

**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, July 30, 2015  
10:00 a.m. – 2:00 p.m.  
Office of Public Defense Services  
1175 Court St. NE  
Salem, Oregon, 97301

**MEETING AGENDA**

- |   |                                   |
|---|-----------------------------------|
| 1. <b>Action Item:</b> Approval of minutes - PDSC meeting held on June 18, 2015 ( <i>Attachment 1</i> )                       | Chair Ellis                       |
| 2. Budget Update  | Nancy Cozine                      |
| 3. Veteran Representation Program Concept - Contractor Feedback   | Chair Ellis<br>Contract Providers |
| 4. Report: ABA Center on Children and The Law Summer Conference   | Amy Miller                        |
| 5. Presence of Counsel at First Appearances ( <i>Attachment 2</i> )   | Paul Levy                         |
| 6. OPDS Monthly Report  | OPDS Staff                        |
| 7. Executive Session* - Commission Review of Statewide Service Delivery Plan; Update on status of union contract negotiations | OPDS Staff<br>Commission          |

***\*The Executive Session will be held at approximately 11:00 a.m. for two purposes. Pursuant to ORS 192.660(2)(f), the Commission will review contract proposals to provide public defense legal services beginning on January 1, 2016. The Commission will also receive an update concerning ongoing union contract negotiations, pursuant to ORS 192.660(2)(d).***

***Please note: Lunch will be provided for Commission members at 12:00 p.m. The meeting location is accessible to persons with disabilities. Please make requests for an interpreter for the hearing impaired, or other accommodation for persons with disabilities, at least 48 hours before the meeting, to Laura Al’Omrani at (503) 378-3349. Next meeting: September 17, 2015, 10 a.m. – 2 p.m., at the Hillsboro Civic Center, 150 East Main St, Hillsboro, OR 97123. 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, June 18, 2015  
9:00 a.m. – 12:00 p.m.  
Mt. Bachelor Village  
Bend, Oregon

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

STAFF PRESENT: Nancy Cozine  
Paul Levy  
Amy Miller  
Caroline Meyer  
Billy Strehlow  
Angelique Bowers  
Ernest Lannet  
Shannon Storey

---

---

The meeting was called to order at 9:00 a.m.

**Agenda Item No. 1 Approval of Minutes – PDSC meeting held on March 19, 2015**

**MOTION:** Commissioner Potter moved to approve the minutes with two corrections to attendance; Vice-Chair McCrea seconded the motion; hearing no objection the motion carried: **VOTE:** 7-0

**Agenda Item No. 2 Representation of Veterans**

Jess Barton and William Brown presented information regarding veteran representation in the State of Oregon. Mr. Barton explained that he is a private attorney, army veteran and a charter member of the State Bar's Military Assistance Panel, and that he worked with Paul Levy and Chris Kent to craft performance standards for representation of veteran offenders in criminal prosecutions, which were adopted by the Oregon State Bar's Board of Governors. Dr. Brown shared that he has an extensive military service background, is a sociologist and professor at Western Oregon University, and has been an expert witness or consultant in cases across the country involving veteran clients. Mr. Brown and Mr. Barton expressed concern regarding the consistency of defense attorneys' investigation of military service for use in defense and litigation strategies. They attributed this perceived problem as a lack of understanding of the military culture among the defense bar, the prosecution, and in the judicial branch.

Mr. Brown conducted a nationwide study; of the 18 responding states, Oregon ranked highest for the number of incarcerated veterans. He contrasted this with Washington and California, where there is a lower percentage of incarcerated veterans and a much higher overall veteran population. Mr. Barton speculated that Oregon's lack of permanent military institutions contributes to the high percentage of veterans incarcerated within its prison system.

Mr. Barton urged the Commission to adopt a best practices model that would require special screening of clients to identify veterans, and assign those cases only to lawyers who have met certain requirements for veteran representation. He noted that a best practice model does exist and is housed on the OCDLA website. Mr. Barton also urged the Commission to adopt minimum qualification standards for attorneys who represent veteran clients so they can better understand the military institution and how military service affects behavior in and out of military service. Mr. Levy came to the table to discuss his insights on the matter. He acknowledged the frustration felt but noted that it is not necessary or appropriate for the Commission to adopt a best practices model for a specific class of defendants. Mr. Levy and Chair Ellis both acknowledged that it is important to have an awareness among service providers about how to best represent veterans.

Vice-Chair McCrea mentioned the Padilla Project, which provides attorneys with guidance for representing clients with immigration issues and asked if anything similar could be used to address the issue. Chair Ellis expressed support for the concept. Mr. Levy said it is something that can be developed and brought to the awareness of defense counsel. Nancy Cozine mentioned that as the new contracting cycle begins, they can see if anyone is interested in establishing some kind of veteran representation program which would be similar to programs already in place for immigration cases. Chair Ellis concluded that the OPDS staff put together a proposal on how to do a better job in this area and present it at the October PDSC meeting.

### **Agenda Item No. 3**

#### **Parent Child Representation Program Update**

Amy Miller, PCRCP Program Manager, presented a ten month update on the Parent Child Representation Program. She noted the purpose of this program is to provide legal representation for parents and children to promote outcomes consistent with Oregon policy. The PCRCP is modeled after a similar program which began in Washington State in 2000. That program has consistently reduced the use of foster care and resulted in expedited permanency for children. The Oregon program was launched in August of 2014 in Linn and Yamhill counties. Components of the program include a caseload capped at 80 cases, multidisciplinary training and support, partner collaboration and system improvement, and independent social work support. The attorneys in the program agree to a high level of oversight by OPDS staff to ensure that they are working towards program goals.

Results and observations of the PCRCP include improved shelter hearing representation, a decline in caseload within the PCRCP counties and an increase in regular independent investigation. Previous to this program, counsel was not required at shelter hearings and this had a detrimental effect on the overall outcome of cases. Judge Murphy, the presiding judge in Linn County provided testimony for the OPDS budget hearing commenting that shelter hearings where attorneys were present were more effective and easier to understand for the parents. Lack of attorney presence at initial shelter hearings is still a consistent problem across the state.

There has been a 7% decrease in caseload since the start of the program. Reasons for the declining caseload are fewer filings due to DHS policy changes, more effective attorney advocacy, and Court of Appeals opinions which continue to clarify the permissible bases for juvenile court involvement.

Attorneys in the program track their hours and are expected to spend one-third of their time meeting with clients, one-third on case preparation and analysis, and one-third on court and meetings. Attorneys are expected to attend all case-related meetings throughout the life of the case.

As part of this program, the Program Manager coordinates quarterly agency-level department meetings with the Department of Human Services, the Department of Justice, the Judicial Department and CASA. During these meetings, OPDS provides an update on PCRCP progress and partners work together to address challenges and remove barriers.

The Program Manager went on to describe the role of case managers. Case managers work as agents of the attorneys on behalf of the attorneys. They fulfill a social-worker-like role, providing a confidential space for the client to problem solve and identify barriers. Since December 2014, 107 clients have been served through the case manager program. In April 2015, a survey was sent to community stakeholders in both counties. Fifty-five people responded; the results are a strong endorsement of the program.

The next step in the program would be to do an evaluation on its effectiveness. The American Bar Association Center on Children and the Law recently released an evaluation tool that can be replicated to apply to the PCRCP. To assist in evaluating the impact of the program, a client satisfaction survey is underway. In order to know for sure if the program is working, an evaluation is necessary. An evaluation will help in determining if the positive changes observed thus far are a result of the program or if they are from other external factors. Having access to the DHS records and Odyssey court data will be key for auditing and setting benchmarks for which to begin measuring success. It will be challenging to isolate the effect of the PCRCP within the counties given the many programs and efforts underway in each county. One additional hurdle is cultural influences within each county. Each county has long-standing cultural structures which, at times, make achieving progress more difficult.

Last, the Program Manager discussed the possibility of expanding the program into another small county due to savings seen as a result of reduced caseload.

#### **Agenda Item No. 4**

#### **National Trends in Public Defense**

Paul Levy began by mentioning litigation in Washington and New York litigation, where lawyers' large caseloads prevented them from performing the essential functions of a criminal defense attorney, explaining that these cases illustrate the need for jurisdictional-specific caseload guidelines. He noted that many jurisdictions continue to rely upon the 1973 NAC guidelines that are not empirically based and undoubtedly too high. Mr. Levy mentioned that Oregon has begun a discussion about jurisdictional specific guidelines, noted the standards created in Texas and Missouri, and mentioned that Professor Norman Lefstein, an expert on the subject of caseload standards and how to develop them, will be presenting at the PDSC meeting and management conference in October. The methodology used to develop caseload standards requires a determination of time required on average for each case type, how many hours the lawyer has available and whether or not that lawyer has other responsibilities outside of case work, and then using a panel of experts, engaged in what is called the Delphi method, to estimate what is required to adequately handle particular case types.

Mr. Levy also discussed a new Statement of Interest filed by the U.S. Department of Justice in litigation concerning, among other issues, the right to counsel in delinquency cases. The DOJ took the position that a youth should not be permitted to waive the right to counsel without first consulting with an attorney. Mr. Levy noted that Oregon tolerates practices in delinquency cases when it comes to waiving counsel and shackling of youth in the courtroom that would not be accepted in adult criminal cases. Nancy Cozine said she would speak to the Chief Justice on the issue of waiver and will keep the Commission informed on progress. Amy Miller noted that she has done some work on the issue of shackling and updated the

Commission on what is going on in Oregon. David Shapiro, an attorney running the Campaign Against Indiscriminate Juvenile Shackling, also known as CAIJS, spoke at the April OCDLA conference about the scope of the problem in Oregon. Amy Miller sent out a jurisdiction-specific survey to community providers across the state. The results are mixed: in some counties shackling is rare and in others it is routine. Since then, the issue has become a priority to the OCDLA Juvenile Law Committee. Chair Ellis suggested drafting an appropriate bill to put into next session.

**Agenda Item No. 5 Lane County Courthouse – Planning for a New Building**

Nancy Cozine indicated that the Lane County trial court administrator asked about PDSC's interest in having space in a new Lane County Courthouse. She explained that at this point, Lane County is not interested in making any commitments, but has requested letters of interest from different state agencies. Bob Homan said that in the current courthouse they have no private space to talk with clients, and suggested that having a space available would be greatly beneficial. Commission members discussed the idea and the approach taken in Multnomah County, which included no lease for the life of the state bond. Chair Ellis concluded with instruction to submit a letter of interest that suggests OPDS is interested as long as the space came with no charge for the life of the bond.

**Agenda Item No. 6 Legislative and Budget Update**

Nancy Cozine updated the commission on the status of the OPDS budget bill, indicating that at this point, the budget includes current service level plus 5.3 million to be used to cover an increase in rates as well as mileage expenses, plus permanent funding for the deputy general counsel position.

**Agenda Item No. 7 Approval of Final Service Delivery Review for Marion County**

Nancy Cozine briefly discussed the status of the Service Delivery Review for Marion County. Chair Ellis mentioned the disparity between the ethnicity of the client base and the practitioners. Ms. Cozine noted that as the next contracting cycle begins, the office will continue to look into shifting specialty court responsibilities to the public defender office and encourage MCAD to continue to assign cases based on the strengths of its member attorneys. Mrs. Cozine noted that the review for Washington County will begin in September.

**MOTION:** Commissioner Lazenby moved to approve the Marion County Service Delivery Review Report; Vice-Chair McCrea seconded the motion; hearing no objection the motion carried: **VOTE 7-0**

**Agenda Item No. 8 Approval of Executive Director to Secure Personal Services Contracts**

Commission members discussed the Executive Director's proposal to contract with outside entities to complete an operational review, and to work with Geoff Guilfooy to update the agency strategic plan, which he helped draft when the agency formed back in 2003.

**MOTION:** Vice-Chair McCrea moved to approve; Commissioner Potter seconded the motion; hearing no objection the motion carried: **VOTE 7-0**

**Agenda Item No. 9 December PDSC Meeting Date; Proposal to Reschedule to 12/10/15**

Commission members agreed to move the December meeting date to December 10, 2015.

**Agenda Item No. 10 OPDS Monthly Report**

Nancy Cozine summarized continued efforts to ensure a smooth transition following the departure of Peter Gartlan. All managers attended management training with Dennis Morrow on June 8th. Ernie Lannet spoke in more detail about changes in the appellate division management team, indicating that Ingrid McFarelane and Marc Brown have joined the team; Shawn Wiley transitioned to a Senior Deputy position. He also summarized recent hiring and promotion decisions.

Shannon Storey, Chief Defender for the Juvenile Appellate Section, gave a brief update on promotions in her unit and recent Supreme Court cases and Court of Appeals opinions.

Angelique Bowers briefed the Commission on the changes that have occurred in the Financial Services section of the office, and Caroline Meyer gave an update on the RFP process.

**MOTION:** Commissioner Potter moved to adjourn the meeting; Commissioner Welch seconded the motion; hearing no objection the motion carried: **VOTE 7-0**

**Meeting Adjourned**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, June 18, 2015  
9:00 a.m. – 12:00 p.m.  
Mt. Bachelor Village  
Bend, Oregon

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

STAFF PRESENT: Nancy Cozine  
Paul Levy  
Amy Miller  
Carolyn Meyer  
Billy Strehlow  
Angelique Bowers  
Ernest Lannet  
Shannon Storey

---

---

The meeting was called to order at 9:00 a.m.

**Agenda Item No. 1 Approval of Minutes – PDSC meeting held on March 19, 2015**

0:00 Chair Ellis 2015, are there any additions or corrections?

0:05 J. Potter I just want to note, Mr. Chair, I was not at the March 19<sup>th</sup> meeting and the official minutes suggest that I was.

0:15 Chair Ellis Now we ought to strike your name.

0:20 J. Potter When you do that, you should probably add Shaun McCrea as an attendee. While we are interchangeable...

0:29 Chair Ellis You're both from Eugene.

0:31 S. McCrea Pretty much.

0:32 Chair Ellis That does restore our forum.

0:36 S. McCrea                   And I would also suggest that on the first page under agenda item number one that the spelling of my name be changed to take out the 'w' and add a 'u.' I know that's kind of picky but I like my name spelled right.

0:52 Chair Ellis                   Alright, any other additions or corrections? Is there a motion to approve? **MOTION:** Commissioner Potter moved to approve the minutes; Vice-Chair McCrea seconded the motion; hearing no objection the motion carried: **VOTE:** 7-0

1:07 Chair Ellis                   Good morning Janet nice to see you in your own senate.

1:08 J. Stevens                   Hi, I apologize, I got lost up here.

**Agenda Item No. 2                   Representation of Veterans**

1:14 Chair Ellis                   Alright, is Jess Barton here? And William Brown?

1:37 J. Barton                   So, It's good to be back in front of the commission after a 12 year hiatus.

1:42 Chair Ellis                   It's good to see you.

1:44 J. Barton                   For those of you who don't know me, my name is Jess Barton, I'm an attorney with a private practice in Salem. I'm also an adjunct professor of criminal justice and Western Oregon University. I have to give you some background about myself I've concluded. I'm an army veteran. I served in artillery units in West Germany in the mid 70's. I am a charter member of the State Bar's Military Assistance Panel and I previously was a member of the executive committee of the Bar's Military and Veterans Law Panel. The biggest thing I did while I was one the executive committee was worked with folks like Paul Levy but primarily with Chris Kent, a corporate attorney who then was the chairmen...

2:29 Chair Ellis                   Whose son is in the army?

2:31 J. Barton                   Pardon? Whose son is in the army, right. He's a warrant officer now. But anyway, he and I worked on persuading the Bar's Board of Governors to include the specific performance standards for representation of veteran offenders in criminal prosecutions. With me is William Brown, Knick name is "Bud." Bud is a professor of criminal justice at Western Oregon University. He's actually a sociologist. His focus is in criminology. He has written textbooks or books on represent...on gangs, youth gangs, street gangs. But, for the last several years his academic work has primarily been focused on the representation of veteran offenders. With a series of academic journal articles on this subject and has spoken at multiple CLE's on the subject, has testified or worked as an expert witness or consultant in well over a hundred veteran defend cases in at least fifteen different states. He's an army veteran too. His military career is a bit more prolific than mine. He was a combat infantryman, he did two tours in Vietnam; he was combat infantryman with an airborne unit. His second tour he served there as an army men after completing army wayer training which is the equivalent in the army or the analog, the army's analog to the Navy SEAL training. I mentioned briefly that Bud has worked in all these different cases as a consultant or an expert witness in veteran defended cases. His conclusion, we spoke about this last night, when brought in early to cases in the pretrial stage, consistently the outcome is better when he is not brought in until later stages. In fact we've concluded, we've seen recently an uptake in the number of cases on post-conviction relief where issues are raised regarding failures of defense attorneys to make use of their client's military service in defense and sentence litigation strategies. The most recent case of the type is a case called Brenner vs. Nooth. It's actually a case that stemmed from Washington County where the post-conviction judge ordered a new trial because of the trial counsel's failure to make use of Mr. Brenner's exemplary military service and the fact that he struggled with post-traumatic stress disorder which as a result has an alcohol problem through self-medication. No use was made, could have been significant use made of that at trial and

defense strategies and there was a failure to do that and post-conviction court ordered a new trial because of that failure. The problem that we have is with the lack of cultural competence among not just the defense bar but in the prosecution bar in the judicial branch, understanding the military culture and military total institution and how other aspects of military service, for example suffering from post-traumatic stress disorder, factors in or plays a role in the conduct that results in criminal prosecutions. What's needed and what we are looking for today from this commission is some change in commission policies to ensure as much as possible that there will be cultural competence among the criminal defense bar in cases where the defense attorneys representing are (inaudible). It's crucially important that that be done now. Currently, Bud is doing that kind of work. He's providing, through his services, providing the defense attorneys who bring him in to the cases the information they need to know about the military culture in a total institution. But, he's going to retire soon. His plan is to retire as soon as possible. So the idea then is to have a s broad of knowledge as possible about military culture among the defense bar in the state so that when Bud does retire, which is like I say as soon as he can do it, there won't be this traumatic loss in cultural competence once he does retire. One of the big things we deal with is why is there this lack of cultural competence. Interestingly, this nation has been at war for going on 14 years. War was declared against Al Qaida in September of 2001. One of the things the United States has done, this is what actually leads to the lack of cultural competence, is its figured out a way to conduct a 14 year long war where 99% of the nation can live in peace. I just want to stop for effect there, that's an interesting thing. President Bush, when he was asked, what can the public do to aid in the war effort and he said go shopping. So it's this one percent that does the military service work for the entire nation but because only one percent of the nation does the military service work we end of with this lack of cultural competence in terms of military culture, military total institution. And with that much said I'm going to turn this over to Bud to talk about statistics.

7:50 W. Brown

Well basically we did a study, a national study as much as we could anyhow, of incarcerated veterans a couple of years ago and we actually got 18 states that were willing to participate they were randomly selected. Actually, a number of states that we contacted refused to participate. Actually, one state in the south, I'm not going to mention what it was, I mentioned the Freedom of Information Act and I think there response was 'Well we'll see you in court.' Well we didn't go to court to get the numbers of veteran their prison. We jumped over them and went. The shocking data was Oregon came out number one in the United States.

8:43 Chair Ellis

Of all the states that?

8:45 W. Brown

Of all the 18 states, Oregon is number one.

8:47 Chair Ellis

That responded to your question?

8:50 W. Brown

Right. These were all telephone conversations with the head of the Department of Corrections in each one of these states. And Oregon came out number one, 19.1% of all prisoners in the Oregon prison system at that time were veterans. And where did we get this number from, we got this number form a signed document from the chief researcher at Oregon Department of Corrections. Now we never even looked at the distinction between women and men. My recollection, and of course I have never published anything yet on the women issue, but I believe that Oregon is certainly number one in female veterans incarcerated and if I remember correctly Oregon has more females incarcerated than North Carolina, south Carolina and Georgia combined. We have more female veterans in our prison. So, well I guess you guys now have the numbers in front of you. I take the reason that I am here with Mr. Barton is simply because it's true, I am getting ready to retire and at least from this. I have been doing it now since 2008. I'm going across the country constantly. This may sound like bragging but actually to me it's like I'm ashamed of it. I'm the only sociologist in the United States right now that has published anything in the past ten years on veteran issues, and particularly reintegration which really upsets me. Right now I have two students on the way to graduate

school. Veterans, Iraq veterans, that I'm hoping these are going to be my replacements as soon as possible.

- 10:54 Chair Ellis Did you form any opinion as to why Oregon had that higher percentage?
- 11:03 W. Brown My opinion on this is basically there are no permanent military installations in the State of Oregon. We have National Guard armories but we don't have fort this, or fort this or camp this. There are no permanent military installations. So basically there is no real reason for the state at this juncture to become really familiar with the military culture and the changes these young people go through when they leave from the civilian world indoctrinated into military culture.
- 11:40 Chair Ellis I would think where there is a major installation like Washington has, that you'd have more because there are that many more military people in the community.
- 11:54 W. Brown Well, we're not talking about military people per say, we are talking about veterans. And there is a big difference there. But Washington for example, they have a number of permanent military installations. They are just to the North of us. They only have a little over 7% of their prison population are veterans. Then you cross the river on the bridge there in Vancouver and you've got 19.1. So the only logical explanation that I can come up with is that Washington, because of the military installations there, are more acculturated to the military culture.
- 12:30 Chair Ellis Can you give us an absolute numbers, not percentages. How many individuals that 19.1 relates to?
- 12:50 W. Brown We're looking at 2,600 veterans in prison.
- 12:56 J. Barton 2,682. That's 2012, that's the date of that September 13<sup>th</sup> letter is talking about.
- 13:05 W. Brown Right. 2012. Now the interesting part about this, for me anyhow as a sociologist, you look south into California and we will be talking about this tomorrow and the number, California has about 3,600 veterans. California has a population of 38 million. We're under 4 million. Washington State, which has a much larger population than the State of Oregon, they have a little over 1,200 veterans in their prison. We're at 2600. I don't have any scientific evidence that it's because of cultural incompetence. It's that I can't come up with another reason. That's the reason that I use that term.
- 13:57 P. Ramfjord Do other states have policies along the lines that you're looking at in their public defense service organizations regarding the representation of veterans?
- 14:07 W. Brown California has lots, but again I've actually had cases in California where the attorneys really actually weren't attuned to the distinction between a veteran and a nonveteran and the cultural exposure that the veteran has gone through, cultural exposure as well as experiences. Then the problem of many veterans, particularly this current younger generation, of reaculturating back into the civilian world, which is really the problem, you know. I know the military and lot of people look at these veterans as though 'wait a minute, they're bad apples. That's how come they're in the criminal justice system.' The problem is, and we will be talking about this tomorrow I guess, is that I've done studies across the country of veterans who are not clients and what I've been looking for are the distinctions and differences between veteran clients and veterans who are not clients and the problem is the only distinction I can find is, the veteran clients got caught because a lot of the behaviors; drinking, abusing drugs, domestic violence, a lot of these things are the same; it's just that they're not caught. So everyone views these people, men and women both, as bad apples. But if you look at they're criminal history before they went into the military I've only had four clients, I believe, of all these years that have had a criminal history before they went into the military. Nearly all of them have honorable discharges. So they went from Boy Scout, to good soldier, good marine, to jail bird

and prisoner in prison. Those are the complications in understanding the culture and those transitioning problems that they encounter.

- 16:08 Chair Ellis Has there been any CLE on this in Oregon that you know of?
- 16:13 W. Brown Yes.
- 16:14 Chair Ellis Tell me about that.
- 16:16 J. Barton There was a 2010 CLE that the bar sponsored about representing military veterans in the criminal justice system. OCDLA was cosponsor. No, I take that back. 2010 OCDLA was the primary sponsor and the bar was the cosponsor. The next year there was a second similar CLE where the bar was the sponsor and OCDLA was the cosponsor. I spoke on the subject at the winter conference in 2010 and at the management conference in 2013. So there have been these CLE presentations. In fact the case I mentioned a bit ago, the post-conviction case Brenner vs. Nooth, one of the things that the post-conviction judge relied on in ruling that the defense counsel provided ineffective assistance, one of the things he relied on that there was this information available to trial counsel, these CLE's had occurred. They had been done, information was out there but trial counsel didn't take advantage of it. I want to make this point: The state is appealing that decision and I expected that they would, but they are not appealing it on the grounds that trial counsel did not provide ineffective assistance by not investigating and making use of post-traumatic stress disorder. The state seems to conceive that, that there was a failure in counsel, the council did provide ineffective assistance by failing to make use of his client's post-traumatic stress disorder. Really I suppose what the state's appeal basically is, is that well we might have made a mistake by not investigating that but it wouldn't have changed the outcome that he had.
- 17:46 Chair Ellis I'm totally confused. I always thought states were the ones that were not attacking the competence of counsel and trying to sustain a conviction.
- 17:55 J. Barton Yeah, they are not trying to sustain the conviction by saying that a criminal defense attorney has no obligation to make use of, to investigate, to make us of, to investigate...
- 18:08 Chair Ellis They're really defending the claim that the defense attorney was inadequate?
- 18:15 J. Barton They're not defending the claim in the sense that they are saying that a defense attorney does not need to investigate and make use of post-traumatic stress disorder.
- 18:24 Chair Ellis Oh, I get it.
- 18:25 J. Barton His failure to have done that, that might be ineffective assistance but it didn't matter, the outcome would've been the same even if he had made use of that.
- 18:33 Chair Ellis Let me ask you both to comment on the two steps that you are urging us to take. One is the mandatory adoption of a best practices model. Tell me what you envision happening there.
- 18:53 J. Barton We'll actually go through this in some detail in the breakout session that we have tomorrow but the first step is you have to make sure that you know who are your veteran clients. Now one of Bud's organization, Bud's organization Pacific Policy Research Institute did a survey of all ODCLA members back in 2013 and of the respondent's, only 43% reported that they, during intake, they take steps to investigate or determine which of their clients are veterans or have military service backgrounds, only 43%. So, fewer than half. But, that's the first step. You've got to know who your veteran clients are. And then there is preliminary screening which should be done at that point. You have to get military records; you have to get veteran's administrator's records, administration records if there are any. Preliminary screening can be done for things like traumatic brain injury, post-traumatic stress disorder...

- 19:46 Chair Ellis Is someone produced the best practices model or is this something you envision being developed here?
- 19:54 J. Barton I think in a general sense or more of a not entirely specific sense, I'll put it that way, the best practice model exists. It's been laid out in a basic form on the ODCLA library defense's WIKI page, veterans and military WIKI page of OCDLA's library defense. It's there and there's information on there about how to go about getting military records, about what questions to ask at intake, how to do PTSD and TBI preliminary screenings.
- 20:24 Chair Ellis That probably doesn't require action by this commission to develop that. That sounds like a very reasonable thing to do. Go to the second one about minimum qualification standards because that does potentially impose a very difficult burden on new case allocations.
- 20:46 J. Barton Well, you know there's a recognition that as Bud has been talking about and I've talked about a little bit and it's that so many people come into these cases and they don't have any military service history of their own. Maybe their uncle served in the military back whenever, but that's going to be it. So, there's going to be this lack of cultural competence in the military culture total institution. An attorney needs to acquire that. An attorney needs to understand how the military system works, how service in the military can affect somebody's behavior once they come out and the way to do that is through either a CLE, this is the only way we can do, the only way to do that is you can't ask all these attorneys go out and serve in the military for a couple of years and come back. That would do it but that's not a realistic expectation. So the alternative would be a CLE, attend a CLE where this stuff is thoroughly covered. The breakout session we're having tomorrow would not qualify, I wouldn't think. It's not extensive enough. It's only one hour. I think we would want to require a day long CLE, something like that. Or, if somebody has done one of these cases, they actually did do one of these cases. They did assemble a multi-cultural, culturally confident and multi-disciplinary team is the phrase they use. And they use that, they assemble that team and they used it. That would establish this level of confidence. I mean we've done it once this year we can do it again. So those are the two alternative ways we see...
- 22:10 Chair Ellis At the time counsel is appointed, is it known whether the defendant is a veteran?
- 22:17 J. Barton Probably not. That would be good if the court would establish that. There are certain kinds of situations where courts are required to, and you know I've been away from this for so long I don't even remember if courts actually are who appoint, I don't actually know if courts these days actually appoint counsel of is that done through OPDS staff or what. I actually don't know, I'm in a state of confusion on that. I used to know about those kind of things, I don't know anymore. But, if there were a case where a veteran defend was assigned to an attorney who is not qualified then that attorney would need to take steps to ensure that the case is transferred to an attorney who *is* qualified to handle the case.
- 22:59 Chair Ellis So, let me make a suggestion. Mr. Levy said he had some thoughts he wanted to share with us on this and before we continue the dialogue with you two, if you wouldn't mind let's let Paul state his review and we will kind of get it off the table.
- 23:21 P. Levy Thank you Mr. Chair. I have already shared with Jess and we have had an exchange about our position of his proposals and I want to start by saying that I appreciate the work of both Jess and Dr. Brown on this issue. They've both been working on it for a very long time, and as Jess says he has presented to OCDLA, to our management conference and others and I think has a legitimate sense of frustration that somehow the word is not getting out there about how these cases should be handled. Our position though is that it wouldn't necessarily be helpful or appropriate for the commission to direct specific best practices as it concerns...

- 24:16 Chair Ellis When you say 'our' are you speaking for the entire staff?
- 24:18 P. Levy The staff. Yes. It's neither necessary nor appropriate for the commission to adopt a best practice model for a particular class of defendants. We don't have those requirements or models for other classes of defendants, except in capital cases and to an extent also juvenile cases. In fact, as Jess said, the State Bar's work group that updated the performance standards for all criminal defense attorneys, he worked with our work group and we incorporated into our recommendations to the board of governors that was adopted with specific recommendations that Jess and Chris Kent and his group had. Those performance obligations of counsel in cases involving veterans are applicable to all lawyers and are specifically applicable to attorneys performing public defense services through both the qualification guidelines and through the contracts that providers have with PDSC. The obligations are already there, the tools are there as Jess described on the OCDLA library of defense and its, while there certainly seems to be more consciousness raising needed and education needed. A particular carve out for a best practice model in this area doesn't seem to be needed. I spoke to Jess and said we certainly can do a better job in our peer reviews and our service delivery reviews and in our regular contact with contractors to check in and ensure that they are, that they have interview procedures and they are appropriately handling their veterans cases. But, a specific carve out doesn't seem to be needed. As far as the qualifications standards, what I shared with Jess is that we need to look at all of our qualification standards. They exist in their present form in much the same state that they have existed for decades.
- 26:55 Chair Ellis They're all based on the severity of the charge.
- 26:58 P. Levy Yes, they're misdemeanor, lesser felony, major felony, homicide, capital case and juvenile. Those are the main case types. But, they're due for a major review in their entirety. I'm not sure if it's appropriate or needed to have specific qualifications in this area but the last update was well over ten years ago and they do need to be updated.
- 27:30 S. McCrea Well, I have a question. I'm looking at page four of what Jess and Dr. Brown submitted, down toward the bottom of the page, talking about identification, obtaining the records to determine about the multi-disciplinary teams and to avoid collateral consequences. So, I actually I have two questions. The first is, assuming that one of our providers determines they have a veteran client and they determine that they need to get those records, I'm assuming that that's going to be a non-routine expense that OPDS would reimburse for?
- 28:11 P. Levy Whether its routine or non- routine expense may be a little complicated but yes. They would, we would expect them to get the records and they would be compensated.
- 28:22 S. McCrea Okay. And if a provider determines that a culturally competent multi-disciplinary team is necessary for defense or mitigation, upon a showing to OPDS, the funds would be available?
- 28:36 P. Levy Yes, and we are clearly regularly asked for expert assistance for veteran clients and assuming that the appropriate showing are made in the request we will approve those. We have approved Dr. Brown, as he says, on many cases. And there are others, he's not the only one who does this.
- 29:01 S. McCrea So, my other question, this is a separate question, is you just were talking about that we haven't updated the best practices qualifications, that kind of stuff in a period of time. When I'm looking at this checklist I mean it comes to mind to me that this is a similar type of situation as Padilla where we are required as defense attorneys to ascertain whether the client could potentially have immigration issues or collateral consequences. Do we currently have anything in terms of best practices that addresses that specifically?
- 29:38 P. Levy Yes. Well, what I said needs to be looked at and updated are qualification standards, not the performance standards. You were on the state bar work group in which we did a

comprehensive update and incorporated specific requirements for counsel in cases where there are veteran clients, including not only obtaining records and determining the impact of the current case of military background and experience but what the consequences of a conviction would have for military service. Those have been updated and are required of counsel now.

- 30: 28 Chair Ellis In the immigration area we had a presentation on that about two years ago and that led to your identifying resources that were knowledgeable in the immigration field and then pommel gate to the defense bar generally, the availability of those resources, so you don't change lawyers but you give the lawyer access to someone who knows the pitfalls in that area. Do you see something like that as possible here, where we would identify those lawyers who really do have background in the specific issues related to veterans and give the defense lawyers access to those resources to kind of supplement what else they might know?
- 32:28 P. Levy I think we haven't specifically envisioned that, but that is certainly something that we can develop. We are asked for recommendations and availability of expert assistance in a variety of case types and while many people post their queries for this type of assistance on the OCDLA listserv or go to their library of defense, some people come to us and we can certainly do a better job of developing the resources or at least our awareness of the availability of resources on veterans issues, especially if Dr. Brown is retiring there is going to be a bit of a void that will need to be filled.
- 32:27 Chair Ellis I'm impressed by the data that you gathered. That certainly is challenging and I'm trying in my mind to think of it as kind of a series of steps that could be taken that start with a more simple to administer and go down. So, I could see the problem being addressed by much more focus at the CLE level of educating these lawyers to these issues and we're benefitted by the fact that the defense lawyers as a group are very good at the CLE and they attended and care about it, this conference is an example. Then I could see a step of the kind I was just describing, you have two or three lawyers or psychologists, whatever the field might be appropriate who are very knowledgeable in this area and then you pommel gate to the defense bar, they're availability to try and get the defense bar to be more aware. The one that troubles me is this notion of requiring that a lawyer that represents a veteran have prior experience representing veterans, or I guess your option was a mandatory CLE. What troubles me about that is just the practicalities of the appointing process. I get the impression that it's not going to be known for a while, until the lawyer starts meeting with the client to develop this and I'm not enthusiastic about requiring a change of lawyers part way into a case. I am enthusiastic about a lawyer that finds him or herself in the context of representing a veteran, something goes off on their head that says 'I remember now, I am supposed to check and get help.' That would be I think terrific, but I am worried about this second proposal because I think it could lead to a lot of switch outs with lawyers and I don't think that's healthy, it's also very expensive. But, let me ask, you're going to present to the conference tomorrow? Okay. Well, I think, I commend you for the paper and I commend you for coming to us and what I'd like to do if the rest of the commission is okay with this, is not act on it today but attend the CLE tomorrow those of us that can, we do have some resistance from staff, it's not that they're anti-veteran, it's that they're faced with the practicalities of how to manage a system and I thought I detected in Paul's comment that, well if we do it here do we have to do it the same for those who represent Hispanics or lawyers who represent some other you know, gay defendants, I mean you can just put a whole series of these where we'd end up with a mandatory requirement that would lead to changing lawyers out a lot and I don't, I think it's a slippery slope if we go down.
- 36:14 J. Barton Two things: changing lawyers might not be necessary. It would be that if an attorney is not qualified, doesn't mean the qualification standards we talked about in our memo (inaudible) to a veteran defended case. Perhaps it wouldn't have to be a change in there just some kind of association of some other lawyer.

- 36:33 Chair Ellis Well that goes back to the thought I mentioned earlier of having specialized resources available, the same way we do now with the immigration law.
- 36:48 J. Barton I understand that is how that works. If you have a client who might face the immigration consequences based on whatever conviction you can get access to, an immigration attorney to advise and assist in figuring out what the immigration consequences might or might not be. Problem might be a second best attorney, (inaudible) the best alternative is to have an attorney who is readily qualified to just handle the case. I could see it. I wanted to mention though, in response to OPDS staff's position and that's that there are these performance standards that the board of governors has adopted. By commission policy those standards are applied mandatorily to PDSC funded providers. The problem is those standards are, they are just a few things within a big body of standards and what would be needed is something more specific, something explicitly laid out. Our position, based on just our experience with these cases, is that nothing short of the PDSC directive to follow something like the best practices model that we've tried to develop is going to get the job done and we see that based on the survey that Bud's organization did a couple years ago. Fewer than half of providers, at least as of 2013, even inquired into whether their clients were veterans or not. It's not unusual for me to talk to some family member of a defendant...
- 38:17 Chair Ellis Wouldn't the CLE approach raise the consciousness of lawyers that that's really something they want for?
- 38:25 J. Barton As Bud said, if they attempt, I mean that's actually a very sore point is that those 2010 and 2011 day long CLE's we had were very poorly attended. Only maybe 25 people attended each CLE. It was really low turnout. I was, well to say disappointed by the low turnout. I remember meeting with Ingrid Swenson after the 2010 CLE. That's the one that OCDLA sponsored, and talked to her about my huge dissatisfaction with the low attendance at that particular CLE. I hoped for better attendance at the 2011 CLE. It didn't happen. When I spoke at the management conference in 2013, I was only given 15 minutes of time to talk but as I was introduced by Lane Borg, he said 'we're going to get you up here faster so there will be time for questions once you are done with your presentation.' I finished my presentation, there were no questions asked. So, will the CLE's do it? In my experience no, it's going to take a directive from this commission. But, having said that, the directive from the commission and then follow up by OPDS staff in terms of these performance reviews, that's what would be required. I completely disagree with OPDS staff's belief that these are not the special needs kind of cases like death penalty or juvenile cases. We're talking about a group of people in that tiny one percent of the American population who didn't support the war effort by going shopping, they went to war and they're back now and they're having trouble reacculturizing within the civilian population. As a result of all that, Oregon we find ourselves with this 19% prison population comprised of veterans.
- 40:12 Chair Ellis In defense of the former president, I think his shopping remark related to the economy.
- 40:19 J. Barton Yes, but that was what he said to do. You can help our war, get that economy going better, now we don't want to have our economy collapse because of 9/11 so go shopping.
- 40:32 W. Brown If I could put out another number and this is an approximate number, I don't have an exact right in front of me but the Oregon Sheriff's Association actually does an association of sheriffs keeps track now of participating counties who count veterans who are booked and over the past several years Oregon has been booking 6000 veterans per year in the other jails and that is a significant number. The vast majority of these, these are indigent defendants. They do not have the funding, neither do their parents, you know, for an attorney. So, I just wanted to give you kind of a scope of what Oregon is looking at right now at 6000 cases, and those are just for counties who participate. There are a number of counties who still refuse to count, or ask veterans when they are booked, 'are you a veteran?'

41:30 J. Stevens How many counties do participate?

41:33 W. Brown About a little over half and they alternate year to year. One county will say ‘we’re going to do it this year’ but next year they drop it, but another county will pick it up. I did a study of the Marion County jail for three times, 2005, 2007, and 2011 and the distance, the number of veterans that we counted in the Marion County Jail in 2007 compared that with 2011, there was a 100% increase in veterans booked in the Marion County Jail. And, chair, I gave a presentation here a couple of weeks ago to the AOC, something about county commissioners, and the sheriff from Marion County was there and corroborated that each time I did the study, the number of veterans are increasing in the Marion County Jail. In 2011, 10% of all the prisoners were veterans.

41:41 Chair Ellis Other questions from the commission?

41:43 J. Stevens I have a couple. In your travels, have you found a system or something happening in another jurisdiction that is inspiring or effective? I mean is there anything out there that anybody has come up with, other than what you’re advocating for?

43:08 J. Barton I actually, is it Mr. Ramfjord, am I pronouncing that correctly?

43:13 P. Ramfjord Yes.

43:14 J. Barton You asked that question a little while ago and to the best of our knowledge, no, there is no state actually doing this sort of thing that we are talking about doing here. So, Oregon would be first, and it would be nice for Oregon to be first because we are first in veterans in our prison population, so it would make sense for Oregon to be first on this.

43:30 J. Welch How about the Oregon Department of Veterans Affairs, have you talked with those folks?

43:36 W. Brown They want to, my experience with them is for the most part they want to deny that this is even happening.

43:42 J. Barton Bud and I are known, we’re within a camp, according to the ODVA staff, we’re within this camp that believes that veterans entangled in the criminal justice system is a problem that really is a serious problem that needs to be addressed. They call, they say (inaudible) seriously, they don’t agree with us, that this is that big of a problem. They say that the percentage of veterans in the prison population is only 14.4% instead of 19, which is still the highest in the country, at this 14.4. But then they say, well that’s not so bad because the veterans comprise 10% of Oregon’s general population which is inaccurate, by their own data its 8.4%. So, I don’t really like working with them. That’s as nice as I can put it.

43:35 N. Cozine For the record, Nancy Cozine. Chair Ellis, members of the commission, I think this has been a remarkably helpful conversation and every time Dr. Brown and Mr. Barton come to us, I think we as OPDS, we feel like this is an important conversation and that’s one of the reasons this is on the agenda today. As we continue to have discussions, I think our position on the specific proposals was relative to how easy it would be to enforce. The reality is that ORS 151.216 prevents this commission and our office from looking in case files. There is administratively no enforcement mechanism available to us to ensure that if we were to adopt such standards, as are suggested, that they are being adhered to. We can’t, there’s no way for us to determine whether or not the client is a veteran client. When we adopt minimum qualification standards or performance standards, we can look in OJIN or Odyssey, whatever system is in use with that county, and determine whether or not the lawyer meets the minimum qualifications for the case type. We have no way to enforce that on the veteran’s side. There is just no indicator for us to look at.

45:47 Chair Ellis I can see that.

45:48 N. Cozine But, what I really like is the conversations developed around comparison to *Padilla Project*, and something that occurs to me is we're entering a new contract cycle and we could very easily talk with our providers to see if anyone is interested in establishing something like a veteran representation resource program where best practices would be housed and a lawyer would be available to find consultation much like in the Padilla setting. We've done that same model with parent representation, child representation through YRJ. So I think that piece that has developed from this discussion is actually something that is really worth thinking about and if the commission agrees I think that is something that we can really look at in this next contract cycle.

46:32 Chair Ellis Let me make a suggestion, because I agree, this has been a very useful dialogue. Between now and the July meeting could staff put together your proposal as to how we might do a better job in this area?

46:50 N. Cozine I wonder if we, if I, Chair Ellis and members of the commission, I wonder if I can suggest October and that's for two reasons. Contract proposals are due by the end of June, we have some time to work with providers and build it into our proposal to this commission for statewide representation.

47:09 Chair Ellis October would be fine.

47:11 N. Cozine October is the conference where we tend to have a lot participation and attendance at these meetings so it is another opportunity to highlight on this conversation.

47:19 Chair Ellis Does that sound right to the others?

47:24 J. Potter It sounds right to me. I would like to make sure that the providers have advanced notice that we are requesting their input into this process too; I'd like to hear what the providers have to say.

47:34 N. Cozine And I, I mean I think we can do that today or I would think we'd want to do that...perhaps we want to do that (inaudible).

47:45 J. Barton But, we sure would like it if you could come to our breakout session tomorrow. Actually I was going to ask, say that Chair Ellis, is that you know if you're not inclined to make a decision today in favor of our proposal, wait until tomorrow after our breakout session. It might change your mind.

48:02 Chair Ellis When is your presentation?

48:04 J. Barton It's at 2:45 tomorrow.

49:08 Chair Ellis That presents a problem for me but it may not for the others.

48:10 J. Barton Yeah, I was figuring that some commissioners might not be able to make it tomorrow, but maybe some of you can.

48:14 S. McCrea I intend to be there.

48:20 Chair Ellis Nice to see you again.

48:22 J. Barton It's good to be here, thank you for seeing me.

48:24 Chair Ellis I remember you from years ago.

48:26 J. Barton I've got gray hair now.

48:30 Chair Ellis At least you still have some.

48:33 J. Barton Alright, thank you very much.

48:34 Chair Ellis Alright, thank you both.

48:34 S. McCrea Thank you.

**Agenda Item No. 3 Parent Child Representation Program Update**

48:40 Chair Ellis Alright, Amy.

48:42 A. Miller Thank you Chair Ellis, Vice Chair McCrea, members of the commission. I have been asked to talk to you today, sorry for the record, Amy Miller I am the program manager for the Parent Child Representation Program and I have been asked to provide an update to you, I am calling it a ten month update because we're are not yet at the one year mark. I've put together a slide show, can everybody see it? I hate to turn down the lights this early in the morning.

49:07 N. Cozine I've been asked that people project a little bit. I think the room is large and it's hard to hear people's voices, sorry.

49:20 A. Miller So, you've obviously had a chance to take a look at the presentation, but I intend to cover some background about the program, cover a little bit about the results we've observed to date and then last, talk about a few next steps as we proceed into the rest of this year and next year. I realize some of this information is repetitive for you, so I will cover some of the high points but feel free to ask questions. I am happy to answer them or provide answers at a later date if needed. The purpose of our program is to provide legal representation for parents and children to promote outcomes consistent with Oregon policy. These include that every child has a right to safety, stability and well-being; parents have a liberty interest in the upbringing of their children. There's a strong preference that children live in their own homes with their own families and when that can't happen the State of Oregon has an obligation to provide an alternative safe home for the child. As you know, our program is modeled on a similar program in Washington State which has been in existence since 2000, is operating in 80% of the counties in Washington including a recent expansion into the Seattle metro area. That program has been evaluated numerous times. It has consistently been shown to be effective at reducing the use of foster care and expediting permanency for children. The goals of our program here in Oregon are to provide confident effective legal representation for parents and children in all stages of the case, including at shelter hearings, to reduce the number of children in foster care, to reduce the time to achieve permanency for children and to increase the number of safe reunifications with parents. So, as you know, our program was launched in August of 2014 in Linn and Yamhill counties and I need to point out that it is slightly different than the Washington program. In Washington, the attorneys in the program represent only parents. In our program the attorneys represent both parents and children, so it encompasses both.

51:47 Chair Ellis Different attorneys or the same attorney?

51:50 A. Miller The attorneys in this program represent both but in different cases.

52:00 Chair Ellis I think I've got it.

52:03 A. Miller They're qualified and they represent parents and children.

52: 05 Chair Ellis                    Okay, and you'd have more than one lawyer involved? One for the parent and one for the child?

52:09 A. Miller                        In these cases, there could very well be several lawyers. There's a lawyer for a mother, a lawyer for the father, plus children, so there could be numerous lawyers in these cases.

52:20 Chair Ellis                        Okay. Got it.

52:23 A. Miller                        Thanks for the clarification. So, as I was saying, this is really a fundamental change in the way OPDS contracts with attorneys for legal services in these types of cases. The lawyers are contracted for a work load model of 80 cases for a full time lawyer. This case cap ensures that attorneys have time to provide confident consistent with the Oregon State Bar performance standards.

52:47 Chair Ellis                        80 cases is pending at any one time?

52:51 A. Miller                        80 open cases at a time, that's correct. In addition to a reduced workload in strict compliance with the performance standards, attorneys in the program agree to a high level of oversight by OPDS. Other components of the program include multidisciplinary training, system improvement efforts; partner collaboration both at the local level and at the statewide level and I will talk about that in detail a little bit later, and case managers. These are individuals with social service experience who are able to provide additional client support in about 10-15% of cases. As I mentioned, we do a good deal of monitoring to ensure that we're heading towards accomplishing our goals. Two of the primary focus areas for us are monitoring attorney's involvement at the beginning of the case, including reviewing discovery, meeting with clients before the first shelter hearing, advocating for clients at the initial shelter hearing, and conducting an independent investigation early in the case. And the reason for this emphasis on getting involved early is early engagement is really essential to resolving the majority of these cases. There are statutory timelines that govern how much time a parent has to ameliorate the conditions and circumstances that warrant juvenile court involvement. The other thing we really focus on is client contact and we require that attorneys spend one third of their total time with clients, either in person or over the phone and that they have an office and staff available to facilitate client contact. I do want to take a moment to acknowledge the attorneys that are participating in this program. The attorneys in both counties really have embraced this program and jumped in with both feet. I think there was some trepidation at the beginning about how it would work, everyone is supportive and on board and in exchange for this increasing level of oversight and these heightened expectations, these attorneys are compensated at a level which allows for a workload model of practice including sufficient resources to run a law office. Moving on to the second section of results. First, shelter hearing representation; so as you know, prior to this program in Linn County attorneys were not present at these shelter hearings where the court was making an initial determination about involvement in the case and in Yamhill County they were very rarely present. As a result of this program, parents and children are now consistently represented at initial shelter hearings by attorneys who have access to discovery and in most cases meet with clients before the hearings. Judge Murphy who is the presiding judge in Linn County provided some testimony for our budget hearing. He commented that shelter hearings with attorneys representing parents and children are overall more effective and easier for parents to understand. I do want to speak briefly to this issue of shelter hearing representation; Linn and Yamhill County were not and are not the only counties where parents and children continue to be unrepresented. In 2014, actually right before I came to OPDS a survey was done from juvenile court judges from around the state, so I have to acknowledge, I don't have first-hand knowledge myself of the results but, eight counties reported that attorneys were not present, rarely or never at shelter hearings and in another eight counties representation is still inconsistent. Next case load; the PCRCP has seen a decrease of 7% in the caseload since the program started. The majority of that decrease has been in Yamhill County. I do want to point out that the contract for these attorneys in these counties has a provision that if a caseload falls below 20% of the

contracted case level a readjustment is triggered and so we are watching that number very closely and certainly are monitoring that to see if we are going to hit that point. I did want to mention a couple of things about the declining case load. Some of the reasons based on my knowledge and experience; first of all DHS is changing some of their policies. DHS has started to implement differential response which to DHS child welfare is a real culture change. They describe it as a re-design to the front door of child welfare in which there are two tracks for families to be worked with. One is an alternative track that wouldn't require court involvement and the other would be the traditional track where a petition would be filed in juvenile court and that's a phased rollout across the state and it was just rolled out in Linn County in April of 2015. We are watching closely to see what happens there. I also want to point out DHS has been training case workers on the Oregon safety model which is their structured decision making process so it takes some of the personal bias and choices out of making decisions regarding families. DHS implemented this safety model in 2006 but DHS would say it wasn't implemented with fidelity so are going around the state doing more training. So, in addition to DHS policy changes I think we are seeing some more effective advocacy on the part of our attorneys in this program. According to the attorneys in the counties, cases are more often dismissed before jurisdiction is established or parents are winning at jurisdictional trials. Anecdotal information from the administrator in Yamhill County is that dismissal of petitions at the shelter hearing stage was very rare prior to this program and now it's occurring more frequently. I think cases are resolving more efficiently and appropriately and Judge Collins who is the presiding judge in Yamhill County commented on this with regards to termination cases. He noted in those cases that TPR's are often dismissed before trial and under the new model of the Parent Child Representation Program, there are no incentives to wait for a petition to be filed, and attorneys are just working to resolve cases in the most efficient appropriate way possible. And lastly, as a result of some Court of Appeals case law, we're seeing an increase in filing litigation and motions to dismiss. I also wanted to mention the Court of Appeals continues to clarify the role of the juvenile court, to clarify and emphasize that court involvement is only warranted where there is a specific threat of harm particular to that child. I included in your appendix in the electronic materials the AB case from May of this year which is a good example of what the Court of Appeals is continuing to do. In that case the Court held that even unfit parents can cede their parental authority and if there is not a threat of harm to the children, there is no basis for jurisdiction. Again, I wanted to speak to the statewide situation regarding case load. Dependency filings have been on a downward trend since 2005. So, in 2005 there were 6,769 dependency petitions filed. In 2014 there were 4,432 petitions filed, this is according to the court system. The numbers are similar in TPR cases in terms of the decline. I recently attended...

1:00:19 Chair Ellis

Just for those who might not know it, you might explain what TPR is.

1:00:24 A. Miller

Oh, termination of parental rights cases. Thank you. I recently attended a juvenile court improvement program meeting where we looked at the data from the first quarter of 2015 and there is an increase of 19% of filings a year ago for the same quarter and a 23% increase in termination filings for in that same period. We talked about possible reasons that maybe the bottom had been reached in terms of this decline but I think it's really too soon to tell. I also monitor whether the attorneys are doing independent investigations and just to explain about investigations in juvenile cases, according to the performance standards attorneys have an obligation to investigate throughout the life of the case. This obligation is broad and may include things like attending treatment meetings, attending placement meetings, going to administrative hearings, contacting and interviewing a whole variety of potential witnesses and working with investigators and social workers to prepare the case. So, in the program, we track the use of investigators within the first sixty days of the case and we focus on the first sixty days because we emphasize sort of front loading the case, that doing good work at the beginning of the case really guides the entire outcome of the case. When the program started in August, 6% of the cases that had been open had an investigator or other expert utilized in the first sixty days. We've seen that number steadily up-tick and its hovering right around

30%, in February it was 28%. I also audit attorney time and activities, I think we talked a little bit about this in the past, but we target for our attorney time that one third of overall time is spent in each category with clients, in court or in meetings, and then in case preparation and analysis. As you can see from this slide we are staying pretty close to our one-third, one-third, one-third target. I think we've been fairly successful at making some system change within a short time but system change, I've also learned, needs to be driven at the local level. The stakeholders need to work together to develop solutions that are effective for their jurisdictions, what works in their county. So, I see my role as providing support for system change, encouraging lawyers and administrators to actively participate in that, so in my role I organize quarterly agency level department meetings with the Department of Human Services, the Department of Justice, the Judicial Department and CASA and we have had seven of those to date which is more than one a quarter because we were doing them monthly when the program first started, and then I organize regular meetings within the county and in the past ten months I have coordinated 25 different system stakeholder meetings to work on quality assurance and system improvement. In April of this year we surveyed stakeholders in both of the counties and the purpose of this was to assess juvenile court community experience with the attorney groups and then to ask whether changes have been observed in the conduct of the attorneys or the experiences of the stakeholders in the community. I mentioned earlier contract compliance, this survey was part of the most recent review, and let me say this is not a scientific survey but merely my way of trying to reach out to the community and get as broad of a response as possible from as many different entities as possible. I think the results from the survey are a strong endorsement of our program. Unfortunately, we don't have a baseline from which to measure, but we will next year. So the findings I noted on the slide, attorneys are providing confident and effective representation and there has been noticeable improvement in advocacy since the launch of the program. I wanted to speak briefly about case managers because I have spoken with you before about case managers. Case managers have a unique role in these cases. They work as agents of and at the direction of lawyers so they fulfill a function similar to a social worker and their role is really unique in these cases. They provide clients with confidential space to problem solve and identify barriers, they have sufficient time to meet with clients and they only have to manage the needs of one client as opposed to say a DHS worker who is trying to problem solve with mothers, fathers, and children in a case. To date, 107 clients have been served through case managers in the program. You can see some of the successes listed on the slide. I did want to point out that in many of these examples the work of the case managers had a direct positive impact on the outcome of the case. I've also given you a handout that is the story of Jacob H. and just to preserve some anonymity and confidentiality I didn't put in the printed materials, but you do have a handout. Jacob was planning to testify at our budget hearings and had a medical emergency and wasn't able to be present, so these are his own words as dictated to me in preparation for the budget hearing, he gave me permission to share them with you today because he believes so strongly in the value of competent representation. I think the key takeaways from his story are number one the importance shelter hearing representation. The attorney was present, she was prepared and she had reviewed the discovery in advance and so was able to walk right in and start arguing on his behalf. The attorney had time to meet with Jacob on more than one occasion and even though the case wasn't open real long, they had developed a pretty close relationship. Although the attorney didn't represent him in his domestic relations case which was tracking with the juvenile case she was able to explain the process and get the paper work started. I think what we see there is a practical effect at having a case load kept at 80 cases because the lawyer did have the time to go the extra mile, to do a little bit of research to walk him through getting that process underway. So, next steps, I would like to get an evaluation underway. I would like to point out that Washington, their first evaluation on their similar program was done about five years from the beginning of the program, the first outside kind of quantitative focused evaluation. In their program they had done some internal evaluations prior to that point, just some small things looking at things like continuances and where attorneys spend their time. I do think that at OPDS we have the skills to do an internal evaluation of sorts as we come upon the one year mark and conveniently the American Bar Association really recently released an evaluation

tool; indicators of success for parent representation program and that provides suggested indicators and methodologies to measure the impact of a program such as ours. I think I am going to be using that as well to develop an evaluation for us. We also began a client satisfaction survey in May, again to assist in evaluation of the program and to also be used as a tool to identify areas of improvement. And last, because this program started so late in the biennium and there have lower than anticipated case load, there is some cost savings associated with it and so we are looking at whether or not we will be able to expand the program if money permits. Every program is not without challenges, so I wanted to make you aware of those as well. One is understanding the external impacts and how they affect our program and the question I've received consistently is 'how do you know that it's your program that's causing a reduction in caseload or this reduction in foster care, how do you know that it's not all of these external factors?' I think it's going to be a challenge to figure out where one starts and the next one begins. I mentioned differential response just as an example that just recently started in April in Linn County. I also wanted to mention some more case law that I think is going to impact how we track things and how we measure things. I mentioned the WAC case which clarifies that the court cannot assert jurisdiction over a child until jurisdiction has been established as to both parents and concerns have arisen that this change could result in a longer time to jurisdiction and result in delayed permanency for children. I don't know how that is going to play out but again we are tracking and keeping an eye on that. Then, I mentioned motion practice, the JBV case, in that case the Court of Appeals provided clear guidance on motions to dismiss. So again, that may impact some of our measurement. Another challenge for us is data outside of our system. I receive a wealth of data in terms of these activity reports every month from our attorneys but I think in order to do a more thorough evaluation or assessment we need access DHS and Odyssey data for auditing and benchmark purposes. We recently received access to raw Odyssey data which is the court system data and we will be looking at building our own reports to do some auditing. The Department of Human Services has data available too that can be used to establish benchmarks and compare between different counties. Last, I wanted to mention influencing culture. In some cases in these counties there are some long standing cultural issues that aren't going to be resolved in ten months. They may not be resolved...

- 1:10:31 Chair Ellis      You're talking about attitude of the judges?
- 1:10:33 A. Miller      Chair Ellis, I'm not necessarily talking about attitude of the judges, I'm just talking about that every county has it's unique cultural challenges and it takes some time to build bridges and establish trust and we are working towards that.
- 1:10:47 Chair Ellis      But, Juvenile has had this (inaudible) for years between the internalistic and the advocacy approaches, I thought that's what you were getting at.
- 1:10:57 A. Miller      Chair Ellis, members of the commission, I was more just referencing culture as a whole. I do have to say that within these counties the court has been so supportive. I've met with the judges regularly and they have been helpful and supportive of this program and from time to time reach out to me to share little nuggets about positive things that are happening within the counties. I was just speaking of culture as a whole and when people have been working in one way for a long time sometimes it takes effort and encouragement and time to change that. So, with that I'm at the appendix. That was a quick brief overview of our program and I am happy to answer any questions.
- 1:11:39 P. Ramfjord      One question I have is just on that ABA evaluation tool, what are the elements that looks at and how are planning to use that in evaluating the program here?
- 1:11:53 A. Miller      Chair Ellis, thank you Commissioner Ramfjord, that's a fantastic question. The tool provides kind of suggested metrics in three different categories. It talks about well-being, it talks about infrastructure and it talks about advocacy and within each there are both qualitative and quantitative metrics that they suggest and then they suggest places to obtain those. For

example when you are looking at infrastructure and whether caseloads are reasonable they suggest contacting your court to determine whether or not you can gain access to that information. For well-being they include things like focus groups of parent clients, focus groups of former child clients. They include things like client satisfaction surveys. So, it's both quantitative and qualitative and it's pretty thorough. The evaluation tool suggests that every jurisdiction may have to apply this in a different way so one of the things I'm going to be doing in July is going to Washington DC for the ABA conference on parent representation and child representation and there is a session on applying this tool so I am looking forward to going to it with all of my questions in hand so I can learn about how other jurisdictions have done that.

- 1:13:14 Chair Ellis      So, up until now it's a two county project? Are you envisioning expanding it?
- 1:13:24 A. Miller      Chair Ellis, members of the commission, certainly I would be delighted to expand the program. I think we are well on track to achieve our goals. I think some of that, there is like I mentioned some limited funding available but I think we're looking closely as to whether we can expand it to a small county. There were some proposals as you know with the legislature with our budget regarding a broader expansion, but the session hasn't ended so I think some of that is at the direction of policy makers as well.
- 1:13:54 N. Cozine      Can I comment really quickly? Chair Ellis, members of the commission, on that note, we've been working closely with the legislative fiscal office and I can talk about more of this in the budget presentation but, through the time that it took to get the program structured as Amy mentioned, there were some reserves because we didn't actually launch until August of 2014 and as you saw the decline in Yamhill county at 18% is pretty significant and in Linn County similarly we've had enough of a decline that we are able to reduce resources to some degree. We think we may be able to fund another small county. We would not be able to begin that probably until January of this next year and we're being clear with the legislature so we don't run into a situation where we've expanded when they weren't aware of how we were using the funds. So, we are working closely with them but we are really hopeful that in January we will be able to come to you with a proposal to expand into one more county.
- 1:15:01 P. Ramfjord      Getting back to that question of knowing how much the decline in caseload may be due to increasing effective advocacy versus other issues. Do we know what the decline in caseload has been in other counties during this same time period; is there some sense of that?
- 1:15:17 A. Miller      Chair Ellis, Commissioner Ramfjord, that is a great question and one in the front of my mind that I am going to be looking into because I think that is very important to start figuring out how our program fits with the rest of the state.
- 1:15:28 Chair Ellis      I take it Megan Bishop is one of the lawyers in your program?
- 1:15:33 A. Miller      Chair Ellis, members of the commission, Megan Bishop is one of the lawyers in our program.
- 1:15:36 Chair Ellis      That was a very touching story. I hope the next few chapters are as good as the last.
- 1:15:46 A. Miller      You'll be pleased to know I spoke with Jacob last week and he's doing well, but continues to be challenged by the obstacles he's facing in trying to achieve long term employment.
- 1:16:05 N. Cozine      Chair Ellis, members of the commission, in October of last year we presented information to this commission about the Parent Child Representation program and one of the lawyers who presented was Rachel Negra. She was in attendance at the April OCDLA juvenile law conference and had a medical incident and she is no longer with us. So, the outpouring of...
- 1:16:37 A. Miller      Rachel, if you don't remember there were several people that spoke with you, Rachel was the one with the sort of angelic face and she kind of blond hair that was about this long. She was

very positive, she was the one who I think had mentioned prior to working with us in this program she had never utilized an investigator on a case and she just was totally truthful and I remember some of your reactions to her honesty about juvenile practice and she was a delight to work with and we are very shocked and sad.

- 1:17:09 N. Cozine But, there was an outpouring of support from her client base and it was really touching and I just wanted this commission to know that and I'm sorry that I'm getting emotional, I don't know why I am. I mean it's sad, but...
- 1:17:19 A. Miller I can also comment that I attended her memorial service and there were several of her former clients there as was the entire Yamhill County legal community really talking about the work that she had done and her impact on that community.
- 1:17:34 Chair Ellis Well Amy thank you and your enthusiasm is infectious. I have seen you present two or three times on this and each time you seem to be energized and motivated and optimistic and I encourage you to continue.
- 1:17:53 A. Miller Thank you Chair Ellis and members of the commission. It's a delight to be here and I have to say I have the greatest job in the world, I really do and I am absolutely thankful to get to work on this program.
- 1:18:03 Chair Ellis Great. Thanks. We will take a ten minute recess and reconvene at 10:30.

**Agenda Item No. 4 National Trends in Public Defense**

- 0:00 Chair Ellis National trends in public defense, establishing caseload standards and right to counsel in delinquency cases. So Paul, do you want to come up?
- 0:24 P. Levy Well, you caught me mid bite on this delicious biscotti. Chair Ellis, members of the Commission, in your materials I wrote a piece that tried to address national trends in public defense in one paragraph and then really focus on where nationally public defense seems to be going and where we think we need to go as well. Some of this, in the piece that I wrote, it's just a refresher and recap for you.
- 1:06 Chair Ellis It felt like something that should be published. Are you doing that?
- 1:11 P. Levy It's published right there for you.
- 1:13 Chair Ellis I get that.
- 1:17 P. Levy You and our provider community are the audience here. You're familiar because we have talked to you before about the Mt. Vernon litigation, the Harrell Hurling, or Hurrell-Harring or whatever, the New York litigation, and what those cases involved primarily were the concern that even though a lawyer was being appointed or made available, it was a lawyer in name only and that it wasn't a constitutionally required lawyer because the conditions in which that lawyer had to work largely by virtue of the number of cases that he or she was asked to handle were such that the lawyer could not perform the essential functions of a criminal defense attorney. What has gone on nationally around the conversation of caseloads is the notion that there need to be jurisdiction specific workload caseload guidelines, and that the national, the NAC standards from 1973 that were endorsed in 2006 by the NLADA are really the absolute maximums but they are recognized as not being empirically based and likely too large and that jurisdictions need to develop their own standards based on their own offense types and the conditions in which those lawyers work in those jurisdictions. We have in Oregon the beginning of the development of such a jurisdiction specific caseload standards. We have as we just discussed earlier recently updated performance standards for defense attorneys. We know and have a good statement of what needs to be done to do the job well.

What we don't know, and this is where the hard work comes in developing these standards and has come in other states, we don't have a good sense of how much time is required to do that in specific case type categories. What I wrote refers you to recent studies in Texas and Missouri where they have done this type of study. Texas actually translated it into caseload numbers. Missouri didn't. For instance, in Texas as a result of their study said that a lawyer should not be handling more than 216 misdemeanors. In Missouri if you do the math based on the hours they say are needed to handle the misdemeanor case its fewer. The NAC guidelines are at 400, it's just, work needs to be done to develop our own standards here. Other states are doing it; it's not just Missouri and Texas. The studies are going on in a number of states now and other states are developing the process to do these types of studies. They're not easy, it requires time tracking, both to see what people are doing and then a fairly complicated consultation process to evaluate really what people are doing and what should be done. We are very fortunate to have in October at the management conference and the Commission meeting professor Norman Lefstein who's written the treatise on this subject and who has been one of the principal advisors in jurisdictions that have developed their own standards. He'll be talking to the management conference about the importance of caseload standards and how they're developed. He will also be talking with the Commission about this as well. So, today we want to introduce you to the subject a little more outlined in my short paper some of the considerations that go into this. It's critical here because we have expectations and have long had them and have I think now better articulated them in our contracts that lawyers should not be contracting for and should not be handling unreasonably large caseloads but we don't have a convenient measure for that and I think the Commission and our provider community would benefit from developing that. So, that's the overview, that's where we want to head and I don't have a great deal more in the way of specifics to provide to you today that's not in the paper that I wrote. I will pause there, I have one other thing I want to say but I will ask if there are any questions, comments concerns?

7:25 Chair Ellis

I've always been a little skeptical of the word caseload because that leaves the impression that all cases are fungible and that he doesn't do a mathematical exercise to determine, which we all know is nowhere near the truth. So, I think the better word is workload and again I'm not quite sure how to measure that and I'm not sure it's going to be something you can do with absolute objective qualitative or quantitative measures and I think you really have to depend on the provider community to communicate when they feel you know 'I just can't keep up with the things I know I should do for the cases I have taken on.' But, the word caseload is simplistic.

8:24 P. Levy

Well, and because of that people have, some people talk for simplicity purposes about caseload standards, others talk about workloads standards. Some people go with caseload/workload and the idea is that these are guidelines, not absolute numbers but they are guidelines derived from the question of what needs to be done for a particular type of case. And that generally is called the case weighted system where you are looking at case types. The notion is though that it needs to be adjusted up or down depending on first of all the hours that a lawyer has available, what other work this lawyer is doing outside of the caseload. In a defender office, for instance, are there supervisory responsibilities, are there other duties that take away from the time available. The key is, as I said, accounting for the time that's required to do the tasks that need to be done for this type of case. The alternate question is, for each client is the job being done? So simply establishing caseload guidelines and limits does not end the responsibility of contractors, contract administrators or our agency to ensure that the representation is occurring in the way that it should occur. I know I have said here several times before that for some lawyers a caseload of one is too much and its, you need somebody to watch and see what work is actually being done. So simply establishing caseloads is not the be all and end all but it is something that would be very helpful to both our responsibilities and for the providers as well.

- 10:40 P. Ramfjord      And we've talked about this before, in particular that our contracts allow us to get more data that are useful to this. I didn't have a chance, I know you referenced the actual studies from Missouri and Texas, but I am curious as to one; what kind of data they were actually mining to make these kinds of determinations and two; know whether you've begun to give thought or are proposing in some point in time what specific data we might want to mine to generate the same type of information.
- 11:13 P. Levy      These studies will have, Texas and Missouri and the others that are happening, proceed with the same basic methodology which is they all involve analysis of the time that lawyers are spending on cases now, public defense lawyers, and so we don't have the time tracking requirement. In order to implement this, there are a number of different ways we could proceed. We could seek volunteer providers for a case study, that's what Indiana is initiating now. But, in any case, the methodology requires an analysis of what people are doing now as far as the time in particular case types and then the convened of what's loosely called the Delphi method, the Delphi group which is a group of lawyers who are recognized to do the job well. They ask them in a structured way how much time really should be devoted to accomplish these tasks and so they take what's happening now, what should be happening and Texas added another component to study private lawyers and the time that they're putting into it, add that into the mix and you've come up with this notion 'this is on average the time that is required to handle this type of case.' And that is, I would imagine the methodology that we would have to follow. As I said, in Texas and Missouri and in other cases, Norm Lefstein has been one of the major consultants and he will talk to us and the commission about how we might go about initiating and conducting one of these projects.
- 13:28 P. Ramfjord      Is there any parallel between the different states in terms the amount of time taken for typical felony cases, typical misdemeanor cases, typical psych cases or the like?
- 13:39 P. Levy      You know we talked in fact with Lefstein about why can't we just do a meta study rather than reinventing it ourselves. He really believes, and I am fairly convinced of this as well that both for the legitimacy of what you come up with and its validity you need to study your own jurisdiction because if you look at the studies in Missouri and Texas they have classifications of felonies and case types that don't match up with ours and their conditions are different. It may be that in some of the states they get to do depositions routinely in criminal cases, we don't. Discovery may be easier in some states and not in others. It is hard to match up and compare the time that other states are determining. And we have a different set of performance standards. We have a pretty rigorous set of performance standards now and expectations. In Montana there was a crisis of caseloads a couple of years ago and they were able to convince the legislature there that there needed to be better funding because they had jurisdictional specific caseload standards that they could point to that were very helpful. So it's a conversation that you will be hearing a lot more about this and it's a conversation that will be going on with our providers because as you know we are expecting them to give us information about the caseloads that they expect to see under their new contracts and we've provided them with the best guidance that we have which are these NAC guidelines, these Missouri and Texas studies. I should say one other thing about the NLADA association of chief defenders which endorsed these old NAC guidelines, did say at the end of their endorsement that these are the absolute maximums and each jurisdiction should develop its own jurisdiction specific guidelines. We know that in many instances they are too high.
- 16:35 P. Ramfjord      I think it's a really important effort and I'm thankful that you are taking that and we are not having a more (inaudible).
- 16:44 P. Levy      That's all I have on that. There was...
- 16:48 Chair Ellis      Are you going to comment on the right to counsel and delinquency?

16:51 P. Levy                    Yeah, I want to briefly talk about this just because it does come under national trends. We have told you in the past about these two statements of interest that the United States Department of Justice filed in systemic challenges to public defense systems and the Department of Justice has continued to file these things. They filed one in Mississippi challenging the pretrial bail system there and then most recently in state court litigation in Georgia which focused on a variety of problems in a specific county, not just juvenile cases, the DOJ filed a statement of interest directed specifically to the issue of waiver of counsel in delinquency cases and I provided that in your materials. It's a very well presented argument about why a youth should not be permitted to waive counsel in delinquency without receiving the advice of counsel before doing so and this is as you know an issue that we are dealing with and this is a helpful document as we continue our own efforts on this issue.

18:27 Chair Ellis                We've had several times when that issue has been surfaced and I thought I remembered most of the chief justice was going to write an admonition letter to trial judges to see that that was done.

18:46 P. Levy                    A conversation along those lines I think is where we last talked about this and there were some discussions with the chief justice but as far as we know nothing has come of that.

19:01 Chair Ellis                You know, I think we ought not to let that just sort of drift away because you think about it, the whole concept of the juvenile system is because the defendant is immature and the pressures on a younger person to waive must be immense. You probably have the DHS officer kind of pushing for it, the judge kind of likes it because it gives him control more than he otherwise might, parents out there may be thinking oh, well we will avoid the cost of a lawyer and all this and just sort of show that I'm trying to be cooperative and they waive and I think, to me it's hard to conceive of a circumstance where if I were a judge I would accept a waiver.

19:56 P. Levy                    And, we're not letting it go either and Amy Miller is taking her enthusiasm that you commented on earlier to this issue as well and this DOJ statement of interest is very helpful, but you are absolutely right. We have it backwards with the delinquency system. Things happen in delinquency cases, waiver of counsel and shackling of youth that wouldn't routinely happen, that would not happen in adult criminal cases and so there's room for continued focus and action on our part.

20:36 Chair Ellis                Well, I would strongly encourage to pursue this because to me it's just a flaw in the system that just cries out for address. I think we were told there are some counties where it's like 90% of the cases there's a waiver.

20:55 P. Levy                    I'm not sure.

20:56 J. Welch                    That's old, that's determined that's old data. We hope it's not right anymore, right? I mean that's several years ago.

21:06 Chair Ellis                I'm old, I remember that.

21:10 P. Levy                    Well, that's all I have for right now.

21:12 Chair Ellis                Any other questions for?

21:14 J. Welch                    Well, I just have to say something about this Georgia thing. It's really good, it's probably the best single document I've ever seen on the subject but it missed the most important point of all and this is the capacity of a 13 year old which is the average age of a delinquency case in this state, to understand what the hell anybody is talking about. I mean, it's just in a way having a lawyer is a step maybe in the right direction but it would be much more straight forward if we can just say you can't waive counsel, end of discussion.

21:49 Chair Ellis

That's where I come in.

21:55 N. Cozine

Chair, may I? As usual I have a few more comments. So, actually after this statement of interest came out I asked Amy Miller to put on the agenda for our office to have a quick meeting to talk about action items that we might want to initiate as a consequence or at least as a follow up, so I will be taking it to the chief justice and we will be having another discussion. We also talked about in this next contracting process, in the jurisdictions where we know that waiver is high, that we might actually want to talk to our providers and make sure they have contract line item that requires someone from public defense to be in the court room at the time of all delinquency hearings so that there is someone available for appointment to the court should they like to appoint. So we are trying to come up with some action items that might help move us forward a little bit more quickly than what we have experienced in the last few years. We'll continue to work on those efforts and keep the commission apprised of the thoughts that we have that we think might be effective. And then, Paul mentioned shackling and Amy has actually been doing some work on that because as you know the lawyers in our system who are handling dependency cases are also handling delinquency cases and so sometimes the issues that arise in a dependency case are connected to attached delinquency case. The issue of shackling came up and she tackled it so I have asked her if she would give a little two minute update on what's been happening on that subject.

23:30 A. Miller

Thank you Nancy. Chair Ellis, Vice Chair McCrea, members of the commission, I am just going to share with you a brief update on what we have been doing on the shackling front. Tom Crabtree is here, he and I have been working closely together on this issue, but at least my awareness or crystalizing of my awareness and the need to move forward began last fall in October. I attended the National Juvenile Defender Center training and our district of the country meets as a group to determine what issues are facing sort of pacific northwest including I think Idaho and Montana region. Shackling was on the forefront of all of our collective minds. So, we connected with David Shapiro who is an attorney who is running the campaign against discriminate juvenile shackling CAIJS and had him come and speak to us at the OCDLA conference in April to talk about the scope of the problem here in Oregon, to talk about the work that his organization is doing around the country and to talk about how we can tackle this within Oregon and to talk about the research, the harm that results to these children as a result of being shackled in the courtroom. Before he came, I sent out a survey to juvenile delinquency attorneys from around the state to kind of get a sense of how this is happening in a particular jurisdiction. It was interesting because it turns out it's almost half and half. In half of our counties, shackling is rare and it's often based on sort of an individualized determination and the other half it's consistent. It happens a lot, it happens almost all the time. Who knows why? We asked whether the lawyers had sought to challenge the shackling practices in their counties and some had said yes and they were met with nothing but positive response. Some said yes and they were met nothing but push back and so it was interesting receiving that information. Since that time this has become a priority for the OCDLA juvenile law committee. We've created a small work group to work on addressing these issues. As I mentioned, Tom Crabtree is on the group, Kevin Ellis from Youth Rights and Justice is on that group and I would welcome the participation of anyone else who may be interested in working to address this issue at sort of a state wide level. You probably read in the most recent OCDLA newsletter the article written by Tom about how he addressed this issue in Deschutes County and I'm pleased to say that something similar has happened in Marion County and shortly a policy will be released prohibiting shackling in that county absent an individual determination as well. So, we are making progress county by county but I think we would like to look at it at the statewide level as well.

26:24 Chair Ellis

Back on the waiver, it does seem to me that is something that cries out for the legislature to act. Is there an appropriate group or body to initiate legislation?

26:40 A. Miller The Oregon Criminal Defense Lawyers Juvenile Law Committee has created a legislative subcommittee. So, I think there is sort of a formalized way to proceed to look at that information and strategize around on how to handle it. One of the things that David Shapiro from CAIJS has helped us work on is whether, and this is in the shackling context but it might also apply in the waiver context, is whether its most appropriate to be addressed through legislation whether this change can be affected through court rule, whether it can be affected at the local level or whether it needs to be a statewide...

27:16 Chair Ellis Seems to me that the key to this is legislation. I know the patterns are in the state differ in one county to another and that's part of the problem. So, I would strongly encourage again that you're a part of that group. Think of drafting an appropriate bill and let's put it into next session, could have some implications for the commission because the absence, there's probably more lawyers required. I would love the opportunity for this commission to weigh in on that question because I think it's pretty optimistic what we would say which is, yes it would take more resources and it would be worth it.

28:02 A. Miller Thank You and I appreciate your support and there is in other states there is legislation on this issue and it is codified and other states prohibit this from happening. So, I can do a more thorough assessment.

28:14 Chair Ellis I would really love to see this issue moved because I think this is the third or fourth time over two to three years that we've heard it here and it just seems we hear it, everybody says kumbaya and then they go home and nothing happens. That's not right.

28:33 A. Miller I agree with you. Thank you for your support.

28:37 Chair Ellis Thank You.

28:38 N. Cozine Chair Ellis, one more comment; I'm sorry. On the caseload standards, for the record Nancy Cozine, I just wanted to point out that Paul mentioned there are case categories that really aren't comparable across Missouri, Texas, Oregon and so it makes the standards created there difficult to rely upon but I do want to point out that there is one case type where it is more similar and that is misdemeanors. That's all that's there, it's a little easier to compare. The 1973 NAC standards set the maximum caseload at 400; that is a very large number of cases to handle per year. Texas and Missouri both in misdemeanor category recommended far fewer than 200 cases per lawyer per year. So, when we ask our providers to look at caseload as they create their proposals, I think it's important that as an administrative agency we are aware of the fact that these NAC standards, while they were endorsed in 2006, that we allow our providers to tell us what's reasonable for them to handle and that we are aware of the fact that it may well be far fewer and it probably ought to be far fewer than 400 misdemeanor cases per lawyer and that the same analogy is likely in other case types as well. That being said, we also have a funding issue that we have to work around and so the need for us to do an Oregon specific standard so that we can approach the legislature tell them where we're at and tell them where we need to be is very essential and we will be talking about that, I think, as Paul said, as we continue this conversation about caseload workload and what we can do to put our providers in a position to provide adequate representation for their clients.

**Agenda Item No. 5 Lane County Courthouse – Planning for a New Building**

30:44 Chair Ellis Don't go away. Lane County courthouse, two of our commissioners are going to be accused for conflict of interest here.

30:57 N. Cozine Chair Ellis, members of the commission, I was contacted by the trial court administrator in Lane County. They are pursuing a new courthouse and they are interested in securing state funding. You will likely recall the conversation we had around the Multnomah County Courthouse and the public defense resource center that is envisioned for that facility. Lane

County has already heard from the Department of Justice that they are interested in space. I included their letter of interest just so that you could see what they're proposing to the county. It looks slightly different than what we proposed in Multnomah County. What I understand from the trial court administrator is that at this point in time they are not interested in making any commitments, they are just interested in having letters of interest so that there is some indicator for them to present to the legislature about the ability to include a state agency within their structure. So, I thought it would be appropriate to have this commission hear from Lane county practitioners. I have heard back from a few and I have actually received mixed feedback. Brad Cascagnette felt that they had enough space in the courthouse, of course there is a new courthouse being built, we don't know what that will quite look like and Greg Hazarbedian commented that he thought it would be useful. So, I think it is good for you to hear from people in Lane County and we can proceed from there.

32:20 Chair Ellis

So do that in July?

32:22 N. Cozine

Well I thought you could hear from them now if you wanted to because I think we need to get, if we are going to submit a letter of interest it needs to be in the next few weeks.

32:31 Chair Ellis

Okay, I am sure what you had in mind is fine.

32:45 B. Homan

I haven't prepared anything, that doesn't mean I can't talk.

32:50 S. McCrea

Well Bob, let's hear it!

32:52 N. Cozine

I have an email from Greg if you want me to read that.

32:56 Chair Ellis

I don't see Greg here.

32:58 B. Homan

No, he's not here. I think what Greg said in his email that we would benefit from having space in the courthouse. I think one of the comments we talked about was being able to have a room where attorneys could go and maybe have someone do a little research during trial if there were two attorneys available to do some of that. To do some fast preparation, even to talk to clients, I mean, we have an early disposition program that requires us to talk to clients at some point and there is no private space in the courthouse to do that at all. We end up talking to them in the hallways, try to find a little corner where there is a little bit of a private conversation but it's virtually impossible to do that and can't go back to the office because it takes another ten minute walk to get back there and then come back to court. So we would greatly benefit by having a cohesive several rooms available for both computer access and visiting with clients.

34:08 Chair Ellis

Tell me if I'm wrong but DOJ's lawyers typically don't live in Lane County they're probably up here or they're in Salem?

34:18 B. Homan

They do have office space in Eugene, closer than our office space so I'm not sure, I don't deal with those attorneys on a daily basis so I'm not sure.

34:33 Chair Ellis

Do you know what they are thinking of closing that office and using this space?

34:38 B. Homan

I do not know that.

34:40 Chair Ellis

Another question I have is in Multnomah under the legislature for financing courthouses, our participation was very significant in the financing of the building. Is that the same here or not so much?

34:59 N. Cozine Chair Ellis, members of the commission that is the same statute they are relying upon in Lane County and they would like to establish a state agency within their facility to trigger the 50% contribution as opposed to the 25% contribution.

35:11 Chair Ellis So, DOJ did it, they don't need us to get that?

35:14 N. Cozine DOJ has expressed interests and correct, it may be us it may be DOJ, it could be both. It may be that the legislature would be more persuaded by two state agencies than one. What I noted in DOJ's letter is that they do have existing space and it sounds like their lease will be expiring and so they would see this as replacement space so that they could be housed inside the courthouse. I think what we saw in Multnomah County was that the county had grown to a point where having providers exclusively outside of the building left us in a position where there weren't adequate meeting spaces and there were too often times when our clients and the alleged victim in the case were wandering the hallways together and it created risks that the courthouse really wished to avoid. So, I am not as familiar with the Lane County courthouse, I don't know the extent to which that is happening there but when you think about a courthouse that's going to be around probably for the next hundred years or so, it's good to think about growing populations and what the county will likely encounter as it grows.

36:31 Chair Ellis But, there is a huge difference between defense lawyers who live in the community and their offices in the community and DOJ lawyers I am assuming do not.

36:48 N. Cozine My understanding Chair Ellis, members of the Commission they have a permanent office with in Lane County with attorneys that reside there.

36:55 Chair Ellis I heard that but that's not saying that the DOJ lawyers who end up in Lane County circuit court live there, they don't.

37:05 N. Cozine They do.

37:06 B. Homan Yes, I think they do.

37:08 S. McCrea Some of them do.

37:12 Chair Ellis And then, the DOJ, I mean they are not the district attorney. They only show up on a limited number of cases I would assume.

37:21 N. Cozine Right, It's interesting in the dependency system the Department of Justice right now is providing the bulk of the representation, in fact they are providing all of the representation in those cases. The district attorney in Eugene is no longer, in Lane County, is no longer participating in the dependency cases. That may change, I think there are discussions happening but I don't know. I suppose the other thing at least that I think is important to think about is something we talked about in Multnomah County which is sort of procedural justice and it does seem odd to have a courthouse where you have both the district attorney housed within the courthouse and the department of justice housed within the courthouse with no resource center for defendants where they can get help other than the trial court.

38:17 Chair Ellis The DA's office is going to be in the new courthouse?

38:21 N. Cozine Well, that's an assumption I'm making I believe it's the way it is.

38:24 B. Homan They're in the current courthouse they occupy by (inaudible) the fourth floor.

38:30 N. Cozine I don't think they're planning as far enough along that we know the answer to that but I would say that it is certainly likely.

38:38 J. Potter Maybe you can refresh my memory but I recall having a presentation by the courts (inaudible) and the various floors of the new courthouse and in that there was a big space potentially for the defense function that would include a resource center but if I recall correctly, it also included potential office space for OPDS lawyers.

38:59 N. Cozine Right.

39:00 J. Potter This particular proposal in Lane County, you're not suggesting or maybe you are that there be an office space for OPDS lawyers?

39:08 N. Cozine I think that's the question before this commission is do we want to submit an interest letter saying hey we would like to be considered. We might want to be considered, were not asking for a commitment and we are not asking you to commit but we'd like to keep exploring this topic and really interestingly, the Multnomah County process is much further along and were at the commitment stage. When Multnomah County was at the stage we are right now with Lane County, I came to you and said hey there's this concept do we want to express interest and the message back was yes. But, it was verbal. In this instance Lane County has asked for a letter, which is probably the more appropriate. Its documenting that we are interested.

39:50 Chair Ellis What's the downside if any?

39:54 N. Cozine I think there isn't necessarily a big downside other than if it's not needed. I mean I certainly don't want to propose that we have a space in a building that isn't needed and I think that's where having provider feedback is helpful because it's not worth maintaining space...

40:15 Chair Ellis I assume the space is not free.

40:18 N. Cozine In Multnomah County it is at least for the term of the bond.

40:19 Chair Ellis I know that, but here?

40:21 N. Cozine Here, the Department of Justice has offered to pay but they don't want to pay more than their current lease agreement which I don't know what that is. So, a question that would arise is whether or not if we were to submit a letter of interest, we would want to put in the same conditions that we have in Multnomah County which is we'd like to be included in the space because our inclusion could trigger this additional 25% contribution amount. We would expect that the space would be free for the life of the bond.

40:54 Chair Ellis That sounds good to me.

40:55 J. Potter So, let's say the DOJ backs out or doesn't participate in this and it's just OPDS and OPDS, we put in a letter of interest. In order to qualify for the 50%, does OPDS have to have an office there or can it be a resource center for the defense function of people that are funded by OPDS under contract. Does a state agency have to have a physical presence or the contractors only?

41:28 N. Cozine Yes, Chair Ellis, members of the Commission, Commissioner Potter, in Multnomah County it's a resource center but we have responsibility for maintaining the space. The state agency, you know we will have to staff someone or contract with someone to be in that space to make sure it is managed appropriately. So it is, we are entering into the agreement as a state agency and we are making it available to our contractors for their daily use additionally.

41:56 J. Potter But you might not have to have a state employee in that space in Multnomah County?

42:00 N. Cozine Not if we contracted out the management responsibilities.

42:03 J. Potter Because that adds to my mind, it adds more flexibility to the space.

42:07 N. Cozine Right, in Multnomah County we added the component of telework spaces for appellate lawyers because we have such a huge portion of our office residing in Portland and in Eugene we do have a attorneys who reside and we may want a few telecommute spaces for appellate lawyers to use if we were to proceed in Lane County.

42:31 Chair Ellis They always have to watch for the slippery slope. Are we going to get the same thing in Marion and Clackamas and Washington?

42:39 N. Cozine That's exactly the question.

42:42 Chair Ellis And, so long as we say rent free I'm fine with that.

42:52 J. Welch Do you want a motion?

42:54 Chair Ellis I guess you do want a motion don't you?

42:57 N. Cozine You know I didn't put it, sorry I didn't put it on as an action item. I'm happy with direction from the commission that I submit a letter of interest if that would wish me to do.

43:06 Chair Ellis Okay, well on the lines we've been discussing.

43:08 N. Cozine A letter of interest that asks, that suggests that we might be interested as long as the space comes with no charge for the life of the bond.

**Agenda Item No. 6 Legislative and Budget Update**

43:17 Chair Ellis Okay. Now we get into the interesting subject of legislative and budget update.

43:32 N. Cozine Chair Ellis, members of the Commission, we are at a point in session where our budget bill has gone through the subcommittee, it has gone through the ways and means committee, it has gone through the senate floor and it is actually having its first reading on the house floor either happening now or its just finished. Well, actually it already happened because the first reading is very fast. So, I anticipate it will be up for third reading most likely Saturday if they are in session or on Monday if they are not in Saturday session. It includes some relatively exciting pieces. We had asked that we be able to increase funding for consortium and law firm lawyers to match what is currently being paid to nonprofit public defender offices. The legislature has included that, they included all of our current service level requests and an additional about 5.3 million that we can use to help increase rates and cover mileage expenses. That was a policy option package 100.

44:49 Chair Ellis So as that comes to bat does that bring them out evenly with what positive event we had with the PD's two years ago?

44:59 N. Cozine Chair Ellis, members of the commission, it will. They gave us a slightly a reduced amount and put in a note that they would like us to do a phased in implementation. They didn't have quite enough to get to the, it was seven and half million that we were requesting and they gave us about 5.3. So, what they are suggesting is that we phased, you know two steps to get them there in the second year of the contract. We are going to keep looking at it and see how we can structure to get them as much as possible in the first year of the contract.

45:31 Chair Ellis Then, going forward will this be viewed as part of our base?

45:35 N. Cozine It will, it will be wrapped into the base.

45:39 Chair Ellis I know since they are still in session our discussion should be it's an outrage how little we got, but it's less of an outrage that you might have expected.

45:43 N. Cozine Right, you will recall that in October we were told that if the PERS decision came out poorly and if the kicker kicked, we could expect absolutely zero and both of those things came to pass and we are looking at an increase of our base budget of 5.3 million dollars within the professional services account. So, it is something for which I think we do need to be very grateful. There are agencies that are not increases, obviously I don't know yet because we aren't at the end of session.

46:23 Chair Ellis I really want to commend you and the others that presented to that. I attended a lot of that and I thought it was really terrific at the way it was handled. That's the public part, but the real part is your work with LFO and all the rest behind the scenes.

46:43 N. Cozine Thank You. It's exciting and we had a lot of voices of support in the building, it was a good session so thank you. Knock on wood, no counting chickens yet.

46:53 Chair Ellis And it is an outrage.

46:55 N. Cozine Yes. But there's more. But wait there's more!

47:00 Chair Ellis More outrages?

47:02 N. Cozine No, more good. We were granted an additional position. So our deputy general counsel position is funded at the level we requested and that means we get to keep Amy Miller so we are very...

47:14 Chair Ellis So you get paid now?

47:15 A. Miller I've been volunteering, so it'll be nice.

47:20 N. Cozine Really, all in all, very good news. We are continuing to work with the legislature to let them know what our needs are but again we've had so much support. I feel really grateful to everyone who worked on this this session, the Commission, all of you. The Commission dedicated so much time to this and it was largely a result of all of your work shaping and shepherding that I was able to then do what I needed to do on the other end and we really had a lot of people working on this.

47:49 J. Potter My only caveat notwithstanding the Chair's enthusiasm is that legislature is not over yet. We've had positions where it's gone south at the last minute and I also think that we have to remember that we asked for fifty million dollars more to solve a need. They asked us to tell us what the need was. We're going to get five million, it's great in perspective to what we've had before but there's still going to be disappointed folks out there when they take a look and see where this five million dollars is going. When I'm talking to legislators I'm telling them that that first priority level, that package 100 takes people that are in the horrible category up to the bad category and there's still going to be lots of folks that are not paid what they need to be paid.

48:40 N. Cozine Yes, and Commissioner Potter, Chair Ellis, members of the commission, some of you may not have seen our phase two budget presentation. We were able to take a look at the 2014 salary scales for public defenders and district attorneys and we have counties where we are up to 50% behind for the non-management positions. So, in Multnomah County a non-management, what we were able to get over the research publically available information, there are non-management district attorneys who made \$160,000 a year, whereas non-management public defenders in Multnomah county cap out at upon average at about 88. In Washington County similarly you've got, actually just varies a little greater it's about 50%.

So, when Commissioner Potter talks about significant need and then going from horrible to bad we understand that there are counties where it is very important that we continue to work toward parity and that is very much a part of our message and we have a lot of people within the political system who share our concern and we will continue to try and improve in that area.

**Agenda Item No. 7**

**Approval of Final Service Delivery Review for Marion County**

49:56 Chair Ellis

Great, thank you. So, now were ready for Marion County.

50:06 N. Cozine

So, you have as attachment number seven the final service delivery review plan for Marion County. This really just ties together all of the conversation that has been had over that last several meetings. There's no new information in there and unless there is anything in the concluding paragraph that you would like altered we will go ahead and (inaudible) a final document.

50:33 Chair Ellis

When I was reading this, I noticed that there's only one juvenile contractor.

50:40 N. Cozine

In Marion?

50:41 Chair Ellis

In Marion.

50:42 N. Cozine

Right, and they were not a part of this review.

50:45 Chair Ellis

I understand that but how do we handle conflicts in juvenile cases in Marion?

50:50 N. Cozine

It's a consortium so...

50:53 Chair Ellis

Okay, so the one provider can, okay that solves that problem. The other area that struck me was the very high percentage of Hispanic or Latino and, do we feel that that's being adequately addressed? I know there's comment in here that there are some Spanish speaking lawyers which obviously helps a lot. Do we feel there's enough happening there?

51:28 N. Cozine

Well, Chair Ellis, members of the commission, my view is that we don't have enough diversity in our practitioner pool that any place in the state. We just don't match our client base so I think it would be hard for us to say that its where it ought to be but whether or not it warrants particular attention in Marion County I think is what you are asking and I'm not sure.

52:02 Chair Ellis

Do you think we are moving in the right direction on that?

52:07 N. Cozine

Chair Ellis, I wish I could answer your question more fully. I know we talked about it within the context of this review but...

52:20 Chair Ellis

I will confess surprise that we had both Mr. Weiner and Mr. Sermak and we asked them are you okay with the caseload allocation and I thought they'd go like this and they both went yeah we are fine, which on part of this report that historically the commission has done which is to be sure we've got the right structure in a county. This feels pretty good to me. There's a long history to it but I think it does feel good.

52:59 N. Cozine

And I would be happy to add a sentence about having the office take a look at the ability of providers to meet the needs of Spanish speaking clients. I think the testimony was that they had adequate interpreter resources.

- 53:20 J. Potter I believe before, Mr. Chair, you had expressed interest not concern about the specialty courts and whether or not there would be a shift from the consortium to the public defender of certain specialty courts. Has that been discussed anymore between providers?
- 53:38 N. Cozine Well, the concluding paragraph indicates that the Chair suggested OPDS should consider specialty court responsibilities to the public defender office and encourage MCAD to continue with its attorneys to assign cases to align with the strengths of its attorney members and certainly those are two things that we would continue to pursue as we move through this next contracting cycle.
- 54:07 Chair Ellis This process took longer than it used to and I think that may be because we are combining both functions. But it's a three year process to get to this. Any comment on that?
- 54:28 N. Cozine Chair Ellis, members of the Commission, it is a longer process in terms of starting with a peer review and then getting all the way to the concluding report in a service delivery review. I think we'll have the chance again to test it again in Washington County. We'll have our meeting in Washington County in September. We did a peer review in May, June, report came out May/June, well actually the peer review I think was May/June of 2014 and we will be there in September to do the service delivery review. So, I think that it will be nice to move through one more of these where we are following one with the other to make a decision about whether or not that's working well. Certainly I would say that there were areas of improvement identified in the Marion County Peer Review that had been addressed at the time of the service delivery review and I think that may have been largely because the service deliver review is on its way and it'll be interesting to see if we see the same pattern in Washington County but I think it's a little too early to say that it is.
- 55:41 Chair Ellis I did think the composition of the team that did the peer review was outstanding as always. We are very grateful. They take summer and private practice, they take time off of what else they are doing and do this and I think it's one of the hallmarks of defense practice in the state, how much each looks out for the other and this is a good example of that. If there are no other comments, is there a motion to approve the Marion County report? **MOTION:** Commissioner Lazenby moved to approve the Marion County review; Vice-Chair McCrea seconded the motion; hearing no objection the motion carried: **VOTE 7-0**
- 56:26 Chair Ellis Well, thanks Nancy. It was a longer process but a good process.
- 56:30 N. Cozine Good. Thank you.
- Agenda Item No. 8 Approval of Executive Director to Secure Personal Services Contracts**
- 56:35 Chair Ellis Alright, so you want to hire some people.
- 56:39 N. Cozine Yes, I included in your materials in attachment eight with just a short memo describing what I'm envisioning. As you know, the Office of Public Defense Services has undergone a bit of change in the last three years. We have a very different structure in terms of how financial services and business services are being managed. They are now separate entities as opposed to one entity. My desire is to have that analyzed by an outside entity that can tell us that structurally we've got the cases in place that we need to have in place. I just think that is a prudent thing to do when we are managing the amounts of money that we are managing. We want to have some outside entity come and take a look and give it some sort of stamp of approval or tell us that we need to make adjustments if that's appropriate.
- 57:35 Chair Ellis It's a little out of sync as you've made the changes, now you are asking for the review.
- 57:40 N. Cozine Right, to review and tell us...

57:43 Chair Ellis Right, but I don't know who's left at AKT but Jeff Guilfooy is a very high quality guy.

57:49 N. Cozine Right, and it's been nice to be able to reach out to him because he knows our agency well and he knows AKT well and he's been able to connect me with a gentleman named John Lauseng who is available and willing to do the work but Jeff can also serve as a conduit and really help as make sure that we hit the pieces that we need to hit.

58:07 Chair Ellis Are you making clear to them that we don't have a big problem that we know of, that we've made these changes, they feel good to us, we are just looking for validation. Please cash your fee.

58:27 N. Cozine Yes. They understand that we are looking to make sure that all of our changes leave us in a very secure place.

58:35 Chair Ellis Okay. My view is if you want this I support doing it.

58:40 N. Cozine Thank You. Then, the other piece is the strategic planning piece. It's interesting; through the course of this meeting we've talked about some very important things. The developments in delinquency cases at the national level, the issues that we are still facing in Oregon; work load standards, caseload standards and then we always have the issue of compensation. All of these things tie together. Our strategic planning process began really when the agency formed and Jeff Guilfooy was the person who assisted but we have not done a complete revision of our strategic plan since 2003 when he helped us with it then. Ever since then it's just been sort of adjusted, what was already there. My feeling is that it is time that we really work with our members. We've done a lot of work over the last two years but, do a check in at the management conference with all of our members, our contracting members and get feedback. Get feedback from within the office, get feedback from you and make sure that as we embark on this legislative cycle and into the next few years we have a strategic plan that really aligns with what is happening at the national level and what the commission's concerns are and what our provider concerns are.

1:00:02 Chair Ellis Any questions or comments?

1:00:09 J. Potter Do you have a sense....

1:00:10 Chair Ellis You look like someone at an auction, you are inadvertently moving your hand. You just bought a Rembrandt...

1:00:18 J. Potter Do you have a sense of the time line for both of these; both an operational review, what that would take, how long and the strategic plan development. And the follow up is do you have any clue at all as to what this might cost?

1:00:34 N. Cozine We had preliminary discussions. So, timing wise I think that the operational review could be a few months. The strategic planning is probably closer to six months. Cost wise we are trying to stay under \$50,000. It's a lot, but it's amazing to see, that's our top but we are not done with negotiations.

1:01:10 J. Potter It doesn't sound like a lot to me really or a major strategic planning process that its going to take six months to spend \$50,000 doesn't sound expensive to me.

1:01:20 N. Cozine No and in what I'm going to call the real world, it's not. I think for all of us, it is.

1:01:30 Chair Ellis You've used that number with them and they are not flinching?

1:01:39 N. Cozine I think we are still in the process of negotiating. And that's part of, I mean I think it will come out to something as reasonable.

1:01:55 Chair Ellis I think fifty is reasonable and I hope you are successful at bringing it around at that (lobby?).

1:02:02 N. Cozine So, we'll see. Yes, that's my goal.

1:02:05 S. McCrea I am really happy that you are including Jeff because he was invaluable when we began this whole enterprise and this stumbling around figuring out who we were and what we were doing and where we we're going.

1:02:18 Chair Ellis This is a lot easier job than he had ten years ago.

1:02:21 N. Cozine That's what I keep saying.

1:02:25 Chair Ellis This is an action item so you'd like our?

1:02:29 N. Cozine I would. It's not required in the statute but I do think it's important just to know that the commission believes this is important and that we should move forward with it.

1:02:37 S. McCrea That you have us on the hook in other words.

1:02:41 Chair Ellis Is there a motion? **MOTION:** Vice-Chair McCrea moved to approve; Commissioner Potter seconded the motion; hearing no objection the motion carried: **VOTE** 7-0

**Agenda Item No. 9 December PDSC Meeting Date; Proposal to Reschedule to 12/10/15**

1:02:52 Chair Ellis The rescheduling, what's the issue there?

1:02:59 J. Potter Mr. Chair, I asked that this be considered only because I'm not able to attend the meeting, not that my attendance is critical but if everybody else was able to attend a week earlier it would work with my schedule.

1:03:15 Chair Ellis I think that's fine unless somebody else has a problem, and then we have to decide who.

1:03:28 S. McCrea Do we need a motion for that?

1:03:30 N. Cozine No, we will just move it. Thank you.

1:03:35 S. McCrea That was easy.

**Agenda Item No. 10 OPDS Monthly Report**

1:03:38 Chair Ellis Alright, so were ready for the OPDS monthly report.

1:03:41 N. Cozine We, the management team at the Office of Public Defense Services were able to enjoy a day long management training with Dennis Morrow on June 8<sup>th</sup> and it was a great training, very helpful and we are going to continue to follow up. As you know we have this new management team with Mr. Gartlan's retirement it made the appellate division as different as our contract and business services. We really turned over in both arenas, so we are making sure that we are all on the same page, that we all have the same methodologies and it was a very good session. So, we will keep working on that and things seem to be moving along very nicely. Mr. Lannet is doing a great job and Pete has come down to visit a few times.

1:04:38 Chair Ellis Have we heard anything from Port Townsend?

1:04:40 N. Cozine Yes, in fact Mr. Gartlan was in the office this week. He has been finishing up final details in his move and they are really enjoying Port Townsend. I think they are officially up there now.

They've done the garage sale, taken out the last few items. So, I thought it would be appropriate for you to hear from both our criminal appellate section and our juvenile appellate section on an update on their work.

1:05:17 E. Lannet

Good morning, Chair Ellis, members of the commission, yeah there has been a few personnel changes. With Mr. Gartlan's retirement on April 1<sup>st</sup> I became the chief defender for the criminal appellate section. At that time Shawn Wiley who had been in management for eight years decided that he had had enough, he wanted to get back into the trenches and do some legal work so he made a request to become a senior deputy again and lead a team of attorneys and get back to what brought us all to the office in the first place. He was a senior deputy before and he's going to be invaluable there as he was on the management team but it did create a necessity to identify two people to join me as chief deputies in the criminal appellate section. After an internal selection process Ingrid Macfarlane was selected and so was Marc Brown. Ingrid Macfarlane has been in first the Oregon Public Defenders Office since the late 80's and then she left for I think six years from 2003 to 2008 or something like that and then has been with us since. She has an amazing amount of experience and has been at all different levels of the office and is really excited to start this new step in looking at the managerial aspects of the office and seeing what we can do there. Marc Brown has been with us for ten years. For the last four years he was kind of our point person for parole matters and he had special duties associated with that which required finding another person to take those duties over. Stephanie Hortsch who has been with our office for fifteen years was selected to do that. Then, also, we try to on at least an angle basis, look at our deputy ones and look to see who has matured into position to take the increased responsibilities and difficulties associated with the Deputy II caseload and Lindsey Burrows was promoted to deputy two. As I reported in March, we were going to be hiring two new attorneys. That process has been completed. We had a very excellent pool of applicants, 75 I think this time. We made it through the final screening and we interviewed 13 candidates and they were very excellent. We were in a position...

1:07:56 Chair Ellis

Well that tells you which way the market is trying to take us.

1:07:58 E. Lannet

Yes, right now we're still on the, still benefitting. Actually, this was a bit unusual that we had as many people that have been practicing for a few years as people who were going to be sitting for the bar and you know, they were all excellent candidates but you know we are in a volume based business and the fact that we had people who were ready to start was important. So we have July 1<sup>st</sup> we have Sarah Delacruz joining us. She is a 2014 graduate from Willamette. She is currently finishing out a year long stint as a petitions clerk at the Oregon Supreme Court. Then, on the 15<sup>th</sup>, Vanessa McDonald will be joining us. She is a 2011 graduate from Berkeley. She was in, this may be a first, she was an honors attorney for the Department of Justice, didn't have any background in tax and finance and was asked to join that section and from what I understand she has been kind of a super star there for a few years and then has made the decision that she really wants to go back to what her roots are as public interest work. So, she's we are nabbing her from the Department of Justice. So, we are excited to see her start. We have the Oregon Supreme Court didn't take notice of our personnel changes. They allowed review in nine cases. So, we are in the process of, I think briefs are in on four of them and we're in the briefing stages for the others.

1:09:40 Chair Ellis

It feels like a lot.

1:09:42 E. Lannet

It is, you know March through June the Supreme Court tends to fill its docket for the year, so...

1:09:51 Chair Ellis

When compared to prior years does that feel like an increase?

1:09:58 E. Lannet

It is actually probably about what we've been doing. I think that it varies a bit year to year but there are times that we are doing a dozen and north of that.

1:10:11 Chair Ellis I always thought when Judge De Muniz was on the court we would see a lot more because he's particularly interested in criminal abusing.

1:10:20 E. Lannet We are, Justice De Muniz, his departure was replaced with people with interest in the criminal law arena. Most of those people were from the Attorney General's office so we find ourselves (inaudible) sometimes. But, we have some interesting cases. Some of them are as simple as we had someone who took items out of a metal recycling box on a property and they were charged with theft and there was no testimony about what the nature of this object was besides it was a chair or a shelving so it comes down what kind of evidence that state has to put on for an object to have value, such as it can't be property for purposes of the Oregon criminal code all the way to another case that Shawn Wiley actually put the brief in and it's for...

1:11:18 Chair Ellis You remind me of a case from Fred Meyers a few years ago and they were trying to treat old cardboard as waste and it did have value.

1:11:32 E. Lannet Yes, and this is kind of similar to that. It comes down to a question of inferences. What kind of inferences can be made that this object is being passed on to a recycling company where they would pay value for it without any explanation about these particular items, whether they had any value whatsoever because it's a mixed, it's not homogenous it's a mixed bag of things so we don't really know what if any value these objects have. At least, that's our position. Yes, Shawn Wiley, there's a life without the possibility of parole sentencing for the third sex crime and we have seen a number of cases where the final crime has been public indecency which is a felony if you have a prior conviction of public indecency or another type of sexual offense. The Oregon Supreme Court allowed review to consider whether that's disproportionate punishment. On a related note, yesterday the Oregon Court of Appeals issued a decision on a case that they had under advisement for about a year and a half which had found that a life without parole sentence was disproportionate punishment for someone who's last or who's only offenses were public indecency. That statute has been around for ten years but we've seen it get used more and more in the last few years.

1:13:03 Chair Ellis Will that case you just described go up too or?

1:13:07 E. Lannet We will certainly be flagging it for the Oregon Supreme Court and maybe combined. We are looking into that possibility. I did not want to spend too much time of each of these. There's companion cases dealing with restitution and whether the state need only show but for causation between a victim's expenses and criminal conduct or whether...

1:13:31 Chair Ellis How are you assigning arguments? How many lawyers are likely to be involved?

1:13:35 E. Lannet On these nine cases we have seven different attorneys handling them and for the most part it's the attorney that handled the case at the Court of Appeals.

1:13:45 Chair Ellis So, you are carrying on Mr. Gartlan's tradition?

1:13:47 E. Lannet Yes.

1:13:49 Chair Ellis Which I commend.

1:13:51 E. Lannet We think it's, I think I said this before in another meeting, doing Supreme Court practice is kind of an essential process of maturation of an attorney so we try to find cases that are even appropriate for deputy one's to do, statutory interpretation where there's a methodology that can be followed that when someone is shown the ability to do that we are more than happy to help them through that process. However then, there's cases like (Manilla) which I assumed the target on my back. It's the state is arguing for about 30 years the Oregon court of Appeals

for consent to be a valid exception to the warrant requirement, there has to be actual authority, so you actually have to have authority over the place that you're allowing the search to happen. That differs than under federal law when apparent authority is good enough, there's a good faith exception for police officers based on a deterrents rationale versus a personal rights model. The Solicitor General took over a case and filed a petition for review which was allowed saying this is an issue of first impression in the Oregon Supreme Court that apparent authority should be enough.

1:15:14 Chair Ellis      So, somebody comes to the door and allows access, turns out they weren't the owner that they just happened to be in the house, is that what you are talking about?

1:15:23 E. Lannet      Yes, and we will be making an argument that under a personal rights model that those interests are not served when someone can put forth themselves as the owner of my automobile and then allow...

1:15:36 Chair Ellis      Do you do internal moot courts for these new lawyers who appear before the Supreme Court?

1:15:41 E. Lannet      Oh yes, even the most practiced attorneys when we have Oregon Supreme Court cases we do an informal moot usually before the brief is filed but when there is a draft, for kind of a brain storming session and then we do a formal moot when it gets closer to the argument. When it's someone's first Supreme Court case there will be at least two formal moots. So, we like to bat these a lot and get all the questions we are going to get upfront and in our own office before we have to go to the court room. We have another case that deals with the right to privacy in bank records held by a third party and we have a case dealing on whether there is a right to counsel on arrest for a DUI. Again, that's a question that has been yes for many, many years but the attorney general's office is seeing if they can turn that into a no. The latest two cases that (Mill) allowed, one of them deals with mental states and the unlawful use of a vehicle statute and whether you must know that you do not have consent of the owner when you are using the automobile or vehicle or whether criminal negligence suffices. Finally, we had a case that was under advisement for two years at the Court of Appeals, was as I understand it there was a convenient store where there was a lottery terminal. The employee is authorized to use the lottery terminal within the course of business but then starts using the lottery terminal in ways to benefit themselves financially and that was charged as computer crime. The question comes down to, we presented it as if I'm playing solitaire on my state issued computer, whether I'm actually committing computer crime because I'm doing unauthorized use of a computer terminal that I have otherwise authority to use, so that's going to be an interesting one. So, there are a lot of cases but it has been a few months since we spoke. We had two decisions. One dealt with identity theft, it was a win and it was some good clarification on what uttering and inverting to one's old use for personal identification and today, the court issued a decision. Its fifty pages in total so I didn't have the time to read it all, but it's a majority decision, a concurrence and two dissents and it deals with article one section twelve, so Miranda essentially. The person was pulled over and then taken to the back of a patrol car in handcuffs and was not advised of their Miranda rights and was asked whether they had anything of concern in their vehicle, our client said no you can even search it and subsequently tried to suppress evidence that was found in the car. The Oregon Supreme Court concluded that the discovery of the physical evidence was attenuated because of the volunteer statement of you can search it. So, it's a loss but it's a better loss than it could've been. The state was arguing that Miranda is a court case rule so there shouldn't be any suppression of physical evidence based on violations.

1:19:19 J. Potter      Very aggressive attorney general.

1:19:21 E. Lannet      Yes, they have a responsive audience right now. Finally we had two cases argued. Both were argued by Josh Crowther the other chief deputy on the management team. One dealt with whether there is a crime exception to the warrant exception, basically whether when you've been illegally detained if you commit a criminal offense whether that's an exception that

therefore no suppression of any evidence that arises out of that. This was someone who provided false information after being pulled over. The most pertinent facts that were brought out at the suppression hearing, because the officer couldn't remember what violation he observed but just knew that it was one he usually gave a warning for, was that the defendant was Native American and was driving a purple Cadillac. Based on how argument goes, we will wait to see what happens with that. And finally, Turnidge was argued this week and Josh argued that. That's of course the Woodburn bank bombing case, we represent Joshua Turnidge and unlike many death penalty cases where the rule is raise any and everything and it's an automatic direct appeal to the Oregon Supreme Court. Sometimes those cases are litigated very well and it's very hard to find strong issues. That case has at least two issues, probably three, that would have been worthy of going to the Oregon Supreme Court in the first place. So, we are hopeful at least that something might develop out of that. I also want to note that in the conference here, we have four speakers from the office. We are opening it with the appellate update. Shawn Wiley has picked up his practice since he's been able to leave the management duties behind and then Kali Montague and then we are ending the conference with a presentation on Williams which is the decision that came out the day that we last met in March dealing with prior bad acts and that is being presented by Mary Reese and Kristin Carveth so we are very excited about that.

1:21:41 Chair Ellis

Okay, thank you.

1:21:43 S. Storey

Chair Ellis, members of the commission, I'm Shannon Storey the chief defender for the juvenile appellate section. I'll try to talk louder. My section is much, much smaller so it will be much more brief. As far as the personnel, the transition from Mr. Gartlan has gone very smoothly for my unit. Mr. Gartlan gets the credit to him and to Nancy in setting us up well to prepare for his absence. As effective April one, we promoted Valerie Colas to deputy two defender for the juvenile appellate section. She's been a strong member of our team in her fourth year in our office. We are very pleased with her progress. We've had review allowed in one case; TL with issue on review is whether a parent may raise ineffective assistance defense counsel on direct appeal from a judgement of the juvenile court. There's an Oregon Supreme Court case that's about 25 years old *Geist* that held in the absence of an express legislative remedy for a parent to deal with ineffective assistance of court appointed defense counsel then there needed to be a remedy made by the court which the Oregon Supreme Court did which allowed for review on direct appeal in the first instance. The Court of Appeals in TL ruled that it was no longer possible, that there are other statutory ways now to get an ineffective assistance of counsel and we petitioned for review and review has been allowed. The briefing will be done in July and argument will be in November. Besides that, we've had a few notable Court of Appeals opinions. I wanted to just alert you to two of them. Amy touched on them, one of them as well those are AL and AB and those cases stand for the proposition that a parent's decision to cede physical custody of his or her children or child to others, whether to a relative or both of them were relatives is not jurisdictional. The attorney general's office was taking the position that if a parent cannot or will not be the primary care provider for their child then DHS is authorized to intervene in the juvenile court and it should be DHS's call where the child goes and not that of the parents. The Court of Appeals has expressly rejected that and expressly endorsed the proposition that a parent can informally cede custody of their children to others so long as the child is safe there's no purpose for the juvenile court or DHS to be involved. That's about all I have.

1:24:46 Chair Ellis

Okay, thanks.

1:24:49 N. Cozine

I want say something, will you tell the factual background in TL?

1:24:51 S. Storey

Oh sure. So in TL we, pre TL we've had the ability to raise ineffective assistance of defense counsel on direct appeal and have done so I think on maybe five occasions. TL is a case where the parents defense attorney did not appear at the permanency hearing where the department had filed a motion to change the child's permanency plan away from reunification

to guardianship for one of the children and APLO which is long term permanent foster care for the other child. The Defense attorney didn't appear, the parents were late arrivals themselves, the court went ahead and litigated the motion and allowed the child's attorney to make argument, allowed the departments attorney to go forward on the motion and then ultimately entered judgements changing all three children's permanency plans. The case was referred to us for appeal, obviously there were no issues preserved to raise on appeal because there was no defense attorney there making any arguments. So, this was one of those cases where we felt raising ineffective assistance of counsel was appropriate and that there was no counsel there. The Court of Appeals disagreed and thought that we needed to develop a record to demonstrate why the attorney wasn't present and also to further demonstrate the prejudice beyond that of the change in permanency plan or show what the attorney would have done had he been present. So that holding is at odds with the Supreme Court case in *Geist* and there was a very strong well-reasoned lengthy dissent by Judge Egan.

- 1:26:50 Chair Ellis      When you win the case is always well reasoned.
- 1:26:58 S. Storey      Right.
- 1:27:02 Chair Ellis      Any questions for either? Thank you both. It sounds like you're just doing great. So, financial services and contract services. Good afternoon Angelique, how are you?
- 1:27:27 A. Bowers      Good. For the record Angelique Bowers, budget and finance manager for financial services. I just wanted to update you guys. Last time I talked with you we had an opening in our unit and I have now hired two people. Actually, because in the process of hiring we had a retirement in our group as well. So, we now have Patti McCarter and Sarah Stahlecker in our unit so we are at the point now where we are working on training and getting them all up to speed but we are fully staffed now.
- 1:28:01 Chair Ellis      Did you get 75 to 1 applicants?
- 1:28:05 A. Bowers      We had almost 90 applicants.
- 1:28:06 Chair Ellis      You're kidding.
- 1:28:09 A. Bowers      Yeah, that's a lot. Very big pool.
- 1:28:14 Chair Ellis      Good, that's it. Any questions for Angelique. Okay.
- 1:28:27 C. Meyer      Chair Ellis, members of the commission, I just wanted to give a quick update, Caroline Meyer contracts manager, quick update on the RFP. You may recall that we issued in the first of May and we did add a few weeks of extra response time to this cycle so providers have until June 26 to respond and we've certainly been getting plenty of responses in. We've had just a couple of requests for extensions so that seems like a more reasonable amount of time for them to respond. So, we are excited about getting those back and getting going. As you'll probably also recall, we're going to be back before you next meeting with our statewide contracting plan. So, we have just under a month to put that together, so it'll be a very busy July for us. But, I think that's it, we've had no additional personnel changes.
- 1:29:23 Chair Ellis      Okay, action coming. Anything else Nancy?
- 1:29:30 N. Cozine      Chair Ellis, I just wanted to comment. I asked Shannon to talk about the circumstances in TL to demonstrate the fact that in both the criminal side and the juvenile side were tackling some really important fundamental issues that affect a lot of cases clearly and the TL issue in particular also ties in with our provider community. This was case in which a lawyer didn't appear. A lawyer was assigned, lawyer didn't appear and the Court of Appeals held that if the

parent didn't make their record, didn't adequately preserve record. So, I just want you to know what good work this office in the appellate section is doing and across the board.

1:30:19 Chair Ellis      It does sound like in the juvenile area, I remember when those positions first became available like four years ago...

1:30:27 N. Cozine      2007, 2007 was the funding, 2008 was the start of the unit.

1:30:33 Chair Ellis      But the whole hope was that this would develop a body of appellate law in the juvenile area which wasn't happening and it sounds like it is happening.

1:30:45 N. Cozine      It is happening and it's happening and the wonderful thing is that with the permanent funding for Amy Miller's deputy general counsel position we now have the bridge to help bring that appellate case law directly to our providers. She has the time, the experience and the expertise to help us really work with our trial level providers so that everything we are developing with the Court of Appeals really gets disseminated out to the trial community and we are available as a resource to make sure people have what they need to make these cases go well in the first instance whenever possible.

1:31:22 Chair Ellis      Okay, any other business? If not I would entertain a motion to adjourn. **MOTION:** Commissioner Potter moved to adjourn the meeting; Commissioner Welch seconded the motion; hearing no objection the motion carried: **VOTE 7-0**

**Meeting Adjourned**

# Attachment 2



## The Presence of Counsel at First Appearances in Criminal Cases: A Brief Review of Applicable Standards and Other Literature

By Paul Levy  
General Counsel  
July 30, 2015

As much of the nation engages in a robust and bipartisan consideration of criminal justice reform,<sup>1</sup> the subject of pretrial detention has received particular attention. The concern is understandable. According to the United States Department of Justice, the country's jails are crowded with nearly three quarters of a million people, most of whom are poor and disproportionately people of color, who await trial on mostly nonviolent offenses. The annual cost to taxpayers is estimated at roughly nine billion dollars.<sup>2</sup> The cost to incarcerated individuals from lost jobs, lost housing, lost educational opportunities, and endangered parental rights is immeasurable.

But there is another entirely different cost to pretrial detention. Decades of research has shown that pretrial detention correlates, likely in a causal relationship, with a higher risk of conviction and of lengthier post-adjudication incarceration.<sup>3</sup> Some research also shows a strong correlation between pretrial detention and recidivism.<sup>4</sup> Of particular concern are pretrial detention systems that rely exclusively or largely upon bail schedules, with no opportunity for individualize judicial assessments of risk of flight or danger to the community. The U.S. Department of Justice recently intervened in a lawsuit challenging such a system, arguing that it not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes

---

<sup>1</sup> See, *Prison Revolt: A Former Law-and-Order Conservative Takes on Criminal-Justice Reform*, by Bill Keller, *The New Yorker* (June 29, 2015), available at <http://www.newyorker.com/magazine/2015/06/29/prison-revolt>.

<sup>2</sup> Eric Holder, Att'y Gen. of the United States, U.S. Dep't of Justice, Speech at the National Symposium on Pretrial Justice (June 1, 2011), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice>, quoted in *Statement of Interest of the United States, Varden v. City of Clanton* (February 13, 2015), available at <http://www.justice.gov/opa/pr/department-justice-files-statement-interest-clanton-alabama-bond-case>.

<sup>3</sup> For a review of the literature, see *Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases*, Mary Phillips, New York City Criminal Justice Agency, Inc. (November 2007), available at [http://www.nycja.org/lwdcms/doc-view.php?module=reports&module\\_id=669&doc\\_name=doc](http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc). For a more recent examination of the data, see *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Christopher Lowenkamp, et. al., Arnold Foundation (November 2013), available at [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf).

<sup>4</sup> *The Hidden Costs of Pretrial Detention*, Christopher Lowenkamp, et. al., Arnold Foundation (November 2013), available at [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf).

bad public policy.<sup>5</sup> Prompted by the latter concern, New York City recently announced it would eliminate bail requirements for many low-risk defendants.<sup>6</sup>

But even with systems, like in Oregon, that rely primarily upon individualized judicial assessments of risk of flight and danger to the community instead of upon bail schedules, a fair determination of eligibility for pretrial release is not likely to be reached without lawyers present to advocate for detainees. An unrepresented defendant, uneducated in the considerations relevant to a release decision and likely unaware of valid objections to consideration of impermissible factors, is unlikely to state a good case for release and at considerable risk of saying something damaging to the defense of his or her case. Not surprisingly, research shows that the presence of counsel makes a difference in whether a person is granted pretrial release.<sup>7</sup>

The benefit of counsel's presence at first appearances goes beyond the assistance provided in gathering and presenting pertinent information concerning the release decision. As described in a recent report on the right to counsel at initial release hearings:

The need for counsel's presence at first bail hearings also connects to protecting an accused's right to a fair trial and ability to prepare a meaningful defense. Defense lawyers know they are needed at the beginning of a criminal prosecution to conduct an immediate investigation, build a trusting client relationship, and to spare clients the adverse trial consequences of pretrial incarceration. The longer the delay in meeting a client, the greater the substantial prejudice to an incarcerated defendant's opportunity to conduct a meaningful investigation, prepare for trial and build a defense. Without counsel, an accused's ability to interview witnesses, gather evidence, challenge the State's case, and make an informed decision whether to go to trial or plead guilty is severely impaired. Additionally, an unrepresented detainee is much more vulnerable to remaining in jail pending trial and suffering the collateral consequences of incarceration, such as losing a job, failing to support his or her family, defaulting on loans, being evicted from a home, and ultimately receiving a harsher sentence.<sup>8</sup>

The right to appointed counsel at a financially-eligible defendant's first appearance in a criminal case is clear as a matter of both statutory and constitutional law. ORS 135.040; *Rothgery v. Gillespie County*, 554 U.S. 191, 128 S. Ct. 2578 (2008). The availability of counsel at first

---

<sup>5</sup> *Statement of Interest of the United States, Varden v. City of Clanton* (February 13, 2015), available at <http://www.justice.gov/opa/pr/department-justice-files-statement-interest-clanton-alabama-bond-case>.

<sup>6</sup> *New York City to Relax Bail Requirements for Low-Level Offenders*, *The New York Times* (July 8, 2015), available at <http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html>.

<sup>7</sup> *Don't I Need A Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearings*, The Constitution Project (March 2015), available at [http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC\\_DINAL\\_Cover.png](http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC_DINAL_Cover.png).

<sup>8</sup> *Id.*

appearances is called for by the American Bar Association Criminal Justice Standards,<sup>9</sup> and advocacy by counsel for the release of clients at first judicial appearances is expected under the Oregon State Bar performance standards.<sup>10</sup> Indeed, representation by appointed counsel at a defendant's first judicial appearance is a requirement of Oregon public defense providers by contract with the Public Defense Services Commission.<sup>11</sup>

And yet some counties remain in Oregon where counsel is not routinely made available to defendants at their first judicial appearance where decisions about pretrial release are, or should be, made. Courts in these counties have been resistant to changing longstanding practices, and local public defense providers have not been motivated to work within their own organizations and with the courts to find workable local practices that will assure a lawyer is present to represent every financially-eligible defendant who appears in court. However, with the newly revised General Terms of the PDSC contract for public defense services, with its emphasis on the obligations of counsel at all stages of a proceeding, the Office of Public Defense Services is moving to ensure that public defense providers in all counties develop and implement a plan to provide representation at the first and subsequent judicial appearance for all criminal defendants eligible for appointed counsel.

---

<sup>9</sup> American Bar Association, *Criminal Justice Standards for the Defense Function*; Standard 4-2.3, Right to Counsel at First and Subsequent Judicial Appearances, available at

[http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html).

<sup>10</sup> Oregon State Bar, *Standards for Representation in Criminal and Juvenile Delinquency Cases*, Standard 2.1, Obligations of Defense Counsel at Initial Appearance (April 2014), available at

[http://www.osbar.org/surveys\\_research/performancestandard/index.html](http://www.osbar.org/surveys_research/performancestandard/index.html).

<sup>11</sup> *Public Defense Legal Services Contract*, General Terms, Sec. 7.1.2.2 Representation at All Court Proceedings (January 2014), available at <http://www.oregon.gov/OPDS/CBS/pages/modelcontractterms.aspx>.