

Members

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



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Thursday, August 6, 2009
9:00 a.m. - 1:00 p.m.
Circuit Court 1
Polk County Courthouse
850 Main Street
Dallas, Oregon 97338

AGENDA

1. **Action Item:** Approval of the Minutes of PDSC's June 18, 2009 Meeting (*Attachment 1*) Barnes Ellis
2. Presentations on Public Defense Delivery in Polk County (*Attachment 2*) Invited guests and audience members
3. **Action Item:** Commission Review of Service Delivery Plan for Clackamas County (*Attachment 3*) Barnes Ellis Commissioners
4. OPDS Monthly Report OPDS Management Team

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

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

Next meeting: The next meeting of the commission is scheduled for September 10, 2009 from 9am to 1pm at a location to be announced in Eugene, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, June 18, 2009
9:00 a.m. - 1:00 p.m.
Mt. Washington Room
Seventh Mountain Resort
Bend, Oregon 97301

MEMBERS PRESENT: Shaun McCrea
Peter Ozanne
John Potter
Chip Lazenby
Janet Stevens
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Paul Levy
Amy Jackson
Caroline Meyer
Billy Strehlow
Shelley Winn

(Meeting was called to order at 9:05 a.m.)

Agenda Item No. 1 Approval of the Minutes of PDSC's May 21, 2009 Meeting

MOTION: Chip Lazenby moved to approve the minutes; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 2 Commission Discussion of Service Delivery Plan for Clackamas County

Ingrid Swenson summarized the information and testimony previously provided to the Commission on the delivery of public defense services in Clackamas County.

Ron Gray testified that nine out of the last ten lawyers who joined the Clackamas Indigent Defense Consortium (CIDC) were under the age of forty. CIDC has an active apprenticeship program with two attorneys currently serving apprenticeships. There are two major benefits to the program. It is a way for new attorneys to engage in criminal defense work and it allows CIDC to evaluate their suitability for membership in the consortium.

Commissioner Ozanne asked Mr. Gray what the Commission's role is in the operation of the consortium.

Ron Gray responded that the Commission's role is to point out areas of concern for the consortium to address. In response CIDC is addressing the structure of the board, the need to plan for a transition in the administration of the consortium, the graying of the membership, an update and revision of the bylaws and an attorney evaluation process.

Commissioner Ozanne noted that although CIDC has been a leader in developing models for other public defense providers even it has found it difficult to apply these models to its own operation. The Commission may need to be more proactive in this regard.

Ron Gray said tha CIDC is undertaking an extensive attorney evaluation process and hopes to complete evaluation of all the attorneys in the fall. The CIDC board is considering the addition of outside board members.

Commissioner McCrea asked Mr. Gray whether the CIDC board was considering eliminating the permanent board terms. He replied that if, for example, CIDC were able to identify an outside board member it should probably be for a permanent position. Permanent board members provide continuity.

Commissioner Potter inquired about the consortium's bylaws. Mr. Gray said the organization has very detailed bylaws that are being revised for the first time since they were developed over twenty years ago.

Benjamin Kim testified that he had practiced law in Los Angeles County for most of his professional career, including eleven years as a Deputy District Attorney. Wanting to move his family out of the area he was drawn to the Northwest and felt that CIDC would be a good fit for him since he did not want to become a public defender but did want to handle some public defense cases as well as start a private practice. He joined CIDC about two and a half years ago and thinks it is a very good model for the delivery of public defense services.

Ron Gray said that whenever a new attorney applies for membership in the consortium, the board has to decide whether it would be appropriate to add another lawyer at that time. Ben Kim applied after another lawyer left so it wasn't a difficult decision. He anticipates that there may be two additional vacancies arising out of the evaluation process.

Commissioner McCrea asked how cases are allocated among members. Mr. Gray responded that there are separate rotations for probation violations, misdemeanors, felonies, Measure 11 cases and homicides. The goal is to get all members qualified to handle all case types except homicides, which are the only voluntary rotation. Cases are distributed evenly for each case type. Once a year a lawyer can opt off a single case but is otherwise expected to handle all cases assigned.

Rhett Bernstein said that he is also a new member of CIDC. He began his legal career as a prosecutor in the Linn County District Attorney's Office but tired of government service and wanted to open his own practice. He enjoys representing indigent clients but likes being able to take on other kinds of cases. He is a member of the CIDC board and also serves on the Clackamas County Bar Association Board. He has found the consortium open to younger members. With the caseload declining, however, it would be irresponsible to bring in new attorneys at this time. The original model at CIDC was for attorneys to receive no more than 50% of their income from public defense cases. Public defense cases currently account for only about 30% of his income.

Commissioner Ozanne said that he did not believe the Commission was seeking to open a public defender office in Clackamas County. The Commission would like to see the consortium live up to its potential. Without an employee/employer relationship it is difficult to enforce quality standards and it may become more difficult to sustain a mixed practice. The trend in larger urban centers has been for attorneys to specialize.

Commissioner McCrea said that Commission Chair Ellis had questioned whether the model in Clackamas County – a single provider system - was the appropriate one. She said that the Commission’s goal is to achieve quality and economy and that she is pleased with CIDC’s responses to the Commission’s concerns.

Commissioner Ozanne said that one of the benefits of a mixed model is that there is some competition, but there is no Commission agenda to develop a public defender office and he would not support it.

Marty Cohen said that the juvenile caseload in Clackamas County is declining. While attorneys have been added over the life of the contract, currently they are only replacing members who leave. One of the older attorneys recently left the consortium and a new attorney has joined after being mentored by Mike Clancey. None of the eleven current members handle only public defense cases. This gives members more flexibility and allows them to survive periods of declining public defense caseloads. While Judge Darling expressed concern about the attorneys’ availability she is aware of the benefits of having public defense attorneys skilled in other areas. With respect to the composition of the board of directors of Independent Defenders, Inc. (IDI). Three members of the board have been in place since the founding of the board. An outside member was added a number of years ago and they would like to add another non-attorney member with expertise in education issues. IDI is also considering the addition of a rotating position that would allow members to serve one year terms. The board meets quarterly and consortium members meet regularly as well.

Gay Canaday said IDI has initiated a six month pilot project in child representation. Two attorneys will specialize in handling children’s cases. They will be partnering with CASA volunteers in advocating for services for child clients. IDI attorneys are now meeting monthly with the juvenile court judge and DHS representatives. They have been working on resolving scheduling issues with the court. Contrary to a statement in OPDS’s report, attorneys are present at all delinquency prelims. The court agrees it is not necessary for attorneys to be at dependency prelims but they are present for shelter hearings.

Commissioner Welch advised other Commissioners that she resides in Clackamas County and knows all of the IDI attorneys. She has also sat as a judge from time to time in the Clackamas County Juvenile Court. Her biggest concern has to do with the zealousness of representation in all classes of cases. Having appeared in courts across the state, she noted that there are a lot of very quiet lawyers in the courtroom in juvenile cases.

Ms. Canaday said that much of the advocacy in juvenile courts occurs outside the courthouse. In order for everyone to perform at a higher level, more time would need to be allocated to these hearings.

Mr. Cohen said that hearings that last fifteen or twenty minutes in Clackamas County might last hours in other counties. More zealous representation would require negotiating more hearing time with the court.

Commissioner Ozanne said that part of the problem is the culture that develops in a particular court. The role of attorneys shouldn’t be to negotiate with judges but to strongly assert the client’s rights.

Ms. Canaday noted that there have been many appeals filed by IDI attorneys in the last year. While it may not be apparent in the courtroom, attorneys are taking appropriate steps. Multiple appeals in civil commitment cases have resulted in the judicial officer now following the letter of the law.

Marty Cohen said that juvenile attorneys have to balance “best interest” and “expressed wishes” representation in juvenile cases. A similar situation exists in drug court and it would be helpful for drug court lawyers to get together to discuss some of the issues that arise there.

Ingrid Swenon said that she and Kathryn Aylward had met with Judge Welch to discuss juvenile representation issues and how to incorporate PDSC’s expectations into the contracting process. She said OPDS had issued a statement on the role of counsel in juvenile cases, that the bar had updated the performance standards for juvenile lawyers and the Commission had directed public defense attorneys to observe these standards. A lot of work remains to be done, however. Both of the Clackamas County consortia have been working to address the Commission’s concerns. They are both good providers and the Commission would like to help them continue to improve. She said she would prepare a draft service delivery plan for the Commission to consider.

Commissioner Ozanne said that the best plan would be to have Commissioner Welch on a permanent rotation through the state’s juvenile courts. Despite his admiration for the Clackamas County contractors, they still have no regular attorney evaluation process in place and have had difficulty dealing with underperforming attorneys. As to both evaluation procedures and board structure, it might be appropriate for the Commission to develop models. This may be a subject to be considered at the Commission retreat.

Agenda Item No. 5

Presentations from PDSC Contractors and Others

Lane Borg, the Executive Director of Metropolitan Public Defender, Inc. said that problem solving courts are good for clients. Defense representation in these courts should not be based on the case counting model since defenders need to participate in the planning meetings for these groups and be full stakeholders.

Paul Lipscomb, the administrator of the Marion County Association of Defenders (MCAD), said there were three proposals they would be making in their contract proposal: payment for proposal: payment for representation in support cases should be more like that provided for representation in treatment courts than that provided in a traditional contempt of court model; MCAD would like to move towards parity in case rates with the public defender’s office; MCAD would like to receive a greater proportion of the Marion County caseload. Olcott Thompson described the rate differential between MCAD and the public defenders office. He said consortia are being asked to fund improved supervision and evaluation out of attorney pay. Public defenders have other advantages such as access to student loan repayment assistance, and payment for cases on which they later withdraw based on conflicts. Consortia get paid only once in these cases. Judge Lipscomb said that when MCAD lost 30 percent of the caseload, the commission was looking for an improvement in quality. That has been accomplished. Lawyers will be judged for their performance based on the bar’s performance standards. The reduced caseload has affected MCAD’s ability to retain high quality, experienced lawyers. The consortium has also been unable to add new members.

Alan Karpinski appeared on behalf of the Multnomah Juvenile Defense Consortium. He said that it is sometimes a misperception to believe that consortia have more flexibility to adjust to declining caseloads than public defender offices. Although consortia do bring some flexibility to the process, adjustments cannot be made overnight and high quality representation depends on stable revenue.

Greg Hazarabedian, the executive director of the Lane County public defender office, spoke on behalf of the Oregon Criminal Defense Lawyers Association, of which he was the current president, and said that in his work in the legislature this year he heard praise for OPDS’s participation in the process.

Bert Putney, the executive director of Southern Oregon Public Defender, said that the Jackson County office had not made progress in the last biennium in narrowing the disparity between public defender pay and district attorney pay but that some ground had been gained in Josephine County although the disparity is still at about \$9,000 per person in Josephine.

Agenda Item No. 6 Training Opportunities for Public Defense Providers

Paul Levy said that providing systematic and comprehensive training is one statutory responsibilities of the Commission. The Oregon Criminal Defense Lawyers Association provides excellent educational programs. One component that is currently lacking in Oregon is comprehensive skills training, especially for new lawyers. A second issue is that not all lawyers are taking advantage of the opportunities that exist. With respect to skills training, the New Hampshire public defense system offers a five-week new lawyer training every fall. Their curriculum provides a model for what a comprehensive skills training program could look like in Oregon.

Commissioners discussed what the next steps should be.

MOTION: Peter Ozanne moved to put training opportunities on the list for service delivery review; John Potter seconded the motion; The motion carried. **VOTE 6-0.**

Agenda Item No. 4 PDSC Budget Report

Ingrid Swenson said that the legislature was planning to pass budget bills for public safety agencies, including PDSC in the near future. A bill to increase court fees also appeared to be moving forward. A portion of the fees collected under that measure would be allocated to the public defense budget. When the PDSC budget passed out of the Public Safety Subcommittee of the Joint Ways and Means Committee it included \$13.1 less than the agency's projected funding needs for the 09-11 biennium. PDSC would potentially be unable to provide public defense services in the final six weeks of the biennium. Revenue from the court fee bill could provide some of the funds needed. Kathryn Aylward said that PDSC's budget included a budget comment requiring it to advise the legislature in February, 2010 about any changes in caseload or increased costs for resentencings. Ingrid Swenson described pending legislative proposals that would decrease the demand for correction services, including one measure that would increase earned time credits for certain categories of inmates, some of whom would be entitled to court appointed counsel at resentencing hearings. Kathryn Aylward said that some of the measures under consideration, such as recategorizing some felonies as misdemeanors and some misdemeanors as violations could dramatically affect the public defense caseload.

Commissioner Lazenby inquired about the causes of the declining public defense caseload. Kathryn Aylward said that a number of possible explanations had been offered but that the causes aren't really known.

Agenda Item No. 3 Commission Discussion of Service Delivery Plan for Post Conviction Relief Cases

Ingrid Swenson said that one new development was that the post conviction relief caseload was also declining, allowing OPDS to concentrate a greater proportion of the caseload with a few providers. In addition the new performance standards can be used to enhance representation. A training on the standards will be offered in the near future.

Agenda Item No. 7 Annual Quality Assurance Task Force Site Visit Report

Paul Levy said that Jack Morris, the Chair of the Quality Assurance Task Force, was not available to make a presentation on the site visit process at today's hearing, but that on his behalf he wanted to acknowledge the generous contribution made by the attorneys who had volunteered to participate in peer reviews. Both they and the members of the task force have

made possible the success of a program that appears to be unique to Oregon. Commission members discussed possible ways of honoring participants for their hard work.

Agenda Item No. 8

OPDS Monthly Report

Ingrid Swenson presented a revised version of the proposed drug court guidelines. Commissioner Ozanne suggested that both judges and attorneys should be made aware of the amount of time that would be required for defense attorneys to observe the proposed guidelines. It might be appropriate to include this information in commentary to the guidelines. Ingrid Swenson suggested that attorneys and judges should be asked to comment on how much attorney time they felt compliance with the standards would require. Commissioner Lazenby said that defense attorneys should be allowed to comment on the practical application of the guidelines and what is realistic to expect.

Ingrid Swenson reported that funding was being sought in Congress for implementation of the the John R. Justice Act loan forgiveness act and that both Oregon senators had signed on in support of funding the measure.

Commissioners discussed the scheduling and agenda for a PDSC retreat to be held in conjunction with its September meeting in Eugene. Commissioner Ozanne suggested that one topic the Commission should consider is whether its energies should be put into deeper exploration of some of the issues that have come to its attention, rather than additional service delivery reviews.

Kathryn Aylward reported that OPDS is exploring a move to a less expensive location in Salem that would also be closer to the courts and the Department of Justice. If a suitable space is found the move would probably occur in March of 2010 when the current lease expires.

Peter Gartlan reported on the status of *Bowen v. Oregon*. He noted that several *amici* briefs had been received and that a conference to decide whether it would grant review would be held by the States Supreme Court in late September or early October. The Court has asked the state to respond to the petition. Its response is due on June 29.

MOTION: Chip Lazenby moved to adjourn the meeting; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, June 18, 2009
9:00 a.m. - 1:00 p.m.
Mt. Washington Room
Seventh Mountain Resort
Bend, Oregon 97301

MEMBERS PRESENT: Shaun McCrea
Peter Ozanne
John Potter
Chip Lazenby
Janet Stevens
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Paul Levy
Amy Jackson
Caroline Meyer
Billy Strehlow
Shelley Winn

(Meeting was called to order at 9:05 a.m.)

Agenda Item No. 1 Approval of the Minutes of PDSC's May 21, 2009 Meeting

0:46 Chair McCrea Good morning. We will commence the Public Defense Services Commission meeting here at Inn of the Seventh Mountain. Let's start with the action item, approval of the minutes. Does anyone have any additions or corrections? Well I noted, and this is very, very small, but on page 3, first full paragraph, we have a small typo where it starts out "do you quantify the differences between" and it should be "between." So with that proviso I would accept a motion to approve the minutes.

MOTION: Chip Lazenby moved to approve the minutes; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 2 Commission Discussion of Service Delivery Plan for Clackamas County

1:21 Chair McCrea Let's move on to our discussion of the service delivery plan for Clackamas County. Ingrid, would you give us a brief synopsis and kind of bring us up to date so we can move on from there.

1:36 I. Swenson I would be happy to, Madam Chair. Good morning. As you will recall we were in Clackamas County in March for our meeting. We met there in the courthouse. We learned that there are

11 circuit court judges in that county. One of them serves primarily as the juvenile court judge. John Foote is the district attorney. Although he didn't meet with you and talk with you, he did meet with OPDS staff and gave us some input. They have seven specialty courts in Clackamas County. There are five adult specialty courts and two in juvenile. The criminal caseload appears to be stable, the juvenile caseload declining a little bit. The county itself is growing and that is probably the reason that the caseload remains fairly stable. We heard from the juvenile court judge about the process there. She said that they have two principle days for juvenile court, and as you will recall, scheduling lawyers on those two days is quite difficult because they all have other practices. Some of them are part of the criminal consortium as well. Let me describe the two consortia. There are two providers, one for juvenile and civil commitment cases and one for criminal cases. CIDC is the criminal provider. It is a consortium and Ron Gray is the administrator. They have 27 attorneys currently. We heard their work described by a number of people as good, although there was an expression of some frustration with a few members who appear to be performing less well than others. They were certainly described as a partner in the local criminal justice system in Clackamas County. The juvenile consortium is the Independent Defense, let's see IDI, and I can't recall what it stands for, but it is an 11 attorney consortium. Some of the folks in the juvenile system described them as top notch. Others worry that some of them seem a little less engaged than others. They don't always meet with the clients prior to the court proceedings. They do not appear at shelter hearings. They have made an effort to do that and it hasn't worked out in that county. Client contact was probably the principle concern we heard about from the juvenile consortium. Both of these consortia have boards and there is some detail provided about the composition of those boards. The CIDC board is larger and comprised entirely of members at this point. They used to have an outside member but no longer – excuse me; I don't believe they ever did. IDI did have an outside member; however, that person has left the board so they have a board comprised of just members. There may be a CASA who has served on their board. After the meeting there Kathryn Aylward and I met with Judge Darling and with Marty Cohen, the administrator of the juvenile consortium to discuss some of the issues that she raised in our meeting. I think we had a very useful discussion. She was concerned about the quality of representation of children in particular. There was some discussion about directing cases to those attorneys who put in the best effort on behalf of child clients. That was one piece that they were going to look at and a number of others. Marty Cohen will be talking a little bit about some of things they have been doing and considering there. Mr. Gray testified at the hearing and essentially said that the question for you should be whether the model provides quality representation or not. Ron is here today and he will talk to you about his view on those issues. He said that micromanagement by the state is not necessary. Their board has been discussing some of the things that the Commission raised, and he will update you on where they are on those issues. We looked at the quality assurance work of the consortium and found that there was not really any organized way of evaluating attorneys. Consideration of a more organized approach to that effort is certainly under way. Judge Maurer, the presiding judge in the county, expressed a high level of satisfaction with the work of this consortium. Chair Ellis engaged him in a discussion about whether or not a public defender model might not serve the needs of the county as well as or potentially better than the consortium. He did not agree. He thought there were some benefits to both models, but he thought this model was working well there and hoped that it would remain in place. I have provided you a letter from Judge Maurer. He was given a copy of your report and the minutes of your earlier meetings. He asked that his letter be delivered to you today.

7:52 P. Ozanne

So the position of CIDC is if there are problems we shouldn't make recommendations, we should just tell them about the problems and they will address them. Is that the philosophy that Mr. Gray is proposing?

8:09 I. Swenson

I will let him speak for himself since he is here. I think they would agree that some changes are appropriate in response to some of the things that they heard and they are looking at those. I will let him speak about that. Then I attached for you - the Commission asked that certain

questions be directed to both of these consortia and that was done in writing. I have provided you the responses as Exhibits A and B. That is an update as to how both of them are addressing some of the issues that arose there.

8:57 Chair McCrea

Thank you, Ingrid. Let's go ahead and hear from Mr. Gray.

9:03 R. Gray

Thanks. I am going to address a couple of things real quickly here, and then I have – actually, two of our younger lawyers have volunteered to come and make a couple of comments about what goes on with CIDC, for about five minutes apiece. Then I am going to address several of the concerns from your body to me and recent things that we have done to deal with those. What I can tell you is that the five areas that I am going to comment on start out with what our two young lawyers are here to address and that is what happens whenever all of your lawyers who are in their fifties or early sixties start to phase out of this operation. What is going to happen with CIDC considering the number of lawyers that we already have in place? One of the things that I want to point out in that area is that about the last 10 lawyers who have been brought on board for CIDC have been under the age of 40 except for one. So even though we seek experienced lawyers we do have lawyers who are in their early 30s and mid-30s that are coming into the process. We are very aware of the fact that it is necessary to have lawyers come in that will be here for the long run, as well as lawyers that can bring in a wealth of experience. There is a balancing factor but statistically it is true that most of our new lawyers are under the age 40, a lot of them are under the age of 30, and we do have an active apprenticeship program and right now we have two lawyers, which is what we carry at any given time, who are involved in the apprenticeship program. It provides us a training ground for potential new lawyers should they pan out and we have openings, or create new openings, but also a way to evaluate them because obviously sometimes they don't pan out to be the kind of lawyer that will do a good job with a full load of criminal clients. That apprenticeship program has two valuable things for us: it is kind of a minor training ground for the lawyer to get to know the courts and our system, and to get paid and to integrate themselves into the local system and the bar, but also to give us a chance to evaluate lawyers that are brand new rather than give them a full caseload and end up with that maybe backfiring if they are incapable of handling what we initially perceive they can handle. Since I can speak to you from experience that a couple of apprentice lawyers have not panned out, I think the program has significant value. However we do bring in lawyers, obviously, for full-time caseloads, who have the qualifications and who we have checked out. Two of those lawyers are here today and I would like to have them speak briefly. They thought it important to come over here today and pitch in on their concerns about the future of CIDC and what drew them to this organization. They are Rhett Bernstein, whose father is a member of CIDC and has been for years. Rhett has been in the private sector as well as been a district attorney in Linn County, I believe, for a couple of years. Then we have Ben Kim who worked in the legal system in the State of California and moved up to Oregon. He came with extensive qualifications all the way up to homicide cases and a background in gang related issues. They both offered to come over here today and speak to you briefly. I would like to have them step up here now so that they can get back to their work.

12:47 P. Ozanne

Madame Chair, Ron, could I just ask you a question about this matter because I apologize. I have to step out for almost a half an hour for a crisis in Multnomah County. In reading the materials and the summary I just wanted to know what your view of the Commission's role is vis-à-vis the operation. I know you have indicated that the board said, "If it ain't broke don't fix it." There is a concern on the board's part about having an outside member. Are you saying we should just defer to whatever is happening?

13:25 R. Gray

No. I think that the role is to point out areas of concern and then have us address them. We may never come to a consensus, but I think what you are going to hear from me today is that every one of these issues has caused the board of directors of CIDC to revisit those areas and make plans for the future that I think will adequately deal with each of those concerns, including the outside member on the board. We have, through discussions at a board meeting,

with Judge Maurer, with Judge Selander, who was a founding member of CIDC who came to the board meeting and had a kind of “come to Jesus” meeting with the board about what we were originally set up to do and what our high points were that sold us to the state to contract with, and what he thinks we need to do for the future as well. We are going to be addressing the structure of the board, the future of a possible transition on the administrative side, the graying of CIDC, an update and review of our bylaws, and an attorney evaluation process that is now in effect. I am going to comment on those things that are all now in progress and ideas we have for the future. I am going to address all of those today. I don’t want to disregard any criticisms, but I think that being an organization of professionals you have the right to expect us to deal with them. We may not ever come to total agreement but as long as we protect the quality of representation to our clients by what we do, I think we have to be expected to effectively manage at the local level.

- 14:56 P. Ozanne That is a fair position. I hope I will be here for most of your presentation. My concern is – I hope you know how much I regard you and the consortium.
- 15:05 R. Gray I appreciate that.
- 15:05 P. Ozanne You have been one of the leaders in developing and holding out models, but I come back four years later and we still don’t have an attorney evaluation program in the county for either consortium. I am kind of wondering, and this is not to blame anybody, but do we have systematic issues in these programs that the Commission needs to think about taking a proactive role to, not particularly for your consortium. I am just wondering if it is just difficult at the local level to develop these. Maybe we need to offer some steps from the Commission.
- 15:51 R. Gray For example, your remark about evaluations, the board has agreed to do an extensive attorney evaluation this fall before the next contract is in place on every CIDC lawyer to see if they should continue with the contract. We have already sent out a client survey and we are in the process of drawing up, and just got approved by the judges, a judicial survey for every lawyer. We are going to tweak it a little bit and then it is going to go out to all the judges. We have asked for, and they have guaranteed, 100 percent feedback on evaluation of all of our lawyers.
- 16:19 P. Ozanne That is great. I know the challenges you face.
- 16:22 R. Gray We have taken those things to heart over the years. For client surveys I have drawn from some of the other contractors. And the president, Brad Jonasson, and I formed a committee and Brad took that over. They designed a client survey that went out this year to clients and there are still some results trickling in. Anybody who has done a client survey knows that they do trickle. These issues, as you are going to find from my comments, are all being addressed. Some of them are just works in progress right now.
- 16:58 Chair McCrea I want to defer these guys for just a couple of minutes. I want Commissioner Ozanne to be here, and I think they won’t mind a couple of more minutes, but since he will have to be out for his meeting, and those always seem to take longer than one expects, why don’t you go ahead with your comments, Ron, because I want him to be a part of this.
- 17:15 R. Gray First of all, regarding the concern about an outside member on the board, as you know and as you heard, we did have a non-CIDC lawyer on our board who was very valuable. In fact, he volunteered time on various committees for us, but decided it was time for him to not do that. When we talked about it with the board the question was who we could bring in from outside who would add some value to what we do. Then I talked to Judge Maurer specifically about that and then to Judge Selander, and actually Judge Maurer came up with what the board thought was a wonderful idea and then there are a couple of variations on that. We are going to investigate them. He immediately said, “Why don’t you bring in Senior Judge Bagley who would love to do work at the local level, who knows you, but has no economic interest in this

process and is not afraid to speak his mind.” I thought it was an absolutely wonderful idea, but we have other senior judges who might be interested as well. Then there are a couple of local attorneys, one who retired from CIDC many years ago but maintains a partial civil practice, Gary McClain, and then another one who is always part of the evaluation process for the appointment of judges, Don Bowerman, who might be interested as well. We are in the process now and the next step is for me to work with our president, Brad Jonasson, to make some contact with all of these individuals and see if we can get a level of interest from one of them, or maybe more than one, who might be willing to come in and give us their time on the board to give an outside perspective, but who have some sense of how the local system works so they don’t come in green. The board was very enthusiastic about that idea when we met last week. That is a work in progress. I expect in the near future, unless everybody just turns us down, that we are going to find somebody who is familiar with the way things work in Clackamas County, whether that be civilly or criminally, who will be willing to help us out. That is a big step for us to get back in that position. As I mentioned with the graying issue, and our young attorneys are going to talk about that, we are bringing in lawyers and we do have an apprenticeship program. We have a procedure in place for adding lawyers or seeking lawyers. We do still have intact a committee that takes all resumes, and letters of interest, and evaluates them, and checks the sources out. Then it reports to the board any time the board wants to add lawyers. They report on the whole group. They do not prioritize them. It is up to the board to decide which lawyer would be the best. That pool of applicants is not huge. We have had three recent inquiries and I have talked to all of those people except one who just recently inquired. I have to get back to that person and tell them to be patient for a month or so because we are kind of waiting on all the budget stuff to get set in place to see what we are going to do about caseloads and the appointment of cases. We just had an apprentice lawyer who went from a first tier contract, which lasts six months, to a second tier contract which allows for some misdemeanors and a few minor felonies for a second six-month period. That is as long as we extend an apprenticeship agreement - a year. We just had a local lawyer sign up. She started at the beginning of this month so she is on her first six-month misdemeanor contract to try to get to know our system and us, etc. As far the attorney evaluation, as I mentioned, we are in the process of receiving what I think are the final remnants of a client survey. We have completed a design for an attorney evaluation by the judges. Judge Maurer mentioned to me yesterday that he had a meeting with the judges and 100 percent agreed to participate. He explained some of the questions and he asked if we needed to tweak a couple of the questions. One of the concerns, for example, was the attorney’s negotiating ability. Unless you have a settlement conference judges don’t really know a lot about that. They wondered if maybe there could be a better way to phrase that question. I assume that survey will be finalized and out to the judges within the next couple of weeks. My goal and the board has agreed, is that this fall no later than September, we will have the information back. We will sit down and evaluate the results and evaluate the performance of our lawyers based on that survey and other comments from judges and prosecutors. We will have a real heart to heart about who is doing well, who is a good lawyer who we want to keep around but still needs to be trained in areas that seem defective, and if there are any people who just aren’t upholding their job. Contracts are written in such a way that they are not ever guaranteed to have a future contract. It would be a decision as to whether they even have a contract as of January 1 when the new contract period comes in. That is a work in progress. It takes a long time to design these surveys and the committee worked a lot of hours on it. Fortunately for the client survey, as I said I was able to work from samples from several other places. I started with the Roseburg example and then a sample from a couple of the public defender offices around the state that they were kind enough to share with me. We went from there. The unfortunate side of a client survey is that sometimes you are lucky to get 10 percent feedback just because court-appointed clients, once their case is done, just don’t want to have a thing to do with anybody anymore. I don’t know how much value is going to come out of that. I am hoping that some will but I have no way to predict that as this point. As far as our bylaws go, with some of the changes that we are talking about there are things in our bylaws that we figure we are going to have to update. The board has also agreed with my suggestion that our president, and a couple of members of

the CIDC, sit down and go through the bylaws to see if there are things that are antiquated, that aren't applicable anymore, that need to be revised, or any new things that we need to put in based on policies that we are now working on. So we are going to update our bylaws this year. I don't think that is a heavy job but it needs to be done. As far as my job as administrator, while I am flattered that everybody thinks that a lot of this organization succeeds or fails because of me and my work ethic, and probably my orneriness, and as Judge Selander says, and I won't quote him because I have before, I am willing to be the bad guy, and that is putting it politely, when the time comes. The question is if I decide to step down what happens? Is the strength of the organization affected? Is the quality control affected, all of that? After talking to Judge Maurer and Judge Selander, I came up with a thought and I bounced it off the board at our meeting on Friday and it was received very well and positively, so what we have decided to do is the following: I am going to, within CIDC, put out an email at the end of this week. What it is going to say, basically, is I am interested in who might be willing to get into a training mode as an administrator? There have been a couple people that have already stepped forward and said that they would be interested in doing it. The idea would be to take people along to local liaison meetings, take them along to any meetings that I go to at the state level, let them see how it works, make sure that they are reimbursed for the expenses so that are not just donating everything, kind of start this awareness process so that, we would have some knowledge on the part of one or two people who could step in if I were to get sick or something and we needed a back up administrator, although I will tell you that we have a couple of lawyers who are kind of qualified to come in now on an emergency basis. We are going to seek some interested people to kind of start an ongoing educational process about what I do and to go along to these meetings and meet everybody and see what happens as part of all the functions that I have engaged in as the administrator.

26:21 P. Ozanne

That is good because I think you are being far too modest to say that it would only takes months to learn what you do.

26:27 R. Gray

You are right about that. I thought about that for a long time. I sat down and made a list of everything that I do and then I started thinking there is no way on the planet somebody could pick this up in 30 days. So one of the things I have agreed to do also for the board is sit down and write out a protocol for when it comes time to pick an administrator. The amount of time I agree to donate, to training, the amount of time we expect to train, how that will be compensated and all of that. I am going to structure something out for the board which will then become part of the bylaws as far as succeeding administrator. I will tell you, absent something happening that I can't fathom, it is likely that I will be around for at least five more years. I am only 55 and I am too ornery to quit, but I have no problem starting the training process. The question was is somebody going to want to sit there and be a trainee for five or 10 years? I can't answer that question but it will be a lot easier to pass the baton if somebody has learned a lot of the ropes and can step in. So as far as the concerns that I was asked to address and to think about, it was kind of like saying, "Geez, you hold us out as a model, and then you start saying, 'well, what about this, and this, and this?'" We decided to seriously take a second look at the board structure with an outside member, a successor administrator, the aging of the group, and the evaluation of lawyers. I have added in a fifth column which is a review and update of our bylaws. That is something that we think is integral in all that and that is making sure that our rules are consistent with whatever changes we make. We don't belittle anything that this board brings to our board. We may not always agree, but we are certainly willing to look at it. One of things, obviously, that I personally am invested in is quality control. I have always insisted that we have some kind of structure at the local level, and now everybody is on board with it especially being involved at the state level for quality control. It would be hypocritical if I wouldn't do it at the local level.

28:45 Chair McCrea

Ron, I have a follow up question while Commissioner Ozanne is still here. One of the issues that was brought up to you in Exhibit A, and the questions that we posed to you, was, in addition to using an outside board member consideration should be given to eliminating

permanent positions and staggering the terms. Right now your board has five permanent members and four rotating members. Was there any discussion of that with your board?

29:08 R. Gray

The rotating positions are staggered terms already. They don't all rotate at the same time. Every year we bring in two new board members, every calendar year.

29:22 Chair McCrea

And what about the permanent positions?

29:21 R. Gray

I think probably what you would find is that if we go to an outside board member that would take one of the permanent positions. That would be the plan of the board. We wouldn't want to bring in somebody and say, "We want you to bring in your expertise but for only a year or two and then leave us." We would leave them the option. I think our preference would be if we bring in an outside person that they feel like they are going to be around for a while. We actually drafted somebody to fill the fifth permanent position. Now let me explain, the only reason that that exists is because of that philosophy that Judge Selander spoke to our group about. He said that the reason that we decided originally to have permanent positions was to continue the philosophy that got us the original contract. To make sure that we carried out those programs that sold us to the state, that held us out as different, that made us better. It was strictly for a continuity of perspective that we decided to do it in that kind of a fashion, but originally we had a permanent board member who was a non-criminal defense person. We are willing to flex back into anything that makes it effective, but that is why we were in that position. The idea of having rotating members was to give every single CIDC lawyer, no matter what their experience level was, a position on the board if they wanted it. We are very careful to try to bring in everybody that wants to be active on the board. Nobody is excluded.

30:51 Chair McCrea

Commissioner Ozanne, did you have any other questions or comments that you want to make? I know your time is running.

30:57 P. Ozanne

Not right now. Thank you, Ron. I appreciate it.

31:00 J. Potter

I have a quick question. You mentioned the bylaws a few times. Are the bylaws a policy document or are they a two-page overview? How do you use your bylaws?

31:13 R. Gray

Our bylaws not only are a structural document but we built into them all the requirements for the individual lawyers, the contractual requirements, the contributing to the brief bank, all of those things. It is a pretty detailed document. I have had some sense of surprise whenever I have been asked by other organizations to send copies of our bylaws out. One of the comments that I get back is we thought it would be kind of a bare bones document. It is very detailed. We could have just put all of that in a separate document and just incorporated it, but we were young and we just did the best we could when we wrote up the bylaws. That was over 20 years ago. That is why I think it needs to be revisited, because it has been around for a while. I don't think we have changed anything in our bylaws in that 20 years.

32:11 Chair McCrea

Other comments, questions? Judge Welch, any comments or questions?

32:18 Hon. Elizabeth Welch

No. Thank you.

32:20 Chair McCrea

Thanks, Ron. Sorry to defer it but I appreciate your patience.

32:28 B. Kim

My name is Benjamin Kim. To be perfectly candid, I don't know a lot about the issues that you are all dealing with regarding CIDC. The question that was posed was that this board was considering whether this should be replaced with some sort of public defender model. I can only speak to my experience. I have been practicing law for about 15 years. I appreciate being called a young lawyer. The bulk of my practice was in Los Angeles. I was a Los Angeles Deputy District Attorney for about 11 years. As Ron referred to, I did a lot of things

in the DA's office down there. In my last few years I was assigned a unit where I was solely responsible for gang related homicides. I carried a calendar of 15 to 20 homicide cases that we would continuously handle and largely in the City of Compton. At some point my wife and I decided we no longer wanted to raise our children in Los Angeles and so we looked for places to move. We really looked all over the map and we decided on the Pacific Northwest. Because I knew I was going to be a criminal defense attorney we focused on the two major metropolitan cities, Portland and Seattle. What particularly drew us to Portland was that I did my research and I found out about this consortium in Clackamas County. I thought that that for me was the perfect model as a practicing lawyer. I had no intention of becoming a public defender. I did not want to work for a governmental agency or a private firm. I wanted to open up my own practice. I did want to be involved with some sort of public defense both for personal and economic reasons. This model for me was perfect. I don't know if Mr. Gray remembers but I actually called him several times trying to put out feelers whether or not a position in this consortium would be available. We moved up here about there years ago. I think I joined the consortium about two and a half years ago. My office is in Oregon City. I do have a private practice. I handle cases throughout Oregon. I do work in Multnomah County as well. I would say at least half of my cases are certainly from Clackamas County and half of my law practice. From my experience it is a great model, not only for the clients that I represent but me personally. I can say that if this was a public defender's office, and I have many public defender friends both in Portland and California, I would not have joined. I would not be representing court appointed cases in Clackamas County as a public defender. I appreciate too much my ability to have a private practice and have a wide range of clients. If this Commission decides to end the consortium and turn it into that public defender model I strongly anticipate that that would be the end of my representation in Clackamas County on this type of case. I would most likely move my office to Portland. Other than that, I really don't have any comments. I thought it might be beneficial for you and I appreciate the opportunity for you to hear a young lawyer's perspective. Thank you very much.

36:25 P. Ozanne

I have a question. I apologize for stepping out. The people at the meeting I attended said they didn't need me. If a classmate of yours wanted to move to Clackamas County and practice criminal law, what would you advise them? How would they go about it?

36:50 B. Kim

From Los Angeles?

36:51 P. Ozanne

From anywhere. Your classmate. How do you get to practice criminal law in Clackamas?

37:01 B. Kim

For me CIDC was able to quickly introduce me to Oregon law. I had already been a criminal attorney for many years. I don't feel I needed a lot of training in general criminal law, but as I am discovering, of course, in Oregon every county is different. In Los Angeles we were pretty much standardized and the rules of court were pretty much the same. I quickly learned that what goes in Washington County is not the same as what goes in Clackamas County, which is not what goes on in Multnomah County. I did feel like I needed some sort of introduction. Even what cases are worth. That is something that is hard to learn unless you practice.

37:51 P. Ozanne

Maybe my question wasn't very well put. How did you get in touch with the consortium? Did they get in touch with you? How did that work?

37:58 B. Kim

I initially talked to some attorneys from Portland and I discussed with them practicing in Portland. A number of attorneys steered me towards the consortium and Clackamas County. I live in Clackamas County so it had that appeal. Upon moving here my initial thought was not to practice in Clackamas County. It was to base my practice in Portland. But I can honestly say what drew me to Clackamas County was the consortium itself. If I had a classmate or a friend who was also interested, who I thought was a qualified attorney; I would wholeheartedly recommend application into that consortium. I think it is a great model.

- 38:49 R. Gray He called me about six times and asked me about the organization and how it was set up and what possibility there would be to get hooked up with the organization. Then I also got a couple of reference phone calls from people that knew Ben that said this is his level of experience and he would be a great asset to your group. He made an application. I had talked to him more than I do normally to applicants and was able to relay that reference information to the board whenever we were looking at adding a lawyer. Because of his vast experience, and also because he would be around for a long time if he joined us, it was a pretty easy pick. You don't find lawyers coming in with his degree of experience very often. He stayed in touch and kept his interest alive until he moved up here.
- 39:52 I. Swenson Could I follow up on Peter's question? I think one of the questions was what if there weren't an opening? You have a limited membership. Does a person have to wait a couple of years to find a place in your consortium? Can you make room for them?
- 40:08 R. Gray Lately, the caseload has been down slightly. I think a lot of people think there is this real easy decision process as to when it is right to add a lawyer. What I can tell you is that virtually every board meeting where we bring up the subject and it is almost every single board meeting, we ask, "Should we add, should we subtract, what are we doing with the lawyer numbers and all that?" We basically end up with something short of a fistfight. There is an always a divergence of opinions. We have to work toward building a consensus. There are some of us that always believe that expansion up to a certain number is a good idea, but it is difficult to justify expansion whenever the caseload goes down or whenever you say, "I'm not sure what the budget is going to do right now. We kind of have to wait and see how that pans out." I have given that particular information to that last three applicants and said, "Don't give up. Hold on until we get some of these issues we are dealing with right now settled. Then we will look at the numbers and the board will be making decisions." I happen to be an advocate that we ought to be around 30 lawyers. The only reason I say 30 is because originally, when I took the job, I figured 15 lawyers was enough sheep for me to herd. Then it got up to 20, and then 25, and then we actually did get up to 30 at one point. There comes kind of a management level where it becomes a little bit hairier. It is driven by case numbers. It is driven by the attitude of the board. When he came on, we had recently had a lawyer that had left and so it was relatively easy to tell Ben we were considering an opening right now when he moved up here, but we have gone through periods where we have expanded by one or two lawyers based upon the number of lawyers that we want in. I expect that with this quality evaluation this year, to be honest with you, that it is conceivable that we will be looking at at least two more openings this fall. To be quite candid with you and it would be naïve for me to say, but I think there are going to be a couple of lawyers that are going to be weeded out of the group by the end of year based on the evaluations that I anticipate. Then if the caseload starts to rise back up then that is always a hot issue for the board, too. The population of Clackamas County keeps growing. It is kind of amazing to me that the crime rate has stabilized with the population increasing because in east Clackamas County the development is just hot. Neighborhoods are going in by leaps and bounds and so you would expect there would be some commensurate rise in crime, but it has kind of leveled off right now. I can't give you an explanation why. I expect that will change in the future. So when people call I am honest with them. I tell them, "This is where we are. We are in the process of adding some, so give me your resume," or, "It is going to be considered but it might be a couple of months but get it to me anyway and keep your interest up."
- 43:18 Chair McCrea Ron, just for clarification, the 27 lawyers don't each have an equal piece of the pie. Is that right? I think you mentioned somebody this morning is going to have a misdemeanor contract?
- 43:30 R. Gray The apprentices are misdemeanors only when they start and it is a limited number of misdemeanors. It is not a full caseload of misdemeanors. Then a second contract they get on top of that number is they get like six minor felonies during the six months. It is a limited number.

43:47 Chair McCrea For the apprentices but for everybody else is it an equal number?

43:51 R. Gray It depends on where they are. We have a rotation for PVs, a rotation for misdemeanors, a rotation for felonies, a rotation for Ballot Measure 11s, and a homicide rotation. The goal is to get everybody all the way up to the Ballot Measure 11 rotation and then it is equal. It is equal within each rotation, by the way. Then the homicide is the only rotation that is voluntary. I think about half our lawyers are on that list. More of our lawyers are homicide qualified but they are not all electing to take those cases. It is all done on a rotation basis. It has been since the creation and it has been my demand that it stay that way because it is easier to manage if attorneys cannot pick and choose their cases. We don't have a star system or a priority system among the lawyers. If you are qualified you take the case. You are not going to pick and choose your clients. We do have one mechanism where once a year a lawyer can opt off a case without an excuse because of some perceived problem they may have with the case or the defendant. That is just as a courtesy to the lawyer and it is called "a bite of the apple," and they only get one every 12 months.

45:03 Chair McCrea Got it.

45:03 R. Gray Other than that you get the case unless there is an ethical conflict that develops or the client creates a conflict. We have walked lawyers up. We have trained lawyers who came in misdemeanor qualified. Then whenever they met state certification qualifications for felonies, they came to me and I approved them. That is one of my jobs. Then we would start giving them felonies. Then whenever they became Ballot Measure 11 qualified we would start giving them Ballot Measure 11 cases. We do have the ability to walk a lawyer up to higher and higher levels.

45:37 Chair McCrea Got it. Okay. Ben, anything else you want to tell us?

45:40 B. Kim No. I think that is it. It is very nice to see John Potter. I get emails from you all the time. Now I can put a face to it. Thank you.

45:52 R. Bernstein My name is Rhett Bernstein. I have been practicing law since 2002. I grew up in West Linn and went up to the University of Puget Sound and came back to Lewis and Clark College for law school. After I graduated I did a stint with the Linn County District Attorney's Office where I prosecuted everything from murder all the way down to minor crimes. When I left I was in the middle of prosecuting an attempted murder. I got tired of working with government. I wanted to have my own practice. I began actively searching for an opportunity to do that. It is no secret my father, Jim Bernstein, had been with CIDC for some time. I think that what is assumed is that working with my father was something that I really wanted to do, which isn't the case at all. My comments are going to mirror Ben's comments. I can tell you the point of being here is to tell you that I would never, ever want to be a part of a public defender model.

47:01 Chair McCrea Why?

47:01 R. Bernstein I enjoy very, very much having the ability to represent indigent clients but at the same time do other things. I have enjoyed developing maybe 10 to 15 percent of my practice doing wills and trusts. I rent from an attorney named Dean Werst who has been doing that kind of law for a long time. I have enjoyed getting into some areas where I don't have to argue incessantly with people during the whole case. It gives me an opportunity to service other folks who I wouldn't ordinarily have an opportunity to. I want to be a good trial attorney, so I think it is important for me to put myself in other areas such as personal injury law where I can develop those skills. I have been privileged to be asked to serve as the prosecuting attorney for the City of West Linn. I am able to keep some of my prosecution skills going as well. I believe that I am the lawyer that I am today, that I have the reputation that I do for whatever it is

worth, that I have been asked to do things like sit on the Clackamas County Bar Association Board, and to sit on the CIDC board at such a young age - I am 32, by the way and I am easily the youngest member of CIDC - because I have been able to make mistakes in other areas and take those mistakes and develop skills in this area. If I were to be pigeon holed into such a model, I don't believe I would be able to cultivate that side of my practice, which is one of the main reasons that I enjoy it. I just don't think that you are going to find that folks at my age, Ben's age, who have been able to pick up those skills who will want to make a complete career of serving in a model like that. I fully intend to be here as long as I am allowed to be here. I am raising my family in Clackamas County. I enjoy what I do very much, but I am fully prepared to step away from it if it means that I need to step into a new kind of model. I wanted you to see a face that wasn't as gray, although I am graying. I fully understand why the presumption is that Clackamas County appears to be a bunch of old folks protecting their turf, but frankly I think that is really just the perception that you see. I don't think that that is the reality of the way business is done. At a young age I have been welcomed into the judge's chambers to interact on how the practice of law is done on indigent defense type crimes and other crimes that I have been retained on. I don't find it to be a closed system at all. I remember before I was a member of CIDC having a conversation with Ron and felt like I was wasting his time. Maybe that was because I was just out of law school, but I didn't have to work diligently to get my foot in the door of CIDC. I saw an ad. I made an application. I believe my dad was excluded from having any involvement in that at all. I had all of the defense attorneys that I had worked with as a DA make letters of recommendation. I think I got in on my own merits and I found it to be an easy transition into what I was doing. I quickly took on larger and larger responsibilities. This year I chaired my first aggravated murder and I look forward to more experiences like that. If I am the kind of lawyer, and my skills and my approach to providing a committed practice are what you are looking for then this is the model that attracts me. I can't say that someone else in my shoes with my kind of skill, for what it is worth, wouldn't be attracted to a public defender model. I can only speak to where I am coming from. My hope is that you will start to see some of the younger faces and not see the folks that have been there for a long time and start to identify CIDC with some younger faces. I appreciate the concerns and I think they are valid, but as a member of the board I can tell you that those concerns are respected. I will let Ron speak to those in detail. If there are any questions that I can answer I will be happy to.

51:33 Chair McCrea

Questions?

51:31 R. Gray

One of the things that I might say is that Rhett is an example of the young attorneys that not only practice but participate on the board of directors. We do have younger lawyers that rotate in and serve on the board of directors who are not afraid to speak their minds and are very active. They come up with some very good ideas, at times, and we encourage that. Rhett is probably one of the most active and I am pretty sure that he can tell you that at no time has he ever felt that his opinion, or anything that he has offered, has been slighted or rejected simply because he is a newcomer. We have encouraged him and all of the young attorneys to be active from the beginning and to volunteer to be on the board of directors, so they feel like they have more value than just getting a caseload. He is probably one of the more energetic but he is a fine example of how all that works.

52:30 R. Bernstein

Let me speak to one more thing. This idea that we add folks slowly. It has been a little while. I think Ben is the last person that we added. I have read all of the minutes of the meetings, and I have read the review of the minutes of meetings at your last meeting. The truth is the case numbers have gone down and the fear of what the budget looks like, having gone through that as a district attorney, is real. It is very difficult to bring somebody in and not be able to tell them you can rely on this much income from the work that you do. I know that the model originally was that attorneys would bring in no more than 50 percent of their income from CIDC and then they would take the rest of it from whatever else they are doing. I can tell you from my experience and having been in the county for three or four years now, that CIDC is on average about 30 percent of what I bring in. That is fine because it gives me the

challenges to do these other things, but allows me to benefit from it as well. I would be the first, because I benefitted from coming into this program at a relatively early stage in my career, to add someone new. Do I think it would have been responsible over the last 18 months? I really don't believe so. If someone had brought me in during this particular period of time and I made my home and my practice in Clackamas County only to learn that, "What do you know, we are going to be cutting back on all C felonies and below and we are just going to have to make do." That would just be a really hard thing for a new attorney, a young attorney to take on. I have been one that has staunchly suggested that we wait until the numbers even out. I have seen that level of income drop since my first year. Thank you.

54:14 Chair McCrea

Thanks.

54:15 P. Ozanne

I guess I would just comment, or maybe someone can correct me, but unfortunately I wasn't at the full hearing in the county. In reading the record and having some experience and background with Clackamas County, I for one at least, had not suggested or really inquired as to a public defender model in Clackamas County. There has been that experience in the past and it was kind of a mixed, difficult experience. For me I sense that the Commission, in the past, just wanted to make the consortium as good as potentially possible. The absence of an employee/employer relationship is frankly a hurdle that has to be overcome particularly with respect to quality. Quality is even a challenge when you have an employee/employer relationship. We have held out Clackamas as a model. As Ron says, we are suggesting that even models can be improved. It will be interesting to see, and probably not in my lifetime, but if Clackamas County grows, how many lawyers, as you two gentleman have expressed, will be able to maintain practices in both criminal and civil. The large urban centers, and maybe Los Angeles is different, but in the ones that I have practiced in it is very difficult and people usually wind up specializing, but as long as you can do it we are not particularly interested in interfering.

55:45 B. Kim

My practice is solely criminal.

55:50 P. Ozanne

That tends to happen when a place gets a couple of hundred thousand people and there are lots of lawyers.

55:58 Chair McCrea

I think the concern, Peter, comes from a comment that the chair made on page 19, of the report, from the meeting on March 12. Chair Ellis said that "Clackamas County is the only remaining metropolitan county with a single provider system," and that he wanted to make sure that the single consortium model was the appropriate one. I think there has been sort of a keying in on that, thinking it means, "Oh, a looming public defender," when it is more - the other thing that the chair said was that, which we all know, is that each community is different and public defense needs may be different in each county. Our goal, as the Commission, is to make sure that we have quality and economy. That is what we are focused on. I will say that I am pleased with the response to the concerns that the Commission has shared with CIDC. I appreciate your comments and we will see what happens with the evaluations and with the other actions that you are taking.

56:55 P. Ozanne

I take the comments by Chair Ellis - I would have to ask him, of course - to point towards another issue we have, which the federal government is facing now - working with people who are too big to fail. I think that is something we have to think about whatever the model is in every county. Do we have a sole provider and are we essentially granting a monopoly? I think one of the benefits of the mixed model is that we get some competition. Again, I am not suggesting that we do that. But I think that that, rather than a public defender issue, is what we are looking at with a sole provider. There is no agenda to develop a public defender as far I can tell. I certainly don't support it.

57:43 Chair McCrea

Thank you.

57:40 R. Gray Do you need anything else from me?

57:40 Chair McCrea Just your continued support and participation.

57:47 R. Gray You have that. I have to be back in court this afternoon. I wanted to make sure before I slid out the door.

57:53 Chair McCrea No. I think we are good.

58:03 I. Swenson I think we want to hear from Marty Cohen and whomever else.

58:15 Hon. Elizabeth Welch Madam Chair?

58:20 Chair McCrea Yes.

58:20 Hon. Elizabeth Welch I am going to talk for a minute.

58:26 Chair McCrea Of course you may. Go ahead.

58:26 Hon. Elizabeth Welch I could hear Mr. Gray whenever he talked and my guess is he just has a nice loud voice and maybe doesn't turn away from the microphone. I missed a lot of what everybody else had to say. I would like to hang in here but would just ask that people try and talk a little louder.

58:52 Chair McCrea Okay. Kathryn is going to move you closer so you can hear better. You let us know. Could you hear that?

59:05 Hon. Elizabeth Welch Yes. Thank you.

59:05 M. Cohen Good morning. I see that you got a copy of my letter which was a response to some of the questions that were raised earlier. I think that is Exhibit B to Attachment 2. I can elaborate some on that. I would say that our numbers have been significantly reduced over what we had initially predicted for the current biennium, which is a first for us. For some reason over all the years that we have been doing these contracts and representing people in juvenile court, and Clackamas County, and doing civil commitment hearings, our numbers have been pretty much right on. We have had about a 50 percent reduction in our numbers over the last year and a half or so. In terms of how we are dealing with that as far as adding attorneys, if someone is going to be dropping out then we are going to add someone to take their place. We have added some attorneys over the lifetime of our contract. We have grown from an initial four attorneys to now 11 and that has dealt with an increase in caseload over that period of time. At least at the current time, given the drop in numbers, given the uncertainty of funding, we are definitely going to be on hold. We did have one attorney who had been with us for a number of years who is no longer a member of our organization. We have added an attorney, a much younger attorney, who's sharing space in Mike Clancey's office to take that attorney's place. Mr. Clancey is mentoring that attorney and helping her learn the ropes and has been doing that for a number of months now. She is formally a part of our organization. One of the issues that has been brought up here this morning that was brought up at the earlier meeting in Oregon City that, unfortunately, I wasn't able to be at since I was out of town, dealt with the issues of attorneys not doing this full-time, so not doing juvenile court full-time and all of our attorneys only do this on a part-time basis. There are different percentages for the different attorneys. We have some attorneys in our group who are also in the CIDC group. They have a limited share, in terms of the number of cases that they get. There are other attorneys who are not in the CIDC group and they get a larger percentage of the cases as

they come in. That is just a matter of how the cases are distributed through the court, both dependency and delinquency cases.

1:02:40 P. Ozanne

Marty, did you interpret the question as a concern? Based on my experience on the Commission, one of the advantages of a consortium is that, at least theoretically, there are people practicing other things, so when the caseload flexes people, again theoretically, can flex. Did you pick up some concern?

1:02:59 M. Cohen

That has always been my philosophy, that it does allow that flexibility. I have always encouraged all of the attorneys in our group to find other interests in their practice so that in these down times they are not going to be hurting as badly financially. One of the issues, and Judge Darling spoke at the last meeting about the difficulty in scheduling, that if an attorney had something going on in court in the adult system that they weren't available when she needed them at the juvenile court. The fact of the matter is that Judge Darling does not hear very many trials. The trials are sent to the judges at the downtown courthouse for the juvenile court in most situations. The hearings that she has are just preliminary hearings, review hearings, shelter hearings, and so even if the attorney were only doing juvenile court, if they had a trial scheduled we were still going to have those scheduling problems.

1:04:27 P. Ozanne

So the concern came from the judge's comments?

1:04:27 M. Cohen

The concern did come from the judge's comment. On the other hand, Judge Darling made the comment that she felt that it was a benefit for us to be doing other things. Some of us do domestic relations work. I do social security disability work. Those other areas of the law give us a lot of expertise that help us in dealing with juvenile court and civil commitment hearings. I see that as advantageous. One of the questions raised was in terms of members of the boards. We are trying to answer some of those. We have three of the attorneys who have been board members for pretty much the life of our group. We added a member a number of years ago, an outside member who is a non-attorney, who is a CASA. He has been helpful in giving us advice as to how to deal with some of the issues that have come up. We would like to add another non-attorney member, maybe somebody whose expertise is in the field of education that would give us some expertise there in how to deal with the kinds of the cases that we see. Also, perhaps, we could rotate through on an annual basis one of the attorneys in our group so that they can see how the board works and the kinds of issues that we deal with. Although I must say that our group is much smaller than CIDC we work collaborately. The board meets every few months. We meet, as a group of attorneys, every few months and we really deal with a lot of the same issues whether it is as a board or a group of 11 attorneys trying to address some of the concerns that have come up. Ms. Canaday is here and she can talk to you about some of the things that are on the dependency side with those cases. She has also been working on the evaluation and what we are trying to do to address that.

1:07:02 G. Canaday

I always defend the Commission's meetings to our group by saying that improvements are always in everybody's best interests. I have taken the process and have kind of gone a step forward to be a little bit more proactive. In saying that I just wanted to let you know that we take things seriously, and the one thing that has really come to light is in the dependency area that we want to step up the representation of children. We have decided to do a pilot project for the next six months. We are going to have two attorneys who are specializing in children's cases. We have expanded the evaluation process that we are using for that, and we are actually trying to advocate for more educational services, assessments, and developmental issues, so that we don't necessarily go hand in hand with what DHS has desired for children, but have to really be a watchdog for children and to ensure that everything that they need is being provided. Keeping in mind that the money that the DHS offices will have available to them will be dissipating a little bit. We are seeing a vast improvement with the partnering with the CASAs as well as the care providers in dealing with children's issues. In terms of the advantages of that, I think the quality of representation will definitely be better. I think that the people who are going to be doing that are invested in doing things that will improve a

child's well-being, as well as hopefully, in terms of the safety model that DHS is using, it will help to improve the dynamics in a family situation so that children may be able to be safely reunified, and if not, maybe there are some other options available through relatives. In terms of the partnering with community resources, we have been actively engaged in meetings with our judge and DHS. We try and do those on a monthly basis. We have tried to work our docket so that it meets everybody's needs, the court, who is very protective of her time, as well as having all attorneys and parties be available along with DHS and CASAs so that we can try and resolve cases on a settlement basis that doesn't interfere with docket time. This has been an ongoing work in process since we were first involved in this contract in how to use judicial time, not wasting her time, by gathering at the docket time. We are going to go outside of our docketing time and do settlement conferences similar to Multnomah County's model but on hours that probably no one else would probably want to do, so before court time, during lunch time, so that we have an engagement of all the partners and parties and then not waste the court time. The advantage to that is that we will be within all the mandated time periods and time frames for resolution of cases. I know in other counties they do case counts in a different way than Clackamas County. I think on paper our numbers are down but I think it is a result of having different ways of measuring cases. I know that that even the way the state counts cases may be a little bit different than how we do that in Clackamas County. In terms of expanding board members, we have been talking with people who have expressed interest in being on the board and in our group. I think, as Marty has stated, it is difficult when our numbers are tremendously down. I think that in terms of our actual case counts, I think since 2007 that we are probably at half the numbers for the individual attorneys in the group. Those are some of the realities of being in an indigent based defense model. There was a statement that Ingrid had made earlier that talked about attorneys being present at shelter hearings. I think that was probably a misstatement. I think that we have attorneys available at all delinquency prelims, but the court has agreed that it is not necessary to have an attorney present at a dependency prelim. However, if there is a shelter hearing there are attorneys present for the shelter hearing. Sometimes when cases come into Clackamas County, Judge Darling does, I think, a very thorough job of determining whether or not there should be shelter care findings and whether or not DHS needs to reconsider their recommendation for placing children out of a parent's home. Having recently discussed that with her, we had suggested that we could have the attorneys that are going to be specializing in the children's cases for that pilot project; they could be present for those hearings, but she kind of dismissed that idea saying that it wasn't necessary at the preliminary hearing. We are willing to make changes, but again we have to keep what our judge says in mind when we make those changes. I feel that we are kind of responding to the inquiries that were made. If there are any questions I will try and answer them.

1:13:14 Chair McCrea Judge Welch, do you have any questions?

1:13:15 Hon. Elizabeth Welch

My goodness, yes, sure. I guess I am going to talk in a little bit, I believe, and maybe it is not so much questions but concerns. Maybe some of the Commissioners don't know this but I live in Clackamas County and I sit in the juvenile court there from time to time to cover for Judge Darling when she isn't able to cover the docket. I have known most of the lawyers fairly well for a very long time. They are not personal friends, but – well one thing is there are a lot of them who are pretty close to being my contemporaries for whatever that is worth. My biggest concern, as an observer, not so much in response to Gay or Marty's comments, relates to the zealotry of representation across the board, all categories of cases. It is an issue that is very common with experienced lawyers and I think it is one of the dilemmas about working in the juvenile system and that is where the line is between doing what is best for your client and representing what your client wants. I think it is a much harder than people who have not done that work have any way to understand. As a result, I think one of the things I have seen all over the state, in my travels, is a lot of very quiet lawyers in the courtroom and it is very distressing to me. I think Gay understands what I am saying. She and I haven't ever had a conversation about this. Your project sounds very interesting and

might be a good place to start in terms of maybe talking more. Although lawyers (inaudible) when I talk about my dilemma that I have tried to describe from time to time, because everybody recognizes it as a problem. If that is a question, Gay, you may have a comment. I think I will keep myself to that observation.

- 1:16:09 G. Canaday Well, obviously, Betsy has seen a lot. She has been very involved in the family law and juvenile system. I would be interested in talking with you about it and what exactly you are focused on a little bit. I think that in the 30 minutes that are usually allotted for these hearings on the juvenile docket that it is difficult to really do an in depth assessment of anybody's particular case. You are really doing highlights of what is going on in a case. If there was really to be the best efforts in everybody's representation, I think that we would be allocating a lot more time in the hearing process. I think there is a lot of work that goes on behind the scenes that isn't necessarily brought up in a courtroom situation.
- 1:17:18 M. Cohen A comment that I would have, and a comment that someone made in a prior presentation, is how – although we have got the same laws throughout the state that each county does things differently and I know from what others have told me is that there are certain kinds of hearings that we have in Clackamas County that the court may allot 15 or 20 minutes for but those hearings may last hours in other counties. If we are going to be more zealous, perhaps, or zealous in a different way, we are going to have negotiate with the court to have more time to be able to deal with that. The part of the give and take is, as Ms. Canaday has said, is that we do a lot of this work with the DHS worker, with the district attorney's office, we have the parties outside of that court setting to try and resolve, as best we can, the issues that we have. The issues that can't be resolved obviously those are going to be dealt with before the court.
- 1:18:34 Chair McCrea Other questions, comments by other Commissioners?
- 1:18:40 P. Ozanne I can safely say since I haven't looked at the juvenile system in Clackamas County, except to have worked closely with Marty and his colleagues in terms of just the concept of consortium. I haven't seen the court, but we are dealing, as some wise former Chief Justice told me when I was holding Ingrid's job, we are dealing with cultures and the cultures vary widely and surprisingly so in juvenile law. I think that a lot of it has to do with the judges and the culture they create. I am not sure negotiating with the judges is what we want you to do. We want you to assert your client's rights as strongly as you can. In several counties I have observed really alarming quietness, as Judge Welch says, and as I said I haven't been to Clackamas, but, frankly, it is promoted by the judges. We are kind of pushing and (inaudible) in some ways, by trying to upgrade juvenile practice through defense. It is a culture problem.
- 1:19:43 G. Canaday I can say that in all my years of practice, I have thought that this year was probably the most interesting year in terms of how many cases have been appealed from our juvenile court. In Judge Darling's own words, it is like a case a week. I am under the impression that even though things might seem tame in the courtroom, that people are taking appropriate steps when things are in disagreement. The other thing is, just on the civil commitment side since that is my specialty, I can tell you that the number of hearings that are actually contested, civil commitment hearings in Clackamas County, have probably been reduced by 75 percent because of the number of cases that have gone up on appeal as well as the referee that is doing those cases has really followed the letter of the law, so that is an improvement. I think that is a good situation.
- 1:20:59 M. Cohen I have one other comment and it is indirectly related to the what Judge Welch just said in terms of that line that attorneys in juvenile cases have to walk between what is best for their client and what their client wants. I would agree with her comments on that. I do the delinquency drug court in Clackamas County. We also have a dependency drug court and I think that it would be helpful – well, let me back up. In drug court, I think there are those same issues because the lines are blurred in terms of everybody's role in drug court. It would be helpful for the people that do the drug courts in the state, perhaps even the juvenile courts

in the state, to get together and talk about those kinds of issues and how they, as individual attorneys or as groups, deal with them. I have been to some drug court conferences and there have been some sessions that have dealt with those issues. They are always interesting discussions. I think within the state that it would be helpful for us to get together and talk about those kinds of things.

1:22:25 Chair McCrea

Thank you. So Ingrid, where do we go from here?

1:22:32 I. Swenson

Madam Chair and Commissioners, one quick follow up to Judge's Welch's comment. I wanted to let you know that she, and Kathryn Aylward and I have met, and she and I talked recently too, about some of these issues. We need to incorporate into the contracting process a more detailed discussion of our expectations of juvenile lawyers. It is a good time and place to do it. There are a number of steps we have taken to provide them guidance. We issued a statement of what we thought the role of counsel is on behalf of children and youth. The bar rules speak very clearly to juvenile lawyers about their obligations to clients in those cases as well as other cases. After you amended the qualification standards last month, they no longer just refer to the performance standards as guides to good practice, but require that providers observe them. Those qualification standards and the certificate that lawyers submit will be resubmitted in connection with new contracts. That is a good point in time at which to bring these changes to their attention and talk about them and our expectations of what people should be looking at. It shouldn't be ambiguous, but the culture remains powerful, as you observed, in individual communities. We do encourage lawyers to get together frequently and talk to other lawyers about how they resolve some of these issues so that there can be zealous advocacy and not just questions about what the role should be and how you confront your local judge in terms of addressing some of those issues. There is a lot of work that remains to be done in juvenile cases. With both of these Clackamas County providers I am very cheered to hear what people have been doing. Ms. Canaday describes some very positive steps that have been taken there and I think CIDC is making the same efforts. Those are good things. They are both good providers. We are pleased to have them and we don't want to lose them, but we want them to continuously strive to do what they do better. I think some good things are underway. I would propose to you that I put together a statement of where I think we are now. Then you can decide whether that is the way you want to express it. If there are changes you want to make or other approaches you want to take that is fine. I have not drafted for you today any particular plan for the county. I would be glad to do that for next month.

1:25:41 Chair McCrea

Very good. I concur.

1:25:42 P. Ozanne

Can I add something. Maybe it is more of a retreat subject.

1:25:50 Hon. Elizabeth
Welch

Hello?

1:25:50 Chair McCrea

Hello.

1:25:50 Hon. Elizabeth
Welch

I lost you.

1:25:58 P. Ozanne

The best thing for juvenile practice is probably to continue to have Judge Welch go around the state on a permanent rotation to really crack these cultures. It is kind of ironic but I think because Clackamas, and I hope the people there recognize how much I respect the work there and how they really put together two good providers, but ironically when I look at it now over all this period of time, I have in my own mind a question that is more an organizational development question than a personal question. If we had these good administrators and we have got these good consortia, and yet we are still talking about attorney evaluations at this stage, even though it is very difficult, at least when I was doing this and, Ingrid, when you are

doing them, you don't mention in a report that there are problem attorneys unless it is a problem. You never mention them by name but you don't even mention that unless there is something going on. Here we are with just a few individuals, but I think we need to talk about being prescriptive and I think it is more a retreat thing that we need to think about. I understand the philosophy of being allowed to develop your own procedures and I think we should continue to do that and use what is developed locally as a model, but as to the board makeup and as to how we do an evaluation of attorneys, I think the time may have come where we should develop our model based on what we have heard and seen. I don't think the consortium system facilitates the development of what I think is needed, even with these two excellent providers. They are still struggling with those issues. I think it is more of a retreat subject. I don't think it affects my vote to support your recommendations.

1:28:02 Chair McCrea Okay. Let's take a five minute break, which will actually be 10 minutes.

(Break)

Agenda Item No. 5 Presentations from PDSC Contractors and Others

1:28:27 Chair McCrea Does anyone want to speak to that?

1:28:40 L. Borg Good morning, still. My name is Lane Borg and I am the executive director of Metropolitan Public Defenders. I am going to keep my comments fairly brief, but one of the things that I want to comment on and first commend the Commission on - I know coming into this job myself and reviewing the process from two years ago that the emphasis was not on saying, "For more money you need to do more cases." That was good news to me. When I was involved with indigent defense in my prior career at MDI that was the watchword. That was what you had to do. I commend the Commission on that and I think that is a good policy, but I think where it needs to evolve and expand is in recognizing that we are participating in specialty courts, in problem solving courts - and it is a good thing, good for our clients and good for the system. The judges are very responsive, especially in Multnomah County, to including us in that. I will use as an example the recently developed mental health court. It really does not lend itself to the case-counting model to saying we will just give you a case credit for an identified case and then you get paid on that basis. The commitment to the problem solving courts is to be there, be there for the policy meetings, be there for all of the sessions and cases, the ebb and flow. But the commitment is the same even if we were down to one case in there. Let's say you had multiple contractors and you just stop showing up. You are going to lose that continuity; you are going to lose that context and participation that is really important. I know, and certainly in some of my positions - there are positions that are identified as FTE and we are just paid for that service and that is good as with ECR in Washington County - but for these others I think you need to think about and have a policy of evolving more toward that. If we just try to show up on our individual cases, or approach it from that point of view, we are going to lose the ground that we have made of being a full stakeholder and partner in these problem-solving courts. Thank you. Any questions?

1:31:12 O. Thompson Paul and I are going to sort of tag team you, if you will. Let's start with Judge Lipscomb.

1:31:24 P. Lipscomb Olcott and I both intend to be brief here. There was an emphasis these last several Commission meetings on telling us to ask for what we need in our contract proposals going forward. I just wanted to give you a heads up. There are three major areas that we are going to be proposing as needs. The first is with respect to how support enforcement cases are handled in Marion County. Under the current system we receive a case credit for that, but the model in Marion County is actually more like a therapeutic court or a treatment court for these SED cases, people who are behind in their child support. They tend to be chronically behind in their child support and over time the model has developed that is more like the therapeutic model than the traditional contempt of court model. As a result, the attorneys basically aren't getting paid for the services they are providing, so we are going to ask for a

different way of providing payment. The second issue that we are going to address is what I would view mostly as a morale issue. That relates to the pay differential on a case count basis between what the contractual awards are to PD offices versus consortia. We are going to ask in this contract period that you move closer to parity. I am going to let Olcott address that. He has already submitted a letter.

1:33:21 O. Thompson

That is right. I know some people read it because I saw people reading it. When I prepared that I knew that PD offices were paid more. That is the policy of this Commission. I was surprised, quite frankly, how great the differential was. From 13 percent on PVs all the way up to 42 percent on Ballot Measure 11 cases. That is an incredible difference. Yeah, historically this Commission and its predecessor received better services from the PD offices because you paid for them. Following up on what Commissioner Ozanne was talking about this morning with the supervision and evaluation issues with consortia, you have never paid consortia to do that. Now you are asking consortia to essentially, "Spend more of your money, cut back on the attorney money because you have to fund the administrative process to do the evaluation, but we are not going to pay you for it. Take it out of your pocket." It is a problem. I remember saying to Kathryn back in January of 2008 that the current differential may well be too great. My position is, and our position is, that it is far too great. Then there are a couple of other things that I wanted to point out. Some are subtle. Some are controlled by this Commission, some are not. Public defender's folks can take advantage of student loan cancellations. Folks who work in consortia cannot. That is by law. You have to be a public defender. They can get even more money, if you will, that way. Conflicts: if a PD office conflicts off of a case even right at the beginning because they discover there is a conflict they get paid for it. They were appointed. They conflict off. At the end, sometimes it happens, everything falls apart and they conflict off at the end. They get paid for that case. If a consortium conflicts off, either at the beginning or at the end, frequently that case goes to the consortium again, another consortium member. All of a sudden you are starting to split a lesser payment among attorneys. Like you, everybody wants to be fairly compensated for the work they do. We particularly want everybody to do really great work. Realistically, equally great work says equal compensation. You need to provide the equally great support that both consortia and PD offices need to provide that great work.

1:36:20 P. Lipscomb

The third point that we are going to be proposing in our new contract proposal, that represents a change, is that we are going to be asking for an increase in the number of cases that we receive under our contract. As you may recall, MCAD lost 30 percent of its traditional business when the PD's office was established in Marion County. The anticipated consequences of that change that this board was looking for were accomplished. You were looking for an improvement in service level. You were looking for improvement in quality. I think the service delivery report that you folks received in January showed that everything that you had asked for had been accomplished by then or was under way. We have a business plan in place. We have adopted all of the best practices. We have incorporated the State Bar's Performance Standards into our contract as the standard against which the lawyers are going to be judged for their performance, and so on. What also happened were some unanticipated consequences, or what I would suggest may well have been unanticipated consequences. One was it impacted our ability to retain high quality, experienced lawyers. We lost a number of our best lawyers as a result of that 30 percent cut. Some lawyers in the consortium have gone looking for other things to do and some of them have completely left the fold. Others have gone into other areas of the law to try and make up for the loss of income. Others are simply just hurting. The second besides retention is recruitment. Because of that 30 percent loss we had to close our doors to new lawyers. We had about a half a dozen lawyers, new lawyers that were on probation and they have all been allowed to work through and complete their probationary service. We have one lawyer who is still on probation, but that is due to performance problems and not due to the fact that anybody is trying to limit their involvement in the organization. With the roll back or decrease in cases that seems to be happening now with the financial situation, I don't see an ability for us to open our doors going forward this contract period. That is why we are going to ask for an

increase in caseload. We think we are providing high quality service. Candidly we feel that we are providing better service than the PD's office and we are going to ask that certainly there be no further deterioration in the case count that is awarded in this new contract or things will simply get worse. Thank you.

1:39:36 Chair McCrea

Thanks.

1:39:46 A. Karpinski

If I could just speak very briefly about our issues. I am Alan Karpinski and I was asked by our administrator to come and speak on behalf of Multnomah Juvenile Defense Consortium, a group that hopes to provide, and continue providing, quality legal services in the juvenile court where we combine experienced lawyers and younger lawyers in a model that, again we hope provides high quality legal representation. One of the benefits to the state is a very low conflict rate saving the board and the state a lot of money. We have correctly projected our numbers, and we have been meeting our numbers, and yet we are faced with cuts because of other organizations that are very, very good organizations that we respect deeply. I came from one of them. Public defender models are tremendous service providers. One of the things that I wanted to comment on briefly here today is the assumption that because we are private firms that we have the flexibility to pick up private work. While we have had some success with that over the years, with the strong economic downturn I think we have seen a decrease in calls in our private practice. The assumption that we are going to be able to absorb significant reductions in our caseloads because we can flex into the private market, I think is an assumption that needs to be revisited or at least debunked a little bit.

1:41:18 P. Ozanne

You heard from some lawyers here this morning that they claim they wouldn't even work unless they had that opportunity to go out and get other kinds of cases.

1:41:29 A. Karpinski

We enjoy that flexibility, and I think it does help to have a family law practice in conjunction with juvenile work, or be able to do criminal defense practice together with juvenile work. We bring a sort of different flexibility to the whole process. I just want to make sure that the board understands that it is not just there for the taking. We can't just turn off this one sort of revenue and immediately turn on this other source revenue. It is not an assumption that really is accurate. We would also hope that PDSC would recognize that maintaining high quality representation and a stable office depends on having stable revenue. What has happened is that we are losing all of our pick-up weeks because we have been meeting our contract and others have fallen short. We are losing our ability to meet our contract that we had crafted with this board in the final six months. We anticipate there are going to be challenges there and we are certainly concerned about the next contract period. That is all the time I will take. I just wanted to make sure that the board is aware of that sort of peculiarity in the consortium model in our county.

1:42:48 Chair McCrea

Thank you. Anybody else? Greg?

1:42:58 G. Hazarabedian

I am Greg Hazarabedian. I am the Lane County Public Defender. Since the agenda said "contractors and others," I wanted to speak to you today as an "other," which is OCDLA president. I just wanted to say to the Commission, as a body, what I have said to some of you individually and that is that as OCDLA president I have spent an inordinate amount of time in Salem during this session on work groups, talking to legislators, and at every level where I interact with legislative staff or legislators, I hear nothing but praise for the work that Kathryn and Ingrid have done with the legislature. I have heard that they are better prepared than their colleagues in other agencies. I hear that they are more responsive than their colleagues in other agencies. I believe that is part of the reason that public defense seems, at this point, to be held a little less harmless, or a little more harmless, however you say that. It seems like we are getting through this process a little better than some other budgets. I just want the Commission to know that those of us who depend on that legislative process to ensure our employees' and our clients' continued expectations are appreciative of that. That is all I want to say.

1:44:12 Chair McCrea Anybody else? Bert did you want to speak? You don't have to.

1:44:27 B. Putney My biggest problem, and I was reminded again this morning that I would probably not get this, but I still need a dating service.

1:44:45 Chair McCrea A dating service? Is that for you or your office?

1:44:43 B. Putney I am way too old for that. I lost another attorney due to a relationship in Portland. Ingrid reminded me today that the chances of getting one are slim and none.

1:45:00 Chair McCrea Are you making a proposal here?

1:45:02 B. Putney I even have a ring. Actually, Jackson and Josephine Counties are quite different from each other in that Josephine County is a very poor county and Jackson County is one of the richer counties, because of the preparation that they have done. Although with the last contracting period that we are presently in, we were able to make some inroads insofar as parity with district attorneys, because Jackson County is rich they also got raises, so in effect there has really been no change in the disparity. It is still about \$13,000 per person in salary. It is about \$300 per month, \$3,600 a year in benefits. On the other hand in Josephine County we were able to increase and district attorneys have not received increases over there like they did in Jackson. We have cut disparity down to only about \$9,000 per person in Josephine. It is still a substantial amount and I know things are going to be tight this time around, but to the extent that we can lower our caseload somewhat and retain the money, as much as possible, that we are presently getting, I think it will work out. We can maybe decrease the disparity a little bit more. That is all I have.

1:46:42 Chair McCrea Thank you. Anyone else? Going once, going twice. Okay. We will move on.

1:46:51 I. Swenson Judge Welch, are you still here? I think we may have lost her during the break. Can we try to reconnect?

1:47:21 Hon. Elizabeth Welch Hello.

1:47:40 I. Swenson How do you wish to proceed, Madam Chair? We can go back to the scheduled agenda items. Excuse me, please. I do have to take this call.

1:47:56 Chair McCrea Kathryn, would you like to start the budget report or do we need to wait for Ingrid? Okay, we will wait for Ingrid. Paul, can you very quickly give us the training opportunities report on Attachment 5.

Agenda Item No. 6 Training Opportunities for Public Defense Providers

1:48:18 P. Levy I certainly can unless I get a call that I have to take. The report I prepared for you is really part of an ongoing discussion that the Commission and our office have had about training. As the report indicates, the Commission before it even began officially performing its functions was receiving recommendations about training. To the extent that the Commission is bound to adhere to state and national standards of justice in accomplishing its mission, providing systematic and comprehensive training is one of the roles that the Commission must perform. We have excellent educational programs and opportunities in Oregon thanks largely to OCDLA. What my report suggests we lack, though, is comprehensive skills training especially for new lawyers. OCDLA is doing a little bit of skills training now and it has been a good program. What we don't have as a system is a boot camp for new lawyers. That has been identified in a number of places and contexts as a need in the state. The other area where there has been sort a repeated concern is attorneys who are doing public defense work

who need training or education, and are not taking advantage of the opportunities that are there. That is also a recommendation that the Commission has looked at or heard over the years - whether it should be requiring training, or not, in some areas. The boot camp initial skills training is an interesting challenge. As you know from the report, and elsewhere, MPD does a trial skills program that has been opened to other attorneys outside their firm, but usually on a very limited basis. It is, however, a model of how this might be done. In preparing for this, I looked at how other states are doing this. New Hampshire, which has a statewide public defender system run by a non-profit organization, with local offices throughout the state, does a five week intensive new lawyer training every fall. There are other problems in New Hampshire, but that program looks, at least on paper, to be excellent. They can do that because they hire, as other major firms do, in classes that start in the fall. Their curriculum is a model for how this might be accomplished. It is an ongoing discussion and it is as much to inform you and to maybe build on this document of identifying all of the various training opportunities. Since this has been in the materials I have heard from some about programs that are not included here. We will keep that list growing. We will continue our work in identifying and building training opportunities. It may require a more concentrated look by the Commission, as I suggested, perhaps its own service delivery examination.

- 1:52:11 P. Ozanne What are the timelines for your recommendations, all of which I support?
- 1:52:15 P. Levy There really isn't a recommended timeline. If the Commission wanted to look at this as a discreet topic for a service delivery review, I am sure we could fit that into our schedule and hear from a broader range of folks than just me. That would be very useful. As far as whether you want to make more specific requirements for training, I am sure that would be a very interesting discussion in which you would get a lot input. I, meanwhile, am continuing to develop this list.
- 1:52:56 Chair McCrea I would like to know more about the New Hampshire program. Not necessarily right now, but I think that would be helpful for us. It would be interesting to look at it.
- 1:53:08 P. Levy I can certainly email that and make that available, sooner rather than later, for the purpose of further discussion.
- 1:53:23 P. Ozanne Would you entertain a motion to put it on the list of service delivery?
- 1:53:29 Chair McCrea Sure.
- MOTION:** Peter Ozanne moved to put the training opportunities on the list for service delivery; John Potter seconded the motion; further discussion?
- 1:53:34 P. Ozanne I support the motion to require training on relevant subjects as long as the training is available. I think there are some programs that are available that are not being utilized. I am in favor of a requirement for some critical areas of practice.
- 1:53:53 Chair McCrea Further discussion? All in favor. The motion carried. **VOTE 6-0.**
- 1:54:06 Chair McCrea Paul, you look so happy. You got us to do something on one of your
- 1:54:09 P. Levy Oh no, you are always very receptive to what I bring here.
- 1:54:14 I. Swenson Madam Chair, my apologies to you and all of the Commissioners. That was a call that I was expecting from Legislative Fiscal. The Chief Justice had called earlier to alert us to some developments in the legislature. I wanted to contact them to see if they needed us back there, and they do. I am going to have to leave fairly soon and I just needed to let you know that.

1:54:40 Chair McCrea So, are you leaving right this minute?

1:54:40 I. Swenson No, not right this minute.

1:54:43 Chair McCrea Let's go to the budget report with you and Kathryn. Then we will do without you as best we can.

Agenda Item No. 4 PDSC Budget Report

1:54:55 I. Swenson Thank you. Let me tell you what the circumstances today are. They have been deferring action on the public safety budgets because they haven't resolved the question of how to implement cuts to the public safety system. As Greg has reported to you at previous meetings, Greg Hazarabedian, there have been lots of meetings between interested parties to talk about potential reductions in the public safety system budget. It sounds like some of those may have been resolved sufficiently that they intend to move forward with some of those bills today. In addition, the Chief Justice advised that the fee bill, which he introduced as a method of raising funds for the judicial branch, is also going to be heard today. We stand to benefit, to some extent, from that fee bill. Some of the fees that would be collected under that measure would be allocated to our budget deficit. That is all by way of background. As you know from the budget documents that we provided to you before and the description we have given you of our circumstances, the budget which passed out of the Ways & Means Committee - and I understand was passed on the House floor today - for PDSC, has a \$13.1 million dollar deficit in it. As Kathryn has explained to the legislature and to you, what that means is we can provide public defense services up until a period six weeks before the end of the biennium and then we cease to have funding to complete the biennium. The effort is to fill that hole and the Chief's fee bill may go a long way toward doing that. The next question is, even if that occurred if the legislature can't find sufficient funding for the corrections budget to accommodate all the new Measure 57 prisoners, then potentially they would deduct another \$13.1 million from our budget and similar amounts from other budgets in order to cover that gap. That is all in play at this point. It remains to be seen how it will get resolved, but that is kind of the situation that we find ourselves in.

1:57:43 K. Aylward I think that covers everything. I am still stunned.

1:57:56 I. Swenson Just found out.

1:57:55 K. Aylward What is nice is that the information put together regarding our budget that has passed actually has a comment that specifically says, "You will need to come back to the legislature in February of 2010 to let us know about additional requirements because of resentencing or because of changes in caseload." At least it is acknowledged that, "This is what you have for now and we know you are going to have to come back and ask for more." I was relieved, at least, to see that acknowledgement in there rather than, "Here is what you got, deal with it." I am encouraged.

1:58:41 C. Lazenby Are they still playing with making some lower level felonies misdemeanors and moving things around that way in an effort to try save money in the system? What are some of the things that they are moving around?

1:58:54 I. Swenson I certainly wouldn't have the most current information, but that has been one of the things that was under discussion is reducing some drug offenses in particular from felonies to misdemeanors, reducing some misdemeanors to violations, all of which would save public defense funding and jail and prison funding as well. In addition, there are two bills that are under consideration which involve other forms of prisoner release. I suppose the one that involves the most potential savings is the earned time credit piece. The proposal would be to give prisoners additional earned time. They get 20 percent now if they are eligible and this would increase it to 30 percent. It would allow for the release of a significant number of

offenders immediately. It does require resentencing in order to get there. Some kind of process has to occur in the court that would involve the appointment of counsel, etc. There is a cost to that procedure. That particular proposal has not been acceptable to the district attorneys, so that has stalled those discussions. They have proposed some alternative approaches, another form of early release. That same measure would delay implementation, or shall I say “phase in” implementation of Measure 57 so that some pieces of that would not take effect immediately. The prosecutors are also fairly adamant that that measure should be immediately implemented in full. Those are some of the things in issue.

- 2:00:54 C. Lazenby It sounded, from the news reports today, like the legislature is politely ignoring the Governor’s veto threat. Is there any chance that they might go back to make additional cuts to try to save the rainy day fund? Would that have an impact on our budget?
- 2:01:12 I. Swenson As far as I know it hasn’t been discussed in terms of our budget, just the education budget at this time.
- 2:01:19 K. Aylward I would just like to say that you have heard some testimony and obviously our office has been dealing with contractors in areas where there has been a decline in caseload. You heard Marty Cohen say there had been a 50 percent drop in caseload. That is huge and not typical, but a lot of places are experiencing a three, four, five, six, eight percent drop and it is affecting how they operate their businesses and they are thinking, “Wow, I don’t have the work anymore. I have to lay people off.” What they are seeing now is nothing compared to the impact this would have on their businesses if some of the legislation that would decriminalize things passed. That would be huge. You would see no misdemeanors. Well you would. You would see what used to be a C felony is now a misdemeanor. Everything that used to be a misdemeanor except DUII, or whatever, would be gone. We would be talking about five, six, 12 million worth of caseload vanishing. I don’t know yet whether those bills – they seem to be held up a little. They don’t seem to be moving forward at this point, but if they do, contractors are going to need to think about how to adapt to a very rapidly, significantly shrinking pie. It has very little to do with how our office looks at RFPs and whether a consortia should get more than PDs. All of that stuff is really insignificant tinkering compared to the impact if some of these bills pass.
- 2:02:47 C. Lazenby Before this point what has been the cause of the decline in the number of cases?
- 2:02:54 K. Aylward I don’t know and I pleased to hear that everybody else who is facing this says, “We don’t know.” We have always predicted our numbers well and this time, boom. Where is it going? I think there are lots of different reasons. I sometimes say that maybe everybody is locked up. Sometimes I say maybe drug courts work. Maybe it is DA budgets. I don’t know what it is but it is the first time ever that we have seen an actual decline in caseloads in some areas. I don’t know.
- 2:03:29 I. Swenson Lots of people would like to take credit for it though.
- 2:03:33 C. Lazenby I think I might know who you are talking about.
- 2:03:38 Chair McCrea So we are really just in a holding pattern today?
- 2:03:39 I. Swenson On the budget that is correct. Resolution should occur fairly soon. Everybody plans to be out of there as scheduled.
- 2:03:55 Chair McCrea Thank you. Alright, Ingrid, you probably need to go.
- 2:04:02 I. Swenson I am expecting another call so I will rudely depart if I get it. In the meantime, I am happy to stay here.

Agenda Item No. 3 Commission Discussion of Service Delivery Plan for Post Conviction Relief Cases

2:04:09 Chair McCrea Shall we attempt the post conviction relief? That is Attachment 3, and we are really sort of in the position where we need to keep focusing on quality service, but we certainly don't have additional packages or money assistance to help with that.

2:04:35 I. Swenson One development, and Kathryn and I were talking about this yesterday, that maybe I could have emphasized a little bit more than I did in this report was that the decline in the post conviction relief caseload parallels the decline in caseload generally. It is pretty dramatic and it does maybe give us an opportunity to concentrate providers a little bit more and work more closely with those fewer providers on some of these issues. That might be a benefit. And, of course, the new performance standards are wonderful to have in place. They are something that we can use proactively. We haven't worked out the details but there will be training on those standards in the near future. We will encourage all of our contractors who do these kinds of cases to participate.

2:05:33 Chair McCrea So questions, comments, anything more on PCR at this point? Paul, would you like to come back and talk to us about the Annual Quality Assurance Task Force?

Agenda Item No. 7 Annual Quality Assurance Task Force Site Visit Report

2:06:03 P. Levy This is an agenda item that is on for this meeting every year. Often we are able to have the chair of the Quality Assurance Task Force present to talk to you about the subject. Jack Morris, who is the current chair, is not here. I will take his role and point out to you what is in the attachment - specifically the attorneys from across Oregon who have volunteered to be part of peer reviews of providers, to acknowledge their work and thank them and ask you, as well, to do the same. I am not going to read all their names off here. Some of these are veterans of early reports. The essential function is helping our providers but it turns out it helps them as well, enormously. The members of these teams that do the review end up saying that they have gained essential information for their own purposes and their own operations by participating in the reviews. I really want to thank the people who are listed here as well as the members our Quality Assurance Task Force. I don't think we gave you their names. If I tried to name them all I am sure I would forget somebody. I would also like to say a word or two about the site visits. I gave a pretty comprehensive report at the last meeting a year ago, about overall the findings that we have made and some of the recommendations. I am not going to repeat that. That report was distilled and updated a little bit in a report that we prepared for the legislature about the peer review process. Among the things that we told them is that, to our knowledge, the program is still unique to Oregon where you have peers doing these intensive quality assurance reviews of other providers. I think we deserve some recognition for that. The only other thing that I wanted to point out is that in these quality assurance reviews, we are looking at and dealing with some of the issues that, or many of the issues really, that the Commission looks at with their service delivery reviews. We are all mindful of the distinction between the two reviews. One, looking at structure and the other looking at performance, but as the discussion this morning illustrates, that distinction is usually blurred and we end up looking at issues of largely what are the quality assurance mechanisms in place with the provider. What we continue to find is there is a great deal of variation as far as attorney evaluations and really providers taking on themselves and recognizing the responsibility to have quality assurance mechanisms in place. Some are very, very good at that, including very small consortia in rural counties. They have embraced their role and function as the guarantors of quality representation within their own group. We have commended them for that. Others need work and we have made recommendations. That is my report.

2:10:03 Chair McCrea That was a very nice report and I echo what you are saying in expressing the Commission's thanks to all the people who have worked on this. It is an impressive list and I know it takes a lot of time. It is on a volunteer basis and we really, really appreciate that.

- 2:10:21 P. Ozanne I am sure Ingrid, on behalf of OPDS and maybe us, sends a letter. I wonder if we should consider something more in the way of appreciation from the Commission to those individuals. Maybe a letter from the Chair.
- 2:10:39 Chair McCrea Maybe a dating service?
- 2:10:47 C. Lazenby Maybe something from the Chief Justice.
- 2:10:48 P. Ozanne Maybe a directive from the board. Maybe the time to do it is the appropriate annual conference. Stand up and thank people. Give them a plaque or something. It is an amazing contribution and it is the only one in the country. I don't feel like we have given them enough recognition.
- 2:11:10 P. Levy I would add that these folks are there for three days of hard work, but before those three days is a fair amount of work reviewing documents in preparation for the visits. Then afterwards there are months and months of work drafting, and reviewing, and arriving at a consensus on the reports.
- 2:11:38 Chair McCrea Thanks, Paul.
- 2:11:51 I. Swenson We will work on a proposal. That sounds like a good idea.
- 2:11:46 Chair McCrea I agree.

Agenda Item No. 8 OPDS Monthly Report

- 2:11:54 Chair McCrea So we are to the monthly reports.
- 2:11:58 I. Swenson We have a couple of things. I think Pete is going to update us on developments at the Appellate Division. I included as an attachment the revised version of the drug court guidelines. We talked about them at our last meeting and decided to direct them to drug court attorneys rather than to the drug court itself. This is the revised draft. Again, it is not for any kind of action today. I am assuming that it conforms to your expectations and then we will circulate it among the defense practitioners and ask for their comment. We will ask John to assist us with his members by providing a copy and getting comments from them.
- 2:12:39 P. Ozanne Sorry but I have another idea. These lists, which are very admirable about what drug – I haven't seen all the drug courts around the state but I have seen some. Some of these things that a lawyer is supposed to do and the speed in which the drug courts proceed, I don't know whether people are actually going to follow these. I wondered if in our comments we ought to give both the court and the attorney, in real terms, the idea of what they need do. Is it something we expect them to spend a half an hour of attorney time in confidence with the client to go through these. It seems to me if we really want our lawyers to do these things, which I certainly do, we want to give them some cover in the sense of if the judges are pushing, or somebody is pushing the time frame, I think it would be good in the commentary to give some real world sense of what we expect and how they can accomplish this. I would be happy to talk with you more about it. I was looking at it and wondering how is this going to look in the courtroom? How am I going to do this?
- 2:14:02 I. Swenson Maybe that is one of the questions we address to lawyers who practice in this area, any maybe to the drug court judges as well, is this realistic and, if so, how would it be implemented? What kind of time would be required? Those kinds of things.
- 2:14:19 P. Ozanne It might give people more leverage. Maybe this isn't a problem but I perceive it is. Some courts are still moving things so fast that I think we need the defense attorney, or individual

ones who are involved in the design of the program to say, “Gee, those meanies that are contracting with us are really expecting us to do these things, and ...”

- 2:14:47 C. Lazenby It does make sense that the feedback that we get from John’s folks is about the practical application. It is not just deleting or giving us additional lists, but what it looks like in practice so that we can make a judgment about how realistic this is and two, whether or not we do want to get into the role of being the meanies and saying we are going to hold you a higher standard in terms of your performance. That can affect how the drug courts actually work.
- 2:15:27 I. Swenson Any other comments on the drug court guidelines?
- 2:15:37 Chair McCrea I thought they were good.
- 2:15:37 I. Swenson I wanted to mention a couple of other things. One is, if you will recall last year Congress passed the John R. Justice Act which would provide loan forgiveness funds for public defenders and district attorneys. Unfortunately they didn’t fund it last time around, but that effort is currently underway and I wanted to point out that our two Oregon senators are among those who signed on to promote the \$25 million dollars to initiate funding for this program. That is good. Finally, the only other thing that I wanted to cover was to advise you that I think we need a brief retreat in September. We will be in Lane County in September reviewing public defense delivery there, but we also need to cover the proposed funding plan for distribution of public defense funds statewide. If you will recall we decided that would be the meeting at which you would review the plan that Kathryn and her staff are preparing in terms of contracts for the next biennium. It is a lot to try to do in one day and already today we have talked about some other retreat items that we need to deal with in that kind of setting. I was hoping that we could schedule a half-day session on Wednesday, the 9th of September, before our regularly scheduled meeting on the 10th. If all of you think that is possible we will go ahead and arrange that and ask you to stay over, at least one night in Eugene between the retreat and the meeting.
- 2:17:37 P. Ozanne Well, and maybe some of the other Commissioners have input, but if we are going to stay overnight, I think there are things that would deserve a day retreat on the Wednesday.
- 2:17:50 I. Swenson Certainly if you think so. I wasn’t sure whether it would be more convenient for everybody to travel in the morning, spend the afternoon in this retreat setting, and then convene the meeting the next day.
- 2:18:05 P. Ozanne We’ll leave it to the Chair.
- 2:18:05 Chair McCrea The acting chair doesn’t have to travel so it is not a problem for me.
- 2:18:14 J. Stevens I can tell you it is perfectly doable to travel starting at 6:00 in the morning and be there in time for a full day.
- 2:18:20 P. Ozanne In addition to what has been mentioned I want to add, - and would ask that you think about it, Ingrid - obviously you have been involved and Paul mentioned the integration of the peer review process with our structural reviews, the service delivery plans. How many more counties or areas are there to review for the service delivery? It seems to me we are just about ready for lap two.
- 2:18:50 I. Swenson We haven’t done service delivery reviews in every county.
- 2:18:54 P. Ozanne I think it was 27 at last count.

2:18:54 I. Swenson It may well be. It should be in the Clackamas report. But except for Polk County and Tillamook County, either a site review team or the Commission has been to every other county to review the service provided there. We have been looking at that data as we complete those visits and trying to decide, is there another place we need to be. I think our focus in both processes is on follow-up at this point.

2:19:32 P. Ozanne I am just wondering, it is a big expenditure of your time and the board's and it is good to get around state, but I wonder whether we should think about maybe putting the Commission's energy into something else like going deeper into some of these issues. I am still not very happy with PCR. I am not meaning any criticism because I was in your position. I think the board needs to think about being much more proactive about how to resolve this.

2:19:57 I. Swenson That would be an excellent topic for a discussion at our retreat.

2:20:02 P. Ozanne We have to get around the state. I am not suggesting that we still don't hold meetings around the state. We kind of know what the service delivery models are. Now it is really how do we improve quality? Again, that is a topic that I would like to talk about at the retreat.

2:20:22 C. Lazenby Quality and consistency.

2:20:25 Chair McCrea Could you make it down in the morning?

2:20:30 C. Lazenby I will have to look at my schedule. It is no more impossible than any other day.

2:20:34 Chair McCrea Judge Welch are you still with us?

2:20:36 Hon. Elizabeth Welch Barely. We are going to a full day on Wednesday? I thought I heard we were going to a full day on Wednesday rather than at noon.

2:21:07 I. Swenson That is correct.

2:21:06 Hon. Elizabeth Welch Is there any chance to do it on Friday rather than on Wednesday?

2:21:12 I. Swenson The only problem is that John Potter's organization has a CLE planned that day so he couldn't participate and interested people would have to choose between those two.

2:21:29 Hon. Elizabeth Welch It is a problem for me but I will make it not be. You are talking about the 9th and 10th? Yeah, I will make it happen.

2:21:46 I. Swenson Very good.

2:21:44 Chair McCrea Thank you. We will go ahead and set that and do the full day retreat on the 9th and we will have the meeting on the 10th.

2:21:57 I. Swenson Very good and if Commissioners have other thoughts about subjects they would like to discuss please let me know. Maybe I will send you a formal inquiry so that we don't miss important things.

2:22:07 K. Aylward Can I just say something about the lease?

2:22:12 I. Swenson Yes.

2:22:10 K. Aylward In the CBS report I thought I would mention to you that our lease on the building that we are in expires June 30. We have agreed to a nine month extension on that existing lease. Becky received in the mail a flyer for a newly built building and she said, "Look, I got a flyer. Can we move here?" The building is directly across the street from the Justice Building. That building is made for us. It is absolutely perfect. It is quite a bit less square footage than we are renting now, and the price per square foot is higher, but when you do the math it could actually save us maybe a \$1,000 a month in what we are paying in rent. That thousand a month for this coming biennium is sufficient to cover any move costs. I think it would be great. It is a shell of a building right now which is why we need nine months to do tenant improvements and space planning. That is what I am working on.

2:23:19 Chair McCrea Great. Pete.

2:23:21 P. Gartlan Good morning. Pete Gartlan with the Appellate Division. I just wanted to follow up on Kathryn's comments. I really like the idea of moving into that building because it makes us a more serious part of the system, just the physical proximity next to the court and DOJ instead of being an outlier. In Shaun McCrea's description it would be more obvious that we are one leg of the three legged stool.

2:23:53 C. Lazenby Is it on the Willamette side or on the other side?

2:23:54 P. Gartlan On the other side of Court Street. If you walked out of the front of the DOJ building you would be looking at this building.

2:24:07 C. Lazenby Where the AOI building use to be?

2:24:05 K. Aylward AOI is still there, next door.

2:24:15 P. Gartlan I don't have much to report other than what is happening with *Bowen v. Oregon*. We seem to be gaining momentum since I last spoke with the Commission. We have received several *amici* briefs from organizations such as the ABA, OCDLA, the Federal PD of Oregon, a group of law professors nationwide, and the Charles Hamilton Houston Institute for Race and Justice, at Harvard, on behalf of NACDL and the Louisiana Association of Criminal Defense Lawyers. We are gaining momentum and as I said the court will decide in a conference to be held in late September or early October. We expect to know sometime then whether or not the court will take the petition for cert. The state is also still in the process of developing its response. I don't know if you remember but the Supreme Court asked the State of Oregon to respond to the petition. The state's response is due June 29. That is all I have.

2:25:31 Chair McCrea Any other business for the good of the order? I would entertain a motion to adjourn.

MOTION: Chip Lazenby moved to adjourn the meeting; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Attachment 2

**OPDS's Draft Report to the Public Defense Services Commission
On Service Delivery in Polk County
(August 2009)**

Introduction

Since developing its first Strategic Plan in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its mission to deliver quality, cost-efficient public defense services in Oregon. Recognizing that increasing the quality of legal services also increases their cost-efficiency by reducing risks of error and the delay and expense associated with remedying errors, the Commission has developed strategies designed to improve the quality of public defense services and the systems across the state for delivering those services.

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through August, 2009, the Commission completed investigations of the local public defense systems in Baker, Benton, Clackamas, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the functioning of public defense system in Polk County undertaken in preparation for PDSC's public meeting in Dallas on Thursday, August 6, 2009, and some recommended areas of further inquiry for Commissioners at the August 6 meeting. The final version of this report will include a service delivery plan for Polk County.

PDSC's service delivery planning process

There are four steps to PDSC's service delivery planning process. First, the Commission has identified regions in the state for the purposes of reviewing local public defense delivery systems and services, and addressing significant issues of quality and cost-efficiency in those systems and services.

Second, starting with preliminary investigations by OPDS and the preliminary draft of a report, the Commission reviews the condition and operation of local public defense delivery systems and services in each county or region by holding one or more public meetings in that region to provide opportunities for interested parties to present their perspectives and concerns to the Commission.

Third, after considering OPDS's preliminary draft report and public comments during the Commission's meetings in a county or region, PDSC develops a "service delivery plan," which is set forth in the final version of OPDS's report. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or propose changes to improve the delivery of the region's public defense services. In either event, the Commission's service delivery plans (a) take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts.

Finally, under the direction of PDSC, contractors subject to the Commission's service delivery plans are urged to implement the strategies or changes proposed in the plans. Periodically, these contractors report back to PDSC on their progress in implementing the Commission's plans and in establishing other best practices in public defense management.

Any service delivery plan that PDSC develops will not be the last word on a local service delivery system, or on the quality and cost-efficiency of the county's public defense services. The limitations of PDSC's budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and its contractors, and the wisdom of not trying to do everything at once, place constraints on the Commission's initial planning process in any region. PDSC's service delivery planning process is an ongoing one, calling for the Commission to return to each region of the state over time in order to develop new service delivery plans or revise old ones. The Commission may also return to some counties in the state on an expedited basis in order to address pressing problems in those counties.

Background and context to the service delivery planning process

The 2001 legislation establishing PDSC was based upon an approach to public defense management, widely supported by the state's judges and public defense attorneys, which separates Oregon's public defense function from the state's judicial function. Considered by most commentators and authorities across the country as a "best practice," this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, while judges remain responsible for appointing attorneys to represent eligible clients, the Commission is now responsible for the provision of competent public defense attorneys.

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission's view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in its mission statement, PDSC is also dedicated to ensuring the delivery of quality

public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

Service delivery planning is one of the most important strategies PDSC has undertaken to promote quality and cost-efficiency in the delivery of public defense services. However, it is not the only one.

In December 2003, the Commission directed OPDS to form a Contractor Advisory Group, made up of experienced public defense contractors from across the state. That group advises OPDS on the development of standards and methods to ensure the quality and cost-efficiency of the services and operations of public defense contractors, including the establishment of a peer review process and technical assistance projects for contractors and new standards to qualify individual attorneys across the state to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and lawyers have visited contractors in Benton, Clackamas, Columbia, Crook, Deschutes, Douglas, Clackamas, Jackson, Jefferson, Lane, Lincoln, Linn, Multnomah, Umatilla and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC undertook a statewide initiative to improve juvenile law practice in collaboration with the state courts, including the creation of a Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and to develop a statewide Service Delivery Plan for representation in juvenile dependency cases.

Another area of practice in which significant concerns about quality of representation have been raised by the Oregon State Bar and others is post conviction relief cases. In March 2008 PDSC heard from judges, the Department of Justice and a number of attorneys whose practice includes post conviction relief about the need for improvement in the quality of representation being provided by public defense attorneys. A work group was convened by the bar at the request of PDSC to create performance standards for attorneys in these cases. Those standards have now been approved by the bar's Board of

Governors and adopted by PDSC as the standards to be observed by court-appointed attorneys. The work group also made additional recommendations to PDSC for improving services in this area of practice. Those recommendations were presented to PDSC at its March 2009 meeting. A service delivery plan for post conviction relief cases is scheduled for further discussion at the May 21, 2009 PDSC meeting.

In 2007 PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in those cases was approved by the Commission in June of 2007.

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that the impact of such shortages is greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

“Structure” versus “performance” in the delivery of public defense services.

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service delivery planning process. That process is aimed primarily at reviewing and improving the “structure” for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into “best practices,” recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.¹ A public agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

Most of PDSC’s other strategies to promote quality and cost-efficiency in the

¹ Debates over the relative effectiveness of the structure of public defender offices versus the structure of private appointment processes have persisted in this country for decades. See, e.g., Spangenberg and Beeman, “Indigent Defense Systems in the United States,” 58 Law and Contemporary Problems 31-49 (1995).

delivery of public defense services described above focus on the “performance” of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time to time in the course of the Commission’s service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission’s deliberative processes. OPDS, with advice and assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

In light of the distinction between structure and performance in the delivery of public defense services and the relative capacities of PDSC and OPDS to address these issues, this report will generally recommend that, in the course of this service delivery planning process, PDSC should reserve to itself the responsibility of addressing structural issues with policy implications and assign to OPDS the tasks of addressing performance issues with operational implications.

Organizations currently operating within the structure of Oregon’s public defense delivery systems.

The choice of organizations to deliver public defense services most effectively has been the subject of a decades-old debate between the advocates for “public” defenders and the advocates for “private” defenders. PDSC has repeatedly declared its lack of interest in joining this debate. Instead, the Commission intends to concentrate on a search for the most effective kinds and combinations of organizations in each region of the state from among those types of organizations that have already been established and tested over decades in Oregon.

The Commission also has no interest in developing a one-size-fits-all model or template for organizing the delivery of public defense services in the state. The Commission recognizes that the local organizations currently delivering services in Oregon’s counties have emerged out of a unique set of local conditions, resources, policies and practices, and that a viable balance has frequently been achieved among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of taxpayer dollars available for public defense services in Oregon. Accordingly, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to those proposals. As the largest purchaser and administrator of legal services in the state, the Commission is committed to ensuring that both PDSC and the state’s taxpayers are getting quality legal services at a fair price. Therefore, the Commission does not see its role as simply continuing to invest public funds in whatever local

public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide quality services in each region of the state.

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

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of their relative advantages and disadvantages. This discussion is by no means exhaustive. It is intended to highlight the kinds of considerations the Commission is likely to make in reviewing the structure of any local service delivery system.

Over the past two decades, Oregon has increasingly delivered public defense services through a state-funded and state-administered contracting system. As a result, most of the state's public defense attorneys and the offices in which they work operate under contracts with PDSC and have organized themselves in the following ways:

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.² Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen

² Spangenberg and Beeman, *supra* note 2, at 36.

by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.³ As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured

³ Id.

organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger law firms, but in which they no longer wish to practice law.

In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the consortium is reasonably well-organized and managed, PDSC has fewer contractors or attorneys to deal with and, therefore, OPDS can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar’s “firm unit” rule, conflict cases can be cost-efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys to handle such cases and, frequently, to pay both the original attorney with the conflict and the subsequent attorney for duplicative work on the same case. Finally, if a consortium has a board of directors, particularly with members who possess the same degree of independence and expertise as directors of not-for-profit public defenders, then PDSC can benefit from the same opportunities to communicate with local communities and gain access to additional management expertise.

Some consortia are made up of law firms, as well as individual attorneys. Participation of law firms in a consortium may make it more difficult for the consortium’s administrator to manage and OPDS to monitor the assignment and handling of individual cases and the performance of lawyers in the consortium. These potential difficulties stem from the fact that internal assignments of a law firm’s portion of the consortium’s workload among attorneys in a law firm may not be evident to the consortium’s administrator and OPDS or within their ability to track and influence.

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality

and cost-efficiency of the legal services the consortium delivers. These methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receive court appointments.

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus, PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. Those observations simply suggest that PDSC may have less influence on the organization and structure of this type of contractor and, therefore, on the quality and cost-efficiency of its services in comparison with public defender offices or well-organized consortia.

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

4. Individual attorneys under contract. Individual attorneys provide a variety of public defense services under contract with PDSC, including in specialty areas of practice like the defense in aggravated murder cases and in geographic areas of the state with a limited supply of qualified attorneys. In light of PDSC's ability to select and evaluate individual attorneys and the one-on-one relationship and direct lines of communications inherent in such an arrangement, the Commission can ensure meaningful administrative oversight, training and quality control through contracts with individual attorneys. Those advantages obviously diminish as the number of attorneys under contract with PDSC and the associated administrative burdens on OPDS increase.

This type of contractor offers an important though limited capacity to handle certain kinds of public defense caseloads or deliver services in particular areas of the state. It offers none of the administrative advantages of economies of scale, centralized administration or ability to

handle conflicts of interest associated with other types of organizations.

5. Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as “overflow” from other types of providers. This organizational structure does not involve a contractual relationship between the attorneys and PDSC. Therefore, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, carefully administered qualification process for court appointments to verify attorneys’ eligibility for such appointments, including requirements for relevant training and experience.

PDSC’s Preliminary Investigation in Polk County

The primary objectives of OPDS’s investigations of local public defense delivery systems throughout the state are to (1) provide PDSC with an assessment of the strengths and weaknesses of those systems for the purpose of assisting the Commission in its determination of the need to change a system’s structure or operation and (2) identify the kinds of changes that may be needed and the challenges the Commission might confront in implementing those changes. PDSC’s assessment of the strengths and weaknesses of a local public defense system begins with a review of an OPDS report like the initial version of this document.

PDSC’s investigations of local delivery systems in counties or judicial districts across the state serve two other important functions. First, they provide useful information to public officials and other stakeholders in a local justice system about the condition and effectiveness of that system. The Commission has discovered that “holding a mirror up” to local justice systems for all the community to see can, without any further action by the Commission, create momentum for local reassessments and improvements. Second, the history, past practices and rumors in local justice systems can distort perceptions of current realities. PDSC’s investigations of public defense delivery systems can correct some of these local misperceptions.

In July 2009 OPDS Executive Director Ingrid Swenson visited with stakeholders in Polk County. In addition to talking to PDSC’s contractor in the district, she met or spoke by phone with all three of the Circuit Court judges; the trial court administrator and members of his staff; the District Attorney, his chief deputy and the deputy assigned to juvenile court matters; the Citizen Review Board coordinator; the Juvenile Department Director and a group of juvenile court counselors; the CASA director; DHS’s branch manager, Child Protective Services Supervisor and Permanency Supervisor.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns out to be the single most

important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for a particular area.

OPDS's Findings in Polk County

Brief Description of the County⁴

Polk County was created from the Yamhill District of the Oregon Territory on December 22, 1845. It became Polk County when President James K. Polk signed a bill establishing the boundaries of the Oregon Territory on August 13, 1848. The area of Polk County is 472,960 acres. It includes the cities of Dallas, Independence, Grand Ronde, Falls City and portions of Salem and Willamina. The major industries of the county are agriculture, forest products, manufacturing, and education. Western Oregon University in Monmouth is a major employer.

The Circuit Court, District Attorney and Police Agencies

There are three Circuit Court judges in Polk County.⁵ Judge William Horner is the presiding judge. The other two are Judge Charles Luukinen and Judge Fred Avera. The Trial Court Administrator is Gene Berg. All three judges handle criminal and juvenile cases. Each judge also does a six-week rotation handling the daily criminal docket in Courtroom 4 located across the street from the courthouse at the county jail.⁶ Judge Horner is the drug court judge. The present courthouse is comprised of a structure built in 1898 and an addition completed in 1965.

Stan Butterfield is the District Attorney of Polk County currently serving his first term in office. Prior to seeking the District Attorney position, he was in private practice and accepted court appointment in public defense cases. Sally Avera, formerly the Chief Defender at the State Public Defender (predecessor to the Appellate Division of the Office of Public Defense Services), is his chief deputy. There are currently six deputy district attorneys, one of whom handles only child support matters. The office would like to add another deputy.

The Polk County jail has 185 beds and is currently staffed at full capacity. Even misdemeanants may be held pretrial and early releases have not been

⁴ The information provided was obtained from Polk County's official website and from Wikipedia.

⁵ The workload of the judges in Polk County is significantly above average. In 2008 there were 3,031 cases per judicial officer filed in Polk County compared to a statewide average of 2,042 per judicial officer.

⁶ In custody defendants do not sit at counsel table but are confined in a glass enclosed structure in the courtroom. Since the defense attorney stands at counsel table there is a significant impairment of the attorney's ability to control statements made by the defendant. While observing proceedings in the court OPDS staff heard one defendant make statements that were potentially damaging to his case, which his attorney was unable to prevent from where he was located, had he been so inclined.

necessary. There are a number of police agencies in the county - the Polk County Sheriff's Office, the Salem Police Department, the Monmouth Police Department, the Independence Police Department, the Dallas Police Department and the Oregon State Police. A number of these communities have municipal courts that handle a variety of minor offenses.

Procedure in Criminal Cases

In both felony and misdemeanor cases, a pretrial conference is scheduled for two weeks after arraignment and trial for 6 or 7 weeks after arraignment. Pretrial conferences are held on Mondays and Fridays, arraignments and other hearings are held on Thursdays. Criminal dockets move very rapidly in Polk County. A change of plea can be arranged within a couple of days. A written plea offer from the state is generally provided at the time of the pre trial conference.⁷ Discovery is generally available within 72 hours after arraignment. Some local police agencies are less prompt than others in providing reports to the District Attorney, requiring the DA to proceed on probable cause statements in some cases.

The drug court was initiated in 2003. As of July 13, 2009 there were fifteen clients in the program, three in residential treatment and six candidates under consideration. The court is open to any defendants with drug related offenses, including non-drug charges. Some clients also have open juvenile dependency cases. Defendants who elect to participate in the drug court must forego any legal motions in their cases and plead guilty. Upon completion of drug court, the charges are dismissed. Clients are encouraged to get driver's licenses, become voters, obtain GED's, go to school or get a job, attend their children's school events and engage in other pro social activities. Mr. Butterfield, when he worked as a defense attorney, provided representation in the drug court and was compensated on an hourly basis by OPDS.⁸

Attorneys are not present at arraignment in criminal cases unless they happen to be in court on other matters. The court appoints the Lillegard firm in all cases except co-defendant cases and cases in which the defendant has been determined to be eligible for drug court.⁹ Defense attorneys are present in felony cases for arraignment at the indictment stage. The court will entertain a motion for release from custody at these arraignments. In other matters a release hearing can be scheduled for the following day if a request is made before 3 p.m.

⁷ For incarcerated defendants, defense attorneys can initiate settlement discussions sooner than the pretrial conference.

⁸ This arrangement was not advantageous. He was not compensated for the time he spent attending "mandatory" conferences and the like and was not able to recommend to his business successor that she continue to provide this service. OPDS is currently exploring alternatives to representation in this court at the hourly rate.

⁹ Court staff expressed concern about the Lillegard firm receiving case credits for cases from which they later withdraw after discovering a conflict or, for example, finding out that a defendant who was first thought not eligible for drug court is later found to be eligible, requiring a substitution of counsel.

Cases scheduled for trial are assigned to one of the three judges on a random selection system. The trial rates in Polk County criminal cases exceed the state average: In 2008, 7.4% of felonies were tried and 5.7% of misdemeanors compared to statewide averages of 5.1 for felonies and 3.9 for misdemeanors. Trial rates in Polk County were significantly above average in 2005 – 2007 as well.

A significant proportion of the criminal cases arising in the county occur at the Spirit Mountain Casino. The most common offenses are trespass (by persons who have been excluded and asked not to return to the casino) and drug possession and delivery charges arising on casino property. The Confederated Tribes of the Grand Ronde, which owns and operates the casino, provides funding for the staffing of a sheriff's station in the town of Grand Ronde.

Procedure in Juvenile Cases

Each of the three Circuit Court judges has a juvenile docket. Judge Luukinen hears juvenile matters on Monday morning, Judge Avera on Monday afternoon and Judge Horner on Thursday. Subsequent hearings in cases initially heard by each judge are scheduled before the same judge. Both dependency and delinquency cases are heard on each day. While counsel is appointed at the time of the shelter hearing, unless the attorney is in court on another matter, the attorney will not be present for the hearing.

Dependency cases:

In Polk County the Juvenile Department prepares the petitions with direction from the district attorney's office. DHS rarely elects to handle cases on a voluntary basis according to one representative of the state and by the time the petition has been filed the child has generally been removed. The DHS Branch Manager for the area, Mike Williams, said that the total number of cases in Polk County has been declining over the last year, as has the percentage of removals. He said that the number of voluntary cases has been increasing under the current supervisor.

The district attorney handles dependency cases through disposition. DHS is represented by Department of Justice attorneys beginning at the permanency hearing stage. There is a model court team in juvenile court that holds planning meetings for the juvenile system and seeks to increase compliance with juvenile court timelines. Currently none of the defense attorneys are participating on this team.

Attorneys are not present at shelter hearings in dependency cases. A status hearing is held a month later at which counsel is present.

The Lillegard firm is appointed to represent parents in dependency cases. Children are not often provided with appointed counsel in Polk County. Other parties to these proceedings report that even when they request appointment of counsel for a child the court may deny it.¹⁰ Counsel has been denied for teens as well as for younger children. When counsel is appointed, an hourly rate attorney, often from Marion County, receives the appointment.

Attorneys for parents are appointed to represent the client only until disposition on the petition. Although the court and the Citizen Review Board schedule regular review hearings after adjudication, parents must request that counsel be reappointed for these hearings. Many do not and thus are unrepresented at the hearing. Even those who seek representation for particular hearings have no representation between hearings.

Polk County has an active CASA program. Christine Olson is the CASA coordinator. There are 32 volunteers and four more in training. There are CASA volunteers available for about half of the children in DHS care. CASAs are appointed at the time of the shelter hearing.

Maria Chavez Haroldson is the CRB coordinator for Polk County. Defense attorneys rarely participate in CRB reviews.

Delinquency cases:

Trish Reding is the Director of the Polk County Juvenile Department. In addition the department has 4.5 FTE probation officers who carry caseloads. When police reports come to the department a lead worker reviews them and screens the youth and the offense for diversion eligibility. If diversion or some other alternative approach is not appropriate, the reports are sent to the district attorney for review and recommendation regarding charges to be filed. Petitions are filed in most felony cases but with DA approval some of these cases can be treated informally. Approximately 90% of youth against whom petitions are filed request counsel. (Some youth also request and receive counsel to assist them in deciding whether to agree to informal treatment.) In probation violation cases, however, it is less common for youth offenders to request counsel. Juvenile Department staff believes this is because youth know they will not receive detention time. There is no detention facility in Polk County. The county contracts with Yamhill County for three of its beds and with Marion County for one bed.

¹⁰ OPDS staff was advised by representatives of two parties to recent juvenile cases that they had asked the court to appoint counsel for the child but that the court had declined to do so, although ORS 419B.195 appears to make appointment mandatory under these circumstances: "Whenever requested to do so, the court shall appoint counsel to represent the child or ward in a case filed pursuant to ORS 419B.100."

One diversion program - the Sanction Court - is available in the Monmouth/Independence, Dallas, Grand Ronde and West Salem communities. The Sanction Court uses the Community Action Model in dealing with first time misdemeanors, violations and status offenses. The youth and at least one parent must appear to address the referral.

A Lead worker on the juvenile department staff handles the sex offense caseload. Approximately 20% of these cases are handled informally. Once a petition is filed, however, resolution on an informal basis is rare. Youth who are adjudicated are eligible to be considered for dismissal of the charges after completing the terms of probation. These youth are not required to register as sex offenders but their records cannot be expunged.¹¹

Youth are represented at preliminary hearings if they have completed the request for court appointed counsel before coming to court. At the preliminary hearing a pretrial conference is scheduled within 30 days and trial within 60.

Public Defense Providers

PDSC contracts with a single provider for non-death penalty cases in Polk County, the Chris Lillegard firm. The firm contracts to handle 1,512 cases per year.¹² There are currently three associates in addition to Mr. Lillegard who represent public defense clients.

In cases with co-defendants or multiple parties (such as juvenile dependency cases), additional attorneys are appointed on an hourly rate basis. There are few Polk County attorneys who accept appointment in these cases. Marion County attorneys are often appointed and occasionally attorneys from Yamhill and other counties.

Comments regarding Local Public Safety System and PDSC Providers

Polk County may be unusual in the extent to which judges and prosecutors have previously served in other capacities. All three judges have both prosecution and defense experience, two of the judges having served as the elected district attorney in the past. The current district attorney previously worked as a defense attorney as did the chief deputy district attorney. One of Mr. Lillegard's associates was employed as a police officer by the City of Salem before attending law school. This breadth of experience may be one of the important factors behind the very close-knit legal community where representatives of each

¹¹ Methods of handling juvenile sex offenses vary dramatically from one county to another. In some counties, for example, a juvenile's record is "shredded" upon successful completion of treatment and probation; in others judges permit the amendment of a delinquency petition into a dependency petition allowing the youth to avoid adjudication on a sex offense.

¹² While previously under quota, that shortage has been made up and the firm is now significantly above quota for the current year.

function appear to enjoy congenial relations with representatives of the others. Despite these relationships, however, people seem to speak with candor about what is working in the system and what is not.

Some of the comments provided to PDSC about the current system are set forth below.

Providers:

Mr. Lillegard's firm has been a PDSC contractor for a long time. He and his current associates and office staff are highly regarded in the local justice community. The attorneys treat court staff and other system partners with courtesy and respect. In the past, there have been associates about whom frequent concerns and complaints were made to Mr. Lillegard, who did not always respond, according to some commentators, in a timely way.

A second contractor is needed for conflict appointments in criminal and juvenile cases. Attorneys who have worked at PDSC's hourly rate in the past express concern about attorneys from other counties who have to drive from those counties to Dallas without any compensation for their travel time (other than mileage). Court staff sometimes has to make multiple calls in order to identify an attorney willing to accept cases in the county. Even though they have agreed to accept Polk County cases, some attorneys change their minds and do not notify OPDS. Some of the attorneys currently accepting hourly rate appointments are excellent and it is hoped they will continue to be available if PDSC decides to pursue additional contracts. Some stakeholders are concerned that the few attorneys who appear most often may be overworked and may be unwilling to continue if more attorneys aren't made available.

Criminal cases:

OPDS staff received reports that conflicts of interest requiring substitution of counsel are identified relatively late in some cases and that attorneys are not required to indicate the nature of a conflict before having their motions for substitution granted.¹³

Motion practice in criminal cases is minimal.¹⁴ The motions that are filed tend to be routine rather than creative. Mr. Lillegard notes that defense attorneys

¹³ While it would be important to insulate the trial judge from any disclosures that might prejudice the defendant's right to a fair trial, it is not apparent why the disclosure cannot be made to one of the other judges or redacted to protect the confidences and secrets of the defendant as recommended in the best practices outlined on page 19 of the Report of the Conflicts Work Group which appears on the Public Defense Services Commission website under "Reports and Publications."

¹⁴ The trial rates in criminal cases are significant higher, however, than the average trial rates in the state as noted above.

generally discuss potential grounds for legal motions in settlement discussions with the state. If a suitable resolution is agreed upon, there is no need to file a motion.

Attorneys appear to be in good contact with their criminal clients and are reported to be prepared when they come to court.

Judge Horner would like to work with the district attorney's office and defense lawyers to find a way to manage the cases that don't require a lot of attention in a more efficient way. Although one of the principle motivations for creating an early resolution program is to relieve pressure on the county jail (which isn't an issue in Polk County), there can be efficiencies for the entire system, particularly if the process permits the resolution of a high volume of fairly routine cases, allowing all parties to focus their time and attention on those that have are more complex and that have genuine legal or factual issues that require more attention.¹⁵ The district attorney's office does not currently see the need for such a program in Polk County since criminal cases move relatively quickly in the county. Although there is no regular meeting of criminal court stakeholders at which such a proposal could be discussed, it is a small legal community and there is reported to be a lot of informal communication.

Juvenile cases:

The principal deputy district attorney assigned to juvenile court says that Lillegard firm attorneys know the law and fight hard on cases.

Juvenile Department staff members report having good working relations with the defense attorneys, both those with the Lillegard firm and the hourly rate attorneys. In general, attorneys provide good representation but motion practice is uneven. The most common motion filed is a motion to suppress; it is less common to file a motion challenging a youth's capacity to proceed.¹⁶ Youth report to their juvenile court counselors that they cannot reach their attorneys and attorneys do not appear to be meeting with incarcerated youth in the time frames

¹⁵ The Commission's guidelines for public defense lawyers in early disposition programs are available on the PDSC website:

<http://www.ojd.state.or.us/osca/opds/Reports/documents/EDPGuidelines.pdf> should the county decide to consider such a program. Of the EDP programs reviewed by PDSC, the Washington County program appears to be the most effective in promptly resolving cases. One feature of the Washington County program that has recently drawn criticism, however, is that the defendant and counsel are both required to certify that the district attorney's information regarding the defendant's prior criminal history before the court will accept a plea petition. This effort to shift the burden of establishing the defendant's criminal history to the defense negatively impacts the attorney client relationship and may create ethical dilemmas for defense attorneys. A legal challenge to the requirement is being considered.

¹⁶ Defense attorneys ordinarily seek funds for an ex parte evaluation of a client's capacity to aid and assist before filing a motion or bringing the matter to the attention of the court. In 2008 there were two requests from Polk County for funds to obtain such an evaluation of a juvenile client.

set forth in the PDSC contract.¹⁷ It is rare for defense attorneys to obtain their own sex offender evaluations.¹⁸ They generally permit the juvenile department to have youth evaluated for risk of reoffending and appropriate treatment options. It does not appear that attorneys are often performing investigation in juvenile cases.¹⁹

In dependency cases, it was again reported that there are good relations between the defense bar and the district attorney's office, the CASA program, and DHS staff. The parties usually come to agreement as to how cases are to be resolved. Attorneys are said to be very effective litigators but, as noted above, dependency clients have no one to advocate for them during the life of the dependency case.

Defense participation in Citizen Review Board hearings is minimal, probably because under the local juvenile court culture, parents are unrepresented at this stage unless they have sought to have counsel reappointed. Parent clients who attend CRB hearings appear to lack an understanding of the nature of the hearing and their role. Mr. Butterfield, before he became the District Attorney, attended CRB hearings with his clients. Some Marion County attorneys and one local attorney also appear.

Defense attorneys do not participate in the local Juvenile Court Improvement Project which does most of the planning for juvenile case processing in the county.

DHS's Permanency Supervisor in Polk County, Laurie Linn, believes that parents need representation throughout the life of the dependency case and that most children, if not all, need to be represented by counsel.

OPDS's recommendations for further inquiry at PDSC's August 6, 2009 meeting in Dallas

Based on the information provided to OPDS during meetings and telephone conversations with justice system stakeholders, OPDS recommends that the Commission consider the following in developing a service delivery plan for Polk County.

¹⁷ PDSC's model contract requires that contractors, whenever possible, speak to and conduct initial interviews in person with in-custody clients within 24 hours of appointment or the next working day. Contractors are required to arrange for contact with out-of-custody clients within 72 hours of appointment.

¹⁸ No requests for authorization of expenses for a psycho-sexual evaluation of a juvenile client were received from Polk County in 2008.

¹⁹ In 2008 there were five requests for funds to engage the services of an investigator in a juvenile delinquency case. All five requests were submitted by the same attorney.

The Structure

Under the system currently in place, PDSC contracts with a single law firm to handle criminal and juvenile cases in the county. Conflict cases are assigned to attorneys working at the hourly rate, principally from Marion County. Judges, court staff and others recommend that PDSC's service delivery plan for the county include an additional contractor or contractors to handle conflict cases.

The Juvenile Dependency System

While there may be other counties that follow a similar model, OPDS staff is not aware of another county in which parents essentially lack representation during the life of a dependency case. The bar's performance standards for attorneys in dependency cases²⁰ assume that the attorney-client relationship continues during this period and that counsel is available to assist the client in accessing services, to represent the client at various agency-initiated planning meetings, to challenge practices that deny the client an appropriate level of visitation, to establish a lack of reasonable efforts to reunify the family, to initiate a request for a court hearing when the client's rights are being disregarded, as well as to encourage and support the client in following through on the parent's obligations. PDSC requires that public defense attorneys observe these performance standards.²¹

The great majority of children receive no representation at all in dependency cases, regardless of age and regardless of the stage of the proceedings in Polk County. While CASAs are appointed for approximately half of the children in care, a CASA's role is entirely different from that of an attorney. CASAs do not represent a child's express wishes, regardless of whether a child is capable of considered judgment. The CASA has no obligation of confidentiality toward a child and statements made by a child to a CASA are not privileged. A CASA cannot cross examine witnesses, prepare and argue legal motions, pursue administrative or other legal challenges on behalf of a child.

The Commission may want to consider what its role should be in identifying best practices, making recommendations regarding appointment of counsel or taking other steps to see that the needs of public defense clients in a particular county are being met.

²⁰ The standards may be found on the Oregon State Bar's website: http://www.osbar.org/surveys_research/performancestandard.

²¹ PDSC's Qualification Standards for Court Appointed Counsel require that attorneys "Have read, understood and agree to observe applicable provisions of the current edition of the Oregon State Bar's Performance Standards for Counsel in Criminal, Delinquency, Dependency, Civil Commitment, and Post-Conviction Relief Cases."

Service Delivery Plan for Polk County

[This portion of the report will be completed at the conclusion of the Commission's discussions and deliberation.]

Attachment 3

**OPDS's Draft Report to the Public Defense Services Commission
On Service Delivery in Clackamas County
(July 2009)**

Introduction

Since developing its first Strategic Plan in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its mission to deliver quality, cost-efficient public defense services in Oregon. Recognizing that increasing the quality of legal services also increases their cost-efficiency by reducing risks of error and the delay and expense associated with remedying errors, the Commission has developed strategies designed to improve the quality of public defense services and the systems across the state for delivering those services.

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through 2008, the Commission completed investigations of the local public defense systems in Baker, Benton, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Clackamas County undertaken in preparation for PDSC's public meeting in Oregon City on Thursday, March 12, 2009, a summary of the testimony taken at that meeting, a summary of the Commission's discussion of Clackamas County at the April 16, 2009 PDSC meeting, and a brief discussion of developments in the county since the March meeting.

PDSC's service delivery planning process

There are four steps to PDSC's service delivery planning process. First, the Commission has identified regions in the state for the purposes of reviewing local public defense delivery systems and services, and addressing significant issues of quality and cost-efficiency in those systems and services.

Second, starting with preliminary investigations by OPDS and the preliminary draft of a report, the Commission reviews the condition and operation of local public defense delivery systems and services in each county or region by holding one or more public meetings in that region to provide opportunities for interested parties to present their perspectives and concerns to the Commission.

Third, after considering OPDS's preliminary draft report and public comments during the Commission's meetings in a county or region, PDSC develops a "service delivery plan," which is set forth in the final version of OPDS's report. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or propose changes to improve the delivery of the region's public defense services. In either event, the Commission's service delivery plans (a) take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts.

Finally, under the direction of PDSC, contractors subject to the Commission's service delivery plans are urged to implement the strategies or changes proposed in the plans. Periodically, these contractors report back to PDSC on their progress in implementing the Commission's plans and in establishing other best practices in public defense management.

Any service delivery plan that PDSC develops will not be the last word on a local service delivery system, or on the quality and cost-efficiency of the county's public defense services. The limitations of PDSC's budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and its contractors, and the wisdom of not trying to do everything at once, place constraints on the Commission's initial planning process in any region. PDSC's service delivery planning process is an ongoing one, calling for the Commission to return to each region of the state over time in order to develop new service delivery plans or revise old ones. The Commission may also return to some counties in the state on an expedited basis in order to address pressing problems in those counties.

Background and context to the service delivery planning process

The 2001 legislation establishing PDSC was based upon an approach to public defense management, widely supported by the state's judges and public defense attorneys, which separates Oregon's public defense function from the state's judicial function. Considered by most commentators and authorities across the country as a "best practice," this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, while judges remain responsible for appointing attorneys to represent eligible clients, the Commission is now responsible for the provision of competent public defense attorneys.

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission's view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in

its mission statement, PDSC is also dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

Service delivery planning is one of the most important strategies PDSC has undertaken to promote quality and cost-efficiency in the delivery of public defense services. However, it is not the only one.

In December 2003, the Commission directed OPDS to form a Contractor Advisory Group, made up of experienced public defense contractors from across the state. That group advises OPDS on the development of standards and methods to ensure the quality and cost-efficiency of the services and operations of public defense contractors, including the establishment of a peer review process and technical assistance projects for contractors and new standards to qualify individual attorneys across the state to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and lawyers have visited contractors in Benton, Clackamas, Columbia, Crook, Deschutes, Douglas, Clackamas, Jackson, Jefferson, Lane, Lincoln, Linn, Multnomah, Umatilla and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC undertook a statewide initiative to improve juvenile law practice in collaboration with the state courts, including the creation of a Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and to develop a statewide Service Delivery Plan for representation in juvenile dependency cases.

Another area of practice in which significant concerns about quality of representation have been raised by the Oregon State Bar and others is post conviction relief cases. In March 2008 PDSC heard from judges, the Department of Justice and a number of attorneys whose practice includes post conviction relief about the need for improvement in the quality of representation being provided by public defense attorneys. A work group was convened by the bar at the request of PDSC to create performance standards for attorneys in these

cases. Those standards have now been approved by the bar's Board of Governors and adopted by PDSC as the standards to be observed by court-appointed attorneys. The work group also made additional recommendations to PDSC for improving services in this area of practice. Those recommendations were presented to PDSC at its March 2009 meeting. A service delivery plan for post conviction relief cases is scheduled for further discussion at the May 21, 2009 PDSC meeting.

In 2007 PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in those cases was approved by the Commission in June of 2007.

The Commission is also concerned about the "graying" of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that the impact of such shortages is greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

"Structure" versus "performance" in the delivery of public defense services.

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission's service delivery planning process. That process is aimed primarily at reviewing and improving the "structure" for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into "best practices," recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.¹ A public agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

¹ Debates over the relative effectiveness of the structure of public defender offices versus the structure of private appointment processes have persisted in this country for decades. See, e.g., Spangenberg and Beeman, "Indigent Defense Systems in the United States," 58 Law and Contemporary Problems 31-49 (1995).

Most of PDSC's other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the "performance" of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time to time in the course of the Commission's service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission's deliberative processes. OPDS, with advice and assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

In light of the distinction between structure and performance in the delivery of public defense services and the relative capacities of PDSC and OPDS to address these issues, this report will generally recommend that, in the course of this service delivery planning process, PDSC should reserve to itself the responsibility of addressing structural issues with policy implications and assign to OPDS the tasks of addressing performance issues with operational implications.

Organizations currently operating within the structure of Oregon's public defense delivery systems.

The choice of organizations to deliver public defense services most effectively has been the subject of a decades-old debate between the advocates for "public" defenders and the advocates for "private" defenders. PDSC has repeatedly declared its lack of interest in joining this debate. Instead, the Commission intends to concentrate on a search for the most effective kinds and combinations of organizations in each region of the state from among those types of organizations that have already been established and tested over decades in Oregon.

The Commission also has no interest in developing a one-size-fits-all model or template for organizing the delivery of public defense services in the state. The Commission recognizes that the local organizations currently delivering services in Oregon's counties have emerged out of a unique set of local conditions, resources, policies and practices, and that a viable balance has frequently been achieved among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of taxpayer dollars available for public defense services in Oregon. Accordingly, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to those proposals. As the largest purchaser and administrator of legal services in the state, the Commission is committed to ensuring that both PDSC and the state's taxpayers are getting quality legal services at a fair price. Therefore, the Commission does

not see its role as simply continuing to invest public funds in whatever local public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide quality services in each region of the state.

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

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of their relative advantages and disadvantages. This discussion is by no means exhaustive. It is intended to highlight the kinds of considerations the Commission is likely to make in reviewing the structure of any local service delivery system.

Over the past two decades, Oregon has increasingly delivered public defense services through a state-funded and state-administered contracting system. As a result, most of the state's public defense attorneys and the offices in which they work operate under contracts with PDSC and have organized themselves in the following ways:

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.² Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by

² Spangenberg and Beeman, *supra* note 2, at 36.

public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.³ As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in

³ Id.

a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger law firms, but in which they no longer wish to practice law.

In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the consortium is reasonably well-organized and managed, PDSC has fewer contractors or attorneys to deal with and, therefore, OPDS can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar’s “firm unit” rule, conflict cases can be cost-efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys to handle such cases and, frequently, to pay both the original attorney with the conflict and the subsequent attorney for duplicative work on the same case. Finally, if a consortium has a board of directors, particularly with members who possess the same degree of independence and expertise as directors of not-for-profit public defenders, then PDSC can benefit from the same opportunities to communicate with local communities and gain access to additional management expertise.

Some consortia are made up of law firms, as well as individual attorneys. Participation of law firms in a consortium may make it more difficult for the consortium’s administrator to manage and OPDS to monitor the assignment and handling of individual cases and the performance of lawyers in the consortium. These potential difficulties stem from the fact that internal assignments of a law firm’s portion of the consortium’s workload among attorneys in a law firm may not be evident to the consortium’s administrator and OPDS or within their ability to track and influence.

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its

attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services the consortium delivers. These methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receive court appointments.

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus, PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. Those observations simply suggest that PDSC may have less influence on the organization and structure of this type of contractor and, therefore, on the quality and cost-efficiency of its services in comparison with public defender offices or well-organized consortia.

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

4. Individual attorneys under contract. Individual attorneys provide a variety of public defense services under contract with PDSC, including in specialty areas of practice like the defense in aggravated murder cases and in geographic areas of the state with a limited supply of qualified attorneys. In light of PDSC's ability to select and evaluate individual attorneys and the one-on-one relationship and direct lines of communications inherent in such an arrangement, the Commission can ensure meaningful administrative oversight, training and quality control through contracts with individual attorneys. Those advantages obviously diminish as the number of attorneys under contract with PDSC and the associated administrative burdens on OPDS increase.

This type of contractor offers an important though limited capacity to handle certain kinds of public defense caseloads or deliver services in particular areas of the state. It offers none of the administrative

advantages of economies of scale, centralized administration or ability to handle conflicts of interest associated with other types of organizations.

5. Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as “overflow” from other types of providers. This organizational structure does not involve a contractual relationship between the attorneys and PDSC. Therefore, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, carefully administered qualification process for court appointments to verify attorneys’ eligibility for such appointments, including requirements for relevant training and experience.

PDSC’s Preliminary Investigation in Clackamas County

The primary objectives of OPDS’s investigations of local public defense delivery systems throughout the state are to (1) provide PDSC with an assessment of the strengths and weaknesses of those systems for the purpose of assisting the Commission in its determination of the need to change a system’s structure or operation and (2) identify the kinds of changes that may be needed and the challenges the Commission might confront in implementing those changes. PDSC’s assessment of the strengths and weaknesses of a local public defense system begins with a review of an OPDS report like the initial version of this document.

PDSC’s investigations of local delivery systems in counties or judicial districts across the state serve two other important functions. First, they provide useful information to public officials and other stakeholders in a local justice system about the condition and effectiveness of that system. The Commission has discovered that “holding a mirror up” to local justice systems for all the community to see can, without any further action by the Commission, create momentum for local reassessments and improvements. Second, the history, past practices and rumors in local justice systems can distort perceptions of current realities. PDSC’s investigations of public defense delivery systems can correct some of these local misperceptions.

In February 2009 OPDS Executive Director Ingrid Swenson, accompanied on some interviews by OPDS General Counsel Paul Levy and Clackamas County CBS Analyst Amy Jackson, visited with stakeholders in Clackamas County. In addition to talking to PDSC’s contractors in the district, they met or spoke by phone with six of the Circuit Court judges, a pro tem judge, the District Attorney and his chief deputy, the Citizen Review Board coordinator, two DHS managers, the Juvenile Department Director, the CASA director, and one of the Assistant Attorneys General assigned to the area.

The initial version of this report set forth the information obtained in those interviews and recommended areas of further inquiry for Commissioners at the March 12, 2009 meeting in Oregon City. The current version of the report incorporates information provided at and after that hearing, and summarizes the discussion that took place at the April 16, 2009 meeting. The final version of this report will include a service delivery plan for Clackamas County.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for a particular area.

OPDS's Findings in Clackamas County (Judicial District No. 5)

The Circuit Court and the District Attorney

There are eleven Circuit Court judges in Clackamas County. Judge Steven Maurer is the presiding judge. Judge Deanne Darling is the primary juvenile court judge. The Trial Court Administrator is Mari Miller. The County has seven specialty courts.

John Foote is the District Attorney and Greg Horner is his chief deputy. There are currently 29 deputies and the number of positions is expected to remain stable. While, as noted below, the defense bar rarely adds new lawyers, the District Attorney's office does have turnover in its staff and has become the point of entry for new attorneys seeking criminal law experience in the county.

Procedure in criminal cases

There are five special courts for criminal cases. The adult drug court is designed for defendants with significant, long-term drug or alcohol addiction. A guilty plea is required for the defendant to participate in the program. One Clackamas Indigent Defense Consortium (CIDC) attorney is assigned to cover the drug court. The mental health court is limited to defendants charged with non-violent offenses whose behavior is principally attributable to mental illness rather than substance abuse or anti-social behavior. There is also a DUII Court, a community court and a domestic violence deferred sentencing program. CIDC lawyers cover these courts as well.

A consortium attorney is present in court for felony and in-custody misdemeanor arraignments. Each case is generally assigned to a particular attorney on the same day as the arraignment. That attorney checks for conflicts, and if a conflict is found the case is reassigned to another consortium attorney.

Arraignments for clients who are in custody, either at the Clackamas County Jail, at the Inverness Jail in Multnomah County or in a state correctional facility⁴, are generally done by video. Only a few prisons (such as the Columbia River Correctional Institute) do not have video capacity.

Three of the Clackamas County courtrooms are fully wired for video appearances and there is a portable “polycom” unit that can be used in other courtrooms. While the capacity for confidential communication between attorneys and clients is limited, the video system is used principally for routine appearances.

The county uses a master calendaring system. There is a court liaison team which includes CIDC, the district attorney’s office, the bar president, the trial court administrator and the judges which addresses system issues on a regular basis. Based on the recommendation of this group the county has been using a “case manager” system for scheduling criminal cases since 2003. Except for serious cases such as Measure 11 cases, the parties are expected to resolve cases or set them for trial by the 35th day after the first appearance. The district attorney’s office is required to include a settlement offer when it provides discovery to the defendant. Motions must be filed 21 days before trial and are generally heard on Mondays. There is no trial docket call but lawyers are required to notify the court 24 hours in advance whether their cases will actually be going to trial.

The state issues subpoenas in only about 15% of criminal cases. The trial rates in Clackamas County, however, are higher than the statewide average.⁵

Clackamas County is growing and the court anticipates that the criminal caseload will continue to grow as well. Jail capacity has been an issue in the county. In 2005, the Circuit Court judges sitting en banc issued an order prohibiting the sheriff from closing additional beds. After the voters approved a levy in November of 2006 the Clackamas County Board of County Commissioners unanimously agreed to devote \$50 million towards construction of a new adult jail and to construct the first phase of an expanded jail at another site with a planned completion date of 2010. There are currently approximately 400 jail beds available in the county.

OPDS contracts with CIDC to handle 6,844 cases per year. CIDC is currently just slightly under quota. The district attorney’s office notes arrest rates have been fairly constant for the past eight years in Clackamas County even though the crime rate appears to be dropping.

⁴ Arraignments from the state institutions are usually on warrants.

⁵ From January 1, 2008 through June 30, 2008 the statewide trial average for felony cases was 5.4% and for misdemeanors, 4.4%. In the same period the trial rates in Clackamas County were 7.1 for felonies (39 to the court and 37 to juries) and 6.7% of the misdemeanors (53 court and 87 jury).

Procedure in juvenile cases

The Clackamas County Juvenile Court is located with other county offices in a group of buildings several miles from the County Courthouse. Mondays and Thursdays are the principal juvenile court days, although preliminary hearings are held daily as needed. There are two juvenile drug courts, the juvenile dependency drug court and the delinquency drug court. Both meet on Wednesdays and are staffed by Independent Defenders, Inc. (IDI) attorneys. Citizen Review Board hearings are held on Tuesdays.⁶

Attorneys are not present for shelter hearings in juvenile dependency cases. Attorneys generally receive notice of their appointment, however, on the same day as the shelter hearing. Dependency cases are scheduled for “judicial review of the petition” 30 days after the shelter hearing. This hearing serves as a settlement conference. Once jurisdiction is established (either by trial or by admission) a review is scheduled before the Citizen Review Board at five months. Upon the court’s instruction, the CRB focuses its attention at this hearing on creating a realistic concurrent plan to be implemented if the primary plan (usually of return to parent) cannot. Since these hearings are scheduled with input from the attorneys, attorneys are almost always present. The court then conducts a review at approximately eight months and a permanency review at thirteen months. A second CRB review occurs prior to the permanency hearing at ten months. This hearing is scheduled at the time of the first CRB review, which, again, allows attorneys to participate in the selection of the hearing date. There are two DHS offices in Clackamas County, the North Clackamas office and the Oregon City office. Both DHS offices are reputed to do a good job of transitioning cases from the initial protective services worker to the on-going worker, both of whom usually appear at the dispositional hearing. There is an active CASA program in the county and individual CASAs are assigned in approximately 60% of the cases.

Ellen Crawford is the Juvenile Department director. There are twenty-three counselors who work under her supervision. This department makes extensive use of formal accountability agreements and other informal approaches based on a comprehensive case management system. Low risk youth are generally referred to diversion programs. Higher risk youth are referred to juvenile counselors who may still recommend a formal accountability agreement. There are three deputy district attorneys assigned to juvenile court cases. It is the district attorney’s office that files the petition after receiving the police reports from the juvenile department in those cases in which adjudication is sought.

⁶ Clackamas County is one of a very few counties where the Citizen Review Board has been able to schedule its hearings to accommodate attorneys’ schedules. Instead of having review dates scheduled automatically in accordance with the DHS calendar, the Clackamas Board schedules its hearings at the time of disposition when the parties and their attorneys are present. The second review is scheduled at the time of the first review. The Citizen Review Board of Washington County has also moved to this system and the Marion County CRB is exploring the use of a similar system in that county.

An attorney from IDI is present for delinquency preliminary hearings. At the preliminary hearing the court sets an “adjudication and disposition” hearing approximately 30 to 60 days later. If the youth wants a trial the attorney notifies the court of the need for a trial date. Few youth remain in custody pending trial. The county has access to fourteen detention beds at the Donald E. Long facility in Portland. Youth are rarely held for more than a few days.

The delinquency drug court currently has fifteen clients. The program serves youth who are fourteen to eighteen years old. The drug court team continues to refine the structure and operation of the court.

Probation violations are used sparingly in Clackamas County juvenile court, and only after other alternatives are exhausted except in cases of new criminal activity or a significant risk to public safety. Attorneys are notified when informal sanctions are imposed on their clients.

Public defense contractors

There are two public defense contractors in Clackamas County, the Clackamas Indigent Defense Consortium (CIDC) which contracts with PDSC to handle criminal cases, and Independent Defenders, Inc. (IDI) which contracts for juvenile and civil commitment cases.

CIDC

CIDC has 27 members. It has a board of directors, five of whom are permanent members. All members are currently consortium attorneys. The board was recently restructured when two of its permanent members resigned. Their positions were taken by two younger members. The board has a president who serves at the pleasure of the board. The current president is Brad Jonasson. Every year two members of the board are replaced with other non-permanent members. CIDC operates under written bylaws; executes written agreements with members and has a manual for attorneys.

Ron Gray is the administrator of the consortium. Mr. Gray serves on two advisory groups to OPDS, has served on site review teams, and, at OPDS's request, prepared a list of best practices for consortia which is attached as Exhibit A. CIDC uses a portion of its PDSC funds for administrative functions and sets aside a certain amount to cover supplemental compensation for lawyers who handle particularly complex cases. Mr. Gray is assisted by Janan Billesbach, who has worked for the consortium for many years. Currently she is partly retired but continues to work half time from her home where she has a dedicated phone line and computer and is able to make consortium appointments on a daily basis.

The consortium president has assumed responsibility for creating an attorney evaluation process. He has assembled a committee which is working on a questionnaire to be sent to clients and a questionnaire to be sent to system representatives. Among the factors that will be analyzed in terms of attorney performance will be trial rates.

The work of the consortium was reviewed by an OPDS site team in 2004. OPDS has also conducted two statewide surveys that included Clackamas County. In the most recent of those surveys, the respondents were principally the local Circuit Court judges. They described the work of CIDC on average as good. Comments noted that the range of skill varied from one attorney to another and that there was some frustration with the less skilled attorneys.

Comments received by OPDS staff prior to this review from members of the local criminal justice system indicated that: CIDC has a lot of very good, experienced attorneys; they maintain a good relationship with the district attorney's office and the court; the county is fortunate to have them; Ron Gray is responsive to concerns from the bench and court staff; the consortium is able to provide mentoring when attorneys need it; the judges' workload is very high in Clackamas County and it is very helpful to have a provider that is as flexible as CIDC; it would help to have more attorneys; members cooperate with the court to make the system work, as does the district attorney's office; CIDC has also been a "partner" in the creation and operation of the treatment courts. Although there is a range of quality, on the whole it is very good with only a couple of attorneys who are problematic. CIDC attorneys are, on average, significantly more experienced trial attorneys than deputy district attorneys in the county.⁷

IDI

There are currently eleven attorneys in the consortium. Most of them have been part of the consortium for more than 20 years⁸. The consortium has a board of three members, one of whom is not a consortium member. The consortium has hired a former DHS worker who uses her expertise as a child welfare specialist to assess child clients' circumstances, advise attorneys about appropriate services for children, review DHS files and otherwise assist attorneys in representing children. The consortium does not sponsor trainings for its members. Members are active participants in juvenile court system-wide meetings and trainings, however.

Marty Cohen is the administrator of the consortium. Concerns about performance by consortium members are brought to his attention. He handles

⁷ Only 4 of CIDC's attorneys were admitted to practice within the last 15 years; more than half the members have been practicing for 25 years or longer.

⁸ One of the senior attorneys is currently training a new lawyer in juvenile representation however.

delinquency cases and staffs the juvenile drug court. He and the attorney with whom he shares office space both have a significant private practice.

In view of the declining juvenile caseload⁹, Mr. Cohen has advised other members of the consortium to take on private cases.

OPDS conducted a quality assessment site review of IDI in 2007. Responses to the 2008 statewide survey indicated that representation provided by this group varied from good to excellent in both dependency and delinquency cases. Caseloads were deemed to be “about right to somewhat too large” in dependency cases and “about right” in delinquency cases. Specific comments noted that most juvenile lawyers were involved in other kinds of practice and that too often they met clients at the courthouse, did not meet with foster parents and didn’t have sufficient contact with clients.

Comments received during visits to the county by OPDS staff prior to this review indicated that the juvenile attorneys are “top notch” and do a great job; some of them have too many court appearances although this is getting better as the caseload declines. (It was acknowledged that their income from public defense cases has declined and that they are probably required to do other kinds of cases. It was also noted that they do a good job of making sure that someone appears for them if they cannot be present for a hearing, although the substitute attorney does not always have the needed information.) One commentator said OPDS should make sure attorneys understand the extent of their duties to clients, especially with respect to contacting them and keeping them informed about the status of the case. It was also suggested that OPDS consider changes in how it compensates lawyers in dependency cases. Some attorneys believe they get paid only for attending hearings, not for continuing representation of the client while the case is open. It was also recommended that the consortium consider terminating one of its members. Marty Cohen is generally considered to be responsive to concerns about members and willing to intervene. Another commentator noted that some of the attorneys are very effective at getting appropriate services for their clients while others seem disengaged. Some attorneys meet with foster parents, others don’t. Some children are reportedly not seen by either their attorneys or their caseworkers.

One of the effects of limited attorney availability is the lack of representation at shelter hearings in dependency cases. DHS indicates that this is a disadvantage to the consortium’s clients because DHS cannot work closely with the parents until the parents have met with their attorneys and decided whether or not to contest the petition and whether or not to cooperate with DHS in service

⁹ All categories of juvenile cases appear to be declining in the county. In the calendar year 2008, the consortium received credit for a total of 2,574 cases.

planning. If attorneys were present at shelter hearings they could also argue against removal or in support of a particular placement.¹⁰

Many attorneys apparently do not have sufficient time to meet with their clients before the judicial settlement conference. While it is reported that attorneys are generally familiar with the case and the documents prepared by DHS, they often have not discussed the case with their clients before the court hearing.

Attorneys do participate on a regular basis in child safety meetings. Now that the Oregon Safety Model¹¹ is in place, decisions about placement are generally not made at these hearings but attorneys who are very committed, especially to child clients, nevertheless attend and participate. It was reported that it would be helpful to have one of the attorneys specialize in the representation of older children who will transition out of foster care to independent living.

In delinquency cases, the quality of representation is rated fairly high even though it was reported that lawyers don't always meet with their clients prior to the adjudication and disposition hearing and that there are few motions filed and few trials. It was also reported that the attorneys' level of experience and good working relations with the juvenile department, the district attorney's office and the court are appreciated.

OPDS's recommendations for further inquiry at PDSC's March 12, 2009 meeting in Oregon City

Based on the information provided to OPDS during its visit to Oregon City, OPDS recommends that the Commission consider the following in developing a service delivery plan for Clackamas County.

The structure

The current system includes two consortia, with overlapping membership, that handle criminal and juvenile cases, respectively. The structure appears to be working satisfactorily although a number of commentators point to the need for additional attorneys and for better quality monitoring.

Attorney evaluation

While CIDC attorneys are given credit for providing high quality representation in most cases, some of the judges express concern about the attorneys' availability, about the need to be bringing in and training new attorneys to eventually replace

¹⁰ It should be noted that despite the absence of attorneys at these hearings they can sometimes be quite lengthy when the court requires DHS to produce evidence of the need for removal and proof that reasonable (or active) efforts have been made to prevent removal as required by ORS 419B.150.

¹¹ The Oregon Safety Model approach to child protection was adopted by DHS in March of 2007.

current members, and about the need to consider removing some consortium members on performance grounds. As the Commission is aware from its service delivery reviews in other areas of the state, one of the weaknesses of the consortium model is that consortia often lack a system for evaluating the work of the attorneys and methods for addressing underperformance. It appears that CIDC is undertaking to create such a system. Ron Gray and CIDC have provided statewide leadership on quality assurance procedures. The Commission may want to follow closely the development of an attorney evaluation process in this county as a possible model for use by other consortia around the state.

Need for Additional Attorneys/Compensation

In Clackamas County, there is a significant discrepancy between the general assessment that the lawyers in juvenile cases are skilled and experienced and the frequent observation that they are not having timely and adequate communication with their clients.

In juvenile cases, the need for attorneys to handle cases in addition to their public defense caseloads may affect their availability for court hearings and the ability of some of them to provide appropriate representation. It appears that the principal dilemma for these providers is that PDSC's case rates do not permit attorneys to limit their caseloads and add new members without finding supplementary sources of income. Significant additional funding for juvenile representation as proposed in PDSC's Policy Option Package No. 100 and SB 450 sponsored by Sen. Jeff Kruse¹² may be needed to ensure that attorneys are meeting their obligations to their clients.

While the burden of high caseloads is understood, attorneys should not allow their caseloads to prevent them from attending shelter hearings, meeting with clients before court hearings, meeting with youth, child clients and foster parents, litigating motions to suppress and taking other actions that may be necessary for good representation.

If current funding undermines attorneys' ability to comply with PDSC contract provisions regarding timely contact with clients, representation at hearings and the like, the contractor needs to raise these issues with the Commission and with OPDS prior to and during contract negotiations.

Summary of Testimony at March 12, 2009 PDSC Meeting

Mari Miller, the Trial Court Administrator for the Clackamas County Circuit Court welcomed Commissioners and guests to the court. She noted that her staff was occupied with planning for Friday court closures. She said that the court has

¹² SB 450 proposes an increase in funding to PDSC specifically for the purpose of improving representation in juvenile dependency cases.

worked effectively with public defense providers to resolve issues before they occur. She noted that her court has the highest number of cases per judge in the state.

Chair Ellis said that the Commission is engaged in a process of reviewing the delivery of services throughout the state and has taken the approach that each community is different and its public defense needs may be different too. The Commission's two goals for public defense are quality and economy. He noted that Clackamas County is the only remaining metropolitan county that has a single provider system and the Commission would like to make sure that the single consortium model is the appropriate one.

Barbara Johnson testified that she is the Executive Director of the CASA program in Clackamas County. She said that she has met with the juvenile consortium administrator in the past to discuss issues that arise between CASA volunteers and attorneys for parents and children. She spoke to a number of experienced CASA volunteers to obtain their comments for the Commission. CASA volunteers commented that attorney caseloads are high and that, although attorneys can make a real difference, they sometimes lack passion, don't return calls, are less zealous when they represent children than when they represent parents, often meet their clients just before court and fail to bring any original information to the court. Attorneys don't regularly attend child safety meetings but do attend CRB reviews. Ms. Johnson suggested that a CASA be appointed in every case and that counsel be appointed only upon request of the CASA or other party. Ms. Johnson said that the decline in the dependency caseload in Clackamas County coincides with the implementation of the Oregon Safety Model and that the decline may be the result of the way the model has been implemented in the county.

Commissioner Welch noted that Oregon has a significantly higher rate removal for children from their homes than most states.

Mike Clancy and Gay Canaday testified that they were part of the original group of four lawyers that founded the Independent Defenders, Inc. (IDI), a consortium that is the sole contractor in the county for juvenile public defense cases and civil commitment cases. IDI has a rotating system for case assignments. Most attorneys handle both dependency cases (parents and children) and delinquency cases. Most civil commitment cases are assigned to Ms. Canaday. Consortium attorneys also cover the juvenile drug court. Most members of the group have been practicing for twenty years or more. Consortium members have brought in some younger attorneys recently, however. Mr. Clancy has mentored one of the newer members. He said the consortium needs to do a better job of bringing new people in.

Ms. Canaday said that consortium's eleven members bring with them different kinds of expertise. Some members have expertise in criminal cases or in

domestic relations cases; one member has expertise in social security benefits and Ms. Canaday has expertise in handling mental health cases. The benefit of having this expertise available probably outweighs the scheduling challenges that arise with attorneys who have other kinds of practices. She said that IDI attorneys love their juvenile work and that that is a key to good representation. She said that IDI has a board of directors of four members including three senior IDI attorneys and one CASA. The board meets quarterly and IDI members meet at least quarterly as well. She believes IDI attorneys get along well with CASA volunteers, who have a different perspective than the attorneys.

Mr. Clancy said that IDI had met with the CASAs to discuss their relationship and other issues. He said that attorneys sometimes have difficulty reaching their clients before hearings, despite efforts to do so. Time frames for hearings are short and don't always allow the attorney time to meet with the client. Some appointments occur just prior to hearing dates. Most attorneys send letters to clients immediately after receiving notice of appointment by fax.

Chair Ellis inquired how the consortium deals with members who have performance issues.

Mr. Clancy said that they use progressive sanctions. The organization lacks a full-time administrator and probably needs to have better procedures in place. Over the years there has not been a need for progressive sanctions because of the experience level of the attorneys. If there are problems, board members talk to the attorney about them.

Ruth Boen, who serves as administrative staff to IDI said that the consortium is responsive to complaints. After discussing calendar management problems with one attorney and providing him specific guidelines, the board sent him a letter setting forth its expectations. She also noted that in addition to the new attorney who was mentored and trained by Mr. Clancy, another young attorney received the same kind of training in another member's office.

In delinquency cases, Mr. Clancy said that there was a period of time when the district attorney's office was objecting to formal accountability agreements (FAA) even in cases in which DA approval was not needed. After a discussion with the juvenile department, circumstances have improved and juvenile court counselors will sometimes agree to FAAs without the district attorney's agreement. Another approach that attorneys for youth have taken is to ask that a case be set out for trial for a long enough period to complete needed services.

Mr. Clancy said that the perception some people reported about attorneys not having contact with delinquency clients was a misconception. Detained youth are held in Multnomah County which does make it more difficult for attorneys to see clients in person. In dependency cases, IDI has hired a retired DHS worker as an investigator who sees children in foster care and prepares a written report

that is provided to the court and DHS. DHS workers are not always seeing children as often as they are supposed to or seeing them outside the foster home.

Both Ms. Canaday and Mr. Clancy said that contact with OPDS has been satisfactory. Ms. Canaday expressed a desire to have access to a list of expert witnesses in termination of parental rights cases to supplement the short list that they are currently working from.

Judge Deanne Darling is the principal juvenile court judge in Clackamas County. She outlined the schedule of juvenile court hearings and noted that attorney availability is a major issue for her in trying to schedule juvenile court matters in a timely way.

She said that the IDI attorneys are very experienced, very efficient and very cohesive in terms of being willing to cover for each other. When lawyers cover for each other, however, they may not know the case. She said that it would help if lawyers in the juvenile consortium were not also taking cases from the criminal consortium because of schedule conflicts. She also suggested that consideration be given to creating a regional contract office that specialized in termination of parental rights. With respect to a public defender office handling part of the juvenile caseload, she said that the consortium has benefits with respect to the management of conflicts.

Judge Darling said that all but possibly one of the consortium attorneys is capable and well informed and that they do a good job of understanding the difference in their role when representing young children and representing older children. She believes they may need to do better outreach in order to have earlier contact with their clients and noted that it is rare that attorneys provide any first hand information or reports to the court regarding any of their clients.

Ron Gray, the administrator of the Clackamas Indigent Defense Consortium (CIDC), said that the consortium was started in 1983 and grew over time. The consortium now has 27 members who are on rotating lists for case assignments. There are separate lists for probation violations, misdemeanors, Ballot Measure 11 cases and homicides. Cases are assigned on a rotating basis, except that if an attorney with special qualifications is available a case may be directed to that attorney outside the rotation. Substitutions do not cost the state any additional funds in Clackamas County since only the second attorney is paid. There is a provision in the CIDC contract that permits attorneys to share the payment but it is rarely used, most attorneys believing it evens out over time. With respect to substitutions due to attorney/client incompatibility, the court usually lets a defendant know when the state will provide one more attorney but only one. Within the consortium there are three members who volunteer to accept appointments for these clients.

Mr. Gray noted that five of the current Circuit Court judges are alumni of CIDC. He said that currently the District Attorney's office perceives the defense as an enemy. CIDC was able to work more effectively with previous district attorneys.

Contrary to a statement in the draft report, Mr. Gray said that CIDC has brought in some new and younger lawyers. The consortium has an apprentice program for new attorneys. New attorneys have to find a mentor lawyer within CIDC to serve as a resource. Only some of the apprentice attorneys are given a position with CIDC.

Five or six of the 27 members handle just criminal cases. Other members have mixed practices and some serve as prosecutors and judges in municipal courts. For most CIDC lawyers 50% or more of their practice is in CIDC cases. This means that most members have a variety of skills that may be needed in particular cases. It also gives members a balanced view of the larger system and makes them more effective in settling cases.

Chair Ellis recalled that several years ago the United States Department of Justice explored the antitrust implications of CIDC being the exclusive contractor for public defense services in criminal cases in Clackamas County. The issue was not pursued by the Department of Justice but Mr. Ellis inquired whether having a single provider was the best model.

Mr. Gray said that the question for the commission should be whether that model provides quality representation. He said a good consortium needs an aggressive manager who is willing to confront attorneys who are not performing satisfactorily. The operation should also be economical for the state and if the state only has to send one check per month to the consortium, it is efficient for the state. Micromanagement by the state is not necessary. If the system isn't broken you shouldn't try to fix it. A public defender office was attempted in Clackamas County in the early 1980s. Consortia have lawyers with broader experience than public defenders and some public defenders have an adversarial relation with district attorneys.

Mr. Gray said that the consortium does not currently have a succession plan for his position, should he decide to retire. To be effective the administrator needs to be willing to be unpopular and he is not sure where his successor will come from but there are a couple of members of the group who might be good candidates.

The CIDC board of directors has five permanent and four rotating members. There was one outside board member but he retired recently and has been replaced by a CIDC member.

CIDC is working on a questionnaire for randomly polling clients about the performance of CIDC attorneys.

When a complaint is received about a CIDC lawyer, Mr. Gray usually consults immediately with the attorney. If the problem is not resolved Mr. Gray can take the matter to the board and the board decides whether or not the attorney can remain a part of CIDC. In two cases, the members resigned before the matter could be taken to the board.

Mr. Gray said that he and his staff have a good working relationship with OPDS staff.

Mr. Ellis expressed appreciation to Mr. Gray for his contributions to the public defense system as a whole.

Judge Maurer, the presiding judge of the Clackamas County Circuit Court, said that he and his colleagues have a high level of satisfaction with the operation of CIDC, especially their screening system for applicants, their level of competence and their commitment. Judges who are former CIDC members continue to have an investment in seeing that high quality public defense services are provided.

The court has been very comfortable with Mr. Gray's ability to address concerns and the mentoring that is provided by senior CIDC members. There have only been a handful of new members added because of the limited size of the group. The process for training new members is not too dissimilar from public defender office models although the public defender offices can provide a greater level of in house training and mentoring.

There will be a need to bring in more new lawyers as the older ones retire and at some point to bring in a new administrator. A more specific and comprehensive recruitment process will need to be implemented to replace retiring members. A public defender office has some advantages in terms of the incentives it can offer to a new attorney but the consortium model offers some incentives too, such as the benefit of having a portion of a new attorney's practice guaranteed, to cover office overhead.

On the whole, this county has preferred a single provider approach. The bench in Clackamas County has been very involved in public defense and has been able to work collegially with this group.

Commission Discussion at April 16, 2009 Meeting

Ingrid Swenson summarized the testimony presented to the commission at the March meeting in Clackamas county and noted that she and Kathryn Aylward had met with Judge Deanne Darling and Marty Cohen, the administrator of Independent Defenders, Inc. (IDI), to discuss some of the issues that had been raised about the juvenile consortium, including a proposal to limit the attorneys who would be appointed to represent children to those who had provided the

best quality representation. Judge Darling also recommended that PDSC consider contracting with a group of lawyers who specialize in handling termination of parental rights cases. Another proposal made at the meeting was that consortium staff appear at the shelter hearing if counsel cannot and make initial contact with the client, since delay in initial contact is seen as a significant problem. Judge Darling also suggested that the commission consider amending its contracts with providers to clarify the requirement of timely contact with clients.

With respect to Clackamas Indigent Defense Consortium (CIDC), Chair Ellis said that although it may be working well at the present time, in three or four years there might be difficulties since CIDC does not seem to be evolving. They are not bringing in new members. Intervention by PDSC may not be necessary now but might be needed in the future.

Commissioner Ozanne agreed and said that the structure of the board was particularly concerning. He said it might be appropriate for PDSC to become more proactive about board structure in defense organizations. The commission could direct that board members have staggered terms and that some portion of the board be comprised of newer members. Chair Ellis said that the most successful boards have been those whose members were appointed by external sources.

Commissioner Potter suggested beginning with small steps such as bringing in outside board members as Tom Crabtree's office has done.

Commissioner Welch asked if PDSC should include a requirement about the composition of boards in its contracts and Chair Ellis noted that encouragement to use best practices had been the Commission's approach in the past and that he is not certain that a contract provision is necessary at this time.

Commissioner Ozanne said that CIDC could be asked to create a model that could be used by other consortia.

Chair Ellis said that a third area of concern is CIDC's apparent inability to deal with underperforming attorneys. Commissioner Ozanne said that the failure to deal with this issue is usually an indication that the provider's quality assurance process needs to be reexamined.

Commissioner Potter asked if the RFP requested information about a provider's board. Kathryn Aylward responded that only the RFP for new contractors does.

Chair Ellis noted the absence of any representative from Clackamas County at this and other commission meetings and said that it may reflect the self-contained nature of the Clackamas County system. A transcript of last month's meeting and this meeting are to be sent to all consortium members and to

Presiding Judge Steven Maurer. Judge Welch observed that the district attorney had not participated in the March meeting either.

Ingrid Swenson and Kathryn Aylward said that CIDC has an active mentoring program for new criminal defense attorneys and that a new lawyer had recently joined the consortium after completing the mentoring program.

With respect to IDI, Commissioner Ozanne noted that members of that group had also been absent from PDSC meetings. Their small board is also concerning. With regard to quality of representation issues, it may be time to amend the qualification standards to require that lawyers actually follow performance guidelines, not just acknowledge awareness of them. The standards should be what the commission expects contractors to do. Commissioner Welch said that quality issues in juvenile cases are of particular concern in the rural areas of the state where lawyers may need to travel long distances to meet with child clients.

Additional Developments since March PDSC meeting.

Attached as Exhibit A are a series of questions sent to and responses received from Ron Gray regarding the operation of CIDC.

Attached as Exhibit B are a series of questions sent to Marty Cohen regarding the operation of IDI. Mr. Cohen will provide written responses to the commission for review at its June 18 meeting.

IDI member and board representative, Gay Canaday, inquired about attorney evaluation models that IDI might adapt for its own use. Several examples were provided.

Testimony and Discussion at June 18, 2009 PDSC Meeting

Ron Gray testified that nine out of the last ten lawyers who joined the Clackamas Indigent Defense Consortium (CIDC) were under the age of forty. CIDC has an active apprenticeship program with two attorneys currently serving apprenticeships. There are two major benefits to the program. It is a way for new attorneys to engage in criminal defense work and it allows CIDC to evaluate their suitability for membership in the consortium.

Commissioner Ozanne asked Mr. Gray what the Commission's role is in the operation of the consortium.

Ron Gray responded that the Commission's role is to point out areas of concern for the consortium to address. In response CIDC is addressing the structure of the board, the need to plan for a transition in the administration of the consortium, the graying of the membership, an update and revision of the bylaws and an attorney evaluation process.

Commissioner Ozanne noted that although CIDC has been a leader in developing models for other public defense providers even it has found it difficult to apply these models to its own operation. The Commission may need to be more proactive in this regard.

Ron Gray said that CIDC is undertaking an extensive attorney evaluation process and hopes to complete evaluation of all the attorneys in the fall. The CIDC board is considering the addition of outside board members.

Commissioner McCrea asked Mr. Gray whether the CIDC board was considering eliminating the permanent board terms. He replied that if, for example, CIDC were able to identify an outside board member it should probably be for a permanent position. Permanent board members provide continuity.

Commissioner Potter inquired about the consortium's bylaws. Mr. Gray said the organization has very detailed bylaws that are being revised for the first time since they were developed over twenty years ago.

Benjamin Kim testified that he had practiced law in Los Angeles County for most of his professional career, including eleven years as a Deputy District Attorney. Wanting to move his family out of the area he was drawn to the Northwest and felt that CIDC would be a good fit for him since he did not want to become a public defender but did want to handle some public defense cases as well as start a private practice. He joined CIDC about two and a half years ago and thinks it is a very good model for the delivery of public defense services.

Ron Gray said that whenever a new attorney applies for membership in the consortium, the board has to decide whether it would be appropriate to add another lawyer at that time. Ben Kim applied after another lawyer left so it wasn't a difficult decision. He anticipates that there may be two additional vacancies arising out of the evaluation process.

Commissioner McCrea asked how cases are allocated among members. Mr. Gray responded that there are separate rotations for probation violations, misdemeanors, felonies, Measure 11 cases and homicides. The goal is to get all members qualified to handle all case types except homicides, which are the only voluntary rotation. Cases are distributed evenly for each case type. Once a year a lawyer can opt off a single case but is otherwise expected to handle all cases assigned.

Rhett Bernstein said that he is also a new member of CIDC. He began his legal career as a prosecutor in the Linn County District Attorney's Office but tired of government service and wanted to open his own practice. He enjoys representing indigent clients but likes being able to take on other kinds of cases. He is a member of the CIDC board and also serves on the Clackamas County

Bar Association Board. He has found the consortium open to younger members. With the caseload declining, however, it would be irresponsible to bring in new attorneys at this time. The original model at CIDC was for attorneys to receive no more than 50% of their income from public defense cases. Public defense cases currently account for only about 30% of his income.

Commissioner Ozanne said that he did not believe the Commission was seeking to open a public defender office in Clackamas County. The Commission would like to see the consortium live up to its potential. Without an employee/employer relationship it is difficult to enforce quality standards and it may become more difficult to sustain a mixed practice. The trend in larger urban centers has been for attorneys to specialize.

Commissioner McCrea said that Commission Chair Ellis had questioned whether the model in Clackamas County – a single provider system - was the appropriate one. She said that the Commission's goal is to achieve quality and economy and that she is pleased with CIDC's responses to the Commission's concerns.

Commissioner Ozanne said that one of the benefits of a mixed model is that there is some competition, but there is no Commission agenda to develop a public defender office and he would not support it.

Marty Cohen said that the juvenile caseload in Clackamas County is declining. While attorneys have been added over the life of the contract, currently they are only replacing members who leave. One of the older attorneys recently left the consortium and a new attorney has joined after being mentored by Mike Clancey. None of the eleven current members handle only public defense cases. This gives members more flexibility and allows them to survive periods of declining public defense caseloads. While Judge Darling expressed concern about the attorneys' availability she is aware of the benefits of having public defense attorneys skilled in other areas. With respect to the composition of the board of directors of Independent Defenders, Inc. (IDI). Three members of the board have been in place since the founding of the board. An outside member was added a number of years ago and they would like to add another non-attorney member with expertise in education issues. IDI is also considering the addition of a rotating position that would allow members to serve one year terms. The board meets quarterly and consortium members meet regularly as well.

Gay Canaday said IDI has initiated a six month pilot project in child representation. Two attorneys will specialize in handling children's cases. They will be partnering with CASA volunteers in advocating for services for child clients. IDI attorneys are now meeting monthly with the juvenile court judge and DHS representatives. They have been working on resolving scheduling issues with the court. Contrary to a statement in OPDS's report, attorneys are present at all delinquency prelims. The court agrees it is not necessary for attorneys to be at dependency prelims but they are present for shelter hearings.

Commissioner Welch advised other Commissioners that she resides in Clackamas County and knows all of the IDI attorneys. She has also sat as a judge from time to time in the Clackamas County Juvenile Court. Her biggest concern has to do with the zealousness of representation in all classes of cases. Having appeared in courts across the state, she noted that there are a lot of very quiet lawyers in the courtroom in juvenile cases.

Ms. Canaday said that much of the advocacy in juvenile courts occurs outside the courthouse. In order for everyone to perform at a higher level, more time would need to be allocated to these hearings.

Mr. Cohen said that hearings that last fifteen or twenty minutes in Clackamas County might last hours in other counties. More zealous representation would require negotiating more hearing time with the court.

Commissioner Ozanne said that part of the problem is the culture that develops in a particular court. The role of attorneys shouldn't be to negotiate with judges but to strongly assert the client's rights.

Ms. Canaday noted that there have been many appeals filed by IDI attorneys in the last year. While it may not be apparent in the courtroom, attorneys are taking appropriate steps. Multiple appeals in civil commitment cases have resulted in the judicial officer now following the letter of the law.

Marty Cohen said that juvenile attorneys have to balance "best interest" and "expressed wishes" representation in juvenile cases. A similar situation exists in drug court and it would be helpful for drug court lawyers to get together to discuss some of the issues that arise there.

Ingrid Swenson said that she and Kathryn Aylward had met with Judge Welch to discuss juvenile representation issues and how to incorporate PDSC's expectations into the contracting process. She said OPDS had issued a statement on the role of counsel in juvenile cases, that the bar had updated the performance standards for juvenile lawyers and the Commission had directed public defense attorneys to observe these standards. A lot of work remains to be done, however. Both of the Clackamas County consortia have been working to address the Commission's concerns. They are both good providers and the Commission would like to help them continue to improve. She said she would prepare a draft service delivery plan for the Commission to consider.

Commissioner Ozanne said that the best plan would be to have Commissioner Welch on a permanent rotation through the state's juvenile courts. Despite his admiration for the Clackamas County contractors, they still have no regular attorney evaluation process in place and have had difficulty dealing with underperforming attorneys. As to both evaluation procedures and board

structure, it might be appropriate for the Commission to develop models. This may be a subject to be considered at the Commission retreat.

Service Delivery Plan for Clackamas County

Structure:

The public defense delivery system in Clackamas County relies on a single provider for criminal defense representation and a single provider for juvenile and civil commitment representation. Lack of competition does not in itself, appear to have negatively affected the delivery of public defense services in the county but when the sole provider is a consortium it is more likely than other types of providers to lack of a system for evaluating the work of member attorneys, a method for addressing underperformance and mechanisms for admitting new members and preparing for transitions in leadership.

Overall the representation provided by members of CIDC is rated as “good,” and representation by IDI as “good to excellent.” The quality of representation provided in individual cases, however, is reported to vary from one attorney to another in both consortia.

Neither of these contractors currently has in place a process for systematic evaluation of the work of their attorneys and both have sometimes failed to address significant performance issues even when they were well known.

Recently, however, both consortia have taken some very positive steps to address attorney performance. At the June PDSC meeting it was reported that CIDC had nearly completed its design work on an evaluation tool and that evaluations of all member attorneys would be occurring in the fall of 2009. Mr. Gray expected that the evaluation process might result in the removal of some members.

IDI has begun research on an evaluation process and has already implemented some efforts at quality improvement. One attorney has been terminated from consortium membership. Two attorneys will specialize in child representation as part of a six-month pilot project. IDI members are meeting with Judge Darling, with CASAs, and with DHS to enhance their effectiveness as community partners.

It is hoped that these positive developments will continue. PDSC will invite representatives of both consortia to report on the results of these efforts at a meeting in the early part of 2010.

In terms of admitting new members, CIDC has long had a well regarded mentoring program in place which allows inexperienced lawyers to handle misdemeanor cases under supervision. When there are vacancies in the

consortium, successful apprentices can be added to the organization and trained to handle the full spectrum of criminal cases. While some younger attorneys have been added over the years, the majority of members have been with the consortium for many years. If and when a large portion of these attorneys decide to retire, the current mentoring system might not be adequate to train a sufficient number of new attorneys.¹³

The CIDC board has now taken some initial steps to plan for the eventual need to replace its current director.

IDI added a new member recently. Openings in the membership are currently rare since the caseload is declining. Again, should a large proportion of the current members decide to retire at approximately the same time, replacement would be difficult and continuing members might not be able to mentor the number of new attorneys needed. No succession plan is in place should the current administrator decide to retire.

While it will be critical for both consortia to ensure that they have the capacity to “evolve” to meet changing circumstances such as those discussed above, the current public defense delivery system in Clackamas County appears to be functioning satisfactorily.

Best Practices

Both CIDC and IDI have implemented a number of “best practices” for public defense providers, including having a board of directors to oversee the operation of the organization.

Both CIDC and IDI have had boards since their founding. Both have had or currently have at least one non-consortium member on their boards. CIDC’s board includes some permanent positions and some rotating positions. All of IDI’s board positions have been permanent but discussions are taking place about possible expansion of the board.

One of the topics that has been recommended for Commission discussion at its September 2009 retreat is the role the Commission should take in outlining and encouraging implementation of best practices for public defense providers.

With respect to boards of directors, for example, PDSC, with the advice of its contractors, could outline some of the board models that have proven successful in Oregon and elsewhere for defender organizations. It could recommend, or potentially require, that public defense contractors have boards of directors that meet certain requirements overseeing their operations.

¹³ The two newer CIDC attorneys who testified before the Commission on June 19 appeared to be very positive additions.

It has also been recommended that PDSC consider taking a more proactive approach to the implementation of quality assurance systems in defender offices, again, either by outlining and recommending best practice models, or by requiring that an approved process be in place.

When PDSC returns to its review of service delivery in Clackamas County in 2010, it can consider how well the IDI and CIDC boards and quality assurance systems compare to any models or protocols identified by PDSC.

Exhibit A

EXHIBIT A – CIDC Questions and Responses

1. **Question:** *CIDC Board. Some recommended best practices for boards and commissions of non-profit organizations are for them to include outside members, staggered memberships and few, if any permanent, members. PDSC may wish to make a recommendation to CIDC on some of these best practices (for example, Commissioner Potter suggested that you designate a certain number of board positions for members with 0-5 years of experience, those with 5 to 10 and those with more than ten) and would like to be informed whether any of these practices have been considered by CIDC and, if so, why they were rejected.*

Response: The short answer to the question about practices on staffing a Board of Directors, is that we have simply operated under the same system for many years and it works. We do not limit our rotation on the Board base don years of experience. A new attorney could be ion the Board the first year of practice. We have a policy of encouraging all CIDC attorneys to spend time on the Board, regardless of experience levels, and this practice has given us a good mix of young and old over the years we have been in operation. We did have a non-criminal defense attorney on our Board for the first 24 years. He also worked on one of the committees. When it came time to replace that member, the Board took a traditional, "if it aint broke don't fix it" attitude. We did debate and did quite frankly battle over bringing in a non lawyer and/or non CIDC affiliated Board member. However, the idea made little headway. My impression, and I could be wrong, is that the Board had no idea what criteria would be used to recruit a non attorney Board member, and chose not to put in the work.

Follow-up Question: *The overriding concern I heard from our commissioners is that your current method of selecting board members may not be serving the best long term interests of CIDC. They would be interested in having a discussion about the merits of using outside board members and of eliminating permanent positions and staggering terms so as to be more inclusive of the broad range of your membership. If these issues have been discussed by your board, the commission would like to hear about those discussions and discuss the merits of them with you in June.*

Would you please send me a current copy of your bylaws and other rules or policies CIDC has adopted that govern the operation of the consortium.

Response: As to the Structure of the Board: I am happy to discuss this with you at the June meeting. As far as access to serve on the Board, we rotate 2 members every year, and have tried to get everyone on the Board who shows an interest. Other issues can wait for now.

2. **Question:** *What is your plan for bringing in new members to replace members who will be retiring in the next five years? Do you have a plan for replacing attorneys you expect to retire in the next 10 years?*

Response: Our method of replacement is not based on cycles of 5 or 10 years. We have a procedure for the Board to decide on open or abandoned positions, to advertise for applicants and a committee to evaluate applications. The efficiency of that system will be based on how much advance notice we get of retirements.

Follow-up Question: *I suppose the logical follow-up question would be, if you don't get a lot of advance notice and a significant number of members decide to retire around the same time, how would you bring in and train a sufficient number of attorneys to handle the caseload? It is not just an academic question since twelve of your members have*

been practicing for 30 years or more. (I know that in the current economic environment much of the workforce is working beyond minimum retirement age and lawyers probably even longer than average, but if the economy takes a significant turn for the better, there may be a lot of retirements that occur around the same time.)

Response: As to what to do in the face of a mass retirement ("migration"): We have yet to work out a specific program, but I will begin to cover the issue with the Board at our next meeting.

3. **Question:** *What is your succession plan for the administrator position?*

Response: We do not have a definite plan for the succession of the administrator. We have several competent members, a few of whom would take the job if recruited. Training would take about a month. But, I am still here to haunt you.

Follow-up Question: *We're glad you're still there and hope you stay a long time. I think the commission would be interested in the process that would be used to select a new administrator assuming there were willing applicants. Would there be any effort to confer with the bench and others at that point about who could best fill your shoes? Without outside input would the board and membership be tempted to select the person least likely to enforce quality standards and expectations?*

Response: As to the administrator: I have mentioned to the Board that any successor should be selected based on Board interviews of those interested, and feedback from the judiciary on ability to work within the present system. There would have to be a training period with me as well. That is about as far as the Board has taken the process.

4. **Question:** *What progress has been made on the development of an attorney evaluation procedure?*

Response: We have already designed and mailed out a client survey to a random sample of clients for all of our attorneys. The return rate from clients is low, as anticipated. We have yet to examine and evaluate the data. However, it will be a factor in the training and work we do with attorneys.

Follow-up Question: *I guess I may have misunderstood what kind of attorney evaluation process Brad Jonasson was working on. When we met in your office back in February, I assumed it was a more comprehensive evaluation than a client feed-back form that was being considered, with direct outreach to judges, district attorneys and others participants in the local court system for input on a regular basis, something like the process put in place by MCAD after its reorganization. Can you clarify?*

Response: As to attorney evaluations, we are drafting a judicial survey for each attorney, and a template for the Board to use to process both judicial and client information on each attorney.

Exhibit B

EXHIBIT B – Questions to IDI Administrator

1. IDI Board. Some recommended best practices for boards and commissions of non-profit organizations are that they include outside members (you already have one), a mechanism for bringing newer members onto the board, and few, if any permanent, members. PDSC may wish to make a recommendation to IDI on some of these best practices and would like to be informed whether you have considered adding board members, rotating board seats or making other changes in your board structure, and, if so, why they were rejected.
2. You have brought in two new consortium members recently. Was that part of a succession plan? Were they brought in by individual attorneys or by IDI? Who bore the burden of training/mentoring the new attorneys? Was this an effective way to bring in new lawyers? Are there other approaches being considered? Do you have a comprehensive plan for replacing attorneys as they retire or move into other areas of practice?
3. What is your succession plan for the administrator position?
4. Does IDI plan to implement an attorney evaluation procedure? Will it include soliciting information from others in the juvenile justice system about the performance of the attorneys? Will it include a process for removing attorneys with significant performance issues?
5. One of our commissioners is considering recommending to the commission that it develop a series of specific requirements/expectations of attorneys for children. It might require, for example, that an attorney for a child between the ages of 0 and 5 be required to observe the child in the residence after initial placement and then on a regular basis, to speak with the foster parent at regular intervals, to communicate with DHS, the CASA, treatment providers, and parents' attorneys on a regular basis, to maintain a file for each client in which the attorney periodically articulates why the child cannot be returned home or placed with relatives, lists the issues that the child's attorney has raised in conversations with the DHS worker, in CRB reviews, in court hearings, and what actions the attorney is taking to advance the plan for the child.