

**Members**

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



**Ex-Officio Member**

Chief Justice Paul J. De Muniz

**Executive Director**

Ingrid Swenson

**PUBLIC DEFENSE SERVICES COMMISSION**

Friday, October 20, 2006  
12:30 to 4:00 p.m.

Robert Burns Room  
The Resort at the Mountain  
Welches, Oregon

**AGENDA**

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| 1. <b>Action Item:</b> Approval of the Minutes of PDSC's September 14, 2006 Meeting<br><i>(Attachment 1)</i>                                | Barnes Ellis                                  |
| 2. Yamhill County Status Report on Public Defense Delivery System<br><i>(Attachment 2)</i>  | Bob Suchy                                     |
| General Discussion of Report  | Barnes Ellis                                  |
| 3. <b>Action Item:</b> Commission Review and Discussion of Report on Clatsop County Public Defense Delivery System<br><i>(Attachment 3)</i> | Barnes Ellis                                  |
| 4. Diversity Task Force Report<br><i>(Attachment 4)</i>   | Angel Lopez                                   |
| 5. OPDS's Monthly Status Report   | OPDS's Management Team                        |
| 6. PDSC Annual Performance Progress Report<br><i>(Attachment 5)</i>   | Kathryn Aylward                               |
| 7. OPDS Strategy for Elimination of Appellate Backlog   | Ingrid Swenson, Kathryn Aylward, Pete Gartlan |
| 8. New Business   | Barnes Ellis                                  |

**Please note:** Lunch will be provided at the beginning of the meeting for Commission members and others who ordered lunches in advance.

The next meeting of the Public Defense Services Commission is scheduled for **Wednesday, November 8, 2006 from 9 am to 1 pm**. The meeting will be held in the basement meeting room at the Office of Public Defense Services, 1320 Capitol Street NE, Salem, Oregon. (Another Salem location is under consideration for this meeting and notice will be provided if the meeting is moved.)

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

September 14, 2006  
Office of Public Defense Services  
Clatsop County Commission's Meeting Room  
857 Commercial Street  
Astoria, Oregon

MEMBERS PRESENT: Barnes Ellis  
Jim Brown  
John Potter  
Mike Greenfield  
Chip Lazenby  
Chief Justice De Muniz

STAFF PRESENT: Peter Ozanne  
Kathryn Aylward  
Billy Strehlow

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[Tape 1, Side A]

**Agenda Item No. 1 Approval of the minutes of the August 10, 2006 meeting**

04-08 **MOTION:** John Potter moved to approve the minutes; Jim Brown seconded the motion; hearing no objection, the motion carried: **VOTE: 5-0**

**Agenda Item No. 2 Presentations on Public Defender Service Delivery in Clatsop County**

08-  
[Tape 2, Side B] 075 Peter Ozanne summarized the information he had received from his meetings in Clatsop County. Judges Phillip Nelson and Paula Brownhill testified about issues relating to public defense including compensation of counsel, the early disposition program and the difficulty of recruiting new public defense attorneys in the county. R. Hendricks of the Oregon Youth Authority; Georgia Gates, the Director of the Clatsop County Juvenile Department; Kathryn Aylward; and attorneys Mary Ann Murk, Kris Kaino, Ty Settles, Don Haller and John Orr also testified.

**Agenda Item No. 3 Progress Report from Marion County Association of Defenders (MCAD)**

83-555 Steve Gorham and Olcott Thompson presented a report on developments at MCAD. They also discussed the operation of the early disposition program in Marion County and the law suit which has been filed against the consortium, its director, its board and the individual board members by two attorneys who were suspended from MCAD.

561-659 Jim Hennings presented four reports comparing compensation rates for Metropolitan Public Defender attorneys with those of district attorneys and city attorneys.

**Agenda Item No. 4      Review and Approval of OPDS’s Report to the Commission on Critical Issues in Juvenile Dependency Practice**

665 –  
[Tape 3, Side A] 005      OPDS’s report to the Commission on Critical Issues in Juvenile Dependency Practice was approved.

**MOTION:** Mike Greenfield so moved; Jim Brown seconded the motion; hearing no objection, the motion carried: **VOTE 4-0**

011-086      Chairman Ellis thanked Peter Ozanne on the occasion of his final commission meeting for his service to the commission and to public defense. Peter Ozanne expressed his appreciation to his management team and to the public defense community for its spirit and commitment to the profession.

086      **MOTION:** Mike Greenfield moved to adjourn; Jim Brown seconded the motion; hearing no objection, the motion carried: **VOTE 5-0**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL MEETING TRANSCRIPT

September 14, 2006  
Office of Public Defense Services  
Clatsop County Commission's Meeting Room  
857 Commercial Street  
Astoria, Oregon

MEMBERS PRESENT: Barnes Ellis  
Jim Brown  
John Potter  
Mike Greenfield  
Chip Lazenby  
Chief Justice De Muniz

STAFF PRESENT: Peter Ozanne  
Kathryn Aylward  
Billy Strehlow

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**TAPE 1, SIDE A**

[The meeting was called to order.]

04 Chair Ellis Welcome everyone to Clatsop County. I happen to be a taxpayer in Clatsop County so I feel glad to be here.

**Agenda Item No. 1 OPDS Monthly Report**

008 Chair Ellis The first item on the agenda is the minutes of the August meeting. Are there any additions or corrections to either the summary minutes or the transcript? I had just a couple and they are typos. On page 11, the third line under Berger, "affect" should be "effect." On page 33, first line, and the remark was attributed to me, "prospective" should be "perspective." There is also repetition about 10 lines down -- "a lot a lot." I think only one of those is required. Other than that I don't have any other changes.

**MOTION:** John Potter moved to approve the minutes; Jim Brown seconded the motion; hearing no objection, the motion carried: **VOTE: 5-0.**

**Agenda Item No. 2 Presentations on Public Defender Service Delivery in Clatsop County**

021 Chair Ellis

Peter, do you want to introduce the Public Defense Service Delivery in Clatsop County?

023 P. Ozanne

I would be happy to and obviously we have met personally with most of the folks in the room and we thank them for their hospitality and involvement. I understand that the meeting will start out, as soon as I am done with my summary, with Judge Nelson and then Judge Brownhill and then we have several of our attorneys here who have comments. A little over two weeks ago, on the 24<sup>th</sup> and the 25<sup>th</sup> of August, Commissioner John Potter and I came to Astoria and spent two days here talking to the key justice officials and professionals, as many as we could in those two days, and, just as a prelude on our preliminary findings, the draft, which is Attachment 2 to the materials today, is the preliminary draft. It was prepared primarily by one person, although John was very helpful in his observations. Trying to summarize what is a complex system with many people involved in a short period of time is subject to error and we would welcome any corrections today. The first 10 pages or so of the report, as usual, just gives people an introduction to the process. The report with respect to Clatsop County begins on page 10. We always try to give a little picture of the county in terms of demographic data. On page 11 are the preliminary findings of the office, by John and me. Basically, things are working well in Clatsop County. People are generally satisfied with quality of service, satisfied with the competence of the attorneys and with their responsiveness, so, as we are often prone to do when we look at a system, is say "If it ain't broke, don't fix it." In large part that is true in Clatsop County. I should add that since that time I have spoken with Cora Lane, who is the Director of Community Corrections here, on the telephone and she confirmed from her perspective that the lawyers are dedicated. Her parole officers or probation officers are sometimes in adversarial situations and are cross-examined by lawyers, but she always felt the lawyers handled themselves professionally and were good advocates. As is the case anywhere in the state by the way, she felt that probably more knowledge about corrections, and the best practices in corrections, would be useful for the lawyers in general. The District Attorney for the county communicated in an email that I sent to the commissioners that while he has concerns, which he again voiced, about the use of non-routine expenses, in general he was complimentary about the quality of the lawyers here. The general picture in terms of quality of services, which is of key importance to our system, is a good picture. I have listed on page 14 and the following pages some of the issues that were identified. Not surprisingly, as in many parts of the state, the future supply of qualified lawyers is of deep concern, particularly to the courts on the front lines. If a lawyer retired, or moved on -- one of the six lawyers who do the work for us under contract (and probably a few others that I wasn't able to identify) -- they would have to search out of county, which is of course an expense to us and a logistical problem for them. So the supply of lawyers is a serious issue and I thought it would be a subject that we would want to discuss with the witnesses today. What can we do collaborately to help increase the supply of lawyers? Of course recruitment would be the obvious solution. Another obvious problem, and I think this is not unique to Clatsop County, although the level of intensity seemed a little higher here, is the caseload. Again, as commendable as it is on the part of the court to move the docket along, as I understand it, although there wasn't data, there is a sense in Clatsop County that it is always near the top, if not the top, in terms of court administration, speed of the docket, how it moves its cases. At least from the lawyer's perspective, both prosecutors and defense, they felt that in light of the limited resources they have, they just can't keep up with the caseload. It is not unique but it seemed to me to be worthy of note and perhaps discussion today. Third, and again not an unusual issue, were contract rates. A number of people cited the rates that Multnomah County was paid in relation to Clatsop County. There have been some Multnomah County lawyers working here, and there was a sense that the lawyers in Clatsop County are not treated fairly. This Commission is obviously aware that it is a high priority for the Commission to try and develop rate equity, taking into account the unique circumstances of the area, so that would be a subject of today's discussion. One other, more narrow but nonetheless important issue is the participation of defense attorneys in early disposition programs and what I call other specialty court programs, most notably the drug court, discussed on page 16 of the report. John and I found after discussing this with the court

and the various attorneys that the participation of defense attorneys is the question. One source indicated to us that the inability to have defense attorneys either in the design phase or the operational programs had to do with some resistance on the Commission or my offices part in terms of providing the resources. We want to make it that clear that we do support these programs and I have attached the guidelines for everyone's information that we developed in conjunction with Oregon Criminal Defense Lawyers. We believe in these programs and we would like to do anything we can, within our budget, to support them. We hope to invite conversation today which may help determine what can be done. My sense is that the Commission really believes there ought to be defense attorneys in these programs. Certainly they participate in most programs in the state, and we think that when there is a need for expeditious resolution lawyers for both the prosecution and defense can serve a role in making the programs effective. Finally, while again it doesn't seem to be an apparent problem in the delivery of services here, there is a question I would suggest that the Commission raise today regarding consortium lawyers. Are the two consortia here really ready, and should they start making themselves ready, for the future in terms of organization and structure. It has worked well before where colleagues and peers have come together to propose a bid to the Commission for a contract. As we know, and the Commission has urged other contractors to consider whether there should be somebody who responds to concerns and complaints from the wider justice community. Should there be any sort of performance review? Should there be a Board of Directors? Again, I think those are subjects that are worthy of conversation here. We all know that we don't try to use a template from Salem or Portland or somewhere else on local counties. We have to adjust to the realities in the county. But at least my impression is that the issue is worthy of conversation today. In closing, I want to say that those were the five issues that John and I identified. John reviewed the draft report before I released it and he thought those were the issues that should be subject to discussion today, but there may be others and I want to defer to the audience and we welcome the identification of other issues.

- 139 Chair Ellis Thank you. Judge Nelson you have apparently been designated as the lead-off batter.
- 141 Judge Nelson I don't know if that is good or bad but we will see what happens.
- 141 Chair Ellis Let me just give a couple of comments. Starting about two years ago we began this program of going around the state trying to meet with people in the communities so that we could better understand what is happening in the different communities. It is really to bring our process to those who are part of the system that we are trying to support. So this is a good chance to have dialogue back and forth and we have made it clear that we are not inclined to impose a single model on everybody. I think you will see from our experience in the places that we have gone, and the changes that we have implemented, it does vary and a lot depends on people in the communities. Oregon is a very diverse state so we are all ears.
- 157 Judge Nelson Let me just first say thanks for coming out to Clatsop County because we are quite a ways removed from Salem. I have sometimes thought that while Salem folks are supposed to be really informed, I sometimes wonder if they really care about how we do things over here. We appreciate you coming out to see individually what we are doing here. Thanks for doing that and I think we are always open to some suggestions, from people outside the area, that maybe we could be doing things a little bit differently or better. I told John and Peter when they were here sometime in mid-August that I think we are very fortunate in the level of indigent providers that we have. We have six people who have been doing it for a long time and seem to be, at least in my view, very competent. If there are issues that look like they could be raised, I think they are on top of it and submit a motion to suppress or something. We don't get a lot of complaints from defendants but when we do, of course we schedule a hearing right away. We may get a letter saying there is a problem with the attorney and I would say the majority of those complaints are pretty much unfounded, at least it doesn't go to representation because a lot of times the defendant maybe doesn't like the advice the attorney is giving them and maybe thinks the case should proceed to trial or there is a

difference of opinion on how to handle the defendant's case, but very seldom, I think, is there really a situation where the attorney has just ignored a witness of the client or ignored doing something the client wanted to be done, or an investigation or research in the case. I don't think I have ever changed counsel on that basis. I think occasionally there may be a lack of communication where the client has said that the attorney won't return my calls, but once they get to court it is usually because the attorney still doesn't have the information to relay to the client or they don't have anything additional to add. By the time they get to court the client has usually worked things out with the attorney. If I do change an attorney I think it is because sometimes the client doesn't care what the attorney says. They don't want to believe it even though a second attorney would tell them the same thing.

- 196 Chair Ellis One issue we had in some of the other communities is late identification of conflict and it may be, in a county as close knit as this one, that conflicts are pretty easy to know about and you identify them up front. Do you have that issue?
- 200 Judge Nelson Once in awhile. I think the attorneys are really good about catching this up front and actually they can speak to that as well. I think we are catching them on the whole, pretty much, within a week or two of the appointment. Even at arraignments I know the defense attorneys are asking prosecutors about potential witnesses who are involved, so they can see if they do have a conflict. Sometimes, even before there is an arraignment, they are saying that they have represented a witness before so they can't do this case. I don't that think its a problem. Every once in awhile maybe a late witness will come up and then the lawyer will say that they can't represent the defendant because they have this relationship with the potential witness. I don't see it as a problem.
- 213 Chair Ellis From our point of view, where this is a problem, it is a big expense item because lawyers get part way into a case and then withdraw and substitution is a costly thing.
- 219 Judge Nelson I also think that our court staff are looking through to try and determine if there are conflicts by looking through OJIN and our records to see if this person was represented by somebody else before so we should appoint that person. Or I think we will go back and look and see if there were co-defendants involved and see if there is a connection. I think even in our court management we are trying to pick those up. I know we can't get them all and there are occasions that we have a defendant in a case and I will get an indication from the staff not to appoint this attorney or these two attorneys, because they have some involvement with somebody else in the case. I think we are catching most of that.
- 233 Chair Ellis How are assignments made? What I am interested in is are lawyers being matched by their skill and experience level to the significance and difficulty of the case, or is it just rotational? How is that done?
- 238 Judge Nelson I don't know how they work that out among the consortia, you know who takes what cases, but I think all of our attorneys who do indigent cases here can do just about any type of case that comes up whether it is a Measure 11, multiple sex abuse case, or a DUII case or a criminal trespass in the second degree. I think that all of our six indigent providers are competent to handle any of those cases.
- 245 Chair Ellis I'm sorry I didn't mean to interrupt.
- 246 Judge Nelson That is alright. It is a lot easier for me to know what you want to hear about, so if you have questions please ask them.
- 248 Chair Ellis One other area that we are always interested in is whether the various components of the criminal justice system are communicating effectively with each other, and how the defense piece of that is being handled. Could you talk a little about the relationship between the

prosecution, the police, the courts, defense, corrections and victims? Is there a coordinating council here? Is there a regular way that the components communicate?

- 257 Judge Nelson We do have the Public Safety Coordinating Council. We do have defense attorney involvement and the DA and both the judges attend those meetings. Community corrections is sometimes one of the participants. I think we have some diverse views about what should be happening or not happening.
- 263 Chair Ellis Who appears at those for the defense side?
- 263 Judge Nelson I believe Mary Ann Murk. I think probably there are occasions when defense lawyers and prosecutors are unhappy with each other for various reasons, but I think on the whole those issues get worked out. There may be some hard feelings for a few days but I think they realize, on both sides, that they need to be able to cooperate a little bit, so we can be able to get some of these cases resolved and have a discussion back and forth. I think that is inevitable. There is an issue going through county agencies right now. I think it is something that will be resolved as far as indigent defense is concerned. I am always willing to have either prosecutors or defense attorneys come in if they have concerns about docketing issues that are going on. I know our trial court administrator has an open door.
- 285 Chair Ellis In some communities we have had judges testify that there was a problem with some attorneys communicating and being available. How is that working here?
- 291 Judge Nelson I am not sure what you are referring to. From the court's standpoint when you get an attorney....
- 292 Chair Ellis Right, the attorney has missed court appearances?
- 293 Judge Nelson Very seldom. I don't think that has been a concern, at least on my part. Occasionally somebody may be late from the DA's office or a defense attorney may be late. Once in a great while a court appearance may be missed but usually there is a reason for it.
- 297 Chair Ellis But no systemic problems?
- 298 Judge Nelson Not that I have seen.
- 302 Chair Ellis This is a delicate subject and I will just put it out there. It is always a difficult one for judges to comment on but do you believe that the cases that are being taken to trial, are ones that should have been taken to trial, or conversely, do you think the cases that are plead are ones that should have been plead? What I am trying to get at is whether you think there is appropriate professional judgment being exercised by the defense counsel in that area.
- 312 Judge Nelson Well, certainly I think defense counsel do a good job of telling their clients whether they think they should go to trial or not. I have seen cases on both sides where I wondered why the prosecutor is pursuing the case, and I have seen cases where I wondered why the defendant didn't take the offer that was made. Sometimes you have a client that says I don't care what the offer is, I didn't do it, and I want to go trial, even though things are stacked against them. Sometimes you have a case where the prosecutor expects that a witness is going to testify one way and they come up with a whole different version or not as strong as what they thought. I think that is always part of the system. But I think generally, from my standpoint, all the cases that have been tried in front of me are cases where there were legitimate issues, and it is up to a jury to sort it out. In a lot of those I am glad I don't have to sort it out.
- 331 Chair Ellis You don't feel that there is a systemic issue?

- 332 Judge Nelson I don't think so and I think you will always have defendants that will have -- call it buyer's remorse of whatever. They will come back on a probation violation and they are looking at going to prison, because it is their third time with a probation violation and they are looking at a longer sanction, and they will say 'Well, I should never have taken that deal in the first place. I should have tried it in the first place.'" I don't think that happens very often.
- 341 Chair Ellis One of the things that the report comments on, and I would be interested in your own observations, is whether six providers is sufficient, and whether we are able to attract lawyers interested in doing indigent defense in the area. What is your observation?
- 347 Judge Nelson I don't want to speak for providers, because I know some of them rely on the business and need to make a living at it, and I think you need to ask them. I don't think that they have enough, to be honest with you. When I see some of these cases going through and there has been a lot of time and research doing a motion to suppress, or they have a difficult client to deal with. I just don't see how they do it. I see these dependency cases, and in this county we take our juvenile cases very seriously, and I hear that counsel representing parents or children in other counties are getting more than we are here, and I know there is the same level of representation and work on those cases and maybe more being done here than in other counties....
- 367 Chair Ellis You think we are understaffed?
- 368 Judge Nelson I think it would be a lot better for us if we had more people to spread that work around, but again that goes to paying them more money. We have six experienced, competent people here doing that defense and if you spread it around but provided the same standard of living and same income that they are receiving now but without having the same number of cases, I think that would be better for everybody.
- 374 Chair Ellis Do you think the caseloads are pushing the limit?
- 375 Judge Nelson You will have to talk with them. Sometimes I wonder how they can keep up with it, but I don't know if there is a set standard or not. They are all busy and they all work hard with the cases. I suspect that sometimes they probably are overwhelmed because of the number of cases and appearances that they have.
- 382 J. Potter Besides getting a snapshot of what is actually going on, we also like to try and look at what the future holds, and in this county, you are going to get another judge. The district attorney tells us that there may be another DA in his future. What will that do to indigent defense? How will it impact indigent defense when there are three judges here? Will docketing practices be adjusted? Will there be more demands on the defense lawyers?
- 390 Judge Nelson Well, I am hoping it will be easier on everybody because now we are doing what we call early resolution conferences. It is usually the first appearance after arraignment where we have people come in with their clients and we are hoping that we will get their cases settled. Sometimes it may be the first time the client bothers to show up and make contact with the attorney. We have them come in, and we are doing four or five now, usually on a Monday or Friday, in which each attorney has an hour and fifteen minute time slot. What we have to work on is spreading this out so that we are doing two or three in each time slot. Then we will at least have more time slots available to do those ERCs and more flexibility so we don't have to set them over. I have already indicated to staff who are here, our trial court administrator and our lead docket person, that we are not expecting to speed cases up but I think maybe we can sustain the level that we are at. If we get the same number of cases but we start setting them out longer for first appearances, ERCs or trials, you might save a little bit now but you are still going to have the same number of cases coming up on deadlines to get done. I am hopeful that everybody is going to find it easier.

- 419 J. Potter And you have the courthouse remodel and a third judge coming on, all scheduled for the next six months, the next year. I saw a diagram of the courthouse when I was there.
- 421 Judge Nelson The county has committed, at least initially, that they would have a third courtroom up in the courthouse by January, and I am not sure it is going to be by January, but I think the latest they said was March.
- 429 Chair Ellis Did you get a chance to see the preliminary report.
- 430 Judge Nelson I did.
- 431 Chair Ellis I would be interested in your comment, on point no. 4, on page 16, about the participation of defense lawyers in early disposition programs and specialty court programs and whether the description is accurate and what your thoughts are.
- 437 Judge Nelson I can remember when we first started developing this early disposition program we had a conversation where we had everyone together in our jury room and we were talking to somebody from Lane County who was involved in the early disposition program there. I don't know how far back it goes, but I think it was before Peter's time and I was told I could talk with somebody about whether they could pay for an indigent provider if needed, and the sense I got was that they really weren't interested, that it was just way too cheap. I really didn't see where that was going to work. I don't think there was anybody willing to work for that price. And I think there was a hesitancy about meeting with somebody on a real quick basis, maybe having a chance to look at the police report, and telling them to plead guilty or not. So, what we did is we developed our own program without defense counsel and I do those cases now and try to make real sure that somebody knows what they are getting into, knows the consequences, make sure that they are going to waive their right to counsel. It takes more time on our part, but on the other hand we have people who have come over from your area, from the Portland or Salem or the valley area, or come over from Bend and come over for the weekend and do something to get charged with a crime, and they don't want to make a second trip back. They are interested in getting their case resolved. (Inaudible) If they are looking to get the case resolved and if they don't have to make a trip back, that is probably a good incentive for them. It would be nice to have an attorney there to look at the police report, and say "Well wait a minute, you shouldn't have been stopped in the first place." I think you should probably talk to the indigent providers and see what they think about this.
- 491 Chair Ellis If you have a complaint about the conduct of one of the providers, and maybe you have never had a complaint, but if you did, what is the process for handling that if you felt there was something really not right about the conduct, be it a quality issue or an ethical issue or whatever? Would you take it just to the lawyer him or herself? Would you think that the consortium is a place for you to go?
- 505 Judge Nelson I have had that come up but only on a few occasions, such as somebody needing set-over after set-over for one period of time. One time I think there was somebody who got a bunch of complaints from people who were not able to contact their attorney after they had been court-appointed. I think I took them back to my office, or whatever and just said "What is going on here?" Is there something going on that we need to be aware of? We dealt with it that way. Hopefully, I would never have to bring it up in court in front of a bunch of other people.
- 519 Chair Ellis We always like to ask -- any suggestions you have about how we can do our job better? You have already indicated that we need to spend more money.
- 524 Judge Nelson You need to pay your providers here more money. I think that is about as much as I can say. There were some problems when it went from judges approving expenses -- investigation expenses-- when it seemed like it was taking a long time for that to get done. I think you have

improved that procedure a lot, because I am not hearing those complaints any more. Whatever you have done, keep doing it. It has helped us on our end.

- 537 Chair Ellis I should know, but how long have been you doing this?
- 538 Judge Nelson This is my fourteenth year.
- 539 Chair Ellis So you saw it in the old days, the pre-commission days?
- 540 Judge Nelson I did. There were some other things too and I don't remember whether Peter and John were here when I talked about the better things that I have seen or not, but I don't have my list for that. I think there are some other improvements that could be made. I wasn't anticipating that question.
- 549 Chair Ellis Well, you are not going to hurt our feelings, if you have a long list of things.
- 550 Judge Nelson Other than you needed an early disposition program, and I don't remember who I talked to down there in Salem, but it was kind of like don't bother us, we have got bigger things to worry about. That was probably before you guys got the Commission.
- 557 Chair Ellis Any other questions for Judge Nelson? Thank you very much.
- 558 Judge Nelson One other thing that I just wanted to mention, there was a discussion about different judges doing things differently. I don't know how you avoid that. I have got my way of doing things and I know Judge Brownhill has her way of doing things. What is interesting is the state has been pretty good about sending (inaudible) through, and believe me they have their ways of doing things and they are not going to change them.
- 566 Chair Ellis They tend to be a little set in their ways.
- 568 Judge Nelson We do have some uniform things we do. We were one of the first courts, I think we were the second one in the state, to use the uniform judgment, which in my view was kind of a hard thing to transition to, and I still don't think it is the easiest thing in the world to read, but it has worked well. We have central docketing. We are told there is going to be a uniform probation violation judgment. I am not sure when that is coming out of Salem. Every time we go to a meeting they keep talking about it, so I think we use a lot of the same procedures. We have some different views in our court on how cases should be resolved. I don't know how you solve that. I think each judge has to deal with the case in front of him or her. I know different counties have different ways of doing things. You say well what do you usually do, and they'll say "Well, Judge so and so does it this way, or Judge somebody else does it the other way." I don't know if that was a criticism that was part of that report, or just one of the concerns that you had. There are some things that we do that are uniform. I don't know if that answered everybody's questions or not.
- 606 Chair Ellis Well we have two more Commissioners, so we will start over again. Thank you, Judge. Judge Brownhill.
- 610 Judge Brownhill I have some handouts. Is it okay if I just pass them around? I am really disappointed that Shaun McCrea is not here, because I used to baby-sit her when she was a child, and I really wanted to say hi.
- 629 J. Potter I will pass that along to her.
- 610 Judge Brownhill Alright, I wanted to address a couple of things today. One is the rate of pay in dependency cases, and the other is what Josh Marquis likes to refer to as our rocket docket. So, let me start with the dependency cases. Our court does take juvenile dependency cases very

seriously. We spend a lot of time on those cases and our indigent providers do also. They not only attend the hearings that we have in court, but they go to meetings, team decision meetings, family decision meetings for which they are not paid.

- 646 Chair Ellis Do all the providers do adult criminal and juvenile dependency and juvenile delinquency?
- 649 Judge Brownhill. No. I have some charts here. Chart 1 shows you how seriously we do take them. Juvenile petitions that were filed from January, 2005 to March, 2006 -- we had 82 petitions -- and we resolved 100 percent of those within a 60-day time limit, which is required by law. For our first permanency hearings, from January, 2005 to March, 2006, we had 33 and they were all resolved within the 425 days that are required.
- 662 Chair Ellis Let me try and get my bearings here. Do you and Judge Nelson both handle those cases, or is one of you a specialist in the juvenile area?
- 667 Judge Brownhill We split almost all of the cases -- all the criminal, civil. The only exception would be SEDs. He handles all of those. I don't know how. But, other than that, 50 percent.
- 676 Chair Ellis Okay.
- 676 Judge Brownhill So we had the experience several years ago of the Juvenile Rights Project coming to Clatsop County and they took on representation of juveniles in dependency cases. They eventually pulled out of Clatsop, and one reason was that they weren't paid as much for cases in Clatsop County as they are paid in Multnomah County so they couldn't afford to stay. If you look at the case values on Chart 4, these are 2003 – 2005, but I think they remain very much the same -- I am not sure about that -- but you can see how our defense lawyers are paid less per case than they are paid in many other places around the state. Mary Ann told me that in her negotiations she was told there is a geographic differential and that is why Clatsop is paid less. I think maybe what that means is we are paid less than any place in the State of Oregon, because if you look at these numbers Curry County received more; Lane County; Juvenile Rights Project and Multnomah Defenders are both in the Portland area; Madras; Crabtree and Rahmsdorff are from Deschutes County, I believe. They are all paid more and that is just not fair. Our lawyers work really, really hard and they are really good at what they do. If you look at Chart 3, you can also see how much time they are spending on our juvenile dependency cases. We aspire to the standards set by the National Counsel of Juvenile and Family Court Judges, and their standard is 60 minutes for a shelter hearing. I haven't figured out how they can fix it, but we are spending quite a bit of time on those. Our adjudication hearings take a very long time. Permanency hearings take a long time and all the lawyers are there for all of these hearings. In addition, they are there for settlement conferences. Settlement conferences are mandatory in dependency cases and they have to come –
- 727 Chair Ellis You don't have a spot for that?
- 728 Judge Brownhill I don't know how long those take. On Chart 5 it just shows how our hearing times compare to some of the hearing times in other counties. We just want to show you that we are spending a lot of time on these cases. That is my pitch for paying these lawyers more. One of our defense providers told me that our children are worth the same as the children in Multnomah County and that is absolutely true. I tried this argument on this person, Billy Strehlow.
- 746 B. Strehlow That would be me.
- 746 Chair Ellis Let me just comment. There are lots of pockets of disparity still there and that is just a fact that has occurred over the 16 years before the Commission got formed. The SCA group was doing the very best they could to deal with the different providers, and it became kind of a historical negotiation issue. We have tried, and are in the course of trying, to both make the

contracting process more transparent and visible, and to adjust those situations where there are disparities that don't have a good basis. This may not happen all at once because our resources are not infinite, but we are very sympathetic to what you are saying, and we appreciate your bringing it to our attention.

776 J. Potter Judge, as we talked about when we were meeting with you, it is good to make the argument to the commission staff, but making the argument to your local legislators is really helpful as well. [End of tape]

**TAPE 1; SIDE B**

002 Judge Brownhill The other thing I wanted to mention is our rocket docket. I have already shown you that we really do move cases fast. (Inaudible) We do move cases. There is no question about that. Our other cases -- I am not convinced that we move our other cases so quickly that lawyers don't have time to prepare. I will tell you that I don't always grant motions to continue and I know that that is a bone of contention with the lawyers, but I do consider the motion carefully and I look at every one of them. I really work toward the 100 percent standard of timeliness position. We have 80 percent, and the 90 percent and the 100 percent standards are what we like to shoot for. I take those seriously, but I don't think that we are moving cases so fast that attorneys can't prepare. I did have some numbers the trial court administrator gave me from 2005. On felony cases we're ranked number six in the state for the timeliness with which we resolve cases.

020 Chair Ellis Six out of 36?

020 Judge Brownhill Six out of 27. Twenty-seven judicial districts and then on our misdemeanors we were number four, so we are up there but that is one year, one year to resolve a felony case or a misdemeanor case, so it seems to me that isn't a whole lot of time. Ninety-eight of the misdemeanors we were only at eleven, not 27. They haven't convinced me yet that we are working so fast that they can't prepare their cases, but we do move our cases. I am hopeful, when we get our third judge, on January 2, that we can slow down and that we won't be working at the same pace that we have been. I will tell you that in 2002-2003, we revised our docketing practice and we had a committee, with bar representatives, including Kris Kaino from the consortium who planned, for about a year, for these docketing changes. I think that has been a positive change. We started the new docket procedures on October 1, 2003. My impression is that it slowed things down somewhat and it has given the attorneys more time, at least to prepare for those cases that are going to trial, because we are setting all of our cases for a settlement conference now, and so we will resolve more of them. We used to try more cases. In 1999 we had 99 jury trials, and that is a lot of jury trials for a little county with two judges. I don't know what our number was last year, but I would guess it is not more than a third of that. I try a case maybe once every couple months and we were doing several a month.

042 Chair Ellis What has changed?

043 Judge Brownhill I think the docketing system has changed. We were pushing cases; we were setting all cases for trial at arraignment before, and giving attorneys until docket call to resolve them. Now we set them for settlement conferences and we are screening out a lot of cases at the settlement conference. They are resolving there, so we are setting fewer for trial. We still give the attorneys until docket call, if they have a good reason for waiting that long, to resolve the case. I think that has been positive.

052 Chair Ellis You had the 99 trials in 1999, is that civil and criminal?

053 Judge Brownhill All jury trials, but we try mostly criminal cases. On these statewide rankings, our domestic relations were ranked 19 out of 27. We have an aggressive district attorney.

- 058 Chair Ellis We know. What is your observation of representation from providers that we are funding?
- 060 Judge Brownhill I think it is excellent. I think they do a real good job.
- 062 Chair Ellis Do you think the idea of all of them being generalists, handling adult criminal, juvenile dependency, juvenile delinquency, do you favor that? Do you think there ought to be some degree of specialization?
- 067 Judge Brownhill In a county this size it works well to have them do everything. At least these six are able to handle any kind of case. I don't see that we need specialization.
- 071 Chair Ellis Are younger lawyers coming into the system? Are we looking at a graying and aging group of six, and not a lot of new talent coming in?
- 072 Judge Brownhill I haven't seen a lot of new talent. My husband and I went to the U of O Law School to do a recruitment, and we had a lot of kids who are interested but they did express concern about coming here and starting out with no support, no mentor, so we didn't really get anybody except perhaps one young man who was raised just up river. He was studying ocean law and came here for the summer, watched some suppression hearings in criminal cases, and now he wants to come back when he finishes law school. He may come in, but the other young lawyers who have moved to town aren't doing criminal law. My concern is that Ty Stettles may change careers, Bob Haller may be elected our judge, some other changes may occur, and if we have less than these six we can't handle the load.
- 086 Chair Ellis Are the six that are doing the work, are they pretty much doing 100 percent indigent work.
- 088 Judge Brownhill I think you would have to ask them, but I know Dawn McIntosh has a very active domestic relations practice. John Orr has an active domestic relations practice. Some of them do retained criminal cases. I think they could tell you better what the percentage is.
- 095 Chair Ellis Do you have a view on whether the caseloads are too high? In other words, the number of cases the defense providers are handling is really more than should?
- 099 Judge Brownhill My opinion is that they should be paid more per case so that they could reduce it. Some of them, especially Mary Ann Murk and Kris Kaino seem like they have a whole of lot of cases but I think they need to have that many to earn the money.
- 103 Chair Ellis Economically.
- 104 Judge Brownhill Right, for economic reasons. I think they are able to handle it, but I think they would be happier if they had fewer.
- 105 Chair Ellis Other questions for Judge Brownhill?
- 106 J. Potter I am concerned about your comment that Mr. Haller or Mr. Settles over there may well change careers and that would cut your attorneys by one-third. Do I also understand you to say that there is no one else in the county that you would be able to go tap to do this work?
- 111 Judge Brownhill We have some other lawyers in the county who do the work at the rate of \$40 an hour, but I don't know of anybody who is willing to go on as a contract attorney and do more cases. There may be some because I haven't actually gone out and talked to them, but I am not aware of anybody right now.
- 115 J. Potter Is that a money issue in your judgment?

- 116 Judge Brownhill I don't know. The two that I am thinking of who live here and do some criminal defense work, are Stacy Rodriquez and Jerry Widawski. I don't know if it is financial for them. Stacy has two babies at home so I would think part of it is personal.
- 120 Chair Ellis Any other questions? Thank you. We appreciate your time.
- 123 J. Potter Thank you judge.
- 124 Chair Ellis We would be happy to hear from anybody who wants to speak, but obviously Mary Ann whenever you are ready we would like to hear from you.
- 127 M. Murk I didn't know if some of the people who are not attorneys in the consortium, if they get stuck here all day....
- 129 Chair Ellis Good afternoon.
- 130 R. Hendricks I am a parole and probation officer with the Oregon Youth Authority here in Clatsop County. I didn't bring any written statements because I just found out at the last minute that this was going on, so I apologize for that, but I just wanted to come and say that I am very impressed with the people who represent their clients from the defense bar here. When youth come to the Oregon Youth Authority, they are normally already through their court process and through the adjudication process. But especially on dependencies, because the Oregon Youth Authority will also have a youth that is with DHS for one reason or another, these defense attorneys do attend a lot of additional meetings like Judge Brownhill and Judge Nelson alluded to. They go to CRB hearings. They go to a lot of case reviews at programs and stuff like that. They are always available. They are easy to contact. They always return phone calls. I think they are very competent and do a very good job. I am really proud of them.
- 145 Chair Ellis Tell us a little more how the CRB process is handled here. What we have heard indicates that it varies a lot around the state.
- 148 R. Hendricks DHS has cases and the Oregon Youth Authority has cases, and when any youth is placed in substitute care the case has to be reviewed under the timelines either by DHS or OYA. Our timelines are a little tighter than DHS's. For example, we have to have the CRB in four months, whereas DHS reviews cases in six months. The reason for that is that in the Oregon Youth Authority we have a tendency to place kids quickly, so we have shorted the timeframe. Basically for any kid placed in sub-care the attorney is notified, and they do attend those hearings on a regular basis, and this could be months after the disposition.
- 159 Chair Ellis Right.
- 160 R. Hendricks It doesn't matter if its DHS or OYA when I have a youth on my caseload. He could have been in sub-care for eight months, for example, and we are doing a review. We do additional CRBs four months and then every six months thereafter. I can also ask the CRB coordinator for a special review for particular kids. All of the attorneys attend those hearings. I have heard a lot of times, like in Columbia County, for example, I was talking to a parole officer last week, and he was saying their defense representation of kids that are placed in the Oregon Youth Authority automatically stops after the disposition over in Columbia. I don't know exactly how that all works out, the difference of how long it goes after the disposition. How does the juvenile have representation from the attorney after the disposition hearing is over? The PO in Columbia County was telling me it was very difficult to get in touch with an attorney after the disposition in Columbia County. It was kind of like hands off. The disposition was over and that is the end of it. I don't experience that here in Clatsop County. I think that is because of the attorneys themselves and their commitment to the juvenile, because we take juvenile cases here in Clatsop County very seriously. I am really impressed with that.

- 184 Chair Ellis I don't know the answer to your question, but we will try and find out.
- 185 R. Hendricks The point I was trying to make is that the attorneys are dedicated and they do a really good job. And what Judge Brownhill alluded to is that they don't get compensated for a lot of the work they actually do. I don't know a lot of what they actually get paid for, at what point and what the rates and the time frames and that kind of stuff are, but I can honestly tell you the attorneys here for the defense, especially in my experience with the juveniles, it just goes on and on and on, and I'm sure at some point they are probably going to get compensated for it.
- 197 Chair Ellis Thank you. Any questions?
- 198 R. Hendricks Thank you.
- 200 Chair Ellis Anyone else who has some thoughts they want to share before Mary Ann steps forward?
- 205 M. Murk I'm not sure what you want me to tell you.
- 206 Chair Ellis Start by telling us a little bit about your consortium and who is involved, how it works.
- 207 M. Murk My consortium is two people consisting of myself and Ms. McIntosh. I put in a bid and took over the contract in 2000 or 2001, and at that time there was just a contract of one person. Over the course of the next two years I took some significant amounts of overages of about \$70,000 a year in terms of the caseloads, so Ms. McIntosh was the chief deputy at the district attorney's office at the time and was trying to get out of the DA's office. I kind of stole her from the DA's office. She came on board during my second round of contract negotiations in 2003 and has been with me ever since. Obviously, at the time that I took her on, I was literally taking double what I contracted for. I think in trying to alleviate some of that stress and take some of the overages from the other consortium she was able to work under my contract and I pay her about \$7,500 a month.
- 230 Chair Ellis How do you come to that? Do you keep track of who is getting how much? Is it time or caseload?
- 232 M. Murk We literally just split it based on contract value. I am not interested in running somebody into the ground. I want to pay her what I get paid under the contract to do those cases, to keep myself from working 90-hour work-weeks. It is important that she be compensated at least at the same rate that I am being compensated.
- 239 Chair Ellis Kind of an interesting relationship because you not partners in a partnership. She is not an employee of yours. You are both members of a consortium, but you are the front practitioner. If it works, it works.
- 246 M. Murk The other consortium here operates the same way. While they contract under a specific name, they have one person who administers it and everybody gets paid the case value. Every month we go through a process of collecting data which my legal assistant inputs. We send all of those figures to Mr. Strehlow and within our own consortium we sometimes have to make adjustments. If we have a conflict we try to resolve it within our own consortium before we involve the other one in order that indigent defense will not incur the extra expense. If she has to sub in, say she subs in August, she subs in September 3, we just make that adjustment within our own consortium.
- 261 Chair Ellis What percent of your practice is indigent defense.
- 262 M. Murk My practice and I tend to go back and forth. I don't tend to like domestic relations for long. I tend to take probably 10 to 12 civil commitment cases a year. I do some privately retained

criminal work and I am also on the Municipal Court Indigent Defense contract here. So I would guess that probably 90 percent of my practice is indigent defense.

- 270 Chair Ellis Including Municipal Court?
- 270 M. Murk That is indigent defense, so I just think of it as indigent defense.
- 272 Chair Ellis Your colleague, what percent of her work?
- 273 M. Murk I know Ms. McIntosh has a lot heavier a domestic caseload than I have. I would suspect that probably 25 to 30 percent of her caseload is domestic relations, privately retained.
- 276 Chair Ellis So she is 65 to 70 percent. I certainly don't mean to get into sensitive issues, but it strikes me as unusual that there are two separate consortiums in a smaller community like this. Is that by design or by historical accident?
- 281 M. Murk I talked about that with Mr. Ozanne really briefly. I think some of that is by historical accident. There was a consortium here when I came here (inaudible). I decided I wanted to go out into my own practice, so I bid and took over the contract. It was initially granted to a Portland firm. So I think that is some of that historical artifact. This used to be essentially a satellite office of a Portland firm. That firm didn't bid and I ended up taking over that contract.
- 295 J. Potter Was that the Juvenile Rights Project that you referred to earlier?
- 295 M. Murk No that was Welch, Chipman
- 297 Chair Ellis Your old firm.
- 297 M. Murk So there is that historical artifact. We have had some discussion surrounding the issue of do we need two consortia. At some point in time there was a lot of discussion about questions relating to anti-trust, and I had actually been told early on in indigent defense, because I came from Curry County where we had some other providers outside the Public Defender's Office, that there was a great deal of concern surrounding whether or not having one contractor in a county would be a violation of anti-trust laws. I think a lot of providers are also under the impression that indigent defense, historically, has wanted at least two providers in one county for whatever reason.
- 319 Chair Ellis Actually, there is more than one provider in most communities. We don't want to get ourselves so dependent on a single source that we have no flexibility. How do you go about allocating cases between you and Dawn?
- 326 M. Murk Clatsop County is a really small county and we spend a lot of time with one another. Those types of issues are handled pretty informally, but there is actually some process behind it. Mr. Kaino, of course, in January every year assigns us arraignment dates. So we have 1:15 arraignments for all in-custody people and every attorney is assigned arraignment dates for the year. So on that day if you are the custody attorney you would go and pick those up. The court has a way of allocating out-of-custodies and dependency cases, because they essentially go through and say, okay this attorney has this weight. So there is actually a process by which they go through and assign based on the weight of the contract. When you come up next on the list then that is the case that you get whether it is a Ballot Measure 11 case or a trespass C misdemeanor. We meet actually once a week formally and we talk about it. How is your consortium doing? How are everybody's figures? There is a lot informal movement. We'll call and say well Mary Ann is over this month so we want to go and assign her in-custody date this Thursday to John, because he is under this month. So, there is movement based on what we have decided at the end of every month, where people are at on the

contract. Within our consortium Ms. McIntosh and I will look at our numbers and say well Mary Ann is over this month, Ms. McIntosh is down, I'm going to call the court and we are going to tell them don't give me anymore out-of-custodies, and give them all to Dawn. There are a lot of informal relationships that are developed between our two consortia and the court and each other.

356 Chair Ellis How long have you been a lawyer?

357 M. Murk Since '97.

357 Chair Ellis So a fair number of years and Ms. McIntosh, what is her experience?

358 M. Murk Her bar number if '94.

361 Chair Ellis You have read the draft report. What is your observation of the comment there that it is difficult to find young, new lawyers interested in this field.

365 M. Murk I have a lot of thoughts on that, but I think one of the issues is that most of the attorneys that go to law school, anymore, this is not 1975 where you went to law school and you paid \$1,000 for tuition a year. This is a point in time when most of the attorneys are graduating from law school with debts of over \$100,000. Lawyers, in order to pay back their government debt are realistically not going to be doing indigent defense, and this is an issue that, at some point in time, indigent defense in Oregon is going to have to address. The reality is that I am fortunate. I am able to do indigent defense because I was able to get through law school with significantly less debt than most of the people I graduated with. That has to do with the fact that I worked pretty much when I was in law school and scholarships helped. The reality is you have an important with these kids coming out of law school that is largely tied to the amount of debt they are going to be carrying. Within this county, I think there are some issues with recruitment. I talked with one girl who came out here recently and she simply doesn't want to do criminal law. I think that is pretty typical of people coming out of law school. Criminal law is not, in their mind, a glamorous profession, and when they do think of criminal law they are affected by the images of TV and they think I want to be the good guy in the white suit, I want to be the prosecutor. Additionally, the work itself is very hard. You have people you are dealing with on a daily basis who are not the easiest people to deal with. I think there are a lot of important factors Within our own county one of the issues that arises is frankly we don't have – there are a couple of attorneys here that I actually talked to about doing indigent defense work and the reality is I don't have the time or patience or money to train them. There are standards that have to be met in order for someone to qualify under the indigent defense standards, and when you are working and chasing a caseload that is over 300 clients a year, you are not going to be able to put in eight hours one week, training somebody when you are not getting paid for it. I think there is an issue of how you train people within the context of not a PD's office, because that is where most people start is within a PD office and they can get their training and their mentoring there. Not a lot of attorneys will probably be moving to Clatsop County. I think that is a pretty fair statement. All those issues are from the perspective of what do I think that we as a group are going to be out there. I think a lot the comments you have heard from the judges are pretty accurate. The reality is that most of the attorneys here have to make their bills. We are not compensated in such a way that we could go out and shuffle off pieces of our caseload to other people, because this is the work that we do. We have done it our entire career and we are not going to be learning personal injury law to make that money. I think if you want us to improve you are going to have to make the job more attractive, and I think one of the ways of making the job more attractive is the compensation piece.

428 Chair Ellis Is your contract on a unit basis?

431 M. Murk Yes.

- 433 Chair Ellis What are you able to do in terms of keeping current on CLEs?
- 435 M. Murk I am not sure I understand that question?
- 435 Chair Ellis Are you active in OCDLA? Do you go to their conferences?
- 437 M. Murk I do some OCDLA CLEs. I do some Dom Rel CLEs because they tend to be a little easier to get to. For example, I go to the juvenile termination that is held down in Eugene. That is coming up in October. I take some books because it is a long drive to a lot of the conferences. I take some books, I do some conferences, and I do some domestic relation conferences as well.
- 450 Chair Ellis From your point of view, as a provider here, any suggestions how we, or OPDS, can do our job better? I don't want to turn it into a grip session, but do you feel like the communication with OPDS staff is good?
- 461 M. Murk We like our analyst very much. We think Billy does a good job and we certainly like him a lot better than the analyst that we had before. Billy is very responsive; he is very good about doing things in a timely matter. We don't have a lot of the issues that we had with our prior analyst.
- 469 Chair Ellis How about the extraordinary expense issue, is that working satisfactorily?
- 471 M. Murk The issue of whether or not we are able to get it in a timely matter, I don't have any significant issues with the way that we are getting it. I think early on, when the transition occurred that we had a lot of trouble getting funds approved. Anymore, I believe we get funds approved in a couple of days. We get it done very quickly and do it by fax.
- 479 Chair Ellis There was a passage in the report on early disposition and a suggestion that defense lawyers weren't as active in that.
- 482 M. Murk We don't participate in that at all.
- 484 Chair Ellis Why?
- 484 M. Murk I think that has to do with the manner in which the early disposition program is set up. Frankly, I and I think everybody in the defense bar believes, that the way the current early disposition program is set up would require us to engage in unethical practice of law, from the standpoint of we do not have the ability to investigate or provide adequate representation, so people feel very uncomfortable with that process. The other issue with it is, what the competition is doing, we were told the defense lawyers would be sitting in court for three hours on Monday afternoon for \$40 an hour. One Hundred-Twenty dollars is three hours that none us have with regard to caseload. The reality is there is a time factor, there is a money factor, and the way that our current early disposition program is set up, is simply not in terms of engaging under the rules guide.
- 505 Chair Ellis Any other comments or questions?
- 507 J. Potter If you could change the system, you are in charge, the defense bar system, the defense delivery system, what would you do in this county? Would you keep it the same or would you amend it to some other system?
- 511 M. Murk You mean just within our own county?
- 512 J. Potter This county.

- 512 M. Murk I think it is very functional. I think it is one of the better defense bars in the state. I think in our county that we function probably better than most providers, in terms of how we administer things. There is just not a lot of paper that explains how we do that. I know we have talked on and off about whether we or not we need to create a (inaudible) organization, I think it is something that we continue to explore, but at this juncture I believe that we function extremely well.
- 527 J. Potter So you would leave it exactly the way it is? Two consortiums, two people in one and four in another, and then there is apparently some outside \$40 an hour people that take some work.
- 530 M. Murk I think the \$40 an hour they do that (inaudible). I know that one of them might be interested in doing some sub-contracting under one of the consortia, but she, at this juncture, is not doing full-time law practice. The other one is, (inaudible). We do have a gentleman, out in Eastern Oregon, (inaudible), I think our process functions really pretty well. It is an odd relationship but the reality is we are communicating with each other probably five or six times a day just discussing cases, what we are doing, and do you have any ideas on this, so we function more as a unit than I think it appears on paper.
- 550 J. Potter I am not asking you to question at all the suggestion of change, but I am always curious, from the defenders point-of-view, what they would like to do. You are looking at folks that have some authority over changing things. This is an opportunity to say this is how I would change it, and what I am hearing is, it works in this county, the dynamics of this county, the demographics of this county. What you are doing works.
- 560 M. Murk I have had clerks and DA's show up on my doorstep. Come in on my day off and this really is a very small, close knit community.
- 566 C. Lazenby Can I ask just one question. You mentioned that you were really working on more cases than the contract, so it sounded like you had a heavy caseload. There was a suggestion early that if there was higher compensation per case, that your caseloads might go down. Is there a link there between compensation per cases?
- 575 M. Murk Yes.
- 576 C. Lazenby And how would that work?
- 575 M. Murk If there were higher compensation per case, we wouldn't have to carry as many cases. If you are getting paid \$210 for an dependency hearing, but in order to get that dependency review hearing ready, you have got to go to at least several hours of meeting, and then drive out, in my case, I have kids that are in Ontario, Oregon and that is over 20 or 30 hours, so in some cases we making less than minimum wage.
- 580 C. Lazenby So, the higher compensation would actually create more resources in the system, so that more lawyers could do the cases.
- 589 M. Murk Yes.
- 590 C. Lazenby So we would be able to attract more people.
- 591 M. Murk I know (inaudible).
- 592 Chair Ellis Could I get a show of hands of how many others that are we are going to hear from from Clatsop. My suggestion is why don't we go ahead and do that and then we will break for lunch afterwards.

- 601 K. Kaino Hi, I am Kris Kaino, and am on the other consortium. Myself and three other fellows make up consortium know as the Clatsop County Defenders Association.
- 605 Chair Ellis So it is a gender split?
- 606 K. Kaino It is.
- 606 Chair Ellis Now I understand.
- 608 K. Kaino If you have questions or things you want me to comment on, I am more than happy. I agree with everything that Mary Ann talked about. One of things, and I am sure when you folks come down, go around to different counties you hear from everybody that we want more money, we want more money. I am fairly certain of that. I do think when you look at Clatsop County and you compare, and I have looked at every contract in the state for indigent defense that we are probably one of the bottom two or three counties in the state for pay. It is hard for me to look at something, whether it is Deschutes, Baker, Coos, Curry County, you are paying significantly higher to those folks than you pay to us. I am sure when you go to Curry County or Coos County, they say, please pay us more money. I thought that indigent defense had a golden opportunity to equalize things, because I think last year was the first year that all the contracts were ending at one time.
- 630 Chair Ellis Part of this process I described earlier, we are trying to maximum the system better.
- 633 K. Kaino So all of the contracts came due at one point. I thought at that point, and I guess you could call them negotiations with indigent defense, my feeling is when we negotiate with indigent defense is “Here is what we are going to pay you, sign the contract or don’t sign the contract and we will get somebody else.” You end up signing the contract because you do that for a living and you are not going to go and try and find something else to do. And I think most of the people who practice in our county enjoy doing it and enjoy the work that they do, but it is just frustrating. I thought that indigent defense, at that point, could have said, “Okay, we are going to balance these contracts, they are all due to renew contracts now, Coos County maybe we’ll pay you” and I am just speaking hypothetically now and not going over specifics, but if we are paying \$500 on C felonies in Coos County, but we are paying \$400 in Clatsop County, we need to balance that and people are going to be paid \$450. I think there maybe are some extraordinary reasons why in certain counties you may pay a little more because it is harder to get somebody there, but by and large I would think that being paid in Clatsop County, Curry County, Coos County, any other counties, that it should be fairly equal and it is simply not. That is the frustrating thing, I think more for us. I think everybody in indigent defense is underpaid, but when you look at the group of indigent defense providers in Clatsop County, we are unpaid compared to most of your other contracts in the state, and significantly underpaid in my mind.
- 666 Chair Ellis I thought what Judge Brownhill stated was very interesting.
- 667 K. Kaino I have heard indigent defense say we are trying to balance those things, but when you guys go back to Salem and next year when we try to do our contract again, we are going to get the one or two dollar a case raise, I have a feeling, and say we can’t raise these other ones, but I will have to practice law for another 110 years before I am equal to these other counties that you are paying, at the rate that we have been increased. My negotiations -- Billy does a good job and I appreciate the job that he does. He is good to work and easy to work with, but I don’t know if I was joking with Billy or not. Actually I was serious. I said I will take Coos County, Curry County’s contract. I laid out about five contracts. We will take those amounts on any of ours, and of course we didn’t get that. That is the frustrating thing for us. I know you folks hear it all the time, indigent defense needs more money, we are underpaid and I

think overall statewide we are, but I think you have contracts within the state, and I think this is by far one of the worst.

- 694 Chair Ellis How does your group organize? Do you function as manager and the others are provided? How would you describe it?
- 699 K. Kaino I manage the contract and deal mostly with state, but we are a pretty closely knit group, the four of us, frankly all six of us that provide indigent defense, so I manage the contract but we meet, like Mary Ann said, probably at least a couple of three times a month pretty informally.
- 708 Chair Ellis Do each of you have a law practice in addition to the consortium work?
- 710 K. Kaino Yes, we are all sole practitioners. I probably, not probably, I do the most indigent defense work in our consortium and then I think John is second. My practice is probably 80 to 85 percent indigent defense and then it goes down. I am guessing -- they would have to answer specifically -- but I am guessing that Don is 50 to 60 percent of his practice is indigent defense.
- 720 Chair Ellis How do you handle case assignments? Is that your judgment?
- 722 K. Kaino No, the same thing that Mary Ann said. I just assign out days to start the year, I just basically take a calendar and we have 1:15 in-custody arraignments. You get those days as Mary Ann indicated, and you show up on those days. Out-of-custody is done by the court and they assign them out and have an idea of what percentage we get. We will go on a monthly basis and, say I am down, or John is down and he needs to get more cases. We are a small enough county that we can balance that pretty good and I think the court does a pretty good job if there are conflicts, they do a lot of that checking, and that works out pretty well. [End of tape.]

## **TAPE 2; SIDE A**

- 003 Chair Ellis Do you feel that six providers is in balance with the caseload demand, or do you think you need more?
- 004 K. Kaino I guess if you looked at a perfect world one or two more people help. It probably would. I think we do a good job and I don't think we need another provider, but I think we do get... Indigent defense is one of those things. I used to work down in Marion County for a number of years and I have been up here for about six or seven years, and all of the attorneys in these consortia have at least nine or ten years of experience or more than that. I do think that we do a pretty good job as far as providing indigent defense work.
- 013 Chair Ellis There is a passage in the report that describes the way you work out payment, on page 11, and it says: "based on the value of work at the end of their respective contracts." I am just curious; do you keep tabs on cases, case values, and just pay each other on that basis?
- 018 K. Kaino What we do in our contract, the way the state pays us is misdemeanors are this amount, Ballot Measure 11s, A felonies, I am sure you know those amounts. What we do is we just assign out 30 cases based on an overall average so we each get the same amount each month. We divide our checks with the percentage of work we do. I get the most money because I do the biggest percentage of cases and it goes down from there. And then what we do is, at the end of each month, when the statistics go to Billy, then we figure out whether we are over or under each month and we balance it that way. The cases are assigned out and it is basically just kind of a lottery of what you get. But over time, each month, it balances out. And if we do have to make adjustments we do that within our consortium, or between the two consortia.

- 031 Chair Ellis I want to ask you the same question we have asked others. This is your moment. Is there anything you want to suggest to us, other than the funding which we understand, about how we could do our job better, OPDS could do their job better?
- 033 K. Kaino I don't really have anything to add. The funding is an issue and I think there is a subcategory there. I think the system that we have now works a lot better as far as extraordinary expenses. I think we actually get them back within the same day, often times, that I send them in. The system that we have now works a lot better. I think the kinks had to be worked out of it a few years ago. But now it works very well and if there are any problems you can contact somebody right away. If something doesn't get approved for some reason at least you can call an analyst and they will explain what you need to do and you can send in more information. I think that works real well. I don't have anything else, other than more money, that needs to be changed dramatically.
- 046 Chair Ellis Other questions? Thanks Kris.
- 046 K. Kaino Thank you.
- 047 Chair Ellis Why don't we take a half an hour for lunch and we'll pick up again at 1:15.  
[Lunch break taken at 12:45]
- 050 Chair Ellis Are we ready to resume?
- 052 P. Ozanne Barnes, Georgia Gates, Director of the Juvenile Department, who John spoke with for an hour or so, would like to make some comments for us.
- 056 G. Gates I just wanted to start out by saying the Public Defense Services Commission has really helped me focus on what the services are in our county. Without this review, I had just been going along and not quite understanding the process, as far as the fact that we have two consortia and they are not combined. I was also very surprised in reading the report and talking to Peter and John when they visited Clatsop County about the discrepancies between the different counties, as far as the fees that we charge. We obviously need to look at two major issues of not being able to recruit public defenders in our county, and then maintaining them in the system. If we are at the bottom of the scale as far as pay is concerned, then that is a fairly easy connection to make. It would be difficult to recruit public defenders. One thing that you may not be aware of on the Commission, although I think there has been quite a bit of advertisement about it, is that this county is really changing economically.
- 073 Chair Ellis There was a big piece in the *Oregonian* about a month ago on that.
- 073 G. Gates Absolutely. The *New York Times* has picked it up. There have been articles all over the place about the transition this county, and Astoria in particular, is making. As a result of that, our cost of housing has gone up significantly. To come to this area, to come to Astoria, and to buy a house you really, as a first time home owner, couldn't afford to buy a house in Astoria. And then we have other communities like, Gearhart, Cannon Beach and Seaside. It is equally expensive in those communities.
- 082 Chair Ellis You know what is interesting? We had this thought expressed in Hood River.
- 084 G. Gates Well, it is true.
- 085 Chair Ellis For similar reasons.
- 085 G. Gates You know Hood River, the Dalles, have been identified as among the cities that have just really been targeted as far as having this huge growth as a second home for retirees. We have

Aspen; we have Vale; we have the Dalles; and we have Astoria that they are looking at. School populations are diminishing because we have the retirees coming into the area.

092 Chair Ellis

Which you would think would increase the tax base.

094 G. Gates

But they are not bringing their families, we don't have kids. In order to bring attorneys into this town, you are going to have to pay them. In order to retain them, you are going to have pay them. If you are comparing Multnomah County with Clatsop County, if you are a new attorney out of law school, you are going where you get a larger fee for criminal law. I just wanted to bring that up. I can give you an example from 2003 to 2005. In this county our juvenile report rate for referrals (police reports) has gone down, I think. I think it is because we have services in place and I think a lot of it has to do with the changing population and changing economic base for our county. We don't have the low-income population and the transient population that we had in the late '90's. This has been a really interesting review for me and I enjoyed reading the material that has come out. Peter also forwarded on the Yamhill County review that he did to us, so it gave me a lot of background. One thing that I am particularly interested in is the fact that with the Commission there is a task force that has been created that provides support to our public defender, consortia, single public defenders, whatever a particular county chooses to have. And I just think that it is wonderful to learn that our public defenders meet regularly together, and have lunch three or four times a month. I have not seen any kind of forum that has been made available to other partners in the criminal justice system, that allows for talking through the concepts and issues. And I do think that with technical assistance from your Commission and possibly allowing billable hours for process groups, or early resolution programs, or diversion programs, we would be able to bring the public defenders more on board in helping to make this system as whole less fragmented. I know that our public defenders are overwhelmed. They spend a lot of hours on their cases, and to expect them to be at the table for a planning meeting, or for a process meeting, that is not something they can bill so that is probably not something that they are very excited about.

Standards of quality assurance, to me, are huge, no matter what level we are as far as the criminal justice system is concerned. The standards really need to be there and you have identified that as being one of the goals to work on in Clatsop County, and I hope there are some ways to get to that point.

143 Chair Ellis

Any questions? Thank you very much. Kathryn did you want to comment on some of the issues that several people have raised.

148 K. Aylward

Lots of issues. I just want to set the record straight on a few things and provide a little bit of historical background. First of all, the analyst for Clatsop County briefly from our office and formerly of Indigent Defense Services, no longer works for us. I don't know the history of what was said or how the contract was managed before I was Director, but I frankly am not surprised to hear that there may have been some communication problems. Mary Ann Murk had the question of why are there two contracts. Randy Vogt had a contract in Multnomah; he wasn't reaching quota, he was short; he owed us lots of money so we said, "You don't have to pay us back, you can work it off, which he did, and had Mary Ann doing most of the work for him, so when he finished paying off his debt he said "See ya. I am out of here." We had heard great things about Mary Ann Murk, didn't want her to leave the area, didn't want to lose her as a contractor, but at the same time didn't necessarily want to push her into a consortium -- that maybe she didn't want, maybe they didn't want -- so we basically said, "Please stay, we are thrilled with you, and we will just hand the contract over to you." That is why we have two. Personally, I don't think it is important anymore to have two providers in a county. I know our office traditionally was more concerned about having all of our eggs in one basket, but -- especially if we move to an administrative model, it is less of a concern that we are going to have difficulty. It was mentioned that Juvenile Rights Project came to Clatsop County and I think there was some confusion. Juvenile Rights Project was in the

same situation. They weren't making their quota in Multnomah and they had been under for years, owed us lots of money. Again, we said, "Would you take cases in Clatsop County?" and they were paid the same rate for their Clatsop cases as their Multnomah cases, so there was no notion that work in Clatsop, or children in Clatsop are somehow worth less. JRP, again when they paid off their shortage they said that they didn't really need to be traipsing off to Astoria all the time, so we are done with our shortage, so now we will stay back in Multnomah, but they did get their same Multnomah rates. The problem that Kris Kaino described the situation that he had, somebody getting \$400 and somebody getting \$500, and while you are renegotiating, isn't that your opportunity to make both of them \$450. I know the Commission knows, but the decision and the instruction is that the Commission wanted us to be able to even up the rates, without actually lowering anybody. We didn't want to say to anybody work for less than what we are paying you now, so with those instructions, you can't make a whole lot of adjustment. I just wanted Kris Kaino to know that that is why it wasn't as simple as waving a wand and having it done. As far as the juvenile rates go, I just caution people not to look at individual case rates in isolation. We actually offered a higher case rate to a contractor in this county than we are currently paying them, and the contractor said "Nope, don't give me those higher rates on the juvenile cases. You can leave my juvenile cases low. I want more on Measure 11, more on termination of parental rights, and I want more on Measure 11s." We said "Okay." We offered both groups the same rates and if someone says "Well, it is the same amount of money, do you care if I have more here and less here." No, not really. So I think that is dangerous to look at just the juvenile rates, because there is more to the picture, and each contractor is different. Some of these on the list are public defenders, they include investigation, social workers; some of them only do juvenile and some do a mix of juvenile and criminal and likewise they are balancing the two off each other. We are making progress with them and they are not the lowest paid in the state. Part of the problem too is if you look at different rates and you say "Well, I get \$50,000 for a murder and \$100 for a misdemeanor, but I have never had a murder, and all I get are misdemeanors." So you really can't compare rates in isolation. I think that is all.

217 Chair Ellis

Thank you. That is helpful. Nothing is ever as simple as it seems.

218 C. Lazenby

I have a question and not for this session, but some day I would like to get some information on this. It has come up twice and maybe you folks understand it more than I do, but we were talking about the overall rates with providers in our meeting in Salem. Greg brought up an anti-trust issue involving the different providers not being able to get together. That is the first I had heard of that. Again today, there was a mention about some anti-trust issue. Is there a way that staff or somebody could provide some sort of background on what this anti-trust issue is that we keep running into.

228 Chair Ellis

I can tell you a little. Was it DOJ or FTC that went over and testified in Clark County, Washington? Actually I think they brought a proceeding. They were all stirred up about the fact that there was a group of lawyers colluding, as they would think of it, on bids for services and somehow that was all wrong. Then it spilled over and the Clackamas consortium received a demand for documents, so we tried to intercept some of this and speak to the people at FTC and say, actually we are the buyer of these services and we think we are reasonably street smart in how we do that and it did just kind of go away. There is embedded somewhere in government the idea that here is an injustice that needs to be righted. But we did head them off when they came into our area. Anyone else on Clatsop County?

253 T. Settles

I am one of the providers out of the consortium with Kris Kaino. A couple of things after reviewing the preliminary report that I wanted to address.... We have two extremely hard-working judges in this particular county. They are at the courthouse early. They are there late. They are both very, very dedicated in particular to the children's issues and drug court issues that are present in this county. Judge Nelson almost single-handedly, in a lot respects, with very, very few resources, has created what I think is a very needed drug court. So my comment is about requiring an attorney to be present at the drug court, and at the meetings

prior to the actual court date. In this county I think there would be substantial conflicts of interest because of the number of clients that are put into the drug court. And not only that, in both consortia you see what we generally refer to as frequent flyers and oftentimes people that are witnesses in various cases are either current or former clients. So requiring an attorney to sit in on the drug court aspect, and these clients also apply to the early disposition program as well, to sit and deal with them would raise substantial issues from an ethical standpoint. In this county, on a conflict basis, when you have a multiple defendant case, or when you have a dependency case that involves several different parties, perhaps one mother, two different fathers, three kids and they have significant issues, there is just a high probability that there is going to be a conflict among some of the attorneys from previous representation. I don't know how you craft something that gets around those kinds of issues about the drug court that I think would play a role if one of the attorneys sat in and tried to provide representation on everything that comes up on a particular drug court day. I don't know the answer on how you get around that in a small county. Similar issues are in existence with an early disposition program. Oftentimes the frequent flyer situation creates conflict problems and oftentimes police reports aren't there that early. I think those are the real issues in terms of how you would go about structuring some type of defense presence in the county. Some of the other issues, in terms of the conflicts that were addressed earlier by the Chair and it being a significant expense for the Commission, I know that both of our judges are very much aware of that and they attempt, when there is a conflict, to try and appoint within each consortium the next person down. Again, due to the small nature of the providers, that can sometimes be difficult not just in terms of the individual themselves, but in a particular situation when you do have the police reports and you sit and you look at them, and there will be a current or former client of yours that is a witness involved in a particular situation.

- 334 Chair Ellis Does the DA give reasonable discovery here?
- 335 T. Settles Well there is a policy that you have to make a written request for it. As I understand it, that is so the Commission can be billed for discovery. There is a district attorney policy requiring a written request and there is a canned form and I just handwrite in the case number and case name.
- 343 Chair Ellis That is for witness identification?
- 344 T. Settles You generally do not get the police reports there. Usually, it is a several day period after that. It happens reasonably quickly, but it doesn't happen right at that time. The other thing that I wanted to address with the Commission, a couple of things, and one is the nature of the group of people who are doing defense work in this county. It is fairly loose, but it is a fairly congenial group of people.
- 355 Chair Ellis We have met half of them today.
- 356 T. Settles There is a constant give and take in this county, in terms of if I have something I haven't seen in awhile, it is very, very common to pick up the phone and either call Don Haller or call some of the other attorney in the county, who is not part of the indigent lawyers who do criminal work. And that is very much part and parcel of the criminal defense practice in this particular county. Frequently having lunch and discussing recent decisions from judges on an ongoing basis and having discussions as to issues, and discussions about things that have been going on in court on regular basis. It is a very collegial approach. It is a very comfortable approach in terms of being aware of judicial attitudes and being aware of what is going on in the courthouse, and what is being presented. I personally believe that there is a concern about this third judicial position, and if it is in fact utilized to sort of even everything out and slow everything down, there is a concern that perhaps that may not be the case.
- 384 Chair Ellis How can a third judge slow things down?

- 385 T. Settles That is what I have been wondering myself. I have some concerns about that, but if in fact a third judge is used to expedite the handling of cases, even more so than what it is now, then it will impose a burden on the defense bar. Again, I am not meaning any disrespect to our judges, because we have two absolutely incredible judges. I used to practice in Alaska for a number of years, and we have two of the hardest working judges that I have ever seen in my life.
- 395 Chair Ellis I was struck by Judge Brownhill's statement that seven years ago there were 99 jury trials, and last year there was maybe a third of that. She attributed that, I thought, to settlement involvement by the judges. My question is, is there more pressure than you think there should be to settle?
- 402 T. Settles There is a fair amount of pressure to settle, but if I can be just as direct as I can, in the system that we had before there would be this mad chaos in which there was this last minute attempt to try and negotiate what you could so that you could resolve the case.
- 411 Chair Ellis In the shadow of trial?
- 411 T. Settles You see we had a court rule, at that point in time, you had to have all your plea negotiations done by docket call, or you were going to trial whether you liked it or not, because the rule at that time was that your client then had to plead guilty to all charges in the charging instrument, at the risk of trying to not going to trial. With the change of having a set time, we have a system now where we actually have two, a series of two settlement conferences. One is what is called the early resolution conference and then you have a second one. You have a set time with the deputy district attorney and with the court system and try and resolve this case. It was a radical change and it is one that works really, really well. The ability to sit down at a specific time with all parties being able to address the issues, has been a tremendous assistance in resolving the cases. There are some things that need to be tweaked a little bit, but in my opinion it works very well. I know the Chair mentioned the conduct of an attorney and I would hope.... Several years ago, one client who will remain nameless but who was very well known, got up in front of Judge Nelson and proceeded to give Judge Nelson a list of my less than stellar qualities That teed off Judge Nelson -- a very, very difficult client So I immediately saw my opportunity and said that obviously after what my client had said, I can't continue to represent him. Judge Nelson looked me straight in the eye and said "Mr. Settles, I didn't hear him say anything worse than he said about me." It works pretty well. I know both of our judges are very much committed to an ongoing look at the process. I really think, and I know that from what was said a couple of years ago, that there is this issue of representation at both drug court and the early disposition program, and if somebody could construct something that would address particularly the potential conflicts, I think there is a role to be played there for defense counsel.
- 477 J. Brown Could you help me understand, just a little bit better, how the early disposition program works in this county. I start out assuming that the idea is at the first appearance the DA's office, after seeing the initial report and with some kind of threshold criteria then makes an offer. The serious client isn't going to get considered for an early disposition.
- 488 T. Settles I have been trying to figure out the DA's criteria for anything for a long time. In terms of the early disposition program we are not directly involved in it. Usually, as I understand that, it is offered at misdemeanor arraignments on Monday afternoon. There is no consortium attorney, defense attorney present at that. It is my understanding that what happens is that they have one, two or sometimes even three deputy district attorneys there who actually talk to these folks and make them an offer.
- 500 J. Brown I was hearing Judge Nelson saying, for example, that out-of-county weekend visitors don't want to come back, whatever. I guess where I am heading with this is that I have a sense that maybe there are some things that could be clarified. The frequent flyers, somebody who has a

client history in the county that the police and the sheriffs and the PD all know, they are not going to be an early disposition candidate, I would think.

- 513 T. Settles No, the issue there is getting access to the police report and sometimes the police reports do raise more questions than they answer.
- 520 J. Brown I would understand that concern. I am just trying, as we work our way in, I am sort of thinking that maybe the other issues aren't that much of an obstacle and somehow the bridge could be closed between the district attorney and the defense attorney regarding adequate discovery and so forth, that maybe that is not as big an issue as we are thinking.
- 531 T. Settles Yes and no. I think everyone in both consortia is very, very reluctant to sit down and advise someone you have never known, based on just police reports.
- 539 J. Brown To the extent that that is an issue it has already been pursued at the OCDLA level –
- 541 T. Settles Right.
- 541 J. Brown Could we assume that you would always be open to –
- 543 T. Settles I think if those issues could be resolved then I think we are talking about some financial issues. Financial issues, quite frankly, in terms of our reluctance, is our secondary issue.
- 550 J. Brown Thank you. That helps me understand.
- 551 Chair Ellis Thank you very much. We appreciate your comments. The next item on the agenda unless there is anyone else from Clatsop that wishes to speak?
- 556 D. Haller Let me make this brief because I realize you have a lot of others things to do. I am not opposed to the early resolution program, but I do want to point out that we generally have a matter of a few weeks to look over most of these things. So we have the settlement conferences or the early resolution conferences that are taking care of those very quickly. Is the way we want to measure how this system is working, how quickly we can get the case heard? In this county a couple of years ago we had a DA scandal, right before he retired, and we don't want that kind of problem where stuff is two and three years behind. Obviously we don't want that but, perhaps how quickly we can shove these things through isn't necessarily the criteria either. The other things -- let's be totally realistic on this -- and I realize why the defense bar would shudder when I say this, but most of the people we are representing have done something. We don't have any rookie DAs left in this county. I guess maybe we make a useful contribution in two ways. Sometimes they haven't done as much as they say, and occasionally, I guess maybe less than one time out of 10, despite the evidence, they haven't done anything. You get better at guessing which one is which over the years, but I shudder at the thought of trying to make that decision after talking to somebody for 15 minutes in a hallway. And I just want to remind everybody that it is that one out of 10, the person whose case you can work on for a couple of weeks that would allow them to keep their job, even if they were convicted of a lesser included offense.... Nobody can figure that out in a 15 minute session. We have an alternative program here that has cleared our docket out beautifully. I realize we take these different tools and we set goals we want to achieve, but are we going to create more of a problem? Are we actually going to be making the system do what it is really there for or worse if we start trying to push this? Keep in mind that maybe for what we are trying to accomplish we don't need to use that particular tool. Thank you.
- 622 C. Lazenby Quick question. You get this first offer from the district attorney's office and you mentioned that there is a second setting later on. When does the first one expire, and then is it used as a negotiation tool like "Well, you should have taken the other offer because now it is going to be that plus" or do you both end up coming back having learned more?

- 631 D. Haller Well the next one is always more reasonable.
- 634 C. Lazenby But the first one has an expiration date?
- 634 D. Haller (inaudible).
- 637 M. Murk Are you asking when this early disposition offer expires?
- 638 C. Lazenby Expires.
- 640 M. Murk Typically, that is usually anywhere from three to five days from the date of the initial arraignment. So there would be an offer and that usually expires by the time we get the appointment order. I think the experience of the defense bar is that typically (inaudible).
- 658 J. Potter Do you happen to know if the DA keeps track of their early disposition program? How many people get an offer from the DA when the defense isn't there -- these folks that supposedly are the people getting back to the valley? Do you have any idea how many that is?
- 666 D. Haller The only ones that I am aware of are the ones that came in that didn't know that they were going to be (inaudible).
- 672 J. Potter Does the DA's office have that down? That is a concern to me, Mr. Chair. I understand what you are talking about. You have an early disposition program, but there are a bunch of cases and a number of folks that are getting deals without any defense lawyers and they are walking that day with some fine or something, and we don't know who they are. I understand part of your argument about conflict issues. I understand the financial part and that is certainly something that can be worked on, but I am wondering if there is a lesser of evils here? Are there people that are getting no representation, that don't understand what the implications might be versus having a defense lawyer there, even if only for 15 minutes, who can at least give them a little bit of direction?
- 693 D. Haller I believe, when talking with people over in Lane County, that one of the problems you are going to see is that the ones who should be taking those probably wouldn't be, and step number two, how does the attorney sitting there, even somebody who is very experienced in these things, and who realizes he is going to be settling most of the cases, (inaudible). I think it is almost impossible to do with a police report. (inaudible). It doesn't seem to fit with the way the real world works with people that actually need attorneys.
- 728 Chair Ellis If the person John describes from the valley is here only recreationally and does something, I wonder how many of those would be indigent?
- 735 D. Haller You know you do get people that come through that say "Well, they reduced a reckless to a violation so I wouldn't go to jail, so I took it and now DMV is suspending my license," because if you are convicted of reckless, it doesn't say reckless is a crime, (inaudible). That is a good point though, because I think everyone of those that I have had has been able to pay.
- 750 Chair Ellis Any other questions? Thanks a lot. [end of tape]

**TAPE 2; SIDE B**

- 014 J. Orr The point I wanted to make was that a lot of the impression that the public has about criminal justice comes out of their own encounters, and the majority of the cases are indigent cases. This is not a really wealthy county, so the public perception of the system has a lot to do with its interface with indigent defense. With the early disposition program, I am concerned about the appearance of speedy, efficient justice, which isn't personal, and hurry up like so many

other things in our culture these days. Somebody may make a decision not fully realizing the difficulty of what they have taken on. .... There is an issue there where you have a certain police officer in our community or a certain law enforcement agency that is really riding hard and aggressively on our Fourth Amendment or our Article I, section 9 rights. This would be complicit, in my mind, potentially, with the erosions of those rights, because it is very convenient and it is an easy thing to do. But then the person gets in the system and they may not be able to do the probation and they will hold that attorney responsible, and it will reflect on the system. Let's just get it done quicker, faster, cheaper, but it is not better. That is one point. The other thing is, I have a private practice and I practice in family law. I really need it to pay my student loans and raise a family. I need the extra work. If you go out to eat at a bad restaurant word gets around. People don't want to eat there. If people get what they feel is a bad deal, they characterize it as being railroaded. They have a term for a public defender, although we aren't called public defenders as such, and it is "dump truck." It is concerning that you become associated with that personally and professionally. You become associated with a process that just moves people in and out, that is going to affect their life and their livelihood.

- 046 Chair Ellis I am kind of impressed with the number of those who have talked about it, and your mindset is a fairly principled one, on this EDP program....
- 050 J. Orr It is frustrating to not know. Sometimes you don't know. To tell somebody that you should do this, on one of the most important decisions they will be making as they interface with our system, when you don't have all the information.... We don't have discovery sometimes. Sometimes it isn't until the day of trial or the day before trial that you find out. It could be the case is just bad, a bad case that you could win and avoid a conviction.
- 057 J. Potter I appreciate all your comments, I really do, and I am a skeptic of the Early Disposition Programs and always have been. But we have worked with a variety of members of OCDLA and this Commission developing guidelines for Early Disposition Programs that require certain things to happen before an Early Disposition Program can be endorsed by us of course. But let's assume that what you are saying is the right way for this county, aren't you still then concerned that there is program going on, that there are people getting advice from, in this case, the prosecutor, and a deal being made and they are walking out with no justice at all. Can't you then argue that you should be challenging the existing program, even if you don't want to participate in a revised one?
- 066 J. Orr I hadn't thought of that but I think you make a good point and maybe that is something we should do. Even if you give the system the benefit of guidelines and safeguards, you will not have early disposition with safeguards because you won't have the entire discovery. On a practical level that is not an informed, genuine plea.
- 075 Chair Ellis We appreciate your comments. Anymore? Thank you very much and we appreciate the interest and the willingness to share with us.

**Agenda Item No. 3 Progress Report from Marion County Association of Defenders (MCAD)**

- 083 Chair Ellis Next item is Agenda Item No 3. Steven Gorham and Olcott Thompson do you want to come forward on the MCAD report?
- 085 O. Thompson Good afternoon.
- 087 Chair Ellis How do you handle the interests that they are talking about?
- 087 O. Thompson One big difference that I know is that we get the discovery the afternoon before. Whoever is doing the EDP tomorrow -- there are about a half a dozen of us -- we go to the District Attorney's Office after 4:00 p.m. today and pick up the discovery for all of the EDP cases that

are scheduled. We have a conference room. Marion County has one big, long arraignment docket in the morning starting at 8:30 with in-custody folks, then out-of-custody folks, and then they do the EDP people. People are cited anywhere from 8:00 to 9:00 in the morning. Nobody really understands why they are citing people at 8:00 in the morning when the court doesn't even start until 8:30. The EDP lawyers have a chance to sit down and talk with the clients on an individual basis in the private conference room. Basically "This is what I know about your case. This is what the offer is. You don't have to take it. This is what happens if they don't take it." And I discuss everything they want to talk about. I was one of the people who helped set it up, however many long years ago it was, and I have never run out of time. Some days you have half a dozen, some days you have two and you never know how many are going to show up, and some days you have 15 or 20 cases. We do not do DUII on purpose, because they are just too complicated. The conflict issues, the frequent flyers aren't on the table, because they are not going to get EDP offers. Most of them are shoplifts or criminal trespasses or criminal mischief or first time drug offenses. The only conflict that I ever ran into was where I was representing a co-defendant of somebody who was getting EDP. If two people come in, and they frequently do, who have been arrested together for shoplifting, it is a take it or leave it offer. If you want to point your finger at your co-defendant, it is not EDP.

- 122 S. Gorham I think the other thing that makes it, or at least our EDP and probably the big programs, work, is real good lawyers and experienced district attorneys so you know when you get this real great offer as an EDP offer, that it is not going to come around again and it is to the client's advantage if they are guilty, and they have been explained all their rights, and they understand what is going on in the system, that this is a good offer. They are basically sweetheart deals for a guilty defendant or somebody who is going to be found guilty, and if you have an experienced attorney there they will usually be able to impart that knowledge to the defendant. And it takes a defendant who is willing to step up to the plate for whatever reason, hopefully, one of the big reasons is that they have done the acts that are set forth. It takes a district attorney's office that is willing to, in whatever types of cases they are willing to do an EDP on, to make those really good offers so that they basically flush out their calendars. Without that, if you are getting a better offer later, why would you? It just doesn't make any sense to do that, or if you are getting really not very good offers, you really don't want to do an EDP. It does take the experienced lawyer to know and to impart to the defendant the potential collateral consequences that the defendant should know about those.
- 149 J. Potter It sounds like to me, in looking at other counties, it is not only the experienced defense lawyer and the experienced prosecutor, but it is an experienced judge and they all have to be vested in making the program work. If any one of them doesn't want it to work, it is not going to.
- 153 O. Thompson They usually just (inaudible) sentences or just a fine. There is no probation; you are done with it today.
- 156 Chair Ellis We are ready.
- 156 O. Thompson We are ready to answer any questions you have.
- 157 S. Gorham This will be our third updated report on what we have done to, hopefully look at concerns that you all had just over a year ago from July on. We think we have met most of those concerns. The biggest change that we have made is our workgroup concept, which we are now into for several months and that has been working very well. I have heard, in fact, nothing negative about it. It does work very well for us and I think meets some of the needs that you thought we needed. I know we gave you a lot of information here to mull over, if you will, but there are some steps that we still need to take. But with the steps we still need to take we have found, I think, two things. The steps we are going to take are going to need the cooperation of the two components of the system, the DA's office and the courts. In Marion County, as you know, the whole system, for the last year, has been dealing with the courthouse crisis. Now

that that is over, maybe we can get the interest of the other components to deal with the other issues. The other issues, as we see them, are the attorney-of-the-day system which primarily.... Well, we think it does match, but it might not match exactly the attorney qualifications with the type of case that they are getting. And then there is the work issue, which again needs that kind of cooperation from the court. We had different mixed signals from the court. One day the court tells us that they really want our attorneys there, and that is the beauty of the attorney-of-the-day system, they are there in court. The next day, and of course we have a diverse court -- we have 14 judges, 13 who are doing the criminal work that we do -- some say they do care about it, some say they don't. Some today say they do care, some tomorrow say they don't. We have to work through that and one reason we have not been able to work through that is the courthouse crisis.

- 202 Chair Ellis Let me make a couple of comments. One is I do want to compliment both of you and the rest of the MCAD Board. I think the dialogue we have engaged in the last year has been a very productive one. We do recognize that you guys are working hard to make improvements and we appreciate it. Hopefully, you haven't minded some of our push backs.
- 209 O. Thompson We both minded and appreciated it.
- 211 Chair Ellis I think everybody is preceding in very good faith. One subject I want to understand better and it comes in the material at different places, but as I understand it, partially in response to some of our concerns, you did initiate disciplinary proceedings against two members. Then each of them has apparently filed a lawsuit and I wanted to find out about that. Also, one of your independent board members resigned for fear that being on the board, under those circumstances, would expose the board members to liability and obviously that is a big eye catcher for us. This may be just informational. Tell me where the situation is now.
- 226 S. Gorham We have two members, and you all called it disciplinary, we called it quality assurance.
- 226 Chair Ellis I'll take your term.
- 226 S. Gorham One member we totally suspended. We thought that this member's quality was not up to snuff, if you will, and we felt it would never get up to snuff because of history, so we totally suspended this individual with no, at least no apparent, way to get back into the consortium. The process was the board gave me the authority to suspend either totally or partially with an appeal to the board.
- 235 Chair Ellis Was this before adoption of this three-tiered system?
- 236 O. Thompson This was before the work groups. This was roughly a year ago now. Work groups were in January or February.
- 239 Chair Ellis Okay.
- 239 S. Gorham This was actually in October that I did this. I had the authority for about a year before that to do this, but that was when I chose to use the authority. Both of the individuals appealed to the board.
- 241 Chair Ellis The other one wasn't suspended?
- 243 S. Gorham The other one was partially suspended. The other person was suspended from doing some of the work but not from doing some of the other. The intent there was, in essence, to give this individual who had been a long time person, who I felt the quality had gone down in certain areas and really needed a kick in the pants to get reinvigorated into ...
- 251 Chair Ellis Are we talking communication issues?

251 O. Thompson This was a basic quality issue. This person really wasn't doing what they should be doing on certain types of cases. They were okay for some, the lesser stuff, but more serious stuff ....

255 Chair Ellis Not digging, not investigating, not developing, not asserting?

256 O. Thompson In the past they had been.

257 Chair Ellis Once had the fire....

259 S. Gorham Apparently, self-described, wanted to be doing something else, wanted to go into a different profession and didn't go there and keep hanging on and doing the cases and, in my opinion, his quality went down. Didn't have the fire to do the work as Your Honor just said.

264 Chair Ellis You don't have to call me Your Honor.

267 S. Gorham So I partially suspended this particular individual. He was doing a range of cases, all the range of cases frankly from misdemeanors to – he wasn't doing direct death penalty cases - but he was doing post-conviction death penalty cases. I suspended him from doing felonies, most felonies. He was allowed to do EDP. He was allowed to do SEDs, contempt's, which I am not sure I know whether that falls in the felony category or not, but he was allowed to do those and then he was taken off of post-conviction and especially death penalty post-conviction rotations. The board sustained my suspensions. There were a lot of threats, if you will, by the partially suspended individual that he was going to sue and finally, remembering that this happened in October, we established a plan for him to get back doing the work that he had been suspended from doing. Especially when the work group plan came in and started to work we modified the plan to incorporate the work groups. Finally, in July he sued us.

288 Chair Ellis Sued on the theory of what?

289 O. Thompson Lots.

289 S. Gorham Lots of different theories. I think the complaint was 25 pages long.

290 Chair Ellis Apparently got some fire back.

291 S. Gorham He had gotten some fire back. Except for the lawsuit, I would say the suspension accomplished what it was meant to accomplish. He was reinvigorated doing the work. He wanted to do the work, but then he sued us.

297 Chair Ellis You say sued "us". Do you mean sued the "entity"?

298 S. Gorham He sued the board members, except for the individuals who did not vote and abstained, (inaudible). And so there were a few board members who he did not sue individually who had voted to not suspend him. He picked and chose which board members he decided to sue. He sued me personally and he sued us mainly for defamation and he sued us for breach of contract, interference. The defamation one is the one that is kind of interesting. We have normal officers' and board insurance. If you look at most of your officers' and board insurances though, they do not cover intention to sue. Most insurers, however, have a duty to defend so the insurance company has hired us an attorney. They have a duty to defend but they may not have a duty to pay off, if that is the right turn, if we would lose. We are in litigation. There is about to be a Rule 21 motion filed. About a month after the partially suspended member sued us, the totally suspended member sued us.

327 Chair Ellis Both representing themselves?

- 328 S. Gorham No they both have attorneys. The fully suspended person who has sued us did not, I think, sue us in defamation. That was just mainly contract issues.
- 339 O. Thompson That person sued the entity, Steve as the Executive Director, and the three then existing officers of the corporation, as officers of the corporation.
- 344 Chair Ellis You are in the group?
- 344 O. Thompson I have been personally sued in both cases.
- 346 S. Gorham And I have been personally sued in both cases. The other couple pieces of the lawsuit and litigation that are interesting and should be of interest to you all, the person who I partially suspended, he claims that MCAD has no business dealing with quality issues, that it is up to you to deal with quality issues. That is said in the lawsuit that we had no authority to suspend or partially suspend them, that quality issues, because the quality issues are PDSC's or OPDS's, that we had no right to enforce those standards. That is a piece that would concern everyone.
- 361 Chair Ellis These lawsuits are of great concern to us, because if there is any truth to that argument, then our whole ability to bring quality to the system is in jeopardy and I am not going to tell you things you know because they are in the written minutes, but we put a lot pressure on you guys to do this. We are there with you and will support you and your lawyers.
- 370 S. Gorham I really appreciate that comment, because I have never been a defendant in a lawsuit before and it is certainly a stressful situation for all of us.
- 374 Chair Ellis I will say it and I think these cases may, at the end of the day, be a very positive thing because I fully expect the courts to say on the defamation that you have an absolute privilege. This is public service that you are doing and you are doing it for perfectly proper reasons. On the interference, nobody has any right, as far as I am concerned, to be a defense lawyer. You have to earn that and you have to maintain that. I not quite sure how to do this structurally, but Ingrid is our general counsel, she is probably the right one for you to be communicating with, but I think I speak for the whole Commission and we are very supportive of your position.
- 392 S. Gorham Obviously one of the concerns is that we have expanded our board to have independent board members, people who weren't MCAD members, and have gotten three very qualified individuals to join our board, one of whom, in response to the lawsuit, decided to resign.
- 400 Chair Ellis Was he named in the lawsuit?
- 401 O. Thompson No he was not and he was not a member of the board when all this terrible stuff happened. He just decided that he wasn't getting any financial benefit by being on our board. He had done indigent defense years ago when it was \$25 case if you didn't go to trial and \$50 if you did go to trial. The exposure that he was facing personally, if the board when he was a member of the board, decided that we needed to do something about this ....
- 413 Chair Ellis Part of my reaction is I really want us to help in anyway we can. I want this to turn out in a way that sets a precedent, that makes it clear to other potential board members that this is not a risk you are taking.
- 417 O. Thompson That is what his concern was. Just dealing with it is a pain in the neck as you may know. One interesting thing that came out of all that and came out of our discussions with a lawyer about conflicts of interest is, all of us folks that are members of the board are also members of MCAD have a financial interest in virtually every decision, because it affects our income as members and maybe we can't vote on anything.

- 428 Chair Ellis But that actually supports having outside board members. You can do in the MCAD structure what a lot of private corporations do on conflict issues, and that is have the independents be a committee to act for the board on those issues. It just makes it all the more important to have independent members.
- 435 S. Gorham Yes I think that is true and I think unfortunately the lawsuit has put a real kink in, at least some people's thinking, whether or not they want to be on such a board and be the independent on the board. We were thinking how do we solve this problem in the short term: Well maybe we just up our insurance, but of course the alternative then is the person will just sue for more money. We have been sued for \$1,500,000.
- 449 Chair Ellis Defamation you can sue for any number. What is the theory on the contract and the interference?
- 451 S. Gorham That he was getting the work and he isn't getting the work now.
- 451 Chair Ellis You could capitalize that ...
- 452 S. Gorham We have some defensible, if not totally defensible arguments to everything. I think one of the other parts of the lawsuit that is somewhat of a minor part for MCAD, but not a minor part for the named defendants, was that OPDS contracted for post-conviction with the then Chair of our board, Dick Cowen. And he has been sued. MCAD itself and he and his officemates were sued under another theory, a conflict of interest theory.
- 465 Chair Ellis Sued by the same...?
- 466 O. Thompson The partially suspended....
- 467 S. Gorham In the same lawsuit because OPDS contracted with the then Chair to do some of the work that we were doing -- post-conviction. That is a conflict of interest for him and gives rise to some right to the person suing. That piece is there and I think that is also a concern for....
- 477 Chair Ellis The plaintiff is just a partially suspended lawyer out in the community looking for something to do.
- 477 O. Thompson He is complaining as basically a member of MCAD that our then Board Chair stole part of the contract from him.
- 480 Chair Ellis So a diversion of corporate opportunity.
- 482 S. Gorham That is exactly one of the claims in there.
- 485 Chair Ellis Is he trying to sue derivatively like he is standing in the shoes of MCAD?
- 486 O. Thompson I think that is what he is trying to do.
- 487 Chair Ellis It doesn't sound like he has done it.
- 488 O. Thompson MCAD decided it was not going to open that can of worms with the Chair. There were a lot of hard feelings but we are past that. It is just a huge can of worms opening up and it is not worth it for the organization to try and get the contract back.
- 494 Chair Ellis Okay. I think I now understand the lawsuits going on. The third one was in a different category, but the first two we will help you in any way we can.

501 S. Gorham So there you have it. I think we are going to keep doing what we have been doing over the last year, which is trying to improve the systems we have established and if you have any further concerns throughout let us know. The hardest piece may now be dealing with the attorney-of-the-day concept and those different issues that I have already brought up to you. We are getting different signals from the judiciary and the DA's office and working together. One of the things that is clear is that we are, I think we always have been, but I think we are clearly in the (inaudible), one of the three parts of the stool if you will, of the justice system.

522 Chair Ellis Can you help me out on one thing. What is the date on Appendix D when the questions from OPDS came to you and what is the date of your response.

527 S. Gorham The date of this response was September 1.

528 Chair Ellis Okay, so it is dated September 1?

530 S. Gorham Yes.

533 Chair Ellis I would say just from my vantage point as one member of this Commission, that I thought that was a very interesting document. I thought that of both the questions and the responses and I feel like our processes work.

539 O. Thompson I have been attending these meetings since the beginning of the year and I have learned a lot just being here and listening to your dialogues.

545 Chair Ellis That is how I reacted to it. Any other comments or questions on MCAD?

546 J. Potter Mr. Chair, I just noted in those questions, the one thing that I highlighted all the way the through was Question No. 29 in your first sentence where it says "MCAD is very flexible and resilient." I think you have proven that.

555 O. Thompson Thank you.

557 Chair Ellis Jim, do you want to come forward. Jim had asked for five minutes on the materials that he had distributed.

561 J. Hennings Commissioners, I have submitted in the past, some of the material that is here. What are new are actually four reports and no report is more than two pages long. It all relates to the equities of compensation of attorneys, specifically in the justice system. It uses MPD as a base, not because of anything other than the fact that I have the information about MPD, so I can compare that. I will tell you we are not the best paid, but we are not anywhere in the bottom. We are definitely near the top in terms of compensation. You should keep in the mind that the majority of the people that are providing public defense services, who are publicly paid lawyers, are doing worse than we are in terms of salaries. It compares in several different ways, and as I have said, it is designed, although it is all on the same subject, depending upon who wants to use the information we can look at differences over time. Over the same period, compared to the district attorney's office as of this year, if there were no further cost-of-living increases, would be \$182,000 difference in salaries. You can look at the problem of school loans. Those are all things you can look it. You can look at the third draft which shows the step increases that the district attorneys have been getting. The last step increases we have been able to do since 2001 and the straight line projection shows that by 2010, the district attorney's office starting salary would be higher than our top end salary for attorneys. The fourth draft is one that I promised you which was in comparison to other people in the system. We have compared just the starting scale and top scale. This does not compare the number of years it takes to get through that scale, it is just for the line attorneys, not supervisors, but attorney where do they start and where do we end. That is \$40,000 and \$62,000. Where is it with the district attorney's salary or the AG's salary which is

comparable. That is \$50,000 to \$94,000 compared to the DA's office in Multnomah County which is \$55,000 to \$100,000. These are line attorneys. I will point out that I make less than \$100,000 in compensation. According to the salary scale the change the Commission in Multnomah County just pushed for, the district attorney will increase to \$125,000, base salary. Just because they had something to do with criminal justice is the City Attorney's Office in Portland, and I will admit that they may not be apropos because they have to keep up with the law firms, but you asked for that information. I prepared the packet so that it can be used as a package, or it can be used separately.

645 Chair Ellis Would I be right in assuming that you caused these to find their way to legislators?

648 J. Hennings Yes, and if you want more copies, I will print more copies. Basically, we see this as a tool for this Commission to use in terms of determining what is appropriate compensation for people that are doing this work, especially looking at the comparable elsewhere. It is not intended to say that you are getting paid too much or you are getting paid too little.

659 Chair Ellis It is a very good piece of work.

**Agenda Item No. 4 Review and Approval of OPDS's Report to the Commission on Critical Issues in Juvenile Dependency Practice**

665 Chair Ellis Peter, the Juvenile Dependency report, Attachment 4.

666 P. Ozanne Mr. Chair, this was a draft that came before you at a previous meeting, dated August 7, 2006 and has been widely circulated both with staff and those outside OPDS interested in juvenile dependency. I entertained suggestions or changes from the Commission and have received none, so it is on the agenda today for final comments and hopefully approval.

678 Chair Ellis Where did Potter go. We need him.

684 P. Ozanne I can filibuster another item of information.

685 Chair Ellis Do that.

690 P. Ozanne Just for the information of the Commission with the regard to the litigation that MCAD reported, I was called by MCAD's defense attorney, Dennis Reese, and I advised the Department of Justice and sought their advice. You know about the saying of being your own lawyer, and I am sure I anticipate this Commission to make clear that we want to cooperate, which I did and I advised counsel. I just spoke for an hour with Mr. Reese and gave him the background of the process. He read virtually all the documents and I sent him some additional information about my investigations, which as you know as we did in all the counties, that I had done Marion County.

714 Chair Ellis One fact question I had. When they were describing the lawsuit and somewhere in the materials, apparently one of the arguments is that one or both of these individuals is still, if "certified" is the right word, under our Qualification Standards.

723 P. Ozanne Well I have submitted, and you have seen the supplemental questionnaires to the indigent defense standards, so they by declaration have stated their qualifications which haven't been challenged by us, we made clear it doesn't necessarily qualify them to do business with the Commission. [end of tape]

**TAPE 3; SIDE A**

002 Chair Ellis Is there a motion to approve the report?

**MOTION:** Mike Greenfield so moved; Jim Brown seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Anything else to say on the MCAD litigation issue?

008 P. Ozanne

No.

008 Chair Ellis

Any other items you want to report. Pete Gartlan indicated that anything that he had could wait until the next meeting. Kathryn do you haven't anything to report?

011 Chair Ellis

Well I have something because I believe this is your last meeting?

012 P. Ozanne

It is.

013 Chair Ellis

I believe you have told us that your schedule is to depart, I think you said September 23 or so.

014 P. Ozanne

Actually the 21<sup>st</sup>, which is right after the Emergency Board hearing.

016 Chair Ellis

I want to speak personally and ex officio. You have served as our first Executive Director under the Commission statutes. You have been in that position for, I believe, four years. I personally think you have rendered wonderful service and there are things that strike me most. First, I think you have done an excellent job of selecting staff and empowering staff. I remember four years ago the question we all had was you had not had the experience of managing a significant agency. I personally feel that you have done a terrific job with that, not only in your selection of personnel, your empowerment of personnel, but bringing to that the evaluation process, a system that is disciplined, and good morale. I think everything that I have seen about the way the agency has developed under your leadership has been positive. Secondly, I think you have done an outstanding job of communicating to all components of the system. I remember five or six years ago when the Commission planning part was going on, the relationships with the law enforcement community and the prosecution community were not very good. There was just a lot of bickering and jealousy and issues of that kind. I think you have built bridges in every direction and I will remember, for a long, long time, that day in front of the legislative committee, when you paraded major spokespeople from every component of the criminal justice, who finally understood the relationship between their function and our function, and they couldn't function if we didn't function and we were not functioning if we didn't have the fiscal support and they were there to urge that we get it. I thought it was one of the most exciting displays of legislative craftsmanship, at least in my experience, that I have seen. Finally, I think your vision for the way this whole process should unfold, the work you have done forming task forces, the work you have done with the quality assurance component, it has just made all of us very, very proud. You leave with a big hole. We understand why you are doing what you are doing. It is a choice you made. We have said it publicly and I will say it again, nobody asked you to and you leave with our very best wishes and our gratitude.

056 P. Ozanne

As the date of departure approaches, I wonder whether I understand why I am leaving. I told people this is so far the best job I have had. As I say, as I start worrying about Maricopa County, and it probably will ultimately be the best job I have ever had, and will regret it. You already hit on what I am proudest of which is really having the good sense to see the talent around us as I leave the organization -- Kathryn and Pete and then Pete choosing Becky Duncan, and being able to bring Ingrid Swenson in. That has been very rewarding. As you all know, they are incredibly good people, talented and committed, so it has been a real joy to work with them. Many of you all know that I was warned about this process of bringing the new mission out around the state, and it has been really warning for me, and has been really rewarding for me. First of all, being this person that would go out to these places and learn about them and try to capture it in a report, but then I really appreciated coming out to these distant places, spending four or five hours, and I think ultimately it has been good for the

Commission, good for the process, so I am very proud of that. Finally, as you mentioned, these task forces and that has to do with the years of work of people like John and others. When we ask the defense community to rally and do these task forces, to volunteer and go out in teams and visit places for two or three days, and nobody refuses. It has been, again, one of the more rewarding parts of my job to see that spirit and commitment to what I regard as a great profession. I want to thank all of you for our personal friendships and the time that we have had to work together. Stay in touch.

086 Chair Ellis

Any other business?

**MOTION:** Mike Greenfield moved to adjourn; Jim Brown seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

# Attachment 2

**YAMHILL COUNTY DEFENDERS, INC.**  
**235 E. THIRD STREET, #17**  
**MCMINNVILLE, OR 97128**  
**Ph. 503-474-4290 Fax: 474-1269**

DATE: September 1, 2006

TO: Public Defense Services Commission

FROM: Yamhill County Defenders

RE: Request for Status Report

Yamhill County Defenders Status Report

I. Introduction

The Public Defense Services Commission [PDSC] made certain recommendations in its Report on Service Delivery in Yamhill County, and requested that the Yamhill County Defenders [YCD] submit a report on or before September 1, 2006, addressing the issues raised. The recommendations requiring action included (1) YCD taking a greater role in managing the performance and conduct of its membership, (2) YCD improving the quality of its juvenile law practice by similarly taking a greater role in improving the quality of its juvenile law practitioner membership, and (3) YCD participating in the Oregon Public Defense Services new Consortium Advisory Board. One additional recommendation requesting that the YCD membership reconsider in the future the form of compensation it will accept for indigent services, hourly rate vs. case counting, will not be addressed in this report as the issue is not “ripe,” and the YCD Board of Directors intends, at a future date, to survey other counties concerning their satisfaction with case count-type compensation and how it affects the quality of their legal services. The Board will then present its findings to the entire YCD membership for discussion and a vote (YCD recognizes the case count trend, however, and understands that in the future YCD may not be given the “choice” to be compensated at an hourly rate for work performed).

Overall, YCD has made significant changes since the PDSC Report was issued. The YCD Board has taken a leadership role in setting the standards for indigent defense providers in Yamhill County, and the quality of services have improved. As reported below, YCD has made the following improvements as well as set in motion more improvements to come:

II. Responses to PDSC Report Recommendations

Recommendation: YCD must assume greater responsibility for managing the performance and conduct of its members and for ensuring the quality of its legal services:

## A. New Bylaws

The Executive Director [ED] and the Board of Directors [the Board] have assumed a greater leadership role with the membership since the PDSC Report. One manifestation of that stronger leadership role is a new set of Bylaws that better define the roles of the ED, the Board, Board Officers, and the membership. In addition, the new Bylaws set forth procedures for becoming a member, including eligibility requirements, discipline, suspension and termination of a member, employee performance reviews, removal of Board members, removal of the ED, and expectations for the professionalism of the membership. The new Bylaws are presently in draft form, and it is expected that the Board will approve the final draft of the new Bylaws in September of 2006. The new Bylaws will then be presented to the entire YCD membership for a vote.

The import of the new Bylaws is that in the past many duties of the ED and Board members had been defined by what had been done in the past, but there were no written processes to rely on if there was a dispute or a question about “how” or “when” or “why” something was done or not done. The new Bylaws provide certainty and fairness, which in turn generates more confidence in the quality of the YCD organization.

In addition, the Bylaws allow for transition of leadership with continued quality assurance. In the past, YCD has had both strong and weak leaders. The effect was inconsistent: Many things were done by a resourceful ED, but without consultation or input from the Board. Conversely, many things were not done at all that should have been done by the Board, but the Board leadership was not engaged. Today, the ED and the Board are engaged, but the new Bylaws are written in a manner that addresses the roles of the parties and make clear that certain tasks are to be performed by certain members and if the tasks are not performed, or performed poorly, then there is a process for quality control or removal.

Finally, the new Bylaws will give the membership and persons seeking membership an understanding of the quality and professionalism expected. The new Bylaws also give a voting voice to the members on issues of allowing new members to join the consortium, regular elections of leaders with staggered terms to promote the importance of transitions and institutional knowledge (without stagnation), and even the opportunity to raise a no-confidence vote.

## B. Improved Board Role

Today the Board has regular meetings on the first and third Wednesdays of each month, and at times schedules additional meetings when warranted. In addition, the Board has formed temporary and permanent subcommittees made up of Board members and interested YCD members. Examples include the Juvenile Law committee, discussed more fully below, the Bylaws committee that drafted the new Bylaws presently being reviewed by the full Board, and the Staff Attorney committee that developed procedures and interviewed Staff Attorney applicants. Designated Board members now attend and represent YCD at various court and criminal justice committees, whereas previously the ED was expected to attend all committee meetings which is an impossible task for one person.

Board meetings are run by the Board Chair, and an agenda is followed at the meetings. At times the Board will meet in Executive Session if sensitive information is being discussed, but most of the time the meetings are open so members may attend—and some do. The result of the regularity and organization of the meetings is that the Board members have become more engaged as they see their leadership roles making a difference in the quality of life of the membership.

Due to the strengthened leadership, members are now more regularly addressing their concerns and requests to the Board, as well as the ED, and seeing tangible results. For example, recently the Board addressed an issue concerning the District Attorney's Office's intent to bill Indigent Defense for the discovery packets photocopied for "Early Disposition" cases (Early Disposition addresses cases the DA's Office seeks to resolve at the first court appearance before counsel is appointed). YCD has allowed its Staff Attorney to be available to confer with defendants who are given Early Disposition plea offers, but no finding of indigency or court appointment is made. Members complained that the DA was inappropriately shifting his copying cost to the Indigent Defense Budget. The Board discussed the matter and determined YCD would take a position on the issue and wrote a letter to OPDS alerting the office to the budget concern. As another example, presently the Board is taking an active role in addressing membership quality of service complaints. In Executive Session, the Board considers the complaint, and then discusses and votes on the action to be taken.

Finally, the stronger Board allows the ED more time to communicate with judges and court staff, deal with minor personnel complaints and conflicts, and represent YCD membership interests at the legislature. This is important because minor infractions or conflicts do not fester, and minor corrections and training issues are addressed swiftly. The same is true for positive feedback. Better communication allows for the passing on of compliments, too.

### C. Executive Director is Implementing Improved Quality Controls

When the contracts were signed by the YCD members for this contract year, the contracts were reviewed by the ED and the Board Chair to assess whether the member met the qualifications for each indigent defense "list" the member requested for appointment. Previously, qualification approval was done by the Presiding Judge or his designated judge. For example, if the member checked "murder, lead counsel," and the ED and Board Chair determined that the member did not meet the qualifications for that list as set forth by Oregon law, then inclusion on that list was denied. In one case there was a dispute over the qualifications of a member to be on a particular list, and the ED brought the matter to the Presiding Judge who concurred with the decision of the ED and Board Chair. In addition, the contract signed this year included expanded professional requirements such as mandatory minimum criminal law CLE hours.

The ED is also implementing new training and mentoring processes. One new process is to appoint a more experienced attorney to act as a co-counsel when a complex legal issue warrants. The more experienced attorney may act as co-counsel for the entire case, or may just work on a specific legal issue. This actually saves indigent defense funds, because the inexperienced attorney does not spend excessive hours learning to "re-invent the wheel" when the mentor co-counsel can in less time focus the legal issues and

train the other attorney by word and example. It is also important that the indigent client be competently represented, and not harmed by an attorney's learning curve. Another process is a voluntary mentoring process. The ED utilizes the specialties of certain consortium attorneys who voluntarily make themselves available for new attorney questions and example legal briefs, which is a "free" resource. Also, the ED keeps track of legal issues and obtains copies of example briefs, which are kept in a "Brief Bank" that is available for YCD member use. This, too, saves money because attorneys spend less time researching and writing a brief when a similar brief has already been written. The ED encourages the members to use this resource. Finally, the ED continues to seek more CLE materials to expand the YCD library for members to have access to "check out" for training and betterment, and members are taking advantage of this service; the library has also been enhanced by attorneys who donate current CLEs they no longer need to the library.

As noted above, due to the strengthened and more engage role of the Board, the ED has more time now to monitor trials and motion performance. The ED contacts judges and court staff about member attorney performance, and now has more time to counsel member attorneys. The ED is also more empowered to correct performance problems when they come up. The Board has directed the ED to address complaints with the member attorney immediately and directly, without need to bring each small issue to the Board for consideration. This is being done with success. In addition, YCD now has a process for a short "Summary Suspension" from the court appointment list, which may be used by the ED in the event of an emergency when a member attorney is having such severe problems that an action must be taken immediately. Longer suspensions and terminations must be approved by the Board.

Last, at present the ED is developing a process for reviewing attorney billing, because the court is concerned that it be given accurate estimates of the indigent defense costs at the time of sentencing. Working with the Board Chair and the Presiding Judge, the ED is in the process of identifying attorney billing standards that must be met by YCD members.

### Conclusion

The PDSC wanted YCD to develop quality assurance programs and processes, and to hold its members responsible for the quality of service. The improvements noted above include standards for membership, discipline, mentoring, and termination of membership if necessary. The roles of the ED and the Board have been delineated, which promotes consistency. And with the more defined roles and more active Board, the ED has more time to address performance issues immediately.

Recommendation: YCD needs to concentrate on improving the quality of its juvenile law practice

#### I. Juvenile Law Training and Mentoring Programs

In response to PDSC's Report, the YCD Board formed a Juvenile Law committee, and recruited YCD members who are experienced juvenile law attorneys to be on the committee. The Board appointed three permanent committee members, and the

committee includes the ED and several Board members. The committee then invited all 9 YCD members practicing juvenile law to attend the committee meetings. The meetings are held on a monthly basis, and as a result many improvements have been implemented. A juvenile law “team leader” was designated by the committee. The team leader and another juvenile law attorney attend the Yamhill County’s Juvenile Dependency Excellence Committee [JDEC] meetings. The initial focus of the Juvenile Law committee, and Yamhill County’s present efforts, has been on dependency practice because the laws are quite complex. However, the committee has also been addressing delinquency issues and will focus even more on this area in the future.

YCD juvenile law members are required to meet or exceed the requirements of the “Principles and Standards for Counsel in Criminal Delinquency, Dependency, and Civil Commitment Cases” [Standards], which were revised and approved by OSB in May of 2006. YCD provided all its juvenile law members copies of the Standards to be used as a training tool and best practice standard.

The juvenile committee has identified the need for its members to participate in ongoing training and to have access to training materials. To that end, it is one of the duties of the team leader to monitor upcoming training opportunities, publish the dates and times to the juvenile law members, and encourage and facilitate attendance by the members. In addition, as part of its CLE library efforts, YCD will attempt to build up its juvenile law CLE resources. The committee understands that many indigent defense providers operate on a tight budget, and so do not have the funds to buy materials. Some juvenile law members have offered access to their libraries, as well. Last, the committee is informing the members about free online resources, such as the Juvenile Law Reporter, and [childtraumacademy.com](http://childtraumacademy.com).

At present, no formal mentoring program for juvenile law members has been established. The monthly meetings, however, are proving to be a forum where training and advice are happening, which is due to the attendance of some of the more experienced juvenile attorneys that leads to an exchange of information. With respect to formal mentoring, the committee is considering the possibility of appointing as co-counsel attorneys who want to practice juvenile law, so the new practitioner can get experience to meet the requirements set forth in the Standards. A series of lunch meetings of interest to juvenile law attorneys is being developed by a volunteer juvenile law member, and the idea is to have a speaker at the lunch meeting who represents one of the many juvenile service agencies such as DHS, CASA, the DDA who handles the juvenile law cases, etc. The hope is that the service provider will tell the juvenile law attorneys about their agency, how it operates, and be available to answer questions.

### III. How the Establishment of a “Team Leader” Improves YCD’s Juvenile Legal Services

Yamhill County Circuit Court Judge, Carol Jones, resumed regular meetings of the JDEC in the Spring of 2006. The JDEC has been meeting monthly, but the meetings will be twice monthly beginning in the Fall of 2006. The JDEC consists of representatives of CASA, DHS, TCA, the YCD team leader and another YCD juvenile law attorney, the AAGs that serve this county, the DDA who handles the juvenile cases, the CRB coordinator, and other interested persons as the issues dictate. The JDEC has

addressed many issues to date, including docketing problems, standardized forms, visitation, the use of contempt for parents who do not comply with court orders, the need for settlement conferences, etc. The team leader relays information about issues and changes in the system to the juvenile law attorneys, and addresses issues at the JDEC that are concerns of the juvenile law attorneys. In addition, the team leader is present to address complaints and accept compliments about juvenile law attorney performances and relay the same to the attorneys and the ED. The communication that happens at these meetings has been invaluable for the quality of Yamhill County juvenile legal services.

JDEC does not address delinquency issues. The team leader and the juvenile law committee are in the process of considering establishing another leader-type position or perhaps a committee that will address the issues of concern with delinquency law. That person or committee would be responsible for communicating with the judges, and juvenile court and probation staff, about delinquency issues and attorney performance. At present the ED does this and will continue until the juvenile committee has a different proposal accepted by the Board.

#### IV. Juvenile Law Attorney Member Statistics

*See*, juvenile law attorney responses appended to this report.

#### V. Steps Taken to Improve Communication With CRB

At the time of the PDSC Report, the CRBs met on a date and time that conflicted with a very busy Pre-Trial Conference criminal court docket. At the request of the juvenile law attorneys, the CRBs are now being held at a more convenient day and time. The CRB coordinator has recently commended the increased participation of the juvenile law attorneys to the PDSC. In addition, the CRB coordinator has been asked to address the juvenile law members at one of the planned lunch meetings referenced above. The CRB coordinator also attends the JDEC meetings, which are attended by the team leader and another juvenile law member attorney. The JDEC meeting provides a monthly, and soon bi-monthly forum for communication.

#### VI. Consideration and Pros and Cons of a Separate or Specialized Juvenile Consortium

The juvenile law committee has had preliminary discussions about forming a specialized consortium for juvenile attorneys. To date, the discussions have resulted in the conclusion that there are too few cases, and too few lawyers interested in specializing in juvenile law to make it feasible. Issues were raised about conflicts and economics. A separate consortium would have its own administrative costs, and given the amount of cases the extra cost does not seem practical. However, the discussion is not closed and all are willing to continue to consider the possibility. The team leader contacted the Marion County Juvenile Consortium to learn about their system (clearly the “model” for juvenile law practice), and the committee is considering its adaptability to Yamhill County. The committee members were impressed with that consortium’s development of standardized training materials, procedures and practices.

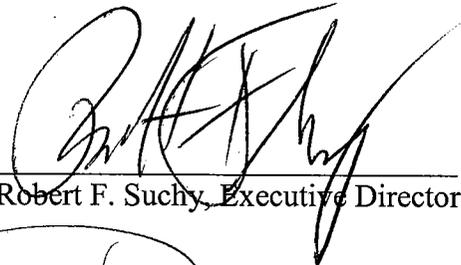
## Conclusion

The PDSC Report spurred the juvenile law attorneys to address inadequacies in the delivery of legal representation to clients in the juvenile system. A framework to address these problems is in place, and progress has been made. The juvenile law committee strongly supports the recommendations of the Juvenile Dependency Work Group, dated July 31, 2006, appended to this report, and is in the process of reviewing the recently published ABA Standards for Representing Parents. Perhaps with the implementation of those recommendations, more attorneys would be willing to practice, or even specialize in, juvenile law.

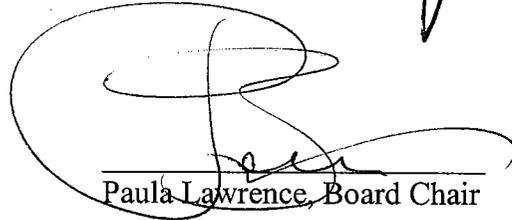
### Recommendation: YCD is Requested to Participate in OPDS's New Consortium Advisory Group

Not only is YCD participating in the Consortium Advisory Group, but also its ED is slated to be its new Chairperson.

Respectfully submitted  
YCD BOARD OF DIRECTORS



Robert F. Suchy, Executive Director



Paula Lawrence, Board Chair

**FINAL RECOMMENDATIONS OF THE  
SUBCOMMITTEE ON QUALITY ASSURANCE OF THE  
JUVENILE DEPENDENCY WORK GROUP**

**July 31, 2006**

The Quality Assurance Subcommittee was charged with making recommendations for improvement in the quality of representation afforded both parents and children in the juvenile dependency (and termination of parental rights) system. The subcommittee operated under the assumption that some (unknown amount of) additional resources would be available for this purpose. The subcommittee agreed at the outset that the purpose of our work was to identify system weaknesses and then to make recommendations for the deployment of additional resources to address those weaknesses, with the end result being a substantial and measurable improvement in the quality of representation for parents and children.

***Weakness:** Uneven quality of representation due, in part, to a lack of specialized training, education, technical assistance, and litigation support.*

***Recommendation:** Establish a juvenile law resource center either within the OPDS or through a contract.*

Activities could include: training coordination and infrastructure; publication of a regular newsletter on juvenile law issues; responding to difficult cases by offering advice, briefs, technical assistance, or even co-counsel; operating a toll free advice and assistance line for attorneys; creating and maintaining a web site and list serve; coordinating and developing volunteer, law student and *pro bono* efforts.

***Weakness:** Increasingly difficult time getting qualified attorneys to work in juvenile court and an unacceptable level of performance from some attorneys who currently do the work, due to non-competitive compensation and excessive caseloads.*

***Recommendation:** Establish and enforce performance standards.*

***Recommendation:** Establish and enforce caseload limits.*

***Recommendation:** Enhance training opportunities and requirements for juvenile court practitioners. Encourage inter-disciplinary, collaborative training opportunities. Monitor caseloads for an increase in appropriate legal challenges, both pre-trial through improved motion practice and at trial, and a reduction in unnecessary contested matters (both pre-trial and at trial) through an increase in appropriate negotiated resolutions. Those who fail to meet the enhanced requirements are restricted from juvenile dependency representation.*

***Recommendation:** Increase the compensation for juvenile court practitioners.*

***Weakness:** The "graying" of the juvenile court (and public defense, in general) bar and the difficulty of attracting new lawyers to the field.*

***Recommendation:** Establish loan forgiveness or assistance programs for lawyers who enter the field and make a commitment to practice in it for a specific length of time.*

**Attachment 1** to OCDLA 8/30/06 Agenda

# Attachment 3

# **REVISED DRAFT**

*(October 13, 2006)*

## **OPDS's Final Report on Service Delivery in Clatsop County & PDSC's Service Delivery Plan for the County**

### Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004, 2005 and 2006, the Commission completed investigations of the local public defense systems in Benton, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Wasco, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of Clatsop County's public defense system, and the comments and discussion that occurred during PDSC's public meeting in Clatsop County held on Thursday, September 14, 2006 in the Clatsop County Courthouse in Astoria. The Commission heard from judges, public defense contractors and other justice professionals in Clatsop County regarding the condition of county's public defense system and how the delivery of public defense services in the county could be improved. The final version of this report will contain PDSC's service delivery plan for Clatsop County.

### PDSC's Service Delivery Planning Process

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

Second, starting with preliminary investigations by OPDS and the preliminary

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

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

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

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

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

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

is now responsible for the provision of competent public defense attorneys.

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission's view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in its mission statement, PDSC is also dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Columbia, Jackson, Klamath, Multnomah and Umatilla Counties and, in 2006, teams have visited the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In accordance with its Strategic Plan for 2003-05, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC 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 2006, the Commission has devoted two of its meetings to investigating the condition of juvenile law practice across the state and to develop a statewide Service Delivery Plan for juvenile law representation.

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

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

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service delivery planning process. That process is aimed primarily at reviewing and improving the “structure” for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into “best practices,” recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.<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 described above focus on the “performance” of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time-to-time in the course of the Commission’s service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission’s deliberative processes. OPDS, with advice and assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

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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).

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in

Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.<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 any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.<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.

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

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<sup>3</sup> Id.

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

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

Finally, to the extent that a consortium lacks an internal management structure or programs to monitor and support the performance of its attorneys, PDSC must depend upon other methods to ensure the quality and cost-efficiency of the legal services the consortium delivers. These methods would include (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) a special qualification process to receive court appointments.

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

individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

#### OPDS's Preliminary Investigations

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

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

This preliminary draft report provided a framework to guide the Commission's discussions about the condition of the public defense system and services in Clatsop County, and the range of policy options available to the Commission — from concluding that no changes are needed in the county to significantly restructuring the county's delivery system. The preliminary draft was also intended to provide guidance to PDSC's guests and audience members at its September 14th meeting in Astoria, as well as the Commission's contractors, local public officials, county justice professionals and private citizens who were interested in this planning process, about the kind of information that would assist the Commission in improving the delivery of public defense services in Clatsop County.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the judicial district's justice system is probably the single most important factor contributing to the quality of the final version of this report and PDSC's service delivery plan for Clatsop County. Accordingly, OPDS invited written comments from any interested public official or private citizen prior to the Commission's September 14th meeting in Astoria.

#### A Demographic Snapshot of Clatsop County<sup>4</sup>

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<sup>4</sup> The following information was taken from Clatsop County's official website, [Wikipedia](#) and data compiled by Southern Oregon University's Southern Oregon Regional Services Institute, which is contained in the Institute's [Oregon: A Statistical Overview](#) (May 2002) and [Oregon: A Demographic Profile](#) (May 2003).

Named after the Clatsop Indian Tribe, Clatsop County with a population of 36,000 is located on Oregon's rugged northwest coast. Incorporated cities in the county include Astoria, Cannon Beach, Gearhart, Seaside and Warrenton. The county's principal industries are fishing, lumber, and agriculture. About 30 percent of the land within Clatsop County belongs to the State of Oregon as part of Oregon's state forest system.

The Lewis and Clark Expedition wintered at Fort Clatsop in 1805-06. Astoria, the state's oldest city named after John Jacob Astor, was established as a fur trading post in 1811. On June 22, 1844, Clatsop County was created from the northern and western portions of the original Twality District. Until the creation of Vancouver County, Washington, Clatsop County extended north across the Columbia River. Provisional and territorial legislatures established Clatsop County's present boundaries in 1845 and 1853.

Before 1850, most of Clatsop County's government was located in Lexington, Oregon, a community located where Warrenton is now. As Astoria grew, it became the center of commerce and industry in the county. The county's residents chose Astoria as the county seat in 1854. The Port of Astoria was created in 1914 to support trade and commerce in Clatsop County.

Fort Stevens, located near the peninsula formed by the south shore of the Columbia River and the Pacific Ocean, was the only military installation in the continental United States that was attacked during World War II. A submarine from of the Imperial Japanese Navy fired 17 rounds at Fort Stevens on June 21, 1942 and escaped before the fort's guns could return fire. Damage to the fort was slight (reportedly a baseball backstop was destroyed and a power line severed).

Approximately 13 percent of Clatsop County's residents hold an undergraduate college degree and 6.5 percent have a graduate degree (compared to respective statewide averages of 16.4 percent and 8.7 percent).<sup>5</sup> Twenty-seven percent of the county's adult population is employed in management or professional positions, compared to the state's average of 33.1 percent. Compared to a statewide average of 26.3 percent, 29 percent of Clatsop County's residents over the age of 25 graduated from high school.

In 2000, Clatsop County had one of the lowest unemployment rates among Oregon's 36 counties at 4 percent. Its per capita annual income was \$19,515, compared to a statewide average of \$20,940. The county had a relatively high poverty rate, however, at 13.2 percent, compared to an 11.6 percent rate in Oregon and a 12.4 percent rate in the United States. The teen pregnancy rate in the county is below average at 15.9 per 1,000 residents, compared with the statewide average of 16.7. Clatsop County's high school dropout rate was Oregon's 14th lowest over the past decade.

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<sup>5</sup> In comparison, the respective numbers in Yamhill County are 13.4 and 7.2 percent and, in Klamath County, they are 10.6 and 5.4 percent.

The diversity of Clatsop County's population is relatively low. Its non-white and Hispanic residents make up 9.2 percent of the county's population, compared to 16.5 percent for Oregon as a whole.

With juveniles (18 years old or younger) making up 24 percent of Clatsop County's total population, its "at risk" population (which tends to commit more criminal and juvenile offenses) equals the state average. Not surprisingly, its "index crime" rate is also equal to Oregon's at 50 index crimes per 1,000 residents (compared to the state's rate of 49.2);<sup>6</sup> however, its juvenile arrest rate was the ninth highest in the state (at 75.6 per 1,000 residents compared to Oregon's average of 53).

In 2005, the public defense caseload in Clatsop County totaled 2,114 out of 171,850 cases in the state. That amounted to 1.2 percent of Oregon's public defense caseload in 2005.

### OPDS's Preliminary Findings in Clatsop County

On August 24 and 25, 2006 John Potter and Peter Ozanne visited Clatsop County on behalf of OPDS to gather preliminary information for PDSC's September 14th meeting in the county. They interviewed both Circuit Court Judges, members of the court's staff, the District Attorney and the Sheriff, representatives of the county's juvenile department, the Citizens Review Board and the local office of the Department of Human Services, and the administrator of one of PDSC's public defense contractors.<sup>7</sup>

Six lawyers in two consortia contract with PDSC to provide public defense services in Clatsop County. Clatsop County Defenders Association (CCDA) is made up of four attorneys including its administrator, Kris Kaino. The second consortium is made up of Dawn McIntosh and Mary Ann Murk. Ms. Murk administers the consortium (the "Murk Consortium"). The public defense attorneys have between nine and 30 years of law practice experience and devote most of their time to public defense practice.

Both consortia pay their members each month based on the percentage of work they perform under the consortia's contracts each month, and the attorneys settle up with their consortia based on value of work at the end of their respective contracts. Kris Kaino assigns arraignment pickup days for both consortia. Based

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<sup>6</sup> For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122.

<sup>7</sup> As of the date of this Preliminary Draft report, OPDS was unable to talk with the administrator of Clatsop County's other public defense contractor or management and staff of the county's community corrections department; however, like all the other persons in Clatsop County interviewed by OPDS, they have been invited to attend and speak at the Commission's September 14, 2006 meeting in Astoria.

upon the experience of OPDS's Contract and Business Services Division (CBS), all the attorneys in both consortia work well together. There are minor variations in contract rates between CCDA and the Murk Consortium; however, both consortia are aware of the differences and apparently prefer this option because of the difference in their mix of cases.

Based upon its two days of in-person interviews and subsequent telephone interviews, OPDS found that virtually all of the justice officials and professionals in Clatsop County are generally quite satisfied with the operation of its public defense system and the quality of legal services delivered by that system. Although assessments of the skills and commitment of among the six lawyers who contract with PDSC varied, four attorneys received numerous compliments for their dedication and advocacy skills and none were considered less than competent.

Both attorneys in the Murk Consortium were singled out for their strong personal commitment and zealous advocacy on behalf of children in juvenile dependency cases. Not surprisingly, they receive most of the court appointments as counsel for children in the county's dependency cases. Most assessments of the performance of CCDA's attorneys in juvenile cases were less complimentary, including impressions that some of the attorneys' apparent commitment to their parent-clients in dependency cases did not equal their commitment to defendants in criminal cases and observations that several CCDA attorneys frequently fail to contact their clients or obtain pretrial discovery prior to their first appearance in delinquency cases. Because the Circuit Court seriously considers the recommendations of Clatsop County's CRB, most attorneys regularly attend the CRB's hearings; however, at least one of CCDA's attorneys apparently fails to attend most CRB hearings involving his clients.

One judge complimented the county's public defense attorneys for their willingness to participate on local policymaking bodies and contribute to court improvement projects.

Neither CCDA nor the Murk Consortium apparently has a board of directors, by-laws or formal quality assurance or disciplinary policies and procedures. Neither consortium's administrator was aware of a reason why Clatsop County has two consortia, other than the State of Oregon's desire in the past to promote competitive bidding among local public defense attorneys. According to the Circuit Court, when the conduct or performance of an individual attorney is called into question, judges take up the matter directly with that attorney. Representatives of other justice agencies in the county were unaware of any means to bring problems or complaints to the attention of the consortia or whether anyone in either consortium was responsible to handle problems and complaints.

During the course of its interviews, OPDS identified five significant concerns

regarding the future of public defense in Clatsop County. First, the Circuit Court, in particular, is deeply concerned about the limited supply of qualified public defense attorneys in the county. Assuming that six defense attorneys can continue to competently handle a caseload generated by a District Attorney's office with six or seven prosecuting attorneys,<sup>8</sup> both judges in Clatsop County wonder what the court will do when one of those six attorneys leaves public defense practice.<sup>9</sup> Apparently, no other attorneys in the county have expressed a willingness to engage in public defense practice and, due to the quality of the attorneys from outside Clatsop County who have been willing to take appointments in the past, the judges believe importing attorneys from other counties on a regular basis is not a feasible solution. Indeed, one of the Circuit Court's judges is so concerned about the impending shortage of public defense attorneys in the county that she traveled to the University of Oregon Law School to encourage recent graduates to enter law practice in Clatsop County and take court appointments.

Second, although the demands of public defense caseloads are a concern in most counties of the state, complaints by consortium attorneys and the District Attorney about the demands of Clatsop County's caseload seemed especially emphatic. The focus of these complaints is the speed with which the Circuit Court processes the criminal and juvenile cases on its docket, which the attorneys believe prevents them from properly evaluating, preparing and resolving many of their cases.<sup>10</sup> While those attorneys expressed appreciation for the Circuit Court's efforts to maintain high standards of judicial administration, they feel that the level of Clatsop County's justice resources, including its supply of lawyers, cannot continue to support what they perceive as one of the fastest moving dockets in the state. Nearly all of the justice professionals with whom OPDS spoke also noted that handling of juvenile and criminal caseloads in Clatsop County is further complicated by variations in the practices and procedures in the two departments of the Circuit Court, which are due at least in part to a lack of communication between the county's judges on matters of judicial administration.

Third, another concern expressed to OPDS in Clatsop County, as well as throughout the state, is the rates paid under the county's public defense contracts. In particular, the attorneys and judges in the county reported what they believe is an unjustified variation in the rates attorneys are paid to handle juvenile dependency cases in Clatsop County compared to Multnomah County. The experience of the Juvenile Rights Project (JRP) in Clatsop County was cited

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<sup>8</sup> Clatsop County's District Attorney informed OPDS that his office will receive funding from the county for a seventh attorney in December, but he indicated that the county's commitment for this funding is limited to six months.

<sup>9</sup> One consortium attorney is currently a candidate in a run-off election for the new Circuit Court Judge in Clatsop County. OPDS understands that other consortium attorneys may be considering retirement or significant changes in their law practice specialties.

<sup>10</sup> Everyone who voiced this concern also expressed hope that the addition of a third judge in the Clatsop County Circuit Court will reduce the pressures of the court's docket.

during one of OPDS's interviews as evidence of this unfair disparity in contract rates. JRP at one time handled a juvenile dependency caseload in Clatsop County under contract with the state. According to the information OPDS gained from this interview, JRP chose not to seek renewal of its contract with the state because it could not afford to operate under the contract rates paid for that work in Clatsop County.

Fourth, OPDS is concerned about (1) an apparent absence of criminal defense attorneys in Clatsop County's early disposition program (EDP), (2) differing perceptions in the county about the reasons for this absence of defense attorneys, including perceptions of PDSC's lack of support for EDPs, and (3) the possibility in light of these perceptions that defense attorneys may be excluded from other specialty court programs in the county such as drug courts. One of the county's judges reported that defense attorneys do not participate in his department's EDP in part because a staff person at OPDS informed him that the agency refuses to provide financial support for the participation of lawyers in EDPs. The county's other judge noted that defense attorneys do not participate in the EDP because they have refused to do so for philosophical reasons. One of the consortium's administrators informed OPDS that defense attorneys feel ethically bound not to participate in Clatsop County's EDP because the District Attorney has refused to provide discovery before the court appearances of defendants who qualify for the EDP. The District Attorney, on the other hand, indicated that police reports are available for review in the courtroom at EDP proceedings and that defendants are given a week to consider the prosecution's settlement offer or consult with an attorney.

OPDS advised all of these individuals of (a) PDSC's support for EDPs, (b) the Commission's development of EDP guidelines in order to ensure the participation of defense attorneys in EDPs that is consistent with their legal and ethical obligations to their clients<sup>11</sup> and (c) PDSC's commitment to assist counties like Clatsop County in the development of quality, cost-efficient EDPs. Nevertheless, because the participation of defense attorneys apparently varies in the criminal drug courts administered by the two departments of the Clatsop County Circuit Court, and because the court is currently developing a new juvenile drug court, OPDS is concerned that the county might not avail itself of the Commission's assistance and support for specialty court programs like EDP and drug courts. As a result, Clatsop County may proceed to administer drug courts and continue to administer its EDP without the participation of defense attorneys.

Finally, as noted above, neither CCDA nor the Murk Consortium has adopted the kinds of organizational structures, programs or processes that PDSC generally recommends for consortia. This raises a concern that Clatsop County's public defense delivery system may not have the capacity to meet the future demands of public defense practice in the county.

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<sup>11</sup> A copy of PDSC's Early Disposition Guidelines is attached in Appendix A.

OPDS's Recommendations for Further Inquiry at  
PDSC's September 14, 2006 Meeting in Astoria

In light of the foregoing concerns, OPDS recommends that PDSC focus its inquiries and discussion at the Commission's September 14th meeting in Astoria on the following five topics:

1. The supply of public defense attorneys in Clatsop County. OPDS recommends that PDSC discuss with the judges and lawyers in attendance at the Commission's September 14th meeting feasible options for increasing the supply of qualified public defense attorneys in Clatsop County. For example, in light of efforts by at least one judge in the county to recruit recent law school graduates into public defense practice, the Commission might consider joining forces with Clatsop County and other similarly situated counties to establish formal law school recruitment teams. These teams could appear at Oregon's three law schools during the hiring season for the purpose of encouraging law students to consider public service positions in underserved areas of the state that offer unique opportunities for legal employment and quality of life.
2. The demands of Clatsop County's public defense caseload. With additional analysis and information from CBS's contract staff, such as comparative data on caseloads across the state, PDSC should inquire into whether the rate at which cases on Clatsop County's Circuit Court docket are processed is unusually high. If so, the Commission might also inquire into the prospects for relieving the pressure of the court's docket, such as the pending addition of another judge, and how PDSC and the Commission's contractors in Clatsop County can assist in relieving that pressure.
3. The contract rates for Clatsop County's consortia. With the benefit of further information from CBS on comparative contract rates, the Commission should discuss the experiences and perceptions of judges and lawyers in Clatsop County regarding (a) the unique challenges of public defense practice in the county, (b) how those challenges might compare with the challenges of public defense practice in counties with higher contract rates (such as Multnomah County) and (c) why the contract rates in Clatsop County should be equal or closer to counties with higher rates. If, in the opinion of PDSC, it appears possible that the contract rates in Clatsop County should be raised to match the rates in other counties, or it appears that further study of these rates and the rates in other counties is justified, the Commission should consider directing OPDS to conduct a study of contract rates in furtherance of PDSC's policy to establish more rational and predictable public defense contract rates in

Oregon.<sup>12</sup>

OPDS's study should be designed to determine if more consistent rates can and should eventually be established across the state. Those rates might include standardized base case rates, with permissible limited variations that take into account local circumstances such as prosecutorial charging practices and the nature and extent of judicial proceedings within specific case categories. Depending on OPDS's assessment of the difficulty of this task and the Commission's assessment of its current priorities, the study could be designed as a pilot project affecting the contract rates in a limited number of counties or as a statewide study affecting the contract rates in every county in the state. In either case, the study should be designed to implement new contract rates or a new rate system for implementation in the affected counties during the formation of contracts in 2007.

4. The participation of defense attorneys in Clatsop County's EDP and other specialty court programs. In developing guidelines for the design and operation of EDPs in consultation with the Oregon Criminal Defense Lawyers Association, the Oregon District Attorneys Association and the Chief Justice's Criminal Justice Advisory Committee, PDSC recognized that the interests of individual defendants and the taxpaying public can be served by the expeditious resolution of cases in which prosecutors offer relatively favorable dispositions or the opportunity to participate in rehabilitative corrections programs. The Commission also recognized, however, that EDPs or other specialty court programs, which lack the usual court processes of adjudication in favor of prompt resolutions or therapeutic objectives and which fail to provide access to legal counsel in the courtroom, present the risk that uncounseled defendants, especially with language or educational deficits, will be unable to fully understand the range of legal options available to them or the legal and personal consequences of their legal decisions.<sup>13</sup> Consequently, PDSC's EDP guidelines were designed to promote the participation of defense counsel in these programs while preserving their advantage in terms of the expeditious resolution of case and cost savings.

OPDS urges the Commission, during the course of its discussions with judges and lawyers in Clatsop County on September 14th, to confirm its

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<sup>12</sup> During the course of its discussions and deliberations over the past several years, the Commission has referred to this policy as the pursuit of an "administrative model" with relatively standardized contract rates largely determined in advance by PDSC, as opposed to the pursuit of a "market model" with variable contract rates that depend on the relative knowledge and negotiating skills of the parties and the supply and demand for lawyers in the relevant market (or county).

<sup>13</sup> The Clatsop County District Attorney did report that the presiding judge in the county's EDP is extraordinarily rigorous in advising uncounseled defendants of their legal rights and accepting waivers of those rights or guilty pleas.

commitment to ensuring the participation of defense attorneys in the development and operation of EDPs and other specialty court programs. PDSC should also offer the assistance of OPDS, its Quality Assurance Task Force and local public defense attorneys to assist the Clatsop County Circuit Court in developing cost-efficient specialty court programs that are consistent with (a) the mission of the county's criminal and juvenile justice systems to ensure due process and promote public safety, (b) the rights of victims and public defense clients in the county and (c) the interests of the taxpaying public.

5. The organizational development of Clatsop County's consortia.

Like some relatively small, well-established consortia in other parts of the state that deliver public defense services to the general satisfaction of local courts, Clatsop County's consortia appear to operate primarily for the purposes of submitting contract proposals to PDSC and administering their contracts in accordance with CBS's contracting policies and procedures. Neither consortium appears to have adopted the organizational components that the Commission has recommended to other consortia in the state, such as a board of directors, a formal organizational structure, a complaint process, an attorney disciplinary process and training, mentoring, recruitment and quality assurance programs. As a result, Clatsop County's delivery system may not be capable of adapting to a future that will inevitably include population and caseload growth, personnel changes on the Circuit Court,<sup>14</sup> in the consortia and in the District Attorney's office,<sup>15</sup> and changes in state and local justice and law enforcement policies.

During PDSC's September 14th meeting, OPDS recommends that the Commission inquire into the feasibility of and support for adopting some or all of the foregoing organizational features of consortia in Clatsop County. In accordance with PDSC's general policy of refraining from imposing organizational structures and processes that are inconsistent with the culture and local practices in a county, the Commission may wish to weigh the advantages of recommending changes in the organization and operation of Clatsop County's consortia against (a) the level of local satisfaction with the consortia's current operations and legal services, (b) the importance of first addressing the other concerns described above and (c) the current demands on the six attorneys who provide public defense services in the county.

The Results of PDSC's September 14, 2006 Meeting in Astoria

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<sup>14</sup> Following the results of the November election, Clatsop County will have a third Circuit Court Judge.

<sup>15</sup> Clatsop County will have an additional deputy district attorney in December, which may be a permanent addition to the District Attorney's office depending on a continuation of county funding.

The commission heard testimony from the two circuit court judges for Clatsop County, Judge Phillip Nelson and Judge Paula Brownhill, from the Director of the Clatsop County Juvenile Department, Georgia Gates, from R. Hendricks of the Oregon Youth Authority, and from public defense attorneys Mary Ann Murk, Kris Kaino, Ty Settles, Don Haller and John Orr. Comments were also received from Cora Lane, the Director of Community Corrections, and from Josh Marquis, the District Attorney for Clatsop County. Peter Ozanne and Kathryn Aylward provided additional information.

In general, the witnesses testified that the six consortium attorneys are competent and hardworking. They were particularly praised for their work in juvenile cases – for attending meetings for which they are not directly compensated and for continuing to represent their clients after the initial disposition. It was reported that they appear to be trying the appropriate cases and litigating appropriate motions. They are also actively involved in the local criminal and juvenile justice systems.

Witnesses and commission members also discussed each of the five potential issues identified in the draft report.

#### The supply of public defense attorneys in Clatsop County.

There is currently, or almost certainly will be in the near future, a need to add new public defense attorneys in Clatsop County and to replace current members as they pursue other professional options. Some witnesses said that the six consortium attorneys are overwhelmed by their caseloads. One of the judges said that more lawyers are needed. One of the consortium administrators said that, while he believes they are able to handle the current workload, in a perfect world where the system was adequately funded they could use one or two more attorneys. In addition, a third judge will be added in January of 2007. While some believe this may lighten the load for the attorneys, others anticipate that it will have the opposite effect.

Attracting new public defense attorneys to the county could be difficult. Some of the obstacles to successful recruitment are case rates<sup>16</sup>, which are lower in Clatsop County than in some other counties; high caseloads<sup>17</sup>; the rising cost of living in the area; the significant indebtedness of many newly admitted attorneys; the inability, due to time constraints, of current consortium members to mentor new members.

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<sup>16</sup> The director of the juvenile department testified that “In order to bring attorneys into this town, you are going to have to pay them.”

<sup>17</sup> Of course, as a number of witnesses testified, if case rates were increased the consortia might then be in a financial position which would allow them to hire additional attorneys and lower their caseloads.

Possible solutions include increased case rates, a loan forgiveness program through the state or federal government, stipends to assist with relocation costs and assistance with recruitment as outlined at page 14 of this report.

#### The demands of Clatsop County's public defense caseload

Judge Nelson said he wondered how the consortium attorneys could keep up with the caseload. He suspected that they were overwhelmed by the number of cases and appearances. The director of the county juvenile department said that juvenile attorneys are overwhelmed by the demands of juvenile practice.

The recent implementation of an early resolution process may help resolve cases sooner and prevent set-overs. In recent years the number of trials has fallen dramatically. Some witnesses believed that the addition of a third judge might help to slow the pace. The local legal community previously came together to review docketing practices. After approximately a year of discussion the current docketing system was implemented and had positive results.

Possible solutions to the caseload issue include continued coordination among members of the local legal community to reduce unnecessary appearances; increased case rates which would permit the consortia to add new attorneys; the use of trained professional volunteers such as the AmeriCorps attorneys currently placed at the Juvenile Rights Project in Portland; the use, when appropriate of investigators to assist in the observation and assessment of child clients' placements and circumstances.

In addition, in the next biennium there may be supplemental funding available to reduce caseloads, increase compensation and improve representation in juvenile dependency proceedings.<sup>18</sup>

The contract rates for Clatsop County's consortia. Judge Nelson told the commission "You need to pay your providers here more money." Judge Brownhill noted the difference in rates for juvenile attorneys in Clatsop County compared with juvenile attorneys in other counties. One consortium attorney testified that he had examined the contracts of other providers in the state and determined that the rates in Clatsop County were among the lowest in the state. Another consortium attorney reported that she was paid \$210 for representing a child client at a dependency hearing. In order to prepare for that hearing it was necessary to spend several hours at meetings and twenty to thirty hours driving to Ontario, Oregon to visit with her client.

Chair Ellis explained that the commission had directed OPDS to address any rate disparities (that were not based on articulable differences in circumstances) as resources permitted, but without reducing the rates of any contractor. He

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<sup>18</sup> A bipartisan group of legislators has formed the Dependency Representation Workgroup to explore methods of improving representation in juvenile dependency cases.

acknowledged that the elimination of disparities could not occur immediately.

As suggested above at page 15 of this report, the Commission may wish to weigh the unique challenges of public defense practice in Clatsop County against the challenges of practice in counties with higher rates and determine whether Clatsop rates should be equal or closer to those higher rates. The commission could also direct OPDS, prior to the next contract cycle, to conduct a study of contract rates in furtherance of PDSC's policy to establish more rational and predictable public defense contract rates in Oregon.

#### The participation of defense attorneys in Clatsop County's EDP and other specialty court programs

Witnesses testified that the county's early disposition program permits defendants charged with relatively minor offenses to resolve their cases at or shortly after arraignment.

Consortium attorneys testified that they had declined to participate in the county's EDP program because they did not believe they would have adequate discovery or time to investigate the case, and because the compensation offered them was inadequate. One attorney was concerned that his reputation among the general public would be negatively affected by involvement in a program that "just moves people in and out." Judge Nelson said that when the program was in the development stage he asked the Indigent Defense Services Division about compensation for the defense attorneys and that he didn't "think there was anybody willing to work for that price."

An experienced Marion County attorney reported that he and other Marion County attorneys had participated in that county's early disposition program from the beginning. He believed the program served a useful purpose for clients charged with minor offenses who wanted to resolve their cases quickly. He attributed the success of the program to the involvement of experienced defense and prosecution attorneys.

Members of the commission noted that an early disposition program could be of benefit to out-of-town weekend visitors without significant criminal records who did not want to return to Clatsop County to contest the charges. Currently, because defense attorneys are not present, these individuals receive no legal representation<sup>19</sup>. While the position of the Clatsop consortium attorneys appears to be a principled one, some reconsideration of their position might be in order in view of the experience in Marion and other counties and the importance of providing legal representation to the participants in the program.

Further discussion, including a discussion of the appropriate compensation rate,

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<sup>19</sup> A consortium attorney said that one of his clients in a retained case had accepted an EDP offer without realizing that it would result in the loss of his driver's license.

might be productive, particularly if experienced attorneys from jurisdictions such as Marion County were included.

#### The organizational development of Clatsop County's consortia

Testimony from consortium attorneys as well as OPDS staff clarified that the existence of two separate consortia in Clatsop County was the result of a number of historical events rather than conscious planning. Both consortia operate with a minimum of organizational structure.

While there is general satisfaction with the services provided by both consortia the Commission could nevertheless recommend to both groups consideration of the benefits that might accrue from consolidation of the two consortia and from adoption of some of the organizational components that the Commission has recommended to other consortia in the state. Participation in the consortia workgroup currently being organized by consortia managers would give the Clatsop County organizations an opportunity to discuss these issues with similarly situated contractors.

#### PDSC's Service Delivery Plan for Clatsop County

[The final version of this report will set forth a Service Delivery Plan for Clatsop County, which contains the Commission's suggestions and recommendations to improve the delivery of public defense services in Clatsop County.]

# Appendix A

## **The Public Defense Services Commission's Guidelines For Participation of Public Defense Attorneys in Early Disposition Programs**

In order to insure that Early Disposition Programs (EDPs) involving court-appointed attorneys compensated by the Public Defense Services Commission (PDSC) meet constitutional, statutory and ethical requirements, PDSC concludes that EDPs should comply with the following guidelines. These guidelines are intended to insure that clients of court-appointed attorneys who participate in EDPs are able to make knowing, intelligent, voluntary and attorney-assisted decisions whether to enter pleas of guilty and that court-appointed attorneys are able to provide meaningful counsel and assistance to those clients.

1. An EDP should insure that the program's operations and rules permit the establishment and maintenance of attorney/client relationships.

### Commentary

Although EDPs offer defendants the opportunity for favorable dispositions of their pending criminal charges and the State of Oregon potential savings for its justice system, Oregon's Rules of Professional Conduct require defense attorneys who participate in EDPs to establish and maintain meaningful attorney/client relationships.

Oregon Rule of Professional Conduct 1.1, requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 requires that "A lawyer shall act with reasonable diligence and promptness in representing a client and not neglect a legal matter entrusted to the lawyer."

2. An EDP should provide the opportunity for necessary pre-trial discovery, including adequate opportunity to review discovery material and investigate the facts of the case and the background and special conditions or circumstances of the defendant, such as residency status and mental conditions. Defendants participating in an EDP should be notified on the record that their attorney has not been afforded the time to conduct the type of investigation and legal research that attorneys normally conduct in preparation for trial.

### Commentary

Article I, Section 11 of the Oregon Constitution provides, “In all criminal prosecutions, the accused shall have the right to be heard by himself and counsel...” This constitutional right to counsel would be meaningless without an adequate opportunity for counsel to inform himself or herself about the nature of the charges against the defendant, the factual and legal circumstance of the case and the background of the defendant.

The following Oregon Principles and Performance Standards for Counsel in Criminal Cases (the “Oregon Standards”) require defense attorneys to carefully review charging instruments, police reports, relevant background information with defendants. These Oregon Standards also require counsel to conduct necessary independent investigation or consultation with experts in appropriate circumstances before advising their clients concerning participation.

**STANDARD 1.1 – Prerequisites for Representation**

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

**STANDARD 1.2 – General Duties and Responsibilities of Counsel to Clients**

Upon being retained or appointed by the court, counsel should contact the client as soon as practicable AND maintain regular contact thereafter. Counsel should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client’s position within the bounds of the law and the Rules of Professional Responsibility.

**STANDARD 1.3 – Role of Counsel**

Counsel should seek the lawful objectives of the client and should not substitute counsel’s judgment for that of the client in those case decisions that are the responsibility of the client.

**STANDARD 1.4 – Initial Client Interview**

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early states of the case and to provide the client with information concerning counsel’s representation and the case proceedings.

**STANDARD 2.5 – Initial Court Appearances**

Counsel should preserve all of the client’s constitutional and statutory rights at initial court appearances.

**STANDARD 2.6 – Independent Investigation**

Counsel should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

3. An EDP should provide for adequate physical space to ensure necessary privacy and adequate time to conduct confidential consultations between clients and their attorneys.

4. An EDP should provide adequate time for defendants to make knowing, intelligent, voluntary and attorney-assisted decisions whether to enter pleas of guilty or whether to agree to civil compromises or diversion. Clients should be allowed a reasonable continuance to make their decisions in the event there is incomplete information or other compelling reasons to postpone entry of a plea, civil compromise or diversion agreement. Clients should be allowed to withdraw their pleas, petitions or agreements in an EDP within a reasonable period of time in extraordinary circumstances.

#### Commentary

The following Oregon Standards require that defense counsel with clients in Early Disposition Programs have adequate time and privacy to meet with their clients and carefully review the clients' rights, obligations and options. These standards, as well as applicable rules of law, require that defendants be given adequate time to consider their options, to knowingly and intelligently waive their rights and to withdraw guilty pleas or agreements to enter programs in appropriate circumstances.

STANDARD 2.7 – Pretrial Motions; Hearings Regarding Ability to Aid and Assist Counsel should research, prepare, file and argue appropriate pretrial motions whenever there is reason to believe the client is entitled to relief. Counsel should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist...

STANDARD 2.8 – Pretrial Negotiations and Admission Agreements  
Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;
4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;
5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

ORS 135.049(C) provides that every EDP must provide (i) written criteria for eligibility, (ii) victim notification and appearance, and (iii) a process to ensure representation and discovery.

5. An EDP should insure that attorney caseloads are sufficiently limited to provide for full and adequate legal representation of each client.

#### Commentary

Oregon Rule of Professional Conduct 1.1, requires that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

6. An EDP should provide for alternative representation for a client eligible for an EDP where such representation would constitute a conflict of interest for the client’s original attorney.

#### Commentary

The following Oregon Rules of Professional Conduct forbid attorneys from representing clients when that representation involves a conflict of interest.

#### RULE 1.16 DECLINING OR TERMINATION REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law

#### RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
- (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

#### RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political.

7. An EDP should not penalize clients or sanction their attorneys for acting in conformity with any of the foregoing standards.

NOTE: These guidelines will be accompanied by descriptions of at least two EDPs currently operating in the state that conform with these guidelines – one from a large, more populous judicial district and one from a small, less populous judicial district.

# Attachment 4

## Public Defense Diversity Task Force

Angel Lopez  
Squires & Lopez  
621 SW Morrison St #1250  
Portland OR 97205  
(503) 241-4708  
[alopez@squireslopez.com](mailto:alopez@squireslopez.com)

John J Connors  
Metro Public Defender Inc  
630 SW 5th Ave Ste 500  
Portland OR 97204  
(503) 225-9100  
[jconnors@mpdlaw.com](mailto:jconnors@mpdlaw.com)

Carol Edmo  
Native American Program  
Legal Aid Services of Oregon  
812 S.W. Washington, Ste 700  
Portland OR 97205  
(800) 546 0534  
[carol-edmo@lasoregon.org](mailto:carol-edmo@lasoregon.org)

Ernest E Estes  
Bonneville Power Admin - LC  
905 NE 11th Ave  
PO Box 3621  
Portland OR 97208  
(503) 230-4201  
[eeestes@bpa.gov](mailto:eeestes@bpa.gov)

Steve Gorham  
341 State Street  
Salem, OR 97201  
(503) 364-6494  
[grumpy@teleport.com](mailto:grumpy@teleport.com)

Manuel Perez  
Rader Stoddard & Perez PC  
381 W Idaho Ave  
Ontario OR 97914  
(541) 889-2351  
[manuel@raderlaw.com](mailto:manuel@raderlaw.com)

Wendy Squires  
Squires & Lopez  
621 SW Morrison St #1250  
Portland OR 97205  
(503) 241-4708  
[wsquires@squireslopez.com](mailto:wsquires@squireslopez.com)

Janet Stevenson  
Lewis & Clark Law School  
10015 S.W. Terwilliger Blvd  
Portland, OR 97219  
(503) 768-6600  
[jws@lclark.ed](mailto:jws@lclark.ed)

Shannon Storey  
Ofc of Public Defense Svcs  
1320 Capitol St NE #200  
Salem OR 97303  
(503) 378-2458  
mary-  
[shannon.storey@opds.state.or.us](mailto:shannon.storey@opds.state.or.us)

Tammy W Sun  
Ofc of Public Defense Svcs  
1320 Capitol St NE #200  
Salem OR 97303  
(503) 378-2476  
[tammy.w.sun@opds.state.or.us](mailto:tammy.w.sun@opds.state.or.us)

Kenneth R Walker  
Walker Warren & Watkins  
838 SW 1st Ave Ste 500  
Portland OR 97204  
(503) 228-6655  
[walwar@aol.com](mailto:walwar@aol.com)

William D Young  
PO Box 50271  
Eugene OR 97405  
(541) 554-1004  
[wdyoung@justice.com](mailto:wdyoung@justice.com)

Peter A Ozanne  
Ofc of Public Defense Svcs  
1320 Capitol St NE #200  
Salem OR 97303  
(503) 378-3032  
[peter.a.ozanne@opds.state.or.us](mailto:peter.a.ozanne@opds.state.or.us)

## **Public Defense Diversity Task Force**

### *Increasing Diversity Subcommittee*

On June 29, 2006 at 3:00 P.M. the Increasing Diversity Subcommittee (hereafter referred to as group) met at the Law Office of Squires and Lopez. Present were:

Angel Lopez  
Shannon Storey  
Steve Gorham  
Bill Young  
Wendy Squires

Absent:  
J. Connors

Ideas discussed are listed below.

#### Diversity Defined:

The group has defined diversity by

1. Age
2. Race
3. Gender
4. Other cultural competence
5. Foreign language skills reflective of the foreign language speakers we serve, including sign language

#### Baseline count:

In order to best develop target goals we believe we need to develop a baseline count of Public Defense trial level Oregon Service provider lawyers.

We would need specific statistical baseline as follows:

1. Total number of lawyers involved in delivering public defense services.
2. Factors including
  - a. race
  - b. number of lawyers who speak a foreign language or who can sign
  - c. age
  - d. demographics
  - e. reported anticipated retirement year
  - f. gender

We believe we could best get this information by survey from law office or consortium administrators.

### Loan Forgiveness:

It was recommended that a Loan Forgiveness program be set in place as a line budget item of \$5,000 per new admittee who chooses to work as a public defender. This amount would help the new lawyer admittee retire their education debt at \$416 a month. This assistance would be in place for the first three years the lawyer would be practicing criminal defense, either as a public defender, public defense contractor or public defense consortium member.

It is anticipated that this would be a dedicated line item with funds coming to the individual defender or consortium administrative offices and specifically accounted for. Any funds not used would be remitted back to indigent defense offices in Salem at the end of the calendar year.

We believe a statewide budget of \$350,000 per year for service of 70 qualified attorneys would be appropriate.

We also discussed recommending a change in the Oregon Tax Law exempting loan forgiveness funds from income.

### OCDLA jobs available website:

This would be a website maintained by the OCDLA where employers could post job openings and applicants could view them.

OSB/OCDLA running adds referencing the website

### Internship:

Establish a number of summer clerkships to interest target members in Oregon as a place to practice indigent defense

Induce major law firms to create "loaner" lawyers for one-year placements in public defense law offices.

### Recruitment:

Develop a brochure about why we should consider working in public defense in Oregon and make that brochure available to law school placement offices along with internships and loan forgiveness opportunities nationwide as well as through the National Lawyers Guild.

Have speakers who could pitch indigent defense careers at state or regional law schools, the state National Bar Association, the OSB's OLIO program, the Oregon Minority Lawyer's Association and the National Lawyer's Guild.

### Mentoring:

Develop a mentoring program for new public defender practitioners.

Implementation of recommendations:

The group recommends a .5 FTE grant writer/program organizer to develop materials and implementation strategies to enact the concepts recommended by this group.

It is recommended that the grant writer/program organizer be placed with OCDLA and that we work with the Oregon Law Foundation to obtain implementation and program funds. We would hope that OCDLA and Indigent Defense Services would also be in a position to assist with funding.

We believe that the grant writer/Program Organizer could breathe life into these recommendations in one year or less.

This meeting summary was prepared by Angel Lopez. Also, please find attached additional comments submitted by Ernest Estes.

Please review all materials and submit your comments, clarifications or additions to me by August 1, 2006.

Thank you all for your valued participation.

Angel Lopez

**From:** "Estes, Ernest E - LC-7" <eeestes@bpa.gov>  
**To:** <alopez@squireslopez.com>  
**Date:** 6/30/2006 9:18:59 AM  
**Subject:** Diversity in the Criminal Defense Bar

I have one additional idea. Criminal Defense Lawyers should participate in activities that allow them to demonstrate and explain the indispensable role of lawyers, defense lawyers, in our judicial system.

I participate in the School to Work program for BPA. High school students (Freshmen, Sophomores and Juniors usually) choose potential careers and get hooked up with practitioners in the area they are interested in. In the Portland area Hillsboro and Portland Public Schools have used this program for years. It appears that the program may be sun setting due to budget cuts or that it is not as vibrant as before. Nevertheless, I am occasionally assigned students who are interested in the law. Among my first questions is, "What kind of law?" Most often they say corporate law. I ask questions about the source of their interests. I get them to talk about trial work. I mention both PD work and DA work especially for students interested in advocacy and trial work. For those who don't want to defend the guilty I challenge that notion. My point here is that the criminal defense bar does not do a particularly good job of defining their role in the criminal justice system. In my discussions with these students I use examples that demonstrate the need for good lawyers on both sides of the isle. Students come away not necessarily convinced that they will not become great criminal defense lawyers but with an understanding and respect for the role of defense lawyers. This puts the possibility that it may be an honorable career for them. This is a long way of saying that one of our recommendations should be for OCDLA to encourage defense lawyers to participate in events at schools, especially high schools to describe the role of criminal defense in the judicial system and the value of trial work in reaching trial lawyer goals.

Lastly Angel, I want to thank you for a excellent and productive meeting. eee.

## OFFICE OF PUBLIC DEFENSE SERVICES

### Diversity Task Force Meeting Minutes July 28, 2006 Meeting

Angel Lopez, Chair of the Task Force, Steve Gorham, Janet Stevenson, Tammy Sun, Ken Walker, Bill Young and Peter Ozanne attended the June 28, 2006 meeting of the Task Force.

Angel, who is also Chair of the Increasing Diversity Subcommittee, reported the results of the Subcommittee's June 29, 2006 meeting:

- The definition of "diversity" should include age, race, gender, other cultures and foreign language speakers;
- A "baseline" of diversity, which accounts for the number of lawyers and staff in the foregoing categories, should be compiled through a survey of law office and consortium administrators;
- A law school loan forgiveness should be established for new full-time public defense attorneys in the amount of \$5,000 for each attorney, funded through the state's public defense budget. The program's estimated cost would be approximately \$350,000 per year;
- A website maintained by OCDLA or OPDS should post current job openings across the state;
- Summer internships in public defense firms should be established to recruit interested students, and large private law firms should be recruited to "loan" associates to public defense firms for one-year of trial experience;
- A recruitment brochure for distribution among law school placement offices and a speakers bureau to make presentations at appropriate legal forums should be created;
- A formal mentoring programs for new public defense attorneys should be developed; and
- OCDLA and OPDS should fund a .5 FTE grant writer and program coordinator to implement the foregoing strategies.

The Task Force agreed that Angel should make a presentation on behalf of the Task Force at the Public Defense Services Commission's October 20, 2006 meeting in Welches, which would include the foregoing proposals.

Ken Walker, chair of the Cultural Competency Subcommittee, reported that the Subcommittee had not yet met, but would do so soon. He also indicated that he would meet with Multnomah County Circuit Court Judge Dick Baldwin before the Subcommittee's meeting to discuss the cultural competency program that Judge Baldwin leads and to determine if the Task Force could integrate or coordinate its efforts with that program.



OREGON STATE BAR  
SECTIONS

Diversity Law

August 8, 2006

Chief Justice Paul J. DeMuniz  
Justice Thomas A. Balmer  
Justice Wallace P. Carson, Jr.  
Justice Robert D. Durham  
Justice Michael W. Gillette  
Justice Rives Kistler  
Justice E. William Riggs  
Supreme Court Building  
1163 State Street  
Salem, OR 97301-2563

Re: Elimination of Bias MCLE Requirement -  
Public Comment Scheduled for September 19, 2006

Dear Chief Justice DeMuniz,

“I FIND THE GREAT THING IN THIS WORLD IS NOT SO MUCH  
WHERE WE STAND AS IN WHAT DIRECTION WE ARE MOVING.” *Justice  
Oliver Wendell Holmes.*

We write you on behalf of the Executive Committee of the Oregon State Bar Diversity Section. Our Committee consists of representatives from numerous bar groups whose missions include the goal of equality and access to justice in Oregon's legal system. For a listing of Committee Members and Section Mission Statement see Exhibit D. Our Committee unanimously opposes the effort to drop the modest Elimination of Bias/MCLE requirement previously approved by the Court.

Please consider these comments in favor of continuing the EOB/MCLE requirement. We would also appreciate the opportunity to be heard at the September 19<sup>th</sup> conference. Because this is a matter of great public importance and concern, we urge the Court to keep the record open for 30 days beyond the September meeting date for additional public comment. This would give members of the public a reasonable opportunity to provide the Court with significant input on this issue. With respect, we believe the public deserves a reasonable opportunity to be heard on such an important matter and that the Court would benefit from such comment.

## BACKGROUND

The Oregon justice system, the State of Oregon, and our nation, are still emerging from centuries of racial segregation and exclusion. Although we have eliminated laws that maintained racial segregation and exclusion, we have a long way to go to change attitudes and achieve racial equality in our justice system. For a brief chronology of race exclusion laws in Oregon and a listing of civil rights advocates who effectively addressed those exclusionary laws and practices, see Ex. A.

In April 1999, the Oregon Legislature, in an extraordinary session and with the participation of Governor Kitzhaber, declared a "Day of Acknowledgment" to recognize the reality of Oregon's discriminatory history and acknowledge individuals of all races working for positive change. The Oregon Legislature adopted the following Resolution:

"Whereas history has been marred by racial discrimination, exclusion, bigotry and great injustice toward people of color, including Native Americans, Africans Americans, Latinos, Chinese Americans and Pacific Islanders; and

"Whereas such mistreatment based on race has been allowed and enforced through our laws and legal system; and whereas an example of a law was an Act passed by the Oregon Territorial Assembly in 1849 (and later repealed) that expressly excluded African Americans from the Territory; and

"Whereas the legislative session that convened in January 1999 is the 150<sup>th</sup> anniversary of this exclusionary Act; and

"Whereas one lingering effect of this history causes harm and pain to people of color and limits the quality and dignity of all of our lives; and

"Whereas we believe that an honest acknowledgment of our racial history and open dialogue can lead to racial healing and reconciliation and free us to move constructively into a better future for all if we take personal responsibility for change by examining and changing our personal attitudes that perpetuate structural, economic and racial separation; Now, therefore,

"Be it Resolved by the State Legislature:

"That we, the members of the Seventieth Oregon Legislative Assembly, recognize Oregon's discriminatory history, acknowledges people of all races and ethnic backgrounds who have worked for positive change and celebrate the progress made and encourage participation in honest interracial dialogue essential to positive social change; and be it further Resolved,

"That we, the members of the Seventieth Legislative Assembly, resolve to increase public awareness of racial discrimination and work toward the full participation of racial minorities in all aspects of Oregon life and that this Day of Acknowledgment provide focus for planning constructive dialogues and actions as we work toward a future of racial equality."- *Passed April 22, 1999.*

The Diversity Section respectfully asks this Court to consider the social policy expressed by the Oregon Legislature in the 1999 Resolution as it deliberates on the EOB/MCLE issue. The Resolution expressly refers to the fact that "mistreatment based on race has been allowed and enforced through our laws and legal system . . ." and resolves "to increase public awareness of racial discrimination and work toward the full participation of racial minorities in all aspects of Oregon life . . ." Indeed, excerpts from the Report of the Oregon Supreme Court Task Force On Racial / Ethnic Issues (1994) were included in the newsletter commemorating the Day of Acknowledgment in the Oregon Legislature. See Ex. A, p. 5.

The Forenote to Non-minority Readers in the 1994 Task Force Report underscores what remains the greatest obstacle to positive change:

"One conclusion permeates this report, but it is expressly stated only on this page. The conclusion should be evident to even a casual reader of the report. Lest any reader fail to perceive the message, however, we state it here explicitly: Non-minorities have brought about many of the problems that minorities encounter and are discussed in this report. Addressing these problems, and ultimately solving them, is the joint responsibility of non-minorities and minorities . . .

Often the greatest challenge is getting those who cause a problem to recognize any responsibility and to agree on the solution. Our society is filled with persons who say, 'It's them; not me' . . .

This report repeatedly urges members of the majority to learn about the problems so that, ultimately, the majority agrees that racial discrimination in our society is "our problem" too and that non-minorities must be involved in the solution. Non-minorities have contributed to the problems that minorities experience, and if the problems ever are to be solved, then non-minorities must work with minorities to rectify the situation.

If a poll were taken of all lawyers, court staff and judges in Oregon, it is doubtful that even one person would admit that he or she discriminates against minorities in any way. "Sure," they might say, "there's a problem. But someone else is causing it. Not me." That attitude makes the education process even more difficult.

The truth is that many nonminorities were raised in a culture in which discrimination was common, even accepted. Not surprisingly, the habits and attitudes learned as children carry over into adult life.

This report, therefore, begins with a plea to nonminority judges, court staff, lawyers, law school faculty and students, juvenile staff, corrections personnel, law enforcement officers and others in government: recognize that our minority population has serious problems in our society. Nonminorities, who have contributed to the problems that minorities encounter, must work with minorities to solve these problems . . ." - *From Overview of Task Force Report (1994)*. For complete Task Force Report and Implementation Committee Report: A Commitment To Fairness (1996), see OJD Website at Ex. E, p. 1.

## THE EOB REQUIREMENT IS SOUND POLICY

As recommended by the Task Force, the EOB/MCLE requirement was adopted several years later by this Court as a one hour per year educational requirement for lawyers. Such continuing legal education helps to educate lawyers about the background of the clients they serve and contributes to an increase in access to justice by the public. This educational standard helps lawyers to “identify and eliminate bias from the legal profession and the practice of law.” MCLE Rule 5.5 See Ex. F, p. 3. This Court approved the EOB/MCLE requirement for sound policy reasons.

Oregon’s EOB requirement is similar to MCLE requirements in Washington, California, Minnesota and West Virginia and comports with the ABA Model MCLE Rules. The ABA encourages regulatory bar associations “to require that lawyers . . . complete programs related to the promotion of racial and ethnic diversity in the legal profession, the promotion of full and equal participation in the profession of women and persons with disabilities, and the elimination of all forms of bias in the profession . . . The practice of law has seen dramatic changes over the past decade . . . An increasingly diverse bar calls for increasing diverse educational options.” ABA Report, Ex. B. The trend now favors state adoption of the EOB requirement. Regrettably, the OSB Board of Governors does not base its current recommendation on policy considerations. If this Court follows the BOG’s recommendation, Oregon would be the first state in the nation to drop this policy without a sound rationale for doing so.

The ABA Report supporting a mandatory EOB/MCLE requirement includes the following discussion:

“It is a fundamental principle of legal and ethical judicial standards that the appearance of bias is as damaging to public trust and confidence as the reality of bias. We are living in a time when public trust and confidence is seriously eroded. It is therefore critical that judges and lawyers monitor their attitudes and behaviors to make sure that fairness and equal justice are never compromised<sup>1</sup> . . .

“ . . . ”

One of the many dramatic changes that has swept through the legal profession over the past 30 years is the growing number of women, minorities and others with diverse backgrounds entering the practice of law. Although, as a whole, the progress of female attorneys and attorneys of color have not matched that of the “typical” white male attorney, there has been advancement in terms of numbers of women and minority lawyers practicing and attaining positions of respect and influence. Attorneys from a variety of backgrounds including women, people of color, people with disabilities, and people with differing sexual orientations now can be found in virtually every aspect of the legal profession.<sup>2</sup>

Why is it important in legal workplaces to deal with the issues of bias?

The benefits outweigh the time, effort and money spent on dealing with these issues after the fact. Workplaces that address these issues before they arise have more satisfied, loyal lawyers. The less lawyers encounter bias, the greater the job satisfaction they experience, and the greater their commitment and loyalty to the firm. Their productivity increases when there is less to complain about; there is lower turnover and ultimately it saves the workplace money to have loyal, dedicated employees who are good ambassadors for their workplace and who remain at the same place of employment through their career. Moreover, clients are increasingly seeking firms that have a diverse workforce of women and minorities.<sup>3</sup>

While many firms fail to realize is that there are bottom-line benefits to developing a diverse legal profession. Given the changing demographics of the U.S. population and the globalization of the legal profession, a policy of inclusion reflects reality. Promoting diversity allows a firm to recruit the best and the brightest candidates of all backgrounds. It is good public relations and engenders loyalty and higher morale. Additionally, expanding the candidate pool increases networking and rainmaking opportunities, thus enhancing a firm's ability to attract and serve a broader client base. It raises the comfort level of diverse client prospects who want attorneys "like them" who speak their language and understand their culture - to handle their business.<sup>4</sup> Ex. B, p. 2.

#### THE EOB REQUIREMENT HAS NOT BEEN FULLY IMPLEMENTED

Based on the extensive history of the exclusion of many members of society from our profession, both the resistance of some members of the bar to necessary change and the time needed to develop and implement consistently high quality EOB courses is understandable. We urge the Court to recognize that this relatively new EOB requirement has not been fully implemented. EOB is a challenging area for educational programming and requires the commitment of the organized bar. However, the bar is capable of more adequately responding to the EOB / MCLE requirement. EOB is worthy of a better effort by all of us - it should be upgraded, not dismantled.

It is important to recognize that the negative response of many lawyers to the EOB requirement is to be expected given the nature of the problem this educational requirement is intended to address. See Task Force quote above. The changes required to elevate a professional standard, although necessary for the good of the public and the legal profession, can be difficult. Experienced diversity trainers tell us that successful trainings typically include a significant percentage of participants who either refuse or otherwise fail to benefit from the training. In a recent EOB training given to a large number of attorneys at the Oregon Convention Center (Justice Peterson and others facilitating), 82% of the participants rated the training between good and excellent. Seventeen percent rated it as only fair or poor. Many of the negative comments were similar to the arguments some members have made against the EOB requirement generally. See Ex. C.

A few comments made by the vast majority of attorneys who found this EOB course helpful reminds us that the EOB requirement can work very well:

- “This Seminar trains us to ask the right questions!”
- “I found the seminar very worthwhile and illuminating. Unfortunately, there are many who come in with a chip on their shoulder and profess that it’s a “waste of time.” Unfortunately, these are people who are in the privileged majority. Keep doing your good work and trying to educate people. You are making a difference and making our state a better place.”
- “Tough topic. I thought the format and the speakers did a nice job of engaging the attendees.”
- “This was a much better presentation than the program on bias from last year. More engaging. It was important to have members of the legal community on the panel. Judges even better.”
- “Unusual approach, but useful. Thank you. Comments of some audience members emphasize the problem.”
- “Thought-provoking. Much more interesting than lecture format. Thanks for your efforts!”
- “Caring, honorable presentation of a difficult subject.”
- “Don’t give up the effort. A lot of the white males in the audience were with you and get the problem - the knuckleheads were in the minority.”
- “Thought-provoking - thank you.” See Ex. C.

Finally, it is important to note that the “advisory vote” by the membership on this issue does not reflect a majority vote of the membership. The BOG is asking this Court to drop a professional standard that 20% of the membership rejected in an electronic vote. Thirty percent of the bar voted and 2/3 of those members voted against the requirement. The Board of Governors then charged a Work Group with recommending a “less onerous” requirement for lawyers. Because we are a self-regulating profession, we have an obligation to impose professional requirements on ourselves for the benefit of consumers of legal services and participants in a judicial system which embodies the rule of law. Sometimes busy lawyers

are prone to forget that lawyering is a privilege not a right. To consider this modest requirement "onerous" reflects an attitude that does not meet our professional responsibility to the public.

DROPPING EOB WILL UNDERMINE PUBLIC CONFIDENCE  
AND TRUST IN THE COURTS AND LEGAL PROFESSION

"A fundamental principle of our constitutional government is that discriminatory treatment on the basis of race, gender, economic class, religion, or physical condition cannot and will not be tolerated. Bias damages a court in its fundamental role as a dispenser of justice." *Report of the Michigan Supreme Court Citizen's Commission to Improve Michigan Courts (1986)*

"The link that makes the independence of the judiciary a real and necessary foundation for our democracy is public trust and confidence. If the judiciary does not have the public trust and confidence of the citizens it purports to serve, then the system will not work . . ." *Honorable Wallace P. Carson - Report of the Proceedings, Oregon's Citizens Justice Conference 2000 (May 6, 2000)*

The overall ranking of justice issues by participants at the above conference included the following (by order of importance):

"Survey Question

- [1] Equal access to the courts and legal services regardless of wealth or position in the community.
- [2] Equal sentences for equal crimes, regardless of race or ethnic background.
- "..."
- [4] Lawyers who are ethical and professional."

*2000 Citizens Justice Conference - Building Trust and Confidence in the Justice System Through Citizen Involvement (May 6, 2000).*

In short, the public reasonably expects us to identify and eliminate bias in the justice system and increase access to justice. We owe it to the public, particularly those who have been unfairly excluded, to make diligent efforts to meet that reasonable expectation. We must reasonably respond both to actual bias and the perception of bias given our history of exclusion and discrimination.

We respectfully submit that a decision by this Court to drop the EOB requirement will be viewed as a breach of faith by the public. Bias must be honestly acknowledged before it can be effectively addressed. Although many commendable efforts are underway, including the EOB/MCLE requirement, the bias acknowledged by this Court's Task Force has not disappeared overnight. Simply put, the public will be dismayed by a decision of this Court to drop the EOB

requirement. Indeed, EOB is the only professional requirement imposed on Oregon lawyers directly related to the equal treatment of all in our justice system. EOB educational requirements are now standard practice in private business and public agencies. Many of us have heard incredulous comments from other professionals when they learn that Oregon lawyers may not be required to adhere to a modest EOB requirement.

A decision to drop the EOB requirement would undermine other efforts by the bar, particularly those of the bar's Affirmative Action Program (AAP) to increase the diversity of the Oregon Bar. After 30 years of hard work, AAP has helped to increase the percentage of ethnic minority lawyers from .5% to 5.5 % of the bar. This is an enormously positive development for our bar and the public. However, 5.5% lags considerably short of reflecting the states 10% ethnic minority population. We still have a long way to go. And, of course, this is not a numbers game. Even more importantly, we want a profession and justice system where mutual respect is valued and expected. The color line that has dominated in our state and country for centuries remains pernicious. The racially integrated bar we desire will not appear unless we do our part and devote our time and attention to these issues . Former Chief Justice Peterson and this Court's Task Force pointed us in the right direction:

“By itself, racial parity achieves only arithmetic racial parity. The true and ultimate goal of an affirmative action program must be to increase the understanding of all races and ethnic groups in the workplace, to increase the appreciation of one for the other, to achieve a society in which no race, no culture, is dominant other than in a numerical sense. The goal is to achieve a heterogeneous culture, one in which racial prejudice and bias, overt or covert, intended or unintended, no longer exists.

How can this be achieved? By education, education and more education.”  
1994 Task Force Report, p. 21.

Importantly, prospective and current law students of color in Oregon have already received a negative message in relationship to this controversy. We have heard directly from students stunned by a membership vote suggesting the Oregon Bar may not be a hospitable environment for them. Unfortunately, this harkens back to a time not so long ago when overt bigotry was prevalent in Oregon. We cannot afford to turn our heads and pretend Oregon does not have a lingering reputation of bigotry toward people of color. Dropping the EOB requirement would undoubtedly be perceived by many as additional evidence that Oregon's reputation is well-founded. Nor can we afford to ignore the likelihood that a decision to drop the EOB requirement would receive national media attention. This would negatively impact the ability of Oregon law schools to recruit students of color as well as the ability of the bar to retain those students in Oregon.

## COURTS AUTHORITY

The Diversity Section emphasizes that the EOB requirement was approved and revised by this Court, the Board of Governors and the House of Delegates. These deliberative bodies fully considered the benefits of this professional standard to our profession and the public as well as the impact on individual lawyers. This Court, of course, had the final authority to approve the requirement. Bar membership should respect this Court's rule making authority in this regard. Moreover, the Court certainly has a strong interest in preserving its authority to establish and maintain professional standards, particularly when a new standard is initially unpopular or not fully understood by the membership.

The EOB requirement will, with time, substantially improve the quality of legal service available to Oregonians and improve the administration of justice. In 1999, Senior Judge John C. Beatty, Jr., concluded that OSB's Affirmative Action Program furthered these important goals. Judge Beatty's comments are highly pertinent to the importance of this Court continuing the EOB requirement:

"The materials submitted in evidence show that minority populations identified as American Black, American Indians, Hispanic Americans and Asian Americans have had varied legal and social discriminatory treatment in Oregon in the past, and currently have residual disadvantages in varying degree dealing with the Oregon legal, judicial and criminal justice systems.

The Oregon State Bar and its members, including all lawyers in the state and all state court judges, have a professional responsibility to promote improvement of the quality of legal services to the people and the administration of equal justice.

A review of the materials submitted [demonstrates] that the Oregon State Bar Affirmative Action Program directed at the legal education and admission to the Oregon State Bar of members of the identified minorities bears a reasonable relationship to the professional objective of the Oregon State Bar, and satisfies the Keller Standard.

"..."

The Oregon State Bar has established by a preponderance of the evidence the challenged expenses as necessarily or reasonably incurred for the purpose of improving the quality of legal service available to the people of the State of Oregon and to improve the administration of justice." *Arbitration Opinion dated April 23, 1999, Ex. G*

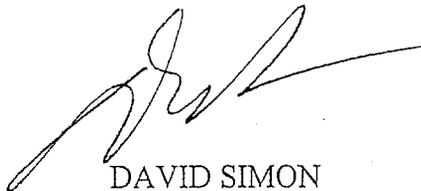
Based on the efforts of a number of groups within our profession (e.g. OSB Affirmative Action Program, OJD Access to Justice For All Committee, MBA's Convocation On Equality, Oregon Minority Lawyers Association, Uniting to Understand Racism Foundation and law firm activities), we can now begin to see positive and tangible results from focusing on the elimination of bias in our legal system. See Elimination of Bias And Professional Responsibility Outline, Ex. F, at p. 5 (Positive Results) and at page 4 (Why Mandatory?); see also Access To Justice For All Committee (OJD) website overview of activities, Ex. E. The Access Committee is a permanent committee recommended by this Court's Task Force and Implementation Committee. An Education Sub-Committee "works with legislators, the judiciary, the Oregon State Bar, and law schools to implement and improve educational programs focused on fairness issues." This effort has included support for the EOB / MCLE requirement at issue.

### CONCLUSION

We recognize that we have strongly expressed these Comments. However, we trust the Court appreciates the purpose of our Section in advancing diversity within the bar. See Ex. D for Mission of Diversity Section. We submit these Comments with the deepest respect for this Court, the Oregon State Bar, access to justice, and the rule of law.

This Court is the standard bearer for the professional standards of the Oregon State Bar and our justice system. Our state and our bar is in motion. The EOB requirement will help to move an increasingly diverse bar in the right direction. We urge the Court to continue the EOB requirement. Rather than drop the requirement, we should improve it. The Diversity Section respectfully suggests that this Court encourage the Oregon State Bar to make it a priority to develop and implement EOB programming that meets the public's expectation of a fair and accessible justice system as well as the practice needs of all Oregon lawyers.

Sincerely,



DAVID SIMON  
Chair  
Executive Committee  
OSB Diversity Section



JUDGE RICHARD C. BALDWIN  
Judiciary Member  
Executive Committee  
OSB Diversity Section

c: Executive Committee Members  
Dennis Rawlinson, OSB  
Karen Garst, OSB  
Sylvia Stevens, OSB

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

February 9, 2004

RESOLVED, That the Comment to Section 2 of the Model Rule for Minimum Continuing Legal Education be amended to include the following language:

Regulatory systems should require that lawyers, as part of their mandatory continuing legal education either through a separate credit or through existing ethics and professionalism credits, complete programs related to the promotion of racial and ethnic diversity in the legal profession, the promotion of full and equal participation in the profession of women and persons with disabilities, and the elimination of all forms of bias in the profession. Lawyers who practice in states and territories that do not require mandatory continuing legal education are encouraged to complete such programs as part of their continuing legal education.

## REPORT

### Introduction

It is a fundamental principle of legal and ethical judicial standards that the appearance of bias is as damaging to public trust and confidence as the reality of bias. We are living in a time when public trust and confidence is seriously eroded. It is therefore critical that judges and lawyers monitor their attitudes and behaviors to make sure that fairness and equal justice are never compromised.<sup>i</sup> It has been responsibility of the American Bar Association to support fair and equal application of the law, and to demonstrate the leadership to increase the quality of justice available to all citizens.

### Background

#### *Bias in the Legal Workplace*

One of the many dramatic changes that has swept through the legal profession over the past 30 years is the growing number of women, minorities and others with diverse backgrounds entering the practice of law. Although, as a whole, the progress of female attorneys and attorneys of color have not matched that of the "typical" white male attorney, there has been advancement in terms of numbers of women and minority lawyers practicing and attaining positions of respect and influence. Attorneys from a variety of backgrounds, including women, people of color, people with disabilities, and people with differing sexual orientations now can be found in virtually every aspect of the legal profession.<sup>ii</sup>

Why is it important in legal workplaces to deal with the issues of bias?

The benefits outweigh the time, effort and money spent on dealing with these issues after the fact. Workplaces that address these issues before they arise have more satisfied, loyal lawyers. The less lawyers encounter bias, the greater the job satisfaction they experience, and the greater their commitment and loyalty to the firm. Their productivity increases when there is less to complain about; there is lower turnover and ultimately it saves the workplace money to have loyal, dedicated employees who are good ambassadors for their workplace and who remain at the same place of employment through their career. Moreover, clients are increasingly seeking firms that have a diverse workforce of women and minorities.<sup>iii</sup>

What many firms fail to realize is that there are bottom-line benefits to developing a diverse legal profession. Given the changing demographics of the U.S. population and the globalization of the legal profession, a policy of inclusion reflects reality. Promoting diversity allows a firm to

recruit the best and the brightest candidates of all backgrounds. It is good public relations, and engenders loyalty and higher morale. Additionally, expanding the candidate pool increases networking and rainmaking opportunities, thus enhancing a firm's ability to attract and serve a broader client base. It raises the comfort level of diverse client prospects who want attorneys "like them" – who speak their language and understand their culture- to handle their business.<sup>iv</sup>

### *Bias in the Administration of Justice*

At least 22 state task forces have found bias in the legal profession to be a serious problem. The perception of bias can undermine the belief in a fair judicial system. Courts must not only be fair, but also be perceived as being fair. The presence of fairness and equality in our court is primarily a product of the people who work there and how they conduct themselves when interacting with the public.

Words, actions and behaviors that indicate bias diminish public trust and violate two fundamental principles of our justice system that:

- Our courts are free of perceived and actual bias; and
- Equal access to fair and dignified treatment in our courts awaits all who enter.<sup>v</sup>

The State Bar of Michigan joined the Michigan Supreme Court in its unequivocal position that "a fundamental principle of our constitutional government is that discriminatory treatment on the basis of race, gender, economic class, religion or physical condition cannot and will not be tolerated...the appearance of bias, as well as the reality of bias, damages our profession and our courts in their fundamental role as protector of freedom and dispenser of justice...as we continue to strive for a bias free society and justice system, lawyers, judges and their leaders must be in the forefront of this effort."<sup>vi</sup>

The State Bar of Michigan Open Justice Commission defines its mission as to:

- raise both public and professional awareness of open justice issues and the impact of race, ethnic origin, gender, religion, sexual orientation or disability on the fair delivery of justice in our state;
- reduce or eliminate such bias or invidious discrimination within the courts or legal profession; and

- increase public confidence in the fairness of the legal profession and the equal application of law for all citizens.

Its goals include:

- Develop judicial, legal and public education programs on fairness and open justice issues.
- Investigate, adopt and implement programs related to all discrimination and bias that impact on the fair delivery of legal services and justice.

### The Role of Continuing Legal Education in Raising Awareness of the Importance of a Diverse and Bias Free Legal System

CLE courses in the elimination of bias in the profession create an important forum for discussion and analysis of diversity issues and their impact on the delivery of justice, and identify weaknesses in the system that require attention and resolution. The Minnesota Board of Continuing Legal Education defines its elimination of bias learning goals as follows:

1. to educate attorneys about the elimination of bias or prejudice in the legal profession, in the practice of law, and/or the administration of justice;
2. to educate attorneys regarding barriers to hiring, retention, promotion, professional development and full participation of lawyers of color, women, and those persons referenced in the "course in the elimination of bias in the legal profession and in the practice of law definition (i.) of the Rules of the CLE Board, both in the public and private sector of the legal profession and in the practice of law;
3. to educate attorneys about the problems identified in the Supreme Court's Race Bias and Gender Fairness Task Force Reports, as well as in other studies, reports or treatises which describe bias and prejudice in the legal profession, in the practice of law, and/or in the administration of justice.

### Current Status of Elimination of Bias Credit in MCLE States

Among the 40 states requiring Mandatory Continuing Legal Education, five have embraced this issue and have adopted courses in the elimination of bias in the profession as part of their ethics

and professionalism requirement: California, Minnesota, Oregon, Washington, and West Virginia.

#### California

All members of the State Bar of California on active status must complete at least 25 hours of approved continuing legal education activities every 36 months. Of the 25 hours:

At least one hour must relate to elimination of bias in the legal profession based on but not limited to: sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age and sexual orientation.

#### Minnesota

Attorneys must attend 45 hours of accredited CLE courses during their three-year reporting period.

2 of the 45 hours must relate to the elimination of bias.

#### Oregon

All active members shall complete 45 credit hours of accredited CLE activity every three years.

At least nine of the 45-hour credit requirement shall be devoted to accredited CLE activity in professional responsibility. Professional responsibility includes legal ethics and professionalism and educational activities related to the role of lawyers concerning racial and ethnic issues, gender fairness, disability issues and access to justice.

#### Washington

Active members shall complete a total of 45 CLE credits within a 3-year reporting period.

Members must complete a minimum of 6 ethics credits in the 3-year reporting period. Ethics credits are approved for segments of courses dealing specifically and exclusively with attorney ethics, professionalism and professional responsibility, including substance abuse, anti-bias and diversity training.

#### West Virginia

All active members of the West Virginia State Bar are required to complete a minimum of 24 mandatory continuing legal education credits by June 30, 2004, and each two years thereafter.

At least three of the credits must be in legal ethics, law office management, substance abuse, or the elimination of bias in the legal profession.

#### Model Programming

The elimination of bias program can take many forms. These include:

- The Difference Gender Makes in the Legal Profession – Hennepin County Bar Association
- Identifying and Eliminating Bias and Discrimination in the Legal System: Codes, Cases and Other Constraints - University of Minnesota Law School
- Race and the Law – The Aftermath of 9/11 – University of Minnesota Law School
- Elimination of Bias: Racial Profiling and Beyond – Minnesota Legal Services Commission
- Cultural Competence in the Workplace – Hennepin County Bar Association
- Disability: The State of the Profession – Hennepin County Bar Association
- Immigrants Navigating the Legal System – Hennepin County Bar Association
- How Deaf Clients Can Best Be Heard – Hennepin County Bar Association
- Understanding Depression and Mental Illness in the Legal Profession – Minnesota CLE
- Diversity Toolkit – Oregon State Bar
- Cultural Competency – Oregon State Bar
- Immigrants in the Courts – Oregon State Bar
- Representing Clients with Personality Disorders – Oregon State Bar

- Valuing Diversity: From \$\$\$ to Sense – California Center for Access and Fairness
- Balancing Personal and Professional Lives – California CEB
- Elimination of Bias in the Legal Profession: Strategic Solutions – California CEB
- Gender Bias in the Law: Identification and Prevention – California CEB

### Conclusion

As our nation grows in diversity, MCLE, in order to be valuable and relevant, is an important forum for discussion and analysis of the issues. MCLE programs that relate to discrimination and bias that impact on the fair delivery of legal services and justice can identify weaknesses in the system that require attention and resolution, and are a valuable and essential component of the full CLE curriculum. We therefore respectfully request that this language be added to the Commentary to Section 2 of the Model Rule to acknowledge the role that elimination of bias courses can play in ensuring fairness and equal justice.

Respectfully submitted,

Suzanne E. Graber  
Chair  
Standing Committee on Continuing Legal Education

Lawrence R. Baca  
Chair  
Commission on Racial and Ethnic Diversity in the Profession

February 2004

VOTE NO ON ATTEMPT TO DROP  
MCLE ELIMINATION OF BIAS REQUIREMENT

Hon. Richard C. Baldwin  
David F. Bartz, Jr.  
Edwin A. Harnden

Henry H. Hewitt  
Angel Lopez  
Don H. Marmaduke

Katherine H. O'Neil  
Hon. Edwin J. Peterson  
Hon. Betty Roberts

Dear Oregon Lawyer:

You will soon receive an e-mail ballot from the Oregon State Bar that includes an advisory vote on whether the **MCLE Elimination of Bias** requirement should be dropped. This vote is vitally important to our profession and we urge your NO vote.

The Oregon Supreme Court approved the **MCLE Elimination of Bias** credit in 2001, following the recommendation of the OSB Board of Governors and a Supreme Court Task Force On Racial/Ethnic Issues in the Judicial System. Recognizing the importance of eliminating bias in the legal profession, and in order to promote professional responsibility and enhance access to justice for everyone, the Oregon Supreme Court approved an education standard to help all lawyers readily "identify and eliminate bias from the legal profession and the practice of law". MCLE Rule 5.5.

The Supreme Court Task Force found startling evidence of bias in our profession which stood in stark contrast to actual demographic changes occurring in Oregon. Although the percentage of practicing lawyers of color has recently increased to 5% of the bar, that number lags significantly behind Oregon's 10% minority population. Without question, the Oregon State Bar's growing numbers of minority attorneys improve access to justice for all those who seek lawyers of diverse backgrounds. But Oregon has a long way to go, and the Supreme Court's **MCLE Elimination of Bias** standard sets our profession in the right direction to enhance professional responsibility and access to justice.

Oregon's **MCLE Elimination of Bias** requirement is similar to MCLE requirements in Washington, California, Minnesota and West Virginia and comports with the ABA Model MCLE Rules. The ABA encourages regulatory bar associations "to require that lawyers . . . complete programs related to the promotion of racial and ethnic diversity in the legal profession, the promotion of full and equal participation in the profession of women and persons with disabilities, and the elimination of all forms of bias in the profession . . . . The practice of law has seen dramatic changes over the past decade. . . . An increasingly diverse bar calls for increasing diverse educational options." Comment, Sec. 2.

Oregon's **MCLE Elimination of Bias** standard of one hour per year, twice approved by the House of Delegates, is a modest step toward correcting **real** problems in Oregon's legal system. *The outcome of this vote will be seen as the public face of our profession.* Be part of the solution and vote NO on this advisory ballot. Please encourage your colleagues to vote NO to keep this essential program intact for the benefit of your clients, the bar and *all* Oregonians.

The Executive Committee of the Oregon State Bar Diversity Section and the Oregon Minority Lawyers Association Board of Directors support this Statement.

# Attachment 5

# **PUBLIC DEFENSE SERVICES COMMISSION Annual Performance Progress Report (APPR) for Fiscal Year 2005-06**

2007-09 Budget Form 107BF04c

Due: September 30, 2006

Submitted: September 27, 2006

To obtain additional copies of this report, contact Public Defense Services Commission at (503) 378-3349, 1320 Capitol St NE, Ste 190, Salem, OR 97301, or visit [http://www.oregon.gov/DAS/OPB/GOVresults.shtml#Annual\\_Performance\\_Reports](http://www.oregon.gov/DAS/OPB/GOVresults.shtml#Annual_Performance_Reports).

## **Agency Mission**

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

## **Table of Contents**

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PART I: EXECUTIVE SUMMARY .....	2
PART II: USING PERFORMANCE DATA.....	3
PART III: KEY MEASURE ANALYSIS .....	4

# ABOUT THIS REPORT

## Purpose of Report

The purpose of this report is to summarize the agency's performance for the reporting period, how performance data are used and to analyze agency performance for each key performance measure legislatively approved for the 2005-07 biennium. The intended audience includes agency managers, legislators, fiscal and budget analysts and interested citizens.

1. PART I: EXECUTIVE SUMMARY defines the scope of work addressed by this report and summarizes agency progress, challenges and resources used.
2. PART II: USING PERFORMANCE DATA identifies who was included in the agency's performance measure development process and how the agency is managing for results, training staff and communicating performance data.
3. PART III: KEY MEASURE ANALYSIS analyzes agency progress in achieving each performance measure target and any corrective action that will be taken. This section, the bulk of the report, shows performance data in table and chart form.

## KPM = Key Performance Measure

The acronym "KPM" is used throughout to indicate **Key Performance Measures. Key performance measures are those highest-level, most outcome-oriented performance measures that are used to report externally to the legislature and interested citizens. Key performance measures communicate in quantitative terms how well the agency is achieving its mission and goals. Agencies may have additional, more detailed measures for internal management.**

## Consistency of Measures and Methods

Unless noted otherwise, performance measures and their method of measurement are consistent for all time periods reported.

**PUBLIC DEFENSE SERVICES COMMISSION**

**TABLE OF MEASURES**

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

<b>2005-07 KPM#</b>	<b>2005-07 Key Performance Measures (KPMs)</b>	<b>Page #</b>
1	APPELLATE CASE BACKLOG - Number of cases in the Legal Services Division backlog	5
2	FEE STATEMENTS REDUCED - Percentage of fee statements reduced due to incorrect billing	7
3	PROCESSING FEE STATEMENTS - Percentage of fee statements processed within 10 business days	8
4	REVIEWING EXPENSE REQUESTS - Percentage of non-routine expense requests reviewed within 5 business days	9
5	EXPENSE COMPLAINTS – Percentage of complaints regarding payment of expenses determined to be founded	11
6	BEST PRACTICES - Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their services, which are identified by PDSC’s site visit process and the process’s “360 degree” evaluations	13
7	ATTORNEY PERFORMANCE COMPLAINTS - Percentage of complaints regarding attorney performance determined to be founded.	15

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

Contact: Kathryn Aylward	Phone: (503) 378-2481
Alternate: Peter Gartlan	Phone: (503) 378-2371

1. SCOPE OF REPORT

- Key performance measures address all agency programs.

2. THE OREGON CONTEXT

The Public Defense Services Commission is responsible for the provision of legal representation to financially eligible Oregonians who have a right to counsel under the US Constitution, Oregon’s Constitution and Oregon statutes. Legal representation is provided for individuals charged with a crime, for parents and children when the state has alleged abuse and neglect of children, and for people facing involuntary commitment due to mental health concerns. In addition, there is a right to counsel in a number of civil matters that could result in incarceration such as non-payment of child support, contempt of court, and violations of the Family Abuse Prevention Act. Finally, there is a statutory right to counsel for petitioners seeking post-conviction relief.

3. PERFORMANCE SUMMARY

<b>KPM Progress Summary</b>	<b>Key Performance Measures (KPMs) with Page References</b>	<b># of KPMs</b>
KPMs MAKING PROGRESS at or trending toward target achievement	Fee Statements Reduced (page 7), Processing Fee Statements (page 8), Reviewing Expense Requests (page 9), Expense Complaints (page 11), Best Practices (page 13), Attorney Performance Complaints (page 15)	6
KPMs NOT MAKING PROGRESS not at or trending toward target achievement	Appellate Case Backlog (page 5)	1
KPMs - PROGRESS UNCLEAR target not yet set		0
Total Number of Key Performance Measures (KPMs)		7

4. CHALLENGES

The primary challenge for the agency is that public defense in Oregon has been chronically underfunded. The hourly rate for an attorney appointed on a non-Aggravated Murder case is \$40 per hour (the rate established in 1991). Over time, the skills, abilities, and experience-level of the attorneys willing and able to work at that rate have steadily declined. Contractors who are paid a flat rate under a contract are assigning excessively high caseloads to their attorneys in order to cover operating expenses. This combination of being either over-worked or under-paid, and in most cases both, prevents attorneys from being able to provide an acceptable level of representation.

Another challenge for the agency is that workload is driven by a variety of factors outside the agency’s control. The enactment of laws that create new crimes or increase penalties for existing crimes impact the agency’s expenditures and workload. Federal requirements have shortened the timelines and increased the complexity of cases involving abuse and neglect of children. In 2004, the United States Supreme Court issued two landmark decisions

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

*(Crawford v. Washington and Blakely v. Washington)* that directly and dramatically impacted caseload. If additional funding is not provided to address such changes, the quality of representation is further eroded.

5. RESOURCES USED AND EFFICIENCY

The agency's 2005-07 Legislatively Adopted Budget is \$176,246,017.

Two of our performance measures (KPM#3 and KPM#4) essentially measure how quickly the agency processes expense requests and fee statements. The agency was able to exceed targets for each of those measures due to technological improvements. Within existing resources, the agency has converted to electronic storage and retrieval of documents; has automated document production with "one click" database features; uses email instead of regular mail for over 70% of the attorney providers; and has developed efficient procedures for review of fee statements by multiple employees.

**AGENCY NAME**

Agency Mission:

**II. USING PERFORMANCE DATA**

Contact: Kathryn Aylward	Phone: (503) 378-2481
Alternate: Peter Gartlan	Phone: (503) 378-2371

The following questions indicate how performance measures and data are used for management and accountability purposes.	
<p><b>1 INCLUSIVITY</b> Describe the involvement of the following groups in the development of the agency's performance measures.</p>	<ul style="list-style-type: none"> <li>• Staff: The agency's Management Team drafted initial performance measures.</li> <li>• Elected Officials: The Joint Legislative Audit Committee and the interim Judiciary Committee assisted the agency in refining and finalizing its performance measures.</li> <li>• Stakeholders: Input was received from the agency's Contractor Advisory Group comprised of public defense service providers.</li> <li>• Citizens: The agency developed, discussed and revised its performance measures during two public meetings.</li> </ul>
<p><b>2 MANAGING FOR RESULTS</b> How are performance measures used for management of the agency? What changes have been made in the past year?</p>	<p>KPM#1, KPM#3 and KPM#4 are used to measure an individual employee's performance and indicate how workload should be redistributed.</p> <p>The agency's Management Team will consider re-allocation of resources based on the results.</p>
<p><b>3 STAFF TRAINING</b> What training has staff had in the past year on the practical value and use of performance measures?</p>	<p>The agency has advised staff of the goals outlined in the performance measures and staff is directly involved in the data collection and/or direct daily implementation of the measures. The performance measures serve as important tools for the agency's managers as they identify and develop necessary staff skills as well as determine the best use of overall resources in order to attain the goals enumerated in the measures.</p>
<p><b>4 COMMUNICATING RESULTS</b> How does the agency communicate performance results to each of the following audiences and for what purpose?</p>	<ul style="list-style-type: none"> <li>• Staff: Graphs are posted on employee bulletin boards.</li> <li>• Elected Officials: The agency communicates results to the Legislature through the Progress Board reports and the Executive Director's biennial report to the Legislature.</li> <li>• Stakeholders: Performance results are communicated through the agency's website and the Progress Board's website as well as being provided in the materials distributed at public meetings.</li> <li>• Citizens: Performance results are communicated to the public through the agency's website and the Progress Board's website.</li> </ul>

### III. KEY MEASURE ANALYSIS

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

KPM #1	APPELLATE CASE BACKLOG Number of cases in the Legal Services Division backlog	Measure since: 2004
Goal	GOAL 1: Reduce delay in processing appeals.	
Oregon Context	Mission Statement	
Data source	Case Management Database	
Owner	Legal Services Division, Peter Gartlan, (503) 378-2371	

**1. OUR STRATEGY**

Our goal is to reduce the delay in processing appeals. If we are able to eliminate the current backlog of cases, then we will have significantly reduced the average time to file the opening brief. In addition, by reducing the number of open and active cases that Legal Services Division attorneys are currently responsible for, attorneys will be able to devote more time to addressing and resolving cases, instead of merely “managing” cases at the cost of case resolution.

**2. ABOUT THE TARGETS**

The Legal Services Division wants to file its opening brief in most cases within 210 days of record settlement. The 210-day target reflects several considerations. First, the agency considers it intolerable that an incarcerated individual must wait more than seven months before an appellate attorney is in a position to properly advise a client regarding the viability of an appellate challenge to his conviction and/or sentence.

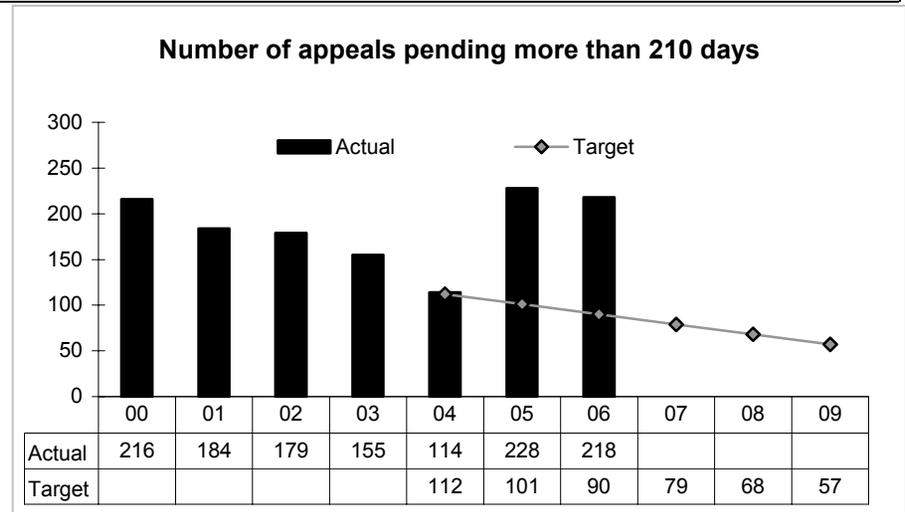
Second, budget reductions in the Attorney General’s Office have caused the Solicitor General to slow its briefing schedule in criminal cases. The Attorney General’s slowed pace means additional delay in the appellate process, which means additional delay for the client. Third, federal courts have intervened in state appellate systems when the state system routinely takes two years to process criminal appeals. The 210-day target represents a reasonable attempt to meet the varying considerations.

**3. HOW WE ARE DOING**

The agency significantly reduced case backlog from June 2000 through June 2004, but the case backlog increased from June 2004 through June 2005, and remained high through June 2006.

**4. HOW WE COMPARE**

Despite what may be one’s initial response to the backlog data for the last two years, the Legal Services Division compares extremely favorably with national standards for attorney productivity. In 2001, the US Department of Justice issued a report entitled “Keeping Defender Workloads Manageable” which contained national data indicating that an appellate attorney should be assigned a maximum number of 25 appeals per year. By contrast, an agency attorney resolves an average of 36 cases per year, or approximately 50% more than the national average.



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

5. **FACTORS AFFECTING RESULTS**

The reason for the case backlog increase is directly attributable to discrete events beyond the agency’s control. In 2004, the United States Supreme Court issued two landmark decisions (*Crawford v. Washington* and *Blakely v. Washington*) that directly and dramatically impacted agency caseload. The *Blakely* decision rendered virtually every sentence imposed by state judges subject to challenge and dramatically increased the number of appeals statewide.

6. **WHAT NEEDS TO BE DONE**

The impact of the *Blakely* decision led to close cooperation among the Court of Appeals, the Attorney General, and the agency, resulting in the development of a streamlined appellate process for hundreds of cases. The parties identified “lead cases” whose resolution would control a category of cases, and developed a streamlined briefing format for the scores and hundreds of cases in each category. The same approach can be and has been used for similar issues.

The agency is developing an evaluation system and performance measures that more closely measure attorney capacity and promote individual responsibility for case production.

Unless the United States Supreme Court issues another landmark decision that produces a similar tidal wave of appellate workload, the agency believes it has weathered the worst of the *Blakely* storm and will soon be able to resume a desirable downward case backlog trend.

7. **ABOUT THE DATA**

The data is derived from the agency’s case database. The strength of the data comes from historical comparison. Its weakness is attributable to the inherent difficulty in quantifying appellate caseloads. For example, one appellate case may have a 30-page record, while another case may have a record of several thousand pages. Or, one case with a 300-page record may present one simple issue, while another case with a 300-page record may present five novel or complex issues. Apart from the conventional method of estimating production (based on raw case numbers), the agency is developing an additional method to measure appellate workload, based on case type, transcript length, and issues presented.

### III. KEY MEASURE ANALYSIS

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

KPM #2	FEE STATEMENTS REDUCED Percentage of fee statements reduced due to incorrect billing	Measure since: 2004
<b>Goal</b>	GOAL 2: Ensure cost-efficient service delivery	
<b>Oregon Context</b>	Mission Statement	
<b>Data source</b>	Accounts Payable Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	

**1. OUR STRATEGY**

The agency carefully reviews all fee statements submitted to ensure that the correct amount is being paid for appropriate expenses.

**2. ABOUT THE TARGETS**

Because this is a new performance measure for which data had not previously been tracked, the agency estimated that 3% of the fee statements could be reduced through careful review. Reducing a higher percentage is better.

**3. HOW WE ARE DOING**

The agency exceeded the targets for both years for which data is available.

**4. HOW WE COMPARE**

The agency has no data with which to compare these results.

**5. FACTORS AFFECTING RESULTS**

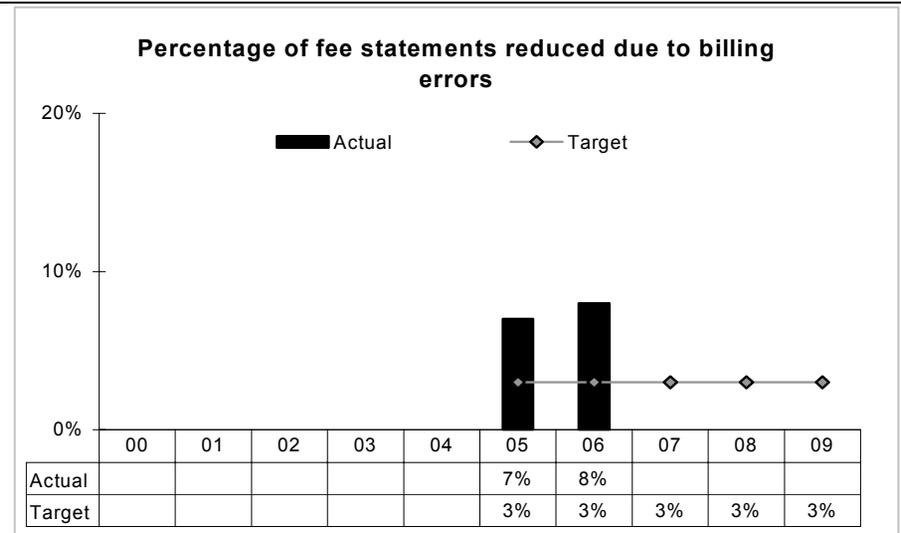
It appears that the initial targets are too low.

**6. WHAT NEEDS TO BE DONE**

Now that the agency has baseline data, the agency will monitor this measure for fluctuation. A drop in the percentage of fee statements reduced may indicate that more careful review of billings is necessary.

**7. ABOUT THE DATA**

The data is derived from the number of fee statements reduced as a percentage of the total number of fee statements received during the fiscal year (July 1 to June 30). Over time, the agency expects that the percentage will drop and then level off as service providers learn that the agency cannot pay for certain items or services and consequently know not to include such items in their fee statements.



### III. KEY MEASURE ANALYSIS

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

KPM #3	PROCESSING FEE STATEMENTS Percentage of fee statements processed within 10 business days	Measure since: 2004
<b>Goal</b>	GOAL 2: Ensure cost-efficient service delivery	
<b>Oregon Context</b>	Mission Statement	
<b>Data source</b>	Accounts Payable Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	

**1. OUR STRATEGY**

The agency’s guideline rates paid to public defense providers are well below the rates many service providers normally charge. By assuring prompt and reliable payment, providers are more willing to work at reduced rates. This performance measure also sets an appropriate standard for employee performance as data is gathered for each employee as well as for the agency as a whole.

**2. ABOUT THE TARGETS**

The agency anticipated that as employees became more experienced and as the agency developed new procedures for processing fee statements, that there would be a gradual increase in processing speed.

**3. HOW WE ARE DOING**

The agency was at target for fiscal year 2004, and then far exceeded the targets for 2005 and 2006.

**4. HOW WE COMPARE**

The Oregon Department of Revenue averages 15 days to process an income tax refund which is comparable to the agency’s measure of 10 business days.

**5. FACTORS AFFECTING RESULTS**

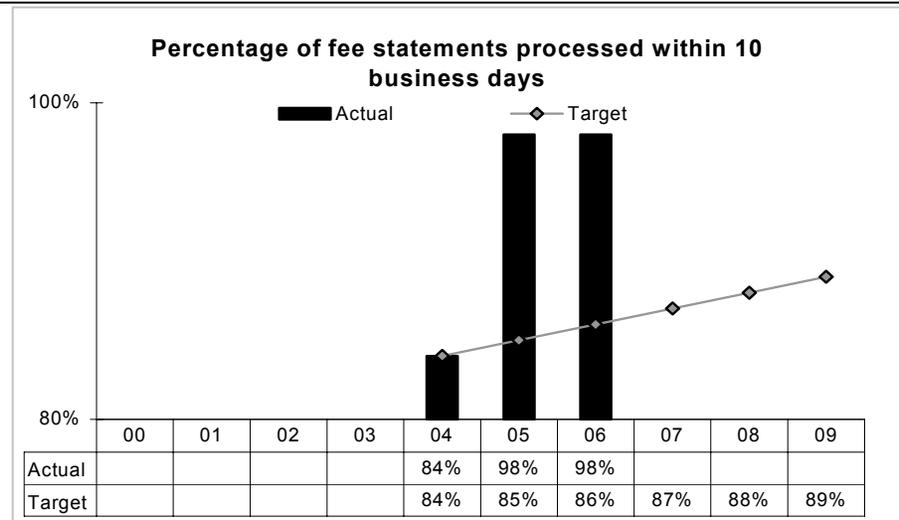
In late 2004, an agency employee developed a technological improvement that eliminated the need for duplicate data entry. Not only did this speed the processing of bills but it also eliminated the chance of error in the transfer of information between accounting systems.

**6. WHAT NEEDS TO BE DONE**

The agency will now consider diverting some resources away from bill processing so that the agency can reach other Performance Measure targets.

**7. ABOUT THE DATA**

The data measures the number of business days between the date a fee statement is received by the agency to the date the payment is issued by R\*Stars (state accounting system).



### III. KEY MEASURE ANALYSIS

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

KPM #4	REVIEWING EXPENSE REQUESTS Percentage of non-routine expense requests reviewed within 5 business days	Measure since: 2004
<b>Goal</b>	GOAL 2: Ensure cost-efficient service delivery; GOAL 3: Improve the quality of representation	
<b>Oregon Context</b>	Mission Statement	
<b>Data source</b>	Non-Routine Expense Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	

1. **OUR STRATEGY**

This performance measure is designed to help the agency meet two of its goals: ensure cost-efficient service delivery, and improve the quality of representation. When a case requires the assistance of an investigator, forensic expert, or other expert service, the appointed attorney must receive pre-authorization from the agency to incur such expenses. In many instances, work begun as soon as possible after the alleged incident is more productive than if there is a delay in the approval process. For those requests that are denied, the attorney will have more time to pursue alternatives.

2. **ABOUT THE TARGETS**

Because the data had not previously been tracked, the agency did not have baseline data from which targets could be set. The agency assumed that there would be a gradual increase in the percentage of non-routine expense requests reviewed within 5 business days as we refined our procedures and as staff gained experience.

3. **HOW WE ARE DOING**

The agency was at target for fiscal year 2004, and then far exceeded the targets for 2005 and 2006.

4. **HOW WE COMPARE**

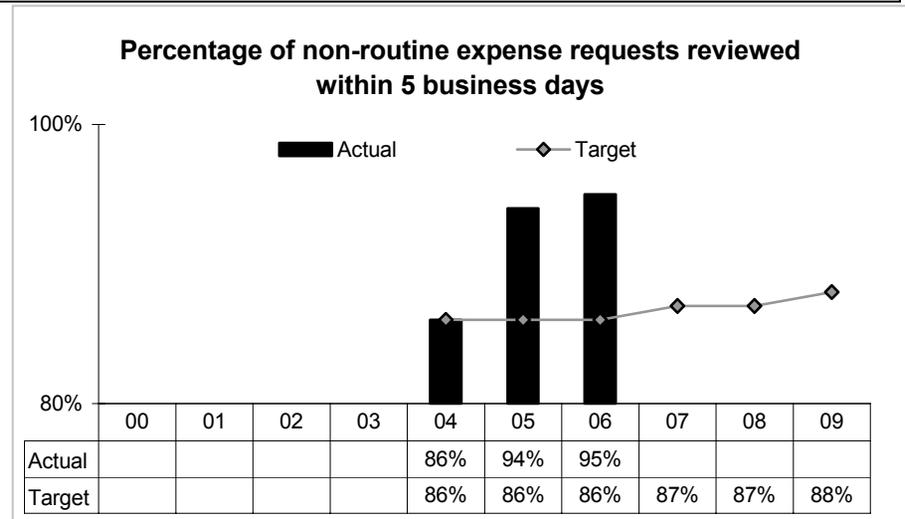
The agency is not aware of comparative data.

5. **FACTORS AFFECTING RESULTS**

The agency is fortunate to have dedicated employees, low absenteeism and a low turnover rate so that their expertise and familiarity with the process allows the agency to exceed targets.

6. **WHAT NEEDS TO BE DONE**

The agency will consider whether to set a “higher” goal, e.g. review 95% of the requests within *four* business days, or whether resources should be diverted to improve results in other areas.



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

7. **ABOUT THE DATA**

The data measures the number of business days between the date a request is received by the agency to the date the response is issued (by email or regular mail).

### III. KEY MEASURE ANALYSIS

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

KPM #5	EXPENSE COMPLAINTS Percentage of complaints regarding payment of expenses determined to be founded	Measure since: 2004
<b>Goal</b>	GOAL 2: Ensure cost-efficient service delivery	
<b>Oregon Context</b>	Mission Statement	
<b>Data source</b>	Contact Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	

**1. OUR STRATEGY**

The agency makes a determination as to whether an expense is “reasonable and necessary” for adequate legal representation of financially eligible Oregonians. The agency developed a complaint procedure and designed a database to track complaints from any source that questioned the agency’s decision to approve the expenditure.

**2. ABOUT THE TARGETS**

The assumption was that if a person made the effort to file a complaint, it was likely that the expenditure was of an unusual nature. Although the agency reviews and approves expenditure requests in advance, there may be times that in hindsight the agency would not have approved the expense. The agency hoped that fewer than 10% of the complaints would be founded.

**3. HOW WE ARE DOING**

Out of approximately 40,000 payments processed per year, the agency received one complaint regarding payment of expenses in fiscal year 2006. The complaint was determined to be unfounded.

**4. HOW WE COMPARE**

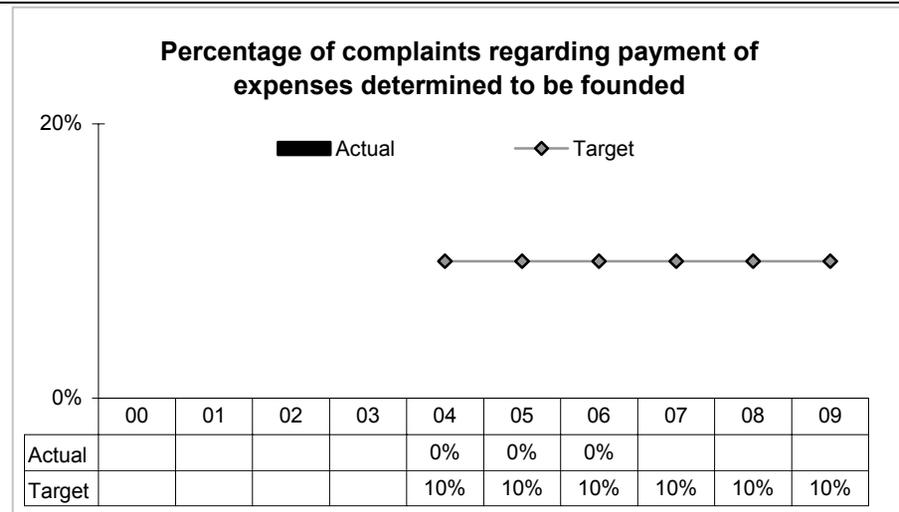
The agency is not aware of comparable data.

**5. FACTORS AFFECTING RESULTS**

Prior to July 1, 2003, expenditures were reviewed and processed by each circuit court. On July 1, 2003, the Public Defense Services Commission assumed responsibility for the entire public defense program. This centralization of expense approvals provides consistency and appropriate distribution of the agency’s limited resources, and likely accounts for the fact that no complaints have been received.

**6. WHAT NEEDS TO BE DONE**

The agency may request that this performance measure be eliminated entirely or combined with performance measure #7 which addresses complaints about attorney performance.



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

**7. ABOUT THE DATA**

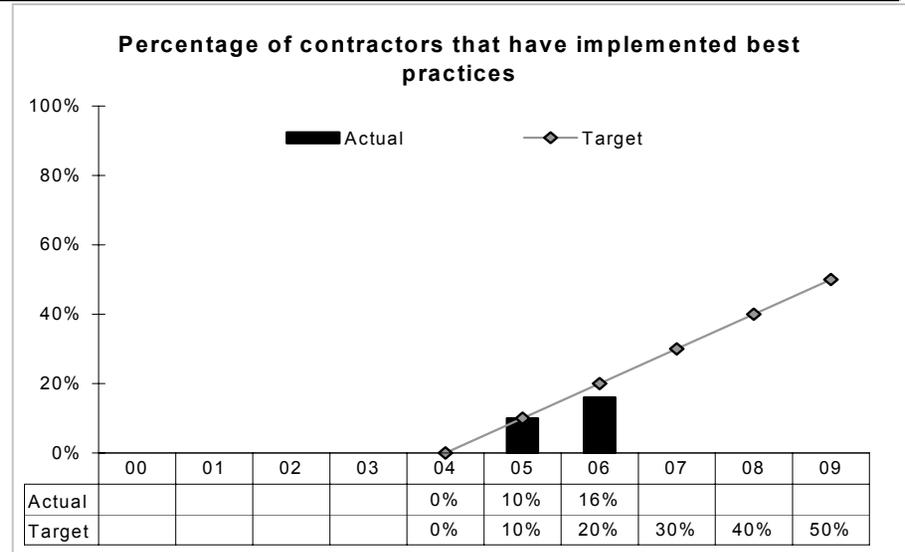
The data includes complaints received during the fiscal year (July 1 to June 30). The weakness of the data is that there will likely always be a very small number of complaints and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance. For example, if we receive one complaint during the year and it is founded, then our percentage would be 100%.

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

<b>KPM #6</b>	<b>BEST PRACTICES</b> Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their service, which are identified by PDSC’s site visit process and the process’s “360 degree” evaluations	Measure since: 2004
<b>Goal</b>	GOAL 3: Improve the quality of representation	
<b>Oregon Context</b>	Mission Statement	
<b>Data source</b>	Site Visit Reports and Contractor Follow-up Reports	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	

**1. OUR STRATEGY**

The agency formed a Quality Assurance Task Force to assist in the development of a systematic process to review the organization, management and quality of services delivered by the agency’s contractors. This “contractor site visit process” engages volunteer attorneys from across the state with expertise in public defense practice and management in a comprehensive statewide evaluation process. Teams of volunteer attorneys visit and evaluate the offices of the state’s public defense contractors, administer questionnaires and interview all relevant stakeholders in a contractor’s county, including the contractor’s staff, prosecutors, judges, other defense attorneys, court staff, corrections staff, and other criminal and juvenile justice officials regarding the contractor’s performance and operations. After a site visit and deliberations among the site visit team’s members, the team submits a report to the contractor and the agency outlining its observations and recommendations. In addition to improving the contractors subject to the site visits, the process is designed to improve the operations of public defense contractors in Oregon by identifying best practices for managing and delivering public defense services and by sharing that information with other contractors across the state.



**2. ABOUT THE TARGETS**

The targets were based on the agency conducting four site visits per year and on the assumption that most if not all contractors visited would adopt the recommended best practices.

**3. HOW WE ARE DOING**

Because the targets did not anticipate the time contractors would require for implementation, the straight-line projection over-simplifies what the agency would expect to see. Although we are not quite at target for 2006, the agency expects to meet or exceed targets in 2007 and 2008.

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

**4. HOW WE COMPARE**

The agency is not aware of comparable data.

**5. FACTORS AFFECTING RESULTS**

In many cases, contractors are unable to adopt a recommendation that involves additional cost or staff time for the contractor because the rates currently paid to contractors are so low that attorneys are burdened with excessive caseloads.

**6. WHAT NEEDS TO BE DONE**

The agency will continue to conduct four site reviews per year. Although contractors are responding positively to the site review process, significant problems continue to exist; some have been addressed but many have not.

**7. ABOUT THE DATA**

The agency initially planned to conduct site visits for contractors with ten or more attorneys. After the first three site visits, the agency realized that in some cases it was more efficient to gather information about all contractors within the county during the single visit. Therefore, the agency now plans to conduct site visits for all contractors other than sole practitioners. Contractors are asked to submit a report to the agency detailing the steps they have taken to implement the recommendations. The figures indicate the number of contractors who, as of June 30th of each year, have reported adoption of recommendations as a percentage of the total number of contractors.

### III. KEY MEASURE ANALYSIS

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

KPM #7	ATTORNEY PERFORMANCE COMPLAINTS Percentage of complaints regarding attorney performance determined to be founded	Measure since: 2004
<b>Goal</b>	GOAL 3: Improve the quality of representation	
<b>Oregon Context</b>	Mission Statement	
<b>Data source</b>	Contact Database	
<b>Owner</b>	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	

**1. OUR STRATEGY**

The agency (through its small administrative office in Salem) funds the appointment of attorneys to over 170,000 cases per year all across Oregon. The information we receive through the complaint process allows the agency to know which attorneys may need additional training and/or resources, or whether to change the types of cases an attorney is allowed to accept, or to remove an attorney from court appointment lists altogether. As the agency works to improve the quality of representation through a variety of strategies, we would expect the number of founded complaints to decrease.

**2. ABOUT THE TARGETS**

Prior to July 1, 2003, no data was kept regarding complaints. The agency hoped that fewer than 10% of complaints regarding attorney performance would be founded.

**3. HOW WE ARE DOING**

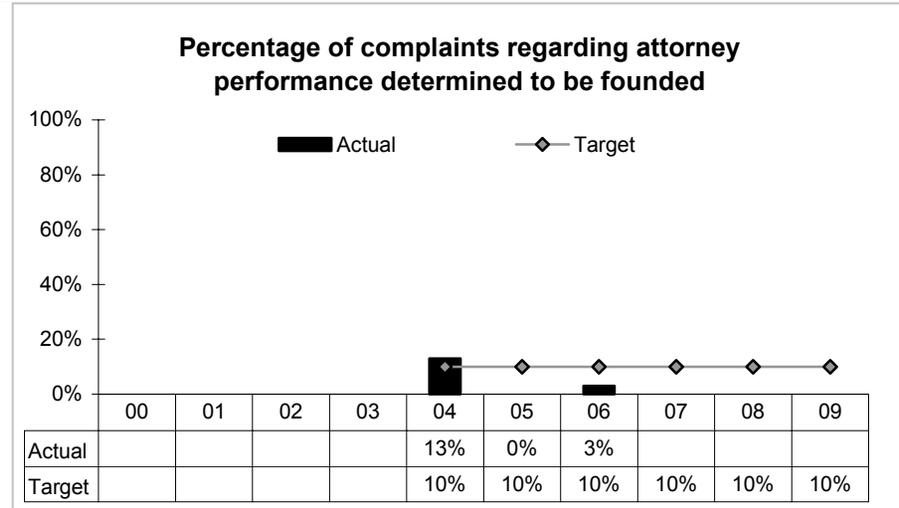
In fiscal year 2004 (the first year of operation for the agency), we did not meet the target; however, in 2005 and 2006, the agency exceeded expectations with fewer than 10% of the complaints received being founded.

**4. HOW WE COMPARE**

Most state agencies that receive complaints use a performance measure based on the average number of days to close a formal complaint and do not use the results of such investigations as a performance measure. Because our agency selects the attorneys who provide legal representation, the quality of their performance does provide feedback on our selection and oversight procedures.

**5. FACTORS AFFECTING RESULTS**

In 2004, the agency initiated a “site visit” process (see performance measure #6) in which volunteer teams of public defense attorneys and staff visit individual contractors to provide training, advice and management expertise. In early 2006, the agency required all public defense attorneys to re-apply for inclusion on hourly paid court appointment lists. Through that process, the agency attempted to select only the best-qualified attorneys.



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

**6. WHAT NEEDS TO BE DONE**

The agency will continue to improve oversight and training of attorneys.

**7. ABOUT THE DATA**

The data includes complaints received during the fiscal year (July 1 to June 30). The weakness of the data is that the total number of complaints received is quite small (38 in 2006) and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance. Furthermore, the absence of complaints should not necessarily be seen as an indication that there are not problems with the quality of representation. In 2000, the Oregon State Bar Task Force on Indigent Defense concluded that representation in juvenile cases and post-conviction relief cases was inadequate. In 2005, the Secretary of State's Audits Division rated the quality of representation in those case types as "risk areas" for the agency.