

**Members**

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



**Ex-Officio Member**

Chief Justice Wallace P. Carson, Jr.

**Executive Director**

Peter A. Ozanne

**Meeting of the Public Defense Services Commission  
Thursday, September 9, 2004  
10:00 a.m. to 2:00 p.m.**

Multnomah County Courthouse  
Courtroom 702  
1021 S.W. Fourth Avenue  
Portland, Oregon

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

**Agenda**

**1. Action Item**

Approval of August Meeting Minutes  
*(Attachment 1)*

Barnes Ellis

**2. The OPDS Status Report  
(Attachments 2 & 3)**

OPDS staff

**3. Public Comment: Service  
Delivery in Multnomah County  
(Attachment 4)**

Mike Schrunk  
(10:30 a.m.)  
Judge Julie Frantz  
(11:00 a.m.)  
Audience members

[Working Lunch]

**4. Status Report on the Implementation of  
the Service Delivery Plan for Lane County**

Shaun McCrea  
John Potter

**5. Public Comment (continued)**

Judge Ed Jones  
(1:00 p.m.)  
Judge Betsy Welch  
(1:30 p.m.)

*Next Meeting: Friday, October 22, 2004, 12:30 to 4:00 p.m., at the Kah-Nee-Ta Resort  
in conjunction with the OCDLA/PDSC Annual Public Defense Management  
Conference.*

PUBLIC DEFENSE SERVICES COMMISSION

August 12, 2004  
Room 50, State Capitol Building

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

STAFF PRESENT: Peter Ozanne  
Kathryn Aylward  
Becky Duncan  
Ingrid Swenson  
Billy Strehlow  
Laura Anson

**TAPE 1, SIDE A****Agenda Item No. 1          Approval of June, 2004 Meeting Minutes**

012 Chair McCrea Barnes is here by telephone so I will call the meeting to order and start with the first item, approval of the minutes. Were there any changes or comments that anyone wanted to make? Okay, I have some. On page 1 line 008, this was an amendment I asked for and I obviously did not state it very well. The comment was John Potter's regarding the previous minutes, "I am not convinced that is moment." What I thought we should add is "this is the moment." Then on page 20, where Ingrid is talking, I guess it is line 34. She said, "Maybe we need to expand on the language about process before the court but in every denial. The statute gives you the authority or the right to seek review by the presiding judge in the judicial district." Please correct me if anyone else sees it differently, but it seems to me we should take out that period and make it all one sentence. Then finally on page 23, line 250, where I was quoting what the Lane County judges had said the minutes indicate "Karsten Rasmussen would be presiding for several weeks long so that may be all the input we can manage for awhile. Thanks for your work." I would ask that we amend the term "long" to read "on Magana" because that was the case that he was presiding over. Those are the corrections that I would request. Any other discussion or comments?

**MOTION:** J. Steven moved for approval of minutes; J. Potter 2<sup>nd</sup>  
**VOTE 4-0**, hearing no objection, the motion **CARRIES**

**Agenda Item No. 2          OPDS's Monthly Report**

043 P. Ozanne Good morning. I wanted to revisit some news that you all know about by now. I informed you in writing but I am sure you heard through other channels that on June 24<sup>th</sup> at our Emergency Board meeting we received the amount we requested for caseload increases of approximately \$4.1 million. But the really good news as we anticipated is that the E-Board released another \$2.9, making a total of \$7 million released to us. That leaves \$2.9 million in the Emergency Fund for our special purpose appropriation. We are hopeful when we return to the E-Board at the beginning of next year that the Board will release additional funds to meet all of our budgetary needs for the 03-05 biennium, which would be a total of \$7 million. So the news is good. I want, first of all, to thank

all of the staff at OPDS and certainly the Commission for their good work and efforts, which I think has built a reputation in Salem that we are indeed managing the public defense system in new and effective ways. That certainly lends credibility to our plea for funds. And I want to thank Kathryn Aylward, in particular, for putting together excellent materials for the Emergency Board. I want to thank John Potter and OCDLA for all the work they have done in advocating for our budget. I think we can be thankful for our good fortune and our success. I hope we meet a similar fate the next time we are before the Emergency Board.

I also want to report to you some bad news. I spoke to the Chief about it before the meeting. Jon Yunker has asked me to inform the Commission that he wishes to resign due to other demands on his time and a feeling that he has contributed what he can to the Commission. I made every effort to convince him otherwise. He said that he would help us in any way he could, including appearing before the Legislature and speaking to legislators. I told him I appreciated that but certainly wished he would remain on the Commission, as I am sure all of you do. Jon had some nice things to say about the Commission. He not only has been intimately involved in all aspects of state government, but continues to keep his ear to the ground. He indicated that the Commission and OPDS's management team were developing a reputation as a high-quality agency and that we are managing our operations skillfully and effectively. I assume the Chief Justice will be conferring with others and will in due course find someone to fill this vacancy.

I also wanted to mention that we were informed several weeks ago of a Secretary of State's audit of PDSC. Our predecessor agency, Indigent Defense Services Division, was the subject of an audit some years ago. We have met with the State Auditor's staff who will be conducting the audit. We found them professional and cooperative. Since we are a new agency, we hope they will focus on our operations since we took over the public defense contracting system. We look forward to insights that can be gained through that process. I will be talking later in the meeting about our performance measures, which we have discussed before and which we will be submitting to the Legislative Audit Committee later this month. We hope that the Secretary of State's audit process will give us more insights into measuring our effectiveness and how we may become an even more effective organization. We obviously hope we get a good report card but we look forward to any recommendations, as I'm sure there will be, for improvement.

Finally, before I turn it over to Kathryn and Becky Duncan for our Division's reports, I want to tentatively express an idea that we would want to talk over with a number of people, and certainly with the Chief. Some time ago it came to my attention that the defense costs of discovery in pretrial matters varies widely from jurisdiction to jurisdiction and agency to agency. There are various nonprofit organizations, treatment providers, police departments and sheriff's departments that seem to be charging widely different rates for discovery. Some of the charges are, on their face, rather excessive. So that was the first factor that drew my attention. Then, as you may recall, we have been exploring the possibility of some centralization in the preparation of transcripts now prepared by individual transcribers across the state at a statutory rate of \$2.50 a page. Perhaps centralization may not be able to cut that cost drastically, although I am hopeful it will in fact reduce costs, the current decentralized system poses problems of quality control. So we are considering the possibility of putting out for bid a contract to transcribe proceedings in several counties as a pilot project, with the possibility of implementing this approach on a statewide basis. I have spoken with several presiding judges who can think of no objections and of course, this project would need to be coordinated with the courts. Those are just two examples of issues that have come up over the past year that I will call technology issues. I'll add just a couple of others. We have a substantial telephone bill at the Legal Services Division because our clients, who are frequently inmates in correctional institutions, call us collect. We are paying premium rates for those collect calls. It mystifies me why we can't package these calls up and, in cooperation with the Corrections Department, contract with a low-cost provider. I also learned recently that the Department of Corrections has a closed circuit video conferencing system which, if you are properly hooked up, would allow any law office in the state to communicate with its clients, or anyone else for that matter in correctional institutions. These systems are available in some jails as well. All of this suggests to me that, rather than picking each of these issues one-by-one in

isolation and trying to work out solutions with individual agencies, that some kind of a workgroup, perhaps under the Chief's direction, should undertake a technology initiative that advances common interests in connectivity and cost savings among judges, prosecutors, defense attorneys and corrections and police agencies. Some police agencies have purchased different kinds of information systems, which others can't access for the purposes of discovery unless they have the proprietary hardware or software. Assuming we are interested in the concept of teleconferencing, there are of course limits from the defense perspective on how much teleconferencing is appropriate and what safeguards would be in place to insure confidentiality. There are a number of concerns and complications to this approach to system technology and information sharing, so at this point I am just alerting you to possibilities and I welcome any ideas you may have after this meeting. I am certainly going to shop this idea around and see if there is a possibility of working together with other agencies to see if our interests can be served. Perhaps we can use technology to our collective advantages and save some money in the process. I think it might be useful to start this conversation and the Chief may already have a forum where we could pursue this a little more.

200 Chief Justice  
Carson

Excuse me, Madam Chair. I think I mentioned to you several months ago about re-forming the Criminal Justice Advisory Committee. We are starting to get that put back together again. It fell flat when we went in the financial dumpster and we haven't had a meeting since then. We were going to special sessions rather than having CJAC meetings the last few years. But we are going to get that back up and running. It will have three or four judges, three DA's, three OCDLA people, and we could add law enforcement to it as well and you will have a seat at it or your designee.

209 P. Ozanne

That in my view is a perfect forum to do this.

212 Chief Justice  
Carson

Well, the Governor has a whole series of committees that are working on criminal justice. One of the things they want the court system to do is worry more about docketing. In fact, they were going to propose a statute setting our dockets, which would be an interesting constitutional discussion down the line. But there is some concern that witnesses in civil and criminal cases are sitting out in the hall, cooling their heels, getting overtime and a variety of other things. So there is a lot of coordination to be done. My hope would be, in a month or two, that we will have the committee put together and have a meeting. I think that technology issues would be very appropriate to make one of the first items on our agenda. We have gone to transcriptionists on the court side, the civil side, when we lost the dollars for court reporters. I would like to get the court reporters back. As an old trial judge, I much prefer a real live court reporter. Whether that will come back or not, we are working on a system for real time transcription in major cases, like death penalty cases, where we know they are going to be appealed. Almost any criminal case is appealed. If we can put that together, we could have an effective system, though we may end that problem and create some others, as most things do. But I am very interested in this, Peter.

238 P. Ozanne

Wonderful. I think CJAC is just the right place to begin these discussions.

Finally, one of the comments the Chief just made reminds me of something I should at least inform the Commission about. As the Chief mentioned, the Governor has initiated a project during this legislative interim which I understand covers the scope of criminal justice, everything from sentencing and corrections to methamphetamine law enforcement. I assume that I was asked to serve on the sentencing subcommittee of this project by virtue of my position with the Commission. I view my participation as on your behalf. And, as we have discussed over the past two years, I don't view my position on your behalf as an advocate for all potential criminal law reforms that the defense community may well support. What I believe you have instructed me to do is limit my advocacy to legislation and changes that relate to the effective operation of the state's public defense system, and not advocate on matters of substantive criminal law and procedure that some or all of us might individually agree with or oppose, but that really aren't matters that we have deemed are appropriate for Commission action. Such matters certainly are appropriate for the Oregon Criminal Defense Lawyer's Association, and they do a very good job of advocacy. So, in that

context, I asked John Potter to select or have his board select a representative of OCDLA to serve on the sentencing subcommittee of the Governor's initiative. And they did so. John Connors is the very able representative of OCDLA who sits on the sentencing subcommittee with me and raises more substantive issues than I would. I mention this at this point because the subcommittee is proposing in my judgment a collection of substantive changes in sentencing law that will cause a net increase in criminal punishments and, therefore a net increase in the cost of criminal justice and public defense. The stakes get higher when punishment increases, which in turn increases the practice requirements of criminal defense lawyers. Whether such increases in punishment may represent good policy or bad policy I am not addressing that question in the subcommittee as your representative. During the course of the subcommittee's deliberations, I have expressed my view that this is the wrong period of time in our state's history to be adding more criminal sanctions and costs of criminal justice, at least without off-setting adjustments in other sentencing statutes or criminal procedures that avoid a net increase in the state's budget for criminal justice. In my personal view, one the functions of such a task force is to try to make hard decisions that the Legislature has more difficulty making in a politically charged environment by identifying options to reduce costs, rather than only offering a laundry list of options, however appealing, that drive the state's costs higher. So I alert you to this issue. I will probably come back with a draft letter at some point. Even though I expect to be out-voted, I think I should be prepared to address the foregoing concerns on behalf of the Commission to the subcommittee's chairman, Hardy Myers. I will keep you posted.

- 280 Chair McCrea I think that is really important, Peter. I'm glad you are involved because we need to know what is going on.
- 282 P. Ozanne I certainly see that as one of my roles. I invite Kathryn Aylward up to present the Contract and Business Services Division's report.
- 287 K. Aylward Moving day has finally arrived. As we sit here, there are movers in our building packing us up. That is why a lot of our staff are here today. We have our three newest employees, Shelley Dillon, Amy Jackson and Laura Weeks here and they are seated back there. Billy you all know. We are mostly here to get out of the way of the movers. I have to say that Lorrie Railey has done a magnificent job in organizing us, down to little details like slipping into people's offices and putting numbered stickers on all the objects in their office. It has been a very smooth process and I am sure everything will work out fine. We are going to have all new phone numbers. There is an automated message that tells the caller what the new phone number is. We are excited about the new premises. We had a lot of people who donated their own time to come in on weekends and repaint their offices, put in book shelves or take out cabinets. So we have all pitched in to do that. One of the other things we're also addressing is storage. When we were with Judicial you called somebody and the boxes disappeared and went somewhere –
- 310 Chief Justice Carson They are in my office.
- 311 K. Aylward So, in the absence of having a plan or funding to pay for storage, we have just been building a box mountain. We discovered that the copy machine we have is capable of scanning documents without any additional hardware or software. So at zero cost we began realizing that we can scan documents and then destroy the originals. We can do this at least with the non-routine expense requests because they never come to us in a paper version. They are faxed in and we choose to print them, but we wouldn't have to. So the paper backup is not necessary at all. We have adequate network backup. We have ITD doing automatic backup for us and we have off-site storage. So I am really comfortable with doing this and it's fun, simple and exciting for us—little pleasures. Erica Robinson in our office is moving away from analyst tasks and we have reassigned her contracts. She really is interested in accounting and Angelique needs the help in the accounting arena. The two of them have been working on year-end closeout, which you have to do at the end of each year. In addition, you may recall that at the beginning of the biennium our accounting

structure could not be approved until after our appropriation was made. The appropriation wasn't finalized until late August or early September. So for those first three months of the biennium every bill that was paid, and there were something like 6,000 to 8,000 entries in our accounting system, were dumped into a dummy number, 99999. Now they are going back through all of those 6,000 entries and putting them in the appropriate category. I was doing a rough calculation. We not only divide by the type of expense, like attorney hours or mileage, but by county and then further by case type. So you could have 90,000 different locations where a particular expense could be recorded. So this has been a huge task for them and they have done a terrific job so far. It will never have to be done again. Finally, we had contracts that expired June 30<sup>th</sup>. All of those have now been preliminarily renegotiated, so the analysts are now working on the closeouts of those contracts and the final reconciliations, as well as the periodic six-month reviews that we do on other contracts that haven't expired. So, in addition to packing and having our computers unplugged, we are still managing to get our work done.

366 Chair McCrea So will you be all moved by Friday the 13<sup>th</sup>?

369 K. Aylward I think that probably by noon on Friday our desks will be in place. The ITD people are coming in over the weekend to actually make the network connections on our computers. Though we can use our computers locally, we probably won't have e-mail tomorrow.

374 Chair McCrea That is pretty good, though.

374 K. Aylward We moved it to a Thursday and Friday. We were going to do Friday and Saturday but they charge more on Saturday, so we pulled it back to Thursday and Friday.

380 Chief Justice  
Carson Could we get an updated telephone roster? I have bits and pieces.

381 K. Aylward Absolutely. I will e-mail it to you as soon as I get back to my office, before they unplug me.

385 Chief Justice  
Carson In due course.

386 Chair McCrea Any other comments or questions for Kathryn? Thank you, Kathryn. So now we have Becky Duncan for the Legal Services Division.

388 P. Ozanne Yes we have Becky Duncan on behalf of the Legal Services Division.

393 B. Duncan Good morning. I'm here to tell you about the biggest thing that has hit the Legal Services Division in quite some time. That is the United States Supreme Court decision in Blakely v. Washington which was issued June 28. Blakely v. Washington is a sentencing case. It came out of the State of Washington and it involves an upward departure on a guideline sentence. The issue in that case was whether or not a finding of fact made by the judge but not the jury could be used to impose a greater sentence. The United States Supreme Court said "No," that if there is a fact that is found and used to increase a defendant's sentence beyond what is authorized by the jury's verdict, then that finding has to be made by the jury or admitted by the defendant. That holding has significant repercussions on sentencing law throughout the country and, of course, all of our trial level practitioners and courts are working with it. At the appellate level, we are working with the implications of this decision as well. What it has meant for our office is this: it has affected some of the cases that we had actually closed, all of our open cases that we have briefed, and all of our open cases that have not yet been briefed. There is also a category of cases that we have been requested to file an appeal on. I will explain these four different categories. For probation violations and pleas, in order to file a notice of appeal, we have to identify a colorable claim so we screen these cases. We have 90 days within which to identify a colorable claim and file a notice of appeal. When Blakely came out, we realized that there were cases, approximately 190 of them, that we had closed but that were still within the 90-day deadline. So we had to go back to the closed

cases and look through the limited information we have in those cases. Because they have just come in and we have never opened, we have very limited information and we need to try and discern whether or not there were potential sentencing issues. Of those categories, we have identified 24 cases that were previously closed, that we have opened and that we will be filing something in those cases. In the briefed cases, we have had all of our attorneys go through all of their caseloads to look at cases where they have already filed briefs to determine whether the sentences in those cases present potential Blakely issues. (end of tape)

**TAPE 2; SIDE A**

036 B. Duncan From the list that we have asked our attorneys to add their cases to, they have identified 155 cases that have potential Blakely issues and we do have some attorneys that have been out of the office and haven't done their Blakely reviews yet. So we are looking at more than 150 cases that have potential Blakely issues where we will have to file additional documents, whether it is a motion or a supplemental briefing. The next category are those cases that we already had and that are coming up in the normal course, but that we have not yet briefed. For those cases, we will be looking for sentencing issues in those cases and we will be adding assignments of errors that were previously non-existent before Blakely. So there will be additional work on our upcoming cases. The area that we think will have the most effect is with cases where there were no issues preserved at the trial level. Those cases would usually go by way of Balfour briefs, or we would ask the defendant to dismiss because they presented no preserved issues. But we are now raising unpreserved Blakely issues so there will be an increase in our filings. Cases that used to be Balfoured will not be for the next while. We can't anticipate what that number will be yet. Then we have cases that we previously would not have opened but for Blakely. These are again the pleas and the probation violation cases where we have to identify a colorable claim up front. These cases would not have had a colorable claim but for Blakely. We have 23 cases that we have identified since we started doing the additional Blakely screening, which we know we would not have opened but we will now open. So overall we're already able to identify about 250 or so cases where there is going to be additional work because of the fall out. It has been a wave of work for our office right now. But we are working with the courts at the appellate level and with the Attorney General's office to handle this in the most efficient way. We are working with the Attorney General's office to designate lead cases in the Court of Appeals so that hopefully some of these issues can be resolved quickly. If we designate a lead case, we are hoping that perhaps we can hold other cases in abeyance to postpone the briefing, or we can link those cases up with the lead case through a motion, as opposed to filing basically what would be very similar briefs in large numbers of cases. So that process is going on right now. Peter Gartlan and I met with the Presiding Judge of the Court of Appeals and representatives of the Attorney General's office about two weeks ago to start that process and that is going on right now. We are also looking at a few cases that are already in the Supreme Court that happen to have Blakely issues. Some of them are preserved issues and some of them are not. We are trying to see what action can be taken on those cases that might help lend some clarity to this area of law. The issue will be with us for a long time because it is a federal issue. Blakely was decided under the United States Constitution, Sixth Amendment. So until the United States Supreme Court speaks on these various permutations of the Blakely issue, we will still have to preserve these issues at the state level. That is the biggest thing that has happened in our office. It was a wave of work, but we are trying to streamline it right now. We are postponing filing additional briefs in the cases in which we have already filed briefs, hoping that we can add the Blakely issues through motions or through some sort of shortened briefing. We are preparing motions for the Court of Appeals asking for waiver of certain court rules, so that perhaps instead of filing a brief that has the two blue covers and meets certain Rules of Appellate Procedure requirements, we are hoping to have those waived just to avoid repetitive filing of the same types of document.

095 Chair McCrea I think you are really correct in saying it is a wave of work. It sounds more like a tsunami and it sounds like you have really scrambled and got it together.

096 B. Duncan Yes, across the country everyone is struggling.

- 097 Chair McCrea Is there anything we can do to help you with this?
- 098 B. Duncan We are still trying to figure out what sort of impact this will have. We are making a concerted effort to track the caseload increase. Peter Gartlan is serving on the Governor's task force on Blakely. This is a special work group dealing with Blakely with representatives from Department of Corrections, the courts, our office and the Department of Justice. Bob Homan of Lane County is representing OCDLA. There may be the time when we can identify the financial impact of Blakely, and then we may be seeking additional funding in light of the additional work. But at this time we are still trying to assess what is coming.
- 110 Chair McCrea Yes, understandably. Any other things to report?
- 111 B. Duncan That is what we have been very busy with. We have good news in that we are making headway in our efforts to accomplish a transition in the death penalty team. As you may know, we have had two senior lawyers who have been working on death penalty cases for several years. One of them has at least six death penalty cases that he has already handled. We recognize that that can create some strain and some backlog. We have two attorneys who are coming into the death penalty assignment and they are working on these cases. So we are moving away from the system where we had dedicated death penalty attorneys who would accumulate the full weight of these cases. One of our attorneys who was handling these cases as of last week filed his brief, so he is transitioning back to a regular caseload which will provide him some change of pace and some relief. So that transition process is in the works. Our office is again occupied with Supreme Court cases, which we enjoy. We have five cases coming up on the September docket of the Supreme Court. So we will be doing moot courts and preparing our attorneys for their Supreme Court arguments. Then a little further out on the horizon, we will be implementing our full staff performance evaluations in October.
- 131 Chair McCrea Any questions for Becky? Thanks Becky.
- 135 P. Ozanne I'd like Ingrid Swenson to come up and join us for the next three topics on the OPDS monthly report. Let me make a few brief comments on the topics of the Contractor Site Visits, Juvenile Training Academy and Proposed Legislative Concepts. Just yesterday, I sent letters out to our site visit team that visited Crabtree and Rahmsdorff, our largest contractor in Deschutes County, thanking them for their service. We are about to embark on a visit to the Clackamas County consortium, which is a larger group still. As the Commission no doubt recalls, our target is to visit over a period of years all of the larger contractors, assisting them in the management of their operations, improving the delivery of their services and developing best practices and learnings over time that can benefit the entire public defense community. At full scale, this is a massive project. As I say, it will take a number of years and it really depends on the enthusiasm and support we can generate among our community of contractors during these first few site visits. I am here to report how pleased I am with the level of response from the lawyers involved in the first visit and those who will be participating in the next one. We have in mind in October at our Management Conference with OCDLA to try to recruit more participants in this process in order to really bring it up to scale and have a sizeable number of contractors reviewed over a reasonable period of time. So I think this is going well. Ingrid will speak about the Juvenile Training Academy, which I think represents a major effort to improve the quality of juvenile defense services across the state. By way of some context for the Proposed Legislative Concept, it defines what a consortium is and how it fits into the constellation of contractors in Oregon.
- 167 Chair McCrea Are you referring to Attachment 2?
- 169 P. Ozanne Yes Attachment 2. Ingrid will walk you through the concept in detail. But this has arisen with developments particularly in Washington State, which we recently learned about. The Federal Trade Commission apparently reached a settlement with a group of defense attorneys in Clark County, Washington with regard to efforts that the FTC thought amounted to anti-competitive

prices practices. As I understand the facts, this group had, prior to the settlement, individually contracted with the county and were unhappy with the rates they were paid by Clark County. So they formed a group and picked one of the group to negotiate a new contract. They told the County that they would no longer accept the fees the County was paying and that the County had to deal with the group as a whole. That caught the eye of the Federal Trade Commission, and there is relevant case law from the U.S. Supreme Court regarding this kind of activity. We see nothing in our system that is analogous to this kind of activity. In fact, we invite the use groups of lawyers in consortia and we encourage them to be contracting parties with the state. But we are still concerned about any potential exposure from the FTC. This piece of proposed legislation is designed to help create an antitrust law exemption for public entities like ours. Public entities in certain instances can behave differently than private sector operations if they have legislative approval. So the intent of this Legislative Concept, which Ingrid will explain in more detail, is really an effort to get the Legislature's fingerprints on our use of consortia. This is a type of entity that we use for contracting because consortia represent an effective, cost-efficient way of delivering services. So that is the purpose for this Legislative Concept.

207 B. Ellis Peter, in your draft I think you ought to include non-profit corporations as another entity that we contract with. The way it is drafted, they are not included and they are obviously a big part of what we do.

214 P. Ozanne Yes, thank you.

215 B. Ellis Secondly, just a note of caution. The antitrust exemption that you are trying to tee up here is what is called the Parker v. Brown doctrine, and that usually involves a state-mandated behavior as opposed to state-permitted behavior. So I don't want to get people's hopes up that this is necessarily going to block the FTC if they choose to take action. I don't thin they will, at least after our conference call. I thought they seemed to understand that we know what we are doing and that we have quite a lot of bargaining power.

227 P. Ozanne Those are good points. Thank you, Barnes. Ingrid, I will turn it over to you.

228 I. Swenson Good morning. Just to expand a little bit on what Peter said about our contractor site visits, the next firm that we will be visiting is the Clackamas Indigent Defense Consortium. It is a large consortium with 29 or 30 attorneys who participate in that consortium. They have volunteered, as did the Crabtree and Rahmsdorff firm, to be among the first offices evaluated, so we appreciate that. It is a sizeable undertaking, particularly because of the structure with all of those independent attorneys and firms. It certainly will be necessary to meet individually with them for input and discussion. We have assembled a fairly good sized site team to do the onsite evaluation and, as Peter said, we appreciate very much the willingness of people to donate their time in order to participate in these evaluations. The questionnaires, which will precede the site visits, are expected to go out early next week. We addressed them to judges, to district attorneys, to local officials such as the sheriff, chief of police and others, just asking them to provide us input about how they view the work of the consortium. It is not our objective to evaluate the work of any particular lawyer. At this point, what we are looking at is the consortium as a whole. So our effort will be to evaluate the quality of representation being provided by that consortium. We expect the onsite visit to occur the week of September 20. If our experience with Crabtree and Rahmsdorff proves true for this evaluation, wrapping up the collection of information and the final report should take at least a month after that. Our quality assurance task force, which is overseeing this evaluation process and basically is comprised of members of the contractor advisory group, have sought to set up additional evaluations to follow Clackamas. At this point, the Metropolitan Public Defender's office has offered to permit us to evaluate their Washington County office and we have scheduled that visit tentatively for November of this year. We decided that it was a better idea to undertake the evaluation of that office, rather than the Metropolitan Defender office in Portland, until our skills were a little better honed for that bigger job. But by the time we complete those three evaluations, we will have had a pretty good start and I think we'll be ready to standardize our process in a way that allows us to do them more efficiently. We may be able to have simultaneous

evaluations going on at multiple sites once we get a process in place. It is still our expectation and hope that these will be peer review processes, so that the benefit can be derived by the office being evaluated, but also by the evaluator, so that there is information that goes between the evaluators and the evaluated office for benefit of both.

- 286 Chair McCrea Ingrid, at any point does any of this information come to us?
- 288 I. Swenson If we follow the recommendations of the Quality Assurance Task Force to Peter, because their role is technically as advisors to him in his capacity as the Executive Director, he would receive and review all of these reports and provide information to the Commission based on a summation of what we are finding, rather than the individual reports.
- 299 P. Ozanne We felt that it would encourage more participation if we kept the specifics of a report confidential between the management of the office and our office, with summaries to the Commission on general findings and ways of improving performance of contractors more generally. What I intend to do on a regular basis is report to the Commission on best practices, discoveries, our information that can be circulated widely for your benefit in managing the public defense system and for the benefit of the defense community for the purposes of improving the performance of their office and their attorneys.
- 308 Chair McCrea That is what I am concerned about, Peter. I know we discussed this a little bit at the meeting in June. I'm certainly not trying to pry into private affairs, but I think trends and that sort of information is helpful for us, and that we do need to be apprised of that periodically.
- 313 P. Ozanne Very much so. As we gain experience and insights from site visits, we will pass them on to you and the defense community. And those who participate in site visits find they are taking back insights to their offices, so this is very much a process of distributing knowledge. But we are also trying to protect sensitive information so we will encourage widespread participation by our contractors across the state.
- 324 I. Swenson I would also like to tell you a little bit about the proposal for a Juvenile Training Academy. I have discussed briefly with the Commission before some of the concerns with respect to the quality of representation in juvenile cases, which the State Bar and other groups have identified. There are a number of initiatives underway to improve the quality of juvenile court representation. One of those proposals is to create a Juvenile Training Academy for juvenile attorneys. At least at this point, the concept would be to create a comprehensive curriculum about what a juvenile court lawyer would need to know in order to be an effective advocate for parents or children in a juvenile proceeding. A workgroup has been formed which is comprised of volunteers with an interest in this area. The Judicial Department's Juvenile Court Improvement Project has expressed an interest and has participated. That work is being conducted under a grant which is directed at improving the quality of juvenile case processing throughout the court system, so they are very interested in working on the Training Academy too. The Juvenile Rights Project, which is a nonprofit public defense firm in Portland representing juveniles in juvenile proceedings, has also long been interested in doing whatever it could to promote the quality of representation. OCDLA and the Juvenile Section of the Oregon State Bar have also expressed interest in not only helping to develop the academy, but also to actually present some of the CLE's trainings that will arise out of this concept. The idea would be to create this curriculum and divide it into modules which can be presented in various forums at various times. So, over the course of a year or more, a person interested in or already practicing in juvenile court could attend multiple CLE's that incorporate this basic curriculum. I'm pleased to say that OCDLA will be sponsoring the first module at its December Juvenile Conference. It is an especially good module that was developed by the ABA for general use and we think the interest level will be quite high. The ABA has been very supportive of our effort. They are providing the presenter and materials to assist us in putting on this first module. So the curriculum will include everything from who are all these people in the juvenile court proceeding including the Department of Human Services, the Oregon Youth Authority, the Juvenile Departments in the counties—all of the people who would be unfamiliar

faces to the criminal practitioner, but who the juvenile practitioner has to know well; to an outline of juvenile law including constitutional, statutory and regulatory law applicable in this area. The State Bar standards would be part of the teaching curriculum because they are a very, very useful tool under all circumstances arising in juvenile court to direct lawyers to the way in which they should be thinking about their cases, preparing their cases and presenting their cases. So it is an ambitious agenda and it is our hope that we can pull it together in such a way that we can offer some of the more substantive pieces within the next year of two. Any questions?

Then I will talk about the Proposed Legislative Concept. The handout which you received has been amended so I am just going to hand it out to the audience. The chief difference between this version and the versions you received earlier is that we took out the direct reference to law firms and terminology which related to law firms because obviously we contract with people other than lawyers to provide services. We contract with investigators and forensic experts and so forth, so we didn't want to limit this just to law firms, although the issue with which we wish to deal is an issue related to the lawyers. (end of tape)

### **TAPE 1; SIDE B**

- 008 I. Swenson We can certainly add nonprofit corporations. I think it was our expectation that the word firms might include those corporations, but there is no reason that we couldn't be more specific about that. In a general sense, what we would be looking to accomplish with this legislation is very clear authorization from the Legislature for us to contract with consortia. One of the issues to which the courts have looked in terms of determining whether state immunity should apply under circumstances such as this is whether there is detailed state authorization for the activity. The other factor that courts look to is the degree of state oversight of the contract once it has been agreed upon, but that piece can be accomplished non-legislatively and is certainly part of the oversight process in which we already engage with consortia, as well as other types of legal entities with whom we contract. We will be providing this, once you have had an opportunity to review it, to other interested persons including the Attorney General's Office who would have an interest in this. But we wanted you to see the concept before we refined it any further.
- 030 Chair McCrea I have a question because I don't have any idea about antitrust law. But how is it that the attorneys in Clark County were doing anything different than what a union does?
- 033 P. Ozanne Well, I don't think it is. But we have an antitrust expert on the line, maybe Barnes can help us.
- 034 B. Ellis Shaun, it wasn't all that clear to me what the contract was in Clark County, but what the FTC I think was concerned about was that the lawyers were threatening as a group not to perform legal services unless they got a compensation increase. The FTC staff viewed that as collective boycott behavior and thought it was terrible. We had a long conference call with FTC staff, and I don't think Peter got a follow-up call, but I think the FTC should have taken away from that call the sense that, first of all, we do know what we are doing. Secondly, our consortia do provide a significant benefit to us for all of the reasons we have talked about. And thirdly, we have substantial bargaining power so, if a consortium began to behave in a way that was offensive to us economically, we'd make changes because I think we have more power than they do. I think the FTC walked away satisfied that they really didn't have a need to wade into this very far. But I haven't heard any follow-up, have you Peter?
- 054 P. Ozanne Barnes, the only follow-up is that we provided information that they requested during our conference call and in subsequent conferences with Kathryn and me. But we haven't heard anything since providing them with that information.
- 058 B. Ellis I think it all came as news to them that we have initiated formation of consortia, that we view it as a positive from an organization point-of-view, and that we have fairly concentrated buying power so we really do have economic leverage.

- 065 I. Swenson Barnes, after you left that conference call we did have an opportunity to talk with the FTC staff about the role that clear legislative direction might have and, basically, we drafted this in response to their reply, which was: "Yes, that would be helpful."
- 068 B. Ellis I'm only hearing part of that Ingrid.
- 069 I. Swenson I'm sorry. The same folks that we were talking with basically recommended to us that we seek clear legislative direction to engage in this kind of contracting behavior.
- 071 B. Ellis I think that is fine. I'm just amazed that they would wade into this at all.
- 076 P. Ozanne I think we are all.
- 083 Chair McCrea So the language that we have here regarding consortia just protects us as the contracting body. It doesn't do anything in terms of the people we are contracting with right?
- 086 I. Swenson No. It is designed to protect them. What the case law seems to indicate is that there are two factors that need to be present in order for a private body to enjoy the protection that the state agency has. One of those is legislative direction or state policy direction, so it could be the Chief Justice directing the courts in a particular fashion or some other branch of government. But since we are under the general authority of the Legislature, if the Legislature directs that and the Commission oversees the activities of the consortium, then this protects the consortium and gives it the same immunity that the state enjoys.
- 097 Chair McCrea So it doesn't alter the consortium's ability to bargain?
- 100 I. Swenson This proposed legislation?
- 101 Chair McCrea Correct.
- 101 I. Swenson No, I don't think so Madam Chair. I think the idea is to simply have the Legislature acknowledge and direct that this Commission engage in contracting which can include contracts for exclusive representation by consortium attorneys.
- 106 Chair McCrea Okay, got it.
- 107 B. Ellis Ingrid, I don't think this legislation would solve all of the potential problems the FTC might see. I thought part of their problem was they thought private lawyers compete on price for indigent services. That has never been true historically, but I can see, for example, if in Multnomah County, the current contractors got together and said, "Let's as a group refuse to deal unless we get pricing at a certain level." I would be offended by that. This Legislative Concept doesn't immunize consortia from contracting in an inappropriate manner by trying to collude with what they might view as their competition.
- 120 I. Swenson I would certainly agree.
- 121 Chair McCrea Any other questions or comments? Do we need to take any action at this time?
- 122 P. Ozanne Not at this point. I think we want to ventilate it a little more, think about it, and we will come back for your approval. Just one other item that has come out in this discussion: I will put it in the category of food for thought for the Commission. As you well know, we have undertaken two major quality assurance measures. One is this contractor site visit process and then the other is the service delivery planning process that the Commission is directly engaged in and which we are about to undertake in Multnomah County. I think when we pause to reflect, maybe at the end of

this year, I think it may be appropriate for the Commission to consider how we might combine these processes. We might combine these efforts in a way to maximize the efforts that are being devoted to these two activities. For example, we are having a group of lawyers look at the Clackamas County consortium, which provides all of the adult criminal representation in the county. They are talking to judges, prosecutors and other lawyers. It would be nice to harness such efforts and combine the processes in a way that makes them both more efficient. Perhaps it is particularly suitable in a smaller county, where there are fewer contractors. Maybe we can get the site visit team to visit all of the contractors in a smaller county and OPDS staff can analyze the structure of the delivery system in that county at the same time. At some point I think we should consider this option because the two processes certainly require a major dedication of the Commission's time and effort, as well as OPDS staff and our colleagues with busy law practices.

153 Chair McCrea Yes, I like that. I like the idea of the unstructured discussion. I guess that is where I was going in terms of my question about whether we were going to be provided results in the sense of being able to build and go forward along the lines that we did with our discussions at the Retreat—figuring out policy and planning and just sort of brainstorming. So I think that is good. Anything else on the monthly report?

159 P. Ozanne That is all we have. Thank you.

161 Chair McCrea Kathryn you want to take Action Item No. 3, the Review and Approval of Preliminary Agreements?

**Agenda Item No. 3            Review and Approval of Preliminary Agreements**

162 K. Aylward Yes. Most of the changes have been minor adjustments for changes in caseload; they are reflecting actual caseloads. There were only a few where I can make some comments. Number 2, Los Abogados in Jackson County shows a 41 percent increase in their caseload quota. The other contractor in Jackson County is Southern Oregon Public Defender. They were operating under a four-year contract that we had amended periodically through the course of the contract to increase their caseload to match what they were actually getting. In the case of Los Abogados, they didn't complain that they were running over so much and so we delayed an increase until the end of their contract. I think in the public defender's case he actually needed the assurance that his quota was there before hiring another person, whereas Los Abogados its consortium members had more flexibility. So that is why there is such a big increase there.

Numbers 14 and 15 are actually connected. There were PCR cases under the Umatilla/Morrow Counties consortium's contract. In particular, what created a problem is that the PCR cases were deferred post-BRAC. So on July 1 came a huge flood of PCR cases that all went to the Umatilla/Morrow consortium and they were literally overwhelmed. They could not do as good of job as they should have been doing. I think they were happy to have those cases removed from their contract. As it happened, we had another bidder, Robert Klahn, who submitted a bid specifically for the PCR cases. We have preliminarily agreed to a one-year contract with Mr. Klahn so that we can see how he does and get feedback from the court and he can see how it is working for him. So that is just a one-year agreement.

194 B. Ellis Is he a long-time practitioner out there?

195 K. Aylward He is a long-time practitioner. He hasn't been providing public defense for a number of years, but he had been. There has been a lot of shifting around in that area over the last 10 or 12 years. Consortiums separate, regroup and reform. He had provided public defense in the past. Occasionally he took a few juvenile dependency cases when the consortium needed a third or fourth person on a case. So far I haven't heard anything negative.

The other contract that I would like to mention something about is No. 16, Lincoln Defense Consortium. Under their previous contract, they had been the last of what we used to call the "outputs" contract. where we agree on an amount of money and then they do whatever the caseload

in that county is. If it is a smaller number than we thought, then they benefit. If it is a bigger number than both parties had agreed to, then we benefit. We have decided to not have those types of contracts anymore. We prefer the notion that we pay for a fixed amount of work. If the work is not there, we are not paying for it. If the work is there, we are paying for it. It has been a transition we have made over last five or six years. Unfortunately, when you switch someone from an outputs contract to a fixed contract they are thrilled if they happen to be running a overage with many more cases than they anticipated because we are then saying to them we will pay you for those extra cases. Unfortunately, in Lincoln County the caseload has dropped below what either party expected. So for them, it was a bit of an abrupt shock: “we are doing the same work we have always done and now you are going to pay us 13 percent less?” And the answer to that was “yes”. So that was a difficult negotiation. Other than that, there is nothing in particular to note in these preliminary agreements.

230 Chair McCrea Any questions or discussions?

231 J. Potter Kathryn just remind me and maybe others. We are going to this 18-month routine so they will all expire on January of 2006, is that right?

235 K. Aylward That is correct. We’ll be ready. I see that look.

237 Chair McCrea Unless there is further discussion, I would entertain a motion.

**MOTION:** J. Potter moved for approval of staff recommendation; B. Ellis: 2<sup>nd</sup>  
**VOTE 4-0**, hearing no objection, the motion **CARRIES**

#### **Agenda Item No. 4 Further Discussion of OPDS Proposed Complaint Policy**

243 Chair McCrea Okay, Peter and Ingrid?

244 P. Ozanne Yes. Of course, our predecessor organization, the Indigent Defense Services Division, and we both had a complaint process. And Ingrid has been involved to a large extent in fielding complaints from a variety of sources. But as you know, we felt that this is the kind of thing that should be embodied in a policy by the Commission, and hence the proposed policy. Your review of the minutes will reveal that there was considerable discussion at your last meeting and we are in the process of preparing a briefing memo for you. This is not an uncomplicated issue. There are important issues and questions of confidentiality that the Commission asked to be briefed on. We will do that at the next meeting and we anticipate asking for the Commission’s approval of the policy at that point. In the meantime, Ingrid is reporting back to you because we wanted to provide an opportunity for public comment. Ingrid will be reporting on the comments we received since our last meeting.

263 I. Swenson Interestingly, we have not heard from the judges and that is one large group of folks that we are interested in hearing from but really have not had much communication with. We did send an e-mail to all presiding judges and trial court administrators asking for input. Maybe they are satisfied with the way it is. We hope that is the case, but I would like to give the courts more opportunity to respond. It has been several weeks since our e-mail went out. In fact, we will probably send them a reminder and ask them to provide further comment before the next meeting of the Commission.

275 Chief Justice Carson If I can help with that, let me know.

275 I. Swenson Thank you, Chief. As far as the district attorneys are concerned, we heard from one and that was John Foote. He expressed approval of the approach we were taking. We have heard from defense lawyers and I will summarize some of their comments. The OPDS management team recently agreed to an amendment which doesn’t appear in the draft you have. It would provide as follows: “Nothing in the proposed policy would prohibit OPDS from receiving information in any form or

from anybody regarding either the cost of public defense services or the performance of public defense providers and taking appropriate action.” In other words, despite the presence of a formal written policy available for people to use, the existence of that policy would not prevent us from using any information that came to our attention and investigating it if it seemed appropriate. Ann Christian provided some comments and some very useful stylistic changes which we will incorporate into the draft before you see it again. She also had a recommendation with respect to confidentiality: specifically, that any document that comes to us enjoying either a privilege under statute or policy continues to have that protection while it is being considered as part of a complaint. We had some communication from the State Bar. We had asked them for their input. One suggestion was that we share the effort with the Bar as best we can. The Bar reports that they receive a good many complaints that would be more appropriately directed to us, and that we will be receiving complaints more appropriately directed to them. I think that is certainly true and they are suggesting that we have a meeting and talk about how to cross-refer those kinds of issues. George Riemer, the general counsel of the Bar, inquired about what standard of quality attorneys would be required to meet. This is a difficult issue certainly and something we can give further thought to. In utilizing the informal policy that we have, I think we have come to an understanding of basic levels of quality representation that must be there. But we have not defined that and you may consider whether or not it would be appropriate for us to do so. Among the comments that were provided by defense lawyers, Dave Hocraffer spent quite a bit of time reviewing the policy and had some comments. I think his principle comment would be, “Why do we need a detailed complaint policy at all?” He said the legislative requirement for a complaint policy about the expenditure of funds could be met simply by designating our Executive Director as the person to whom all inquiries and complaints could be directed. If a complaint did not rise to a level which would compel either a Bar complaint or didn’t amount to a contract violation, then we should probably not trouble ourselves to deal with those kinds of complaints. He said that, with respect to concerns about the expenditure of funds, since non-routine expenses are generally subject to preauthorization and payments are closely monitored, there is no need for an independent process. I have responded in part to David and I will respond further. But I think there are certainly situations other than those he refers to which would require inquiry, even though the conduct didn’t amount to a violation of the contract or a disciplinary violation. I think there are things that attorneys do or do not do that are worthy of our notice and may require some intervention on our part. Attorney Martha Roberts suggested that the complaint policy regarding quality issues be given priority. She is simply suggesting that, in the policy, we move that quality piece in front of the expenditure of public funds piece. That can be easily accomplished and might well be appropriate. Greg Hazarabedian, a contractor with our office, and Jacques DeKalb both recommended an appeal process. There is no appeal process set forth in the policy proposal that you have seen. In the complaint policies that I reviewed preliminary to development of this policy, some do provide for appeals, some don’t. Within the structure of OPDS, the policy does provide that, for particular sanctions, the Executive Director has to personally approve them. I certainly think that that would be an appropriate limitation on the office’s ability to propose particularly significant sanctions. But for an appeal outside the office, I think we would have to give consideration to what that would look like and what purposes it would serve. Certainly in the informal policy that is currently in place and has been for years, there has been no appeal designated as such. Tom Sermak from the Lane County Public Defender provided some commentary. He inquired whether we shouldn’t require that a person have some kind of standing before we entertain a complaint from that person. I am not sure that would necessarily be a good idea. I think people could, for whatever reason, bring to our attention something that was significant, even though they weren’t a party to the case or a prosecutor or a judge. Depending on what that information was, it certainly might require some kind of intervention. He also felt that there was unnecessary overlap with other entities, such as the court and the Bar, although I do think our policy attempts to defer to those processes when one of them is underway. We can certainly look further at whether or not to eliminate any kind of overlap, if we have a meeting with the Bar as suggested by their General Counsel. (End of tape)

**TAPE 2; SIDE B**

- 001 I. Swenson Tom also recommended that we defer issues involving consortium attorneys to consortium administrators and employee attorneys in public defender offices to the employer. I think our process certainly contemplates that the consortium administrator or employer will be made aware of and involved in those discussions. We can certainly review our proposed policy again to see if there are places where it would be appropriate to include that person more fully. He also recommended an appellate process.
- That is a summary of the comments that we have received to date. Our management team reviewed the policy before this meeting and we will do it again before we bring it back to you. As Peter indicated, I will brief you in writing on the issues with respect to whether we can maintain a confidential process and, if so, whether that is a policy decision this group wishes to make.
- 014 P. Ozanne Thanks Ingrid. Madam Chair, if I might suggest by way of process that, for purposes of today's agenda since we have a lot of items on it and we will be bringing the Complaint Policy back as an action item, you not entertain discussion from the audience. Certainly the Commission may want to discuss the policy now, but the audience will have sufficient opportunity to give their input at our next meeting if they wish. I would also urge them to submit their comments in writing, so we can digest them and conserve the remainder of the agenda for other items that are more pressing. As I say, we will be taking this up as a formal action item at our next meeting.
- 021 Chair McCrea Our meeting on September 9<sup>th</sup>?
- 022 P. Ozanne Yes.
- 023 Chair McCrea I think that is a good idea. So, if the audience has comments, if you could either submit those in writing or hold those until the next meeting, we would appreciate it. Does anyone on the Commission want to discuss this matter further?
- 025 J. Potter I don't need to discuss it further, but when you mentioned George Riemer, and he was asking us about the quality issues, does the Bar have any comments about this process and how it may duplicate what the Bar is doing? Should we be asking them that?
- 030 I. Swenson Yes, John. I think that his thought was that to some extent there would be overlap because in fact he warned us, "Look out, we get all kinds of things that either relate to disciplinary violations or not and you can expect to receive the same once you have this policy in place. So why don't we sit down and talk about cross-referrals, so that we don't duplicate each others efforts?"
- 034 J. Potter I would be interested in that analysis, to see what it is that the Bar would do and what it is that we would contemplate doing. How much that leaves us.
- 037 Chair McCrea Anything else on that? Before we move on to the next item, Barnes, usually it is my role to ask for a break, but Janet is asking for one. Can we impose on you to take about a five to eight minute recess?
- 040 B. Ellis Can I call back in?
- 041 Chair McCrea Of course.
- 042 B. Ellis Okay I'll do it. What would you like, 10 minutes?
- 043 Chair McCrea We have just about 10:30, so at 10:40. We will take a 10-minute break.
- 046 Chair McCrea (Calls meeting to order at 10:43.) So we are on Agenda Item No. 5. (tape stopped)

**TAPE 3; SIDE A**

**Agenda Item No. 5 Further Discussion of Agency Performance Measures for the Legislative Audit Committee**

001 P. Ozanne Madam Chair, this is an item that I would like to suggest we keep in mind for more discussion later. It is really my personal request that it be on the agenda now. Perhaps no more than 10 minutes would be appropriate at this point. This is a discussion that could go on for a long time, like a retreat topic. Let me back up and say why this topic is on the agenda again. First of all, as the Commission knows, when we first embarked on a strategic planning process and I came on board with the Commission, we started contemplating the management of the entire public defense system. The first thing we did was to discuss and develop a strategic plan, so we all know that we were interested in accountability and holding ourselves to missions and goals and strategies. Over time, we also expected to develop refined measures to measure our accomplishments. So we would have developed performance measures without the requirement of them from the Legislature. I now understand that the process of developing performance measures, administered by the Joint Legislative Audit Committee with the assistance of the Oregon Progress Board, is virtually hardwired into the state budget process. So it is very important, as your administrator and with the aid of others like Kathryn, that we attend to this process and develop performance measures that are meaningful and that satisfy valid concerns of the legislators. We have tried to do that so far. Kathryn in large measure developed most of them with regard to the performance of CBS's functions. We discussed them and reviewed them at a previous meeting. It isn't necessary for the Commission to see those measures again to give me the feedback I am requesting now. But let me just highlight them, looking at a document you've reviewed entitled the "Links to Oregon Benchmarks." These are performance measures that you reviewed at a previous meeting before and approved them. This is a form from the Progress Board that we prepared for the purposes of our presentation to the Joint Legislative Audit Committee, which is about to take place at the end of this month. It states our name, our agency mission which is part of our strategic plan: "Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible." Then the document breaks down various goals which advance that mission. Goal #1 would be an obvious one. We discussed it a lot: to reduce delay in processing appeals. It goes right to the heart of administration of justice, as well as the interest of our clients. We are measuring backlog with respect to this goal. Another one, which is a bit more narrow, but really speaks to the performance of CBS in managing contracts: Goal #2 tracks a percentage of fee statements processed within 10 business days. We want to be responsive, so this is a valid measure. For purposes of illustration, by 2007 we would like to have 95 percent of our fee statements processed within 10 business days. Other goals expressed what I will call "outputs" rather than "outcomes."

We presented the foregoing performance measures to our Contractor Advisory Group for further discussion and advice. That discussion was very valuable and quite lengthy. And what it led me to think about was: do we need to consider measures for what I'll call in our presentation to the Legislative Audit committee more intangible but nonetheless overarching goals that make our agency and our mission different than any other government agency? Now in saying that, I think it is very important as we engage in this process that we not seem either aloof from the legislative process of developing performance measures or somehow coming off before the Legislature as special or different from everybody else. We have to be very careful about that. But in the discussions with the Contractor Advisory Group, I was impressed with the contractors' concern that we not let people think our goal is simply to be efficient case processors; that we are not just like every other agency, like the Transportation Department, for example. In essence, we are in the business of delivering quality defense services, and that involves some intangibles. I have distributed a document, and it is in front of you, containing an outline entitled "How we measure quality in criminal defense." This was developed with a lot of thought by one of our contractor advisors who also chairs our Quality Assurance Task Force, Jim Arneson. I won't go through the entire outline, but it sets forth some of the basic goals and functions that a criminal defense or a juvenile defense lawyer should pursue. For example, one of the goals of criminal defense is a minimal rate of conviction of the innocent at least in the adult system. Another goal is the

prevention and deterrence of illegal police conduct and the enforcement of constitutional rights through criminal procedures and by filing of motions to suppress evidence. Another goal is the minimization of excessive conviction, meaning a defendant who is found guilty is convicted of the right offense--the common battle in the arena of criminal law over lesser included offenses. What is the appropriate offense, if indeed an offense has been committed? That can be the major source of litigation. Another goal is obtaining alternative sanctions for clients, when they are desired by the client, like drug treatment, mental health and domestic violence programs. Jim Arneson has outlined some ways of measuring these goals, and here is the catch. These are very difficult concepts to measure. Indeed, it is difficult to even conceive of measurements that are feasible to administer or to collect data to support. I'm not saying that we need to figure all that out right now. What I'm asking for now is advice about what I should say in the course of making the presentation to the Joint Legislative Audit Committee. Should we attempt to remind folks that the goals I just mentioned are indeed our overarching goals that we may not ultimately be able to measure; that they are very important but they sometimes lead our contractors to act in ways that cause other players in the system to think they are interfering with governmental processes? That is not truly the case. I believe, and we probably all agree, that these functions really serve to strengthen governmental processes. But, in any event, I'm struggling with ways to account for such functions and goals in the process of a performance measurement development process that focuses on efficiency. I don't mean to denigrate the process as "bean counting," but simply counting numbers and saying that all of our goals and functions can be analyzed, sliced and diced and counted may be a slippery and dangerous slope for our agency and our contractors and clients. So I'm seeking your advice in terms of our presentation to the Joint Legislative Audit Committee.

- 114 B. Ellis How do you avoid the same thing that happened in the Vietnam War where the measurement of body count became how people thought you measured progress. Of course, that may or may not have correlation and it becomes sort of distracting—that you begin to go for the metric and not for the true objective.
- 118 P. Ozanne Well, that is exactly the point I'm trying to make, Barnes, though you have said it much better than I have. That is very much my concern; that we can describe the overarching goal but may not be able to develop the metric to the satisfaction of this process or the Audit Committee. It seems to me that we have to keep surfacing what ultimately we're all about, so we don't just get up in the body count mode.
- 125 Chair McCrea To be able to deal with this in 10 minutes it is a huge topic. I think it is in some ways a question of a philosophical shift because we have had discussions previously about whether we need to have some quantification for the Legislature. I guess my question would be that you have mentioned this as a possible retreat topic. Is there something that you have to do for the Legislative Audit Committee before we would likely have a retreat?
- 132 P. Ozanne Yes, we have a presentation on the 26<sup>th</sup> of this month. We have conferred with staff in the Judicial Department, which has been in this business for a long time, in order to strengthen our presentation. I am seeking a little more guidance from you right now as to whether I should venture into this territory of ultimate albeit intangible goals during our the presentation to the Audit Committee in order to reinforce the notion that all we do may not be quantifiable or subject to measurement—at least to alert the Audit Committee that we can't measure everything and that we can't simple provide the Legislature with a body count to show that we have made progress. So perhaps it is a philosophical shift. I'd like to be warned from venturing off into territory which would damage our credibility with the Committee or the Legislature. I guess that is my concern. I don't want us to get off the track. I think some people who have heard me talk about this think that it may be about to take a dangerous detour. My view is that we need to remind people who are listening that we are about something more than just numbers.
- 146 Chair McCrea For me, I think that is a really important. Peter, I seriously think that it is helpful and important. I at least would encourage you to bring up the list of intangibles because that is a lot of what we are and I think that is important.

- 154 J. Potter I certainly view it as an opportunity to educate. We are different than the Highway Department. They can measure things by pot holes and miles and striping and all the other things they measure, but we have a more difficult time. But anybody who deals with agencies like Human Resources are going to have the same kinds of problems. Corrections, they grapple with this too, recidivism rates, when they measure things like success. Going beyond this piece of paper and talking in general terms, with you at the helm doing that, doesn't bother me at all.
- 162 P. Ozanne Well, I wish we had something like recidivism rates. That is one of our problems. We really can't come up with metrics or even a concept to embrace some of our more intangible goals. But if you have no problem with me stumbling through these matters with the Audit Committee, I'll give it a try. I'm sure the Committee will challenge me to come up with metrics, refine the concepts, or forget about it because we can't measure it. But I would like to keep that conversation going.
- 170 Chair McCrea Absolutely, and I don't think you will be stumbling through it Peter.
- 171 Chair McCrea Janet, Chief, did you want to comment?
- 172 Chief Justice Carson I would certainly agree this is very difficult area and we are struggling the same way you are.
- 172 P. Ozanne Some people have suggested that we are all about the quality of justice, and that is fine. But how are you going to measure that?
- 175 Chair McCrea That is something that the federal courts have been struggling with within the Defender Services Advisory Group, which includes both the federal defenders and CJ attorneys. How far do we go in trying to quantify those things? It is very difficult. So you are in good company there.
- 178 P. Ozanne This is helpful. At least no one has warned me to get off of this topic. I certainly have to be careful. I would like to hear more from Barnes. His body count analogy I thought was just right.
- 182 B. Ellis I think it is very hard to measure intangibles, so I am okay with trying to find the more objective metric as a way of stimulating our own group to move on things. But you are absolutely right. You have to keep in mind the broader objective and not get consumed by the shorter term measurements.
- 190 Chief Justice Carson Peter you alluded to it or mentioned it, and that is the Legislature, which becomes a little schizophrenic. What we are fighting is between outputs and outcomes. We have been trying to move to outcomes, yet that is where you can't measure very well. Take drug courts. Output is a case. The fact that it saved a person's life or saved his job or family is the outcome. And they can be documented. But you can't put them on a scale. I don't know that you would go to the Progress Board and say, "Well, we saved 300 families last year, and we are going to save 600 next year." Whether that is realistic, I don't know. But we are playing with their sports equipment and they want measurable audits, so you are doing the right thing here. But we can't lose sight of the fact that our strengths are our outcomes. A safer society, more humane treatment of individuals charged with crimes, things like that which you can't measure. Your presentation suggested that you are spotting the difference between the two, and that they may not really buy into those measurements that can't be precise. They want to know how much shoplifting went down, not what happened to the defendant or the society at large, and that is hard to bridge. My hope would be that sometime we can get the Legislature to see that. Janet whispered that I will be dead by then.
- 217 P. Ozanne There was a troubling suggestion during our E-Board conversations that perhaps some of the efforts we have been making, which seem to me to be clearly improving the system through our service delivery planning and our site visits, shouldn't begin without all of the performance measurements in place. Otherwise, how can you show that we are doing anything positive? I take that suggestion

as a serious concern by the Legislature. So we will be back to you on this topic, and we will certainly report on our August 26th meeting with the Joint Legislative Audit Committee. Thank you for the input. That is all that I need for now.

225 Chief Justice  
Carson The best advice I could give is stay close to Robin on this. She understands all of this and she will give you good counsel.

**Agenda Item No. 6 Follow-up on Region 4 Service Delivery Plans**

- 231 P. Ozanne Attachment 4 is essentially the marching orders that the Commission gave us at our last meeting: How do we proceed with the implementation of the major piece to the Lane County Service Delivery Plan, which is a new court-appointment list? Attachment 4 is a memorandum from me to the Commission dated August 4, which outlines step-by-step who does what, when and how. I would like any comments or corrections from the Commission so that we can proceed to implement--
- 242 B. Ellis I have a question, Peter. When you get to approval and selection of the administrator, what are you contemplating by way of compensation?
- 247 K. Aylward I think a lot of that depends on the scope of work that the panel of five thinks is necessary. There was some discussion about whether or not cases could be assigned at arraignment. Everything would go to the Public Defender's Office and then they would sort out and pass on cases to the administrator. I don't think it is clear how much work this administrator will have to do. But I wouldn't imagine that it would be more than half time.
- 255 B. Ellis Well, conceptually, are you thinking of an hourly system or a fixed rate?
- 260 K. Aylward I'm assuming you are talking about an hourly system for the appointed counsel. But for the administrator, generally what we do is have a fixed amount per month. We say \$2,000 a month to administer under this contract, or \$1,500 a month, and then we don't ask them to keep track of their time.
- 263 B. Ellis If we do it on a monthly basis, I would think the first couple of months are going to be much heavier. So we should think in terms of at least a year.
- 270 K. Aylward That's right. I think some of the earlier drafts or concepts indicated that the administrator would be at will to the Commission. But the problem with that is, if the administrator spends the first three months working flat out to set it up and it puts him in a position of having the Commission say, "Okay, we are done with you," and he has done all the grunt work, I agree with you. There would be a term of the contract that would be certainly not less than a year.
- 278 B. Ellis Personally, I would err on the side of paying the administrator generously because I think it is critical to the whole program. If we get someone who is really high energy and enthusiastic and works the territory this can work. If we get someone for whom this is a drag, the whole program is going to go down. I'm not quite sure what the numbers ought to be, but that would be my tilt. Secondly, in the same paragraph, and maybe it will happen when you do the written policies and procedures, but we need some clarity as to the authority of the administrator. Is the administrator directed to try to match ability to complexity of cases, which I hope to see him do, not just do the rolodex. I think that ought to be spelled out.
- 299 P. Ozanne I contemplated, Barnes, and the timing may therefore not be the best if we are going to get the announcement out on September 1 for the position, that we would craft those kinds of things in the position announcement. Perhaps we should wait until the September 9 meeting so the Commission can look at that position announcement.

- 306 J. Potter I think it is probably a good idea to wait and have us take a look at the draft before we send it out.
- 309 P. Ozanne That sounds fine. So the date of September 1 for the announcement should be changed, maybe to September 15.
- 310 Chair McCrea Barnes, any other comments on the draft?
- 311 B. Ellis No, those were the issues I had.
- 312 Chair McCrea Well, I noticed Peter that I must have lost the coin flip. I'm the one that is on the Panel instead of John.
- 316 J. Potter I thought the minutes were clear.
- 317 Chair McCrea Right, and what page is that on? But I'm fine with it. I will say that, Peter, in fairness, you tried to get together with John and me to sit down and go through this memo. Unfortunately, the day you were coming down to Eugene neither of us was available. So that of course will be a priority—to try and sit down and go through this and put together these things for the next meeting on September 9, so we can have the position announcement ready to go. We need to have the details. Any other comments or questions?
- 332 S. Gorham I have two quick ones. I notice on page 2 you say the person should reside in Lane County. I guess I would change that to say the person resides or practices in Lane County, or primarily practices in Lane County. Because you may have somebody who is just on the other side of the line who resides in maybe one of the counties surrounding Lane County, but who does practice almost exclusively or whatever language you want for that. It is more of a problem in a place like Marion County where you know West Salem is Polk County. There may be somebody in that kind of situation. So they are aware of Lane County certainly. But you can get awareness by practice, not necessarily actually living in the county. Then when you talk about pay, I think your pay scale should be at least the court-appointed attorney rate, if not maybe a tad more. That is our pay structure in Marion County. Basically my pay is a substitute for doing the court-appointed work that I would doing.
- 364 Chair McCrea Those are good comments. Thanks. Anything else? Okay, lets move on. We have a little less than an hour to complete the agenda.
- 367 P. Ozanne Linn County we can defer. I am going to write a letter to Linn County's Presiding Judge about their Early Disposition Program, which is the main component of a service delivery plan for the county. That really depends upon Item No. 8, a discussion of the Early Disposition Program guidelines, which is on our agenda this time. So there is nothing more for Item No. 6 on the agenda.
- 373 Chair McCrea So we are ready to move on to Item #7, Preliminary Discussion of Region 1 Service Delivery Plan, which is Attachment 5?

**Agenda Item No. 7 Preliminary Discussion of Region 1 (Multnomah County) Service Delivery Plan**

- 377 P. Ozanne As the Commission members can no doubt see, this is a familiar document, at least for the first nine pages. I do provide some changes in logistics in this draft, including a proposed meeting on September 9 in Portland. Our previous meetings, by the way, have been from 11:00 a.m. to 3:00 or 4:00 p.m.. I am contemplating that time and would like your feedback. Our next meeting will be an opportunity to hear from people in Portland and Multnomah County. We could hold another half-day meeting that straddles the lunch hour to make ourselves more accessible. I recognize that this is an imposition on all of you, but that would be my proposal. I haven't incorporated meeting times in this draft. I'm seeking your guidance if that timing is acceptable again on September 9.

- 400 Chair McCrea I think the 10:00 to 3:00 is fine.
- 401 J. Stevens That is a little more difficult for me because I have a child that gets out of school at 3:00. I can shop her around for awhile, but not for hours and hours and hours. If I drive three hours away, at least, if we could start at 10:00 and be done by 2:00 that would work.
- 408 P. Ozanne That is fine. It still straddles the lunch hour. 10:00 to 2:00, that is doable from my perspective if it is agreeable to everyone else.
- 412 Chair McCrea Any other comments. Barnes?
- 413 B. Ellis Yes, I had a couple. There is a typo on page 14. The real question I have goes to what I think is going to be our hardest issue in Multnomah County. That is the rate disparity that we have. It would be really helpful to me if there could be a table set up with the current contractors that makes a comparison of the contracts and the rates because I am insecure in terms of really having a handle on that. Then I would think it would be helpful in the report that you are putting together to list the factors that arguably justify rate differentials. Maybe not the particular ones we have. You have done a lot of that in the document, but you had one sentence in there that sort of gave a foregone conclusion that the Commission would decide that the rate differentials are bad. I don't think that is necessarily so. There are real differences in what some contractors are providing to the system as a whole compared to others. (end of tape)

**TAPE 4; SIDE A**

- 015 B. Ellis That is not a criticism of anybody, but it does have a lot of history to it. So I would like to see more of the factors that might justify rate differentials and then a table that sets out what the differentials are now, so that when we address this issue we really have the factual background.
- 024 Chair McCrea Can you do that, Peter?
- 025 P. Ozanne Yes.
- 025 Chair McCrea Barnes, I'm sorry you sort of jumped ahead of me. I just wanted to make sure that changing the meeting time on September 9 from 10:00 to 3:00 to 10:00 to 2:00 was okay with you?
- 028 B. Ellis That is fine.
- 028 Chief Justice Carson Shaun, I won't be there that day. I have court arguments most of that week and the next week. So I will be sitting on a bench, but not in a Portland.
- 031 Chair McCrea Well, we will miss you Chief.
- 032 Chief Justice Carson I'll miss you.
- 032 Chair McCrea Peter, you started to make some preliminary comments and we went on to the date and time. I want to go back to that.
- 0 33 P. Ozanne Yes. The specificity that Barnes is calling for we did contemplate in preparing this draft of our report. There is a question about what level of detail we want discuss in a public meeting versus delegating to your administrators a plan to work out the details. I think it is a matter of judgment. I concluded, at least at the beginning, to simply speak in general principles. To the extent I communicated the notion that rate differentials couldn't be justified or deemed appropriate, that was an error on my part. I certainly do believe that there can be differentials and that is the first

issue that we should identify. The goal really is to be able to articulate to people's satisfaction the reasons for differences in rates and to develop guidelines for the Commission to adopt and structure OPDS's exercise of discretion—to justify when rates should be different and when they shouldn't be. Another way to put it, "what are we getting for our money." By developing certain criteria, we will shift the discussion to justifying rate differences and what we are getting for that. There may well be very justifiable reasons for differences in rates. I have listed some of them in the Preliminary Draft of our report on Multnomah County. I agree with Barnes a rate differential issue will be our toughest. The draft report was meant to be pretty open-ended, as you can see, and pretty general in its terms of the issue because I think the quality of our staff report to you and the quality of your decisions will depend on the level of input we get from the legal and criminal justice communities in Multnomah County, and certainly from our contractors. One of my missions after this meeting is to be sure to encourage written input, which will be the easiest to manage and digest before our September 9 meeting. With cooperation from all the players in the county, I will try to structure a meeting on September 9 in which various components of the system have an opportunity to express their views on these issues and others. I welcome other ideas regarding the relevant issues in Multnomah County that people in the audience or on the Commission have. But the four issues I have outlined thus far seem to be major ones. Perhaps the less significant ones are the handling of conflicts and late withdrawals, but they are very important issues nonetheless. However, they may be matters of perception rather than reality. In other words, changes have been made to various systems and processes in Multnomah County a number of times, as well as quite recently. We may still be looking through a rearview mirror. Again, comments from contractors and others in Multnomah County during this process will be essential to determining if we really do have problems with those two issues, in particular, as well as others. I think that is about all I have to say, other than answering your questions.

- 078 Chair McCrea I guess the concern that I had regarding the variations in contract rates was the comment at the bottom of page 11 about a number of judges and prosecutors expressing their views that some of the ablest and most experienced public defense attorneys in the county are being unfairly treated and may leave the practice due to the relatively low rates they are paid under our contracts. This is apparently coming from judges and prosecutors, not some disgruntled contractors themselves. To me that was a big red flag.
- 084 P. Ozanne Yes, I think it is. However, I'm sure you all appreciate that, when one writes one of these reports, one is not quoting people verbatim. You are not being given numbers of the people that were interviewed and what each one said exactly. But I included this observation because it caught my ear when I spoke with a number of judges and prosecutors. I also met with the senior staff of the District Attorney's Office. There were about 15 people in the room and several expressed that concern. Nobody interrupted and said, "Oh, that is wrong!" And judges I have spoken with about the concern over differential rates raised the specter of losing effective lawyers. It is not a representative sample, but it is a comment that did stick out. And you're right, it wasn't made just from economic self-interest.
- 092 B. Ellis You had another provocative observation in the last paragraph at page 14. Contractors intentionally take conflict cases, do a little work, and then back out at the end and get full payment. I know several contractors have complained about that, but it would be very upsetting to me if this is happening.
- 103 P. Ozanne This may simply be another matter of perception rather than reality. But I remember this issue also came up during my first round of interviews with contractors when I took this job. As I said, it may be reduced in large part or eliminated by formation of the Portland Defense Consortium. That is why I prefaced this preliminary report with my observations about perceptions, misperceptions and reality. But this concern is out there. Whether it is true or not is another question. But in terms of designing a system, the issue is like the system of billable hours. There are temptations for abuse that one would like to reduce or eliminate. So without accusing anyone of intentionally doing something, it seems to me that we strive to design a system to handle conflicts, to the extent we still need to, that reduces risks of abuse. I think we have to keep in mind what kind of incentives and

disincentives we are creating with any process. But, again, this problem may just be a misperception in the county. Like rumors and gossip, misperceptions tend to travel around pretty rapidly. In my view, a major function of our reports to you, as well as the Commission's service delivery planning process, is to correct such misperceptions when they exist.

- 118 J. Potter It seems to me the notion of transparency that you have talked to us so much about—this is the uncomfortable part because we are going to be talking about dollar figures. On the other hand, all of the information is public record and, if people wanted to know what someone is making in Multnomah County, they can get the records. So I don't have too much of a problem with getting it out. You have started that process at page 13 of the report. But one of the factors that is not in there, which is implicit I think, is, historically, some people have been better negotiators than other people. That is one of the reasons why people get paid differently.
- 126 P. Ozanne There is also the idea of an efficient market, of course. If there is perfect knowledge among all the players, like the U.S. stock market, and assuming all the players are equally vigilant, you have a stable balance between supply and demand and a prevailing price structure. Our market for public defense services has not worked that way in the past. So when you don't have an efficient market with open knowledge and equal vigilance, you get variations in outcomes and apparent bargains or windfalls that otherwise may be difficult to explain.
- 132 J. Potter Personally, I applaud the notion of having this transparency out there. It is not like we are beating somebody over the head with it. There may be valid reasons, there are valid reasons, why we are going to have different numbers. Or it could be that there are some inequities, even within the justifiable differences. My guess is that there will always be some differences in rates.
- 137 P. Ozanne I suppose the concern is that someone in this building may beat us over the head. I think the best we can do is answer by saying that we are trying to work our way through this and eliminate disparities. But one might be tempted to say. "Well, you are getting this service for this low rate, so how about paying it to everybody?"
- 143 J. Potter Well, if you list the criteria as to why you are paying different rates, it may in part explain the rates.
- 144 P. Ozanne We talked about this, but I appreciate the guidance. The next draft of the report will be more detailed, as you requested, Barnes.
- 147 Chair McCrea We don't want to get into a discussion with the audience on everything, but does anyone have a comment that they just can't wait until –
- 149 P. Ozanne Excuse me Madam Chair, may I add just a process point. I should have talked to John Potter about this before. With the corrections that people have mentioned, and I caught a couple of things myself, I would like to circulate these revisions to the draft report. What I thought, John if it is permissible, since our website is still being rebuilt as we move in together, could we use your OCDLA website to distribute this preliminary draft? What I would then do is send out an announcement tomorrow to all of our contractors saying, "Here is the next draft of the report, please read it and give us written comments by August 27, so we get good input from our contractors by the September 9 meeting. I'll also give the draft report to Mike Schrunk and several judges and invite them to attend the meeting. I doubt that they will submit a written report. I wanted to put a corrected version of the draft report on your website so our contractors will have easy access to it.
- 163 J. Potter Absolutely. We have an indigent defense button on the website. It can easily go there. Also, even though you are sending it out directly to contractors in an e-mail, we can also send it out to approximately 1,040 e-mail members. We have 1,040 of our members who have e-mail out of the 1,227.
- 170 Chair McCrea Anything further on this agenda item? Let's move on to Item No. 8.

## Agenda Item 8

### Initial Review of a Proposed Policy for Early Disposition

172 P. Ozanne

I would like to ask John Connors to join us at the table as a member of the Oregon Criminal Defense Lawyers Board of Directors. Just by way of background, this issue of Early Disposition Programs came up in our review of Linn County and our interviews there. That county has apparently had some lack of success in getting an effective EDP going. There are a variety of explanations, but one seemed to be, in talking to everyone, that the defense bar there was not involved. Of course, there are serious issues of fairness and constitutionality about Early Disposition Programs that should be addressed through the participation of the defense bar in the development and implementation of such a program. Lack of defense participation might also make the other players a little wary of proceeding with an EDP. It seemed from that Linn County experience that we really need to get more actively involved in EDPs. Secondly, there is quite an understandable difference in philosophy among practitioners about Early Disposition Programs from the defense perspective. Those will probably always be there and they are healthy concerns. But I think the Commission has viewed its obligation, as I do, that when there is a statute establishing Early Disposition Programs, as there is in this state, to look at these programs as one of the ways that we are a key component of the criminal justice system promote cost-efficiency, as long as certain standards are met. I have highlighted this commitment to cost-efficiency whenever I have had the opportunity before the Legislature, explaining that we are willing to work with others to develop Early Disposition Programs if they include appropriate safeguards. Where that leads, it seems to me, is that we need to have some consensus within the defense community over what standards or guidelines such a program would have to meet. So I asked John Potter and the OCDLA Board of Directors to consider and develop some standards or guidelines. We discussed whether or not those standards should ultimately become standards adopted by the Commission, which would be my view. We are not asking for that today. The version before you is a handout from the OCDLA Board of Directors with attachments. As you can see, John Connors and the Board put considerable time into this. Frankly, when I first looked at these standards, I thought as an administrator/bureaucrat that they lacked the detail or specificity that I would like. Because one of my roles on your behalf might be, however uncomfortable, to ask or tell a contractor during our contract negotiation process that, despite individual philosophical concerns, to provide services in an EDP. I hope it doesn't come to that, but that is a possibility. Another role I might play is to approach a court, very politely and respectfully, and say "Your Honor, as presiding judge, I want to advise you that your Early Disposition Program doesn't meet the Commission's guidelines for ensuring the protection of clients' constitutional rights, most notably, the right to counsel." The more specific our guidelines are, the more specific my conversations can be. For example, in the draft there is a 24-hour limit. Those kinds of limits may evoke or inspire a lot of disagreement, but they do have the advantage of specificity. However, as I thought about and heard John speak at our last Contractor Advisory Group meeting, these certainly represent critical principles. I hope no one would argue with them. I would like John Connors to present his views and the Board's on this. Maybe we can make the standards more specific, but maybe another alternative is to present these overarching principles or concerns and then accompany with one or more model programs to make my conversations more substantive and productive. Some of these programs have been developed. There is one in Lane County that seems to pass everyone's muster. I'm sure there are others across the state from which we can lay out the key elements of an acceptable program that meets these standards. That would provide enough specificity at least for me to have an intelligent conversation with a contractor or presiding judge about the nuts and bolts of an acceptable EDP. So with those comments, I will turn it over to John. I really do appreciate, John, the efforts of you and the Board in crafting these proposed standards.

245 J. Connors

Good morning. By way of background, it might be helpful for you to know that the recommended guidelines are really the product of a small work group of OCDLA members. The good news was that, even though the group was small, we had a wide range of experience with these types of court programs from Deschutes County, Multnomah County, Lane County, including community court, domestic violence diversion court and programs at arraignments in misdemeanor cases. Then the OCDLA Board had a chance to pretty thoroughly discuss these proposals at one of their meetings

and endorsed them. Finally, Peter already mentioned that at his advisory group meeting there was what I thought was a very helpful discussion that generated one change in Item No. 4, which I'll talk more about in a minute. Obviously, these standards represent an effort to make sure that certain important principles are followed with respect to these programs. They are pretty self-explanatory, but I just wanted to highlight a couple of them. The first one deals with the fact that it needs to be clear that these types of programs implicate the attorney/client privilege. Having been at the NLADA National Conference up in Seattle last year where there was a specific program about specialty courts and the types of problems they generate, one thing that kept coming up over and over again is the fact that there is confusion about the roles of the parties. Because there is a team approach, often judges try to persuade defense lawyers that they are not advocates and that they can share all sorts of confidential information. We just felt that it was important that it be stated clearly so everybody understood that the attorney/client privilege was in place, and that all the rules that flow from that are in place. The second most important thing was the fact that there really needs to be an adequate place for the clients to meet with their attorneys and have complete information about their case before they make a decision to go into the program. In Multnomah County in one of the community courts, which was a very successful program over in Northeast, run at the King Community Center, their dockets would some days have as many as 50 or 60 people scheduled for disposition. It was really important that the lawyers staffing that program had a chance to meet separately with their clients, have confidential conversations with them about the police reports in their case, and then feel comfortable that the clients understood what was going on. The advisory group heard a chilling story about a program no longer in existence where as many as 15 clients would be herded into a room with one lawyer, they would be informed generally what the program was about and what rights they might have. But there was no specific discussion of their particular case and they were discouraged from asking questions. So obviously, part of what we are trying to capture here is to insist that those types of programs don't exist. The third thing I want to highlight, and maybe the most controversial recommendation, is that there be adequate time for the clients to make up their minds. As an update on the fourth recommendation, we have eliminated that last sentence—the part that said people shouldn't be allowed to enter the program for at least 24 hours. The experience across the state is that flexibility is very important. A lot of times the clients simply want to be done with their case that morning. If it is a situation where, for example, someone is charged with trespass and they are being offered a violation, it is probably a lot more strenuous for them to have to come back to court than to be able to take care of their case right then and there. The other end of the spectrum is the Stop Program in Multnomah County, where people enter a diversion on felony drug cases. They are required to go through a year of treatment with random UA's, with acupuncture and with frequent appearances back in front of the judge. In that program from the beginning, there has been a two-week opt-out option. In other words you sign up for the program, you start the program, but you can still withdraw within two weeks. So what we have tried to do is to write a guideline that would be flexible enough to serve all those differences in all the different communities of the state. What Peter has asked me to do, and I will follow-up, is to develop supplemental language that says in the event somebody needs more information, for example, if the police reports weren't present when they were considering the program, that they would be entitled to a one-week set over without any kind of hassle about that. At the other end, that language would provide that people be allowed a one-week opt-out provision in the event that new information is developed or something startling in the case happens. That is probably unlikely. It would only happen in a small minority of cases, but we think it is important to the integrity of the programs and the overall success of these types of programs that this kind of flexibility be allowed. Then the last thing that I wanted to mention was just that other information besides the guidelines is before you including relevant legal authority. We thought might it be helpful to the Commission. The last couple of pages are from the Lane County Training Manual that was prepared by Tom Sermak. He has primarily run the program in Lane County, but he wanted to have captured in a training document regarding what is important in terms of his experience running the program down there. So just by way of explanation, that is what the other parts of the materials are.

353 P. Ozanne

Thanks John – so today, Madam Chair, we are seeking your reaction to this by way of a discussion. If the Commission agrees with me that it is appropriate for the Commission, after deliberation,

reflection and more public input, to ultimately adopt a policy or set of guidelines on EDPs, then that topic would come up in a subsequent meeting. So today the topic is on your agenda to simply get a sense from you of as to where we should go from here.

- 363 Chair McCrea John, any comments?
- 364 J. Potter I think I agree with Peter’s assessment that these would be adopted as either rules or standards, whatever word you want to use, and that having an existing program as a model against which the standards are compared is better than trying to develop the operational details in the rules or the standards. I think we would get bogged down because every county is going to be slightly different. Even when you choose a county as a model, it is going to be different in Jackson County than in Lane County. So I support Peter’s proposal to adopt a set a rules or standards and back them up with a model program that one can use to implement these rules or standards.
- 384 P. Ozanne With more time and thought, we might even end up with two models, one for a small county and one for a large county. Because the first reaction will be, “We can’t implement this model in our county because of our unique problems and circumstances!” Maybe we would develop two models to at least address the size issue.
- 393 J. Potter My guess is that the model is going to be helpful. I don’t want us to appear like we are trying to jam a model down a county’s throat. But if you are out in whatever county and you are trying to develop a program, having something on paper that you can work with in the particular jurisdiction is going to be easier than asking a county to develop a new program themselves. So we are helping them out.
- 398 P. Ozanne And maybe it would be useful to name the model county program because we can suggest to the Presiding Judge in County A, “Why don’t you talk to the Presiding Judge in County B about their model?”
- 406 Chief Justice Carson Do you plan to connect with the presiding judges and get their take on it?
- 407 P. Ozanne We certainly will.
- 408 Chief Justice Carson What I hope we would do, as John has already suggested, and I have no objection with moving in this direction, is I would like to talk to my colleagues and see what they have to say. The sticking points for the local defenders, the DA’s and the judges varies, so we need their input. (end of tape)
- TAPE 3: SIDE B**
- 001 P. Ozanne I certainly agree. We are going to circulate these draft standards or guidelines within the District Attorneys Association’s Executive Committee once we have our act together—and perhaps the Judicial Conference, though I would seek your guidance. We would certainly circulate it widely.
- 004 Chief Justice Carson Great. Before we adopt it?
- 004 P. Ozanne Yes indeed. And perhaps the CJAC, when it is re-formed, would be an appropriate place to bring this up as well.
- 005 Chair McCrea Janet, any comments or questions?
- 006 J. Stevens No.
- 006 Chair McCrea Barnes anything you want to add or any questions.

- 006 B. Ellis No, I'm very encouraged by it. I would like to see it pursued. I think it is a great start.
- 007 Chair McCrea I think so too And I agree with John's comments. I want to say to you, John Connors, thank you very much. For it's obvious that a lot of time and energy has gone into this. Thanks to the OCDLA Board and the small group involved in the drafting because the issues that you have outlined are things that always caused me concern—confusion in the roles of the parties; the question of privacy if you have to stand in the courtroom and try and communicate with the client; if you have the discovery, the question of having to make a decision right there on the spot is always very, very difficult for the attorney to adequately advise the client. So it is obvious that a lot of time and energy has gone into consideration of the issues. I think that it promotes our goal of efficiency and also doesn't sacrifice the idea of quality. So thank you very much. I think we are heading in the right direction.
- 018 J. Connors You're welcome.
- 019 P. Ozanne Madam Chair, in that regard I'm sure the Commission would like to express its appreciation to others if I named them individually. And I will do that at some appropriate point. I do want to say that our Contractor Advisory Group has been exceedingly helpful to me and therefore to you. In fact, at the last meeting in Eugene I expressed my concern that we were asking people like Jack Morris in Hood River and Bert Putney from Medford to meet in Eugene once a month, even though we discuss the kinds of important issues that have come before you today. I asked them, "Since you know you are all volunteers and are traveling a long ways from your busy law practices, maybe we ought to go use an e-mail, list serve system to replace some of our meeting and meet on a quarterly basis?" Their unanimous reaction was: "We really want to participate in the important work of the Commission, we appreciate the opportunity, and we will continue to do so." We did decide to cut back to every other month for our meetings. But I am really gratified by our contractors' support, as well as other members of the defense bar, as we ask people to serve on such things as site visits. We are even getting attorneys who no longer contract with us stepping forward and saying, "How can I help?" There are a lot of good feelings out there about what the Commission is trying to do, and a willingness to help out. That is all I have today on the agenda. There is, of course, Item No. 9, New Business, in the event there is some.

**Agenda Item No. 9 New Business**

- 040 Chair McCrea That item has your name on it, Barnes.
- 041 B. Ellis No.
- 041 Chair McCrea Alright, no new business –
- 042 J. Potter I have one item that we brought up at some point in the past. I think it has been brought up, but I'm not sure. ABA Death Penalty Standards. Have we discussed that at all here? The ABA has a new set of death penalty standards and they are shopping those around to see if agencies like us that implement such standards would adopt them. The OCDLA Board has looked at them. John Connors, in particular, has spent some time reviewing them and believes they are standards that Oregon should consider.
- 050 P. Ozanne Yes, we have encountered those and are familiar with them. They have been presented to OPDS in the context that we are controlled by them as a mater of law, which isn't true, or that we should adopt them as a matter of policy. Ingrid, in particular, has reviewed them in detail. We are certainly of a mind that the Commission may want to move in that direction. It would be ultimately up to the Commission. The way this is proceeding, John, is that we are reviewing them and we have also convened an experienced group of capital defenders to look at how we do business across the state. One example is that we are looking at qualification or prequalification of attorneys who have declared themselves to be qualified in capital cases, but who do not contract with us. There

seems to be a consensus among experienced capital defense attorneys and prosecutors that we should look at that process and the qualifications standards. As part of that, I think perhaps the first place I would bring in the ABA Standards is in informal discussions with the group of about six capital defenders who are assisting us. They are all of a mind that the ABA Standards are great and that they should be adopted. So I would first like to have the discussion there and then bring the question to you in due course.

- 068 J. Potter It's on the burner somewhere?
- 069 P. Ozanne Yes, it is on our burner.
- 069 Chair McCrea Any other new business?
- 070 J. Stevens Can I go back to the next meeting, Peter? I had understood you to say you wanted to meet from 11:00 to 3:00 but if you think we need from 10:00 to 3:00 I don't have a problem with that. It's just if we were going to meet from 11:00 to 3:00 if we could shift it an hour.
- 073 P. Ozanne I appreciate that. We will try to accommodate your schedule. I think we don't want to cut people off on September 9 if we can help it. But most people realize that four hours is a big contribution on your part. So we will try to manage the agenda in a way that we will get it done in four hours.
- 079 Chair McCrea 10:00 to 2:00 right?
- 080 P. Ozanne Yes, that is what we are talking about now. September 9th from 10:00 a.m. to 2:00 p.m. And do I have the date right at Kah-Nee-Ta, John? October 21<sup>st</sup>, is that our next meeting in conjunction with the Management Conference at Kah-Nee-Ta?
- 084 J. Potter I have Friday the 22<sup>nd</sup> of October.
- 085 P. Ozanne I will have to correct the draft report in that regard because I think I mentioned the 21st. Do you have a time in mind yet?
- 086 J. Potter I have 1:00 to 4:00 p.m. down.
- 091 S. McCrea Any other new business?  
**MOTION:** J. Potter moved to adjourn the meeting; J. Steven: 2<sup>nd</sup>.  
**VOTE 4-0;** hearing no objection the motion **CARRIES**

[The meeting was adjourned at 11:55 a.m.]

Presenter: Kathryn Aylward

**Public Defense Services Commission**  
**Agenda Item**  
September 9, 2004

**Summary of 2005-07 Agency Requested Budget**

Description	Category	General Fund	Other Fund	Total
Legal Services Division	Essential Budget	\$6,129,905	\$0	\$6,129,905
Contract & Business Services	Essential Budget	\$2,729,958	\$1,159,281	\$3,889,239
Public Defense Services Account	Essential Budget	\$166,349,886	\$0	\$166,349,886
Subtotal		\$175,209,749	\$1,159,281	\$176,369,030
ACP Transfer	Policy Package 100		(\$201,542)	(\$201,542)
Employee Commensurate Comp.	Policy Package 101	\$223,801	\$0	\$223,801
Post-Conviction Relief	Policy Package 102	\$765,888	\$0	\$765,888
Parity	Policy Package 103	\$10,642,151	\$0	\$10,642,151
Subtotal		\$11,631,840	(\$201,542)	\$11,430,298
Agency Total		\$186,841,589	\$957,739	\$187,799,328

MEMO

To: PDSC  
cc: Peter Ozanne, Kathryn Aylward, Peter Gartlan, Rebecca Duncan, OCDLA, Contractors Advisory Group, Other Interested Persons  
From: Ingrid Swenson  
Date: 8/30/04  
Re: Legal and Policy Issues relating to Confidentiality of PDSC Complaint Policy

Prior to consideration by the Public Defense Services Commission of the adoption of a proposed PDSC complaint policy at its September 9, 2004 meeting, Chair Barnes Ellis directed that members be provided with a memo outlining the legal and policy issues regarding confidentiality.

This memo sets forth relevant provisions of the Public Records Law, some examples of issues that might arise during the course of complaint processing and recommendations for an amendment to the draft complaint policy and a statutory change.

### **OREGON PUBLIC RECORDS LAW**

As explained in the Attorney General's Public Records and Meetings Manual<sup>1</sup>, Jan., 2004 at p. 21:

The Public Records Law is primarily a *disclosure* law, rather than a confidentiality law. Exemptions in ORS 192.501 and 192.502 are limited in their nature and scope of application because the general policy of the law favors public access to government records. Accordingly, a public body that denies a records inspection request has the burden of proving that the record information is exempt from disclosure. Oregon courts interpret the exemptions of the Public Records Law *narrowly*, and the courts “presume” that the exemptions do not apply. [Citations omitted.]

There are two types of exemption from disclosure in the Public Records Law, conditional and unconditional. Conditional exemptions exempt information from disclosure unless the public interest requires disclosure under the circumstances of a particular case. For conditional exemptions, disclosure decisions are based on a balancing of the public interest in favor of disclosure against governmental and private interests in protecting confidentiality.

With respect to some of the exemptions in the unconditional category the legislature has already weighed the competing interests and determined that, as a matter of law, the

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<sup>1</sup> The Attorney General's manual is published biennially following each legislative session. It “is an opinion of the Attorney General interpreting the Public Records and Public Meetings Laws. Its principal purpose is to provide general legal advice to state agencies.” *Id* at xiii

confidentiality interest outweighs any public interest in disclosure. With respect to others, however, the public interest in disclosure may be included as a consideration.

An example of an unconditional exemption is the legislative prohibition against disclosure of personal information about PERS members adopted by the 2003 legislature. ORS 192.502(12).

Some of the exemptions potentially applicable to the kinds of information likely to be included in complaints, responses to complaints, and information needed to investigate complaints are: personnel discipline actions, internal advisory communications, personal information, confidential submissions, and other Oregon statutes establishing specific exemptions (such as ORS 40.225 – 40.295, which set forth privileges under the Oregon Evidence Code) and ORS 135.055 (9) (prohibiting OPDS from disclosing non-routine expense requests, authorizations and billings to the district attorney prior to the conclusion of the case).

### **Personnel discipline actions:**

ORS 192.501(13) exempts from public disclosure, unless the public interest requires disclosure in the particular instance, “a personnel discipline action, or materials or documents supporting that action”.

This provision does not exempt complaints and related documents in cases in which no discipline is imposed but exempts only completed actions in which discipline has been imposed. The purpose of the exemption is to protect disciplined employees from ridicule. City of Portland v. Rice, 308 Or 118, 124 n 5. (1989).

In Rice the Supreme Court held that where no disciplinary action was taken, the exemption did not apply and records of the Portland Police Bureau internal investigation unit’s inquiry regarding police officer misconduct were subject to disclosure.

Even when disciplinary action has been taken records may not be exempt from disclosure if the public interest outweighs the employee’s privacy expectation. The public interest in disclosure prevailed with respect to records of a disciplinary action which resulted in the criminal prosecution and sanctions against two law enforcement officers with supervisory responsibilities. Public Records Order, January 27, 1992, Robert Moody.

On the other hand, the privacy interest of three high-level management officials of the Executive Department outweighed the public interest in disclosure of records of a disciplinary action where the officials were not dismissed and no criminal prosecution occurred. Public Records Order, April 29, 1993, Mark Haas.

This exemption would apply to disciplinary actions taken by the Legal Services Division in response to complaints about its employees. While there is no employment relationship between the Contract & Business Services Division and PDSC's contractors and other public defense providers, to the extent that CBS were to impose "sanctions" for founded complaints upon contractors and providers, similar public interests would be at stake and the exemption might be available by analogy although research disclosed no precedent for such a claim.

### **Internal Advisory Communications:**

ORS 192.502(1) exempts:

[1] Communications within a public body or between public bodies [2] of an advisory nature [3] to the extent that they cover other than purely factual materials and [4] are preliminary to any final agency determination of policy or action. [5] However, this exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

This exemption is "designed to encourage frankness and candor in communications within or between governmental agencies". Attorney General's Public Records and Meeting Manual, at p. 53.

In the context of the PDSC complaint policy this exemption could be used to protect from disclosure information received from other public bodies or officials, such as judges, district attorneys and others relating to a complaint. It could also be used to protect information obtained internally, such as from analysts and accounts payable representatives regarding the cost or quality of services rendered by the provider against whom a complaint had been made. In addition it could be used to protect internal communications among OPDS staff, and between OPDS staff and advisors such as the death penalty peer panel, regarding the substance of a complaint, thereby encouraging candid discussion and exchange of information.

A claim of exemption under this provision, however, does not foreclose an *in camera* inspection of records by the court for the purpose of weighing the privacy interests against the public interest in disclosure.

In Kluge v. Oregon State Bar, 172 Or App 452 (2001) the bar declined to provide records requested by an attorney who was the subject of a bar disciplinary proceeding on the ground that the records sought were internal advisory communications. The Court of Appeals held that the lower court had erred in relying solely on the bar's description of the records and should have held an *in camera* inspection so that the public interest in disclosure could be weighed under the particular circumstances of the case.

## **Personal information:**

ORS 192.502(2) exempts:

[1] Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, [2] if public disclosure would constitute an unreasonable invasion of privacy, [3] unless the public interest by clear and convincing evidence requires disclosure in the particular instance. [4] The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

In Public Records Order, March 4, 1988, Board of Naturopathic Examiners, the attorney general concluded that the board was required to disclose a license applicant's answers to some questions but not others. The board was permitted to withhold as personal information answers to questions regarding drug and alcohol addiction and treatment, and mental health treatment.

To the extent that a complaint against a public defense services provider required inquiry into personal issues such as drug and alcohol or mental health issues, this exemption would protect a provider who disclosed such information in response to, or in mitigation of, a complaint.

## **Confidential submissions**

ORS 192.502(4) creates a conditional exemption for:

[1] Information submitted to a public body in confidence [2] and not otherwise required by law to be submitted, [3] where such information should reasonably be considered confidential, [4] the public body has obliged itself in good faith not to disclose the information, [5] and when the public interest would suffer by disclosure.

Public bodies are advised in the Attorney General's manual to specifically discuss with the person submitting the information whether it is being submitted in confidence. Attorney General Public Records and Meeting Manual, at p.68. Consequently, if the PDSC complaint process is to be confidential and the information obtained exempt under this exception, the complaint policy should clearly state that OPDS will not disclose the information "except as required by law".

In addition, to qualify for this exemption, the person making the submission, whether it be the complainant, the person complained of, or a witness, must intend the person's submission to be confidential. Compare Public Records Order, September 12, 1988, Hansen with Public Records Order, November 17, 1988, Rae.

It is certainly possible that a complainant might choose to make a non-confidential submission but that the public defense provider, the provider's client or another witness might choose to submit information in confidence. For example, a Court Appointed Special Advocate might make a complaint regarding the quality of representation provided to a juvenile client by a public defense attorney. The CASA might indicate that the submission was not being made in confidence. Nevertheless, the public defense attorney, the client and other witnesses might wish to respond in confidence. The client and the attorney might be motivated to respond in confidence in order to protect privileged information relevant to the complaint. Witnesses might desire confidentiality to prevent either the CASA or the public defense attorney from knowing the source of information provided to OPDS.

If an OPDS complaint file included information that was submitted and accepted in confidence and otherwise qualified for the exemption but also contained information not submitted in confidence and for which there was no other reasonable ground for exemption, the information not submitted in confidence would have to be separated and disclosed. ORS 192.505.

In Sadler v. Oregon State Bar, 275 Or. 279 (1976) the plaintiff brought suit to compel the bar to provide him with communications relating to an attorney's professional conduct and conduct related to his campaign for public office.

Rules in effect at the time provided that "unless otherwise ordered by the Board" investigations and hearings in disciplinary matters were not public and that records of disciplinary proceedings were not to be released prior to the recommendation of the Board to the Supreme Court. Exceptions to the policy allowed certain bar officials, the accused and his attorney to have access.

In holding that the records must be provided, the Supreme Court noted that many persons could see the records and that the bar on its own motion could make the records public. Furthermore the court found no evidence that any person who complained to the bar regarding the attorney in this case had done so on condition or with the understanding that his complaint would be held in confidence. Finally, since by bar rule all such records became public as soon as a formal written complaint was filed, it was clear that the rule was designed to protect the attorney, not the complainant.

The bar had argued that the public interest would suffer if the records were disclosed. While the court did not decide this issue since the other requirements of the exemption had not been met, it did cite its earlier opinion in Ramstead v. Morgan, 219 Or 383 (1959) which noted the importance of providing "machinery" for open criticism of the bar. The court found no evidence that a complainant might hesitate to criticize an attorney if the complaint were public but thought "more valid" the bar's concern that attorneys and judges would be reluctant to report their "brethren".

Witness statements obtained during the investigation of a complaint to the Physical Therapy Licensing Board were determined to be exempt from disclosure under this provision. Public Records Order, August 17, 1987 Mullman.

Unabridged quotations from employee interviews conducted for an evaluation were determined to be exempt from disclosure since “Disclosure would undermine the integrity of the review process and of management of the personnel who were promised confidentiality. Disclosure could also subject staff members who provided interview responses to possible recriminations.” Public Records Order July 14, 1989, David A. Rhoten.

This exemption might also apply to records of drug and alcohol or mental health treatment discussed above under the Personal Information category

### **Transferred records**

ORS 192.502(10) exempts:

Public records or information described in this section, [1] furnished by the public body originally compiling, preparing or receiving them [2] to any other public officer or public body [3] in connection with performance of the duties of the recipient, [4] if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable.

This provision would protect records requested by OPDS from other agencies if such records were exempt from disclosure by the custodial agency.

### **ORS 40.225 to 40.295 – Evidentiary Privileges**

ORS 192.502(9) exempts from disclosure public records “the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.” This includes the evidentiary privileges set forth in ORS 40.225 – 40.295 including the lawyer-client privilege.

A review of the case law and public records reports under this section disclosed no case in which the privilege asserted belonged to someone other than the agency or official in possession of the record. If agency records sought by a public records request include advise to the agency from its attorney regarding legal issues facing the agency the exemption applies. On the other hand, it would appear that privileged information provided by a public defense client to OPDS would not be protected by this exemption since disclosure to a third party could be construed as a voluntary disclosure and waiver of the privilege. Similarly, if an attorney or other provider, in responding to a client complaint or a complaint from a third party, found it necessary to provide privileged information to defend

against the complaint, this exemption would not appear to protect such information from disclosure in response to a public records request.

### **NEED FOR PROTECTION OF CONFIDENTIAL SUBMISSIONS AND PRIVILEGED INFORMATION**

As the commission considers whether its complaint policy should seek to protect some kinds of information obtained in connection with a complaint from disclosure to the public, the following examples illustrate some of the issues that might arise.

#### Example 1.

At sentencing in a murder case the court asks Attorney A how many hours he has spent on the client's case so that the defendant can be ordered to pay for the cost of representation. The attorney reports the number of hours expended and the district attorney, who has observed the whole proceeding, believes this number to be excessive. Counsel for the co-defendant reports having spent less than 25% of the time spent by Attorney A. The district attorney files a complaint with OPDS regarding the expenditure of public funds. OPDS might initially try to determine the average number of hours spent on cases similar to the one about which the complaint was made. If Attorney A's fees were within the average range for similar cases, OPDS might contact the complainant and report this fact and inquire whether there were additional factors which should be considered by OPDS. If, however, Attorney A's hours greatly exceeded the average for the same type of case, OPDS would then want to inquire of Attorney A about the reason for the large number of hours. In order to respond to such an inquiry the attorney might need to discuss avenues of defense which were explored but not used for some reason. One reason an attorney might decide not to pursue a particular defense would be because an investigator determined that the witness who could testify about the circumstances giving rise to one defense might undermine another, stronger defense.

Although the defendant in this example has been convicted, he still has a right to appeal and to seek post conviction relief. It is therefore important that confidential and privileged information not be disclosed publicly since it could then be used against the defendant in a subsequent proceeding.

If investigation beyond the inquiry to the attorney were needed, other members of the defense team would not be able to provide OPDS with information about case preparation and theory unless they were assured that the information they provided would be exempt from public disclosure. The investigator, for example, or an expert witness used in the case, might have very useful information about the attorney's use of time but disclosing it could prejudice the client.

### Example 2.

In another example, assume that it is the client who complains that her lawyer is refusing the client's request to subpoena certain defense witnesses for the upcoming trial. If OPDS contacted the attorney to report the client's concern and determine whether or not it was valid, the attorney might respond: I am not subpoenaing Witness 1 because he would say that the defendant is lying. I am not subpoenaing Witness 2 because he would identify the client as the perpetrator. Obviously access to this attorney work product by the prosecution would be damaging to the defense.

### Example 3.

In a third example a judge makes a complaint about a lawyer who is wasting resources by trying cases which should not be tried. In a particular case the judge reports that the attorney turned down a good pre-trial offer, went to trial, and lost on all counts. A conversation with the lawyer might reveal that the client insisted on a trial despite advise to the contrary from the attorney. Public disclosure of this information would undermine the attorney-client relationship and possibly prejudice the defendant at sentencing.

## **RECOMMENDATION TO COMMISSION REGARDING CONFIDENTIALITY**

The purpose for implementing a formal PDSC complaint policy is to protect clients and the public from poor representation and from misuse of funds. Both policies would appear to be better served by enhancing OPDS's ability to use all resources at its disposal without jeopardizing clients' interests.

Some of the resources upon which OPDS would need to rely for information with which to evaluate and resolve complaints would be reluctant to provide information unless it could be provided in confidence either for fear of retaliation or for fear of jeopardizing clients' interests. In addition, public defense clients should not have to choose between filing a complaint and retaining the privileges provided to them by law.

Finally, OPDS has in its Contract and Business Services Division files information which has been submitted in confidence and the disclosure of which to the district attorney is prohibited under ORS 135.055(9). OPDS should be able to use information in its files to investigate complaints but the use of such information should not make it subject to public disclosure.

### **Proposed Policy Language**

If the commission were to approve language to the following effect, it would not (and could not) create a new basis for exemption under the Public Records Law but would facilitate appropriate assertion of existing exemptions: **“Submissions to OPDS may be made in confidence or may include information submitted in confidence. OPDS will**

**not disclose such information, except as required by law, without the consent of the person making the submission”.**

Adoption of this language would mean that the complaint process itself would not be confidential but that OPDS could receive and use information submitted in confidence and could assert any appropriate exemption in response to a request for records relating to complaints.

**Proposed Statutory Language**

In order to insure protection of privileged communications it might also be appropriate to seek legislation providing that privileged communications do not lose their privileged status by disclosing them to OPDS for the purpose of making a complaint or providing information regarding a complaint.

**PRELIMINARY DRAFT**  
**(09/9/04)**

**OPDS's Report to the Public Defense Services Commission  
on Service Delivery in Multnomah County (Region 1)**

\* \* \* \* \*

***[NOTE re. this Preliminary Draft: Readers of OPDS's previous reports on service delivery systems in Region 4 (Benton, Lane, Lincoln and Linn Counties) will observe that the content of the first eight and a half pages of this Preliminary Draft report are nearly identical in content to the initial pages of those previous reports. As noted on page 9 of this report, subsequent sections of this Preliminary Draft are either (a) intended to outline some of possible issues for consideration by PDSC at its September 9, 2004 meeting and to guide and stimulate written comments from interested parties in Multnomah County between the Commission's August 12th and September 9, 2004 meetings or (b) left blank pending further deliberations and directions from the Commission and comments from interested parties in the county.]***

\* \* \* \* \*

Introduction

Since the completion of its Strategic Plan for 2003-05 in December 2003, the Public Defense Services Commission (PDSC) has focused on strategies to accomplish its mission to ensure the delivery of quality public defense services in the most cost-efficient manner possible. Recognizing that quality legal services promote cost-efficiency by reducing the risk of legal errors and the resulting delays required to remedy them, the Commission has concentrated on strategies designed to improve the quality of the state's public defense delivery systems and the legal services delivered by those systems.

Foremost among those strategies is what the Commission refers to as a "service delivery planning process"—a process designed to investigate and improve local public defense delivery systems across the state. During the first half of this year, the Commission undertook investigations of the public defense delivery systems in Benton, Lane, Lincoln and Linn Counties. Following those investigations, PDSC developed Service Delivery Plans to improve the operation of those counties' delivery systems and the quality of legal services the Commission provides in those counties.

The current report, which examines the condition of Multnomah County's public defense delivery system, represents one of the first steps of that planning process in Oregon's largest county. Following receipt of written comments from interested parties in response

to this preliminary draft and preparation of a final report by the Office of Public Defense Services (OPDS), PDSC will hold its regular monthly meeting on September 9, 2004 in Portland in Courtroom 702 in the Multnomah County Courthouse (1021 S.W. Fourth Avenue) in order to receive further comment from interested parties in the county and to deliberate on the condition of the county's public defense delivery system and potential strategies to improve it. Those deliberations are expected to continue during the Commission's monthly meeting on Friday, October 22, 2004 at 12:30 p.m. at the Kah-Nee-Ta Resort in conjunction with the PDSC/OCDLA's Public Defense Management Conference and on November 11, 2004 in Portland at a time and location to be announced.

### PDSC's Service Delivery Planning Process

There are four steps to PDSC's service delivery planning process. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they deliver in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services. Second, starting with preliminary investigations by OPDS and a report such as this, the Commission will review the condition and operation of local public defense delivery systems and services in each region by holding 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 report and public comments in response to that report and during its meetings in the region, PDSC will develop a Service Delivery Plan for the region. 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 will (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. Fourth, under the direction of PDSC, OPDS will implement the strategies or changes proposed in the Commission's Service Delivery Plan for that region.

Because critical steps in PDSC's service delivery planning process will not yet have been completed, any findings and preliminary recommendations in the final version of this report may be reconsidered or revised, depending upon new information presented to the Commission and its deliberations at subsequent meetings, as well as additional research and investigations by OPDS that may be ordered by the Commission. Furthermore, any Service Delivery Plan that PDSC develops in a particular region will not be the "last word" on the service delivery system in that region, or on the quality and cost-efficiency of the region'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 public defense contractors, and the wisdom of not trying "to do everything at once," all place constraints on the extent of the first planning process in any region. Indeed, PDSC's 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 regions of the state on an expedited basis in order to address pressing problems in those regions.

### Background and Context to the Service Delivery Planning Process

The 2001 legislation creating PDSC was based upon an approach to public defense management, supported by the state's judges and public defense attorneys, that Oregon's public defense function should be separated from its 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 indigent clients, the Commission not the courts is primarily 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.

A range of strategies to promote quality and cost-efficiency. 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 Contractors 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 processes 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.

Numerous Oregon State Bar task forces on indigent defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers.

In accordance with its Strategic Plan for 2003-05, PDSC has developed a systematic process to address complaints over the performance of public defense contractors and individual attorneys. The Commission is also concerned about the “graying” of the public defense bar in Oregon and a 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. 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.<sup>1</sup> 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 delivery of public defense services (which are 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 Contractors 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.

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<sup>1</sup> 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).

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 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 may be. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in 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:

- 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.<sup>2</sup> 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 in any other type of law practice. However, the Oregon's not-for-profit public defender offices are not government agencies staffed by public employees. They organized as non-profit corporations with by boards of directors, managed by administrators who serve at the pleasure of their boards.

While some of Oregon's public defender offices operate in 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

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

county can operate with a public defender office alone.<sup>3</sup> 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.

- 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 for a consortium 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 30 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 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 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.

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<sup>3</sup> *Id.*

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 receiving court appointments.

- Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defenders offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals 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, 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.

- 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.

- 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.

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***[NOTE: The following sections of this Preliminary Draft are only intended to identify some of the potential issues for consideration by PDSC and to guide and stimulate written comments from interested parties in Multnomah County. These sections have been revised in accordance with the Commission’s deliberations at its August 12, 2004 meeting and in light of any written comments received by OPDS before its September 9, 2004 meeting.]***

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#### OPDS’s Preliminary Observations on Service Delivery Issues in Multnomah County

The primary objectives of OPDS’s investigations of public defense delivery systems throughout the state are (1) to provide PDSC with an assessment of the strengths and weaknesses of a system in order to assist the Commission in determining the need for changing the service delivery structure of that system and the kinds of changes that might be needed and (2) to identify issues the Commission is likely to confront in the event changes are needed.

These investigations serve two other important functions. First, they inform local public officials, participants and other stakeholders in a county’s criminal and juvenile justice systems of the condition and effectiveness of important aspects of those systems. The

Commission has already discovered that the function of “holding a mirror up” to local justice systems for all the community to see can, without any further action by the Commission, create its own momentum for self-reflection and improvement within that local community. Second, the history, past practices and rumors in a local justice system can distort perceptions about current realities. OPDS’s investigations and reports on service delivery may serve to correct some of those misperceptions.

Over the coming months, as PDSC deliberates on the service delivery issues in Multnomah County, OPDS conducts further investigations and the Commission receives public comment, this Preliminary Draft will develop into OPDS’s final report to the Commission on the condition of Multnomah County’s public defense delivery system. The blank sections of this draft that follow will eventually contain OPDS’s substantive findings and recommendations to the Commission regarding the effectiveness of Multnomah County’s delivery system and the need for any change in that system.

At this early stage of the Commission’s service delivery planning process, the Preliminary Draft is simply intended to provide a framework within which the Commission can begin its discussions regarding the condition of public defense service delivery in Multnomah County and the range of policy options available to the Commission—from concluding that no changes in the county are needed, to significantly restructuring the county’s delivery system. This draft is also intended to offer some guidance to PDSC’s contractors, public officials and justice professionals and other stakeholders in Multnomah County’s criminal and juvenile justice systems about the kind of information and advice that is likely to assist the Commission in maintaining or improving the county’s public defense delivery system. In the final analysis, the level of engagement and the quality of the input from all of these stakeholders may be the single most important factor in determining the quality of OPDS’s final report to the Commission, and the effectiveness of the Commission’s final decisions regarding service delivery in Multnomah County.

Therefore, on behalf of the Commission, OPDS urges all interested parties in Multnomah County to forward written comments regarding this Preliminary Draft, or any matter relating to the delivery of public defense services in the county, to Peter Ozanne, the Executive Director of OPDS at [peter.a.ozanne@opds.state.or.us](mailto:peter.a.ozanne@opds.state.or.us), or at OPDS, 1320 Capitol Street NE, Suite 200 Salem, Oregon 97303. The written comments received thus far are included in Exhibit “A”. The readers of this report are also welcome to attend the Commission’s September 9, 2004 meeting in Portland, from 10:00 a.m. to 2:00 p.m., in Courtroom 702 of the Multnomah County Courthouse (1021 S.W. Fourth Avenue), at which time the Commission will take further public comment.

In order to provide a framework for the Commission’s initial deliberations regarding the service delivery system in Multnomah County and guidance for public comment, OPDS offers the following preliminary observations. They are based upon (a) PDSC’s discussions and public comments to the Commission since its preparations in early 2003 to assume responsibility for administering the state’s Public Defense Services Account and the public defense contracting system, (b) discussions between public defense contractors in Multnomah County and OPDS staff over the past two years, (c) interviews of the

county's public defense contractors by OPDS's Executive Director over the past 18 months, and (d) interviews of the county's contractors, public officials on the Local Public Safety Coordinating Council and the Circuit Court's Criminal Justice Advisory Council, senior staff of the District Attorney's Office and the Department of Community Justice and ten Circuit Court Judges by OPDS's Executive Director over the past two months.<sup>4</sup>

1. The general quality and cost-efficiency of services. In general, Multnomah County's public defense system appears to be delivering quality, cost-efficient legal services at a level at least equal to any other county in the state. A number of stakeholders observed that the quality of public defense practice is among the best in the state, particularly in the areas of juvenile law and the defense of Ballot Measure 11 cases. Judges on the Circuit Court are generally satisfied with, and frequently complementary of, the performance of most public defense contractors in Multnomah County. The senior staff in the District Attorney's Office, while critical of a few individual attorneys and law offices, and concerned about such chronic issues as the expenditure of non-routine expenses, the untimely and apparently unjustified withdrawal of counsel in criminal cases and some appointments of counsel for apparently ineligible defendants, is, in general, favorably impressed with the commitment and the quality of advocacy and legal services provided by the county's public defense contractors. Finally, contractors generally regard each other as skilled and experienced lawyers who are committed to the common goal of providing high quality public defense services.

Although there appear to be many accomplished lawyers providing public defense services in Multnomah County, some of the larger contractors have gained statewide and national reputations. Metropolitan Public Defender Services, Inc (MPD) and the Juvenile Rights Project (JRP) have been cited over many years as national models for the delivery of public defense services. The Portland Defense Consortium (PDC) is regarded throughout the metropolitan area as a group of lawyers with some of the most experienced and ablest advocates in the state's criminal defense bar. Multnomah Defenders, Inc. (MDI) has generated a large corps of distinguished graduates and a reputation for providing quality defense services in juvenile and misdemeanor cases.

Perhaps the greatest long-term challenge for the Commission will be to find ways to maintain the quality and cost-efficiency of public defense services in Multnomah County and to ensure that, over time, the level of quality remains consistent among all the county's contractors.

2. Variations in contract rates. Variation in rates of payment under PDSC's contracts for the same kinds of cases, or to contractors who appear to be similarly situated, seems to be the most persistent complaint among justice system stakeholders in Multnomah County. PDSC is already well aware of this issue as a result of the many complaints voiced by the county's contractors at Commission meetings over the past two years. However, the concern is not limited to contractors in the county. A number of judges and prosecutors have expressed the view that some of the ablest and most experienced public defense

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<sup>4</sup> Interviews with additional criminal and juvenile justice stakeholders in Multnomah County will continue in August, September and October 2004.

attorneys in the county are being unfairly treated and may leave the practice due to the relatively low rates they are paid under PDSC's contracts.

As the table entitled "Multnomah County Rate Comparison" and attached as Exhibit "B" indicates, variations in the rates paid for public defense cases in Multnomah County do in fact exist and in some cases they are significant.

The causes of these rate variations are many. One example might be that, over decades of arms-length contract negotiations with the state, some contractors may have benefited from persistent attention to those negotiations and to planning for the growth and management of their operations, while others may have suffered from inattention to those matters due to the demands of their law practices. Another cause might be that some contractors have developed significant infrastructure, including staffs of in-house paralegals, investigators, interpreters and social workers, which accounts for some of the differentials and which, from the state's perspective, often represents a cost-efficient method of providing services that the state would otherwise have to pay for as non-routine expenses. In any event, PDSC has inherited these differentials, and many stakeholders in Multnomah County perceive this problem as the largest threat to continued effectiveness of the county's public defense system.

Unfortunately, solutions for eliminating these differentials in rates may not be easy to come by, particularly in an environment in which Oregon's voters rejected the Legislature's method of balancing the 2003-05 state budget by failing to pass Ballot Measure 30 last November and, therefore, rejected the state budget for Oregon's public defense system. In addition to the shortfall in the state's public defense budget caused by the failure of Ballot Measure 30, the 2003 Legislature specifically directed PDSC not to raise its contract rates during this biennium. The harsh reality of this environment appears to leave the Commission with the unappealing option of taking money from some higher paid contractors, thereby risking the dismantlement of established public defense offices and the disruption in the careers of dedicated lawyers, in order to give more money to other lower paid contractors.

Assuming that PDSC finds no justification for continuing variations in the contract rates in Multnomah County and determines that such variations pose a threat to the stability of the public defense delivery system in the county, OPDS suggests that the Commission consider several interrelated approaches to addressing this issue:

- Recognize that variations in contract rates is a problem that can only be resolved over several contract cycles or biennia;
- At the risk of using painfully familiar metaphors, recognize that the best solutions probably involve a "glide path" approach, as opposed to "running over a cliff," in the sense that comparative contract rates should be adjusted upward or downward on an incremental basis and on a multi-year timeline set by the Commission;
- In accordance with PDSC's normal practices and procedures, changes in contract rates should be part of the normal contract negotiation process, which is

administered by OPDS and subject to the review and approval of the Commission;

- Acknowledge that strict uniformity in contract rates is unrealistic and that differences in rates of payment for similar cases or to contractors that appear to be similarly situated are justifiable, as long as the basis for such differences is rational and capable of articulation; and
- In order to properly structure the administrative discretion of OPDS, PDSC should establish criteria or guidelines to justify differences in contract rates and require OPDS to articulate the bases for any differences in accordance with those guidelines. The following list represents a few examples of criteria that might justify relatively higher contract rates:
  - the existence of internal infrastructure, such as paralegals, investigators and interpreters;
  - the capacity to handle high volume caseloads (although this factor could also lead to efficiencies that call for lower rates);
  - the capacity to handle unique caseloads or participation in special court programs;
  - a strong and effective management structure, including financial management systems for internal business operations, administrative processes to facilitate dealings with OPDS, and personnel management and staff evaluation systems to ensure the quality and cost-efficiency of legal services;
  - training programs with the scope and capacity to train significant numbers of lawyers in the local legal community and which are accessible to other public defense attorneys on an ongoing basis;
  - the capacity and willingness to raise legal challenges and handle test cases that have widespread implications for the development of the state's criminal law and procedure or for local criminal justice policies and practices;
  - an institutional presence on behalf of the public defense community at policy-making bodies, such as the Local Public Safety Coordinating Council and the Criminal Justice Advisory Council;
  - offers potential benefits to the rest of the county's public defense contractors.

3. Contractor preferences and caseload priorities. In light of the fiscal calamities experienced by PDSC's contractors in 2003 as a result of budget cuts during special session of the Legislature and the steps the Chief Justice and his Budget Reduction Advisory Committee (BRAC) were forced to take in response, PDSC is also well aware of the desire of some contractors to have "preference clauses" in their contracts. These clauses would presumably establish preferences among contractors and priorities in the allocation of cases, in the event of a precipitous drop in caseloads and in order to ensure that these contractors retained most or all of their original caseload quotas.

Because another budget crisis and a precipitous drop in caseloads is only a possibility rather than a probability, OPDS recommends that the Commission avoid the time and effort associated with negotiations between OPDS and contractors over preference clauses before the need is apparent. In the event PDSC faces another budget crisis comparable to 2003, the Commission can then establish a fair and open process to address contractors' caseload shortages that would involve (a) Commission deliberations on the record at its regular public meetings regarding contractor preferences and caseload priorities, (b) an opportunity for full and fair comment by contractors and other stakeholders, and (c) the establishment of explicit rules or guidelines that would also be subject to public comment before their adoption.

The most that OPDS would suggest the Commission consider at this time is a set of general principles that could govern the determination of contractor preferences and caseload priorities in the event of another budget crisis. For example, on numerous occasions over the past two years, PDSC has discussed the possibility of giving non-profit public defender offices preferences and priorities in the allocation of caseloads because of the dependence of the offices' attorney-employees on a full caseload due to restrictions on their ability to engage in any other types of law practice and because of the special services the offices may offer and the unique caseloads and special programs they may serve. The Commission has also discussed giving particular consortia a higher priority in the allocation of caseloads, but with greater flexibility to adjust their caseloads downward due to the ability of consortium lawyers to engage in other types of law practice. Finally, the Commission has discussed the possibility of giving individual lawyers on court-appointment lists the lowest priority for caseload allocations due to their ability to rely on private law practices for income. While the process of establishing these principles will still involve substantial time, effort and pain in anticipation of an improbable event, the process could be justified on the grounds that all of PDSC's contractors are entitled to a clearer idea of the business risks they are assuming for the purposes of developing their business plans and recruiting new employees for the future.

4. The process for handling attorneys' conflicts of interest. The state's process for handling (i.e., paying for) cases in which a public defense attorney discovers a conflict of interest and is required by professional ethics to withdraw has, over the years, been a source of ongoing controversy and frustration for justice professionals in Multnomah County. The challenge for the state has been to strike a balance between (a) fairly compensating attorneys who, with due diligence, have discovered a conflict of interest (e.g., a prosecution witness turns out to be a former client of the attorney's law office) and expended substantial amounts of time and energy to prepare a defense in the case and (b) avoiding an incentive for attorneys to hold on to cases until the last minute and lighten their caseloads by raising conflicts of interest, knowing that they will probably receive full credit and full payment for the case. That balance has been elusive. The result has frequently been double payments for the same case: one for the attorney who discovers a conflict of interest late in the case; and one for the attorney who is substituted into the case.

This problem is by no means unique to Multnomah County. But, perhaps because the large number of cases and large number of defense attorneys in the county make the problem more visible, the process for handling conflict of interest cases in Multnomah County has been a particularly visible object of criticism and complaint. Prosecutors and judges are obviously concerned about last minute withdrawals and substitutions and the delays they cause in court proceedings. Defense attorneys frequently complain about the problem too. Indeed, several PDSC contractors have claimed that a virtual “gray market” in conflicts cases has existed for years in the county, with a few contractors augmenting their caseloads and income with conflict of interest cases that demand little work and, if held long enough, generate full payment.

Whether or not this claim has any validity, the issue of how conflict cases in Multnomah County are handled may be a good example of past history and practices distorting current perceptions of reality. In 2003, the Indigent Defense Services Division (IDSD) of the State Court Administrator’s Office took steps that may have solved, or at least significantly mitigated, this problem. IDSD encouraged a group of individual lawyers and law firms who had previously contracted with the state to gather together and form the Portland Defense Consortium (PDC). PDC now handles many, if not most, of the serious criminal cases involving conflicts of interest in the county, without the kinds of disruptions and double payments that Multnomah County experienced in the past. Because the consortium is not considered a “firm unit” by the Oregon State Bar for the purposes of determining conflicts of interest, attorneys in PDC can transfer cases among themselves without disqualifying the entire consortium or all the attorneys in it from handling such cases. Furthermore, OPDS does not provide double credits or double payments for cases assigned to the consortium that are transferred among PDC’s attorneys.

Yet the problem of how to handle conflict of interest cases cost-efficiently in Multnomah County has probably not disappeared and may still deserve the Commission’s attention. To the extent that the handling of conflict of interest cases remains a significant problem, OPDS recommends to PDSC that the Commission take steps in this service delivery planning process to resolve, or at least further reduce, the problem. Fortunately, the Commission has access to the talents and experience of Ann Christian in addressing this issue. As part of her contract with PDSC to expand the Application/Contribution Program across the state, Ann agreed to study the issue of handling of conflict of interest cases and to develop more cost-efficient strategies and processes for the Commission’s consideration. Ann plans to administer a survey of Multnomah County contractors and develop her proposals over the next few weeks.

5. Withdrawals and substitutions of attorneys. A significant number of prosecutors and defense attorneys have reported instances in Multnomah County in which defense attorneys are allowed to withdraw from cases relatively late in the case without declaring a conflict of interest or providing any other apparent reason justifying withdrawal. These observers consider such instances commonplace, occurring particularly in less serious “run-of-the-mill” cases. OPDS cannot conclude from a relatively few anecdotal reports by observers without direct knowledge of the facts in these cases that a serious problem exists. But further investigation may be warranted.

The Commission will recall that it readopted a Substitution Policy at its June 2004 meeting, which was mandated by the 2003 Legislature, calling for the courts to confer with OPDS in certain instances when a motion to withdraw has been granted and the court is about to substitute one lawyer for another. The apparent purpose of this policy is to reduce costs to the Public Defense Services Account caused by the repetitive withdrawals of court appointed attorneys in criminal cases. Under the policy, OPDS and the courts may agree to exempt particular categories of cases from the policy's "meet and confer" requirement.

To the extent that "run-of-the-mill" cases in Multnomah County may have been exempted from this requirement under PDSC's Substitution Policy, a significant number of withdrawals without apparently sufficient reasons may not be coming to the OPDS's attention. Although PDSC's Substitution Policy and its enabling legislation does not authorize OPDS to participate in or influence a judge's decision to grant an attorney's motion to withdraw, further investigation by OPDS and conversations with the Multnomah County Circuit Court are likely to uncover the nature and extent of this problem, and may offer OPDS an opportunity to inform the court of any implications for PDSC's budget. Therefore, OPDS proposes to continue investigating this issue.

A Demographic Snapshot of Multnomah County

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OPDS's Findings in Multnomah County

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OPDS's Recommendations

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Exhibit A

Comments on the Case Value Disparity issue as it applies to Multnomah County:

Current disparities in case costs between Multnomah County contractors existed from the day a second office (much less a third, fourth, etc) was created and reflect nothing more than the historical advantage of Metro's long head start in the business. For all the years that Metro was the only contractor, and, apparently, even to this day, Metro's size gave it leverage in negotiations that other contractors could not match. No other contractor was allowed to employ comparable staff or pay comparable wages.

"Variations in the rates paid for some cases in the county are both real and significant. The causes are many. For example, over decades of arms-length contract negotiations with the state, some contractors have benefited from their rigorous and persistent attention to those negotiations and to the growth and management of their operations, while others have suffered from their inattention or neglect of those matters.

MDI certainly paid "rigorous and persistent attention" to the negotiations process, but never achieved the case prices, salary levels, or benefit packages that Metro obtained as a matter of course. Over the period of several contracting cycles in the late 80's, MDI, through tough negotiations, managed to gain the addition of trial assistants to the staff (but did not even get close to the level of support then long enjoyed by Metro). Nor did we ever achieve pay equality with Metro, despite endless efforts. I can't speak for other contractors, but the notion that MDI lost out in the negotiations process due to "inattention or neglect" is both false and insulting. In general, and for reasons I understand, the SCA's position on all such efforts was to reject them out-of-hand. Metro had the opportunity to grow unchecked for many years, later contractors were created on the assumption that they would be cheaper than Metro, and that lower costs could be achieved by requiring smaller staff to caseload ratios. A comparison of contracts by staff-to-caseload numbers is a necessary step towards understanding the disparity.

"Some contractors have developed significant infrastructure, including staffs of in-house paralegals, investigators, interpreters and social workers, which accounts for some of the differentials and, from the state's perspective, represents a cost-efficient methods of providing services that the state would otherwise have to pay for as non-routine expenses. In any event, PDSC has inherited these differentials, and many stakeholders in Multnomah County perceive this problem as the largest threat to continued effectiveness of the county's public defense system.

Exactly. But is that additional staff really "a cost-efficient method of providing services the state would otherwise pay for". As far as I could ever see, the state didn't pay anything comparable on cases assigned to offices that did not have the additional staff. Outside of the death penalty, what contractor has ever been paid "non-routine" money for a paralegal or social worker? My own, now dated, examination of investigation expenses revealed that costs per case were dramatically lower in cases for

which investigators had to be individually sought and paid for, as against cases assigned to offices with investigative staffs. (Not that I support having investigation "out sourced", staff investigators are critical to effective representation, all offices should have them, but not because it is cheaper, as it is not cheaper, it is just better.) The bottom line is that the system does not provide equal services to all similar defendants, and that is a threat to the integrity and the effectiveness of the system. There is no justification for the continued imbalance in resources, the entire system needs to be financed at the Metro level of service.

In order to properly structure the administration discretion of OPDS, PDSC should establish criteria or guidelines to justify differences in contract rates and require OPDS to articulate the bases for any differences in accordance with those guidelines. The following list represents a few examples of criteria that might justify relatively higher contract rates:

"the existence of internal infrastructure, such as paralegals, investigators and interpreters;

This begs the question, the additional staff is the heart of the disparity, but hardly a "justification", the justification would have to explain why the larger staff is needed at one contractor and forbidden at others.

"handling unique caseloads or participation in special court programs;

A special program has special staff, no problem there, but, at least in Mult Co. even outside of such programs the staff levels at Metro are far higher than those of any other contractor. What explains that?

"a strong and effective management structure, including financial management systems for internal business operations, administrative processes to facilitate dealings with OPDS, and personnel management and staff evaluation systems to ensure the quality and cost-efficiency of legal services;

A function of size only, and not something that should be rewarded with high contract prices, why doesn't improved management mean lower costs? Every office should have "personnel management and staff evaluation systems to ensure quality and cost effectiveness" but the SCA has never paid more than lip service to the ideal. In recent years the SCA has chosen to create many "contractors" without any management or staff evaluation systems, apparently such systems were viewed as an unnecessary luxury in those contracts. If such systems had been a priority in the past they would already be in place for every contractor, to the extent they don't exist the money should be spent to install them, rather than use their nonexistence as a basis for denying the necessary funding to create them.

"training programs that are accessible to other public defense attorneys in the county;

As to Multnomah County, if this were true, which it is not, it might justify the cost of one staff trainer at Metro, but it hardly counts as a

basis for a disparity between contractors in wages, benefits, or levels of service provided to clients.

"an institutional presence on behalf of the public defense community at policy-making bodies, such as the Local Public Safety Coordinating Council and the Criminal Justice Advisory Council;

Metro has had that institutional presence and done much for indigent defense with it. They deserve much credit for those efforts. But how does that justify more money?

"benefits to the rest of the county's public defense contractors."

And what might those be? Or more to the point, what is the budget for those benefits and might they be cheaper if each contractor provided them internally?

To sum up, why is it necessary to find justifications for the current disparity? The goal ought to be the elimination of the disparity. All similar defendants should be provided an equal level of service. If what Metro does is what needs to be done, then all contractors should be able to provide that level of service.

Additional Input to the PDSC  
On Service Delivery in Multnomah County

By John Connors  
Multnomah County Director  
Metropolitan Public Defender

The task of describing the delivery of service to indigent clients in Multnomah County completely and fairly is a daunting one. This is especially true given the history of the Metropolitan Public Defender in Multnomah County and the long list of contributions that this office and all its members have made that are not easily measured. This is important because of questions that have been raised about differences in costs per case throughout the county. This memo is an effort to capture at least some of the attributes and accomplishments of MPD. Most of the specific activities described have occurred in the past two years.

I. Value Added – Clients and Caseload

For the past 33 years, MPD has handled the majority of court appointed cases in Multnomah County—including felony, misdemeanor and juvenile matters, civil commitments and most of the specialty courts. During some years MPD's share of the total county caseload has been more than 60%. This is not surprising when one considers that for many years MPD handled more than 1/6 of the entire court-appointed caseload throughout the State. Over the past decade the Portland office of MPD has handled approximately 13,000 cases a year, with a staff of about 40 attorneys. More important is the fact that lawyers and other staff at MPD have often been in the forefront of establishing and assuring excellent representation in areas such as death penalty cases, Measure 11 cases, drug and property cases involving enhanced sentences, and on a wide range of issues in both juvenile law and civil commitments. A significant statistical study covering a recent 18 month period shows that more than 60% of all these charges end up in acquittal or dismissal. The critical role the office plays in the integrity of the system and protecting individual rights is beyond dispute and immeasurable in terms of its contribution to a democratic society.

Throughout this long history, few claims of incompetent practice have been filed and only a handful of post conviction claims have been sustained against any of the lawyers on any case. Throughout this long history there has been only one instance of bar discipline—a stipulated reprimand on a complex conflicts issue.

It's easy to overlook in a system that is so busy, but there is much added value to a job well done. When trial cases don't get retried because of post conviction relief, when federal habeas relief is unnecessary to correct unjust or wrongful convictions, when contractor's malpractice coverage rates remain constant due to proper work on cases—the whole system and State saves money. When clients feel that they were properly represented—that time was spent with them and on their case, that their rights were

protected, that they were shown respect and dignity—they think twice and often don't re-enter the system, saving the system and the State money.

When clients are provided alternatives and alternative sentences are prepared and advocated, clients often change their lives and become productive citizens. When this happens, not only do they provide for themselves and their families, but they don't come back with new cases. When MPD handles thousands of duty-informational calls a year and hundreds of expungements per year for any prior clients, without specific contract credit, the system and the State saves money and becomes more just. The same is true with respect to the dozens of calls we take from staff at the Federal Defender's office looking to coordinate efforts to handle pending or potential State cases affecting their clients, and the dozens of cases our office handles on behalf of out of state prisoners or probationers seeking to clear their warrants or reinstate their social security benefits.

## II. Value Added – Staff Development

MPD has also greatly benefited the criminal justice system on both a statewide and county level by developing and training large numbers of lawyers who then go on to become leaders in the Bar. MPD alumni include approximately 10% of the statewide circuit court bench and Ancer Haggerty, Oregon's first black federal judge. Office alumni include two of the law professors at Lewis and Clark, Steve Kanter and Susan Mandiberg, and a list of other college professors. The office has also helped train some of the most highly regarded private practitioners across the State in both criminal law—Janet Hoffman, Steve Houze, Larry Matasar, Lisa Maxfield, and Ken Lerner, and civil law—Larry Barron, Ray Thomas, Stuart Teicher, Steve Crew, Linda Eyerman, Diana Stuart, and David Slader.

The Portland office has also graduated a significant portion of the Federal Defender's office, including Steve Jacobson, Ellen Pitcher, TJ Hester, Tony Bornstein and Susan Russell, as well as most of their investigators. Many of the leading death penalty practitioners in the State, including Mark Cross, Rich Wolfe, David Falls, Laurie Bender, Michael Curtis, Kathleen Correll and Jim Lang, have also practiced at MPD, as have the heads of several other public defender offices—Jack Morris, Tom Crabtree, and Carole Hamilton. Finally, it's worth mentioning two Oregon State Bar presidents, Judge Julie Frantz and Angel Lopez, and three OCDLA presidents, Jack Morris, Dave Audet and Paul Levy, started at MPD.

This of course doesn't count the large number of support staff and interns who have gone on to become attorneys, social workers, or other persons dedicated to the ideals of quality and service.

## III. Value Added – Legal Leadership

MPD also has a long and significant history of leadership in making legal challenges and providing legal training and support. Much of this leadership has benefited the system on a statewide basis. Initial lobbying efforts in the state legislature on behalf of indigent

defense were handled by Jim Hennings and Marcy Hertzmark. For many years much of the testimony regarding criminal law matters came from MPD staff. This type of system leadership continued through last year when the office, joined by the Lane County Public Defender's office, sued the Oregon Judicial and Legislative branches for adequate funding and, along with the Multnomah County Sheriff, sued the Oregon State Hospital for due process violations.

More importantly, the office has a long history of raising major issues from their daily caseload. A very small sampling includes Tony Bornstein's work challenging the Multnomah County jury pool, Gail Meyer's work challenging the "scheme or network" sentencing structure in drug cases. Susan Russell and Michael McShane's challenges to Measure 11, and Paul Levy's challenges to Measure 40. More recent efforts include attacking the trespass zones and minimum sentences for certain drug and property offenses. It is not an overstatement to say that in every year of its 33 year history MPD attorneys have been in the vanguard of excellent lawyering on the most minor violations of city ordinances up through the most serious murder cases. This commitment and expertise have also been demonstrated in the large number of significant appellate cases that have come from the office. These include, *State v. Hockings* on discovery, *State v. Carahar*, emphasizing looking to the Oregon Constitution first on search and seizure issues, *State v. Campbell*, defining what is a search in Oregon, *State v. Freeland*, outlining District Attorney obligations with respect to similarly situated defendants, and *State v. Wacker*, further defining permissible searches in Oregon—to name just a few of many, many cases.

#### IV. Value Added – Innovation

MPD has a long history of system involvement and innovation. Starting with Jim Hennings' pursuit of federal grant money to start the office in 1971, to his early use of Jesuit Volunteers as alternatives workers and pre-sentence report writers, to his current work as Chair of the Local Public Safety Committee's computer data committee, the office has provided dozens of examples of leadership in the areas of technology and innovation.

Much of this work has been in cooperation with the court, starting with now senior federal Judge Robert E. Jones' early disposition docket, up through Judge Abraham's special separate docket for drug cases, and more recent programs such as STOP and Clean Court, three different community courts, and the early assignment project. In all of these MPD has helped improve efficiency and promoted cost savings.

These efforts have also included projects with other system players such as Stand Down, a project to allow veterans to clear warrants and access services in cooperation with the District Attorney's office, the criminal law internship program in cooperation with the Lewis and Clark Law School, the trial practice program in cooperation with the Davis, Wright, Tremaine law firm and the voter's registration program in cooperation with the Western Prison Project.

## V. Value Added – System Involvement

Much of MPD's ability to add value to the system is its commitment to participation in a wide variety of criminal justice activities and agencies. This involvement is on both the macro and micro level and is systematic and ad hoc. Recent activities include staff participation in the Local Public Safety Coordinating Council, Criminal Justice Advisory Committee, and various court work groups including those on the Oregon State Hospital, the mental health court, Sentencing Support, CARES, Electronic Monitoring, OJIN, SWIS, community corrections sex-offender grant, CRBs, standardized release decisions, and the domestic violence program. There are also ongoing meetings for the drug courts, community court, juvenile court, the misdemeanor docket, the contractor's and sheriff's computer system that demand time and attention.

The staff at MPD also always makes itself available for individual requests. These may include more systematic projects like participation in the special grand jury on corrections, or the Federal Defender Screening Committee for its panel attorneys or a special sentencing seminar at one of the law schools. More isolated examples include Justice DeMuniz's work on the Russian criminal justice system or meeting with concerned family members of minority Measure 11 defendants claiming discrimination, or placement of a clerk by the OSB affirmative action program, or interns from the PSU criminal justice program, or participation in the OSB diversity section job symposium for minority students, or meeting with pre-law students from OES or guest lecturing on ethics at the Lewis and Clark Law School Clinic. The office has also maintained an important position on the County Bar Association's Judicial Screening Committee. MPD's commitment to help in the almost daily requests to aid someone or some part of the community has been relentless.

## VI. Value Added – Community Involvement

In addition to all the case work, client work and criminal justice system work, members of MPD have done significant amounts of community work in an effort to make others more aware of our mission or to simply help our clients in a form other than their case. This kind of activity has been a long tradition and is very diverse. A very small sampling includes, fundraising for the Campaign for Equal Justice through co-sponsored sports events with the District Attorney's office, staff contributing to the Burnside Chapel, Volunteers of America and Sisters of the Road Café through our Entertainment and Humanities Committee, presentations on civil rights at Jesuit, Lakeridge, and Tigard High Schools, speaking appearances on Ballot Measures on KBOO, KGW or KXL, meetings with editorial boards of the Oregonian or other publications and fundraising efforts for Oregon Lawyers Against Hunger and the establishment and support of Courtcare.

## VII. Conclusion

In addition to the discomfort a person always feels when bragging, I'm now certain that attempting to capture all the added value provided by MPD was not only a daunting task but an impossible one. Everywhere I turn I've done injustice to each category by only scratching the surface or leaving out worthy name. There is also important ground left completely uncovered, for example, the clothing room and Library that MPD maintains for use by the whole defense bar, our regularly, open training sessions, or the work of Keith Rogers and myself on a national level with the VERA Institute, or the current work of myself and Martha Spinhirne on the Governor's Task Force on Sentencing, but then you get the idea. Thanks for the opportunity to provide input.

MULTNOMAH COUNTY RATE COMPARISON

Case Type	MPD Rates*	MDI Rates*	PDC Rates	JRP Rates*	B & T Rates	M & B Rates	L & L Rates	NAPOLS Rates	MCIDC Rates	RCDC Rates	Kliewer Rates	Case Type
MURD	\$19,837		\$13,000	\$16,500	\$12,012							MURD
AFEL	\$936		\$773						\$788	\$775		AFEL
AM11	\$2,976		\$1,600						\$995			AM11
BFEL	\$527		\$469				\$460		\$476	\$468		BFEL
BM11	\$2,976		\$1,600						\$900			BM11
CFEL	\$457	\$500	\$412				\$390		\$410	\$410		CFEL
EDP	\$198						\$230			\$120		EDP
EXTR	\$298		\$274				\$220			\$225		EXTR
DUIS	\$377	\$375	\$300				\$220		\$300	\$375		DUIS
DWSS	\$377	\$375	\$300				\$220		\$300	\$225		DWSS
MISS	\$377	\$325	\$300				\$220		\$300	\$225		MISS
OTMS	\$377	\$375	\$300				\$220		\$300	\$225		OTMS
SCDV	\$377	\$375	\$300				\$220		\$300	\$225		SCDV
Trailing/Comm.Crt.	\$179		\$160			\$155			\$154			Trailing/Comm.Crt.
DPV	\$198	\$170	\$138			\$135	\$170		\$134	\$150		DPV
FPV	\$198		\$138			\$135	\$170		\$134	\$150		FPV
MPV	\$198	\$170	\$138			\$135	\$170		\$134	\$150		MPV
CPV						\$125						CPV
CONT	\$397		\$300			\$235						CONT
FAPA	\$397		\$300			\$235						FAPA
SUPP	\$397		\$300			\$235						SUPP
CVHC										\$600		CVHC
CVPC									\$1,000			CVPC
MHMI	\$198											MHMI
JDEC	\$595	\$580	\$510	\$580	\$520	\$500		\$596			\$525	JDEC
JDEP	\$793	\$580	\$510	\$580	\$520	\$500		\$596			\$525	JDEP
JPDC	\$278	\$270	\$195	\$285	\$235	\$230		\$300			\$235	JPDC
JPDP	\$298	\$270	\$195	\$285	\$208	\$230		\$300			\$235	JPDP
JUDF	\$536		\$428	\$516	\$395	\$390					\$390	JUDF
JM11	\$1,488		\$1,275	\$1,548	\$988							JM11
JUDM	\$317		\$295	\$310	\$297	\$280					\$280	JUDM
JUDO	\$317		\$274	\$260	\$255	\$280					\$280	JUDO
JPV	\$159		\$115	\$130	\$109	\$130					\$135	JPV
JUTC	\$2,579	\$2,500	\$1,735	\$2,475	\$1,456	\$1,500		\$2,500			\$1,500	JUTC
JUTP	\$3,769	\$2,500	\$1,735	\$2,475	\$2,080	\$2,000		\$2,500			\$2,100	JUTP
SO12					\$4,160							SO12
OTHR	\$198	\$270	\$274			\$280	\$220		\$265			OTHR

\* Includes Investigation

Notes:

1. MPD AFEL, BFEL, and CFEL rates are converted from crime seriousness level based on 2002 - 2004 case mix.
2. MPD is paid annually to staff felony arraignments.
3. MPD handles STOP Court (Drug Treatment Court), MHMI Docket (Civil Commitment), and Community Court (Misdemeanors).
4. MDI is paid annually to staff Westside Community Court.
5. MDI CFEL cases are only DUII Felony and trailing CFEL.
6. PDC PV caseload is primarily trailing from felonies and misdemeanors.
7. M & B handles Contempt Court and PV caseload is primarily trailing from Contempt Court.
8. L & L handles the X-Docket (fast-track drug felonies) and the PV Court.
9. L & L BFEL and CFEL cases are STOP and X-Docket rejects.
10. NAPOLS only handles Indian Child Welfare Act cases.
11. MCIDC is paid annually to staff Misdemeanor EDP Court.
12. MCIDC handles conflict cases
13. MCIDC also handles PCR cases from Multnomah County Jail.
14. RCDC handles Gresham Courts (Early Resolution Program & DUII Diversion).
15. RCDC handles a very small portion of felonies that MPD, PDC and MCIDC cannot take.

KEY

AFEL	Class A Felony
AM11	Class A Measure 11
B & T	Bertoni & Todd
BFEL	Class B Felony
BM11	Class B Measure 11
CFEL	Class C Felony
CONT	Contempt
CPV	Contempt Probation Violation
CVHC	Habeas Corpus
CVPC	Postconviction Relief
DPV	DUII Probation Violation
DUIS	Driving Under the Influence of Intoxicants
DWSS	Driving While Suspended
EDP	Early Disposition Program
EXTR	Extradition
FAPA	Contempt for Violating Family Abuse Prevention Act Restraining Order
FPV	Felony Probation Violation
JDEC	Juvenile Dependency w/Child Appointment
JDEP	Juvenile Dependency w/Parent Appointment
JM11	Class A or B Measure 11 Felony Where a 15-, 16- or 17-year-old Is Indicted as an Adult in Circuit Court
JPDC	Postdispositional Proceeding w/Child Appointment
JPDP	Postdispositional Proceeding w/Parent Appointment
JPV	Juvenile Probation Violation or Motion to Modify
JRP	Juvenile Rights Project, Inc.
JUDF	Juvenile Felony
JUDM	Juvenile Misdemeanor
JUDO	Juvenile Other
JUTC	Termination of Parental Rights w/Child Appointment
JUTP	Termination of Parental Rights w/Parent Appointment
Kliewer	Law Firm of Ronnee S. Kliewer
L & L	Liebowitz & Lopez, Inc.
M & B	McKeown & Brindle, P.C.
MCIDC	Multnomah County Indigent Defense Consortium
MDI	Multnomah Defenders, Inc.
MHMI	Civil Commitment
MISS	Misdemeanor
MPD	Metropolitan Public Defender Services, Inc.
MPV	Misdemeanor Probation Violation
NAPOLS	Native American Program/Legal Aid Services of Oregon
OTHR	Other
OTMS	Other Traffic Misdemeanor
PDC	Portland Defense Consortium
RCDC	Rose City Defense Consortium
SCDV	Show Cause Diversion
SO12	Class A or B Measure 11 Felony Sex Offense With Alleged Victim Under Age 12
SUPP	Contempt for Violating a Support Order
Trailing/Comm.Crt.	Trailing Misdemeanor (felony client's additional misdemeanor cases) or Community Court Misdemeanor