiency of the evidence to prove an allegation, we review the juvenile court’s explicit and implied findings to determine if there is any evidence in the record to support those findings. *N. P.*, 257 Or App at 639-40. Here, the juvenile court did not make any express findings. Therefore, our task is to determine whether the juvenile court’s implied findings regarding allegation A and H are supported by any evidence in the record.

We begin with allegation A, which alleged that “mother was subjected to domestic violence by the father and the mother is unable to protect the child from exposure to father’s domestic violence without DHS intervention.” As mentioned above, in addition to allegation A, DHS alleged in allegations C and D of the petitions that father had engaged in domestic violence toward mother and that the children had been exposed to father’s domestic violence. At the March 2013 hearings, DHS presented evidence that mother and father had a history of arguing and that three of their arguments involved some physical component. The first of those arguments was an incident in Texas in 2006, in which mother and father were fighting over car keys. Both mother and father had one end of the keys and both were trying to get them from the other’s hand. Mother sustained an injury to her wrist during that incident. The second incident occurred in 2009, when mother got upset that H was watching a television program and wanted to discipline H. Father intervened by pulling mother away from H and forcing her into another room of the house.

Finally, the third argument between mother and father was the 2012 incident that precipitated DHS's involvement in this case, which occurred at their home one evening. Earlier that day, father had called mother to ask if father's friend, Green, could come to the house. Mother had told father that that was fine as long as Green was gone by the time she got home. Father apparently misunderstood mother, and when mother arrived home, Green was still there. Mother became upset and father left the house with Green. Minutes later, father returned and confronted mother in the kitchen about embarrassing him in front of Green. Mother testified that she backed away from father down the hallway and towards the living room. She further testified that "I got pushed on the ground. Got back up. Was walking to go upstairs to get away when I got pushed again into the wall." Father's account differed. Father testified that, after confronting mother, he was trying to leave the house. Mother was in front of him and was walking backwards as he was trying to walk down the hallway. Father testified that mother tripped over the carpet and had fallen backwards against the wall, hitting her head. Father tried to help mother up, but she refused his help and then a few minutes later, mother left the house with M and called the police.

Father makes two primary arguments in his challenge to the sufficiency of the evidence to prove allegation A. First, father argues that the juvenile court committed legal error when it treated mother's admission of allegation A as conclusively establishing that allegation despite the fact that father contested that allegation. Father argues that mother's admission did not preclude him from challenging the truth or sufficiency of *all* the allegations in the petitions that allegedly established jurisdiction over his children, and that he succeeded in challenging allegation A when the court concluded that DHS had failed to prove the other domestic violence allegations. Second, father argues that the evidence was insufficient to prove allegation A given the fact that the court dismissed the other domestic violence allegations and that, in doing so, the court impliedly found mother's account of the alleged domestic violence not to be credible.

DHS responds that, when viewed in the light most favorable to the juvenile court's disposition, the evidence was sufficient to support a finding that mother was subjected to domestic violence by father. Additionally, at oral argument, DHS argued that the juvenile court's findings regarding domestic violence in the family were not inconsistent because it was possible for the court to find that father had subjected mother to domestic violence, while also finding that father had not engaged in a *pattern* of domestic violence.

Initially, we note that we disagree with DHS that the court did not make inconsistent findings regarding domestic violence. At the end of the March 2013 hearing, the court dismissed allegations C, D, and E as not proved and explained that "we'll establish the jurisdiction over the children as to father on F and H only." Nonetheless, the juvenile court included mother's admission to allegation A in the 2013 judgment. The inclusion of that admission indicates that the juvenile court found that mother was subjected to domestic violence by father and that she was unable to protect the children from exposure to father's domestic violence, while, at the same time, the court's dismissal of allegations C, D, and E indicates that the court found that father had not engaged in a pattern of domestic violence against mother or anyone else, as well as that the children had not been exposed to father's domestic violence. Furthermore, the court's statements at the hearing indicate that what the court thought was problematic for the children was the fact that father had exposed them to mother's mental health problems—not that father was a domestic abuser. That intent was confirmed by the court at the August 2013 hearing, at which it clarified that domestic violence classes were not appropriate given the bases for jurisdiction, further indicating that the court did not assert jurisdiction based on father's alleged domestic violence. Therefore, though allegation A is included in the 2013 judgment, it is inconsistent with the court's statements and other findings.

With regard to father's legal argument, we agree that it was legal error for the court to give conclusive effect to mother's admission that mother was subjected to domestic violence by father when father denied that he had abused

mother. Allegation A did not concern only the conduct of mother, but also included the disputed conduct by father. Mother's admission that she was subjected to domestic violence by father cannot conclusively establish that fact when father denied that allegation. In some dependency cases, as in this one, the parents are adverse to one another. Father had a right to deny the allegations in the petitions, and the juvenile court could not rely on one parent's admission to conclusively establish an allegation regarding the contesting adverse parent's conduct. In such a case, the juvenile court can consider the admission by one parent as a fact in determining whether DHS proved the admitted allegation, but it cannot conclusively establish that allegation. Here, then, to the extent that the court relied solely on mother's admission for establishing allegation A, it was error to do so.

In short, we agree with father that the evidence was insufficient to prove allegation A. First, the juvenile court implicitly found that mother's testimony regarding domestic violence between the couple was not credible because the court dismissed the domestic violence allegations against father. Second, as mentioned above, the court's inclusion of allegation A in the 2013 judgment was inconsistent with the court's other implied factual findings that father had not engaged in a pattern of domestic violence, as well as its implied finding that the children were not exposed to father's domestic violence. In fact, at the August 2013 hearing, the juvenile court confirmed that domestic violence was not the basis for jurisdiction, further indicating that there was insufficient evidence to support allegation A.

Father also challenges the sufficiency of the evidence to prove allegation H, which alleged that father was aware of mother's mental health issues, which, if left untreated, affected her ability to parent the children, and that he failed to protect the children from mother. Father acknowledges that there was sufficient evidence to prove that mother had mental health issues and that father was aware of those issues, but he argues that the evidence was insufficient to prove that he had failed to protect the children from mother. According to father, the evidence at the hearing demonstrated that father had a history of actively intervening and

protecting the children from mother and that father employed strategies of mitigating the effects of mother's mental health issues on the children, while preserving the family unit. Citing *Dept. of Human Services v. D. S. F.*, 246 Or App 302, 266 P3d 116 (2011), father argues that such intervention did not require him to actually remove the children from contact with mother.

Again, our task in determining whether the evidence was sufficient to support the juvenile court's findings is to review for any evidence. As to allegation H, DHS presented evidence that mother suffers from mental health issues and that those issues affect her ability to parent the children. Father admitted that mother had mental health issues, and he testified that her issues manifested with bipolar-like symptoms or mood swings. Father testified that mother can "go from *** calm and reasonable to *** screaming, yelling and unable to be reasoned with, *et cetera*. And then within five minutes, she can flip right back." Father testified that mother has a history of mental health issues and that she has suffered from depression throughout their marriage. Father also testified that, in the summer of 2012, mother sought counseling and was diagnosed with manic depression, severe anxiety, and PTSD from a car accident in 2006. The children's maternal grandmother also testified that mother has ADHD.

DHS also presented evidence that mother had a "difficult" relationship with H because mother had not bonded with H. As a result, evidence demonstrated that mother treats H differently than she treats M, with whom she has bonded. Father testified that when H was younger, mother would spank her a lot; he testified that he had discussed mother's use of spanking with her and that they had agreed that mother would stop disciplining H through spankings. After that discussion, father testified that mother spanked H "only a few times." DHS also presented evidence of a 2009 incident in which mother slapped H across the face. At the time of that incident, father had not been permitted to live at the family home due to a mandatory restraining order that had resulted from the previously mentioned 2009 argument between mother and father in which father had pulled

mother away from H to prevent her from disciplining H. After mother had slapped H, father told mother to report herself to Texas CPS or he would. Mother reported the incident, and she received parenting classes as a result.

Father testified that there had been an improvement in mother's relationship with H in the last year and a half to two years. Before that time, father explained that mother would yell at H almost every other day and mother would send H to her room so that mother would not have to be around her. Father further testified that he would talk to H to explain to her what was happening and to "try to alleviate some of the stress there." In early 2012, H received counseling for two or three months after she had started acting out at home. Father testified that it was possible H's behavior was related to mother's mental health issues. Father also testified that he encouraged mother to seek counseling to start working on her relationship with H, which mother did in the summer of 2012.

Despite mother's strained relationship with H, the evidence demonstrated that H was happy, felt safe at home and at school, and that she had positive things to say about her parents and her brother. Francom, the DHS caseworker who was first assigned to the case, testified that H reported that her parents "tend to yell and argue but she's not sure what they argue about." H also reported that sometimes mother will spank her, but that father never did, and that she had never seen her parents physically fighting. Francom testified that H seemed like a "pretty well-adjusted" and "advanced" child.

As mentioned above, DHS presented evidence that mother and father argue in front of the children and that sometimes those arguments have physical components. DHS presented evidence that M was present during the August 2012 incident and had gotten upset and kicked father after M saw that mother was injured from falling. DHS also put on evidence that when police responded to mother's 9-1-1 call, M was upset and "whimpering." After that, M experienced nightmares and had some trouble sleeping.

Evidence at trial also demonstrated that the children were living with their maternal grandmother in Texas after Texas CPS had removed them from mother's custody. Mother was still living in Texas, with no immediate plans to return to Oregon and testified that she intended to file for divorce, though she stated that she was not one-hundred percent positive that she would do so. She also indicated that she was not sure whether she would resume her relationship with father. Father was living in Oregon at the time of the hearing and, due to his job, did not intend to move to Texas, but was considering visiting the children there after the hearing. Father also expressed a desire to continue his relationship with mother if mother continues to address her mental health issues in counseling and continues to rebuild her relationship with H.

After reviewing the record, we have difficulty finding evidence to support the allegation that father failed to protect the children from mother. But, even assuming the existence of such evidence, we agree with father that DHS failed to prove that jurisdiction was warranted in this case because the circumstances do not demonstrate a current threat of serious loss or injury to the children that is likely to be realized.

As mentioned above, our task is to determine whether, when viewed in the light most favorable to the juvenile court's disposition, the evidence was legally sufficient to warrant jurisdiction. Here, assuming allegation H was proved, the only other allegations that were proved or admitted were allegations B (mother has not asserted custody), G (mother has mental health issues), and F (father is the legal father of the children). Combined, those circumstances under the facts of this case are legally insufficient to prove that there was a current risk of nonspeculative harm to the children that would warrant jurisdiction.

Under ORS 419B.100(1)(c), juvenile dependency jurisdiction is warranted when a child's "condition or circumstances are such as to endanger the welfare" of the child. A child is "endangered" if the child is exposed to conditions or circumstances that "present a current threat of serious loss

or injury.” *Dept. of Human Services v. C. J. T.*, 258 Or App 57, 61, 308 P3d 307 (2013). In determining whether jurisdiction is proper, the key inquiry is “whether, under the totality of circumstances, there is a reasonable likelihood of harm to the welfare of the child.” *Dept. of Human Services v. C. Z.*, 236 Or App 436, 440, 236 P3d 791 (2010) (internal quotation marks omitted). DHS has the burden to prove that there is “a nexus between the allegedly risk-causing conduct and the harm to the child,” and that the risk of harm is nonspeculative and present “at the time of the hearing.” *C. J. T.*, 258 Or at 62.

At the time of the March 2013 hearing, the children were not living with mother; Texas CPS had removed them from mother’s custody and placed them with their maternal grandmother. Mother and father were not living together, and indeed, were living in separate states. Thus, at the time of the hearing, the children were not at risk of being exposed to mother’s mental health issues, and, because they were not with mother, father cannot be said to have been failing to protect them from mother’s mental health issues.

Even if the family were to be reunited eventually, the evidence presented on the degree of mother’s mental health issues and their effects on the children do not demonstrate a current risk of serious harm. That is particularly so given father’s history of actively protecting his children from mother’s mental health issues. Father recognizes that mother and H have a difficult relationship and has ameliorated the effects of that bad relationship by encouraging mother to seek counseling, providing counseling for H, discussing mother’s behavior with H, and providing opportunities for H to spend extended time with relatives. Furthermore, despite the difficult relationship between mother and H, H is a well-adjusted child, and there is no evidence that H has suffered, or will likely suffer, serious emotional harm due to mother’s mental illness.

As for physical harm to H, the only instance in which mother physically injured H was in 2009 and occurred when father was not allowed to live at the house due to a restraining order. Father, in those circumstances, cannot be said

to have failed to protect H from mother. Furthermore, that incident occurred more than three years before the hearing, and DHS presented no other evidence of mother physically harming H since that time, beyond spankings. We agree with father that H has not received ideal parenting, but, under the totality of the circumstances, the evidence does not establish a risk of serious threat of injury or loss that is likely to be realized.

As for risk of harm to M, DHS failed to present any evidence that M had suffered or will likely suffer serious emotional or physical harm as a result of mother's mental illness or father's failure to protect M. The evidence demonstrated that mother had a positive relationship with M and that she never used physical violence against him. The only evidence of mental harm was M's reaction to the 2012 argument between his parents. After seeing that mother was injured, M kicked father and told him to leave mother alone. After that, M experienced some nightmares and sleeplessness. That evidence fails to demonstrate that there is a current threat of serious emotional harm to the child.

DHS also argues that M was endangered by virtue of exposure to mother's mood swings and seeing mother treat H poorly. We recognize that a condition or circumstance need not involve a child directly for a court to find that the child is endangered if the condition or circumstance creates a harmful environment for the child. *C. Z.*, 236 Or App at 443. However, the state must prove that the harm is, in fact, present. *Id.* Here, DHS failed to demonstrate how mother's mental health issues created an environment in which M was likely to suffer serious emotional or physical harm at the time of the hearing, particularly when neither H nor M was living with mother and father was seeking custody of the children.

In sum, we conclude that the juvenile court erred in asserting jurisdiction over father's children because the evidence was legally insufficient to demonstrate that, under the totality of the circumstances, there was a current risk of serious emotional or physical harm to the children, likely to be realized.

Judgment in A154075 reversed and remanded; order in A155310 reversed and remanded with instructions to enter an order setting aside the October 2012 judgment.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of S. C. C. V.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

J. B. V.,
Appellant.

Douglas County Circuit Court
1000517;
Petition Number 10JU366, 12JU297;
A155043 (Control)

In the Matter of H. B. B. V.,
aka H. H.-B., a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

J. B. V.,
Appellant.

Douglas County Circuit Court
1000518;
Petition Number 10JU366, 12JU297;
A155044

William A. Marshall, Judge.

Argued and submitted March 7, 2014.

Valerie Colas, Deputy Public Defender, argued the cause for appellant. On the opening brief were Peter Gartlan, Chief Defender, and Kimberlee Petrie Volm, Deputy Public Defender, Office of Public Defense Services. With her on the reply brief was Peter Gartlan, Chief Defender.

Karla H. Ferrall, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

EGAN, J.

Vacated and remanded for reconsideration of father's motion to dismiss; otherwise affirmed.

EGAN, J.

In this juvenile dependency case, father appeals two judgments that changed the permanency plan for two of his children from reunification to adoption. *See* ORS 419B.476. He assigns error to the juvenile court's denial of his motion to dismiss the juvenile court's jurisdiction over the children, the court's decision to change the permanency plans from reunification to adoption, and the court's admission of certain exhibits for the purpose of making those two decisions.¹ Those assignments each spring from father's legal argument that the trial court improperly relied on the exception to the rules of evidence created by ORS 419B.325(2) to receive the challenged exhibits. He contends that the statute does not apply to either juvenile court jurisdictional determinations or to certain aspects of permanency hearings. We agree with father that, for purposes of ruling on father's motion to dismiss, the juvenile court's admission and consideration of the challenged exhibits was error. We therefore vacate the parts of the judgments denying father's motion to dismiss and remand for further consideration of that motion under the applicable evidentiary rules. Otherwise, we affirm.

The pertinent facts are undisputed and involve procedural matters. The juvenile court asserted jurisdiction over the two children as to father on four separate bases that generally pertained to his inability to safely parent them. The children were placed in foster care and a plan to reunite them with father was implemented. Father subsequently filed a motion to dismiss the juvenile court's jurisdiction. The juvenile court considered that motion at a contested permanency hearing at which the Department of Human Services (DHS) and the children sought to change the permanency plan from reunification to adoption. Early in the hearing, the parties and court agreed that the motion to dismiss and the permanency plans should be considered simultaneously; accordingly, the parties did not specify the purpose for which any given testimony or evidence was introduced.

¹ Father also assigns error to the denial of his motion for continuance, a contention that we review for abuse of discretion. *See, e.g., State ex rel Dept. of Human Services v. K. C.*, 227 Or App 216, 230, 205 P3d 28, *rev den*, 346 Or 257 (2009). We have considered that assignment and reject it without further discussion.

At the hearing, DHS moved to admit several exhibits into evidence, including a psychological evaluation of father, a police report describing an incident involving father and the children, counseling records, and certain of the children's medical records. Father objected to the admission of the exhibits on the ground that they "are hearsay and contain hearsay"; he argued that the exhibits were not admissible for purposes of either the motion to dismiss jurisdiction or the permanency-plan determination. In response, DHS did not attempt to argue that the exhibits, or any portion thereof, were admissible under the rules of evidence. Instead, in an argument that was opposed by father, DHS urged that the challenged exhibits were admissible for both purposes under the exception to the rules of evidence created by ORS 419B.325(2). The trial court relied on that statute to receive the challenged exhibits.

The trial court denied father's motion to dismiss the jurisdictional petitions and also changed the permanency plan from reunification to adoption. In a letter addressed to the parties, the court explained those decisions, in part, by citing extensively to information contained in several of the challenged exhibits.

The parties' dispute on appeal revolves around ORS 419B.325:

"(1) At the termination of the hearing or hearings in the proceeding, the court shall enter an appropriate order directing the disposition to be made of the case.

"(2) For the purpose of determining proper disposition of the ward, testimony, reports or other material relating to the ward's mental, physical and social history and prognosis may be received by the court without regard to their competency or relevancy under the rules of evidence."

Pointing to the phrase, "[f]or the purpose of determining proper disposition of the ward," father asserts that subsection (2) of the statute, which operates as an exception to the otherwise applicable rules of the Oregon Evidence Code, OEC 101(1),² does not apply to a juvenile court's jurisdictional

² OEC 101 provides, in part, "(1) The Oregon Evidence Code applies to all courts in this state except for: [inapplicable exceptions]." As noted below, the

determination. In other words, he contends that a jurisdictional determination—such as was called for by his motion to dismiss—does not constitute a “disposition” as that term is used in the statute. He advances a related argument with respect to permanency-plan hearings, contending that a permanency hearing consists of two phases, an “adjudicative” phase and a “dispositional” phase. He argues that the exception to the rules of evidence created by subsection (2) only applies at the latter phase and that the trial court therefore erred in receiving and considering the challenged exhibits for purposes of conducting the former.

DHS argues that, in the context of a parent’s motion to dismiss, a juvenile court’s jurisdictional determination is a “disposition” within the meaning of the statute. With respect to the permanency hearing, DHS responds that such a hearing is entirely “dispositional” and that the suspension of evidentiary rules created by ORS 419B.325(2) therefore applies to all aspects of a permanency hearing.

Father’s assignments of error present legal questions that we review for legal error. *E.g.*, [Hannemann v. Anderson](#), 251 Or App 207, 208, 283 P3d 386 (2012). Our task is to discern the legislature’s intent, which we do by examining the text of the statute in context before considering any legislative history that appears useful to the analysis. [State v. Gaines](#), 346 Or 160, 171-72, 206 P3d 1042 (2009).

We begin by considering whether ORS 419B.325(2) applies in the context of a motion to dismiss juvenile court jurisdiction. That question hinges on what the legislature intended by the use of the term “disposition of the ward,” because it is only for that limited purpose that the legislature authorized the suspension of otherwise-applicable evidentiary requirements. Father argues that the “disposition” of the ward refers solely to the court’s ultimate determination that directs the ward’s “placement, care, and supervision.” DHS takes a broader view of the word, arguing that a juvenile court’s ruling on a motion to dismiss jurisdiction falls within its reach. “Disposition” should be given its

exception created by ORS 419B.325(2) is also provided in OEC 101(4)(i), 262 Or App at 755.

“plain, natural, and ordinary meaning,” which we attempt to do by turning to the relevant dictionary definition of the term. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993); *Dept. of Rev. v. Faris*, 345 Or 97, 101, 190 P3d 364 (2008). That definition provides:

“**1** : the act or the power of disposing or disposing of or the state of being disposed or disposed of: as **a** : ADMINISTRATION, CONTROL, MANAGEMENT; ***
b : a placing elsewhere, a giving over to the care or possession of another, or a relinquishing *** : the power of so placing, giving, ridding oneself of, relinquishing, or doing with as one wishes ***.”

Webster’s Third New Int’l Dictionary 654 (unabridged ed 2002). That definition can be read to support father’s argument that “disposition” refers only to the court’s exercise of its power to direct the ward’s placement, care, and supervision (the “act” of administering or “giving over to the care or possession of another”) as well as DHS’s argument that “disposition” encompasses the court’s jurisdictional decisions (the “power” to administer or place elsewhere).

When read in context, however, it becomes clear that the legislature did not intend the relaxed evidentiary standard of ORS 419B.325(2) to encompass a juvenile court’s jurisdictional determination. As an initial point, the other uses of the term “disposition” in the juvenile dependency statutes either support father’s position or, at the least, do not support DHS’s. See *State v. Klein*, 352 Or 302, 309, 283 P3d 350 (2012) (a statute’s context includes “related statutes”). For instance, ORS 419B.117(1)(c) provides that notice must be given to a parent or guardian of their right to “appeal a decision on jurisdiction *or* disposition made by the court.” (Emphasis added.) That disjunctive phrasing suggests that a jurisdictional determination is distinct from the “disposition” of the ward. Additionally, in the protective-custody context, ORS 419B.168 refers to “the court or a person appointed by the court to *effect* disposition” (emphasis added); ORS 419B.175 refers to “a person designated by a court to effect disposition of a child.” Of course, no entity but the court is authorized to effect a juvenile court’s jurisdiction, but other persons may naturally be appointed to effect

the court's directions as to the ward's placement, care, or supervision.

More revealing, however, is the fact that, in order to establish juvenile court jurisdiction over a child in the first instance, "[t]he facts alleged in the petition showing the child to be within the jurisdiction of the court as provided in ORS 419B.100(1), unless admitted, must be established by a preponderance of competent evidence."³ ORS 419B.310(3). There is no argument from DHS that ORS 419B.325(2) applies to an initial determination whether a child is within the juvenile court's jurisdiction. Nonetheless, DHS's position is that, once juvenile court jurisdiction has been established with competent evidence, the exception of ORS 419B.325(2) applies to subsequent challenges to that jurisdiction.

We answer that contention with two points. First, where the legislature has intended for the exception of ORS 419B.325(2) to apply—*e.g.*, in permanency hearings and review hearings—the legislature has stated that intent. *See* ORS 419B.449(2) (at a review hearing the "court may receive testimony and reports as provided in ORS 419B.325"); ORS 419B.476(1) (same for permanency hearing). The legislature has stated its intent that jurisdiction must be established in the first instance with competent evidence, ORS 419B.310(3), but has not expressed an intent to exempt subsequent jurisdictional determinations from that competent-evidence requirement. Second, the factual and legal considerations that are relevant to establishing jurisdiction in the first instance and to maintain jurisdiction in the face of a motion to dismiss do not differ in any significant respect. *Compare, e.g., State ex rel Juv. Dept. v. Smith*, 316 Or 646, 653, 853 P2d 282 (1993) ("If, after considering all the facts, the juvenile court finds that there is a reasonable likelihood of harm to the welfare of the child, the court may take jurisdiction."), *with Dept. of Human Services v. J. M.*, 260 Or App 261, 267, 317 P3d 402 (2013) ("[W]hen the court's continued jurisdiction is at issue, DHS has the burden of showing that

³ "Evidence is 'competent' when it is relevant, material and admissible[. *** T]he juvenile court's rulings thereon are governed by the Oregon Evidence Code." *State ex rel Children's Services Div. v. Page*, 66 Or App 535, 538, 674 P2d 1196 (1984) (internal footnote omitted).

the conditions that were originally found to endanger the child persist.”). Moreover, the results that flow from either determination are identical, *viz.*, juvenile court jurisdiction, *vel non*. In view of the important interests at stake, the legislature has imposed a significant evidentiary threshold that those who would seek to make a child a ward of the court must cross by using only competent evidence. In the absence of an explicit indication to the contrary, it is not persuasive to suggest that the legislature intended for the juvenile court’s jurisdiction, once established with competent evidence, to be perpetuated with less-than-competent evidence. We therefore conclude that ORS 419B.325(2) cannot serve as the basis for the court to receive or consider evidence for the purpose of making a jurisdictional determination.⁴

We turn now to consider the arguments regarding the permanency-hearing portion of the juvenile court proceedings. ORS 419B.476, which establishes procedures and standards for the permanency hearing, explicitly incorporates the evidentiary exception of ORS 419B.325: “A permanency hearing shall be conducted in the manner provided in ORS 418.312, 419B.310, 419B.812 to 419B.839 and 419B.908, except that the court may receive testimony and reports as provided in ORS 419B.325.” ORS 419B.476(1). When DHS seeks to change a ward’s permanency plan from reunification to adoption, DHS must prove that (1) it made reasonable efforts to effect reunification, and (2) that, despite those efforts, the parent did not make sufficient progress to allow the child’s safe return home. ORS 419B.476(2); *State ex rel Juv. Dept. v. C. D. J.*, 229 Or App 160, 164-65, 211 P3d 289 (2009). If the court determines that reunification is not possible under that standard, it must then determine

⁴ DHS argues that father waived his arguments regarding the challenged exhibits because, in making his objections to their admission, he failed to distinguish the objectionable hearsay portions of the exhibits from the nonobjectionable portions, citing *State v. Brown*, 310 Or 347, 800 P2d 259 (1990) (when evidence is “offered as a whole and an objection is made to the evidence as a whole and is overruled, the trial court will ordinarily not be reversed on appeal if any portion of the offered evidence was properly admissible”) (internal quotation marks omitted). That argument, however, is inapt because DHS urged the juvenile court to receive the challenged exhibits for all purposes under ORS 419B.325(2) and the court did receive them on that basis. Father made the legal argument that ORS 419B.325(2) was an improper basis on which to admit the evidence, the precise issue he raises on appeal.

an appropriate permanency plan for the ward (*e.g.*, adoption, guardianship, or placement with a relative). *See* ORS 419B.476(5).

In recognition of the stark fact that ORS 419B.325 applies to permanency hearings, father attempts to characterize a permanency hearing as a bifurcated process consisting of two phases. He refers to the juvenile court's determination of DHS's efforts and his progress under ORS 419B.476(2)(a) as the "adjudicative" phase of a permanency hearing. Father characterizes the juvenile court's determination of the appropriate permanency plan as the "dispositional" phase of the permanency hearing, and he contends that ORS 419B.325(2) operates to eliminate evidentiary requirements only at that second phase. Under that conceptualization, he contends that the trial court erred in receiving and considering the challenged exhibits in determining whether his progress was insufficient to allow his children to be safely returned to his care within a reasonable time.⁵

We begin by noting that the terms of ORS 419B.470 to 419B.476 (governing permanency hearings) do not draw the distinction between "adjudicatory" and "dispositional" phases in a permanency hearing that father proposes. In support of his argument for such a bifurcation, father notes that ORS 419B.476(1) also incorporates ORS 419B.310, which, again, and among other things, provides that the facts alleged in the jurisdictional petition must be proved by "competent" evidence. He thus reasons that the legislature, by incorporating two different sets of evidentiary rules at a permanency hearing, must have intended those differing rules to apply to different phases of the hearing. That argument, however, is of no help to father in the face of ORS 419B.476(1)'s explicit incorporation of ORS 419B.325, an incorporation that does not admit of any exception or qualification: "the court may receive testimony and reports as provided in ORS 419B.325." Moreover ORS 419B.310(3), insofar as it addresses evidentiary rules, provides only that the "facts alleged in the petition showing the child to be within

⁵ Father does not challenge the court's finding that DHS made reasonable efforts to reunite him with his children.

the jurisdiction of the court” must be established by competent evidence. That statute does not purport to direct the evidentiary rules that govern outside the limited context of jurisdictional determinations. Father’s argument also overlooks that a juvenile court may be called to consider both jurisdictional questions and permanency plan questions at a permanency hearing, as was the case here. Thus the incorporation of ORS 419B.310 in ORS 419B.476(1) strongly indicates the intent to require competent evidence for purposes of making a jurisdictional determination at a permanency hearing, a conclusion that, we note, reinforces our conclusion regarding the evidentiary rules that apply to a jurisdictional determination.

Next, despite father’s assertion that the permanency hearing is a bifurcated proceeding, the hearing, in the end, serves but one purpose. Although ORS 419B.476 sets out many different steps that the juvenile court must take to arrive at a permanency decision—steps that vary depending on various circumstances of the ward, the current permanency plan, the proposed change to the plan, and the parents—it is evident in its very nature that the purpose of a permanency hearing is to determine an appropriate plan for the placement, care, and supervision of the ward, *viz.*, an appropriate “disposition.” The determination under ORS 419B.476(2)(a) that father refers to as the “adjudicative phase”—assessing father’s progress and DHS’s efforts to determine if reunification is possible—is merely one step that the trial court is sometimes required to take along the way to its ultimate determination. Even under father’s understanding of the term, reunification with the parent is one possible “disposition of the ward.” *See* ORS 419B.476(5)(c) - (g) (possible permanency plans include “return home,” adoption, establishment of a legal guardian or placement with a “fit and willing” relative, and a “planned permanent living arrangement”). If the court determines that reunification is possible under the applicable standard and that the plan will accordingly be reunification, that determination, in effect, constitutes a “disposition of the ward.” If, on the other hand, the court determines that reunification is not possible, as was the case here, the court has eliminated one possible disposition among several. In either event, the juvenile court’s

determination of father's progress in light of DHS's efforts under ORS 419B.476(2)(a) is one that is part of the broader effort to arrive at an appropriate "disposition of the ward."

It is true that the "reasonable efforts" and "sufficient progress" determinations tend to concern the actions taken by DHS and father, as opposed to the circumstances of the ward. It is also true that the type of "testimony, reports or other material" that the court may receive under ORS 419B.325(2)—*viz.*, those "relating to the ward's mental, physical and social history and prognosis"—might not tend to bear greatly on what father and DHS have done *vis-à-vis* their respective reunification efforts. We note, however, that the "reasonable efforts" and "sufficient progress" determinations are explicitly centered on whether the *ward* may safely return home, and that the court must make those determinations with the "ward's health and safety the paramount concerns." ORS 419B.476(2)(a). As we have observed, "evidence relates to a ward's 'mental, physical and social *** prognosis' if it provides information that is relevant to a forecast or prediction of how the ward will fare in the future, and it necessarily includes information about the ward's future potential caregivers." *Dept. of Human Services v. B. J. W.*, 235 Or App 307, 312, 230 P3d 965 (2010) (omission in *B. J. W.*). It is thus quite natural that the legislature would intend for the juvenile court to be able to consider the types of ward-centric evidence described in ORS 419B.325(2) in assessing DHS's efforts and father's progress under ORS 419B.476(2)(a).

Father nonetheless argues that the 1981 legislative commentary to the Oregon Evidence Code supports his view of a permanency hearing as a bifurcated process. OEC 101(4)(i) provides that certain evidentiary provisions do not apply to "[p]roceedings to determine proper disposition of a child in accordance with ORS 419B.325(2) and 419C.400(4)." The commentary behind that provision provides:

"The Legislative Assembly deleted the Advisory Committee's blanket exemption of juvenile departments from courts to which the Oregon Evidence Code applies. Rule 101(1). The Legislative Assembly believes that the Code should apply in the adjudicatory phase of a juvenile court proceeding,

whether for delinquency or dependency. However it added paragraph [(i)] to subsection (4) of Rule 101 to clarify that during the dispositional phase of a juvenile court proceeding, evidence may be admitted in accordance with ORS [419B.325(2)]. This statute allows the receipt of materials relating to the child's mental, physical and social history and prognosis without regard to their competency or relevance under the rules of evidence."

OEC 101 Commentary (1981). As noted, father attempts to argue that the "reasonable efforts" and "sufficient progress" determinations of ORS 419B.476(2)(a) constitute the "adjudicatory phase," but that is clearly not what the quoted commentary means by "adjudicatory phase" because the test of ORS 419B.476(2)(a) was not enacted until well after 1981. *See Or Laws 1999, ch 859, § 15*. Moreover, an examination of our case law indicates that the term "adjudicatory phase" has long been understood—in both the delinquency and dependency contexts—to refer to the juvenile court's jurisdictional determination, rather than the determination of whether reunification of the family is possible under ORS 419B.476(2)(a). *See State v. Stewart / Billings*, 321 Or 1, 13 n 3, 892 P2d 1013 (1995) ("Juvenile court delinquency proceedings have two aspects: (a) the adjudicatory or jurisdictional phase, in which the court must decide whether the young person's conduct warrants juvenile court jurisdiction; and (b) the dispositional phase, in which the judge is faced with the task of what to do with a youth over whom jurisdiction has been established." (Quoting Robert H. Mnookin and D. Kelly Weisberg, *Child, Family and State: Problems and Materials on Children and the Law* 1008 (2d ed 1989)); *State ex rel Juv. Dept. v. Reynolds*, 317 Or 560, 563-64, 857 P2d 560 (1993) (using the term "adjudicatory hearing" to refer to the "jurisdictional phase" of a juvenile delinquency proceeding); *State ex rel Juv. Dept. v. Reding*, 23 Or App 413, 416, 542 P2d 934 (1975) (noting two relevant determinations in dependency case: "the first, whether facts produced under the rules of evidence justify the court's taking jurisdiction of the child and, second, if so, the disposition to be made of the child under more relaxed rules of evidence"). In sum, we conclude that the trial court did not err in relying on ORS 419B.325(2) to receive the challenged

exhibits for the purpose of making its determination under ORS 419B.476(2)(a).⁶

Father urges that, even when the challenged exhibits are considered, there is insufficient evidence to support the court's denial of his motion to dismiss and that we should reverse on that basis.⁷ Although DHS advances arguments why several of the exhibits, or at least portions thereof, were nonetheless competent under the rules of evidence, we are not in a position to determine what the record would look like if it had been properly developed in an adversarial setting under the applicable evidentiary rules. We therefore conclude that the appropriate course is to remand this case to the trial court to reconsider the motion to dismiss in light of the applicable evidentiary rules.

Vacated and remanded for reconsideration of father's motion to dismiss; otherwise affirmed.

⁶ Father's brief cites, in a footnote, several cases implicating a parent's liberty interest under the Due Process Clause of the federal constitution, and states that, when DHS is attempting to change the permanency plan to something other than reunification, "fundamental fairness" requires DHS to make the required showing with competent evidence. Beyond that cursory and conclusory assertion, however, he does not advance any argument that the Due Process Clause required the court to confine DHS's proof to competent evidence. We therefore decline to address that argument. *See, e.g., Wilson v. Dept. of Corrections*, 259 Or App 554, 557 n 3, 314 P3d 994 (2013) (declining to address a constitutional argument that was asserted but not developed).

⁷ Father does not advance an argument that there was insufficient evidence to support the change in permanency plan when the challenged exhibits are considered. Therefore, in light of our conclusion that the challenged exhibits were not received in error by virtue of ORS 419B.325(2) for purposes of the change in permanency plan, we are not called upon to review the sufficiency of the evidence regarding that change.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of N. B.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

A. B.
and S. U.,
Appellants.

Multnomah County Circuit Court
2014802782;
Petition Number 110605M;
A157767

Kathryn L. Villa-Smith, Judge.

Argued and submitted March 10, 2015.

Valerie Colas, Deputy Public Defender, argued the cause for appellant A. B. With her on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

George W. Kelly argued the cause and filed the brief for appellant S. U.

Jeff J. Payne, Senior Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

TOOKEY, J.

Reversed.

TOOKEY, J.

Mother and father appeal a judgment of the juvenile court taking jurisdiction over their one-year-old daughter, N. Parents contend that, in light of their decision to cede care of N to N's paternal grandmother (grandmother), the evidence that the Department of Human Services (DHS) presented at the jurisdictional hearing, which focused on parents' risk-causing behaviors, did not demonstrate that N's condition and circumstances were such as to endanger her welfare. ORS 419B.100(1)(c). DHS responds that ORS 419B.100(2) prohibits us from considering grandmother's care of N in evaluating N's condition and circumstances. We disagree. The proper inquiry is whether N's condition and all of her circumstances, including parents' conduct, grandmother's care of N, and all of the circumstances attendant to the arrangement between parents and grandmother, expose N to a current threat of serious loss or injury. Here, DHS did not contend that there was any nexus between the risk-causing conduct that it proved and a threat of serious loss or injury to N. Accordingly, we reverse.

In April 2014, DHS filed a dependency petition alleging that N and her four-year-old half sister, K,¹ were within the jurisdiction of the juvenile court because their "condition or circumstances are such as to endanger the welfare of the person or of others." ORS 419B.100(1)(c). In the second amended petition, DHS again alleged that the juvenile court had jurisdiction under ORS 419B.100(1)(c). At the jurisdictional hearing, which took place in August 2014, the court determined that DHS had proved the following allegations:

"B. The mother exposed the children to persons who present a risk of harm to the children.

"C. The mother needs the assistance of the Department of Human Services to develop parenting skills because she

¹ Mother is also the mother of K. K has no legal father, but father is her "psychological father" and she is very bonded to him. Mother separately appealed the judgment of jurisdiction as to K, who was in mother and father's care, not grandmother's. In that appeal, we affirmed without opinion. [*Dept. of Human Services v. S. U.*](#), 269 Or App 598, 346 P3d 668 (2015).

Throughout this opinion, we refer to the children as N and K; quotations have been modified accordingly.

lacks the skills necessary to avoid exposing her children to dangerous and harmful people and places.

“D. The mother’s substance abuse interferes with her ability to safely parent the children.

“H. The father *** is involved in criminal activities that interfere with his ability to safely parent his child.

“I. The father exposed the child, K, to criminal activity, drugs, and guns. He needs the assistance of the Department of Human Services in order to learn the parenting skills necessary to safely parent his child and protect her from harm.

“J. The father’s *** substance abuse impairs his judgment and ability to safely parent his child.”

The court also found that, as alleged in allegation G, there is no legal father for K. The court entered a judgment that, as relevant to this appeal, took jurisdiction over N. Both parents appeal.

On appeal of a judgment of dependency jurisdiction, we may review the facts *de novo*. ORS 19.415(3)(b); [*Dept. of Human Services v. C. Z.*](#), 236 Or App 436, 442, 236 P3d 791 (2010). Where, as here, no one has requested *de novo* review and we do not undertake it, we “assume the correctness of the juvenile court’s explicit findings of historical fact if these findings are supported by any evidence in the record,” and “further assume that, if the juvenile court did not explicitly resolve a disputed issue of material fact and it could have reached the disposition that it reached only if it resolved that issue in one way, the court implicitly resolved the issue consistently with that disposition.” [*Dept. of Human Services v. N. P.*](#), 257 Or App 633, 639-40, 307 P3d 444 (2013). We state the facts consistently with that standard.

Mother and father first became romantically involved in May 2009, while mother was pregnant with K. In June 2010, father was arrested at parents’ home in north-east Portland for a probation violation; during the arrest, police found a gun in a closet, which resulted in father’s conviction on a charge of felon in possession of a weapon. Later that year, while father was in prison as a result of that

conviction, parents separated. They reunited in October 2011, after father was released. They began living together again shortly thereafter.

N was born in May 2013 and lived with parents and K for three months. When N was born, the family lived in the same apartment complex as grandmother and father's sister, aunt. In June 2013, grandmother moved to Scappoose. Soon after, aunt joined her there. Aunt is in the process of purchasing the house that she and grandmother share.

In August 2013, parents brought N to stay with grandmother in Scappoose. At first, they visited every few days; later, after the semester started at Portland Community College, where both parents were enrolled, they would visit every week. After December or January, they visited every two to three weeks. When parents visited, they would bring K. Grandmother testified that, when N had a doctor's appointment, aunt would take N to parents the morning of or the evening before the appointment and parents would take her to the appointment. Grandmother explained that she and aunt were very attached to N; in particular, aunt "really didn't want to give her back. And so she was just kind of our baby." She explained that, by April 2014, the arrangement was indefinite: "We would have kept her until she graduated from college, if that [was what happened]. We were prepared for that." A DHS worker who had observed family visits with the children, which included grandmother and aunt, noted that N was very bonded to grandmother. He observed that, "[t]he majority of the time N was actually being held by [grandmother], and N's spending the majority of her time [during the visits] with [grandmother]."

At the time of the hearing, in August 2014, mother was 25. In the past, she had worked as a dancer at various strip clubs in Portland and, in the summer of 2011, while father was in prison, she had worked as a prostitute. Neither child was ever exposed to those activities. In December 2013, mother stopped dancing at strip clubs and, in January 2014, began working part-time as a cashier at a Rite Aid in northeast Portland. At the time of the jurisdictional hearing, mother was still working at Rite Aid and was anticipating a promotion. Father, who was 34 at the time of the

hearing, has several criminal convictions beginning with a conviction for third-degree assault entered in 1997.

Both parents admitted that they use marijuana and cocaine. Mother used cocaine while she was dancing; after she stopped dancing, she used it occasionally. When she was going to use drugs, she would leave K (as well as N) with grandmother. Mother sometimes used drugs even after she started working at Rite Aid, where she was subject to random drug testing. Shortly after the children were taken into DHS custody, mother submitted a urine sample that tested positive for both marijuana and cocaine. Father uses marijuana regularly; mother testified that he used it every other day. Father leaves the house when he uses marijuana.

In November 2013, the police stopped parents as they were leaving a party where they had smoked marijuana. Mother, who has never had a driver's license, was driving a car that she owned; at the jurisdictional hearing, she admitted that she was high during that stop. A 16-year-old girl was also in the car. The police found a marijuana pipe and marijuana in the car and a gun in the glove compartment, which was locked. The gun belonged to mother, who knew that father was not to be around weapons. The police also found a baggie of cocaine in father's pocket.

On the night of April 22, 2014, while mother was working an overnight shift at Rite Aid, father took K with him to what turned out to be a controlled drug buy. After police officers removed father and his companion from the car and arrested father, they discovered K sleeping in the back seat. They took her into protective custody and placed her in foster care that night. Mother denied that father had taken K to a drug deal.

The next day, April 23, after a shelter hearing, the court ordered DHS to continue K in care and take N into protective custody. The next day, April 24, mother met with the assigned DHS caseworker, Kennedy, and told him that N was at grandmother's house in Scappoose. Kennedy told mother to bring N to his office, but she did not do so. In the afternoon, Kennedy, a police officer, and a third person took N from grandmother's house and placed her

in nonrelative foster care. Kennedy attempted to obtain emergency certification for grandmother as a foster-care placement, but he could not do so as a result of a founded disposition in DHS records that dated back to 1992, when father was a child.²

In June 2014, parents were evicted from their apartment; they were staying with a friend at the time of the jurisdictional hearing. Both parents testified that, if it were necessary in order to be reunited with the children, parents would move in with grandmother. Grandmother testified that, if the children were returned, parents and the children could move in with her. In closing argument, DHS contended that parents had “stated that the children, if they were returned to them today, they wouldn’t go home with the parents. They would go home to [grandmother].”

At the jurisdictional hearing, father contended that N was “nowhere near any of” parents’ risk-causing conduct and that parents had “show[ed] good judgment” by placing N with grandmother. Mother argued that she had “done a good job of raising her children or seeing that they are being raised by someone or cared for by someone who is trustworthy and doing a good job” and that parents had “conceded *** custody of N to [grandmother].”

In closing argument, DHS pursued two lines of argument regarding N. First, DHS briefly argued that, as to allegations B and C—which alleged that mother had exposed the children to persons who present a risk of harm—“if N had been in the care of [parents] at the April 22nd date, *** N could just as well have been exposed to this drug deal. Because there were no other persons available in the home to watch N.”

Second, DHS returned to a line of reasoning that it had raised in questioning its witnesses. That line of reasoning was that parents’ decision to send N to grandmother *itself* presented a risk to N because, as Kennedy put it in his testimony,

² No further information about that founded disposition appears in the record. At the time of the hearing, DHS was attempting to have grandmother certified as a placement for both children.

“during the first *** few months of development and the first few years of development, it’s most important for the child to be with their primary parent for building bond and bonding relationships, and particularly with the mother and the child. It’s important for them to spend—not only spend time and having that direct contact and care for, it—it leads to what we call the parent-child bond. And I felt that was kind of concerning and that [mother] was not caring for her own daughter.”

On redirect examination, after Kennedy noted that, during family visits, N had mostly been held by grandmother, which suggested that grandmother had been her primary caregiver before DHS became involved, Kennedy agreed with DHS’s attorney’s statement that, “given that [N] was eleven months of age at removal, that arrangement would tend to prevent parent-child bonding.”

In closing argument, DHS returned to the idea that parents’—and, particularly, mother’s—decision to give N to grandmother showed that they were inadequate parents to both children: “This is a mother who has a pattern of leaving her children in the care of others so that she can engage in these activities, which include substance abuse and criminal activities.” The fact that, in DHS’s view, if the children were returned to parents immediately after the hearing, “[t]hey would go home to [grandmother]” rather than to parents provided further support for that argument.

Notably, DHS did not argue that N had been exposed to a risk of harm while she was in grandmother’s care, and it did not present evidence indicating any way in which parents’ risk-causing conduct would present a risk to N if parents and N all lived with grandmother. Rather, as explained above, DHS’s primary argument was that parents’ bad judgment was confirmed by the fact that they had left, and would likely continue to leave, primary parenting of N to grandmother. DHS did not ask the juvenile court to consider whether a risk to N would exist if parents and N lived with grandmother. DHS also did not refer to ORS 419B.100(2).

As to N, the court explained its decision to take jurisdiction as follows:

“I struggled with N. As we all know, N’s been living with her grandmother and her aunt. And I didn’t hear any testimony that she was not cared for. Mother made the election to—and father elected to leave her with grandmother, and that’s where she’s been for her little life.

“But I do find that the issues presented, the substance abuse issues and the judgment issues regarding—involving K extend to N, because those parenting decisions are going to be made for both children.”

Accordingly, it entered a dependency judgment taking jurisdiction over N.

Both parents appeal, contending that, even if their conduct presented a risk to K, who was in their care, that conduct did not present a risk to N because she was not in their care. Parents contend that “the totality of N’s circumstances was that she was being cared for by grandmother and aunt and the court had to determine whether grandmother and aunt caring for N would expose her to a threat of serious loss or injury that was likely to be realized.” (Emphasis in father’s brief.) In parents’ view, DHS failed to demonstrate any nexus between parents’ conduct and a risk of harm to N.

In his reply brief, father cites *Dept. of Human Services v. A. L.*, 268 Or App 391, 342 P3d 174 (2015), which issued after parents filed their opening briefs, as further support for parents’ view. In *A. L.*, the parents appealed judgments taking jurisdiction under ORS 419B.100(1)(c) over their three children, two of whom had lived with the paternal grandparents for their entire lives. DHS had placed the youngest child with another relative shortly after birth. *Id.* at 394. The parents, who lived sporadically in the paternal grandparents’ household, “interacted with [the children] like close relatives rather than parents.” *Id.* at 393.

DHS filed dependency petitions as to all three children after the third child tested positive for methamphetamine at birth. *Id.* at 394. At the time of the hearing, in addition to having concerns about the parents’ ability to safely care for the children because of their drug abuse and lack of parenting skills, DHS also had concerns about the

paternal grandparents' ability to safely care for the children. *Id.* at 398.

We held that, in light of the parents' entrustment of the children to the paternal grandparents, DHS had not showed any connection between the parents' conduct and a risk of harm to the children. *Id.* at 400. Nor had DHS showed a risk that the paternal grandparents' care had created a reasonable likelihood of harm to the children. *Id.* at 398-400. Finally, we explained:

“DHS’s arguments rest on a mistaken assumption that parents cannot give custody of their children to people who are not DHS-certified. To the contrary, the court must have jurisdiction for DHS to change the placement of children and, for jurisdiction to be warranted, there must be a current threat of harm to the children. ORS 419B.100(1)(c). Because parents have entrusted the primary care of the children to the paternal grandparents, who do not pose a current threat of harm, the court did not have a basis for asserting jurisdiction over the children. See [*State ex rel Dept. of Human Services v. Smith*](#), 338 Or 58, 86, 106 P3d 627 (2005) (concluding that, where mother’s family did not pose a threat to the child, that mother’s inability to parent independently did not amount to a condition seriously detrimental to the child).”

Id. at 400. Accordingly, we reversed the jurisdictional judgments.

In this case, father contends that, under *A. L.*, parents' “decision to voluntarily cede all the primary caregiving responsibilities for N to grandmother” is outcome determinative. He explains that “[p]arents had not disturbed that arrangement in the seven months that N had been in grandmother’s care, and parents each testified that they had no intent to do so. [DHS] presented no evidence to the contrary.” Accordingly, father contends, jurisdiction was not warranted.

For its part, DHS acknowledges *A. L.*, but contends that, under ORS 419B.100(2) and two cases applying that subsection, it does not control the outcome here. ORS 419B.100(2) provides, “The court shall have jurisdiction under subsection (1) of this section even though the child

is receiving adequate care from the person having physical custody of the child.” In DHS’s view, the effect of that provision is that, if a parent’s conduct would cause a risk to a child in the parent’s custody, then the juvenile court may take jurisdiction over any child of that parent, even if the child is under the care of someone else and is not at risk of harm. Here, DHS asserts, “the record of parents’ activities is sufficient to support jurisdiction regardless of [grandmother’s] care.”

We begin by noting that, in *A. L.*, we rejected the view, which DHS expressed during the jurisdictional hearing in this case, that a parent’s decision to turn over his or her child to another person *in itself* supports a determination that there is a current threat of harm to the child.³ In *A. L.*, DHS argued, among other things, that the “parents leaving [the two older children] with the paternal grandparents for long periods of time” in itself contributed to a risk of harm to the children. 268 Or App at 397. In rejecting DHS’s arguments, we explained that those arguments “rest on a mistaken assumption that parents cannot give custody of their children to people who are not DHS-certified.” *Id.* at 400. Implicit in our rejection of DHS’s assumption is the premise that a parent’s decision to allow a responsible person to care for his or her child for the long term, and to allow the child to become bonded to that other person with a “parent-child bond,” does not, in itself, provide support for a juvenile court’s decision to assert jurisdiction over the child.

We also disagree with DHS that, in cases like this one, where someone other than a parent is the primary caregiver for a child, ORS 419B.100(2) excuses DHS from showing a nexus between risk-causing conduct—here, parents’ conduct—and a risk to the child. To discern the meaning of a statute, we employ the methodology set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009), to determine the legislature’s intent. We first examine the text of the statute and its context. *Gaines*, 346 Or at 171. We also consider legislative

³ We do not understand the trial court to have relied on that argument in taking jurisdiction over N.

history “where that legislative history appears useful to [our] analysis.” *Id.* at 172.

ORS 419B.100(1) provides, with two exceptions not relevant here:

“[T]he juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and:

“(a) Who is beyond the control of the person’s parents, guardian or other person having custody of the person;

“(b) Whose behavior is such as to endanger the welfare of the person or of others;

“(c) Whose condition or circumstances are such as to endanger the welfare of the person or of others;

“(d) Who is dependent for care and support on a public or private child-caring agency that needs the services of the court in planning for the best interest of the person;

“(e) Whose parents or any other person or persons having custody of the person have:

“(A) Abandoned the person;

“(B) Failed to provide the person with the care or education required by law;

“(C) Subjected the person to cruelty, depravity or unexplained physical injury; or

“(D) Failed to provide the person with the care, guidance and protection necessary for the physical, mental or emotional well-being of the person;

“(f) Who has run away from the home of the person;

“(g) Who has filed a petition for emancipation pursuant to ORS 419B.550 to 419B.558; or

“(h) Who is subject to an order entered under ORS 419C.411(7)(a).”

Before the juvenile court can assert dependency jurisdiction over a child, it must determine, by a preponderance of the evidence, that the child falls within one of those eight categories. ORS 419B.310(3).

Thus, jurisdiction is proper under ORS 419B.100(1)(c) when a child's "condition or circumstances are such as to endanger the welfare of the" child. A child's welfare is endangered if the child is exposed "to conditions or circumstances that present a current threat of serious loss or injury." *Dept. of Human Services v. C. J. T.*, 258 Or App 57, 61, 308 P3d 307 (2013). "It is the *child's* condition or circumstances that are the focus of the jurisdictional inquiry." *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405, 122 P3d 116 (2005) (emphasis in original). Because of ORS 419B.100(1)(c)'s focus on the child, DHS must "establish a nexus between the allegedly risk-causing conduct or circumstances and risk of harm to the child, and that the risk of harm is present at the time of the hearing and not merely speculative." *Dept. of Human Services v. E. M.*, 264 Or App 76, 81, 331 P3d 1054 (2014).

As set out above, ORS 419B.100(2) provides, "The court shall have jurisdiction under subsection (1) of this section even though the child is receiving adequate care from the person having physical custody of the child." As noted, DHS contends that, given that provision, we cannot consider grandmother's care of N in deciding whether N's condition and circumstances are such as to endanger her welfare.

That view of ORS 419B.100(2) is incompatible with the text of ORS 419B.100(1). To determine whether a child's condition and circumstances present a current threat of serious loss or injury, as required by ORS 419B.100(1)(c), a court plainly must consider *all* of the child's circumstances, including the circumstance that the child is being cared for by someone other than the parents and the other specific circumstances attendant to that arrangement. See *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 652-53, 853 P2d 282 (1993) (earlier version of ORS 419B.100(1)(c) "require[s] the juvenile court to consider the totality of the circumstances presented in the case before it").⁴ To do otherwise

⁴ The 1993 Legislative Assembly repealed *former* ORS 419.476 and, in its place, enacted ORS 419B.100. Or Laws 1993, ch 33, §§ 53, 373. ORS 419B.100 has been amended numerous other times. Or Laws 1993, ch 546, § 10; Or Laws 1993, ch 643, § 5; Or Laws 2005, ch 843, § 31; Or Laws 2011, ch 291, § 5; Or Laws 2013 ch 1, § 61. Although the reenactment and some of the subsequent amendments have changed the text of subsections (1) and (2), none of those changes affects our

would change the focus of the inquiry from the condition and circumstances of the child to the circumstances of the parents. That would be inconsistent with the text of ORS 419B.100(1)(c), which directs the inquiry to the condition and circumstances *of the child*. See, e.g., *Vanbuskirk*, 202 Or App at 405.

Rather, subsection (2) does not negate any part of the requirements of subsection (1)—in this case, the requirement that the child’s “condition or circumstances are such as to endanger [the child’s] welfare,” ORS 419B.100(1)(c). Instead, subsection (2) provides additional information about the breadth of the inquiry under subsection (1): The mere fact that the child is being adequately cared for does not prohibit the court from taking jurisdiction *if one of the requirements of subsection (1) is satisfied*. Accordingly, in considering N’s condition and circumstances, we must consider not only the circumstance of N living with grandmother, but also whether, given that arrangement, parents’ conduct nevertheless poses a current threat of serious loss or injury to N.

DHS cites *State ex rel Juv. Dept. v. Moyer*, 42 Or App 655, 601 P2d 821 (1979), *rev den*, 288 Or 633 (1980), and *State ex rel Juv. Dept. v. D.*, 55 Or App 912, 640 P2d 660 (1982), in support of its view that it need not show a link between parents’ conduct and a risk to N under these circumstances. In *Moyer*, the older of the mother’s two children, M, who was four at the time of the hearing, was born while the mother was incarcerated. 42 Or App at 657. Before M was born, the mother “arranged with a friend’s mother, Mrs. Stowers, to care for the child and set up a legal guardianship, which continue[s] in effect.” *Id.*

On appeal of a judgment that, as relevant here, took jurisdiction over M under subsection (1)(e), we concluded that jurisdiction was proper under that subsection because, “[b]y being unavailable to care for [M], the mother ‘failed to provide’ for her.” *Id.* at 662 (quoting *former* ORS 419.476(1)(e)

analysis. Accordingly, throughout our discussion, we refer to “subsection (1)” and “subsection (2)” without distinguishing between *former* ORS 419.476 and ORS 419B.100 and without distinguishing among the versions of ORS 419B.100.

(1977)).⁵ Under subsection (2), the fact that the mother had established a legal guardianship “was insufficient to defeat jurisdiction.” *Id.* at 661. We explained:

“Subsection (2) was added following the decision in *Sneed v. Sneed*, 230 Or 13, 368 P2d 334 (1962), in which our Supreme Court held that a child in the actual custody of his maternal grandmother, though the mother had legal custody pursuant to a divorce decree, could not be subject to the jurisdiction of the juvenile court where the grandmother was taking adequate care of him. 230 Or at 17-18.^[6] While the present case is distinguishable from *Sneed*, we perceive no basis in the statute for holding that the existence of the legal guardianship in addition to actual custody is sufficient as a matter of law to defeat jurisdiction.”

Moyer, 42 Or App at 661.

Thus, in *Moyer*, we did not hold that subsection (2) excused the juvenile department from showing that the juvenile court had jurisdiction under subsection (1). Instead, we decided that the court had jurisdiction because the mother had “failed to provide” for M, *former* ORS 419.476(1)(e) (1977), by being unavailable to care for her, and the fact that the mother had made arrangements for M’s care, and that M was being cared for adequately, did not defeat that jurisdiction. *Moyer*, 42 Or App at 661. Although that holding may not withstand further scrutiny under the current text of ORS 419B.100(1)(e), it is consistent, structurally, at least,

⁵ At that time, subsection (1)(e) provided jurisdiction over a child when “[e]ither his parents or any other person having his custody have abandoned him, failed to provide him with the support or education required by law, *** and protection necessary for his physical, mental or emotional well-being ***.” *Moyer*, 42 Or App at 660 (quoting *former* ORS 419.476(1)(e) (1977)) (omissions in *Moyer*).

The juvenile court had taken jurisdiction over M under both subsection (1)(e) and subsection (1)(c). *Id.* On appeal, as explained in the text, we held that jurisdiction was proper under subsection (1)(e); that conclusion obviated the need to consider whether it was also proper under subsection (1)(c). *Id.* at 662 n 3.

⁶ In *Sneed*, the court set out the full text of *former* ORS 429.476(1), which, at that time, listed five bases for jurisdiction, and then observed that, in earlier cases, it had held “that the court cannot assume jurisdiction of a child, pursuant to the above statute, unless the person having the actual physical custody of the child, even though a stranger to the child, has neglected the child.” 230 Or at 17. It reiterated, “[T]he statute does not justify declaring a child to be dependent and made a ward of the court when the actual care the child is receiving is adequate and proper.” *Id.*

with our understanding of the operation of subsections (1) and (2), explained above, and, in any event, it construes subsection (1)(e), which is not at issue here.

As quoted above, in our analysis of subsection (2) in *Moyer*, we referred to the Supreme Court's opinion in *Sneed*. *Sneed* and its predecessors created an additional, extratextual requirement for dependency jurisdiction under subsection (1): "[T]he person having the actual physical custody of the child, even though a stranger to the child, [must have] neglected the child." *Sneed*, 230 Or at 17. In response to that holding, the legislature enacted subsection (2), which rejected *Sneed*'s extratextual neglect requirement and refocused the courts on the text of subsection (1), which, as explained above, enumerates the bases on which the legislature intended the juvenile court to have jurisdiction. In *Moyer*, we recognized the legislative rejection of *Sneed*'s extratextual neglect requirement and, considering the text of subsection (1)(e), concluded that jurisdiction existed under that subsection because the mother had failed to provide for the child by being unavailable. We did not hold that subsection (2) eliminated the juvenile department's burden of establishing one of the bases of jurisdiction listed in subsection (1). Accordingly, *Moyer* does not persuade us that our reading of the statutory text is incorrect.

We turn to *State ex rel Juv. Dept. v. D.*, the second case on which DHS relies in support of its view that it need not show a link between parents' conduct and a risk to N. In *D.*, the child's father had killed the child's mother and was serving a 17-year indeterminate prison sentence with a five-year minimum. 55 Or App at 914. The father and the juvenile department agreed that the child should live with an aunt and uncle in Arizona, and the father had established a conservatorship fund of \$85,000 for the child. *Id.* The father contended, however, that the juvenile court should not take jurisdiction once those arrangements were made. *Id.*

On appeal of a judgment taking jurisdiction, we noted that "[j]urisdiction was *not* based on lack of parental care or on parental failure to provide under ORS 419.476 (1)(e)," but we did not specify any ground in subsection (1) upon which the juvenile court did base its jurisdiction.

Id. (emphasis in original). After noting that the father had made arrangements for the child while he was incarcerated, we reasoned as follows:

“The fact remained, however, that [the father] would be incarcerated for an indefinite period and would be unable to supervise and ensure those arrangements. The child is too young to protect herself or to assist in her own care. Her circumstances are such that she needs someone to supervise and ensure the arrangements for her care. The legislature intended the state to have that role. [Subsection] (2) confers jurisdiction ‘even though the child is receiving adequate care from the person having [her] physical custody.’ See *State ex rel Juv. Dept. v. Moyer*, 42 Or App 655, 601 P2d 821 (1979), *rev den*, 288 Or 633 (1980) (legal guardianship, established to care for child while mother incarcerated, in addition to actual custody, did not defeat jurisdiction).”

D., 55 Or App at 914-15.

Thus, we noted that jurisdiction was not based on the parent’s failure to provide for the child, as it was in *Moyer*, but then reasoned that the father’s inability to “supervise and ensure [the] arrangements” that he had made for the child nevertheless allowed the juvenile court to take jurisdiction. *Id.* at 914. In doing so, we stated that “[subsection] (2) confers jurisdiction ‘even though the child is receiving adequate care from the person having [her] physical custody.’” *Id.* at 915 (emphasis added).

DHS is correct that our reasoning in *D.* supports its view that, when a child is being cared for by someone other than a parent, DHS need not show that one of the bases for jurisdiction in subsection (1) is satisfied. Indeed, under our reasoning in *D.*, subsection (2) entirely negates subsection (1); the juvenile court has jurisdiction *whenever* a “child is receiving adequate care from the person having [her] physical custody,” if that person is not her parent. *Id.* No consideration of any basis for jurisdiction under subsection (1) is necessary, as demonstrated by the fact that, in *D.*, we did not state whether any basis for jurisdiction specified in subsection (1) applied.

However, that reasoning is plainly wrong; it is inconsistent with the text and structure of subsections (1) and (2).

As we have explained, subsection (1) sets out the bases for jurisdiction, and the court may not take jurisdiction absent proof that one of those bases applies. ORS 419B.310(3) (“The facts alleged in the petition showing the child to be within the jurisdiction of the court *as provided in ORS 419B.100(1)*, unless admitted, must be established by a preponderance of competent evidence.” (Emphasis added.)). If, as we reasoned in *D.*, subsection (2) “confer[red] jurisdiction” whenever a child was not in the care of a parent but nevertheless was receiving adequate physical care, subsection (2) would be an additional, independent basis for jurisdiction; it would belong in subsection (1), not in its own subsection. Its placement in its own subsection, rather than as an additional enumerated basis for jurisdiction in subsection (1), demonstrates that the legislature did not intend it to provide such an independent basis for juvenile court jurisdiction.

The text of subsection (2) confirms that conclusion. It provides, “The court shall have jurisdiction *under subsection (1) of this section* even though the child is receiving adequate care from the person having physical custody of the child.” ORS 419B.100(2) (emphasis added). Thus, subsection (2) expressly recognizes that its application is subject to the prerequisite of “jurisdiction under subsection (1).” It is an additional instruction regarding the scope of the inquiry under subsection (1), not an independent basis for jurisdiction.

Because our decision in *D.* was plainly wrong, we now overrule it. After considering the legislative history of ORS 419B.100(2) that the parties have proffered, we conclude that it does not add anything of value to our analysis. *See Gaines*, 346 Or at 170 (the value of proffered legislative history “is for the court to determine”). As explained above, 271 Or App at ____, subsection (2) was enacted in response to the Supreme Court’s decision in *Sneed*, and its intended function was to reject the judicially created categorical rule that a juvenile court could not take jurisdiction over a child who was receiving adequate physical care from “[t]he person having the actual physical custody of the child, even though a stranger to the child.” *Sneed*, 230 Or at 17. Thus, to analyze whether the juvenile court has jurisdiction, we

apply the text of the relevant basis for jurisdiction in subsection (1), keeping in mind that the legislature did not intend to categorically preclude jurisdiction whenever the child is receiving adequate physical care.

As to subsection (1)(c), then, the relevant inquiry remains “whether *** the evidence in the record, as a whole, establishe[s] that the totality of the child[]’s circumstances or conditions exposed [the child] to a current risk of serious loss or injury that was reasonably likely to be realized.” *A. L.*, 268 Or App at 398. The effect of ORS 419B.100(2) on that inquiry is that the mere fact that a child is being adequately cared for by a nonparent does not prohibit the court from taking jurisdiction, as long as the totality of the child’s circumstances expose the child to a current risk of serious loss or injury. Here, then, DHS had the burden of alleging and proving that parents’ conduct posed a risk of serious loss or injury to N despite the fact that grandmother was caring for N.

DHS could have pursued that theory of jurisdiction below. Had DHS done so, it could have presented evidence indicating that parents would take primary caregiving responsibilities back from grandmother; for example, DHS could have ascertained whether parents intended to parent N if they moved in with grandmother, or whether parents would have continued allowing grandmother and aunt to care for N even if they all lived under one roof. Or DHS might have argued that parents’ mere presence in grandmother’s household would have presented a threat to N even if parents did not take over primary caregiving responsibilities. But DHS did not.⁷

In taking jurisdiction over N, the juvenile court decided that “the substance abuse issues and the judgment issues *** involving K extend to N, because those parenting decisions are going to be made for both children.” In the

⁷ In particular, neither DHS nor the juvenile court connected any risk to N with the possibility that parents and the children would all move in with grandmother. As noted above, in closing argument, DHS asserted that, if the children were returned immediately after the hearing, the children would go home with grandmother and parents would go elsewhere. Nor did DHS or the juvenile court connect any risk to N with the fact that, according to grandmother, parents occasionally took care of N for several hours at a time.

context of all of the court's findings, which do not identify or hint at any specific way in which parents' risk-causing conduct might have affected N, and DHS's failure to identify any such nexus, we understand the court's decision to be based on a speculative belief that, as long as parents had legal custody of N, they might remove her from grandmother's care, at which point she would be exposed to parents' bad judgment and substance abuse issues. That is not sufficient to support the conclusion that there is a current risk of harm. See [*Dept. of Human Services v. B. L. J.*](#), 246 Or App 767, 774, 268 P3d 696 (2011) (rejecting DHS's argument that, "even if the children will not be at risk in Bingham's house, mother [and the children] might leave Bingham's house," because there was no evidence demonstrating "that it is reasonably likely that mother will leave her current supportive environment").

Reversed.

Oregon Office of Public Defense Services

PARENT CHILD REPRESENTATION PROGRAM

ADVANCING LEGAL REPRESENTATION FOR PARENTS AND CHILDREN TO PROMOTE POSITIVE OUTCOMES

PCRCP, a pilot program of the Oregon Office of Public Defense Services, aims to improve outcomes for families through high quality representation of parents and children in juvenile court proceedings.

REDUCED CASELOAD FOR LAWYERS

PCRCP lawyers will have a caseload of not more than 80 cases. Lawyers will be expected to have frequent client contact, attend all case-related meetings, conduct independent investigations throughout the life of the case and advocate at all court hearings at every stage of the case, including shelter care hearings.

GREATER OVERSIGHT

Observe OSB Performance Standards.
Provide data and engage in regular reviews with the Office of Public Defense Services.

TRAINING & SUPPORT

Multidisciplinary trainings.
Partner collaboration.

INDEPENDENT SOCIAL WORKERS

Social workers will work directly with PCRCP lawyers to support parents and children in a variety of ways including: gathering information, connecting clients with services, and developing recommendations for alternative service plans.

BASED ON WASHINGTON STATE MODEL

Started in 2000, results include increased family reunifications and reduced time to permanency.

KICKOFF AUGUST 2014

LINN & YAMHILL COUNTIES

Linn & Yamhill have been selected as pilot counties. Selection was based on opportunities for improvement within the county and the willingness of attorneys and system partners to implement practice changes to improve outcomes for families involved in juvenile court proceedings.

GOALS

1. Ensure that parents and children have meaningful representation at all stages of the case, including shelter hearings.
2. Provide competent, effective legal representation throughout life of the case.
3. Reduce the number of children in foster care.
4. Reduce the time to achieve permanency.
5. Increase the number of children who are safely reunified with parents.

A NATIONAL MOVEMENT

Started in 2008, and maintained by the American Bar Association Center on Children and The Law, the National Project to Improve Representation for Parents Involved in the Child Welfare System works to ensure that the child welfare process is fair and just for all families. Though not a funding source, the National Project provides a wealth of information and inspiration!

QUESTIONS & COMMENTS

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Office of Public Defense Services

PARENT CHILD REPRESENTATION PROGRAM

POSITIVE OUTCOMES AND COST-EFFECTIVE RESULTS



High Quality Legal Representation

- Quality legal representation leads to higher rates of permanency for children.¹
- Repeated studies indicate that when parents are represented by attorneys with reasonable caseloads, the attorneys spend more time with parents and, as a result, both parents and children have better experiences with the child welfare system.²
- Families are more likely to be reunified when mothers and mothers' attorneys are present at early stage hearings.³
- The direction a case takes early on often predicts whether a child will return home.⁴
- The attorney's advocacy for frequent visitation, parent engagement, and the right service plan helps steer the case toward early reunification.⁵



Multidisciplinary Client Advocacy & Support

- Independent social workers help parents succeed: cases reach reunification more quickly and have a substantial cost savings.⁶
- Parents' level of engagement within the child welfare system is critical to reunification. Even a moderate increase in engagement is associated with a 47% increase in the rate of reunification.⁷
- Too often, agencies choose from a formulaic menu of services in making referrals for parents. Additional advocacy is needed to find flexible and creative services for parents to enable parents to move faster towards reunification.⁸



Positive Outcomes

- Children served by Washington's Parent Representation Program return home one month faster and reach other permanency outcomes one year sooner.⁹
- Children served by New York's Center for Family Representation team representation model are twice as likely to be safely reunified and stay home with their families permanently.
- Jurisdictions which want to improve parental representation and potentially shorten the time children are in foster care should consider a program similar to Washington's PRP.¹⁰



Cost Effective

- Reducing the time children spend in foster care saves money. Annual cost of foster care per child in Oregon is about \$26600.¹¹
- New York Center for Family Representation's similar program saves \$9 million/year by reducing the length of stay in foster care and promoting safe reunification with parents.¹²
- Washington's Parent Representation Program provides a cost benefit to the state through reduced foster care stays. In 2013, the program saved \$7.5 million.¹³

¹ Courtney, Hook & Orme, *Evaluation of the impact of enhanced parental legal representation on the timing of permanency outcomes*, Partners for Our Children (Discussion Paper Vol. 1(1)) (2011).

² Laver, *Improving representation for parents in the child-welfare system*, American Bar Association Children's Rights Litigation (October 2013).

³ National Council of Juvenile and Family Court Judges, *Effects of parental and attorney involvement on reunification in juvenile dependency cases*. PPCD Research Snapshot August 2011 (August 2011).

⁴ Cohen and Cortese, *Cornerstone advocacy in the first 60 Days: achieving safe and lasting reunification for families*, ABA Child Law Practice (May 2009).

⁵ *Id.*

⁶ Pilnik, *Parents' social workers help parents succeed*, ABA Child Law Practice Vol. 27 No. 9.

⁷ Marcenko, Newby, Mienko, and Courtney. *Family reunification in Washington State: which children go home and how long does it take?*, Partners for our children (August 2011).

⁸ See FN 4.

⁹ Washington Partners for Our Children, *Washington's Parents Representation Program helping children in child welfare systems reach permanency*, Partners for Our Children Issue Brief (February 2011).

¹⁰ See FN 5.

¹¹ Fixen, *Children in Foster Care: Societal and Financial Costs*, A Family for Every Child (November 2011). This figure includes not only room and board, but personal care services, one-time payments and staff time but does not account for court costs, legal representation, and other system costs.

¹² New York Center for Family Representation, *2013 Report to the Community*.

¹³ American Bar Association Center on Children and the Law, *ABA National Project to Improve Representation for Parents*, http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf.

Attachment 4



National Trends in Public Defense and the Oregon Experience: Seeking Reasonable Caseloads

Paul Levy
General Counsel
Office of Public Defense Services
June 18, 2015

In 2003, the National Legal Aid and Defender Association (NLADA) summed up the state of public defense in the United States with a short report entitled *Five Problems Facing Public Defense on the 40th Anniversary of Gideon v. Wainwright*.¹ Those problems were identified as jurisdictions that provide no counsel at all or pressured defendants to quickly waive their right to counsel; unmanageable attorney caseloads that interfere with the performance of essential defense functions; lack of enforceable performance standards for public defense attorneys; chronic underfunding of public defense systems; and lack of independence from control and pressures outside the judicial system. The following year, the American Bar Association published its own assessment of the state of public defense, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*.² As the title suggests, this detailed report focused on the same problems identified in the NLADA summary from the year previous.

Ten years later, on the occasion of the 50th anniversary of *Gideon*, little had changed in the assessment of public defense across the country. In a report entitled *50 Years Later: The Legacy of Gideon v. Wainwright*, the U.S. Department of Justice wrote that despite the expansion of *Gideon's* mandate to misdemeanor and juvenile proceedings, "the promise of *Gideon* remains unfulfilled. The quality of criminal defense varies widely across states and localities. Many defenders struggle under excessive caseloads and lack adequate funding and independence, making it impossible for them to meet their legal and ethical obligations to represent their clients effectively."³

Oregon has not been immune to the problems affecting public defense elsewhere in the country. Although the structure of the Public Defense Services Commission (PDSC) and the manner in which it administers its contracts has been cited as a model for providing defense services,⁴ securing adequate funding and assuring the presence of counsel, especially at first

¹ http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_Problems.

² http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def

³ <http://www.justice.gov/atj/fifty-years-later-legacy-gideon-v-wainwright>.

⁴ *Evaluation of Trial-Level Indigent Defense Representation in Michigan* (NLADA, June 2008), at 55.

http://mynlada.org/michigan/michigan_report.pdf. See also, *Justice Denied: American's Continuing Neglect of Our Constitutional Right to Counsel* (The Constitution Project, April 2009), at 166. www.constitutionproject.org.

appearances and for youth who may be pressured to waive their right to counsel, continue to be challenges. But what Oregon shares most clearly with the rest of the nation is a concern about ensuring reasonable defender caseloads.

The PDSC has learned through statewide surveys, service delivery reviews, peer reviews, and from other reports and testimony that the size of defender caseloads is a concern across the state.⁵ Fortunately, this is an area where Oregon can now benefit from recent developments at the national level. Among those developments are the publication, in 2011, of Professor Norman Lefstein’s treatise, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*,⁶ which provides a comprehensive discussion of why achieving reasonable caseloads is important, the history of past efforts to set caseload standards, a discussion of new approaches to setting standards, and a review of strategies for fulfilling the obligation to achieve reasonable caseloads.

More recently, the U.S. Department of Justice has weighed in with “statements of interest” in two lawsuits—the *Wilbur v. Mt. Vernon* case in Washington and the *Hurrell-Harring* case in New York—challenging the constitutionality of public defense systems that were alleged to be burdened by unmanageably large caseloads.⁷ The DOJ statements and the resolution of those cases, one by settlement and the other following trial, provide valuable guidance for how to monitor and enforce the provision of public defense services in a way that seeks to assure constitutionally adequate representation for all public defense clients.⁸ Finally, two recent reports—one from Texas⁹ and the other from Missouri¹⁰—provide a detailed description of a methodology for establishing empirically-based, jurisdiction-specific caseload standards.

Central to all of the above sources is the proposition, best stated by the court in *Wilbur v. Mt. Vernon*, that the “[m]ere appointment of counsel to represent an indigent defendant is not enough to satisfy the Sixth Amendment’s promise of the assistance of counsel.” In other words, the key measure of whether a public defense system meets its obligation to afford defendants their right to counsel—to provide what might be called “constitutional lawyering”—is whether appointed counsel has sufficient opportunity to conduct meaningful and timely client consultation, seek the pretrial release of the client, conduct an independent investigation of the

⁵ To be sure, these same sources have informed PDSC that the assessment of the quality of public defense services in Oregon is generally good. This contradiction—consistent reports of high caseloads and of generally good lawyering—points to the need for better tools to measure the caseloads of lawyers and assess the work they are performing.

⁶ The treatise is available as a free download from the American Bar Association here: http://www.americanbar.org/groups/legal_aid_indigent_defendants.html.

⁷ The two statements are available here: <http://www.justice.gov/atj/supporting-right-counsel-through-statements-interest>.

⁸ The 2013 U.S. District Court opinion in *Wilbur v. City of Mount Vernon* is available here: <https://www.wacdl.org/us-district-court-issues-ruling-in-wilbur-v.-city-of-mount-vernon>. The 2014 settlement agreement in *Hurrell-Harring v. State of New York* is available here: <http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state>.

⁹ The 2015 report to the Texas Indigent Defense Commission is available here: <http://www.tidc.texas.gov/resources/publications/reports/special-reports/weightedcaseloadstudy.aspx>.

¹⁰ The 2014 Missouri Project report is available here: http://www.americanbar.org/groups/legal_aid_indigent_defendants.html.

alleged offense, contest the legality of searches, interrogations and other police actions in the case, and subject the state's case to a true adversarial challenge.

Controlling caseload size through the establishment of jurisdiction-specific standards is seen as key to enabling constitutional lawyering. Not surprisingly, the approach taken in recent efforts to set such standards, such as in Missouri and Texas, and in other states following on their example, is to calculate the time ordinarily required to perform the essential functions of defending a particular case type and establish limits based upon the time that a lawyer has available to perform those functions. The methodology is, of course, more complex, involving time studies of work performed by public defense counsel on particular case types, similar time studies of a cross-section of private lawyers, and recommendations from a panel of experts convened to make time estimates based upon best practices for defending particular case types.

The PDSC, of course, has not established caseload standards for Oregon public defense providers, although the Office of Public Defense Services (OPDS) has begun exploring the feasibility of doing so. The studies conducted elsewhere have typically been grant-funded, involving consultation with experts from the American Bar Association and technical assistance from professional accounting or research entities. In the meantime, the PDSC has approved a revised General Terms to its Legal Services Contract, which provides a more explicit requirement that lawyers performing services under contract meet the relevant performance standards of the Oregon State Bar and that contract administrators assign work under the contract such that a lawyer "[h]as a current workload, including private practice cases not covered by this contract, that will not interfere with competent and diligent representation that fulfills the Standard of Representation set forth in Section 7.1.1 of this Contract." *Public Defense Legal Services Contract, General Terms, Sec. 7.2.2(b)*.

In addition to the above, the PDSC's Request for Proposals for legal services contracts for 2016-2017 requires that a contract proposal include an annual projected caseload for each attorney who will provide services under the contract, along with a projection of work each attorney may be obligated to perform on matters outside of the contract. The instructions for projecting acceptable caseloads have referred applicants to the recent Missouri and Texas studies, and reminded them of the contract language quoted above. The instructions also state that "[i]n no event should the annual projected caseload exceed the 2007 recommendations of the American Council of Chief Defenders Statement on Caseloads and Workloads," with a link to that statement.¹¹

The ACCD caseload statement is an endorsement of the 1973 recommendations of the National Advisory Commission (NAC) on Criminal Justice Standards and Goals of an annual caseload per lawyer of not more than 150 felony cases or not more than 400 misdemeanors per lawyer. While these standards have been criticized by Professor Lefstein and others as lacking an empirical basis and likely too high, they are still widely used, including by the State of

¹¹ The ACCD statement is available here:

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.nlada.org%2FDMS%2FDocuments%2F1189179200.71%2F&ei=zgZBVa74G9S2ogTntYBQ&usq=AFQjCNHp0WITOAJud2R9M_KbjVk1VfjIQ&sig2=8BhcvIH3UfZbL8On7S2yDw

Washington in the standards adopted by its Supreme Court in 2012. In lieu of an Oregon-specific caseload study that sets standards tailored to the substantive and procedural law of this state, the ACCD statement remains an available measure for evaluating contract proposals. However, the methodology and outcomes of the more recent caseload studies demonstrate that the NAC standards may be significantly too high for both felony and misdemeanor cases given the demands of criminal defense in Oregon today. As such, where possible OPDS may insist that contractors agree to caseloads lower than the NAC numbers.

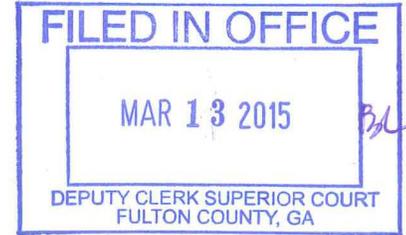
But the true measure of whether Oregon public defense providers have appropriate caseloads is whether they are adequately serving their clients by performing the functions essential for criminal defense. As the court observed in the *Mt. Vernon* case, “[w]hile a hard caseload limit will obviously have beneficial effects and the Washington Supreme Court’s efforts in this area are laudable, the issue for this Court is whether the system of public defense provided by the defendant municipalities allows appointed counsel to give each case the time and effort necessary to ensure constitutionally adequate representation....” Thus, in that case the court required, among other things, monitoring to ensure that each client receives timely and meaningful consultation with counsel, and the collection of data regarding the use of experts and investigators, pretrial motions filed, the number of contested cases, and case outcome data. Similarly, the settlement of the New York litigation required, in addition to setting caseload standards¹² and monitoring compliance with them, the establishment of a plan to ensure attorneys communicate effectively with clients, utilize investigators and experts, and have the necessary time and experience to handle the assigned cases.

The General Terms of the PDSC contract for public defense legal services enables OPDS to require that contract administrators maintain and provide upon request data on the current number and type of cases assigned to contract attorneys, and to maintain and provide upon request data on attorney case activity and case disposition. Access to this type of information, along with access to enhanced case information from the Oregon Judicial Case Information Network, may permit OPDS to better monitor compliance with contractor quality assurance obligations. But there is little doubt that establishing empirically supported Oregon-specific caseload standards would provide a significant benefit to both PDSC and contractors as we both seek to ensure constitutional lawyering. To this end, we are very fortunate to have Professor Lefstein join us this October to meet with the PDSC and the provider community at the annual Public Defense Management Seminar, for the purpose of continuing the discussion of the importance of caseload standards and how to achieve ones tailored to the realities of Oregon criminal law and procedure.

¹² The agreement specified that “[i]n no event shall numerical caseload/workload standards established under [the terms of the agreement] be deemed appropriate if they permit caseloads in excess of those permitted under the standards established for criminal cases by the National Advisory Commission on Criminal Justice Standards and Goals (Task Force on Courts, 1973)...”

FILE COPY

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



N.P., *et al.*, on Behalf of Themselves and All
Others Similarly Situated,

No. 2014-CV- 241025

Plaintiffs,

-against-

**STATEMENT OF INTEREST
OF THE UNITED STATES**

THE STATE OF GEORGIA, *et al.*,

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES

In the criminal justice system, children, like adults, are entitled to due process, and the rehabilitative focus of the juvenile courts cannot come at the expense of a child's constitutional rights. As the Supreme Court declared almost fifty years ago, "[u]nder our Constitution, the condition of being a [child] does not justify a kangaroo court." *In re Gault*, 387 U.S. 1, 28 (1967). To the contrary, due process requires that every child who faces the loss of liberty should be represented from their first appearance through, at least, the disposition of their case by an attorney with the training, resources, and time to effectively advocate the child's interests. If a child decides to waive the right to an attorney, courts should ensure that the waiver is knowing, intelligent, and voluntary by requiring consultation with counsel before the court accepts the waiver.

In this case, Plaintiffs allege, *inter alia*, that children in juvenile delinquency proceedings in the Cordele Judicial Circuit are denied their right to meaningful representation and are, at best, provided with "assembly-line justice." Amended Complaint ("Compl.") at 7, *N.P. v. State*, No. 2014-CV-24-1025 (Fulton Cnty. Super. Ct. Oct. 3, 2014). Several defendants have moved to

dismiss the complaint. Without taking a position on the merits of the case, the United States files this Statement of Interest to provide the Court with a framework for evaluating Plaintiffs' juvenile justice claims and to assist the Court in determining the types of safeguards that must be in place to ensure that children receive the due process the Constitution demands.¹

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal or state court. The United States has specific authority to enforce the right to counsel in juvenile delinquency proceedings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141.² Pursuant to that statutory authority, the United States is currently enforcing a comprehensive settlement with Shelby County, Tennessee, following findings of serious and systemic failures in the juvenile court that violated the due process and equal protection rights of juvenile respondents.³ An essential component of the

¹ The United States' silence on other issues presented in this litigation is not intended to express any view or assessment of other aspects of this case. Plaintiffs here allege that adult defendants in the same jurisdiction regularly enter guilty pleas without any substantive attorney-client interaction. Compl. at 7. The Department takes these allegations seriously and is troubled by any suggestion that citizens are being denied their right to counsel, but we confine our Statement in this instance to the allegations regarding juveniles in the Cordele Judicial Circuit. We have previously filed Statements of Interest in cases concerning the right to counsel in adult proceedings. See Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., Aug. 8, 2013), available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>; Statement of Interest of the United States, *Hurrell-Harring v. State of New York*, No. 8866-07 (N.Y. Sup. Ct., Sept. 25, 2014), available at http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf. There, as here, we took no position on the truth of the factual allegations or the merits of the case. In *Wilbur*, the United States provided its expertise by recommending that if the court found for the plaintiffs, it should ensure that public defense counsel have realistic workloads and sufficient resources to carry out the hallmarks of minimally effective representation. In *Hurrell-Harring*, the United States provided an informed analysis of existing case law to synthesize the legal standard for constructive denial of counsel.

² The statute provides, *inter alia*: "It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 14141(a) (1994). (emphasis added).

Agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with “reasonable workloads” and “sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters.”⁴

The Department of Justice’s commitment to the due process rights of juveniles is manifested in additional ways as well. For example, the Department’s Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) works “to develop and implement effective and coordinated prevention and intervention programs and to improve the juvenile justice system so that it protects public safety, holds offenders accountable, and provides treatment and rehabilitative services tailored to the needs of juveniles and their families.”⁵ Through grants and other programs, OJJDP supports efforts to reform state and local juvenile justice systems. Those activities include programs aimed at providing juvenile defense counsel with “customized technical assistance, training, and resources for policy development and reform,” reducing “the overrepresentation of minority youth in the juvenile justice system” and improving “access to counsel and quality of representation for youth with unique needs.”⁶

In addition, in March 2010, Attorney General Eric Holder launched the Access to Justice Initiative (“ATJ”), tasked with carrying out the Department’s commitment to improving indigent

³ Mem. of Agreement Regarding the Juv. Ct. of Memphis & Shelby Cntys., Tenn. Dec. 17, 2012, *available at* <http://www.justice.gov/crt/about/spl/findsettle.php>.

⁴ *Id.* at 15.

⁵ Vision and Mission, OJJDP, *available at* <http://www.ojjdp.gov/about/missionstatement.html>.

⁶ See Press Release, U.S. Dep’t of Justice Office of Pub. Affairs, *Attorney Gen. Holder Announces \$6.7 Million to Improve Legal Defense Services for the Poor* (Oct. 30, 2013), *available at* <http://www.justice.gov/opa/pr/attorney-general-holder-announces-67-million-improve-legal-defense-services-poor>. Similarly, the Department’s National Institute of Justice (“NIJ”) has funded research on indigent defense, and waiver of counsel in juvenile court is one area of research that is ongoing. Investigators from Georgetown University and the University of Massachusetts are presently studying “age-based differences in defendant knowledge regarding the role of counsel, presumptions about counsel, and maturity of judgment when making decisions about whether to waive the right to counsel in juvenile court. See National Institute of Justice, *Indigent Defense Research*, *available at* <http://nij.gov/topics/courts/indigent-defense/Pages/research.aspx>. NIJ expects to release the results of this study in 2016.

defense.⁷ Within of a few months of its creation, Laurence H. Tribe, the first head of ATJ, emphasized the vital importance of early appointment of counsel, particularly in juvenile cases. In his remarks at the 2010 Annual Conference of Chief Justices, he stressed that “[e]very child in delinquency proceedings should have access to justice via a right to counsel at every important step of the way: before a judicial determination regarding detention, and during probation interviews, pre-trial motions and hearings, adjudications and dispositions, determination of placement, and appeals.” He urged state courts to “adopt a rule that at the very least requires consultation with an attorney prior to waiver of counsel” for juveniles.⁸

Finally, the United States has taken an active role in providing guidance to courts and parties on the due process and equal protection problems that result from the nation’s ongoing indigent defense crisis. For example, the United States filed Statements of Interest in *Wilbur v. City of Mount Vernon* in 2013 and *Hurrell-Harring v. State of New York* in 2014. Both cases involved the fundamental right to counsel for indigent adult criminal defendants and the role counsel plays in ensuring the fairness of our justice system.⁹ Although these prior filings focused on adult criminal justice systems, the allegations at issue here are even more problematic because they apply to children.

In light of the United States’ compelling interest in protecting the right to counsel generally and the right to counsel for juveniles in particular, the United States files this Statement

⁷ See Access to Justice Initiative, U.S. Dep’t of Justice, *available at* <http://www.justice.gov/atj/>.

⁸ Laurence H. Tribe, Senior Counselor for Access to Justice, Keynote Remarks at the Annual Conference of Chief Justices (July 26, 2010), *available at* <http://www.justice.gov/opa/speech/laurence-h-tribe-senior-counselor-access-justice-keynote-remarks-annual-conference-chief>.

⁹ The United States also recently filed a Statement of Interest in *Varden v. City of Clanton*, asserting that any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes poor public policy. See Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv34-MHT-WC (M.D. Ala., Feb. 13, 2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/02/13/varden_statement_of_interest.pdf.

of Interest to assist the Court with its analysis of the alleged failures of the juvenile defense system in the Cordele Judicial Circuit.

BACKGROUND

This country has seen significant development in the last century with respect to how courts and justice professionals treat children charged with delinquency. As explained in the Shelby County Findings Report,¹⁰ prior to 1899 the law treated children over seven years of age and adults the same way. “States prosecuted children in the same manner as adults and sentenced them to lengthy periods of incarceration in adult prisons.”¹¹

This harsh approach began to change in the late nineteenth century as states established separate courts for juveniles that explicitly endorsed judicial flexibility and informality rather than rigid procedural safeguards.¹² The goal of these reforms was to enable juvenile judges to respond to the unique needs of accused and adjudicated youth. At the time, “bedrock due process protections afforded adults were considered restrictive for juvenile court judges, who sought to work informally to treat, guide, and rehabilitate young people.” Findings Report at 8. Soon, however, many became concerned that in juvenile courts “the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” *Kent v. United States*, 383 U.S. 541, 556 (1966).

As a result, in the 1950’s and 1960’s juvenile justice evolved again, culminating in the Supreme Court’s landmark ruling in *Gault*, 387 U.S. 1. In *Gault*, the Court recognized that the unintended consequence of the juvenile courts’ more flexible approach was the failure to

¹⁰ Findings Report Regarding the Juv. Ct. of Shelby Cnty, Tenn. Apr. 26, 2012, *available at* http://www.justice.gov/crt/about/spl/documents/shelbycountyjuv_findingsrpt_4-26-12.pdf.

¹¹ *Id.* at 8.

¹² *Id.*

prioritize due process. Rather than enshrine that disparity further, *Gault* eradicated it. *Gault* stands for the proposition that children involved in the juvenile justice system are fully entitled to due process in their dealings with the court. As the Department has previously observed:

Gault focused not on creating a system of rigid formality, but on ensuring that juveniles were afforded the protections of due process. In essence, the Court outlined important constitutional protections afforded to juveniles in the delinquency process — the right to counsel, the right to notice of the charges, the right to confront witnesses, and the right to be free from compulsory self-incrimination.¹³

Despite *Gault*'s unequivocal command and the increasing recognition that children require counsel with specialized, training, supervision and skills, practitioners and scholars have recognized that the promise of *Gault* is threatened.¹⁴ And, if Plaintiffs' allegations are correct, in the Cordele Judicial Circuit, juvenile defenders are absent altogether.

DISCUSSION

Plaintiffs seek declaratory and injunctive relief, alleging that juvenile defendants within the Cordele Judicial Circuit are routinely denied their right to counsel outright or that the right is reduced to a "hollow formality" lacking any semblance of a representational relationship between defense attorney and client. Compl. at 8. While taking no stance on the merits of these

¹³ *Id.* at 8-9.

¹⁴ See Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court – A Promise Unfulfilled*, 33 CRIM. L. BULL. 371 (May-June 2008) (reviewing and analyzing the findings of the 1995 national juvenile assessment by the American Bar Association's Juvenile Justice Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* and 16 statewide juvenile defense system assessments subsequently undertaken by the National Juvenile Defender Center *available at* <http://njdc.info/our-work/juvenile-indigent-defense-assessments/>); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 549-51, 561 (2009) (describing obstacles to effective representation due to inadequately funded juvenile defense systems and noting that "high caseloads also negatively impact indigent juvenile clients more than indigent adult clients" because defenders who handle both "often make 'triage' decisions, and it is not unusual for defenders to focus most of their attention on adult felony cases, at the expense of the delinquency clients."); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 791-92 (2010) (noting that *Gault*'s promise is "threatened by routine and widespread substandard representation" as "many attorneys for juveniles do not interview witnesses or visit the crime scene. They do not file pre-trial motions. They do not prepare for dispositional hearings" and they are unprepared for bench trials.).

factual allegations, the United States maintains that children, like adults, are denied their right to counsel not only when an attorney is entirely absent, but also when an attorney is made available in name only. A state further deprives children of their right to counsel if its courts allow them to waive that right without first consulting with competent counsel.¹⁵

I. DUE PROCESS DEMANDS THAT CHILDREN BE PROVIDED WITH THE IMMEDIATE AND ONGOING ASSISTANCE OF SKILLED COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS.

A. The right to counsel is a central requirement of due process in delinquency proceedings.

The Constitution guarantees that every criminal defendant and child accused of delinquency, regardless of economic status, has the right to counsel when their liberty is at stake. *Gideon v. Wainwright*, 372 U.S. 335, 340-341, 344 (1963); *Gault*, 387 U.S. at 36. The right to counsel is so fundamental to the operation of the criminal and juvenile justice systems that diminishment of that right erodes the principles of liberty and justice that underpin these proceedings. Although it was *Gault* that first codified this procedural right for juveniles in state proceedings, the Supreme Court had long emphasized the critical role of counsel in ensuring fairness to the accused: “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] requires the guiding hand of counsel at every step in the proceedings against him.” *Powell v. Alabama*, 287 U.S. 45, 68-69

¹⁵ If the Plaintiffs prevail, the Court may consider as one possible remedy the appointment of a monitor as part of its authority to grant injunctive relief. Monitors, or their equivalent, have been utilized in similar cases. In *Wilbur*, pursuant to an order for injunctive relief, the court required the hiring of a “Public Defense Supervisor” to supervise the work of the public defenders. The supervision and monitoring includes extensive file review, caseload assessments, data collection, and reports to the court to ensure there is “actual” and appropriate representation for indigent criminal defendants in the cities of Mount Vernon and Burlington. See Statement of Interest of the United States, *Wilbur*, *supra* note 1, at 19.

(1932). *See also Johnson v. Zerbst*, 304 U.S. 458 (1938) (establishing right to counsel in federal criminal prosecutions).¹⁶

In the half-century since *Gideon* and *Gault*, the Court has continually reaffirmed that zealous representation by qualified counsel is essential to a constitutional criminal justice system. The Sixth Amendment right to counsel now applies even where the actual likelihood of imprisonment is more remote,¹⁷ and it attaches at the accused's initial presentment before a judicial officer.¹⁸ Specifically addressing the right to counsel for juveniles, the Court has noted that it "is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice." *Kent*, 383 U.S. at 561.

The *Gault* Court emphasized this point repeatedly, and criticized the reasoning that led some to argue that adults should be afforded greater procedural protections than children. *See Gault*, 387 U.S. at 27-28 ("[A detained juvenile's] world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'"); *id.* at 29 ("The essential difference between Gerald's case and a normal criminal case is that the safeguards available to adults were discarded in Gerald's case."); *id.* at 47 ("It would indeed be

¹⁶ The President's Comm'n on Law Enforcement & Admin. of Justice, Exec. Office of the President, *The Challenge of Crime in a Free Society* 86 (1967) ("The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel."), *quoted in Gault*, 387 U.S. at 38 n.65.

¹⁷ *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (counsel must be appointed even in cases in which a prison sentence will be suspended, but could someday be imposed).

¹⁸ *Rothgery v. Gillespie*, 544 U.S. 191 (2008) ("This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty.") (citations omitted).

surprising if the privilege against self-incrimination were available to hardened criminals, but not to children.”).

Although the law has long recognized a distinction between children and adults, our understanding of these differences—and the law’s recognition of them—has increased over the last ten years.¹⁹ In that time, the Supreme Court has repeatedly underscored that age is “far ‘more than a chronological fact,’” and that the law must adapt accordingly. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citation omitted).

Buttressed by scientific research, the Court has increased protections for juveniles out of recognition that “the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.” *Graham v. Florida*, 560 U.S. 48, 78 (2010). In shielding juveniles from capital punishment, the Court found that “general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” *Roper v. Simmons*, 543 U.S. 551, 569 (2005). In *Graham*, the Court extended its own prior holdings to the sentence of juvenile life without parole for non-homicide offenses based on the recognition that scientific research “continue[s] to show fundamental differences between juvenile and adult minds.”²⁰ *Graham*, 560 U.S. at 68. Children must now be afforded special consideration in the context of *Miranda* waivers²¹ because they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental

¹⁹ See Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Development Capacities with the Legal Rights Provided by In Re Gault*, 60 RUTGERS L. REV. 125, 149-60 (2007) (reviewing recent research from psychology, neuroscience and psychosociology on adolescent decision making).

²⁰ According to the U.S. Department of Health and Human Services’ National Institute of Mental Health, brain maturation does not occur until the early twenties. See Nat’l Inst. of Mental Health, *The Teen Brain: Still Under Construction*, NIH Publication No. 11-4929 (2011), available at <http://www.nimh.nih.gov/health/publications/teen-brain-still-under-construction/index.shtml>.

²¹ *J.D.B.*, 131 S. Ct. at 2403.

to them.”²² Most recently, the Court emphasized that its increased protections for juveniles in the sentencing context are compelled by the “hallmark features” of youth: “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller v. Alabama*, 132 S.Ct. 2455, 2468 (2012). These same features make children more vulnerable than adults and more dependent on qualified counsel to navigate the justice system.

[Roper and Graham] relied on three significant gaps between juveniles and adults. First, children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable . . . to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as “well formed” as an adults’; his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity]”.

Id. at 2464 (internal citations omitted). This reasoning applies not merely to the sentencing phase, but to the entirety of a juvenile’s contact with the justice system.²³

Case law, practical experience, and scientific research compel the conclusion that children are entitled to procedural safeguards that acknowledge their vulnerability. Indeed, many states and localities have endeavored to do this by providing an array of enhanced safeguards for juveniles at all stages of the process, including a requirement that all custodial interrogations of juveniles be recorded, *e.g.*, Wis. Rev. Stat. § 938.195 *et seq.* (2008); a presumption that juveniles are indigent for purposes of attorney appointment, *e.g.*, Pa. R. Juvenile Ct. P. 151 (2014); statutory safeguards prohibiting the public disclosure of juvenile court records, *e.g.*, 33 V.S.A. § 5117 (2009); strict sealing and expungement requirements beyond those typically afforded to adults, *e.g.*, Mont. Code Ann. § 41-5-216 (2014); rules rendering any communications between

²² *Id.* (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

²³ *Miller*, 132 S.Ct. at 2468 (noting that “incompetencies associated with youth” can include a juvenile’s “inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.”).

juveniles and court staff inadmissible, *e.g.*, Ark. Code Ann. § 9-27-321 (2010); and prohibitions on juvenile shackling in court proceedings, *e.g.*, Fla. R. Juv. P. § 8.100(b) (2014). Each of these measures is a concrete recognition of the reality that children are different, and each is a positive step in the provision of enhanced safeguards for our youth.

B. Children who face the loss of liberty must be represented zealously by skilled counsel at every stage of delinquency proceedings.

The right to counsel means more than just a lawyer in name only. Justice systems must ensure that the right to counsel comprehends traditional markers of client advocacy and adequate structural support to ensure these traditional markers of representation are met. The Department has previously discussed the requirements for effective counsel in its filing in *Hurrell-Harring*,²⁴ and the standards set forth there are as applicable to juveniles as they are to adults. Indeed, the unique qualities of youth demand special training, experience and skill for their advocates. For example, although the need to develop an attorney-client relationship is the same whether an attorney is representing an adult or a child, the juvenile defense advocate's approach to developing the necessary trust-based relationship differs when the client is a child.

Because the client in juvenile court is a minor, counsel's representation is more expansive than that of a criminal defense lawyer for an adult. Lawyers for children must be aware of their clients' individual and family histories, their schooling, developmental disabilities, mental and physical health, and the client's status in their communities in order to assess their capacities to proceed and to assist in their representation. Once those capacities are understood, the lawyer must vigorously defend the juvenile against the charges with that capacity in mind, and then prepare arguments to obtain rehabilitative treatment should the child be found guilty.²⁵

²⁴ Statement of Interest of the United States, *Hurrell-Harring*, *supra* note 1.

²⁵ Mlyniec, *supra* note 14, at 378-79.

Attorneys representing children must receive the training necessary to communicate effectively with their young clients and build a trust-based attorney-client relationship.²⁶ Without that relationship, they cannot satisfy their responsibilities as counsel. These well-established duties include advocating for the client at intake and in detention hearings, investigating the prosecution's allegations and any possible defenses, seeking discovery, researching legal issues, developing and executing a negotiation strategy, preparing pre-trial motions and readying for trial, exploring alternative dispositional resources available to the client, uncovering possible client competence concerns, and providing representation following disposition and on appeal.²⁷ At all of these stages, the vulnerable juvenile client faces processes overwhelming to most adults, and accordingly, must have an advocate who can guide them in terms they can understand through a relationship built on trust.²⁸ Every child who faces the loss of liberty must be

²⁶ Nat'l Juvenile Defender Ctr., NATIONAL JUVENILE DEFENSE STANDARDS, Standard 3.6 (2012) ("Counsel must recognize barriers to effective communication. Counsel must take all necessary steps to ensure that differences, immaturity, or disabilities do not inhibit the attorney-client communication or counsel's ability to ascertain the client's expressed interest. Counsel must work to overcome barriers to effective communication by being sensitive to difference, communicating in a developmentally appropriate manner, enlisting the help of outside experts or other third parties when necessary, and taking time to ensure the client has fully understood the communication."). The standards were developed during a five-year process by multi-disciplinary teams consisting of juvenile defenders, prosecutors, judges, legislators, academics, and other juvenile justice stakeholders. *See also* Nat'l Research Council of the Nat'l Acads., *Reforming Juvenile Justice: A Developmental Approach* 203 (Richard J. Bonnie et al. eds. 2013) ("The youth's decision-making capacity and voice may be enhanced by the lawyer's ability to create an appropriate environment for counseling, build rapport with the youth over time, engage the youth in one-on-one age-appropriate dialogue, and repeat information as many times as the youth needs to hear."); Robin Walker Sterling, *Role of Juvenile Defense Counsel in Delinquency Court* 8 (2009) ("Juvenile defense counsel do not assume they know what is best for the client, but instead employ a client-centered model of advocacy that actively seeks the client's input, conveys genuine respect for the client's perspective, and works to understand the client in his/her own socioeconomic, familial, and ethnic context.").

²⁷ *See generally* Nat'l Juvenile Defender Ctr., *supra* note 26; R. Hertz, M. Guggenheim, A.G. Amsterdam, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES (2012).

²⁸ These challenges are complicated by the number of children in the juvenile justice system struggling with learning or developmental disabilities. *See* Joseph B. Tulman, *Special Education Advocacy for Youth in the Delinquency System*, in SPECIAL EDUCATION ADVOCACY 401, 405-06 (Ruth Colker, Julie K. Waterstone eds., 2010) (citing to studies on system involved children and noting their overrepresentation in the delinquency system); *see also* Mary M. Quinn, et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 *Exceptional Children* 339-45 (2005) (Among other findings, number of youth needing special education services was almost four times that of children in public schools); Joseph P. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 876 n.2 and accompanying text;

represented from the time of arrest through the disposition of their case by an attorney with the skills necessary to zealously advocate their interests.

Georgia law recognizes the specialization of juvenile defense by requiring the creation of juvenile defense units with attorneys trained and dedicated to representing children accused of delinquency offenses.²⁹ Ga. Code Ann. § 17-12-23(c) (2014). Specialization requires training and oversight to ensure that attorneys have the resources and support necessary for competent representation, including initial and on-going training on adolescent brain development and its implications for building an attorney-client relationship,³⁰ protecting juvenile clients' constitutional rights,³¹ the child's relative culpability,³² the law of pretrial juvenile detention,³³

Nat'l Juvenile Defender Ctr. & Juvenile Law Ctr., TOWARD DEVELOPMENTALLY APPROPRIATE PRACTICE: A JUVENILE COURT TRAINING CURRICULUM, Module 3, *Special Education and Disability Rights* 1 (2009) ("A large number of youth who come into contact with the juvenile justice system in the United States have experienced school failure, fall significantly below peers on reading and math achievement tests, and have characteristics that entitle them to special education services. In particular, youth in the juvenile justice system are more likely than youth not involved in the juvenile justice system to meet the diagnostic criteria for specific learning disabilities, emotional disturbance, mental retardation, speech or language impairments, and other health impairments, including attention deficit disorder.").

²⁹ See also Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Ass'n, *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*, Principle 2A. (2d ed. 2008) ("The public defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law that is different from, but equally as important as, the representation of adults in criminal proceedings.").

³⁰ *Graham*, 560 U.S. at 78 ("Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in the defense. . . . Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all lead to poor decisions by one charged with a juvenile offense . . . These factors are likely to impair the quality of a juvenile defendant's representation."). See also Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 270-74 (2005); Nat'l Juvenile Defender Ctr., *supra* note 26.

³¹ *J.D.B.*, 131 S. Ct. 2394 (juvenile suspect's age is relevant factor when determining whether he or she is in police custody and entitled to be warned prior to interrogation pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966)).

³² *Miller*, 132 S. Ct. at 2465 (distinctive attributes of youth caused by on-going development of parts of the brain involved in controlling behavior, including transient rashness, proclivity for risk, and inability to assess consequences, lessen child's moral culpability).

³³ Nat'l Juvenile Defender Ctr., *supra* note 26, at Standard 3.8(a) ("Counsel must be versed in state statutes, case law, detention risk assessment tools, and court practice regarding the use of detention and bail for young people.").

dispositional resources,³⁴ special education law,³⁵ the collateral consequences of delinquency findings,³⁶ and the ethical issues that arise in delinquency representation.³⁷

A juvenile division should have the resources to monitor workloads so that attorneys are available to advocate for clients at intake³⁸ and during detention and probable cause hearings.³⁹ Outside of court, they need adequate time to meet with clients, investigate the prosecution's factual allegations, engage in a robust motions practice, devote time to preparing for trial and the disposition process, and to monitor and advocate for the needs of post-disposition clients who are still within the court's jurisdiction.⁴⁰

³⁴ American Bar Ass'n, Juvenile Justice Ctr., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 36-38 (1995) ("The purpose of the dispositional process is to develop plans for juveniles that meet their educational, emotional and physical needs, while protecting the public from future offenses. . . . More than at any other stage of the juvenile justice system, counsel should explore every possible resource during the dispositional process.").

³⁵ Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Ass'n, *supra* note 29, at Principle 7C (juvenile defense team members "must receive training to recognize issues that arise in juvenile cases . . . [including] . . . Special Education"); *id.* at Principle 9A ("The public defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition"); *See also* Tulman, *supra* note 28 (special education rights provide opportunities to develop delinquency advocacy evidence and arguments otherwise unavailable to juvenile defender).

³⁶ *Gault*, 387 U.S. at 32 ("[M]any [juvenile] courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers."); The President's Comm'n on Law Enforcement & Admin. of Justice, *supra* note 16, at 87 ("Employers, schools, social agencies have an understandable interest in knowing about the record of a juvenile with whom they have contact. On the other hand, experience has shown that in too many instances such knowledge results in rejection or other damaging treatment of the juvenile, increasing the chances of future delinquent acts."). *See, e.g., Padilla v. Kentucky*, 559 U.S. 356 (2010) (defense counsel's failure to correctly advise client regarding immigration consequences of accepting guilty plea is outside the scope of constitutionally reasonable professional assistance and therefore may be basis for finding of ineffective assistance of counsel).

³⁷ American Bar Ass'n, *supra* note 34, at 26 (commentators have suggested that many of those who represent children "do not understand their ethical obligations, and as a result, fail to zealously represent their young clients."); *see, e.g.,* Nat'l Juvenile Defender Ctr., *supra* note 26, at Standard 1.1 (Ethical Obligations of Juvenile Defense Counsel), Standard 1.2 (Elicit and Represent Client's Stated Interests), Standard 1.6 (Avoid Conflicts of Interest).

³⁸ Nat'l Juvenile Defender Ctr., *supra*, note 26, at Standards 3.1, 3.2, 3.5.

³⁹ *Id.* at Standards 3.7, 3.8.

When faced with severe structural limitations, even good, well-intentioned, lawyers can be forced into a position where they are, in effect, counsel in name only. For example, if they do not have the time or resources to engage in effective advocacy or if they do not receive adequate training or supervision because their office is understaffed and under-resourced, then they will inevitably fail to meet the minimum requirements of their clients' right to counsel. These conditions lead to *de facto* nonrepresentation. *Hurrell-Harring*, 930 N.E. at 224; *see also State v. Peart*, 621 So.2d 780, 789 (La. 1993) (“We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance. As the trial judge put it, ‘[n]ot even a lawyer with an S on his chest could effectively handle this docket.’”).

In justice systems where lawyers regularly fail to advocate for clients in a manner traditionally expected of effective counsel and/or where lawyers lack the structural support necessary to do their jobs, it is tantamount to the system's failure to appoint counsel.⁴¹ If the allegations in this case are ultimately proven true, then Plaintiffs are being systematically deprived of their constitutional right to counsel in the Cordele Judicial Circuit.

⁴⁰ In formulating remedies that address the Constitutional violations that the Department found during its Shelby County, Tennessee investigation, the Department required the establishment of a juvenile defender unit with “sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters.” Mem. of Agreement, *supra* n.3, at 15. The Department also required “training on trial advocacy skills and knowledge of adolescent development.” *Id.*

⁴¹ A breakdown of the adversarial system where children routinely appeared without counsel had disastrous effects in Luzerne County, Pennsylvania where a juvenile court judge routinely incarcerated youth for minor transgressions, sending them to a private detention facility in which he had a financial stake. *See* John Schwartz, *Clean Slates for Youths Sentenced Fraudulently*, N.Y. Times, Mar. 27, 2009 at A13 (New York edition), *available at* http://www.nytimes.com/2009/03/27/us/27judges.html?_r=0. And as one legal commentator recounted: “In Pennsylvania and other states, juvenile proceedings are sealed to the public for the protection of a juvenile's privacy. However, the former director of the Office of Juvenile Justice in Pennsylvania, Clay Yeager, said that ‘they are kept open to probation officers, district attorneys, and public defenders, all of whom are sworn to protect the interests of children.’ He added, ‘It's pretty clear those people didn't do their jobs.’ Pennsylvania Supreme Court Justice J. Michael Eakin stated, ‘The DA fell down.’ He added, ‘The public defender fell down. To fall down that often is just wrong.’” Sarah L. Primrose, *When Canaries Won't Sing: The Failure of the Attorney Self-Reporting System in the “Cash-For-Kids” Scheme*, 36 J. LEGAL PROF. 139, 152 (2011) (citations omitted).

II. GIVEN THE UNIQUE STATUS OF JUVENILE OFFENDERS, THEIR RIGHT TO COUNSEL MAY BE DENIED WHEN THEY WAIVE THAT RIGHT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

Plaintiffs allege that children accused of delinquency in the Cordele Judicial Circuit routinely waive their right to counsel without ever having seen or being advised by a lawyer. According to Plaintiffs, juveniles are regularly presented with a Hobson's choice: waive counsel without ever speaking with an attorney and have your case resolved immediately *or* schedule another hearing, remain in detention and hope counsel can be present at the next proceeding. This alleged systemic deprivation of access to counsel is particularly troubling.

Because the right to counsel is “necessary to insure fundamental human rights of life and liberty⁴², . . . ‘courts indulge every reasonable presumption against [its] waiver’⁴³ and ‘do not presume acquiescence in the loss of [this] fundamental right[.]’⁴⁴ Indeed, effective counsel is so central to the constitutional guarantee of due process in criminal proceedings that the decision to waive counsel must be knowing, intelligent, and voluntary. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (waiver must be a “knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances”). Determining whether a waiver of the right to counsel is made knowingly, intelligently, and voluntarily depends on the facts and circumstances surrounding the case, “including the background, experience, and conduct of the accused.” *Johnson*, 304 U.S. at 464. A juvenile’s waiver of counsel cannot be knowing, intelligent, and voluntary without first consulting counsel.

⁴² *Johnson*, 304 U.S. at 462.

⁴³ *Id.* at 464 (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

⁴⁴ *Id.* (quoting *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307 (1937)).

The same characteristics of children that require skilled and specially trained counsel to represent them also demand that courts ensure that a child's decision to waive counsel is knowing, intelligent, and voluntary. Many states have taken steps to limit and safeguard waivers of counsel by juveniles. Maryland, for example, prohibits a court from accepting a waiver unless "the child is in the presence of counsel and has consulted with counsel," and "[t]he court determines that the waiver is knowing and voluntary."⁴⁵ Other states, such as Iowa, Kentucky, Louisiana, Texas, and Wisconsin, prohibit waiver of the right to counsel by children under a certain age or at many juvenile proceedings.⁴⁶

Those states recognize that the same principles that underlie juvenile right to counsel apply specifically with regard to juvenile waiver of rights. *E.g.*, *J.D.B.*, 131 S.Ct. at 2403 (citation omitted) (holding that juveniles are more likely to feel pressure to waive *Miranda* rights during interrogation and courts must take juveniles' age and suggestibility into account in assessing validity of waivers); *Miller*, 132 S.Ct. at 2468 (identifying "incompetencies associated with youth—for example, [a juvenile's] inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.") (citing *Graham* and *J.D.B.*). The decision to waive one's right to counsel, like the decision to waive one's *Miranda* rights, or to confer with prosecutors about a plea, must be well thought-out, with an understanding of present and future ramifications. This poses a particular challenge for young

⁴⁵ Md. Code Ann. § 3-8A-20(b) (2008).

⁴⁶ Iowa Code § 232.11(2) (2010) (child cannot waive right to counsel at detention, waiver, adjudicatory, and dispositional hearings); KY. Rev. Stat. Ann. § 610.060(2)(a) (Baldwin 2010) (court shall not accept plea or conduct adjudicatory hearing in any case where court intends to impose detention or commitment unless child is represented by counsel); Tex. Fam. Code § 51.10(b) (Vernon 2010) (child's right to counsel shall not be waived at transfer, adjudicatory, dispositional, commitment, and mental health proceedings); Wis. Stat. § 938.23(1m)(a) (2010) (juvenile younger than fifteen may not waive right to counsel).

people, who “tend to underestimate the risks involved in a given course of conduct [and] focus heavily on the present while failing to recognize and consider the future.”⁴⁷

There is something unique, too, about the role courts play in assessing waiver of counsel, because the right to counsel “invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. The protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.” *Johnson*, 304 U.S. at 465; *see also Westbrook v. Arizona*, 384 U.S. 150, 150 (1966) (per curiam). And the Fourteenth Amendment’s Due Process Clause imposes its own serious and weighty duty on courts to determine whether rejecting offered assistance of counsel is intelligent. “Anything less is not waiver.” *Carnley v. Cochran*, 369 U.S. 506, 514-16 (1962). In order to properly fulfill this “serious and weighty responsibility” without abandoning its own judicial role in juvenile delinquency proceedings where a child faces a loss of liberty, a court should appoint an attorney who will explain the importance of counsel before the court accepts a waiver.⁴⁸

Recognizing that juvenile waivers must be afforded particular scrutiny in view of the child’s age and immaturity and that waiver of counsel is an area of special concern even in adult courts, national standards require that children be prohibited from waiving counsel without first consulting with counsel:

The problem with juvenile waiver of counsel is clear: children require the advice and assistance of counsel to make decisions with lifelong consequences in the highly charged venue of a juvenile court proceeding. As a result of immaturity, anxiety, and overt pressure from judges, parents, or prosecutors, unrepresented

⁴⁷ Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL’Y 17, 24 (2012).

⁴⁸ Jennifer K. Pokempner, *et al.*, *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 567-68 (Summer 2012).

children feel pressure to resolve their cases quickly and may precipitously enter admissions without obtaining advice from counsel about possible defenses or mitigation. In order to ensure the client's due process rights are protected, the client must have meaningful consultation with counsel prior to waiving the right to counsel.⁴⁹

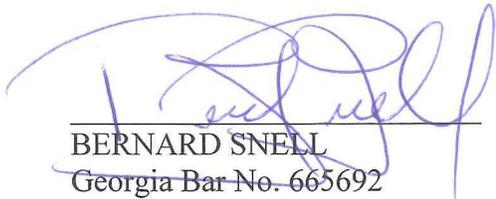
When juveniles are not provided counsel, courts cannot ensure that their waivers are knowing, intelligent, and voluntary. Because this is what the Plaintiffs allege is happening in Cordele Judicial Circuit, should the Court determine that children are indeed regularly waiving counsel without first consulting with an attorney, the Court can and should find that the resulting waivers amount to a system-wide denial of the right to counsel.

CONCLUSION

If the Court determines that the juvenile justice system within the Cordele Judicial Circuit fails to provide the requisite due process protections afforded to juveniles, or the Court finds that juveniles are regularly waiving their right to counsel without the opportunity to consult with an attorney, then the Court should hold that *Gault* is not being fulfilled and juveniles' constitutional rights are being violated.

⁴⁹ Nat'l Juvenile Defender Ctr., *supra* note 26, at Standard 10.4 (commentary); *see also* Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Ass'n, *supra* note 29, at Principle 1(B) ("The public defense delivery system ensures that children do not waive appointment of counsel and that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.").

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This is to certify that I have this day served the following with a copy of the within and foregoing STATEMENT OF INTEREST by placing a copy of the same in the United States mail in an envelope with adequate postage to assure delivery.

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Attachment 5

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
ADMINISTRATIVE SERVICES DIVISION

June 2, 2015

Mr. Alex Cuyler
Intergovernmental Relations Manager
Lane County Administration
125 East 8th Avenue
Eugene, Oregon 97401

Re: Letter of Interest on acquiring leased office space at the new Lane County Courthouse

Dear Mr. Cuyler:

This non-binding Letter of Interest expresses the Oregon Department of Justice's (DOJ) desire to continue further discussions with your office at Lane County Administration regarding developing a partnership which would allow DOJ to consider leasing office space at the new Lane County Courthouse that may be built during the 17-19 biennium.

Currently we lease approximately 13,000 square feet in Eugene from a private property owner. Our lease expires January 31, 2018, but it may be possible to extend our lease until the completion of the courthouse, provided it is within a reasonable time. It is not certain at this time what our square feet need would be however for planning purposes it may be reasonable to assume over 13,000 square feet but less than 20,000 square feet.

There are various terms and conditions DOJ and Lane County would need to negotiate and agree to before commitments could be made. However, DOJ is certain that we are seeking a turnkey office space specified to our program needs where DOJ is not responsible for absorbing any of the tenant improvement costs. In addition, we would be looking for comparable rent rate to the State of Oregon's uniform rate for state-owned buildings. In turn, DOJ would provide a favorable lease term.

Thank you for contacting me and offering to establish partnership in this exciting endeavor. I look forward to working with you.

Yours sincerely,

Archana Thapa-Sherpa
Director of Facilities Management & Procurement
Operations Sections
archana.thapa-sherpa@doj.state.or.us

Attachment 6

MEMORANDUM

Legislative Fiscal Office
900 Court St. NE, Room H-178
Salem, Oregon 97301
Phone 503-986-1828
FAX 503-373-7807

To: Public Safety Subcommittee

From: Steve Bender, Legislative Fiscal Office
(503) 986-1836

Date: June 3, 2015

Subject: Public Defense Services Commission – SB 5533
Work Session Recommendations

Public Defense Services Commission – Agency Totals

	2011-13 Actual	2013-15 Legislatively Approved	2015-17 Current Service Level	2015-17 LFO Recommended
General Fund	\$230,208,646	\$249,684,307	\$265,595,131	\$272,378,854
Lottery Funds	0	0	0	0
Other Funds	\$3,799,452	\$4,474,644	\$5,033,764	\$3,833,764
Federal Funds	0	0	0	0
Total Funds	\$234,008,098	\$254,158,951	\$270,628,895	\$276,212,618
Positions	76	76	76	77
FTE	75.23	75.79	75.11	76.11

Attached are the recommendations from the Legislative Fiscal Office for the Public Defense Services Commission budget. They include the following:

- Approve the Current Service Level of funding for the agency, as adjusted by Package 070 (Revenue Reductions/Shortfall).
- Approve Package 107, to provide \$1.2 million General Fund to offset the Other Funds revenue shortfall, and to fully fund the Current Service Level budget.
- Approve Package 100, as modified, to provide \$5.2 million General Fund to increase case rates paid to private and consortia contract attorneys, plus \$161,700 General Fund for mileage reimbursements.
- Approve Package 104, as modified, to provide \$222,023 General Fund and to establish one permanent full-time Deputy General Counsel position (one position, 1.00 FTE) to administer the Parent Child Representation Program.

Adjustments to Current Service Level:

See attached "Work Session Presentation Report" dated 06/03/15.

Accept LFO Recommendations

***Motion:** Move the LFO recommendations to SB 5533, or move the LFO recommendations with modifications.*

Performance Measures

See attached "Legislatively Proposed 2015-17 Key Performance Measures" form.

***Motion:** Move the LFO recommendations on Key Performance Measures, or move the LFO recommendation with modifications.*

Recommended Changes to Appropriation Bill:

The Legislative Fiscal Office recommends a total budget of \$272,378,854 General Fund, \$3,833,764 Other Funds, and seventy-seven positions (76.11 FTE), and that Senate Bill 5533 be amended by the -1 amendments.

***Motion:** Move adoption of the -1 amendments to SB 5533.*

SB 5533 Final Subcommittee Action:

***Final Motion:** Move SB 5533, as amended, to the Full Committee with a Do Pass recommendation.*

Carriers:

Full Committee: _____

Senate Floor: _____

House Floor: _____

Public Defense Svcs Comm

LFO Analyst Recommended

Agency Number: 40400

**LFO102 - Work Session Presentation Report
2015-17 Biennium**

**Version: L - 01 - LFO Analyst Recommended
Cross Reference: 40400-000-00-00-00000
Public Defense Svcs Comm**

	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other Funds	Nonlimited Federal Funds	Total Funds	Positions	Full-Time Equivalent (FTE)
2013-15 Agy. Leg. Adopted	244,280,071	-	4,467,042	-	-	-	248,747,113	76	75.79
2013-15 Ebds, SS & Admin Act	5,404,236	-	7,602	-	-	-	5,411,838	-	-
Ways & Means Actions	-	-	-	-	-	-	-	-	-
2013-15 Leg Approved Budget	249,684,307	-	4,474,644	-	-	-	254,158,951	76	75.79
2013-15 Leg Approved Budget (Base)	249,684,307	-	4,474,644	-	-	-	254,158,951	76	75.79
Summary of Base Adjustments	618,205	-	46,686	-	-	-	664,891	-	(0.68)
2015-17 Base Budget	250,302,512	-	4,521,330	-	-	-	254,823,842	76	75.11
010: Non-PICS Pers Svc/Vacancy Factor	51,880	-	2,954	-	-	-	54,834	-	-
020: Phase In / Out Pgm & One-time Cost	3,436,193	-	-	-	-	-	3,436,193	-	-
030: Inflation & Price List Adjustments	9,395,840	-	496,372	-	-	-	9,892,212	-	-
040: Mandated Caseload	2,408,706	-	13,108	-	-	-	2,421,814	-	-
2015-17 Current Service Level	265,595,131	-	5,033,764	-	-	-	270,628,895	76	75.11
070: Revenue Reductions/Shortfall	-	-	(1,200,000)	-	-	-	(1,200,000)	-	-
Adjusted 2015-17 Current Service Level	265,595,131	-	3,833,764	-	-	-	269,428,895	76	75.11
Total LFO Recommended Packages	6,783,723	-	-	-	-	-	6,783,723	1	1.00
2015-17 Legislative Actions	272,378,854	-	3,833,764	-	-	-	276,212,618	77	76.11
Net change from 2013-15 Leg Approved Budget	22,694,547	-	(640,880)	-	-	-	22,053,667	1	0.32
Percent change from 2013-15 Leg Approved Budget	9.1%	0.0%	(14.3%)	0.0%	0.0%	0.0%	8.7%	1.3%	0.4%
Net change from 2015-17 Current Service Level	6,783,723	-	-	-	-	-	6,783,723	1	1.00
Percent change from 2015-17 Current Service Level	2.6%	0.0%	0.0%	0.0%	0.0%	0.0%	2.5%	1.3%	1.3%

	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other Funds	Nonlimited Federal Funds	Total Funds	Positions	Full-Time Equivalent (FTE)
2013-15 Agy. Leg. Adopted	14,185,524	-	-	-	-	-	14,185,524	60	60.00
2013-15 Ebds, SS & Admin Act	635,613	-	-	-	-	-	635,613	-	-
Ways & Means Actions	-	-	-	-	-	-	-	-	-
2013-15 Leg Approved Budget	14,821,137	-	-	-	-	-	14,821,137	60	60.00
2013-15 Leg Approved Budget (Base)	14,821,137	-	-	-	-	-	14,821,137	60	60.00
Summary of Base Adjustments	192,066	-	-	-	-	-	192,066	(2)	(2.89)
2015-17 Base Budget	15,013,203	-	-	-	-	-	15,013,203	58	57.11
010: Non-PICS Pers Svc/Vacancy Factor	30,839	-	-	-	-	-	30,839	-	-
030: Inflation & Price List Adjustments	139,713	-	-	-	-	-	139,713	-	-
2015-17 Current Service Level	15,183,755	-	-	-	-	-	15,183,755	58	57.11
Adjusted 2015-17 Current Service Level	15,183,755	-	-	-	-	-	15,183,755	58	57.11
Total LFO Recommended Packages	-	-	-	-	-	-	-	-	-
2015-17 Legislative Actions	15,183,755	-	-	-	-	-	15,183,755	58	57.11
Net change from 2013-15 Leg Approved Budget	362,618	-	-	-	-	-	362,618	(2)	(2.89)
Percent change from 2013-15 Leg Approved Budget	2.5%	0.0%	0.0%	0.0%	0.0%	0.0%	2.5%	(3.3%)	(4.8%)
Net change from 2015-17 Current Service Level	-	-	-	-	-	-	-	-	-
Percent change from 2015-17 Current Service Level	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%

	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other Funds	Nonlimited Federal Funds	Total Funds	Positions	Full-Time Equivalent (FTE)
2013-15 Agy. Leg. Adopted	226,918,697	-	3,982,500	-	-	-	230,901,197	-	-
2013-15 Ebds, SS & Admin Act	4,617,158	-	-	-	-	-	4,617,158	-	-
Ways & Means Actions	-	-	-	-	-	-	-	-	-
2013-15 Leg Approved Budget	231,535,855	-	3,982,500	-	-	-	235,518,355	-	-
2013-15 Leg Approved Budget (Base)	231,535,855	-	3,982,500	-	-	-	235,518,355	-	-
Summary of Base Adjustments	-	-	-	-	-	-	-	-	-
2015-17 Base Budget	231,535,855	-	3,982,500	-	-	-	235,518,355	-	-
020: Phase In / Out Pgm & One-time Cost	3,436,193	-	-	-	-	-	3,436,193	-	-
030: Inflation & Price List Adjustments	9,209,290	-	496,372	-	-	-	9,705,662	-	-
040: Mandated Caseload	2,408,706	-	13,108	-	-	-	2,421,814	-	-
2015-17 Current Service Level	246,590,044	-	4,491,980	-	-	-	251,082,024	-	-
070: Revenue Reductions/Shortfall	-	-	(1,200,000)	-	-	-	(1,200,000)	-	-
Adjusted 2015-17 Current Service Level	246,590,044	-	3,291,980	-	-	-	249,882,024	-	-
Total LFO Recommended Packages	6,561,700	-	-	-	-	-	6,561,700	-	-
2015-17 Legislative Actions	253,151,744	-	3,291,980	-	-	-	256,443,724	-	-
Net change from 2013-15 Leg Approved Budget	21,615,889	-	(690,520)	-	-	-	20,925,369	-	-
Percent change from 2013-15 Leg Approved Budget	9.3%	0.0%	(17.3%)	0.0%	0.0%	0.0%	8.9%	0.0%	0.0%
Net change from 2015-17 Current Service Level	6,561,700	-	-	-	-	-	6,561,700	-	-
Percent change from 2015-17 Current Service Level	2.7%	0.0%	0.0%	0.0%	0.0%	0.0%	2.6%	0.0%	0.0%

	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other Funds	Nonlimited Federal Funds	Total Funds	Positions	Full-Time Equivalent (FTE)
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Package 070 Revenue Shortfalls

Package Description Package 070 modifies the current service level to incorporate the impact of an Other Funds revenue shortfall. The Professional Services Account, which supports payments to contractors providing public defense services, is finance by a combination of General Fund and Other Funds revenue. Other Funds revenues from the Applications/Contributions program are forecast to be below level needed to fund 2015-17 biennium current service level expenditures.

Package 070 reduces Other Funds expenditures by \$1.2 million to allow the agency to retain a \$414,000 ending balance (which is equivalent to approximately 2.6 months of expenditures).

LFO Recommendation Approve the request.

LFO Recommended

Revenues	-	-	-	-	-	-	-	-	-
Expenditures	-	-	(1,200,000)	-	-	-	(1,200,000)	-	-

	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other Funds	Nonlimited Federal Funds	Total Funds	Positions	Full-Time Equivalent (FTE)
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Package 100 Consistent Rates & Mileage for PD Kors

Package Description Package 100 appropriates \$7,548,195 General Fund for two purposes. Funding includes \$7,386,495 to increase case rates paid to private and consortia attorneys to the levels paid to public defender offices; plus \$161,700 to pay mileage reimbursements to providers in the Eastern, North Coast, Central, Southern Oregon and Willamette Valley regions. The funding increases would become effective in contracts beginning on January 1, 2016.

LFO Recommendation Appropriate \$5,361,700 General Fund for two purposes. Funding includes \$5,200,000 to increase case rates paid to private and consortia attorneys to the levels paid to public defender offices; and \$161,700 to pay mileage reimbursements to providers in the Eastern, North Coast, Central, Southern Oregon and Willamette Valley regions.

Funding for mileage reimbursements becomes effective in contracts beginning on January 1, 2016. Case rate increases are provided in two steps. Beginning January 1, 2016, PDSC will increase case rates by approximately 55% of the amount initially requested, to move case rates for private and consortia attorneys closer to the levels paid to public defender offices. Beginning January 1, 2017, PDSC will increase case rates to the full levels provided for in the initial package request.

LFO Recommended

Revenues	5,361,700	-	-	-	-	-	5,361,700		
Expenditures	5,361,700	-	-	-	-	-	5,361,700	-	-

	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other Funds	Nonlimited Federal Funds	Total Funds	Positions	Full-Time Equivalent (FTE)
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Package 107 ACP Revenue Shortfall

Package Description Appropriates \$1.2 million General Fund to offset a shortfall in Other Funds revenues that support current services. The current service level includes \$5,033,764 of expenditures of Application/Contribution Program revenues to support PDSC programs. 2015-17 biennium revenues, however, are projected to be \$1.2 million below the amount needed to finance these expenditures and maintain an adequate ending fund balance.

Package 107 provides \$1.2 million of General Fund to offset the shortfall and fund programs at the current service level.

LFO Recommendation Approve the package.

LFO Recommended

Revenues	1,200,000	-	-	-	-	-	1,200,000		
Expenditures	1,200,000	-	-	-	-	-	1,200,000	-	-

	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other Funds	Nonlimited Federal Funds	Total Funds	Positions	Full-Time Equivalent (FTE)
2013-15 Agy. Leg. Adopted	3,175,850	-	484,542	-	-	-	3,660,392	16	15.79
2013-15 Ebds, SS & Admin Act	151,465	-	7,602	-	-	-	159,067	-	-
Ways & Means Actions	-	-	-	-	-	-	-	-	-
2013-15 Leg Approved Budget	3,327,315	-	492,144	-	-	-	3,819,459	16	15.79
2013-15 Leg Approved Budget (Base)	3,327,315	-	492,144	-	-	-	3,819,459	16	15.79
Summary of Base Adjustments	426,139	-	46,686	-	-	-	472,825	2	2.21
2015-17 Base Budget	3,753,454	-	538,830	-	-	-	4,292,284	18	18.00
010: Non-PICS Pers Svc/Vacancy Factor	21,041	-	2,954	-	-	-	23,995	-	-
030: Inflation & Price List Adjustments	46,837	-	-	-	-	-	46,837	-	-
2015-17 Current Service Level	3,821,332	-	541,784	-	-	-	4,363,116	18	18.00
Adjusted 2015-17 Current Service Level	3,821,332	-	541,784	-	-	-	4,363,116	18	18.00
Total LFO Recommended Packages	222,023	-	-	-	-	-	222,023	1	1.00
2015-17 Legislative Actions	4,043,355	-	541,784	-	-	-	4,585,139	19	19.00
Net change from 2013-15 Leg Approved Budget	716,040	-	49,640	-	-	-	765,680	3	3.21
Percent change from 2013-15 Leg Approved Budget	21.5%	0.0%	10.1%	0.0%	0.0%	0.0%	20.1%	18.8%	20.3%
Net change from 2015-17 Current Service Level	222,023	-	-	-	-	-	222,023	1	1.00
Percent change from 2015-17 Current Service Level	5.8%	0.0%	0.0%	0.0%	0.0%	0.0%	5.1%	5.6%	5.6%

	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other Funds	Nonlimited Federal Funds	Total Funds	Positions	Full-Time Equivalent (FTE)
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Package 104 Juvenile Dependency Improvement

Package Description The PDSC requested \$315,144 General Fund to finance establishment of two permanent full-time positions (two positions, 2.00 FTE), to improve administration of the Juvenile Dependency Improvement Program (a.k.a., the Parent Child Representation Program). The positions include a Deputy General Counsel to administer the program, and an Office Specialist 1 to assist with data entry and audit functions.

LFO Recommendation Appropriate \$222,953 General Fund and establish one permanent full-time Deputy General Counsel position (one position, 1.00 FTE) to administer the Parent Child Representation Program.

LFO Recommended

Revenues	222,023	-	-	-	-	-	222,023		
Expenditures	222,023	-	-	-	-	-	222,023	1	1.00

Legislatively Proposed 2015-2017 Key Performance Measures

Agency: PUBLIC DEFENSE SERVICES COMMISSION

Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

Legislatively Proposed KPMs	Customer Service Category	Agency Request	Most Current Result	Target 2016	Target 2017
<p>- Parent Child Representation Program (PCRP): Percent of PCRP attorneys who report spending 1/3 of their time meeting with court appointed clients in cases which the attorney represents a parent or child with decision-making capacity.^[1]</p> <p>^[1]For a discussion on determining decision-making capacity, see The Obligations of the Lawyer for Children in Child Protection Proceedings with Action Items and Commentary, Oregon State Bar, Report of the Task Force on Standards of Representation in Juvenile Dependency Cases (2014).</p>		Proposed New KPM		80.00	95.00
<p>- Trial Level Representation: During the term of the OPDS contract, percent of attorneys who obtain at least 12 hours per year of continuing legal education credit in the area(s) of law in which they provide public defense representation.^[1]</p> <p>^[1] Case types listed in the 2014-2015 Public Defense Legal Services Contract General Terms are: criminal cases, probation violations, contempt cases, civil commitment cases, juvenile cases, and other civil cases. (http://www.oregon.gov/OPDS/docs/CBS/ModelContractTerms/documents/ModKJan2014.pdf)</p>		Proposed New KPM		80.00	90.00
<p>1 - APPELLATE CASE PROCESSING - Median number of days to file opening brief.</p>		Approved KPM	227.00	180.00	180.00
<p>2 - CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.</p>	Accuracy	Approved KPM	94.10	95.00	95.00
<p>2 - CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.</p>	Availability of Information	Approved KPM	85.40	95.00	95.00

Agency: PUBLIC DEFENSE SERVICES COMMISSION

Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

Legislatively Proposed KPMs	Customer Service Category	Agency Request	Most Current Result	Target 2016	Target 2017
2 - CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.	Expertise	Approved KPM	93.80	95.00	95.00
2 - CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.	Helpfulness	Approved KPM	95.10	95.00	95.00
2 - CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.	Overall	Approved KPM	90.60	95.00	95.00
2 - CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.	Timeliness	Approved KPM	89.00	95.00	95.00
3 - BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.		Approved KPM	100.00		

LFO Recommendation:

Approve Key Performance Measures, including Proposed New Key Performance Measures, and Key Performance Measure targets identified in the above table.

Sub-Committee Action:

SB 5533-1
(LC 9533)
6/3/15 (TR/ps)

**PROPOSED AMENDMENTS TO
SENATE BILL 5533**

- 1 In line 8 of the printed bill, delete "\$13,884,739" and insert "\$15,183,755".
- 2 In line 9, delete "\$243,385,731" and insert "\$253,151,744".
- 3 In line 11, delete "\$3,588,385" and insert "\$4,043,355".
- 4 In line 19, delete "\$549,585" and insert "\$541,784".

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Attachment 7



Oregon

Office of Public Defense Services

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

Public Defense Services Commission

Marion County Service Delivery Review Final Report June 2015

I. INTRODUCTION

Background. In 2004, the Public Defense Services Commission (PDSC) began meeting in public session in various regions of the state as part of its commitment to evaluating the effectiveness and efficiency of public defense services in all counties of the state. Since that time, the Commission has met in every region of the state. Reports from these evaluations, based upon dozens of interviews and public testimony from local justice system stakeholders, have focused on the structure of public defense services. Some counties rely upon one consortium for all its representation needs, while others might also include a non-profit public defender office, a private law firm, or hourly attorneys, in order to provide sufficient services for the county. The goal of these “service delivery reviews” has been to ensure that the best type and number of public defense organizations are serving each county.

Parallel with the Commission’s service delivery review process, the Office of Public Defense Services (OPDS) has facilitated nearly 50 peer reviews of individual public defense providers since 2004. For each review, teams of public defense leaders from around the state spend several days in a county conducting interviews with justice system stakeholders in the course of examining the quality of representation provided by the entity under review. Among the primary aims of these reviews are identifying successful local policies and procedures that might be recommended to other public defense providers, and making recommendations for improvement where needed. The overarching purpose of these reviews is to assist each public defense provider in pursuing excellence. Until recently, peer review teams produced confidential reports provided only to contract administrators and managers at OPDS.

In 2013, OPDS merged the two review processes while preserving the core purposes of each review. Under the current practice, a peer review team will examine some or all providers in a county, much as it would in the past. As a part of the peer review, providers and other system stakeholders are informed that the Commission will visit the county under review to follow-up on the findings and recommendations of the peer review report. Prior to the Commission’s public meeting in the county under review,

OPDS staff update the peer review report based on follow-up interviews with public defense providers and county officials. After the Commission's hearing, at which it receives testimony from stakeholders, a draft final report is prepared for Commission deliberation and approval.

Marion County Peer Review. The Marion County peer review team looked at the two public defense contractors providing representation in criminal cases. The Marion County Association of Defenders, Ltd. (MCAD) is a consortium of approximately 40 attorneys that contracts to provide representation in all criminal case types. The Public Defender of Marion County (PDMC) also contracts for these case types. The peer review team did not examine the work of the sole juvenile court contractor, the Juvenile Advocacy Consortium in Marion County.

The OPDS executive director asked David Audet to chair the peer review team, and asked attorneys Rosalind Lee, Alex Bassos, Morgen Daniels, and Tony Bornstein to serve as team members. Paul Levy, OPDS General Counsel, served as staff for the team.¹ The team's site visit was conducted in May, 2013, with a final report submitted in September 2013.

Prior to the review team's site visit, OPDS solicited information about each contract group. MCAD members and PDMC employees received an online survey about entity operations and the effectiveness of contract administration. The administrators of MCAD and PDMC also answered detailed questionnaires about their organization's operations. Both administrators cooperated fully with the evaluation, providing invaluable assistance in preparing for the evaluation and scheduling interviews for the site visit. Typically, peer reviews also employ an online survey of justice system stakeholders who are familiar with the work of a contractor. However, OPDS had asked all Marion County judges and the District Attorney for comments about MCAD and PDMC as part of its annual statewide performance review of all public defense conducted earlier in 2013. The peer review team reviewed results from the statewide surveys from 2010 to 2013.

A three-day site visit to Marion County was completed on May 3, 2013. During the site visit, team members met with judges, court staff, prosecutors, Sheriff's staff, MCAD and PDMC board members, attorneys and staff of each organization, and others, interviewing more than 35 people. At the conclusion of interviews, the team met separately with each administrator to discuss preliminary findings and conclusions. A draft report was then provided to each administrator for comments and corrections, after which the team approved a final report.

¹ David Audet, who has served on a previous peer review team, is in private practice in Hillsboro, where he is a member of the Oregon Defense Attorney Consortium. Previously, he was an attorney with the Metropolitan Public Defender. He is a past-President of the Oregon Criminal Defense Lawyers Association (OCDLA). Morgen Daniels is an attorney in the Appellate Division of the Office of Public Defense Services. Previously, she was with the Intermountain Public Defender in Pendleton. Alex Bassos is Director of Training at the Metropolitan Public Defender. Rosalind Lee is in private practice in Eugene, where she is a member of the Lane County Defense Consortium. Tony Bornstein is an attorney with the Federal Public Defender in Portland. He is also an alumne of the Metropolitan Public Defender.

Service Delivery Review Procedure. On October 29th and 30th, 2014, OPDS Executive Director Nancy Cozine, PDSC member John Potter, and OPDS Analyst Shelley Winn, conducted interviews with key Marion County justice system officials and contractors to determine what developments had occurred in the county in response to the peer review reports.

The key findings and recommendations of the peer review reports, and the information gained from the follow-up interviews and meetings, are related in the balance of this report. This report will be amended further in response to information gained during the PDSC meeting in Marion County on January 22, 2015. The report will be finalized following a subsequent PDSC meeting after deliberations on any specific findings and recommendations arising from the January meeting.

II. MARION COUNTY

Demographics. Marion County has a population of about 319,985, making it the fourth most populous Oregon county after Multnomah (759,256), Washington (547,672) and Lane (354,542). The total estimated population for Oregon in 2012 was 3,899,353². The county includes 20 incorporated cities, of which the largest are Salem and Woodburn.³

According to U.S. Census data, the county is significantly more diverse than the statewide population, with 68.2% identifying as white persons not of Hispanic or Latino origin (78.1% statewide); 1.4% identifying as black persons (2.0% statewide); 2.5% identifying as American Indian or Alaska Native (1.8% statewide); 2.1% identifying as Asian persons (3.9% statewide); and 24.8% identifying as persons of Hispanic or Latino origin (12.0% statewide). Census data also show the county has a slightly lower than statewide percent per capita of high school graduates (82.5%; 88.9% statewide), and a lower percent of college graduates (20.7%; 28.6% statewide). Nearly a quarter of persons over the age of five in the county speak a language other than English at home (14.6% statewide).⁴

Geographically, Marion County extends east from the Willamette River to the Cascade Mountains, covering the “promised land” that was the destination for Oregon Trail pioneers. The county is the largest producer of agricultural income among Oregon’s counties. The State of Oregon is the largest single employer in the county, with 38 state agencies based in and around Salem. Other major employers include food processors, manufacturers, schools and colleges, and tourism.⁵

² U.S. Census Bureau, State & County QuickFacts, 2012 Estimates.

<http://quickfacts.census.gov/qfd/states/41/41047.html>

³ The Salem Metropolitan Statistical Area (MSA), which consists of Marion and Polk counties, is the second largest in the state after the Portland-Vancouver-Hillsboro MSA, which consists of seven counties adjacent to or near Portland, and ahead of the Eugene-Springfield MSA, which consists of Lane County.

<http://www.pdx.edu/prc/2010-census-profiles-oregon-cities-alphabetically>.

⁴ <http://quickfacts.census.gov/qfd/states/41/41007.html>

⁵ <http://bluebook.state.or.us/local/counties/counties24.htm>.

Oregon State Police profiles of index crimes for Marion County show a steady decline over the five year period ending in 2010, with the numbers dropping from 15,389 in 2006 to 10,868 in 2010. Total reported crime for the county also declined each year over the same period.⁶

Justice System. Several features define the Marion County criminal justice system. First, its operations take place at two courthouses. While other large counties, such as Multnomah and Washington, also divide criminal court operations between two locations, in those places the facilities are separated by a short walk. In Marion County, the main Courthouse in downtown Salem is about five miles away from the Court Annex, where first appearances occur in all cases and where numerous other hearings can occur in many cases. The county jail is located adjacent to the Annex.

Another defining feature of the Marion County court system is the absence of central docketing. As discussed further below, if cases are not resolved at the Annex, they are assigned to one of the ten or so available judges at the Courthouse, each of whom manages his or her own docket. While this presents some logistical challenges for busy public defense attorneys, most lawyers report that they like the system because they know what to expect from a judge as a case proceeds toward resolution and because trials are rarely rescheduled due to other trials competing for the same time slot.

Twelve judges have offices in the Marion County Courthouse, including Presiding Judge James Rhoades. The building underwent extensive renovation after a 2005 arson fire and is now a comfortable, modern building with impressive accommodations for the court and public. The District Attorney's offices are located in a building across the street from the Courthouse.

Case processing. All criminal cases originate at the Annex, which is a court facility located near the Marion County Jail at 4000 Aumsville Hwy SE, Salem, about five miles from the downtown Courthouse. The Annex is served by two judicial officers: a referee, and a Circuit Court judge.

First appearances in criminal cases at the Annex are at 8:30 am for out-of-custody defendants; in-custody defendants appear at 3:00 pm. Jail staff provide in-custody defendants with a sheet of paper listing all MCAD and PDMC attorneys, with the name of the lawyer appointed to a particular defendant highlighted.

Discovery and plea offers are given to defense counsel at the first appearance in nearly all misdemeanor cases. In many felony cases, police reports and plea offers are available at first appearance if the defendant waives a "preliminary hearing." If it later appears that the case will proceed to trial, a defendant may request a preliminary hearing (which, as in most counties, simply means the deputy district attorney will take

⁶ Oregon State Police, 2010 Annual Uniform Crime Report, http://www.oregon.gov/osp/CJIS/Pages/annual_reports.aspx. The "Crime Index" was developed to measure crime on a national scale by choosing eight offenses that are generally defined the same by each state, which are: Willful Murder, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny (Theft), Motor Vehicle Theft and Arson. Total reported crime was 40,942 in 2006 and 33,270 in 2010, the last year for which data are available and a low for the five-year period.

the case to grand jury), although many cases proceed to trial on an information of the district attorney.

The second appearance in criminal cases, called a “Rule 7” hearing, after Uniform Trial Court Rule 7.010, is also at the Annex. This proceeding is the occasion for defendants to enter a plea of guilty, or to enter a plea of not guilty and request a court date at the downtown courthouse. Those who plead guilty at the Annex can elect to be sentenced immediately or at a later date, and Rule 7 hearings may be continued to allow the parties to continue negotiations. In-custody cases must go downtown if a settlement is not reached within 30 days of arrest, unless there is a waiver of the defendant’s 60-day speedy trial right.

Typically, the first Rule 7 date is set within one or two weeks of the first appearance for in-custody defendants. For them, the appearance is at 8:30 am. For out-of-custody defendants, Rule 7 hearings are at 1:30 pm, about 30 days after the first appearance. The court limits the number of cases on any given day, and attorneys have some control over when the Rule 7 hearing will be held, so there is some variance on when these are scheduled.

When cases are transferred to the downtown courthouse after a Rule 7 hearing, the defense attorney asks Annex court staff at the service counter to assign a judge to the case. Any intention to file a motion for change of judge (“an affidavit”) must be announced at the counter, with motions filed by 5 pm the following day. This allows little or no time for client consultation, especially for those who are in custody. Court staff also provides defense counsel with a case status date with the assigned downtown judge. Each judge conducts case status hearings at regular times during the week, although the time and day is different for each judge.⁷

Once a case goes downtown, it is managed by the assigned judge. In Marion County, pretrial motions are, in fact, scheduled and heard on a date prior to the scheduled trial, unlike some other counties where motions are heard on the day of trial.

Before a case resolves at the Annex or goes downtown, there may be other pretrial matters heard at the Annex, such as release hearings, and some trial-related motions, such as motions to suppress or motions in limine. (A short release pitch is typically made at first appearance, but more informed release hearings are heard separately.) Pretrial hearings at the Annex are heard at 10:30 am for in-custody defendants; 2:30 pm for out-of-custody.

Probation violation hearings are also held at the Annex unless a judge has made clear that he or she wants to preside over a particular defendant’s probation violations, which happens relatively rarely. After the first appearance on most PVs, there is an “Admit/Deny” date about 12 days after arrest. Contested hearings are set at the Annex

⁷ The trial judges each have slightly different practices once the case gets on their docket; most of the judges require one or more “status conferences” and a pretrial hearing. Some require only a pretrial. Most judges, but not all, have a standard Pretrial Order setting out their specific requirements and deadlines for such things as exchange of exhibits, etc. The content of the orders varies from judge to judge. Most of these matters are explained in a “Judicial Preferences” Manual maintained by the Court.

a couple days after the Admit/Deny date, in order to meet the statutory requirement to have a hearing within 14 days of arrest.

Marion County also operates a Drug Court, a Mental Health Court, and a Veterans Court. MCAD attorney Phil Swogger staffs the Drug and Mental Health Courts. Some cases are referred directly to these courts at the time of arraignment. If a case that begins on the regular case track is negotiated into one of these courts, Mr. Swogger is typically substituted as counsel when the client enters the specialty court. Judge Dennis Graves presides over the Drug Court, and Judge Mary James presides over the Mental Health Court.

Daniel Wren, an MCAD attorney and board member, staffs the Veterans Court, along with a PDMC attorney, a deputy DA, and representatives from the Veterans Administration, probation and parole, and treatment providers. Judge Vance Day presides over the Veterans Court.

Oregon Judicial Department (OJD) data shows that the Marion County felony trial rate is slightly higher than the statewide average, and the misdemeanor trial rate is slightly below the statewide average.⁸ The average age of criminal cases when closed is older than OJD targets but consistent the statewide average.⁹ The total number of criminal cases filed has declined slowly but steadily over the past five years.¹⁰

System Issues. Overall, defenders, prosecutors, the court, and other criminal justice system stakeholders in Marion County enjoy cordial and collegial working relationships. While the normal friction of adversaries is clearly present, the various parties express

⁸ Cases Tried data from the Oregon Judicial Department, at <http://courts.oregon.gov/OJD/OSCA/pages/statistics.aspx>.

	<u>Felony</u>	<u>Misdemeanor</u>
2011	5.2% (4.4% statewide)	2.3% (3.8%)
2010	4.9% (4.2%)	2.5% (3.7%)
2009	6.1% (5.7%)	2.6% (4.4%)

⁹ Age of Terminated Cases data from the Oregon Judicial Department, at <http://courts.oregon.gov/OJD/OSCA/pages/statistics.aspx>

	<u>Felonies Closed Within 120 Days (Goal is 90%)</u>
2011	71.7% (71.7% statewide; 70.5 Multnomah, 88.0 Lane, 88.1 Coos)
2010	72.6% (70.6% statewide; 67.1 Multnomah, 88.7 Lane, 88.9 Coos)
2009	71.3% (69.7% statewide; 61.9 Multnomah, 85.9 Lane, 89.3 Coos)
	<u>Misdemeanors Closed Within 90 Days (Goal is 90%)</u>
2011	79.1% (80.0% statewide; 86.6 Multnomah, 86.3 Lane, 87.4 Coos)
2010	76.1% (78.2% statewide; 82.8 Multnomah, 88.7 Lane, 86.3 Coos)
2009	77.7% (78.5% statewide; 79.5 Multnomah, 87.1 Lane, 88.8 Coos)

¹⁰ Cases Filed data from the Oregon Judicial Department, at <http://courts.oregon.gov/OJD/OSCA/pages/statistics.aspx>

	<u>Felonies</u>	<u>Misdemeanors</u>
2011	2,543	3,979
2010	2,705	4,044
2009	2,750	4,409
2008	2,791	4,364
2007	3,246	4,495

general satisfaction with the structure of the county's criminal justice system and work collaboratively on some policy and procedural matters. As noted above, difficulty with access to confidential meeting space for in-custody clients is a barrier to necessary communication between attorneys and clients. And the physical distance between the Annex and the downtown courthouse creates a strain on defenders who regularly find themselves needed in several places at or near the same time.

The peer review team explored in several interviews the findings of a 2011 Criminal Justice Commission report¹¹ on Measure 11 showing that 63 percent of Measure 11 defendants in Marion County are convicted of some Measure 11 charges. This is a higher percent than in other rural counties, which on average convict at a lower rate than larger populous counties. By way of comparison, though, the Measure 11 conviction rate in Multnomah County is 36 percent. The study also showed that while blacks who are indicted for Measure 11 offenses are about 15 percent less likely to be sentenced to prison than whites, Hispanics are about 40 percent more likely to be sentenced to prison than whites in Marion County. When the peer review team asked deputy DAs about the report, they were unaware of it but suggested the data simply reflects better case assessment and charging decisions by the Marion County DA's office than in those counties that convict in a smaller percentage of cases.

Statewide Survey Results for Marion County. As noted above, unlike most other peer reviews, OPDS did not send Marion County justice system stakeholders a survey specific to MCAD and PDMC because the annual statewide public defense performance survey had been sent to some of these officials just a couple months prior to the site visit. The peer review team did review the Marion County results for the statewide surveys for 2010 through 2013.

The statewide survey asks generally about public defense representation in Marion County. Some survey responses had suggestions aimed at both entities, but other comments did not identify whether it was true of one or both providers. Particular areas of concern for both entities included better management of lawyers, though the particular challenge areas for each group appear to be quite different. Some MCAD lawyers are criticized for not visiting clients frequently enough, or arriving to court unprepared. One respondent indicated that the "Public Defender in Marion County does a better job litigating pre-trial issues than the MCAD members," but that "MCAD membership (overall) does a much better job managing clients and getting clients to acknowledge the reality of their situation." Overall, most respondents to the statewide surveys reviewed by the peer review team rated public defense representation in Marion County as "good," with a few respondents over the years saying it was "excellent," some saying "fair," and none saying "poor."

III. OVERVIEW OF MARION COUNTY ASSOCIATION OF DEFENDERS (MCAD)

Background. The Marion County Association of Defenders, Ltd. is a consortium of attorneys formed in 1993 as a Section 501(c)(3) nonprofit corporation. Steve Gorham served as MCAD's first Executive Director until 2008, when Paul Lipscomb became the

¹¹The study attributed most of the disparity in application of Measure 11 to DA practices. The study is available at http://www.oregon.gov/CJC/docs/measure_11_analysis_final.pdf.

Executive Director after retiring as Presiding Judge in Marion County. Shortly after the finalization of the peer review report, Jon Weiner, a Salem attorney, became Interim Director of MCAD. He continues in that position as of the writing of this report.

In 2005, when MCAD was still the sole public defense provider in criminal cases in Marion County, the PDSC conducted a service delivery review of public defense in Marion County. Its 236-page report recognized that there were some very good attorneys on MCAD's active roster of between 50 and 55 attorneys, but found that the organization lacked structure and, in particular, did not have effective quality assurance and management mechanisms.¹² The report concluded that MCAD should undertake significant reforms if it wished to continue to contract with PDSC and that a new public defender office should be established with quality assurance and management structures that would "serve as models for other public defense providers across the state."¹³

In September 2006, MCAD reported to the Commission on progress toward reforms. Their 46-page report described a restructured board of directors that would include non-MCAD members appointed by outside entities; creation of a "communications plan" that required members, among other things, to check their voicemail; an "education plan" requiring mandatory membership in OCDLA and attendance at CLE programs; and the creation of a "work group" structure, which would be the core of MCAD's quality assurance program.¹⁴ As described in more detail later in this report, these structures remained in place at the time of the peer review.

In early 2009, Ingrid Swenson, then-executive director of OPDS, provided the Commission with a 12-page report summarizing the 2005 review and subsequent improvements at MCAD.¹⁵ By this time, Judge Lipscomb had become executive director of MCAD and the new public defender office was also in operation.

In 2010, the Commission again heard from MCAD and PDMC.¹⁶ The MCAD report described plans to become a "model of excellence" in public defense. The PDMC report described its basic office operations.

Operations. As noted above, MCAD is governed by a board of directors. There are nine board members, three of whom are non-MCAD members. The Marion County Circuit Court Presiding Judge, the local bar association and the dean of the Willamette Law School each select one of the non-MCAD board members. MCAD attorneys on the board have staggered three year terms. The non-MCAD members do not have limits to their length of service. The board meets monthly and considers major policy, personnel, and financial matters.

¹² *OPDS's Report to the Public Defense Services Commission on Service Delivery in Marion County* (February 2006),

<http://www.oregon.gov/OPDS/docs/Reports/MarionCountyReportwithappendices022106.pdf>.

¹³ *Id.*, at 34.

¹⁴ PDSC Agenda, September 14, 2006. <http://www.oregon.gov/OPDS/docs/Agendas/09-14-06.pdf>.

¹⁵ PDSC Agenda, January 22, 2009. <http://www.oregon.gov/OPDS/docs/Agendas/01-22-09.pdf>.

¹⁶ PDSC Agenda, June 17, 2010. <http://www.oregon.gov/OPDS/docs/Agendas/06-17-10.pdf>.

The MCAD Executive Director is selected by and serves at the pleasure of the board. When Paul Lipscomb began his service as Executive Director, he devoted a significant amount of time to MCAD business. He later moved from Salem to Sisters, Oregon. Although he always attended board meetings and remained available by phone and email to address MCAD matters as needed, the distance limited his day-to-day contacts in Marion County. As noted earlier, Jon Weiner became the Interim Executive Director in January 2014 and he continues to serve in this capacity.

The daily operations of MCAD are managed by the Office Manager, Lisa Richardson, who works full time, and Leslie Cross, who works on an intermittent part-time basis. They work with MCAD members and the court to track case assignments and manage payments to members. They also maintain a database, which members can access and update, to track attorney caseload and case-specific data, such as disposition by counts. A fine is imposed on members who are late in entering closing data about their cases.

Members of MCAD must apply for membership every two years, coinciding with the two-year period for MCAD's contract with PDSC. Each member signs an "MCAD Independent Contractor Attorney Agreement," which details the conditions of membership, including provisions regarding imposition of corrective actions and termination for unsatisfactory performance. Corrective measures and termination may be taken by the MCAD board of directors "or its designee."

Although the active roster of MCAD attorneys lists 41 members, that number includes some who accept very few or no appointments through the group, either because they have their own contracts with PDSC to provide representation in capital or PCR cases or because they have a busy practice of retained cases.

MCAD's written protocols include three main components to the group's quality assurance mechanisms. First, an education plan requires, among other things, membership in OCDLA and attendance at CLEs, including two MCAD-sponsored CLEs per year. Second, assigned mentors provide guidance to new MCAD lawyers regarding Marion County criminal procedure, as well as knowledge and skills for effective criminal defense. Third, a mandatory work group structure provides that each member will participate in a work group, headed by a group leader, which meets regularly to discuss legal and procedural developments affecting criminal defense in the county. In addition, according to the plan adopted by MCAD, the work groups "include oversight of attorney performance, routine performance reviews, and appropriate response to complaints."

According to the work-group plan description, complaints are handled within a three-level structure. At the first level, the work group will investigate complaints and develop an "action plan" to address specific concerns about a member's performance. Matters that cannot be resolved at the first level are referred to a "Committee of Working Group Leaders," which may place a member on probation for no longer than three months. At the end of that period, a "probation monitor" will report on the matter, recommending an end to probation if the report is good or referral to the next level. At the third level, the MCAD Executive Director receives reports about the matter and "will impose whatever resolution s/he deems appropriate," subject to a member's right to seek review by the MCAD board of directors.

MCAD members are appointed to cases through an “attorney of the day” structure that has been in place since well before the 2005 PDSC review of public defense in Marion County. At a monthly MCAD membership meeting, attorneys sign up for a rotation on a court calendar for misdemeanor and felony case assignments. On his or her designated day, the attorney is present in court for arraignments and personally meets new clients there and can make arrangements then for further meetings with the client. PDMC receives cases on the first work day of the week, and MCAD is present the other days of the week to receive case appointments. According to MCAD, its attorneys meet with all clients within the time periods required by its contract with PDSC. At the time of the peer review, lawyers were able to switch days and trade cases in ways that increased some attorney caseloads to unacceptably high levels. Since the peer review, MCAD reports that it has implemented case distribution oversight to even-out caseloads and prevent attorneys from carrying too many cases.

IV. SUMMARIZED FINDINGS OF THE PEER REVIEW & SYSTEM DELIVERY REVIEW UPDATES

Responses to Questionnaires Circulated in 2013. MCAD members were asked to complete an online survey about the operations of the consortium. Thirty-two members responded to that survey. In response to the member survey circulated at the time of the peer review, most MCAD attorneys expressed general satisfaction with how the consortium operated. However, in response to a question about how well MCAD addresses concerns about underperformance by lawyers, while most (16) said it was “good,” and five said “excellent,” five also described it as only “fair,” and five said “poor,” and comments suggested that MCAD needed to address the consistent under-performance of certain attorneys.

Information Obtained During Peer & Service Delivery Review Interviews. During the course of its three day site visit, the peer review team interviewed about 35 individuals involved with the Marion County criminal justice system, in addition to meeting twice with Paul Lipscomb. The Service Delivery Review team, which included OPDS Executive Director, Nancy Cozine, PDSC member, John Potter, and OPDS Analyst, Shelley Winn, interviewed stakeholders, as well as MCAD and PDMC lawyers and leaders, during October 29-30, 2014.

Most interviewees described overall satisfaction with MCAD attorneys and, more generally, with the functioning of the criminal justice system in Marion County. Attorneys from MCAD are seen as good partners in a number of collaborative efforts, such as standing committees on court operations and security, special projects such as an effort to streamline jury duty procedures, and in connection with a number of special courts, such as a new veteran’s court that requires good working relationships among prosecutors, defenders, the court, community corrections, and treatment providers. Marion County is also enthusiastically embracing evidence-based practices in its parole and probation operations, which are managed by the Sheriff’s Department. Likewise, the county has been active in grant-funded prison reentry programs.

Many interviewees did express some concern regarding the county’s Courthouse Annex and jail operations. The options for meaningful, confidential attorney visits with clients at

the jail are very limited. On the other hand, Annex personnel complain about attorneys showing up late and unprepared for proceedings. Moreover, the jail is at capacity, requiring routine releases for purposes of population control.¹⁷

Interviewees generally described the work of MCAD attorneys as very good, and many said that the quality of the group overall improved significantly when Paul Lipscomb became executive director. Stakeholders noted additional improvements when Jon Weiner became the Executive Director in January 2014. However, reports continued to suggest that a small number of low performers remain in the group. The concerns with these attorneys generally involved lack of adequate case preparation and poor client contact.

According to interviews, MCAD attorneys like being a part of the consortium and especially appreciate the support they receive from the MCAD office staff. Several attorneys described a high degree of satisfaction with the group's mentor program for lawyers new to MCAD. It appears that MCAD did some work to improve its training and mentoring program between the time of the peer review and the service delivery review visits.

V. RECOMMENDATIONS OF THE PEER REVIEW TEAM FOR MCAD & MCAD RESPONSE

Consortium Structure and Administration

The peer review team found that the consortium model generally, and MCAD's structure in particular, allows public defense clients to benefit from the knowledge and skill of experienced criminal defense attorneys who wish to engage in the private practice of law but are willing to accept public defense cases, and that the MCAD consortium includes some excellent attorneys. These attorneys, who generally maintain a substantial caseload of privately retained clients, enjoy the collegiality of the MCAD group and appreciate the efficiency of MCAD staff in handling the business end of public defense work.

The peer review team also found that MCAD has structures designed to assure quality representation. Its education plan is a model that can be recommended to other consortia, including MCAD's commitment to conduct its own CLE programs. The mentorship program is appreciated by members new to the group. The group's email listserv is an important and effective means of collaboration among members. And the work group structure is a good model for consortium lawyers to keep abreast of legal and procedural developments and to address particular issues and challenges that group attorneys may be facing. MCAD also has an excellent database that is capable of capturing and measuring important information about caseloads, case outcome, and attorney performance. MCAD's addition of caseload oversight and management is a very positive improvement.

¹⁷ Members of the peer review team observed an in-custody arraignment of a person charged with theft in the third degree, who was ordered held in custody. Asked about this afterward, the team was told the person would undoubtedly soon be released due to overcrowding.

Quality of Representation

MCAD took steps to improve overall representation and to address concerns regarding particular lawyers following the peer review report. Still, effective quality assurance remains a challenge for MCAD. Interviews indicate that there are a few lawyers in the group who continue to appear for court without being well prepared, effective advocates for their clients.

Peer Review Recommendations & MCAD Response

1. **Quality Assurance.** The peer review team recommended that MCAD review its procedures for ensuring quality representation by all of its members, and that the board review the OPDS *Best Practices for Oregon Public Defense Providers*¹⁸ and determine how best to implement procedures for training attorneys, monitoring and evaluating attorney performance and, where necessary, remedying performance deficiencies. The peer review team further encouraged MCAD to explore the prevalence of resolving cases at the Annex without pretrial litigation, including whether the practice is confined to particular attorneys, and determine whether each attorney is fulfilling the obligation to advocate for a client's cause with zeal, skill and loyalty. MCAD has clearly taken steps to address concerns regarding the quality of services provided, but has not yet found a way to address all concerns.
2. **Enhanced Database Capability.** The peer review team found that MCAD is well served by a strong office staff and a sophisticated database that enables the group to easily account for the work it performs, make required reports to and receive payment from OPDS, and distribute payment to its members. The peer review team recommended that the database be used to track additional information such as open public defense cases for each member, and case closing information such as the resolution by alleged counts and the manner in which the case was resolved. Again, MCAD has been responsive to the peer review team recommendations and has begun tracking attorney caseloads and other information.
3. **System Issues.** With the physical distance between the Annex and downtown courthouse, the peer review team found that public defense lawyers could spend much of each day literally running and driving around, with little time for client contact, case preparation, or litigation. The peer review team recommended that MCAD leaders explore the desirability of changing the current scheduling practice and work with PDMC and the court if a different approach appears to be preferable. This appears to be an area where MCAD could continue to focus.
4. **Measure 11 advocacy.** The peer review team recommended that MCAD review the findings of the 2011 Criminal Justice Commission report on

¹⁸ Available on the OPDS website at <http://www.oregon.gov/OPDS/CBS/pages/bestpractices.aspx>.

Measure 11, and determine if a different approach to these cases, either on a case-by-case basis or as a systemic challenge, is warranted by the data that show disproportionate conviction rates in Marion County for persons charged with Measure 11 offenses. This appears to be another area where MCAD could continue to implement improvements by ensuring that qualified lawyers are readily available for more serious case types.

VI. OVERVIEW OF PUBLIC DEFENDER OF MARION COUNTY (PDMC)

Background. As noted above, the October 21, 2005, Service Delivery Plan adopted by the Commission for Marion County called for the creation of a new public defender office with quality assurance and management structures that would “serve as models for other public defense providers across the state.”¹⁹ Thereafter, a steering committee that included members of the local community worked with OPDS to plan for the new office and recruit a board of directors, which held its first meeting in September 2006. The board met regularly to establish the new office and recruit an executive director. Tom Sermak, who had been a senior attorney with the Public Defender Services of Lane County, was selected as the Executive Director. He began working with the Board on April 2, 2007, to locate office space and furnishings and recruit an initial staff for the office, which opened in July 2007.

In Ingrid Swenson’s 2009 report to the Commission on Marion County, she described the efforts made to establish the PDMC. She reported that in 2008, the first full year of PDMC operations, the office received 1,877 appointments (MCAD received 6,319 appointments). She also wrote that “[w]hile the substantive legal work of the office is said to be good, there have been on-going issues related to the deployment of the office’s attorneys, timely appearances at court hearings, office management, and adequate training of new attorneys.”²⁰ Later, in an update before the PDSC in 2010, it appeared that many of the concerns identified earlier had been resolved. The office had expanded to eight lawyers, two investigators, a legal assistant and three other fulltime support staff, and was handling approximately 25% of the adult criminal caseload in the county.²¹

Operations. PDMC is a nonprofit corporation governed by a seven-member board of directors that meets monthly. One board member each is appointed by the Chief Justice of the Oregon Supreme Court, the President of the Oregon Bar Association, and the Chair of the Marion County Board of Commissioners. The board selects the remaining members. Among its duties, the Board approves an annual audit and report from the Executive Director, approves revisions to an employee manual, and conducts an annual review of the Executive Director. According to the employee manual, the board may also receive employee grievances, a process that had been followed in at least one instance at the time of the peer review.

¹⁹ OPDS’s *Report to the Public Defense Services Commission on Service Delivery in Marion County* (February 2006), at 34.

<http://www.oregon.gov/OPDS/docs/Reports/MarionCountyReportwithappendices022106.pdf>.

²⁰ PDSC Agenda, January 22, 2009. <http://www.oregon.gov/OPDS/docs/Agendas/01-22-09.pdf>.

²¹ PDSC Agenda, June 17, 2010. <http://www.oregon.gov/OPDS/docs/Agendas/06-17-10.pdf>.

At the time of the peer review, PDMC had budgeted for eight attorney positions in addition to the Executive Director, who handles his own caseload. Their work was supported by two investigators, two legal assistants, and several other support staff. As discussed more fully below, the Executive Director articulated a strong desire to add several new attorney positions, another investigator and another support person to the office staffing.

The PDMC negotiated for an increase in its 2014 contract in order to add attorneys and staff, and while the number of lawyers had increased to 10 by the time of the service delivery review, PDMC had not yet implemented any form of mid-level management as was recommended by the peer review team. Additionally, only one attorney who was employed at the time of the peer review remained by the time of the service delivery review. Seven of the lawyers interviewed at the time of the Service Delivery Review were relatively new to the office.

PDMC is the primary public defense contractor for new case appointments on the first workday of every week. An attorney from PDMC, usually the Executive Director, is present at criminal arraignments, at which time new clients and the court are given the name of the PDMC lawyer who will handle the matter. Lawyers are assigned on the basis of their qualifications to handle particular case types, with an effort to maintain balanced workloads. PDMC reviews the docket prior to arraignment to screen for obvious conflicts of interest. After arraignment, when discovery is received, the assigned attorney determines whether any conflicts of interest are present pursuant to a written conflict checking procedure.

Although a senior PDMC attorney holds the position of “assistant to the executive director,” Mr. Sermak has primary responsibility for supervising and training all staff attorneys. Training consists largely of an orientation to the office and the Marion County court system, the assignment of a mentor, and some case review during the early stages of employment. Thereafter, PDMC relies upon the resources of the Oregon Criminal Defense Lawyers Association (OCDLA) for most of its training and continuing legal education needs. The physical configuration of the PDMC office promotes frequent informal consultations among the firm’s attorneys, who also meet as a group once a week to discuss their cases and system issues. At the time of the peer review, and again during the service delivery review, Mr. Sermak was described as being spread too thin to offer sufficient supervision to newer lawyers in the office. Nonetheless, lawyers report that they enjoy their work, appreciate the excellent support staff, and feel supported in the office.

As part of its case closing protocol, PDMC seeks to provide each client with a survey asking about satisfaction with the firm’s services. Responses, which are rare, are reviewed by the case attorney and, in the event of critical responses, by the Executive Director. The responses are maintained in the client’s file. There is no tabulation of responses or other data maintained concerning the responses outside of the client’s file.

According to the Executive Director, “[a]ll staff is to be evaluated annually.” However, responses on the survey of all PDMC staff, discussed further below, indicate that regular performance reviews may not be occurring. Annual performance appraisals

were still not happening at the time of the service delivery review visit, but there had also been a significant turnover in lawyer staff.

PDMC is an active participant in justice system policy discussions. All PDMC attorneys are members of the Marion County Bar Association. The Executive Director is a member of the Local Public Safety Coordinating Council. He also meets regularly with the presiding judge to discuss issues concerning his office. He also represents the office at monthly meetings with judges, court staff, jail administration, community corrections and others regarding operations at the Courthouse Annex. All stakeholders described Mr. Sermak as an excellent resource who has fostered positive working relationships with all Marion County stakeholders.

VII. SUMMARIZED FINDINGS OF THE PEER REVIEW & SYSTEM DELIVERY REVIEW UPDATES

Responses to Questionnaires Circulated in 2013. In response to the survey of PDMC employees in 2013, there was strong endorsement for the clarity of the PDMC mission to provide high quality legal services²² and that PDMC is accomplishing its mission. Nearly all respondents to the survey said they were proud to work at PDMC, and that they were supported in their work by the office. Most respondents disagreed with the statement that “my compensation is about equivalent to others who do the same kind of work,” and, for reasons discussed further below, similarly disagreed with the statement “people stay in the same job assignment too long.”

Responses were somewhat mixed regarding PDMC supervisory functions, which was reflected as well in staff interviews conducted by the peer review team. While nearly all respondents strongly agreed that “my supervisor treats me with respect,” there was some disagreement that management priorities are consistent with the PDMC mission and that management decisions take into account the needs of PDMC staff. There was also somewhat weak support for the statement that the “current organizational structure is appropriate for PDMC’s mission and philosophy,” and mixed responses to whether supervision is helpful in accomplishing daily tasks. Nearly half of the respondents also disagreed with the statement that “I receive regular formal performance reviews by my supervisor.”

Information obtained during interviews. During the course of its three day site visit, the peer review team interviewed about 35 persons involved with the Marion County criminal justice system, in addition to meeting twice with Tom Sermak. As noted earlier, the Service Delivery Review team, which included OPDS Executive Director, Nancy Cozine, PDSC member, John Potter, and OPDS Analyst, Shelley Winn, interviewed stakeholders, as well as MCAD and PDMC lawyers and leaders, from October 29-30, 2015.

²² The firm’s mission statement reads: “The overall mission of the Public Defender of Marion County is to provide high quality, cost effective criminal defense to persons who qualify for our services while maintaining the confidence of the clients that they are receiving zealous and proficient legal representation.”
http://www.pdmarion.org/Public_Defender_of_Marion_County/PDMC_Home.html.

Most interviewees described overall satisfaction with both PDMC attorneys and, more generally, with the functioning of the criminal justice system in Marion County. Like MCAD, attorneys from PDMC are seen as good partners in a number of collaborative efforts, such as standing committees on court operations and security, special projects such as an effort to streamline jury duty procedures, and in connection with a number of special courts, such as the veteran's court that requires good working relationships among prosecutors, defenders, the court, community corrections and treatment providers.

Most interviewees recognized PDMC as an important player in the Marion County's criminal justice system. A number of people noted the difficulties that PDMC had when it began operating in a fairly closed and insular legal community. In this connection, one person described Salem as a "big farm town." Several judges acknowledged that Mr. Sermak had a "steep learning curve" when PDMC began operations and that there were a number of problems at first. Those issues have been largely resolved, although the fairly regular turnover at PDMC means a regular influx of attorneys new to the system who face challenges of mastering difficult work in a complex setting. Generally, though, judges and other court staff consider Mr. Sermak to be a very good manager. He is said to "check in" regularly about attorney performance, responds to specific performance concerns, and participates constructively in system policy discussions. One person said he does a "fantastic job" as a system partner.

Overall, PDMC attorneys are seen as zealous advocates for their clients. Some interviewees expressed concern that some attorneys were zealous to a degree that it was a disadvantage to the clients. Others noted appreciation for PDMC motion and trial practice. At the time of the service delivery review, PDMC lawyers were described as having consistently good client contact and arriving well-prepared for court hearings.

Several interviewees mentioned the turnover at PDMC, which means that judges, DAs and others regularly encounter inexperienced attorneys who are dependent upon training and supervision from Mr. Sermak. As mentioned earlier, there are concerns that Mr. Sermak spends too much of his time in court and on casework to devote sufficient time to supervision.

Interviews with PDMC attorneys and support staff reflect a group that is strongly committed to zealous client advocacy but frustrated with the barriers to effective advocacy. The relatively low compensation for attorneys is seen as the primary reason for high turnover at the office. At the time of the site visit, two senior attorneys had just resigned and another one, who said he loved his job there but needed to find better paying work, resigned shortly after the visit. As noted earlier, by the time of the service delivery review, only one attorney who was present during the peer review remained on staff. The peer review team heard complaints regarding leadership, but those concerns were not articulated during the service delivery review. A major friction point for many was office technology, which is based on Apple products. While Mr. Sermak has not made any immediate changes to the office system, he is exploring other options.

Peer Review Recommendations & PDMC Response

- 1. Quality of Representation.** The peer review team commended PDMC for having established itself in the Marion County criminal justice system as a strong and respected presence known for its zealous and effective advocacy on behalf of public defense clients. PDMC was also commended for having a strong and engaged board of directors that is clearly committed to responsible stewardship of PDMC and supportive of its role in the local legal community. Finally, PDMC, largely through its Executive Director, was noted as a valued partner in county criminal justice planning and responsive to concerns and needs of the court and other system stakeholders. Mr. Sermak is widely applauded for successfully establishing PDMC, and providing strong representation for public defense clients.
- 2. Office Management.** The peer review team found that PDMC's structure must evolve in order to sustain its good work, and recommended that it add several attorney and staff positions to allow establishment middle-level management. This recommendation was identified as necessary in order to relieve the Executive Director of sole responsibility for the training and supervision of PDMC attorneys, and promote closer and more meaningful supervisor involvement with attorney development. The team also recommended that Mr. Sermak and the PDMC board assess whether he can better meet the demands of successfully leading and inspiring the office employees. The team specifically recommended that PDMC provide more training for its attorneys, noting that the high turnover rate makes on-going training essential. It recommended that the Executive Director explore ways to offer a new lawyer trial skills curriculum and hour-long presentations at the PDMC office, on topics affecting criminal defense generally and in Marion County. Finally, the peer review team recommended that, to the extent that the firm is able to increase its salary scale, both the office and its clients will benefit significantly. PDMC has done a few trainings in the office, but nothing consistent, has not implemented any mid-level management structure despite addition of new lawyers at the start of 2014, and has not created a new lawyer trial skills curriculum.
- 3. System Issues.** With the physical distance between the Annex and downtown courthouse, the peer review team found that public defense lawyers could spend much of each day literally running and driving around, with little time for client contact, case preparation, or litigation. The peer review team recommended that PDMC leaders explore the desirability of changing the current scheduling practice and work with MCAD and the court if a different approach appears to be preferable. This appears to be an area where PDMC could continue to focus.
- 4. Measure 11 advocacy.** The peer review team recommended that PDMC review the findings of the 2011 Criminal Justice Commission report on Measure 11, and determine if a different approach to these cases, either on a case-by-case basis or as a systemic challenge, is warranted by the data that show disproportionate conviction rates in Marion County for persons charged with Measure 11 offenses. PDMC has, since the peer review, designated two experienced attorneys in the office who handle all of the Measure 11 cases.

VIII. Service Delivery Review – Recommended Areas of PDSC Inquiry

Both MCAD and PDMC serve as dependable public defense resources in Marion County. Both should be applauded for taking steps to act on recommendations made by the peer review team. At the same time, both have challenges that will require the continued efforts of leaders and lawyers in both organizations.

1. Quality Assurance.

The Commission will likely want to ask MCAD about its plans for addressing concerns regarding individual lawyers. While many MCAD lawyers are seen as having good client management skills, some are reported as failing to meet with clients in a regular and timely fashion, failing to adequately prepare for court, and settling cases without appropriate pretrial litigation. Addressing these matters should be considered a very high priority. The Commission may also wish to ask MCAD what it has done since the service delivery review interviews to be sure qualified lawyers are readily available for murder and other serious case types.

With regard to PDMC, the Commission might want to inquire about any additions to training available to new lawyers, and any efforts it is making to attract and retain lawyers.

2. Management.

MCAD was applauded for having a robust database capable of ascertaining not only caseload information, but also details regarding case outcomes. The Commission might want to inquire about any enhancements planned for its database.

The Commission will likely want to ask PDMC about any plans it has to implement a mid-level management structure, whether new attorneys are getting regular reviews, and what plans the office has for acquiring new case management systems.

3. Systems Issues.

As noted, both MCAD and PDMC are seen as dependable, valuable resources. The Commission might wish to ask both about their willingness to work together to address system issues, and about any efforts they have made to achieve more regular communication with each other and with other system stakeholders. Additionally, the Commission might want to ask whether there are system issues that could be addressed more effectively through a collaborative approach.

4. Structure.

Marion County's current public defense structure, with a consortium and a public defender office, was adopted in 2007. It has served the community well, and

seems to have improved the overall level of representation in the county. The Commission will likely want to know that both providers remain committed to the concept of excellence and that both have concrete plans to improve representation through regular training, enhanced monitoring of attorney performance, regular reviews, and immediate responses to concerns regarding representation.

IX. TESTIMONY AT JANUARY 22, 2015, PDSC MEETING

Chair Ellis began by thanking everyone in Marion County for the time and effort they dedicated to the review process. Nancy Cozine then provided a summary of the Service Delivery Review Report and recommended areas of Commission inquiry.

Chair Ellis asked Judge Prall whether there was any information the court would like the Commission to consider. Judge Prall said the court shared the concerns and accolades outlined in the report, and confirmed that the introduction of a public defender office heightened the responsibility and professionalism of defense delivery in Marion County. She noted that the court shares the long-standing concerns created by the distance between the annex and the courthouse, and problems with lawyers signing themselves up to be in two places within too short a timeframe and then being late to court. She said the eCourt implementation exacerbated the issue because some of the annex work had to be shifted back downtown, increasing the need for travel between the two locations. Chair Ellis noted the efficiency created in the public defender office by having only one lawyer responsible for taking cases each day, and asked whether a similar efficiency could be created within the MCAD group; Judge Prall thought that might reduce time conflicts.

Chair Ellis also asked questions about lawyer assignment within both entities. Judge Prall said her impression was that both providers were making an effort to assign cases based upon experience, but that efficiencies might be captured through increased specialization at MCAD.

Chair Ellis expressed his sense that the public defense providers in the county worked well together. Judge Prall agreed, saying that Marion County benefits from a very collegial Bar. Chair Ellis asked whether the court has good access to both Mr. Weiner and Mr. Sermak. Judge Prall responded in the affirmative, explaining that both were very available during eCourt implementation. She commended their ability to work collaboratively and follow through with communication to their groups. Commissioner Potter asked whether there was any regular policy meeting for the defense bar, the judges, and the prosecution. Judge Prall said that a local Criminal Justice Advisory Council is on the horizon, delayed slightly because of eCourt, but starting soon. She also mentioned the Annex group, which meets regularly to address operational issues. Chair Ellis asked whether non-English-speaking populations are being well-served. Judge Prall noted that it was very helpful to have several lawyers who speak Spanish,

that in other cases the attorneys are good at utilizing and accessing interpreters, and that she is satisfied that attorneys are communicating well with their clients.

Chair Ellis asked whether the Commission could do anything to improve the quality of counsel in Marion County. J. Prall commended the Commission's approach to the Service Delivery Review, and indicated that it was a helpful and important process. Chief Justice Balmer asked whether there are enough lawyers available to handle the serious felony cases. Judge Prall said both providers seem to be focused on training newer lawyers to be able to handle these cases, pairing a less experienced lawyer with a more experienced lawyer.

Chair Ellis thanked Judge Prall and invited District Attorney Beglau to share his thoughts. Mr. Beglau began by thanking the Commission for including his office in the review discussions, and emphasized the collegial nature of the practice in Marion County. He expressed strong support for having prosecutors and defense practitioners on equal footing, and appreciation for Tom Sermak's and Jon Weiner's level of involvement in policy discussions. Mr. Beglau indicated that both were present for important discussions, like new approaches in misdemeanor cases where defendants are unable to aid and assist, and diversion of prison-bound property offenders who are at a medium and high level risk rate, which is saving about 50 or 60 prison beds, and specialty courts. He acknowledged that it can be harder to get the message out to MCAD attorneys because it is a bigger, more diverse group. He also suggested that it would be helpful to have those in public defense management positions refrain from taking a caseload.

Chair Ellis asked whether the District Attorney's Office is experiencing the same level of turnover that we are told the public defender's office. Mr. Beglau said that it isn't as big a problem, but that the office is starting to lose people to jurisdictions with better salaries. Chair Ellis asked whether there is an experience disparity between lawyers in the DA's office and those in the PD and MCAD. Mr. Beglau said there is disparity, and went on to explain that as Oregon comes out of the recession, counties are starting to increase salaries. He indicated that the issue is being studied in Marion County. He again emphasized the importance of creating equal footing between the defense and prosecution. When asked about anything the Commission could do a better job of, Mr. Beglau suggested increased training and mentoring for defense lawyers, saying that the issues presented today are more complex than ever; he also suggested increased salaries. Commissioner Potter asked about the discovery process in Marion county. Mr. Beglau indicated that it was the subject of a recent discussion and would be examined as part of the county's effort to identify ways to be more effective at resolving cases quickly.

Chair Ellis asked about the composition of the lawyers in Mr. Beglau's office. Mr. Beglau indicated that there are thirty-three lawyers, in four sections: domestic violence, child abuse and adult sexual assault, career property and the drug team. He explained that on each team there is a manager and five or six lawyers. The remaining case types are divided up, mostly the misdemeanors, and the entry level lawyers get most of those cases. He indicated that with a

manager for each team, there is a lot of supervision and mentoring on the more serious cases. Mr. Beglau pointed out that it takes five years for a lawyer to know what they are doing in a child abuse case, and that he wouldn't want a brand new lawyer taking on a child abuse case or a Measure 11.

Chair Ellis thanked Mr. Beglau and invited Mr. Weiner and Mr. Sermak to present information. Mr. Weiner began by saying that he began as interim executive director in January of 2014 and that it became obvious very quickly that his mission was to understand and address concerns outlined in the peer review report. Chair Ellis asked Mr. Weiner whether he is handling a caseload. Mr. Weiner said he doesn't have daily assignments, but that he tries to co-counsel with newer lawyers in more serious cases, and that he also likes to work on murder and PCR cases.

Chair Ellis asked about the composition of the MCAD board. Mr. Weiner indicated that three of the nine are external members and that the monthly meetings are well attended. Cheryl Richardson, Chair of the MCAD board, indicated that they would soon be filling the executive director position and that Mr. Weiner would be a frontrunner given the work he has accomplished in the last year.

Chair Ellis asked about MCAD's methodology for assigning cases. Mr. Weiner explained that MCAD lawyers don't get to decide what types of cases they are qualified to handle on their own; it must be approved by MCAD. He indicated that he is working with the court to make sure that only the most qualified lawyers are taking murder and Measure 11 cases, and he is also looking at the possibility of having lawyers specialize in certain case types.

Chair Ellis asked Mr. Sermak about turnover at the PDMC. Mr. Sermak explained that the primary reason is financial, and he gave several examples of lawyers who simply could not continue to practice with the low salary. Commissioner Potter asked why lawyers from MCAD aren't applying at PDMC. Mr. Weiner speculated that it was because most of the MCAD lawyers have been their own boss for a long time, and changing now would be very difficult, and that many like the flexibility of doing a variety of case types. He estimated that out of the 38 MCAD lawyers, 20 to 25 are full-time criminal law practitioners, but the rest enjoy other private work. Vice-Chair McCrea noted that Mr. Weiner was now monitoring caseloads, and asked whether that working out alright. Mr. Weiner indicated that it was. Vice-Chair McCrea followed up by asking whether there were any lawyers who were not taking cases regularly enough to stay current on the law. Mr. Weiner indicated that one lawyer didn't take a particular case type, but that it was not a problem, and said that the group is really working on getting newer lawyers up to speed so that they can take felony cases.

Mr. Weiner and Mr. Sermak expressed appreciation for the work of the Commission and employees at the Office of Public Defense Services. Both said the system is working well at this point. Mr. Sermak pointed out that his firm is prepared to expand when necessary, and expressed support for the idea of staffing specialty courts out of the public defender office. Chair Ellis asked

whether conflicts are becoming a problem now that PDMC has been around for a longer period of time. Mr. Sermak said they are becoming more prevalent, but checking dockets in advance allows them to avoid having too many. Vice-Chair McCrea asked Mr. Sermak whether he is still carrying a caseload, and he indicated that he stopped taking new cases several months ago and finished his last case late last week. He indicated that this change has given him time to address county policy and structure issues in his office. Vice-Chair McCrea finished her questions by asking Mr. Sermak about the challenges of practicing in Marion County. Mr. Sermak said they will be working on discovery issues – that often video tapes or other evidence are not requested from the policy until the defense attorney requests them, and this slows down the whole process. Mr. Sermak also noted the challenges with Measure 11 cases, saying that in Marion County there is a policy against negotiating out of Measure 11. He indicated that as a result, 20% of the Measure 11 cases in Marion County went to trial in 2012. He compared this to other counties: 27% in Clackamas County (but only 86 cases were filed during the entire year); 7% in Multnomah County; 6% in Lane County; and 12% in Washington County. He said this is a major challenge.

Chair Ellis thanked Mr. Weiner and Mr. Sermak.

X. A Service Delivery Plan for Marion County

Commission members met and discussed the service delivery plan for Marion County on March 19, 2015. After reviewing the report, testimony, and taking final comments and information from providers, the Commission concluded that overall, things are going well in Marion County. The Commission suggested that OPDS analysts continue with the current distribution of cases in Marion County, but also work on a plan for shifting caseload in the future. The Chair suggested that OPDS should consider shifting specialty court responsibilities to the public defender office, and encouraged MCAD to continue working with its attorneys to assign cases to align with the strengths of its attorney members.

MARION COUNTY ASSOCIATION OF DEFENDERS

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October 30, 2014

Executive Director Nancy Cozine
Office of Public Defense Services
1175 Court Street NE
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Re – May 2013 Peer Review – Responsive Actions

Dear Director Cozine,

The Office of Public Defense Services (OPDS) completed its most recent peer review of Marion County contractors in May 2013. That process generated several reports, one of which focused specifically on the Marion County Association of Defenders (MCAD). The MCAD peer review report raised several concerns. Although MCAD's process of addressing those concerns is ongoing, the responsive actions taken by MCAD thus far are outlined below.

Concerns Raised in Peer Review Report

Although the peer review report's thoughtful consideration of the Marion County service delivery system addressed many issues, the report's primary concerns as to MCAD can be fairly described as follows:

- Are MCAD attorneys “working their cases” less vigorously than they should be? There is apparently a perception by some that there exists a pattern of MCAD attorneys filing disproportionately few pre-trial motions, and resolving a disproportionately large number of cases at the Court Annex.
- “Quality assurance remains a challenge for MCAD.” Many stakeholders opine that “a number of low performers remain in the group.” MCAD does not effectively address underperformance by its members. The workgroup structure, while an effective means of improving attorney performance, is perhaps too cumbersome to be relied upon as the sole means of addressing attorney performance issues in a timely manner.

- MCAD “does not appear to embrace a strong client-centered practice.” Members may be “worried about underperformers not because of the consequences for clients but because ‘their bad behavior reflects on others and may have economic impact on others.’” There is no “equivalent concern for the welfare of MCAD clients.”
- The distant location of then-Executive Director Paul Lipscomb necessitated that “the MCAD board directly address the need for leadership transition.” Although centralization of certain quality assurance functions is likely a positive development, Judge Lipscomb’s distance from Marion County impairs the effective performance of these centralized functions.
- “It appears that MCAD is in need of again examining whether the organization and its clients could benefit from changes in procedures and personnel.”

Responsive Actions by MCAD

MCAD has taken action on several fronts in response to the concerns raised in the Peer Review Report. Some actions have been relatively simple, while others have entailed considerably more planning and effort. While MCAD’s efforts are (and must be) ongoing, a summary of the changes effectuated thus far in 2014 are set forth below.

Transition in Leadership

MCAD transitioned to a locally situated interim executive director in January, 2014. After receipt of the OPDS’ evaluation of MCAD’s response to the Peer Review Report, and consideration of other interested applicants, the MCAD Board will decide whether to retain or replace the current interim executive director.

Changes in Personnel

MCAD has historically been challenged by its seeming inability to make necessary changes in its membership, and its seeming reluctance to add or subtract member attorneys when necessary from a quality assurance perspective. In 2014, MCAD responded to that challenge by making both types of changes to its membership rolls. In particular, MCAD added five new misdemeanor attorneys to its ranks.

Training/Mentoring/Workgroups

MCAD’s workgroup structure was recognized in the peer review report as a distinct asset. The workgroups have been reshuffled and revitalized. Attendance at the monthly workgroup meetings has returned to its former levels. Each new attorney has been assigned a mentor and a workgroup. In addition, the executive director plans to meet with these new attorneys for lunch approximately once per month. Oregon Post-Conviction Consortium Administrator (and MCAD Board Member) Noel Grefenson has agreed to attend these lunch meetings in an effort to enhance the training of these new members. It is anticipated that the Board will approve partial or full scholarships for each of these new members to attend the National Criminal Defense College (NCDC) in Macon, Georgia for two weeks. It has been the policy of the Metropolitan Defenders

(Metro) to send its new attorneys to the NCDC, and it would appear to be appropriate for MCAD to do the same.

Changes in Case Assignment Process

Since its inception, MCAD has assigned cases on somewhat of a rolling basis, irrespective of the caseloads of the attorneys who are signing up to take “attorney of the day” (AOD) assignments. Typically, members choose their assignments by picking “felony days” and “misdemeanor days” at the monthly MCAD meetings. However, it became a common practice over time for attorneys to trade assignments between themselves (e.g. – “I’ll take your felony day next Tuesday and you can take my misdemeanor day tomorrow”). Moreover, some attorneys have proven to be especially adept at picking up stray cases from colleagues, the court, and even the Public Defender’s Office. MCAD has taken steps to de-randomize this process and flatten-out the distribution curve as much as possible, in order to inhibit the ability of its member attorneys to garner huge caseloads. In certain cases, MCAD has worked with individual attorneys to limit their caseloads when it appeared necessary to do so.

MCAD attorneys now sign up for cases in inverse order of the number of cases they have. In other words, the attorney with the fewest cases signs up first, the attorney with the next fewest cases signs up next, and so on. Although the Interim Executive Director and several members did travel to Portland to learn about the case assignment procedure used by Metro, it was determined that implementation of such a system would require a systemic change in the way that the Marion County Circuit Court handles its criminal docket. With Marion County’s change to ecourt at the end of this year, it was not feasible to address this type of systemic change at this time.

MCAD also took steps to reel in the supply of available stray cases. The court and the Public Defenders Office now route all such cases to the MCAD office, which assigns those cases based largely upon caseload considerations.

Enhanced Availability of Attorney (and MCAD) Contact Information

The first step to embracing a client-centered approach was for MCAD to provide accessible contact information to our clients. MCAD’s website has been enhanced, such that contact information for each of its attorneys is provided therein. Moreover, MCAD’s contact information is now prominently displayed, with an offer to help anyone having questions or issues regarding an MCAD attorney.

MCAD has also arranged with Lieutenant Doug Cox to have fliers posted in each pod at the Marion County Jail. These fliers have contact information for the MCAD office and each MCAD attorney. Similar to the website, the fliers display an offer to help anyone having questions or issues regarding an MCAD attorney.

Enhancing MCAD’s Participation in the Criminal Defense World and the Community

In spite of its status as the largest consortium in Oregon, MCAD has largely been absent from the criminal defense community. In 2014, MCAD has attempted to change this by actively seeking to take a more active role in that community. MCAD participated actively in the Pay Parity Committee and Lobbyist Selection Committees, receiving the OCDLA President’s Award for its

efforts on the Pay Parity Committee. MCAD is also active on several local committees, including the Marion County Circuit Court court committee and the Oregon State Hospital – Marion County workgroup.

MCAD has also attempted to increase its utility to the local community, enhancing its website to provide particularly useful forms and pleadings to other practitioners and the general public. MCAD has also added valuable information about important community resources – such as links to the following:

- Contact information for free clothing, food boxes, veterans' assistance, health and medical, and shelters.
- DOC Transitional Services Division – Department of Corrections Transitional Services Information and Contacts by county.
- Marion County Jail - Information regarding visiting hours, policies, and frequently asked questions.
- Marion County Jail Inmate Roster – Full Roster with booking photos.
- Victim Information and Notification Everyday (V.I.N.E.) - A searchable database to locate an inmate anywhere in Oregon.
- Oregon Courts Resources and Links – A guide to preparing yourself to navigate the court system, including court etiquette.
- Court Calendars

Expanded Utilization of Database

Taking heed of the Peer Review Report's recognition that the MCAD database could be more powerfully utilized, MCAD has expanded its use of the database in important ways. The database is now used to track members' caseloads. It has also been used to provide numerical data about trends among MCAD attorneys overall or even particular attorneys. This expanded use of the database has been instrumental in allowing MCAD to monitor attorney caseloads and make responsive adjustments accordingly.

Finally, the database is being expanded to allow for the tracking of two additional parameters – client meetings and pre-trial motions. Starting in November, attorneys will track all of their client contacts, and all motions filed, in new data fields being added to the database. These two metrics should provide valuable information regarding client-centered practices and how hard MCAD attorney are working their cases. Members have embraced these changes, and have suggested the addition of even more data fields to track valuable metrics.

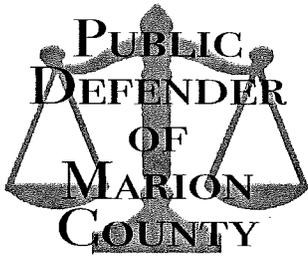
Conclusion

The actions outlined above represent but a few initial steps in what must be a continual quest for improvement on the part of MCAD. As the largest consortium of public defense providers in

Oregon, MCAD is uniquely positioned to be a significant positive force in the public defense community. Metro, which occupies a similar position among public defenders' offices, has enthusiastically embraced its position as the flagship of the State's public defense fleet. Although in the beginning stages of fundamental change, MCAD is committed to moving toward an analogous position among private bar providers.

Sincerely,

Jon Weiner
MCAD Interim Executive Director



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February 18, 2015

Ms. Nancy Cozine, Executive Director
Office of Public Defense Services
1175 Court St NE
Salem, Oregon 97301

Rè: Marion County Service Delivery Review

Dear Ms. Cozine:

Thank you for inviting me to appear before the Public Defense Services Commission when they addressed the forthcoming Service Delivery Review for Marion County. In your draft report you suggested the Commission might want to inquire into certain areas regarding PDMC's internal structure or it's role in the local criminal justice system.

While I found the inquiries made of me and the other Marion County folks invited to participate to be quite appropriate and enlightening, I did note that some of the areas you thought worthy of consideration were not addressed. Anticipating that you or the Commission might like to know how I would have responded had I been asked, I have prepared this letter.

The draft report suggested the Commission might inquire whether PDMC had created a mid-level management structure. PDMC had the semblance of such a structure but it was not formalized. Following the visit of your team to our office late last year we both formalized and expanded the structure. PDMC has nineteen employees. For some time all the office staff have been directly supervised and evaluated by our Office Manager, thus she has direct supervisory authority over three secretaries/legal assistants, a receptionist and an office clerk. The Office Manager is directly supervised and evaluated by the Executive Director. Ever since the Board adopted an Emergency Succession Plan, a senior lawyer has acted as "Assistant to the Director," which required her to be familiar with the duties of the ED and practiced at performing them when the ED is unavailable either due to vacation, illness, injury, etc. At my suggestion, my assistant also undertook a more direct role as office liaison to Willamette University Law School and the Extern program we participate in. We also had a deputy public defender who had volunteered to coordinate the law-clerk and CLS activities of the externs who worked with us. Your visit coincided with the conclusion of our office expansion to ten lawyers and increased support staff. Motivated by your visit and the increased need, we now have a formal management structure in which I, as ED, supervise the Office Manager, the Assistant to the Director, our three investigators, the Measure-11 lawyers, and share supervision of the Major Felony lawyers. The Assistant to the Director has primary responsibility to administer the Extern program and supervise the law clerks, she also supervises the misdemeanor/minor

Ms. Nancy Cozine
February 18, 2015
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felony attorneys and divides supervision of the major felony qualified attorneys. She and I have in the past informally shared training responsibilities; her role in that process is now formalized. Admittedly the structure is rudimentary but we believe it will suit the needs of our nineteen employees. We also believe that by dividing the responsibility to regularly evaluate the employees it will alleviate another concern, which is the office's failure to comply with the schedule of annual formal evaluations. I have enclosed a flow chart showing the new management structure.

Our evaluation practice as set forth in the employee manual specifies that each new employee undergo an informal evaluation after three months of employment, a formal written evaluation at six months and a first annual review six months after that. The new hires are then evaluated annually thereafter. (While I have been lax about maintaining the evaluation schedule overall, new hires almost always receive their first three evaluations at or near the time they are scheduled.) We have now divided the duty of evaluating attorneys roughly in half. Additionally, our experience during our years of operation have led us to conclude that senior attorneys with more than three years in the office in most cases don't need to be evaluated annually, so we are changing our policy to require a formal evaluation every other year for attorneys with more than three years in the office. If in an individual case the need arises to do a formal evaluation more frequently we will assure that happens. In making this change we are mindful that the evaluation process is not a disciplinary tool nor is it a primary or even secondary training tool. PDMC policy and practice is to address disciplinary and training issues *as they arise* not wait till the annual evaluation occurs. The evaluation is to measure progress and set goals which, with the more senior attorneys can be adequately accomplished with biannual evaluations.

We are also in the process of formalizing our training program. A lawyer hired with no prior experience is taken out and introduced to the Annex experience usually on the first day; they are advised that within the next few days they will be expected to have chosen a "mentor" attorney, who will be the primary go-to person with questions. Each new hire is required to sit in on at least two client interviews, one of which must be in the jail. They must then conduct at least two interviews under supervision. They are expected to "shadow" an attorney for some portion of a day. They are expected to observe at least one of each kind of appearance or hearing before they take part in one. If they have not already done so they are sent to the new-lawyer CLE and to the next available OCDLA Trial Skills seminar. They are required to observe a trial, and co-counsel a trial before they have a trial on their own.

PDMC has a training manual, which I characterized in our meeting as having "fallen into disuse." While that may have been an apt characterization the manual was still circulating among new hires. However, it has always served as a secondary resource—secondary to the hands-on training described above. That said, the manual was out of date and not well-tailored to the practice of law in Marion County. The training manual is in the process of being updated and made more Marion County applicable with special sections describing the more common elements of local practice and with another section detailing how criminal law is practiced at PDMC—emphasizing office procedures and the specialized tools and support the office offers. Past experience indicates it will always be a secondary training tool, but it will provide a readily available and reliable source of

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information for those occasions when the inexperienced attorney cannot find a colleague to pose a question to.

Insofar as ongoing in-house training is concerned, I provided a partial list of trainings we have done here at PDMC; a more expanded list of the presentations we have done in the last fourteen months or so would include a CLE on Immigration Law set up by one of our staff lawyers. The presenter appeared interactively over the internet; she did trainings all over the country and her presentation to us was specifically tailored to Oregon and 9th Circuit law. We had a Forensic Psychologist come in for a lively session on the various types of forensic assessments, how they are conducted and the various instruments relied upon by the assessors; one of our members gave a formal CLE on the law as it pertains to firearms, concealed weapon permits, the "open carry" law, etc. We have had speakers present on the new ignition interlock devices, how they work, where they can be obtained, problems with them, etc. And we have had folks from local treatment agencies, jail mental health, the local 370 program and others come in on occasion to address topics of interest. We also make liberal and frequent use of OCDLA CLEs.

The draft report also mentioned what was characterized as frustration with our reliance on Apple products. I suspect the frustration was more directed at the database we are presently using rather than the machines we use to access it. In point of fact there *are* problems with our current database system principally surrounding how it integrates with our calendaring system. The database currently automatically enters on the assigned attorney's calendar all court appearances or events linked to a particular case and that calendar is available to all PDMC employees both in the office and remotely. But the ability to integrate or enter an attorney's personal appointments to that calendar is cumbersome and limited. The database is a custom product developed in conjunction with the Lane County PD office; maintenance has increasingly become an issue and development is slow. That said, and the calendaring issue aside, the system does pretty much what we need it to do. The New Dawn program would probably be better, certainly a bit more polished, and one would hope maintenance would be less of an issue, but it may not be cost-effective to switch databases. I won't know that until we can get some cost figures out of New Dawn. We will be attending a demonstration/ question-and-answer session on the New Dawn product at the end of this month and I hope to know more then.

The final topic the Commission was invited to inquire into was the rate of conviction for M-11s in Marion County versus the rest of the state. First, let me put the issue into historical perspective. The 2011 report that provided the troubling data was based entirely on cases filed in 2008. By the end of 2008 MCAD was about two years into its newly restructured form, and PDMC had been in existence for eighteen months. My office expanded considerably between 2008 and April 2013 when the site visit occurred. We had also just changed our own intra-office structure to designate two of our most senior and experienced attorneys to do the M-11 cases. I have since asked the Criminal Justice Commission, the source of the 2011 report, to update the data relied upon in that report and they have provided me with the most current data which, unfortunately, only goes up to 2012. Regrettably I cannot report a statistically demonstrable improvement in Marion County's M-11 statistics between 2008 and 2012. For example, in 2008 Multnomah County obtained convictions for M-11 offenses in 36% of those cases where M-11 was

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charged (21% highest M-11, 15% lesser M-11); in Marion County it was 63% (48% highest M-11, 15% lesser). In 2012 Multnomah County's numbers were 39% (28% highest, 11% lesser); Marion County's numbers were 64% (55% highest, 9% lesser)

The 2011 report notes, however, in discussing the disparity in prison sentences resulting from M-11 cases:

It appears that in Multnomah County prosecutors are more likely to indict an offender for a M11 crime, and then obtain a plea agreement to lesser offenses. The plea agreements still include a prison sentence in many of these cases. Prosecutors in Marion County are much more likely to convict for the indicted charge. If they are unable to obtain a conviction for the M11 offense indicted, then offenders are more likely to receive a probation sentence or have their case dismissed.

The report also noted that a M-11 case that goes to trial is 300% more likely to result in a M-11 conviction than if the case is negotiated. It is my perception, somewhat born out by statistics, that Marion County is less likely than most jurisdictions to negotiate out of M-11. Unfortunately the 2011 report does not break down trial statistics by county, but it does show that of the 2272 M-11 cases brought statewide in 2008 352, or 15% went to trial with 70% of those resulting in M-11 convictions. In 2012, statewide, 200 of 1665, or 12% of M-11 cases went to trial again with 70% resulting in M-11 convictions. I had CJC break down the resolution by trial statistics for 2012 by county. Marion County took 34 of 170 or 20% of its M-11 cases to trial with 74% of them resulting in M-11 convictions. By contrast Multnomah County took only 29 of 405 or 7% of its M-11 cases to trial, with 93% resulting in M-11 convictions. Lane County took 10 of 157 or 6% to trial with a 90% M-11 conviction rate. Washington County took 27 of 210 or 12% to trial with 70% resulting in M-11 convictions. And Clackamas County took 24 of 86 or 27% of M-11 cases to trial with 71% resulting in M-11 convictions.

I was recently advised by Walt Beglau that his office does not have a written policy for charging or negotiating M-11 cases but that they do not as a rule negotiate out of M-11. That was my experience when I was trying cases and it seems to be a policy that is only recently easing up. Our M-11 lawyers negotiate aggressively, and try a lot of M-11 cases. (When a client's option is "this measure eleven sentence for sure or a risk of that one," more of them opt for trial.) All the lawyers have reported to me that they are getting more non-M-11 offers and are taking fewer cases to trial. Unfortunately, statistical data is two years behind so my only data is anecdotal.

Another factor that should be addressed is variance, if any, between counties in the number of M-11 charges brought in a single case. It goes without saying that a client facing multiple M-11 sentences will plead to a lesser number of M-11 charges to cut his losses and it is also self-evident that a defendant taking a case to trial with multiple M-11 charges is more likely to end up in a M-11 conviction. I am told that data are available from CJC and I requested it but it was not provided.

Marion County brings a lot of M-11 charges. In 2012 they filed a M-11 case for every 1890 citizens; by contrast Multnomah County filed one for every 2368 citizens and Washington County filed one for every 2600 citizens. They also have a practice of not negotiating out of M-11; I believe that to be contrary to most jurisdictions where

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negotiating out of M-11 is a common way to avoid trial. (Marion County pays a price for that as well; the 2011 report noted that for the period 2004-2008 the per capita cost of prison for Marion County citizens was the highest in the state at \$118 per citizen per year.)

It is difficult for the defense bar to affect charging practices; we cannot turn down the faucet but we can block its flow, which is what we are doing by taking such a large percentage of cases to trial. If the current anecdotal evidence is born out by statistics as they become available we are effecting some change. I'm hoping when Marion County's Criminal Justice Advisory Council becomes operational, the increased dialogue will enable the defense bar to have a more direct impact on the way M-11 cases are prosecuted in Marion County and bring the statistics more in line with the rest of the state.

I hope this additional information is useful to you in preparing the Service Delivery Review for Marion County.

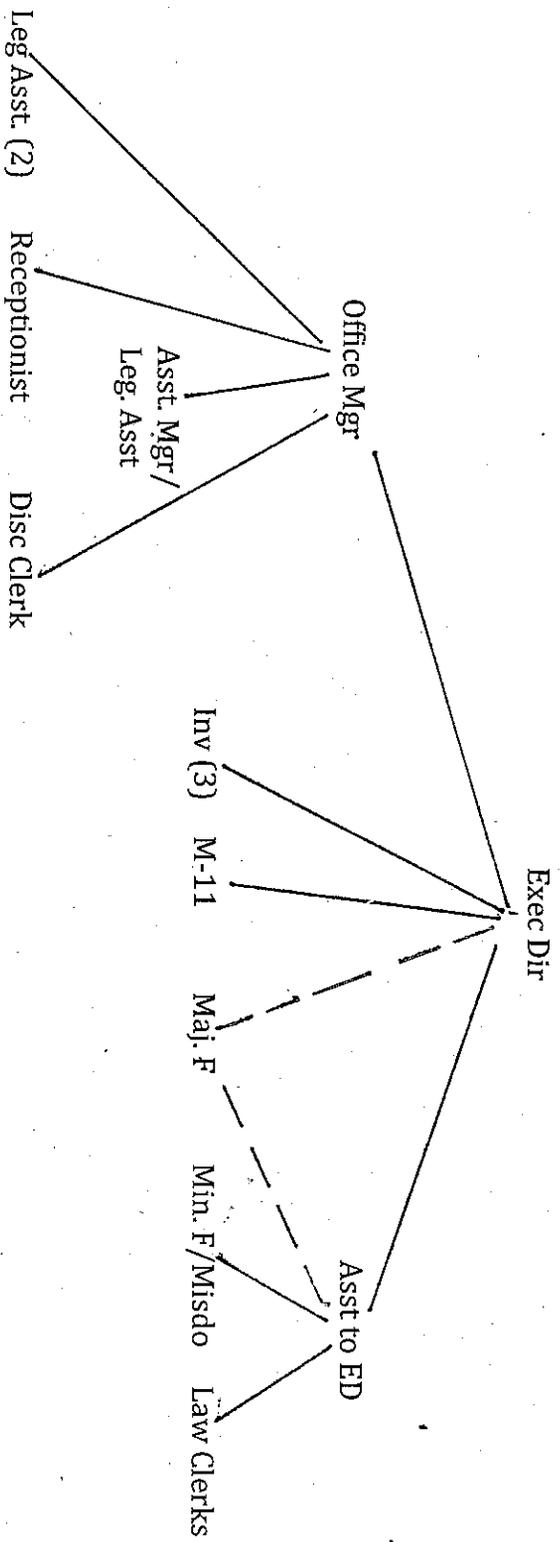
Sincerely,

A handwritten signature in cursive script, appearing to read "T. Sermak".

Thomas S. Sermak
Public Defender of Marion County, Inc.

PDMC Organizational Chart

Jan. 2015



The Exec Director supervises and does regular evaluations of the OM, AED, M-11 lawyers and Investigators; the ED and AED jointly supervise and evaluate the Major felony lawyers. AED in addition supervises and evaluates the Minor Felony/Misdemeanor lawyers and the law clerks. The AED also administers the Extern program with WULS. The AED remains able and available to perform all ED administrative functions in the AD's absence

In addition to having primary responsibility for all purchasing, case reporting, and budgetary matters, the Office Manager supervises and evaluates the receptionist, Asst. Office Manager, legal assistants and discovery clerk.

Attachment 8



Oregon

Public Defense Service Commission

Office of Public Defense Services

1175 Court Street NE
Salem, Oregon 97301-4030
Telephone: (503) 378-3349
Fax: (503) 378-4463
www.oregon.gov/opds

Date: June 11, 2015
To: Public Defense Services Commission
From: Nancy Cozine, Executive Director
Re: Operational Review & Strategic Planning

The Public Defense Services Commission last obtained the assistance of an outside contractor for the purpose of completing an operational review when the agency formed in 2001, and again when the Indigent Defense Services Division (previously housed within the Oregon Judicial Department) merged into the agency in 2003. Much has changed since that time. The Office of Public Defense Services has grown and restructured to better support its staff and contract community; experienced employees in key management positions have retired; and many more long-time employees either are or will soon be eligible for retirement. Statutory and caselaw developments (e.g. the *Padilla* case, which requires defense lawyers to advise clients regarding potential immigration consequences), and more clearly defined national standards related to public defense practice, require public defense attorneys to spend more time on cases than at any point in the past.

Given the significant changes and developments within OPDS and in public defense at the national level, particularly those that have transpired during the last three years, as well as the increasing availability of data that can be used to better monitor performance, the time has come for an updated examination of the agency's business operations and its strategic plan. The agency last contracted with Geoff Guilfooy, of AKT, to provide these services. AKT remains available to offer operational reviews, and has the expertise and experience necessary to complete the work in an efficient manner. Mr. Guilfooy is no longer with AKT, but continues to offer strategic planning services as an independent contractor, and has a positive working relationship with AKT. In order to complete an operational review and to update the agency's strategic plan as efficiently and effectively as possible, the OPDS executive director intends to enter into two contracts. One contract, with AKT, will secure an operational review, particularly focused on the agency's business services. This review will ensure that the agency continues to employ best practices in all business transactions. The second contract, with Mr. Guilfooy, will provide a broader scan and analysis to help the agency identify areas of need, establish and prioritize goals, and identify strategies for achieving those goals. As part of the process, Mr. Guilfooy and the executive director will interview Commission members, contract providers, and other agency stakeholders.

ORS 151.219(1)(e) requires the OPDS executive director to “[e]mploy personnel or contract for services as necessary to carry out the responsibilities of the director and the office of public defense services.” While the Commission’s review and approval is statutorily required only for public defense services contracts¹ (not personal services contracts), the broad nature of the two personal services contracts contemplated here – the operational review and strategic plan – are such that Commission discussion and approval for the OPDS executive director to negotiate and secure these services will assist the agency as it moves through the contracting and review process. The Commission’s support is a critical step in engaging the contractor community in the agency’s efforts to create a strategic plan that will serve clients and providers through the next decade.

¹ See ORS 151.216(1) (d), which requires the Commission to “[r]eview and approve any public defense services contract negotiated by the director before the contract can become effective.”