

Members

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



Ex-Officio Member

Chief Justice Wallace P. Carson, Jr.

Executive Director

Peter A. Ozanne

Public Defense Services Commission Meeting

Friday, October 22, 2004

12:30. to 4:00 p.m.

Kah- Nee-Ta Resort
Ollallie & Eagle Rooms
Warms Springs, Oregon

Agenda

1. **Action Item:** Approval of Minutes (*Attachment 1*) Barnes Ellis

2. OPDS's Monthly Report OPDS's Management Team
 - CBS's Status Report
 - LSD's Status Report
 - OPDS Contractor Site Visits
 - Juvenile Training Academy

3. **Action Item:** PDSC's Proposed Complaint Policy (*Attachment 2 & 3*) Ingrid Swenson

4. Discussion of Region 1 (Multnomah County) Service Delivery Plan (*Attachment 4*) Peter Ozanne

5. Status Report on Lane County's Court Appointment Process Shaun McCrea Peter Ozanne

6. Discussion of Plans for PDSC's November 19th Retreat in Portland (*Attachment 5*) Barnes Ellis Peter Ozanne

7. New Business Barnes Ellis

Next PDSC Meeting:

Thursday, November 18, 2004, 12:30 to 4:30 p.m.
Location in Portland, Oregon to be Announced

PUBLIC DEFENSE SERVICES COMMISSION

September 9, 2004
Multnomah County Courthouse
Courtroom 702
Portland OR

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Janet Stevens
John Potter
Jim Brown
Chip Lazenby

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

TAPE 1: SIDE A

Agenda Item No. 1: Approval of August, 2004 Meeting Minutes

- 002 Chair McCrea [Calls meeting to order at 10:05.] We are going to go ahead with the approval of the minutes pending Barnes' arrival. Did anyone, John, have any suggested changes or corrections to the minutes?
- 005 J. Potter As you pointed out to me Shaun on line 218, "I don't think" instead of "I don't thin" and on page 27 under Peter Ozanne, line 51 the word "matter" should have two T's not one.
- 011 Chair McCrea On Page 18 line 175 I was talking about federal defenders and it says "CJ attorneys" and I would like that to be changed to "CJA attorneys" that is for the "Criminal Justice Act." Any other suggested changes?
MOTION: J. Potter moved for approval of the minutes; J. Stevens 2nd
VOTE: 4-0; hearing no objection the motion **CARRIES**

Agenda Item 2: The OPDS Status Report

- 020 P. Ozanne Thank you, Madam Chair. I continue to be gratified by the attention the Commission pays to our minutes. I will be asking my colleagues at OPDS to report on specific matters, but let me give you the highlights. First, we have completed our move and Kathryn will review the details. I can see, as we expected, that it facilitates a lot of collegiality and a lot of communication which wasn't there before. I think everyone feels that it is one organization now. I'm pleased that we found a place for all of us and it looks like it is going to work out.
- Second, as you know from my communications with you over the past week, we have worked out with your input a proposed budget for the next biennium. Kathryn will go through the details. It is a budget that we are confident is the right amount for our base budget and we have Kathryn to thank for working through this. We have asked you to look at our proposed

policy packages, in particular, and got your feedback. Policy packages are requests for new money. While I am not pessimistic, I have to say that the mood in Salem right now is not a “can do” attitude with regard to new money. So I wouldn’t want to get anybody’s hopes and expectations up that we will get new money. I would be very happy with our proposed base budget, although we will be vigorously seeking additional money that is reflected in our policy packages.

We broke our proposed policy packages down into three components. The first is to bring the salary structure of the Legal Services Division of our agency up to the salary levels of the Attorney General’s Office – in other words, parity for the state employees. I know that is going to raise some concerns to those who aren’t state employees, but we felt for three reasons we ought to go for this. One, I think it is a feasible first step toward parity. Two, I think we have a clear comparison between the salaries of Assistant Attorney Generals and the salaries of our lawyers, which strikes people in positions of authority in Salem as unfair. Third, it is a small number by comparison to the other packages. So our tactic is to put that as the first priority, although we will continue to vigorously advocate for parity in the amount of \$10.6 million. Our second priority is post conviction relief. It is a manageable number compared to state-wide parity at \$765,000. It is addressing a problem that certainly all of you are aware as we embarked on the unification of public defense. While there are capable lawyers doing first-rate PCR work, as a system we have to give it something like a D+ grade in my opinion, when you look at the results and when you talk to the defense community. When you talk to judges and the Attorney General’s Office and when we appear before the legislature, which frequently considers the abolition of right to counsel in post conviction relief proceedings, judges and the prosecutors always support the provision of counsel in PCRs. They want defense attorneys there because it makes the system work. So what we are saying is: the system is important, we haven’t been given the resources to perform the task of providing effective assistance of counsel, here is what it costs, we want your support. We have heard the prosecution and defense communities, the Contract Advisory group and judges, all who feel that the way to manage this system is to bring the defense function into our office and centralize its management. Perhaps staff it with very able younger lawyers and find a top flight supervisor. Under this proposed policy package, it would be a separate division of OPDS with the supervisor reporting directly to me. We would expect that the four attorneys in this new division would take a major portion of the state’s PCRs in order to test our hypothesis that tighter management and full-time, specialist lawyers will do a better job. Not only will they advocate vigorously in cases that require it; but they will separate the wheat from the chaff. Right now, in my opinion, we are spreading our money an inch deep and a mile wide. There are relatively few lawyers who want to do this work, which often involves challenges to the competency of their colleagues in the defense bar. We are paying the same amount of money for all cases without regard to their merit or difficulty, and too many of the cases are being handled summarily and inadequately. Under the proposed policy package, we will ensure rigorous case screening, specialization, a place where we can attract younger lawyers with high quality training and experience, and vigorous advocacy in the cases that deserve it. So that explains the priorities among the policy packages as I see them. I am certain we will be having additional conversations regarding this proposed budget in future meetings not today given our agenda but certainly going forward Kathryn will give you details. Finally, as I said before, we are proposing a \$10.6 million policy package in order to achieve parity among our trial level attorneys across the state. This has been a priority for indigent defense for years, if not decades, and we will continue to pursue. However, given the current economic and fiscal climate, I am not optimistic that we can expect significant progress on this front during the next biennium.

The last item of course is Blakely which continues to be a concern to us and an issue and perhaps Pete will speak to that.

094 J. Stevens

Peter I have a quick question. What is ACP transfer on the list of policy packages?

- 095 P. Ozanne It refers to the Application/Contribution Program. That item represents money that we will be giving back, which is something the Legislature likes. What is the number there, Janet?
- 098 J. Stevens \$201.550.
- 099 P. Ozanne Kathryn will explain the details, but we have had some position authority in the past, which represent unfilled FTE for auditor positions that we are transferring from our agency to the Judicial Department. With that, I will turn it over to Kathryn.
- 103 K. Aylward The way the budget process works is that you have what is referred to as your base budget, which is basically what an agency had in 03-05 that just gets carried forward and becomes the base budget. To that the process adds essential packages, which include inflation that the state has set at 2.4 percent and, in our case, mandated caseload, which then results in your essential base budget. The first two categories are straight forward. They just evolve from current expenditures in our operating budget. For the Public Defense Services Account, an essential package, we are asking for a 13 percent increase to cover projected caseload increases. Our starting point was \$143 million, which was what the Account got reduced to last biennium due to budget cuts and Ballot Measure 30. So our current request for 2005-07 looks like a big essential package, but it is just putting us back up to where we were before those cuts. On top of that, there is \$4 million for inflation and a cost-of-living adjustment at 2.4 percent, which we are allowed to incorporate into our budget. We have also anticipated a 1.5 percent caseload growth year-on-year for 04-05-06-07. If that proves to be true, then we will have enough money to cover that caseload. If not, we always have the option to go back to E-Board if the caseload exceeds what we have anticipated.
- Regarding the ACP transfer, you may recall that the Commission gave a joint presentation to the April E-Board with Judicial Department this year. The Judicial Department was requesting three limited duration positions that they would then ultimately make permanent positions, assuming that we would agree to abolish what works out to be 1.45 more expensive positions that we have. These positions are funded out of Application/Contribution funds. The \$20 fee that indigent defendants pay when they fill out an application for a court-appointed attorney goes into a separate pot of "other funds" money that is used to pay Verifiers in the courts and a couple of positions at CBS that are filled positions. There are also a whole bunch of vacant positions because there has never been enough money to fill those positions. So what we are essentially giving away is the ability to spend that money if it were there. So it appears to be a good deal. The court got three verifier positions and we gave up 1.45 auditors.
- Employee commensurate compensation package is the cost of having the Legal Services Division attorneys' salaries set to match the salaries of the attorneys in the Appellate Division of the Department of Justice.
- 142 P. Ozanne We think, by the way, that this item should be part of our base budget. But state fiscal staff disagreed. In the statute governing the Commission there is language to the effect that the Commission shall establish pay rates for OPDS staff commensurate with the pay rates of other state agencies. So we thought that this item should not be an add-on or policy package, but should actually be part of our base budget. However, fiscal staff disagreed with the argument that we are simply pursuing what the statute requires of our agency. And the commensurate pay scale would, of course, be at the Attorney General's Office.
- 153 K. Aylward The post conviction relief package is for four FTE attorneys. The policy package for parity includes three categories. Public defender attorneys' salary parity is one component. That is about \$4.8 million. The second category is an increase in the hourly rate from \$40 to \$55 for regular cases and from \$55 to \$75 for death penalty cases. Previously, we spent a lot of time figuring out what the rate should be, maybe from \$40 to \$65 or to \$95, but our policy packages have never been approved. So we thought we'd take it in smaller bites. Maybe it is

the sticker shock that is affecting legislators. For investigators, the rate is going from \$25 to \$30. Death penalty investigators who are now getting \$34 hour would go up to \$40, and those are packaged together.

166 Chair McCrea Do we need to do anything with the budget today?

168 K. Aylward No, it is just informational.

169 Chair McCrea Any questions from what we have heard?

170 P. Ozanne Madam Chair since we expect Mike Schrunk to be here at 10:30 and Judge Julie Frantz at 11:00, I will just remind my OPDS colleagues that we just have a short time. I would like Ingrid Swenson to talk a little bit about the confidentiality issue regarding our proposed Complaint Policy. Ingrid's memo regarding the issue is in your packet of meeting materials. Pete, being an excellent appellate lawyer, will be very concise regarding Blakely issues and his LSD report.

173 P. Gartlan Good morning. I will give you a quick update on Blakely. We have identified lead cases in the Court of Appeals and those cases will be argued later this month. The idea is to argue some lead cases and those cases will probably control most of the cases in that category. That should cut down on the processing of a lot of individual cases. The Supreme Court, the Attorney General and our office have done the same thing in this regard. We have agreed on some lead cases and we have settled on what they should be. They are being transferred to Chief Justice Carson in the Supreme Court today. We are going to try and follow the same process with the Supreme Court as we have with the Court of Appeals. I looked back historically at what the case assignments were last year for July and August. Last year we assigned 159 cases over that two month period. This year for the same period we have assigned 262 cases. That will give you an idea of the impact of Blakely. Cases that may not have had a notice of appeal filed in the past because there was no colorable claim of error in cases arising from a guilty plea, no contest plea and probation cases, are now more active because they have Blakely issues or potential Blakely issues. Until the appellate courts issue rulings about preservation and what kind of Blakely issues will be considered, we have to process notices of appeals in all of these cases. So Blakely is having a significant impact on our office. In addition to all of the other cases in our office, our attorneys have had to review all of the open files in our office to look for Blakely issues regardless of what stage of the appellate process the cases are in. If the case had been through the Court of Appeals, we are still filing motions in the Supreme Court to hopefully get the Supreme Court to review the Blakely issue, or to at least try to preserve it for federal habeas corpus review.

[Chip Lazenby arrives at 10:23 a.m.]

216 P. Gartlan Our office is also represented on a Governor's workgroup to develop options for the Legislature to address Blakely. We will also be represented at the next Judicial Conference in October for a presentation on Blakely.

Our office is in the process of arguing five cases in the Supreme Court. Interestingly, at least from my point of view, we had a request from the Court of Appeals for our office to appear as amicus in yet another landmark U.S. Supreme Court case, the Crawford decision, which raises confrontation issue. It is interesting because, not only were we invited to appear as an amicus, but we were given equal time to argue. So I think that is a tremendous compliment to the office. I don't ever remember that happening before.

242 P. Ozanne Thanks Pete. Ingrid is going to talk to you again about our proposed Complaint Policy. We will be bringing this back before you at a later meeting as an action item on your agenda, but we wanted to update you on the issue of confidentiality as you requested at the last meeting.

249 I. Swenson

Good morning. We did talk a little bit about this issue at the last Commission meeting and you have seen the proposed Complaint Policy at previous meetings. We continue to circulate it, receive comments and address concerns as best we can. We will present a revised draft for your review at a future meeting. Chair Ellis had specifically inquired about the proposed policy with respect to the confidentiality of complaints. I prepared a memo, which has been provided to you. I don't know if you have had a chance to review it. The approach I take in the memo is simply to outline the requirements of the state's public records law and how they affect the documents that we might receive during the complaint process. Basically, the situation is that Oregon's public records law makes all documents generated and received by state agencies during the course of business public and available. Then there are a series of exemptions in the statutes that affect different documents in different situations. After reviewing the public records law, I highlighted in the memo some of the exemptions that might typically apply during the course of our complaint investigations. There will be others of course, depending on the circumstances of a case. But these are the ones we would look to. As you know, we are not yet certain whether our Legal Services Division falls under this policy or if that division is completely independent. We are considering that. Frankly, I think this policy is designed more for use with Contract and Business Services, rather than for the kind of employer-employee relationship that exists at the Legal Services Division. So there is an exemption in the law for personnel discipline actions, which would be applicable to LSD. There is also an exemption for internal advisory communications, which is important to protect the communications that an agency had within the agency itself and between itself and other agencies. There are explanations as to how that has been viewed in other cases. The principle section of the law that would probably be applicable to our Complaint Policy is the section on confidential submissions, which basically says that, if people submit information in confidence and you assure them that you will make an effort to maintain that confidentiality and the public interest is served by that confidentiality, then those kinds of records can be treated as exempt. In the memo, and I won't discuss it today because I see District Attorney Schruck is here, I talk about the Sadler case, which is the case involving the Oregon State Bar and its effort to prevent disclosure. The ultimate recommendation in this memo is that the Commission consider, when the proposed Complaint Policy is formally before you for approval, a statement to the effect that the Office of Public Defense Services would receive and use materials submitted in confidence and would honor any appropriate exemption to disclosure of documents that are generated or received in connection with the complaint process. We are going to be meeting with the Oregon State Bar officials shortly to talk about a number of things regarding our proposed policy, including coordination with their complaint policy.

300 Chair McCrea

Ingrid, I wanted to make an observation and then a request. The observation is that I thought you wrote an excellent memorandum. Very well done, I appreciated how you brought everything together. The request that I would make is at page 8 of the memorandum, where it says "Recommendation to Commission regarding Confidentiality." In the first paragraph, we have as the purpose of implementing the formal Complaint Policy to "protect clients and the public from poor representation and from misuse of funds." I would like to suggest that we also include as part of our policy to protect defense counsel from unjustified complaints.

325 I. Swenson

Thank you.

326 Chair McCrea

John did you want to comment?

327 J. Potter

Ingrid, who makes the determination that the public interest is served by the confidentiality?

328 I. Swenson

Ultimately, it could be a court. It just depends on the process. If you decline to disclose a record, then it depends on whether the jurisdiction is either the Attorney General's office or the District Attorney's Office of the county who reviews the record. If that request is then declined a person can file an action in court to demand disclosure. Then the court decides.

But initially, it is the agency that is asked to produce the document that has to make that determination.

- 339 J. Potter Is there a scenario where the District Attorney is asking for it?
- 342 I. Swenson Yes.
- 343 J. Potter And then you go to the AG's office?
- 343 I. Swenson Yes.
- 343 J. Potter And if it is the AG's office asking for it, do you bypass the AG's office and the DA and go to the judge?
- 344 I. Swenson Well, as you are aware John, the AG has many divisions that perform different functions. A situations has arisen where the Attorney General had provided advice to an agency and a member of the public was seeking to obtain that information. The Attorney General's Office took the position in that case that it was a privilege on behalf of themselves as well the agency.
- 353 Chair McCrea Anything else on this? Thank you, Ingrid. Anything else on our reports, Peter?
- 357 P. Ozanne No Madam Chair.
- 357 Chair McCrea Before we commence with our first invited guests, I want to recognize and acknowledge Greg Hazarabedian and welcome him as the new Director of Public Defense Services of Lane County, Inc. When you are starting Greg?
- 359 G. Hazarabedian October 1.
- 360 Chair McCrea October 1 as the new head of the Lane County Public Defender's Office.
- 364 G. Hazarabedian Thank you, Madam Chair.
- 364 Chair McCrea I'd like to welcome our first invited guest.

Agenda Item No. 3: Public Comment Service Delivery in Multnomah County

- 365 P. Ozanne I'll introduce him, but before we do that I'd like to highlight relevant portions of our Preliminary Draft report. Mike Schrunk was kind enough invite me to his office to speak with his senior staff. That is part of the input that I received with regard to the public defense delivery system in Multnomah County. Just briefly, the first eight pages of the draft report, which is Attachment 4 to today's agenda, explain to the reader the Commission's service delivery planning process and its objectives. The process is not designed principally to look at individual lawyers or even individual contractors, but to look at how the system as a whole is functioning in a particular county or region of the state. Multnomah County is the second region of the state that the Commission has chosen to review. Certainly, the process will uncover problems with individual contractors or attorneys from time to time, but the main purpose of the process is to look at a region or county systematically to determine how well the public defense delivery system is designed and functioning. The Commission has reviewed Lane County, Benton, Linn and Lincoln counties thus far, which it grouped into what we called "Region 4." Pages 9 to the end of the draft report contain what I have repeatedly referred to as "preliminary observations" about Multnomah County or "Region 1." I didn't want anyone to think this process is being driven by OPDS or its staff, rather than the Commission. This report and its observations and recommendation is simply intended to assist the Commission in identifying the issues based upon my interviews, conversations and

observations and the experiences of OPDS staff with regard to Multnomah County. At page 11, the report starts out with the observations that the general quality and cost-efficiency of the services delivered by our contractors in Multnomah County is good and perhaps excellent. It certainly compares well with other regions of the state. So I believe we are starting our planning process in Multnomah County with what is essentially a well-functioning service delivery system. The draft report then identifies a series of issues that may be ones the Commission will want to consider in the course of this planning process, but which you may or may not take any action on. The variation in contract rates is an issue in the County that we talked about in past Commission meetings with regard to the approval of particular contracts, especially since the Commission took over the public defense contracting process in July of 2003. I have outlined some of the implications of variations in rates in the draft report. As a result of your request during the last meeting, we have also included an attachment, Exhibit B, to the report, which details the various rate variations. There are rate variations and they are significant. However, in my opinion, they're not as great as have been claimed in many of the complaints we've heard. The draft report suggests ways to approach this issue if you choose to address it now.

There has been lots of discussions in Multnomah County and around the state about whether certain types of organizations ought to be given priority in the event of calamitous cuts in public defense caseloads or budgets like we experienced in 2003. The view expressed in the draft report is that, since we are unlikely to experience the kinds of cuts that we faced in 2003 with BRAC, why incur the pain and suffering implicit in a process of determining preferences among contractors if we don't need to? But the report does suggest that perhaps the Commission should try to articulate some general preferences, if for no other reason than to give people some basic guidance in developing their business plans and whether they should recruit and hire additional employees. Perhaps for that reason, the Commission should undertake the task. Of course, it won't be without difficulty and controversy.

Issue No. 4 in the draft report is the handling of conflicts of interest. As I mentioned in the draft report, this has been an ongoing source of complaints. Certainly it is true in virtually every jurisdiction that prosecutors and often judges see withdrawals for conflicts of interest as suspect or unjustified. Frequently, they don't have access to the underlying facts or the reason for the withdrawal. However, there are complaints that should be taken seriously, as well as observations from our colleagues in the defense bar, suggesting that perhaps there have been some abuses. The dilemma arises from a desire not to punish people for discovering a conflict late in a cases when the conflict was not reasonably discoverable then, on the one hand, and not creating rewards or temptations for people to withdraw to reduce their caseloads while still getting paid and then handing off to somebody else who ultimately gets compensated for the case again, on the other hand. There have been suggestions in the county of a "grey market" in conflicts in which some lawyers dump cases for full payment with little work on those cases. Whether or not this is true, there does appear to be a perceived problem that troubles the court and prosecutors that we probably should examine.

So these are the issues in Multnomah County thus far. We expect that more will be identified as we proceed with this planning process. With that, Mike, will you please come forward? We have organized the courtroom in a way that keeps the Commission down here on our level.

479 M. Schrunk

I'm Mike Schrunk and I know most of you. I am the District Attorney here and have been for 20 plus years. Prior to that time I actually took appointed criminal cases in the state, particularly conflict cases, and was on the Federal Public Defender's panel. So I have had some experience in the past defending criminal cases.

486 P. Ozanne

Excuse me, I was actually going to introduce those people who you may not know. Jim Brown was a colleague of yours from Benton County. You know Chip Lazenby, Shaun McCrea from Eugene, Janet Stevens from Bend and the Bend Bulletin and John Potter with

the Oregon Criminal Defense Lawyers Association. Barnes Ellis, who is our Chair and is expected soon. Thanks for coming Mike and thanks for inviting me to your offices last month.

498 M. Schrunk Peter, let me first of all commend you personally and the Commission for what you are doing. I really think you are on the right track and you are going the right direction. I reviewed and I sent around to my senior deputies the draft report, though not the same draft that you handed out today – the draft that was before the appendices were attached. I think we reviewed a 9/02 draft and this one is 9/09. I arranged for Peter to come in with representatives from my senior staff and mid-level staff – someone from each of the trial divisions handling everything from juvenile, misdemeanors, community court, person crimes; the full range – to speak in an open session where they could without recriminations make their comments. I think that was helpful. In fact, I set the ground rules and then I left the room so there would be no blow back on them.

423 P. Ozanne You did tell them to beat up on me though.

424 M. Schrunk Well I told them I needed Peter alive when they walked out of there. I have practiced law in this community before there was Public Defender's Office and I have seen the growth of the Public Defender's Office. I have seen by leaps and bounds the improvements of representation because of our local Public Defender's Office. I have sat on any number of court committees both as a private practitioner and as a deputy district attorney and then as the district attorney. I am convinced that we are going in the right direction, but there are still some things we can do. It is not perfect. As you know, you have taken on a heavy job just sitting on the Commission. No one likes to pay for the person who rapes someone's neighbor's daughter to be defended. No one particularly likes that requirement and wonders why tax money is being expended that way. That said, all of you wouldn't be here unless you believe in a true adversarial system of justice with a level playing field. I commend you for trying to make that happen and to keep pushing.

Some of the areas that we'd like to define and we try to step back, not to say that I don't put my hands around Jim Hennings neck and shake him every once in awhile, nor does he stop from kicking me in the rear end if I am going the wrong way, and that is as it should be. That makes for a better system. But I think if you take the personalities out, and there are always going to be conflicts in a hotly contested trial, and there are going to be noses out of joint, but things will heal. But we have got to have a system that works, that is adequately funded. We suffered through a disaster when indigent defense could no longer represent clients during what is referred to as the BRAC. And I think you have all heard the horror stories. One of the hallmarks I think of what happened here is we banded together and decided what would be prosecuted and what wouldn't be prosecuted. And believe it or not, we had an awful lot of good input from the defense bar. We tried to come out fighting the issues we needed to fight, but also holding hands and supporting the need for an adequate system. That said, there are some problems areas that I think need attention, that need monitoring. The conflict area, and there are two kinds of substitution conflicts. One is a conflict when there is a legitimate conflict. I think we need to pay attention to this and we need to work hard. Now we don't as prosecutors across the state probably come with completely clean hands, when I talk about conflicts. It is incumbent on us to make sure that we get early and complete police reports or investigative reports with a list of witnesses out. So we have to do that. But it is also incumbent upon appointed counsel to screen those things, to read them as expeditiously as possible, and to notify the court if they have a conflict. In any metropolitan area, maybe even more so in smaller communities, you are going to have conflicts because you have represented someone, you have represented someone's sister or a co-defendant or the state's chief witness. And those have got to be brought out early. Too often we see this brought out at the last minute and it is disruptive to the trial process, it is disruptive to the court process, to witnesses, to victims and doesn't serve the ends of justice. It gives everyone a black eye. And attached to the conflict issue is the substitution of counsel. When I say substitution of

counsel, there is no apparent witness or representation or firm rule conflict. It is just when they get at each other's throat, the client and counsel.

TAPE 1: SIDE B

001 M. Schrunk

I recognize that this usually happens as you get closer to trial. The client doesn't like the advice that he or she is getting. Quite frankly, that advice is frequently: "You are dead in the water and you are not going to get up and tell some lie in court." Then we get a substitution of counsel this way. There is a feeling in our office that this is pushed too far. Again, this is way too disruptive to the system. So again I would ask that the things that you can monitor, that you can take a hard look at, are the conflicts and substitution counsel.

And non-routine expenses, there are going to be expenses. Sometimes we feel that it is the defense counsel's job to ask and ask and ask and ask and ask until they are denied by the court or denied somewhere along the way, and then assign that as an issue on appeal as error. That may be true or that may not be true, I don't know. I suspect it probably isn't. I would like to believe that all requests for non-routine expenses are legitimate. When those expenses are approved and the money is to be expended, when will that forensic work be done, when will that pathology report be done, when will that mental health report be done? Not that you get the money approved and I hire Dr. McCrea, but she is booked up for the next 90 days so we again set things over. We stop the wheels of justice until we get this one expert. I think paying more attention to when non-routine expenses are approved or authorized is a timeliness issue. If you are going to have ballistics, so be it. But let's make sure we have the time between the approval and the actual performance of the test, or whatever we are doing. Contract rates, I see that there are different rates paid to the various contractors in this community and certainly across the state. I know that this is a touchy subject and I know that you and Peter have inherited not a one size fits all system. Nor do I think one size fits all is correct, but I think the contract rate has got to include and recognize that the defense bar doesn't just represent an individual client. Their presence in the community is integral to the quality of life, the quality of justice in the whole community. That means that the attorney has got to attend 7:00 a.m. meetings, local public safety council meetings. They have got to participate in numerable committees and they aren't billable. But someone has to have an office, and they need to have a support network to do these sorts of thing. We try in any high volume operation a lot of pilot projects. Pilot projects are important, whether they are drug courts, community courts or mental health courts, like they are doing down in Lane County. You need defense counsel to be involved in the planning process. Is that covered in the rate for a Class C felony or a Class A felony? I don't know. Maybe there is a legitimate reason for paying people just a flat fee and saying, "You don't have to participate." But I think what I am trying to say is we need the defense infrastructure in each community, certainly here and we need it supported. We are always going to pick at it and say they have too many investigators or legal assistants. But the fact of life is they need to participate with the courts, with the prosecution, with the victim's community and with the police community. They need to serve on committees. Their voice needs to be heard early on. So you have to factor that into when you set the rate for how you are going to pay and how you are going to contract. I just think that is crucial. The one thing in my troubled decades of prosecution that I learned is that we have got to work together and we have got to choose what we can disagree on. When we disagree, that is fine. That's what courts are for and you all know you are trial attorneys in here, for the most part. You know that you try less than 10 percent of the cases and the rest of it is done in negotiation, the rest of it is done in setting policy. What are the thresholds for a DA issue? What are the thresholds for entrance into a drug court? What are the thresholds for entrance into a mental health court? How do you staff a community court? How do you staff a fast plea an expedited plea court? These are things that need to be factored in when you figure out how you are going to contract with various defense contractors. Those are my comments. Again, I have read the draft report and I will start now that the Chairman has arrived.

[Barnes Ellis arrives at 10:55.]

- 057 M. Schrunk I think those are the things you ought to take into account. Like I say, I am an unabashed fan of the indigent defense. I think it is a very high level in fact. I think they win cases they shouldn't. I chew people's rear ends in my office when that happens, but it's the way it ought to be. It makes your District Attorney's Office better, it makes your police departments better and it makes your judges better when you have a proactive defense component in the community. That said, I could stand more guilty pleas. I will answer any questions or any areas you want to cover. And I think the report is a good first step. Those things that I highlighted, I would hope you will monitor them and will work on trying to figure out some sort of solutions.
- 068 J. Potter Mike, you may recall last legislative session Max Williams had, early in the session, a long proceeding on extraordinary expenses, or what we are now calling non-routine expenses, about things that the defense may have purchased or done, and whether or not there were some inappropriate expenditure of funds. What I am gathering from your comments, though, is slightly different. If I understand what your office is saying, it may not be that the funds that were awarded were inappropriate, but that the time frames in which the funds are used, and the way that is being done, is slowing down the process or causing delays, is that what you are saying?
- 077 M. Schrunk I think that is it, more than what is being accrued. Of course, we are always going to pick at it when you hire someone to read crystals about the witnesses or for jury selection. You are always going to get someone who is going to fire at you. That is the nature of our business. My complaint is more if Dr. Potter is approved for up to \$5,000 for the examination of Mike Schrunk defendant, and you are booked out for 120 days, we don't do anything about it. We don't ensure that, when you are hired, you are available and you meet some sort of parameters. We all know, defenders, prosecutors and judges have more to do than we really want to do, so we kind of let things slide. When you let things slide, we are spending time that is not ours. Court dockets, witnesses fall off, we lose them. Local jails spend money housing people. We have a list here that we started monitoring between the defenders office and the courts and my office of cases where defendants have been in local custody over 150 days. Now a lot of them are just awaiting services and we are not clean either. The state mental hospital on aid and assists, we have to solve that problem and that is not your problem. But, hopefully, you can get your oar in the water on that. We have to be able to get fit to proceed hearings or evaluations done. So I guess my plea is, when those things are extended or approved, that someone says, "Hey, when is this going to be done?" and there is a time slot that is going to be done, this week or next week, but not 90 days from now.
- 101 J. Potter So is the person who might do that the judge? Or are you suggesting that we have a standard?
- 103 M. Schrunk I think that would be a question, when you are asked for extraordinary expenses: when will this be done? This should be part of the consideration. Will it be done, or since we got the money, we will never get it done?
- 106 Ron Fishback There is a shortage of qualified people, particularly in the mental health system. When I seek approval for funds, I typically ask two or three different professionals, when are they available, are they available to do it? It is kind of shocking how far out it is. We don't control their professional schedules.
- 107 M. Schrunk I agree with you.
- 108 Ron Fishback I have an evaluation now that was done, but I can't get it completed because the fellow is off on, as he put it, "murder row" up and down the valley, having to do other more pressing things before he can conclude matters in my case. It does drag things on.

- 111 M. Schrunk Ron, I do agree with you. I don't think that it is entirely your fault, nor is it entirely the deputy district attorney's fault nor the court's fault. I think all of us together have got to develop new experts. We can't hold out for Dr. Potter because we know he is the best and we know he is going to help our case. That is a consideration that we have to make. I would almost urge that we make the appointment before we get the funds or we determine the availability of the doctor. As you know, there is a cache of doctors that we use and we have the same problem. It is hard to say, "Well, let's explore Dr. Stevens because we know how Dr. Potter is going to come down, so let's take a chance on a new doctor." I think we have to. I guess the other thing that I have learned is when you look at a system or an agency, if you watch it, it will change. So I guess what I am saying is, if you pay attention to it, we will do a better job. It's like our 150 days in custody without anything happening. Now, all of sudden, we are getting this report monthly. And I know the defenders look it and I know judges look at it, and I know I look at it and ask questions of the people who are responsible for this case. You don't need to have any drastic policy. You just have to monitor it and it will change. And if it doesn't you can find out why. I'm not so much concerned about approving money for people to read crystals or whatever because I think enough people have enough sense not to approve those kinds of extraordinary expenses. I think there may be probably one or two instances and, lord knows, prosecutors have those same kinds of problems.
- 132 J. Potter Well, possibly during this brainstorming session that we are having here, you mentioned when you are requesting the expense that you are asking the judge or asking the state and you are saying, "We have got Dr. Barnes as our No. 1 choice and he is available in 60 days." You are giving the court or the agency more information about when the expert would be available and that may then put everyone on notice as to what is going to happen on the front end.
- 138 M. Schrunk I would agree. And Ron Fishback, if he went and asked for his money and he said, "I've got Dr. Barnes or Dr. Potter, and they are available in 120 days." Whoever the approving authority is going to say, "Go back and renegotiate that time frame or find someone else." In some court systems, when you ask for things, you have to certify that this not going to cause undue delay. What's undue?
- 153 J. Potter Thanks Mike.
- 154 M. Schrunk You know, maybe it's just a grumpy old prosecutor, but we have the same problems. I am the last one to come in here and say that I have clean hands because we do things that delay the system too. Peter has asked me to point out some of the areas that were of concern.
- 156 J. Potter I think you have raised a new wrinkle because I didn't hear that concern being raised at the last legislative session.
- 161 C. Lazenby First of all, I am shocked and appalled that there is expert shopping going on in this field. So if you have any ideas, and I think it is beyond the scope of this Commission to figure out ways to open barriers of entry in this expert field. Do you have any ideas on how we could grow that field of experts, other than increasing resources in the system, which is the perennial answer.
- 166 M. Schrunk Chip, I don't know if you as a Commission can do it, but if you want to grow that the same way the district attorneys do it, they try collectively to try to push out for different experts. I think you can say, "Let's cultivate these different experts, or let's broaden our field to draw from." I think that is what we all need to do. There is no question about that. If you talk to the judges, they are in the same predicament that we have in a way. We become captive to someone else's schedule, which mucks up our schedule
- 177 C. Lazenby I wrote down notes of what you talked about, how important it is to be adequately funded, and you touched a little bit on the contract rates. In my other life before this one, the issues of parity kept coming up in the legislature, especially the disparity between what prosecutors are

paid and how their offices are funded and the kinds of funds that we have. Traditionally, when the public defense side has tried to seek more funds, as you pointed out politically they are very unpopular, and what has consistently stymied efforts of getting parity has been the opposition of the District Attorney's Association. Are you signaling a change in direction that you are willing to work with us and try to get system parity?

- 188 M. Schrunk For a long time some of you in this room have heard me in other forums advocate for a Criminal Justice Worker 1, 2, 3 and 4. I think it should be the standard for entry level attorneys, whether it be a Deputy District Attorney, a Deputy Attorney General or a Deputy Defender. I think there needs to be – I don't mean to insult any of the fine young defense attorneys here, but I have interviewed literally hundreds of people for deputy district attorney and I find that 99.9% of them are the same men and women that end up defending. They believe in the system, they want the same goals, they believe in the same premise of advocacy. Yes, we have true believers on each side, you know, whatever that terms means. But they are by and large the same people. I don't see why there shouldn't be some sort of parity. We can make the argument that prosecutors review more cases. Well, there just has to be more prosecutors to review the cases that get rejected. But I think there needs to be some sort of parity. I'm not speaking for all district attorneys, as you well know. I try to work hard with the office that I am in to continually improve the salary structure and I have shared that with the defender agencies. The only thing that appalls me sometimes is that Hennings will get a hold of it and then I will get back that someone is claiming that Hennings is saying that my staff is overpaid. I say, "Jim, that's the wrong message. It is your staff that is underpaid."
- 217 Chair Ellis Anything else? I will apologize later for my tardiness, but thank you.
- 218 P. Ozanne Mike, if we have other questions, I will bring them to you and perhaps meet with your senior staff again. We would like to follow up as we go through this planning process. And knowing how cooperative you are, I know you would be willing to do that.
- 222 M. Schrunk Good luck. I think the fact that you are coming around to various regions in the state and you are holding open hearings and you are taking input. That is important. Getting the public input, getting input from the stakeholders in the system, and then Peter coming around. Peter has a lot of credibility up here because he worked with our Public Safety Coordinating Counsel for a long time, and he has talked formally and informally with defense counsel and prosecutors. You are on the right track. Thanks for letting me spend this time with you. Good luck.
- 235 Judge Frantz I'm Julie Frantz. I have been the Chief Criminal Judge for the last seven or eight years. First of all, I would like to compliment the Commission on the thoroughness of the draft report. The detail and the analysis, I really think it was a very thoughtful and thought-provoking report. I would like to start by echoing the last comment that was raised by Mike and Commissioners, and that is the parity issue. I strongly believe that it is absolutely critical and essential that defense counsel be paid on an equal basis with deputy district attorneys. There is no justification for otherwise, and that has historically has not been the case. That is something that has to be addressed. I might just digress for a moment. I did defense work for five years between 1975 and 80, and then I did civil work for about 14 years before being appointed to the bench 10 years ago. I have been impressed with the increased level of complex cases, the growth of those who are mentally ill and who are charged with crimes, and the complications in the system that that has caused and the necessity for defense counsel to be in various courtrooms at the same time. The difficulty of being able to easily access clients for the reasons we all know, budget problems. All of those things have added a tremendous load to defense counsel's job. We never have been in a position to do more than simply count the number of cases that each individual attorney carries, rather that to be in a position to look at the magnitude of each case and look at the complications that are created by the types of cases and the issues that a particular client brings to the table. I see it as being significantly different than it was when I was practicing in this area 30 years ago. The elements are the

same, but the growth of complexity and additional issues I think have dramatically increased. The level of competency of defense counsel is very high in this county. The dedication and commitment to clients and to working within system I think is something everyone can be proud of. The interaction between the District Attorney's office, defense counsel and law enforcement, and how it works in this county, is something I think we can be very proud of. I do believe that it is absolutely critical, as it was pointed out in the report, that there be clear criteria for those who are appointed, whether it be through a contracting firm, independent contractor attorneys, a consortium or a public defender's office – that there be well-established criteria for those who should be appointed on certain types of cases. And that goes beyond just experience. I think there needs to be evaluation of not only the competency, but the attentiveness that they pay to their clients.

That is going to segue into an area that I think is a big concern to the Commission, and that is the level of substitutions that create considerable expense. Let me move to that for a moment. I have made a concerted effort to only allow substitutions when there is virtually no alternative – when there is an active conflict when substitution is mandated or there is such a deterioration of the attorney/client relationship that the representation can simply not go forward, like threats or multiple bar complaints. I do not grant substitutions simply because there is a bar complaint. I will often conduct a little mini-session in my court to make a determination as to whether that is something that should be granted or denied and to see how that develops. There are times when the deterioration is too extensive, there is no communication between the parties, and both sides are saying, both the defense and the client, that they cannot proceed. That in itself is still not a reason. I am making a point of this because this seems to be one of the major criticisms – that is routine substitutions. I spend a great deal of time in my court trying to talk through the issue with defendants of the role of defense counsel that their job is to prepare the case for trial, to do everything that is possible to assess the case, and to provide the best feedback so the client can make the best decision for him or herself. There needs to be a desire to work together and listen to the advice of counsel. The attorney may be doing and is doing many things for the client that the client is not aware of. That being said, one of the major complaints that I hear is the lack of communication between attorneys and clients. If there is one thing that I could identify that defense counsel could improve and would save a great deal of anguish for defense counsel and reduce the level of frustration for clients and reduce the number of substitutions that come before me would be that defense counsel, on a regular basis, would have immediate contact with their client. Now that is not always possible because attorneys are in trial and they have heavy caseloads. But early face-to-face contacts or phone calls followed by face-to-face contacts would create confidence by the client in the attorney. If that doesn't happen very early on, there is frustration and distrust that develops, and it leads to motions for substitution in my court. If nothing else comes out of this process, that is the one thing that I would emphasize again and again: early contact and answering phone calls. Now, that being said, I think there are an increasing number of clients who are very difficult to manage and there is an increasing amount of legal information that gets floated around through the jail system. There are increasing numbers of what we refer to as jail house lawyers that are providing bad advice to other inmates. Those issues make the job of defense counsel even more difficult. A lot of time has to be spent undoing that bad advice both by defense counsel and the court. There is also a greater number of clients who are preparing their own motions and who get into a struggle with their attorneys because their attorneys won't handle their motions or won't file the motions, and that creates a great deal of conflict. The standard in my court is that, if at all possible, we will work around that kind of conflict, and it works with the new ethics rules. If the conflict is clear and it is a natural conflict in accordance with the rules, there has to be a substitution, whether that happens in the first week, or it happens on the 120th day and trial is about to occur. Where I think money should be spent is on a system that uncovers conflicts prior to appointment of counsel. And I know we have a system in place and it sometimes works and it sometimes doesn't. That system should remain in a place. But a review should also be done again after the first couple of weeks, after the police reports have been received. There are witnesses who pop up at that time. There are unindicted co-

defendants that create all kinds of problems. The earlier the substitution can be made, the less expensive it will be for the system and for indigent defense, and the more effective the representation will be for the client because, if any substitution needs to be made, it will happen very early on. That is a place to spend money.

With regard to the issue of psychologists, we used to have in Multnomah County a list of those who were approved. That was dismantled about six years ago because there was really no clear criteria for who should be on the list. There was not a good system for indigent defense to control the list. So now it is really by word-of-mouth who an attorney should pick to perform a psychological evaluation on a client. There are those who are more favored than others. You see their names coming in all the time. But there is an incredible shortage of psychologists to do examinations for the purposes of aid and assist, sexual examinations and other evaluations like GBI evaluations and diminished capacity. There is an extreme shortage and when we hit the summer months or we hit the holidays and psychologists go on vacation, we then spend September and October trying to catch up. By the time we almost turn the corner, the holiday season hits and the same thing happens over again. People just are not available. Any plan that would create a list of qualified psychologists would be extremely helpful. I think it would move cases along. I think the identification of the psychologist and the time when that psychologist will have the report back would be a very good approach. Often in my chambers when we have a settlement conference and I find that the psychologist's evaluation is not back, I require the defense counsel right then and there to get on the telephone and call the office and tell the psychologist that the report must be due back by X days because this case is going to trial. Or if we are not that close to the line, we get a date when that report will be back, or a date by which that evaluation will be done. Everybody has to be pushed in the system. There is no question about it. At the same time, there are things that have to be done in order for a case to be properly prepared to be tried.

There are constitutional rights that must be protected, and post conviction relief to be avoided at all costs because that is additional burden on the system. I started case management conferences about four months after Ballot Measure 11 was enacted. We did a study in the court regarding the number of Ballot Measure 11 cases that came through the system in one month and we found there were approximately 45 to 50. I determined that I could do 15 minute case management conferences in each case, with about 16 between 8 a.m. and 12 noon on Tuesday mornings. So I set up a system where, every 15 minutes, lawyers on either side come to my chambers without their clients. I have a checklist that is prepared and we go down the checklist to make sure that such things as police reports have been confirmed, photographs of the evidence that is needed to be tested. Are there records that need to be subpoenaed from different counties? Are there psychologists' evaluations? I don't require defense attorneys to talk about that but, if it affects the timeline of the case, they do need to talk about it. There are probably about 30 or 40 boxes that we go through. Those 15 minutes conferences take place between 70 and 77 days after the initial appearance, the idea being that after 60 days there is a waiver and the defendant is going to be in custody. And the defense attorney has had adequate time to develop a relationship with the client and to get into the case enough so that we can talk about the particulars. By doing these case management conferences, we start the discussion of settlement going forward because any time two lawyers have to pick up a file and go into the judges chambers to talk about the case they have to know something about the case, to have thought about it. And the two lawyers start talking about what needs to be done and what the options might be for settlement. Often the settlement conference is set. By utilizing this system, I have been told by the sheriff that they have seen a dramatic change already in the length of time that an individual remains in custody because the cases are getting resolved earlier. Set-overs in felony matters are handled by Judge Koch and me. Misdemeanors and drug and property cases go through the CPC court. The CPC court, the Criminal Procedure Court, also does substitutions of attorney on the property and drug cases and in misdemeanor cases. The set-overs do not occur without a conference, unless the set-over would place the case within the 120 to 150 days for sex offense cases. So the attorneys have to come in, and we sit down and go over the reasons why

the set-over is being requested. I hold the reins as tight as possible for the nearest date when the case can get tried. The other forum is in Judge Koch's court, the presiding court, where requests for set-overs are heard. I believe we are doing everything we can to keep those trial dates as close as possible to the 120 days, and only setting beyond that when there would be a serious issue that could come up on post conviction relief. For example, if the case was tried without the psychological report being back before a trial with a GBI defense.

With respect to the disparity of pay that is provided to different contractors, addressed at pages 12 and 13 of the draft report, I think you have done an excellent job of outlining a very complex issue that has multiple facets. I think the outline set forth in the report should be pursued. It is a very difficult situation for those who are underpaid for doing very complex cases and who have clients that are facing significant sentences if convicted. They look across the table and see others who are doing the same kind of work who are getting paid more. That is demoralizing and troublesome. On the other hand, there are some contracting firms, non-profits, who have an infrastructure that needs to be supported in order to provide the quality of services. That has to be taken into account in setting those costs. I think the goal should be to ensure quality services at a fair price, to use your terminology. It is a complex issue and it has to be inspected and evaluated. So I am open for questions. I know there are things I haven't addressed, but those are my initial thoughts.

- 546 J. Potter In your experience, what percentage of the substitution of counsel requests that are raised in your courtroom, after hearing the arguments and chatting with these folks, what percentage do you approve?
- 551 Judge Frantz Now just so it is clear, I only do the Ballot Measure 11 and A and B felony cases – those that are not on the property and drug docket that go to CPC. I assume you are talking about those that are not natural conflicts.
- 558 J. Potter Right.
- 558 Judge Frantz The percentage that are approved, I would say, and this is just a random guess, a gut reaction, probably about 15 to 20 percent. It is my goal if at all possible, to keep the relationship together, so it is probably more like 10 to 15 percent. Sometimes the attorney and client can go to the jury room, if there is a communication problem, to sit down and talk about the case. Sometimes what I do is, when there is a substitution request, at the right time I ask the clients if they would agree to defer the motion for substitution and allow me to conduct a settlement conference. I get an agreement on the record to do that. We go to my chambers and talk about the case, and sometimes we are able to resolve the case right then and there. We go back on the record and again I ask the defendants if they are voluntarily withdrawing their motion for substitution of counsel. Of course, that is a case with no additional expense.
- 592 Chair Ellis I thought I understood you to say that a big factor that you think leads to these motions for substitution is lack of communication. The question I have, is there any observation you have as to any common characteristics that lead to that? I am just going to suggest some and you tell me what you observe. Is there is correlation between hourly compensation and per case unit compensation that you think may contribute to that? Is there a correlation between the experience level of the lawyer, either so young they don't do it or so old they don't do it? Is there any correlation between an MPD lawyer, various consortium lawyers and the other lawyers that appear? In other words, I am trying to see if there is something we can be thinking of from the contracting level to try and address the issue.
- 624 Judge Frantz I think it varies from individual-to-individual. I have seen across the board a level of dedication in each type of contracting situation, whether it is a public defender, an independent off the court-appointed list, somebody from a consortium, somebody from a small contracting firm. I have seen the same level of dedication, commitment, ability, responsiveness and attentiveness.

TAPE 2: SIDE A

- 001 Judge Frantz I have also seen the same level of lack of attentiveness and responsiveness to clients across the board.
- 002 Chair Ellis Does it tend to be repeated? So you see the same people involved?
- 003 Judge Frantz Yes.
- 003 Chair Ellis Is there anyway that could get communicated either to contracting agency or the agency's staff?
- 005 Judge Frantz There are instances with individuals where I see the same issues coming up over and over. That could be shared.
- 008 Chair Ellis There is nothing we could be doing to make sure that it is communicated, so that it could be corrected?
- 009 Judge Frantz Well, I think you as a Commission have spoken to a number of judges and sought feedback from a number of judges in our courthouse, as well as I think you have spoken with the District Attorney's Office and others. So my understanding is that there has been quite a bit of feedback about the issues that lead to concern about inattentiveness and lack of communication, lack of preparedness, competency.
- 016 Chair Ellis One other issue that I thought of, still on the substitution issue. On the conflict cases, you said that, if there is money, a place we should be spending it would to improve the conflict situation. Can you help us? First of all, what is there now and what do you see could be done?
- 021 Judge Frantz Well, Jim might be able to help me out a little with this. My understanding is that MPD still has a contract to review the police reports –
- 025 J. Hennings We don't review police reports because we don't have them. We don't have that information. Our review is when we get the case and if we see that that client is already represented by somebody and, if so, it goes to that person. We make sure that there is a strict rotation. The main area that we have problems with is that we don't get the information. We have talked with the District Attorney and Mike Schrunk would like to give us the information, but he does not have to do that. He would like to be able to submit it to us electronically. He would like his reports coming from the police department to come electronically. There is a great deal more that would we could do if there was further attention given within the first week or two when you start getting the police reports. The problem is we shouldn't get involved, we are mandated to get involved in the case once we are appointed, because that breaks the attorney/client relationship. But if we don't, then Julie sees it as a conflict request from the client. But at the same time, how deeply do we want to get involved in the case because we don't have the information? So there is an area I think the Commission, working with the other people in the justice system, should start pushing, and not only in this county but throughout the state. Early discovery of this type of information is necessary. The chief issuing deputy district attorney would love to have the time to let us know who the key witnesses are and the co-defendants. He doesn't have time because he has to issue cases every morning. So something as simple as that is preventing the district attorney from letting us know so we can determine those kinds of conflicts.
- 048 Chair Ellis Any other input on that?

- 049 Judge Frantz It is a very expensive process to put into place – to be able to track every witness in the police report before the case is assigned. It has to be done quickly. Judge Koch, Doug Bray and I have talked about it and we have talked about it at Criminal Justice Advisory Committee meetings. It is a very expensive process.
- 053 P. Ozanne Judge, just to follow up on the substitution issue. I certainly hope that our report indicated how much progress has been made in your courtroom. You were one of the first to alert people to the substitution issue. Of course, it is always a challenge for those of you in judicial management positions to manage the decisions of so many independently elected officials in this courthouse. We suggested in our draft report, I think we referred to “run-of-the-mill” cases, which is not a very good term, that there may be substitution cases that occur below your radar screen. You were saying that you do Ballot Measure 11 and A and B felony cases. Mike Schrunk, when he just spoke to us, mentioned the effects of shining the spotlight on decisions or behaviors and how that could heighten the awareness of a problem and change decisions or behaviors simply because of the attention. Working with the Commission, is there any similar ground to be gained here with respect to other judges’ substitution decisions?
- 066 Judge Frantz The key to it is having the same judge hear the motions and not having a motion for substitution be heard before one judge pertaining to one defendant and then another judge hearing the second motion for substitution and then a third judge hearing the third motion because there is an inclination by a judge to give the benefit of doubt to the defendant to work with another attorney. If it is the same judge who is always hearing the motions, that judge is going to be much more concerned about the fact that there has already been an attorney appointed for you, and you are only entitled to one attorney at taxpayer expense. There has to be a very sound reason to remove that attorney and appoint another attorney. So in the cases that I don’t hear, they go to CPC court, the Criminal Procedure Court, where we change judges on a regular basis with three-month rotations. Sometimes judges are only there for a month at a time. There is constantly a push to have judges who are in those rotations understand the importance of holding the line on substitutions of attorneys, just like there is a push to let the judges hold the line on set-overs according to stated procedures. So that is the issue. If there is any criticism to be lodged against the judiciary, I think it is because there are constantly changing judges hearing these motions. There isn’t that same sort of understanding of the importance of trying to keep the relationship together between the parties and the expense of not doing so.
- 097 Chair Ellis You referred to some bad advice that jail lawyers give. Is that something that is increasing in incidence because word gets out that that may be short-term perceived advantage?
- 099 Judge Frantz What I see is trends that defendants rely upon in order to get new attorneys. For example, someone will get a hold of the model ABA code and it will say that each attorney should not have more than X number of cases. Then they bring that in as a basis for their attorney to be removed because the attorneys have more than X number of cases according to the code.
- 104 Chair Ellis They all do.
- 104 Judge Frantz They all do. So we try to avoid that conversation as much as possible. Then there will be the filing of bar complaints. There will be a rash of filings of bar complaints early on. That’s why I hold a mini-hearing to make a determination of the legitimacy of the bar complaint. If you grant those motions, then you give the green light and then anyone who is dissatisfied and doesn’t like the news that they are hearing from their attorney will file a similar motion.
- 113 Chair Ellis Do you think it is going down, up, or staying the same?
- 113 Judge Frantz It is definitely on the increase. Ballot Measure 11 consequences and property consequences, whatever, if there are significant sanctions that will be incurred if a person is found guilty and

they are not happy with the assessment that the attorney is providing as to the probability of a more favorable outcome, the frustration that develops for the defendant becomes significant and the only person to blame is the attorney who is providing that advice. So I think in this era when we have very significant sanctions for criminal behavior, the frustration and taking it out on the defense attorney has created much more difficult relationships between defendants and their counsel.

- 126 Chair Ellis Do you see a higher correlation in the more serious crimes?
- 127 Judge Frantz Yes, I can only speak from recent experience.
- 128 Chair Ellis Which brings us back to the other point you made to improve the assignment criteria to get the more competent, experienced lawyers handling the more difficult cases.
- 132 Judge Frantz Right. And if a defendant threatens a lawyer on the 120th day and it is ready to go to trial, the consequence is not far away and there is a threat to the attorney, I take a look at how serious the threat is. It is not out of the realm of possibility for a client to throw a punch or to create some type of situation, either consciously and unconsciously, which creates a conflict that has to be addressed, even though it is very late in the case. The later the motion is brought, unless there is a clear conflict, the less likely it is that the motion will be granted. If there is a conflict that is brought early on, there usually is a possibility of working it out. When the conflict comes very late, often when it is about to go to trial, those are normally not allowed.
- 147 Chair Ellis Any other questions for Judge Frantz?
- 147 J. Connors Judge, you mentioned the 120-day rule a couple of times. It is my understanding that about 90 percent of the felonies in Multnomah County get done in that time frame. Does that sound right to you?
- 152 Judge Frantz Well, the Supreme Court requires that they be concluded within the 120 days. We are falling below that. We haven't attained that goal. It is 150 days for sex offender cases because it simply takes longer for the relationship to develop between the attorney and the client, and there is often more to do in those cases such as sexual evaluations and so forth. That is taken into account when we are talking about resolving the case in 120 days. But the truth of the matter is we are resolving less than that 90 percent within 120 days.
- 160 J. Connors Do you know how close we are?
- 162 Judge Frantz I think it is around 80 percent, give or take a couple of percentage points.
- 165 J. Connors Then the second thing I wanted to ask is you mentioned the complexity of the cases have increased. Having worked with you on the court and the mental health groups that you and Commissioner Naito have chaired, we have heard a lot that there are more mentally ill people in the jail. My sense is that this has played a big part in the complexity of the cases. Is that a growing problem?
- 170 Judge Frantz Absolutely. That is a great contributor, and it takes more time to deal with those cases and the psychologists to evolve relationships. Clients have to stay in custody longer. I think there is a lot of serious lawyering going on. There are a lot more motions created by inmates and I think caseloads are heavy, so there is less time and it is more difficult for lawyers to access their clients. You know it is not possible to fax documents back and forth between lawyers and clients, so it means going out to Inverness Jail to get a 60 day waiver signed and that takes sometimes three hours of time. Sometimes Inverness is closed because they have run shutdowns. There are all kinds of factors that are making it so much more difficult for defense counsel to be able to have substantive conversations with their clients and to get procedural matters taken care of. Of course, that takes away from the time that they have to

prepare the cases and it adds to the frustration of the clients and the dissatisfaction with their attorneys because they are not seeing them as much.

- 191 Ron Fishback One of the things I have thought about over the years, and that the Commission might want to think about, is for some of these really difficult clients, say you inherit someone who has had two or three lawyers before and it is a very serious case, often I will press for a second opinion. Sometimes what folks need is an outright substitution. But I think most of the time, but not always, Lawyer No. 2 gives the same advice as Lawyer No. 1. But if you could approve funds for a second opinion, I think it would be less expensive than an actual substitution. That lawyer could consult with trial counsel and review the work that has been done by the first lawyer at a very reasonable rate. This is just something to consider.
- 206 Judge Frantz What I tell someone when there is just a total breakdown in the attorney-client relationship and they just can't proceed is that "you have the opportunity to work with one more attorney. You will not have a third attorney and, if you cannot work with this attorney, you may well find yourself in a position of representing yourself. These are extremely serious charges and you do not want that to happen." I tell them that up front so that they don't go through three or four lawyers. But there are extreme cases where substitution has to be granted, in my opinion, even though there is not an actual conflict as defined.
- 215 S. Gorham Judge, how often do you follow through with that threat?
- 217 Judge Frantz I have followed through on it and the case has gone out to trial. I have asked attorneys in the court if they can continue zealously representing the client and they say "yes." But if the situation has deteriorated where, as Ron was saying, we get another attorney in and client hears the same advice and we move the case to resolution. We determine if he or she will stay on and it goes out to trial and the defendant decides, "I better have an attorney." It does mean that trial gets set over and the attorney gets back on, and then the case often gets resolved. It has to be followed through on, or it has no effect. It is a hard thing to do from a judge's perspective because sending someone out to trial who is facing hundreds of months if found guilty causes a conflict in your conscience to do that. But the flip side of that is having four or five or six attorneys appointed to get to the same point. The other thing I do is ask to see if there is a legal advisor that can be appointed to make it absolutely clear to clients that they will be representing themselves because they are not going to get another attorney. That attorney might agree to stay on as a legal advisor to provide procedural information. It is a very awkward situation for an attorney to be a legal advisor. You are giving some legal advice but you are not controlling the presentation of the case. It is just setting the lawyer up for post conviction relief proceedings. So that is a very difficult situation for a lawyer to be in. I do know of one case that went to trial where someone insisted on representing himself. I think those cases where an attorney has been removed and a client has refused to go ahead with that attorney, those individuals have changed their minds ultimately and continued with the attorney or accepted a legal advisor.
- 260 Chair Ellis Thank you.
- 260 P. Ozanne Can I follow up Barnes on a question that Ron Fishback suggested which was thought-provoking. Ron, I know you have a reputation of being asked to handle difficult clients and do it successfully. Do you have a network of defense attorney who share your insight about a second opinion? Or is the issue whether we are willing to compensate for that function?
- 269 R. Fishback Yes, and I think it could be something that is useful. It needs some thought. If I could say that I could get the folks in Salem to pay for an independent lawyer to review all of my work in a case. That might give a person more confidence, as opposed to an ad hoc call to someone for a second opinion.

- 282 Chair Ellis Wouldn't that lead to a sense when the word gets around that everybody is entitled to that second opinion, and then it soon it becomes generic?
- 286 R. Fishback That is what I haven't thought through. It could be a problem. It is just like your reputation at the jail. It rises and falls like the tides. One month you are golden and another month you just have people saying bad things about you. You can have people that hate your guts and want a new lawyer because they just can't trust you.
- 292 S. Gorham I know in our system that is a function I perform. I just did it this week, where there was a breakdown. I find that when I step in, it is primarily because of what I'll call bedside manner of the attorneys. And another attorney with a different perspective or bedside manner seems to help.
- 302 J. Hennings One of the things that Julie said I think was very important and that is a problem comes if the early attorney/client relationship is not created and it is not continued. Quite frankly, with all of the jails we have, the difficulty is getting in and out of the jail and the lack of resources that all of us operate under in terms of caseload and court staff. We are setting people up so that, even if another relationship was formed, it is not a continuous one. I think one of the things that needs to be looked at in terms of quality is, are you providing sufficient resources to allow that ongoing relationship, both the early version and the ongoing. If you want attorneys to talk with their clients every other week, we can't do it unless you provide the resources to go with that. I think we do a very good job here of getting to our clients very, very early. But the problem is that ongoing relationship, even in our office.
- 337 R. Fishback Can I jump in here. When we look at how the Multnomah County docket looks, when the lawyers are in their offices and when the jail phones are shut down, it is no wonder that you see lawyers at the Inverness Jail on Saturdays and Sundays. You know this is a really heavy burden to carry. But you know that if you are in court in the morning and you are in court in the afternoon, and they don't take phone calls from 11:00 to 1:00, it is the pits. Your voice mail stacks up and you are either calling back at night or on the weekends a lot of times. And that says nothing about being in trial.
- 351 P. Levy I realize that we are talking mainly now about personality conflict substitution. I have written an article that will probably be in your mailboxes next week for the OCDLA Defense Attorney that suggests we have perhaps been withdrawing for what Judge Frantz is calling actual conflicts of interest – withdrawing easily and too often, although my article suggests why that is happening and some of the reasons for that. Without bringing up the whole article which you can read next week, I think there is good news and reasons why I think there will actually be fewer substitutions for actual conflicts of interest with the adoption of the new disciplinary rules. If those rules are interpreted the way they appear to read, we actually will be able to avoid many substitutions, particularly in the larger firms where the conflicts arise because of former clients who were represented by attorneys who are no longer with the firm. We should be able to stay on those cases, where now we are getting off.
- 370 C. Lazenby Peter, can you see that we get a copy of that article, because I'm not on the mailing list?
- 377 S. McCrea Mr. Chair, you were late and the rest of us have been going since 10:00, so I think a break would be appropriate here.
- [Take a break at 12:05 p.m.]
- TAPE 2: SIDE B**
- 248 Chair Ellis [Calls meeting to order at 12:40 p.m.] We would happy to invite comments from anyone who is here. Would anyone like to share with us their thoughts?

250 J. Connors I actually have some comments, based on the memo that I submitted. I wanted to hear about what others had to say about the cost differences, but rather than waste time –

255 Chair Ellis Why don't you come on up?

258 J. Connors Well, the obvious questions for you are the cost of cases and efficiency. I wanted to address both of those. Just by way of background, I think keeping in mind the volume of work we do, the Portland office does 13,000 cases per year, which range all the way from second chair in death penalty cases, seven murder cases, to a substantial, 60 percent, of the Measure 11 cases in the county and all of the other felony cases. Juvenile cases, the lawyers typically handle about five or six termination cases a year. We do almost all of the civil commitment cases for the whole county and we staff most of the specialty courts including STOP, which some years has been as many as 700 cases a year, with one lawyer and one team. We also have the case assignment project, which I will talk about more in a little while. It is important to see that the Portland office does 13,000 cases with a staff 40 of lawyers; a total staff of 96 people, six of whom are administrative. The studies we have done show that that is a significantly low amount for that big of a staff.

Of course I am biased, but I think in terms of a quality issue, just about any way you can measure that or anyway you can test it, I think the quality of our work has been excellent. I mentioned that an 18-month statistical study showed that about 60 percent of the charges we handle go away. More specifically, that breaks down to about one-third of the cases where our clients are found guilty of lesser crimes. Only about one-third of them are actually found guilty of the charges against them. The office historically has had about a 7 percent trial rate. We have had about a 9 or 10 percent trial rate on the Measure 11 cases, which is way above the national standards that I understand is between 1% and 3% in terms of trial rate. Obviously, we are concerned about the conflicts. About a year or a year and a half ago, we instituted a practice within the office that no one could get off a case without it being reviewed by a manager. I would say almost all of the cases we get off of are based on actual conflicts. We have worked hard and struggled with conflicts, and we are optimistic that the rules will get changed so we are not getting off cases we don't want to get off or where witnesses or victims in cases are former clients and the lawyer that handled the case is long since gone. But it has been my experience that there are very few cases that we are getting off of, based on personality clashes or that type of issue. Judge Frantz mentioned the list of cases over 150 days old. When that study came out, we were glad to hear that only 15 of the 89 cases were ours. Again, we handle almost 60 percent of the Measure 11 cases, and again six or seven murder cases a year, so I think that is statistically significant. That is in addition to all of the anecdotal stories about some of our programs that result in drug-free babies being born to the STOP program and things like that. So you can ask me what I think about the quality, but by any of the standards that I have heard about being used, the quality is high and the description that it is very high to excellent is an accurate one.

So the bulk of my comments are about this efficiency question. Just to be really clear on the charge and the cost per case, I think it is important to keep in mind a couple of things. Maybe I have mentioned this in the past but because this is such an important issue and you want to be fair in terms of the cost per case and be efficient. Keep in mind our cost for the case involves the cost of the investigation. We do those 13,000 cases with 11 investigators, and that means we can investigate every misdemeanor. We don't have to go back for state funds on those seven murder cases. That is all included, and I think that is an important part of your analysis. The second thing that we have in-house, a crucial part of our legal system, is the alternative court. Part of what they do is find drug treatment programs, so that people don't come back. They get people hooked up in anger management programs. They help people find contacts for jobs, and we work closely with some of the employment offices – not only on specific cases, but on a system-wide basis. People that work on tracking these resources throughout the state have done studies on things like juvenile sex offender treatment programs. That information is available simply by people calling and asking for it. People

from around the state call and use our office for that resource, not to mention some more specific things along the lines like a list of experts that we keep in our database and make available to people, like the clothing room that through donations we make available to anybody that has a client who needs to get dressed up for court, like our training sessions that have always been opened to anybody who wants to attend, and we have a library that is frequently used by lawyers outside our office.

341 Chair Ellis How many lawyers outside of your office are coming to the training sessions?

343 J. Connors Not enough. When we specifically advertise it, we typically get between four or five. Some of the trial skills programs that we have put on, we have specifically invited people from other offices and have let them participate. But it is not as big a number as it should be. I think that is for a lot of good reasons and probably the main one is that people are busy.

347 Chair Ellis Would you share your brief bank?

348 J. Connors We would. I don't know of any specific requests that have come from outside recently. But I know historically we have. Part of what is happening based on the lists is a lot of documents get sent back and forth and it is sort of the same answer with respect to the training because OCDLA has so many programs in a year. I think a lot of the people outside our office rely more on them. But that is something we talked about a lot, and have talked with John Potter about. We would be glad to work with the Commission to try to get a more coordinated effort along those lines.

Getting back to the cost per case issue in the memo, I mentioned that the duty attorney calls and literally we take turns dealing with those calls and questions. Typically, I would say there are 20 a day. The expungements – there are all the people who are coming back to court after three to 10 years after their convictions, usually because they want to get a better job. We literally handle hundreds of those cases per year, in coordination with the Federal Defender's Office. That was a program started when Judge Abraham was Chief Criminal Judge about 10 years ago, and Steve Wax realized he was calling me on a pretty regular basis to coordinate records on cases. We went to Judge Abraham to formalize that process. It is usually two or three cases per month and it is usually people who get charged in state court. We get appointed and get credit, but just as often, it is the behind-the-scenes coordination that doesn't count as a case for us. The out-of-state warrants, again probably between three and four cases a month, people calling or writing from places like Oklahoma, Georgia, Florida, those are all examples within the last month. They have been kicked off their SSI because they have an outstanding warrant. These are people who are usually very, very sick and often mentally ill. Again, this is a task that we agreed to do because we were in the best position to do it. Some cases, Judge Frantz would call and ask us to do it. Sometimes the DA would call and ask us to do it. In terms of the amount we get paid, in terms of the number of cases, it is not counted anywhere. Juvenile cases – I am pretty confident we are not the only office that does this, but there is a lot more that we do, like early expulsion hearings, if someone is looking at getting kicked out of school, like appearing with some of our child clients at Grand Jury when they have been victims of abuse. More and more we are pushed to handle aspects of family law cases, such as custody issues with respect to divorce proceedings that might be going on at the same time as a juvenile case. That is something I know Kathryn and others have tried to be fair about the payments. But the resources, as I understand it, haven't been there and that is an issue. We just try to do the right thing without it being counted as much as it needs to. Appeals – lawyers will handle appeals often because they want to protect the judge's ruling or just because they want to protect what was good law. We recommend and encourage the newer lawyers to handle appeals early on in their careers. Again, that is something that is not specifically counted toward our quota, but it is something we have done. I think a fair estimate would probably be about six appeals per year, which isn't a huge number.

I think you are starting to get the message here that there is a lot more that we do than initially meets the eye. The case assignment project was a good example of this approach. I think Ann Christian was frustrated that newer judges and JC3s three that didn't know who should get what case. There would often be quarrels bordering on fistfights among the contractors on who should get a case. The court really didn't have the staff to provide any real guidance on those issues. Finally, we agreed to do that for money credit, but not for case credit. It is a significant project, and it eliminates a lot of conflicts up front. I think Jim undersold our work in that department somewhat. The problem came when the DA's office changed computer systems and they could no longer get us the list of co-defendants and potential co-defendants. So we could check our computers and send out a list to the other contractors, but we still captured many, many conflicts before they are even assigned and avoided the issue of whether or not anybody has to be paid. Then, finally, Judge Frantz touched on this, but there is quite a bit of start-up work with things like the STOP court or the Community Court. Literally, when the Community Court was being started, a lawyer that was going to staff that was going to meetings in the community on a weekly basis to listen to people in the community, to hear why they thought somebody who had left a vacant car in the neighborhood should be punished more severely than somebody who was actually charged with theft or prostitution. It is just part of the infrastructure that we provide. Part of the point I want to make is the cost per case is misleading, unless you find a way to count all these things, and I think it would be counterproductive to make us count all these different things because of all the time we would spend doing that.

- 438 Chair Ellis I was going to ask as I was listening to you whether you think we ought to change the contracting method to buy these extra services on a disaggregated basis?
- 442 J. Connors No, I think if it is not broken don't break it would be my notion. But I'm just trying to give you a more complete and accurate picture of that infrastructure and some of what we have been able to learn and do over the last 33 years. We have learned from our mistakes. We have had a lot of wonderful opportunities to help be part of Community Court and STOP Court and those sorts of things. I think right now our biggest practical problem is going to be the change in the federal law with respect to hourly workers and the fact that our investigators and legal assistants are now going to be limited to a 40 hour week because we can't pay overtime, and how we are going to struggle with getting the 13,000 cases done within those 40 hour limits. But that is something that we have a good start on. We are confident we can get the work done with a lot more organization and planning, which to me is more important than having us count all this other stuff. I think you should just let us deal with that issue. The ethics and flexibility that has been a hallmark of our office –
- 461 P. Ozanne May I follow up on that? John, there have been comments over time, and I am sure you have heard them too, that we should disaggregate or at least more closely track what we are paying for in the context of our duty to administer limited taxpayers' funds. And how can we be assured that we are getting some savings through economies of scale? In fact, we have listed some of the same factors in the staff report that you have mentioned as needing to be accounted for. But should these factors also be quantified in dollar terms? And at some point, aren't there presumably some offsetting savings that come from a large office with lots of cases? How can we be sure that we are getting those advantages? Is it realistic to try to determine that we are getting these advantages with an office like yours?
- 275 J. Connors I think it is very realistic and very important. The memo was sort of the first try to capture some of that. I know, based on the meetings I have attended of the Contractors Advisory Group, that it is a whole mind-set that you are trying struggle through, in terms of how do you measure quality and how do you measure contribution. All I can say is it is an important issue and that we will keep working with you and the Commission.
- 484 P. Ozanne Not only quality, because you have spoken to that, but also dollars and the sense that are we, by configurations like your office compared to others, enjoying economies of scale and

getting some dollar savings. I'm trying to figure out how we can measure that, and maybe disaggregating and costing out the services provided would be one way. I'm just wondering if you have any thoughts on that.

496 J. Connors

Well, I think it does get into the issue. We have struggled to get the work done and be everywhere we are supposed to be. The reality that Judge Frantz described is a very real reality. You know, you talk about economies of scale, and part of why we were able to deal with the BRAC crisis, and in part why we are able to work with new programs such as when Mike Schrunk gets a federal grant to start new Community Courts, we can make our best efforts to staff these functions within our current budget and within our current structure because we have some flexibility. You know part of that is the whole CSL case-weighting system that helps us. For example, when there aren't as many Measure 11 cases assigned in a year but there are more misdemeanors, which is currently what is happening, we can adjust. So the significance and the savings based on economies of scale are usually significant. The terms of how you actually count all that, I can say is based on things like the fact that our structure and the economies of scale allow our lawyers to do way more cases than national standards. Juvenile lawyers handle somewhere between 400 and 500 cases a year. The misdemeanor lawyers handle somewhere around 500 cases a year. The minor felony lawyers handle somewhere in the neighborhood of 350 to 400 cases a year. Major felony lawyers, people handling Measure 11 and murder cases, do significantly more. The only thing I think, it is just sort of an attitude and an ethic, that because we are a public defender office and we are non-profit organization for many years, we do more cases than we have contracted for because, come December, we don't want to say to the system, "No, we are done, we are not going to pick up cases." So those are all hard things to count and measure, but it all adds up to a picture that I think says we are very cost efficient.

Let me just – I see Judge Welch has arrived – there are just a couple of reasons why I think the structure works, and I just want to touch on those before you call Judge Welch. One is we have always hired people and trained people under the notion that being a public defender is a vocation. I will talk about that in a second. But we not only see ourselves as needing to be excellent legal technicians, we really train and hire people with good trial skills and constantly push that. We try to have our written product as legal technicians to be excellent. We don't want people to ever feel that they get second rate lawyers. We feel that we really are the experts because this is what we do all the time.

557 Chair Ellis

Is your hiring still predominantly entry level lawyers, or do you do much lateral hiring?

559 J. Connors

Predominantly. We do some. I guess no more than 10 percent. The other part of that is we really do hire people and train people to be counselors. They have to be able to talk to clients about problems. They have to be willing to talk to clients to encourage them to do things to get them out of this system, and that has been a really important part. We don't have a lot of rules in this office. But the ones we do have are really important things, like the client comes first. And a big component of this is that, if you really train and teach people that part of what we do, it gives clients respect. And hopefully, when we give clients respect, they will develop respect for themselves and the system, society and laws. Maybe that is the reason they don't come back through the system and cost the state more money.

574 Chair Ellis

Can you give us your opinion on the issue that Judge Frantz is addressing – not conflict substitution cases, but relationship substitution cases. How much of that do you see, and how does your office handle it?

581 J. Connors

I believe that I get most of the complaints by phone and I am very confident that almost all of the written complaints get directed to me. Both Jim and I review all of the post conviction claims and any other claims along those lines. In part, because of the structure and because we have the team approach – a legal assistant and an investigator working on almost every case – we really do make it a priority for somebody in the office to see their clients within 24

hours. And we make it a big priority, in terms of the structure, that when the client calls somebody from the team he or she should be available. So, if the lawyer is in court all day, the legal assistant should be back in the office and they can field questions from the client and the client's family, and do all the kinds of things that relieve the kind of pressure that Judge Frantz described. From my experience, there are complaints and we try to meet them both in terms of the client and their family. When Peter had his former job as part of the study on minority representation in Portland, he brought to my attention some families of clients of minorities in prison on Measure 11 cases. They weren't even necessarily our clients, but we met with them and tried to resolve their issues and garner respect for indigent defense, particularly from the black community. We have always been very, very careful to communicate to the judge that, if there is any kind of complaint, we want to know about it right away. We would much rather deal with the problem early on and consistently than to have it fester. I think we have a good record with the judges. I can tell you from at least a half a dozen uncomfortable meetings I have had with judges about complaints that they also go the other way. I think part of the system Mike Schrunck described of the system working well together is absolutely true. I'm sure there are complaints but, if we can deal with them, I think they are pretty minimal.

626 Chair Ellis

Going back to the disaggregation issue, if I can call it that. I am kind of torn listening to you and reading your report because, on the one hand, all of the things you describe are valuable and good. And they are important to do. I also think it important that Salem doesn't direct everything in terms of complete disaggregation. On the other hand, I am sure you sense that there are other defense providers who feel aggrieved at the rate disparity that exists. They may understand some of what you said, and they may have the sense that it is more that you guys have been good bargainers, and that you have been at it for a long time and history kind of unfolded and it happened that way. Is there some way that, without converting the contract to a complete disaggregation where, for example, we buy X dollars worth of community involvement and, you know, that is just taking a nonsensical example –

TAPE 3: SIDE AB

001 Chair Ellis

Is there some way to build in enough information to be able to better understand both, at the Commission level and at your compatriots' level, what this incremental cost is producing in the way of services?

003 J. Connors

Well, let me try to answer your question in the way Judge Frantz addressed it. I think she really hit the nail on the head when she said the issue is not so much whether we get paid more than anybody else. It would be easy for you to just let us divide and conquer each other. I think we all lose in that sort of situation. And the quality and leadership we provide would be severely damaged. Once you lose all those efficiencies, I don't think you get them back. It is different to be a public defender. The real issue is we do make 30 percent less than the DAs. Over the course of the first 10 years a Deputy District Attorney is going to make \$100,000 more than one of our new lawyers. Coincidentally, that probably matches the debt load of that new lawyer. We don't have the opportunity for a client to come in and put down \$40,000 to handle a Measure 11 case because, by law, we are only allowed to do the cases we are assigned. That ethic and that notion that being a public defender is a special vocation had the entire office sign up for two weeks of unpaid leave during BRAC, and some people went more than that to get through the crisis. If you start to nickel and dime public defenders, and disrespect that notion that it is a vocation, all the kinds of efficiencies that I described, and all the leadership and the kind of quality that the whole system comes to expect because of the way we have done business for 33 years, will be lost. You are going to lose a lot. I will think more about how you disaggregate that out and measure it. But I guess my message to you is you have got the record. I don't know how else you want us to demonstrate cost-effectiveness or quality. I think the record speaks for itself. If you want us to think more about exactly how to line item all these factors, we will. But I think it is sort of missing the boat and missing the point. There is a lot we do that you can't really quantify in terms of a dollar cost. The state has learned the hard way for many, many years. We can't afford the \$40 an hour

rate. If you want to get into that mentality, it won't cover our costs anyway. That is probably not a direct answer to your question.

- 033 Chair Ellis Let me make a suggestion. We have two judges here and I know you are planning to be here the whole day. So why don't we recess for a minute. We will let our two judicial colleagues speak and then we will get back to you.
- 037 Ron Fishback At some point, perhaps not in this session but at a future session, the Portland Defense Consortium would like to be heard. We have not submitted anything in writing, but I will say right at the offset that I really appreciate Mr. Connors' efforts.
- 041 Chair Ellis Okay, we will get back to both of you. Judge Jones, do you want to lead off here? Thank you for coming.
- 045 Judge Jones I'm pleased to have the opportunity to do it. I am Ed Jones and I am a circuit court judge here in Multnomah County. But before I got this job, I was the Director of MDI for 14 years and I negotiated a lot of contracts with the state over those 14 years and those negotiations were often intense. We never got what we wanted or even, in my opinion, what we needed to provide the level of service we thought our clients were entitled to. But we did the best we could with the money we got. Part of our willingness to make due with less money than we thought our clients deserved was that we were aware of the financial constraints of the Indigent Defense Services Division and now those that you operate under. But what I didn't understand then, and I don't understand now, is, given those constraints, some contractors were paid much more for exactly the same kinds of cases. I don't mean to say that I don't understand the historical reasons for the disparity. I do. What puzzled me is the persistence of that disparity, even to the present. I am very pleased that the Commission has decided to undertake an examination of the question.
- I agree with John Connors that the lawyers and the staff at Metro have been in the forefront of establishing and assuring excellent public defense in this state. There is no doubt about it. I don't have any issue with their achievements. There is no court, no defense lawyer, no defendant that hasn't benefited from the work that Metro has done over the decades. It is absolutely the case. My concern isn't with their history or achievements. It is with their current budget and about the sacrifices that other contractors and other defendants have to make to allow Metro to have more money for every case. To make myself clear, I want to ask the Commission to look at the items with added value and that John set out in his document and ask yourself, "What is the current cost in this budget of each of those achievements? How much are you paying this year for each of those achievements?" Now in the draft report for today's meeting, on page 13, there are criteria that might justify relatively higher contract rates. They might rationalize higher contract rates. But if you actually sit down and say, "What is the current dollar cost in this contract for each of these achievements and are we getting our money's worth?" I think the answer you have to come to is: "We have no idea." For example, talk about the existence of an internal infrastructure. Well, that begs the question. That is why they get more because they have more people and that is where the money is directed. There office is like MDI and any other office, like your office. Frankly, that is where the money goes to the employees.
- 086 Chair Ellis Can I interrupt prematurely? Is there any data or information comparing what a comparably experienced lawyer at MDI gets relative to a counterpart at MPD?
- 089 Judge Jones Well, of course.
- 090 Chair Ellis At the individual level, as opposed to the contractor level?
- 091 Judge Jones Well, I would hope you have that data, frankly. It certainly wouldn't be that hard to get, if you didn't have it.

- 092 Chair Ellis Do you know if there is a disparity there?
- 092 Judge Jones Well at Metro pay scale, and John would know, but I think they run a little higher in the beginning and ultimately they go further up. I think there are some rationalizations that explain that. In other words, MDI lawyers top out sooner than Metro lawyers. The difference is small maybe \$1,000 or \$2,000, I am not even sure what it is.
- 098 J. Connors Closer to \$3,000, I think.
- 099 Judge Jones That is obviously one place the money goes. But when you look at the spread sheet, I have no idea and I can't vouch for these numbers, but it suggests that the same group of cases being done by each of the two offices generated over \$300,000 difference to you in costs. Now what did you get for your \$300,000, that is my question to you. Now, if you go down and look at the proposed suggestions, for example, a strong and effective management structure, you can have a strong and effective management structure in any defender's office if you are prepared to pay for it. But the reality is that the offices that have come along since Metro have not been given the opportunity. So to use that now as a reason to continue to give more money to Metro, it just doesn't make any sense. We go down and look at the capacity and willingness to raise legal challenges and handle test cases. Now how much does that cost? What is the dollar value of that? I mean, is it a \$100 extra a case or \$10 extra a case? Frankly, I don't think that any other law office would be any less capable, or has been historically any less capable, of raising those kinds of challenges. It simply isn't the case that any of the items laid out in the draft report can be connected to some justification for actually having more money. And that, in the final analysis, is the problem here – that you are examining why you are paying the extra money.
- 125 Chair Ellis John Connors, for example, the training that they do?
- 127 Judge Jones Yes, how many outside lawyers do you have attending one of Metro's training sessions? A second question: let's suppose that the cost of one trainer, full time, is a justifiable expense in an office the size of Metro. What does that average out to per case: one dollar, ten dollars? You certainly could figure it out. If you want to have that the trainer there, and frankly I think it is a good idea, fine, write it into the contract. But to justify a \$300,000 difference in a relatively small group of cases on the basis of having one lawyer doing some training, most of which is done internally, just strikes me as being – the reality is that most of the indigent defense training in this state is done through OCDLA.
- 137 Chair Ellis They do a lot of what I call CLE, but do you really think they do the training?
- 139 Judge Jones I don't know how many defender offices other than Metro have anybody working as a designated, paid trainer? Who is training those people? Let's suppose that training is a good idea. Should all the money we are spending on training be spent in one office?
- 144 C. Lazenby Let me ask you a question. Let's assume we take out all of the deltas out of the Metro budget and then we distribute the money evenly throughout all of the providers in the Metro area. What is the plus for indigent defense in this city if you do that? Or is there one?
- 149 Judge Jones There are a number of different issues there. If there are things that can be done that need to be done by somebody, then everybody should have a fair shot at providing that service. That hasn't happened. If it is something that can be spread around, it should be. So it depends on what the particular service is. One of the items listed on in the report was an institutional presence on behalf of public defense. That is probably system-wide one of the greatest contributions that Metro makes to indigent defense – is the time that people in the administration and other lawyers spend involved in these public processes. Fine, what is the dollar value of that? How many extra dollars does it take to have that presence? The answer

is, frankly, that it doesn't take any extra dollars. Lots of people do those things on their current salary. What justifies – and again I am just using that number because it is handy; I suspect the real number is larger looked out over the entire contract – how much of that \$300,000 in additional funds goes to providing that institutional presence on behalf of public defense? It is a necessary task, but how does it fit into the budget? What is the cost? Are you getting cost effectiveness with that money for that service? I don't know, but you should know.

- 171 C. Lazenby I don't really have a point of view on this, as you probably know from knowing me, but let me just go down this line and talk about this a little more. I was around when the county was setting the first contracts here, and one of the reasons why we gravitated toward these larger and larger contracts was because of a perception that I think was valid – that there was a real inconsistency in quality and services, it just wasn't cost-effective.
- 176 Judge Jones I am absolutely in favor of larger defender offices doing the bulk of the work in counties that can support an organization of that size. There is no question in my mind that those offices provide a higher level of service largely, in my view, because of the group training, the sort of self-support that comes out of that kind of office. That was on one of the findings of a task force of the State Bar, when we made a statewide survey, when we looked at complaints about the quality of work and the better quality of work that was getting done in larger defender offices. That is a fact.
- 186 C. Lazenby But your arguments, to a certain extent, result in decentralizing those services, if you are going to break down all the components and let them out for bid to see who is going to do them. You are dispersing those services amongst a lot of different –
- 191 Judge Jones If you are not getting services now, then they need to be dispersed. That is a real question. That is the question that comes up with the training issue. Another one of these factors in the report – a capacity to handle high volume caseloads – well, if it costs more money to have high volume caseloads, why are we doing it? It doesn't make any sense to spend more money to have bigger caseloads. That's nuts. If you are not saving money by having bigger caseloads, you shouldn't be doing it. The benefits need to be pinned down, quantified and priced out. Maybe you will come to the conclusion that you are getting your money's worth for the extra money. But frankly, you ought to pay the same for the cases and sign a separate deal for the additional services, instead of hiding those additional services in increased case values. Because if everyone gets X amount of dollars to do a case and we say well we also need this service for drug court, to do a training session, to lobby, I guess we could call it that. Whatever it might be, fine, let's put a cost on it. Maybe Metro is the right place to get them done. They certainly have a good history to do them. Then give them a contract to do them. But then you know what you are spending and you are not hiding those services in your case cost. That is what has got us to where we are today. Anybody who looks at these numbers says, "How can this be fair?" Rather than sitting around trying to rationalize it, let's lay it out clearly. We pay X for that kind of case and, because the system needs these additional services, we buy it for a price.
- 222 C. Lazenby Judge, there is also an irony that you and I are getting into this conversation –
- 223 Judge Jones It's history.
- 224 C. Lazenby Yeah, but it seems to me as well that a lot of things I heard John mention are in the nature of the beast, and the reason why people get into this business and stay in this business. So to a certain extent, you look at Ron Fishback or Ken Walker and say, "I know that those guys do things that they don't get compensated for either." So don't we run the risk that, if we put a price tag on everything and there are no extras, we are ignoring what it means to be a true professional criminal defender.

- 226 Judge Jones In other words, we are only paying one office for the free work, and we aren't paying the others. I'm saying that I think a lot of contractors add a lot of "added value" because, frankly, with what you pay they couldn't do otherwise. But you can't do these contracts and not provide added value. Because if you were just doing what you were paid to do, you couldn't represent your clients. We all understand that. So everybody who has one of these contracts is giving you more, is subsidizing the payments you make. That is a fact. Frankly, if none of them get paid for it, then we would all lump it and everyone would understand. They wouldn't be happy, but they would understand. But why should one office get its "added value" recognized with a fat check, while other offices' added value results in nothing? That is my question. It seems to me that you have to know the answer.
- 247 J. Potter Let's switch gears just a little bit. You are on a brainstorming roll, but I want throw this idea out. Why do we have two large offices in Multnomah County? Why don't we have MDI and Metro PD merge together?
- 250 Judge Jones Frankly, I don't think there is any good reason except –
- 251 Chair Ellis Conflicts?
- 252 Judge Jones Well, the consortium model is probably the best response to conflict problems. Now I have been surprised to discover in many large jurisdictions that public defender offices solve conflict problems by never looking anything up. That is the way it is done in many big cities. They just don't look it up. I'm not recommending that, but we are one of the few jurisdictions that I am aware of where the defender offices take seriously their obligation not to take conflicts, and that clearly has some expense association with it. The consortium model does respond to that. Now, I think there are other big problems with consortia because, of course, to say they are management-thin hardly comes close to describing it. They have zero management, or as close to zero as any group of people trying to get a common task done can get by with. I don't think, frankly, that is a good idea, but it clearly has some advantages with regard to conflicts.
- Multnomah County is not a rational system, not a rational provider system. It is entirely a question of historical accident. MDI would not exist if Jim Hennings would have been willing to do traffic cases. There it is. That is why MDI was created, to do traffic offenses which Jim's office didn't want to do. Then, over time, as cases and numbers went up, it grew into more and more misdemeanors, into juvenile cases, and by the time we wanted to get into felonies it was a mature industry. There weren't many extra cases lying around and, frankly, the state over a period of years chose to sign many contracts, which have a big advantage for the state. That is not something the state was very successful with, with Metro and to a lesser extent with MDI, simply because, once you get to a certain size, you have some leverage in the negotiation process that the little guy doesn't have. You have two caseloads you could be gone tomorrow. Everybody understands that. And when the comment in the first draft report about not being as good as a negotiator; well, when you have no where to go and nothing to stand on, it is hard to negotiate tough. On the other hand, if you have the bulk of the cases in the jurisdiction, it is possible to negotiate with a little more leverage, and that has been the history in this jurisdiction. Things have flowed towards those who have the ability to negotiate from a tough position and away from those who have not.
- 298 Chair Ellis Just to give the other side of that. If an organization has only one purpose and one buyer for that purpose, how much leverage do you think you really have?
- 300 Judge Jones Well, it is like the union shop that has one business union. They have to get along. I mean they can strangle each other but, bottom line, they have to come to an accommodation. The large contractors are in exactly that position with you or the State Court Administrator. It wouldn't be possible to say, "Metro, we are tired of you and you are not being reasonable, so you're out of business and we are going to hire somebody else."

- 307 Chair Ellis The other side of it is, it is not very realistic for Metro to say, “We are tired of you.”
- 308 Judge Jones Right. That means you have a classic contractors-state negotiation that comes down to the last minute, and finally everybody is forced to get reasonable and get on with their life. They have to live with each other, and that is how it has been over all of the years it has been going on. But right now this notion of added value as an explanation for rate disparity, how come it can't be costed out? Why shouldn't we have a clear set of standards?
- 319 J. Potter I want to come at this one more time. Let's say that we decide that there is some value, and we talked it out and concluded there is some added value – we decide that, as Connors said, having an institutional presence makes sense or, as Schrunk said, having a defense infrastructure in a large office makes sense – then why aren't we combining these two offices? Why doesn't MDI and Metro combine? And if that were the case, would we be saving money? We have two administrative processes with the two offices. Couldn't we reduce the average cost per case by doing that?
- 326 Judge Jones You would think so. But when you look at the numbers and the bigger the office, the more cost. So I guess the answer is “no,” although I can't understand why that is. I mean, you would think there would be economies of scale – that if you got a 50-lawyer office, you could do a drunk-driving offense for 10 or 15 percent less than a five lawyer office. But you guys haven't achieved that. In fact, the bigger the office, the more money you pay.
- 334 C. Lazenby You have already explained why that occurs. You explained that the smaller groups don't have the leverage and the negotiations to get the true cost. So really the argument may not be that MPD is getting paid too much. The argument may be that the other contractors need to be paid more.
- 338 Judge Jones I don't disagree with that. Don't get me wrong, nobody is getting enough money to do the work you expect them to do. Really, the issue you have is how to share the pain, not how to divide up the extra cash. I wish our discussion was, “Let's divide up the money in a way we can all be happy with,” but that isn't it. What you guys are dividing up is the suffering and you are not dividing it fairly, in my opinion. That is pretty much what I have to say.
- 346 P. Ozanne Judge, I would like to follow up on what Chip asked. And maybe I just didn't hear your answer. I certainly understand all of your arguments we have to track and manage costs. And merger of the larger offices might make some sense, as I understand you. Disaggregating cost, and you might have been out of the room when we talked about this with John Connors, the reason you would do that, it seems to me, is to encourage other people to bid on the disaggregated services. There also would apparently be some competitive dynamic that would perhaps increase our cost savings. So, on the one hand, as Chip was saying, you are apparently advocating structurally for larger organizations and, on the other, you seem to be suggesting that we should move toward a competitive market model that would tend to atomize the organizational structure for our contracting system. How would you handle this if you were the administrator in our position? What is your advice in that regard?
- 364 Judge Jones Well, we can talk about the ideal system for Multnomah County. Even assuming we could agree on what it would be, and I can give you a view on that, I don't think you can get there from here, at least not in the next decade or two. In some ways, the biggest problem over time is that contracts proliferate and, up until very recently, they never went away. In each new situation, it would present a problem for the Commission or the State Court Administrator and they would respond with some new contract to solve that problem, or some side deal with an existing contractor to solve that problem. And the things just have gone unimproved might be one way to describe it

- 377 P. Ozanne Unless I am misunderstanding you, by costing out these various services and putting them for bid we would be encouraging the formation of boutique contractors that would be saying, “We will do drug court, we will do the lobbying, we’ll do such and such for less money.
- 380 Judge Jones If you can get the service. Now the institutional presence issue is an interesting one. You can’t bid that out. That doesn’t make any sense. The people who are there from indigent defense should be the people who are deeply involved because they are doing it every day. But, for the life of me, I can’t understand how that service fits into a budget number or why it would justify an extra \$20 a case.
- 391 J. Stevens If you can’t justify it, and I think you are probably right that you can’t, then doesn’t the Commission have the obligation to say, “We’ll take away that \$20 and hire more lawyers somewhere else where we need them more.”
- 396 Judge Jones If you start with the assumption that you are spending apparently more money than you could get those same cases done elsewhere and then say, “What am I getting for that money?” Until you know for sure what that money is going to, you can’t make a decision about whether it is wisely spent. And, frankly, a lot of these items don’t have any demonstrable cash value. You know, “we do the big cases, we win in the Supreme Court” – every lawyer’s dream, but is it because we pay them more and, therefore, they get better people? Or is it because we have smaller caseloads, which cost more money, so the lawyers have time to do those impact cases? I can think of six different explanations for why one office would have more presence in the Supreme Court than another, and each one of them might come down to some sort of a budget issue. But you have to decide what it is. Why is it that they are in the Supreme Court more often, smaller caseloads, smarter lawyers, what is it? If paying them an extra \$3,000 wins more cases, then I am all for it. But, frankly, there are a lot people, and I am probably going to regret saying this, in the system which no extra amount of money is going to make into a good lawyer.
- 422 Chair Ellis That was pretty well phrased.
- 423 Judge Jones When they get hired in a public defenders office, they have already decided that getting rich is not their life goal. They ought to get paid a decent wage and many of them don’t. But I don’t think that money produces better lawyers. It just produces people who can pay off their loans and feed their kids.
- 434 Chair Ellis Thank you.
- 437 P. Ozanne Judge, you have written testimony that I will pass out to the Commission.
- 438 Chair Ellis Judge Welch?
- 441 Judge Welch I am Elizabeth Welch and I am the Chief Family Court Judge for Multnomah County. I just have a couple of issues. They are not very dramatic and they are not very messy. The first thing I want to say is that, in the year that this change-over has occurred, as far as I know as the person who signed most of the paperwork to appoint and compensate and approve fees, and I don’t have to do that anymore, it was absolutely a seamless transition. We have had no problems whatsoever with this new function, absolutely none.
- I am going to talk now mainly about juvenile court, which is a very small part and on the edges of what you have been talking about while I have been sitting here. One of the advantages we have enjoyed over the years, and I have been involved in one capacity or another for 35 years back when I started in the DA’s office for juvenile court and the system is so much better that it is absolutely breathtaking, one of the reasons for that is the quality of work that is being done by defense attorneys in juvenile court. We benefit mainly by the fact that juvenile court is not a place you go when you are being punished or when they shouldn’t

have hired you in the first place either in the DA's office or in a defender organization. We have wonderful lawyers who stay in the system to become extremely expert and it is a very, very challenging job and very different from criminal defense. We are very grateful to the Public Defender's Office and MDI and some of the other firms that have contracts. They don't simply move people in and out, and that allows people to become very capable and very, very effective. You can always be better, but I am very happy 99 percent of the time with the quality of representation that we see in the juvenile court. One of the things that I am hoping, as this system that you are administering gets on its way and looks at new issues and how to better do the job, the issue of conflicts is, of course, a pain in the neck for people who are trying to run an efficient system. You have to get off the case and now we have to postpone the trial and all that sort of stuff.

I don't know if all of you have an understanding of what a juvenile court case looks like. I am not talking about delinquency. That is just like the criminal model, except there is no jury and it is simpler. The dependency case model is something I should tell you a little bit about, just to make sure you understand. A dependency case is a case where the children are removed from the parents because the parents aren't very good at that job. In the typical dependency case there is one mother and typically two or three fathers for the children who we are dealing with. And then there are the kids. These people all probably need to be represented. If you add that into the calculus of conflicts in the criminal context, you will go absolutely bonkers. MPD is appointed to represent the mother in a dependency case. They check their records and they discover that, eight years ago, they represented one of the fathers in a criminal matter. They can't take the case. It is a mess. When you talk about making law firms all into one, what that means is there are people who simply would not get represented. It would be a disaster from our standpoint to do that. Most of our conflicts are with the Metropolitan Public Defender because they have such a broad range of representation of the adults, and because they have been around for a long time.

The solution for the conflicts, of course, is an appointment list, and our appointment list is so pathetic that it is embarrassing. We rely on that because there are only X number of contractors, and we need a lawyer for the momma in a determination case and no one can represent her because of all these conflicts. So we fall back on the appointment list. Our appointment list is horrible. We can't get anyone to be on it anymore for all of the obvious reasons. We have a list that is kind of a public list and then we have people that we actually appoint off it. I am just being honest and I'm not going to name any names. But most of the lawyers on that list we have decided we are not appointing because they are not competent lawyers. They don't do enough work at the juvenile court or they are just not competent lawyers, and we are in terrible distress. We have no lawyers to help us out on these conflict situations, which are numerous.

The other thing that I want to make sure you are aware of in Multnomah County, we have a very elaborate system in juvenile court. We have many kinds of hearings that we invented. We place a lot of demands on the lawyers who represent kids and parents. Again, if the model in your head is the criminal model, I have to ask you to try and suspend that and think about a hearing that occurs the first day the case is in the system. A lawyer from one of the firms picks up a case in what we call shelter hearings. There is a second hearing, which in about 50 percent of the cases happens in about two weeks. We have a pretrial conference, a JSC or Judicial Settlement Conference, in every one of these cases. The lawyers are expected to be prepared, to have worked with their clients and to be ready to settle the majority of these cases at that point. Then just a trickle of them go on to trial. After there is adjudication and the children are made wards of the court, there are family decision meetings. Actually, they happen before and are called by the Department of Human Services, which most lawyers feel obliged to attend, especially if their client has a shot at getting their kids rather than a hopeless case scenario. There is also a Citizen's Review Board. The demands that we place on the lawyers who are in these contract agencies is horrendous. And then we top that off by operating in two physically different locations. We have judges here and we have judges at

68th and Halsey and they have hearings back and forth during the day. We try to minimize that, but it is a pain in the neck for them and it is a pain in the neck for us because it slows us down, because we have to wait for people, because they run overtime, and all of that. The fact that we operate out of two buildings, I'm surprised Jim Hennings can hold on to some of these folks. So, what I am saying as sort of the caretaker and spokesman for the system is I want you to be aware of how hard these lawyers work. We think they are wonderful with a few minor exceptions. They are wonderful, hardworking, dedicated and of course underpaid. But mainly we want to help you find ways to compensate them better and to get us more people on that appointment list to relieve some of the strain.

There is one other subject that I just want to open up to you, but there is no obligation on your organization's part to deal with this. I am, among other things, the Chief Probate Judge in Multnomah County. There is a problem in the probate area that one of these days is going to actually hit the world and people are finally going to recognize it. The human impact between a civil commitment, in which people have a full bore right to counsel, and the establishment of a guardianship is that a guardianship lasts forever, unless it is actually terminated by the court. There are people whose liberty is at stake, their right to choose where they live, their right to have all of the decisions about their life made for them against their will, have no right to representation in this state. What we do in Multnomah County, much to the distress of the few other probate judges that are in the state, is that we do the old style when Mr. Ellis and I were young lawyers and that is, if you were in the wrong courtroom at the wrong time, you got told that you were going to represent this person and you were not going to get paid. Because the elder law bar in this state and, in particular, in this community are such good folks, they do it. They just take the appointments and they represent the people. Most of them don't have much of a case in fighting off the guardianship, but they absolutely have no right to representation, unless of course they can hire a lawyer and pay for. But if they can't, there is no money and there is no attention being paid to this issue. I know it is not on your plate, but I'm just mentioning it. I would be glad to talk about anything else you would like.

- 645 Chair Ellis Questions?
- 646 S. McCrea Do you have any suggestions about what we could do to help you in terms of your appointment list?
- 648 Judge Welch Well, again, I make the assumption that the reason people are not on the list is because the compensation isn't that good. I haven't taken a survey, but I did send a letter out about three or four years ago to domestic relationship types. They would be most obvious, although there might be other people. I said in my letter that this is good stuff; that you are representing children, you are on the side of angels. I think maybe one person responded and I think I sent out 50 letters. It is tough stuff.
- 008 Chair Ellis You indicated you had an informal or unofficial quality screen on the appointment. Do you think it would be useful to consider something more formal with criteria for inclusion on the list, or some kind of advisory committee that would screen people on the list? It is troublesome to hear people may think they are on the list, but the reality is they are not qualified and are not being used.
- 015 Judge Welch I don't know how people get on the list. I mean I know there is a process, but I just don't know exactly how it works. But there are people that have been on it forever. I shouldn't be this ignorant as to how they get on there. We have asked, and I don't know if it has gotten to you yet, it was a long time ago, to be given permission to take some people off the list and we haven't gotten an answer yet.
- 020 Chair Ellis Who did you ask?
- 021 Judge Welch Well, I asked the trial court administrator. Have you received a request, Mr. Ozanne?

- 022 P. Ozanne We are thinking about that statewide, in terms of qualifying people for appointment lists, in general. As we do that, which we are doing in Lane County as we develop a new court-appointment system there, it is a learning experience for us. We expect that in any court, including your court, we will apply this experience to screening qualified applicants for appointments. But I hear you saying it is not so much screening; it is finding somebody who is competent. The two would go hand-in-hand, I expect.
- 029 Judge Welch Obviously, we have to appoint the people who we have. If somebody needs a lawyer, at least somebody said this person was a lawyer. Mr. Ozanne mentioned something about the idea of people in this field should just represent parents and some lawyers should just represent kids, and maybe there is some desire on the part of the lawyers to do that. I haven't had much time to think about that. But there is one law firm that just represents children, the Juvenile Rights Project, although that is not even 100 percent; it is 97 1/2 percent. Meaning no disrespect to the Juvenile Rights Project, I think it is a dangerous idea that the system can become specialized that way. I can understand having done it myself, having appeared a little bit in juvenile court when I was in private practice, and then representing kids. First of all, anybody would rather represent the kids than the parents for obvious reasons. It would kind of be like being a prosecutor and a defender, one in the morning and one in the afternoon, because when you are representing parents – the system is a good system in my opinion the screening that DHS does is a good screening – you don't get to fall off a log and secure dismissal of cases. Most of the cases have a lot of substance to them. Some of them are a little bit marginal, so if you are representing parents you are very much in the criminal law context. Your client has committed a crime, now how do we mitigate the damages and give them the best shot at recovering their parental responsibilities and rights. And then in the afternoon, you represent a child, where you want to see absolute purity and perfection in the parental function before you want to participate in the return of the child to these always somewhat marginal situations. Obviously, it would make you crazy to have to do both of those things, and I sympathize with that. The crazy making that goes on in private practice is there for lots of us though, where we present people on eight different positions. I think it is important that, as people mature in their professions, they understand that there are two sides to issues and that the world is not made up of Donna Reeds and Robert Youngs. That is not what the world looks like and sometimes we have to make due with parents who are not perfect by a long shot. But the kids are better off with a parent, rather than disconnecting them from everyone.
- 065 Chair Ellis Metro provides both juvenile service and criminal service. I'm not sure if there is anyone else who is doing both. My question for you, from your vantage point, is that a plus with Metro, a minus, or is it neutral?
- 069 Judge Welch Well, I think it is a minus simply because of the conflicts that we all have to live with as a result. I think way over half of the conflicts are out of that firm, and I don't know how many firms serve our juvenile court.
- 075 I. Swenson Eight.
- 075 Judge Welch As an example of the virtue of having Metro, we have a program that we started here about four years ago called the Family Probation Program. It is a wonderful program. What we do is, on the first day that a dependency case hits the door, we have a person whose sole job is to do a criminal records check. This woman has contact with all the databases in the state to find out if any of the parents are involved in the system or have a history in the system. It is a wonderful program that lets us know on day one a lot more about the parents than we normally do. If the case is adjudicated in the juvenile court as a dependency case, and we know that dad is on probation in Multnomah County, that adjudication on dad is transferred to the judge who is handling the juvenile case so we have one judge and one family, so there is continuity. Having been the pigeon who started this, the virtue of having probation violation determinations made in the context of the family chaos that is going on is absolutely fabulous,

and everybody who has been involved in it – some of them kicking and screaming, the DA, the defense bar, the probation department – agree it is a wonderful program. One of the biggest questions we had is are we going to have two lawyers for dad, one for the PV and one for the juvenile dependency case. And the answer is sometimes we have to have two lawyers, but sometimes we don't. And when we don't have to have two lawyers is when Jim Hennings', operation is involved in the case. Then we have one lawyer. We have lots of lawyers out in the community who are getting involved in this, but the consistency saves money and it is a very good system.

I guess the real point I want to make is that we have had very good luck with the very collaborative approach that we have here in Multnomah County. We have had great support in the past from the State Court Administrator being able to flex around and do some of these unusual things. Basically, there is nothing terribly wrong with our system and please don't do anything to that.

- 114 Chair Ellis What is everybody pleasure? We are close to when we said we would end but we have a lot of good people here.
- 114 P. Ozanne I just want people to know that they will have another opportunity to speak because we will be back here in November and many of you will be at Kah-Nee-Ta in October, where we are also going to meet.
- 118 Chair Ellis John, do you want to come back now?
- 121 J. Connors I would like to wait.
- 122 Chair Ellis Ron?
- 123 Ron Fishback I would like to wait until October or November.
- 125 P. Pederson This is the spread sheet that Ed Jones was talking about. I sent it to the Commission last spring, but I don't know if it made it to you all. It is just the numbers of the contracts over a two-year period showing the difference in payments. The thing I would actually like to talk about, and supposing we look for a minute at the big picture, the forest for all of these trees. For 45 years, it has been Oregon law and policy that, to contract out work, you had to pay the prevailing local wage. Now that doesn't include professional services. The Bureau of Labor and Wages has surveyed folks outside here doing potholes. What the Bar does every year is an economic survey, so that is the next attachment. In 2002, the average Portland hourly rate for criminal cases was \$179 an hour. The average salary for the private bar in criminal cases \$73,475. So the parity question I think everybody agrees there should be parity in case values, same type of work, you get the same sort of pay and parity with what. We suggest parity with Metro because they are the big fish and may be the prevailing entity. We've heard about parity with prosecutor's salaries. That is another goal. I propose, based on 45 years of Oregon policy, that we have parity with the private bar. Not today, not tomorrow, but as the goal. Those are some thoughts about where we should end up ultimately. We will never get there, but our reach should exceed our grasp, and it should be headed toward parity with the Oregon Bar.

The other bit of information I have is some real good news. It is a letter from Mike Schrunk about discovery at first appearance. If you have discovery, and everybody agreed about that this morning, if you get the police reports, you will have something to talk to your clients about. If you get discovery at the first court appearance, you will be able to see who the witnesses are and where the conflicts are. So Mr. Schrunk has written a letter saying that he agrees that complete early discovery enhances the possibility of early and just disposition, ensuring justice is provided for all citizens. "Sometimes you will only have one police report or one copy. I truly believe that the fiscal constrains will be eased by early discovery so we

will save money if we get police reports at first court appearance.” This is an excellent letter by Mike Schrunk. The bad news is it is dated August 10, 1981. Those are my two cents.

174 Chair Ellis I suggest we put those in the record. Is there anything else to cover today?

Agenda Item No. 4: Status Report on the Implementation of the Service Delivery Plan for Lane County

176 J. Potter Shaun has a quick report on Lane County status that she wanted to give.

177 S. McCrea Thank you, John. As you will recall, we are going to have the five-member panel that the Commission approved. It is going to have a member from the Lane County Public Defenders Office. I will be the Commission’s representative, and we are going to ask the Lane County Judges for a designee. Those will be three members, and then we will have an at-large member and fifth member will be somebody who has some experience or background in criminal defense. So John was going to talk to Lane PD and ask them to appoint someone.

184 J. Potter They have appointed Tom Sermak.

185 S. McCrea Tom Sermak will be on the oversight panel. I contacted Presiding Judge Mary Bearden and talked with her by phone to remind her about my letter. She said she would get me a designee very soon. I will follow up with her next week. After a telephone conference with Peter, John, Kathryn and Ingrid, I also contacted John Kim, who is the Lane County Bar President, and talked with him about assisting us in terms of recommendations for the other two members to make up the five-member panel. We are going to get that oversight committee or panel in place, we are going to get out the information requesting applications for the administrator, and we are going to rock and roll. There you have it.

199 Chair Ellis **MOTION:** S. McCrea moved to adjourn the meeting; C. Lazenby 2nd
VOTE: 6-0; hearing no objection the motion **CARRIES**

Meeting is adjourned at 2:05 p.m.

D R A F T
(10/7/04)

PDSC COMPLAINT POLICY AND PROCECURES

The following Public Defense Complaint Policy and Procedures (PDCPP) is adopted by the Public Defense Services Commission (PDSC) pursuant to ORS 151.216(1)(f)(j) and (h), effective _____.

Policy:

It is important for the Office of Public Defense Services (“OPDS”) to be aware of complaints regarding the performance of public defense providers and the cost of public defense services, to have a policy regarding the processing of such complaints, and to address such complaints in a manner which is consistent with its obligation to provide high quality, cost-efficient public defense services.

Certain complaints are in the jurisdiction of the courts or of the Oregon State Bar and should be conducted under procedures adopted by them for such matters. OPDS has an independent duty to oversee the quality and cost of public defense services and to take appropriate action to ensure quality and cost effectiveness.

The PDCPP governs the procedure for receiving, investigating, and responding to complaints regarding (1) the quality of services provided by public defense attorneys, and (2) payment from public funds of attorney fees and non-routine fees and expenses incurred in cases.

In order to provide OPDS with specific guidelines for the handling of complaints, the PDSC adopts the following procedures.

Procedures:

- 1. Complaints regarding the quality of services provided by public defense attorneys**
 - a. A “public defense attorney” is an attorney who provides legal representation at state expense pursuant to ORS 151.216 and other statutes.
 - b. A complaint regarding the quality of services provided by a public defense attorney shall be made in writing and signed by the complainant.
 - c. Upon receipt of a complaint under this paragraph, OPDS will make an initial determination whether the complaint raises a facially reasonable issue regarding the quality of services provided by a public defense attorney.
 - d. If the complaint raises a facially reasonable issue regarding the quality of services, OPDS shall determine whether:

- i. the complaint relates to a current concern or dispute which may be capable of resolution through OPDS intervention (for example, a current client contacts OPDS to report lack of contact with the client's lawyer); or
 - ii. the complaint relates to past or continuing conduct which cannot be resolved by OPDS intervention.
 - e. If the complaint relates to a current concern which may be capable of informal resolution, OPDS shall provide the attorney and, if applicable, the attorney's employer or consortium administrator, with a copy of the complaint. OPDS shall attempt to resolve the issue with the attorney or the attorney's employer or consortium administrator by agreeing upon an appropriate course of action.
 - f. If the concern is about past or continuing conduct which has not been or cannot be resolved by OPDS intervention, OPDS shall then determine whether the concern is one which is being or should be addressed:
 - i. by the court (for example, if the client is seeking to have counsel relieved and new counsel appointed, or if the client has filed a petition for post conviction relief alleging inadequate representation by counsel); or
 - ii. by the bar (for example, if the allegation is one of misconduct by the lawyer).
 - g. If one or more of the collateral proceedings identified in *fi* and *fii* above has already been initiated, OPDS shall inform the complainant, the attorney, and, if applicable, the attorney's employer or consortium administrator that OPDS will monitor the progress of the proceeding in the court or bar.
 - h. If the complaint is of a nature which would more appropriately be addressed by the court or bar and such proceedings have not been initiated, OPDS will inform the complainant of the availability of those processes and inform the attorney, and the attorney's employer or consortium administrator if applicable, that the complainant has been so advised.
 - i. If:
 - i. the complaint is not capable of informal resolution and is also not properly the subject of a court or bar proceeding (such as an allegation that an attorney is continually failing to meet obligations under the attorney's contract with PDSC or fails to meet PDSC's Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense), or
 - ii. the court or bar proceedings have resulted in a determination that the lawyer has failed to adequately represent the client or has violated an OSB disciplinary rule,
 - j. Then:

OPDS shall review information submitted and findings made in collateral proceedings, if any, and may perform its own investigation. After notice to the attorney and the attorney's employer or consortium administrator, if

any, of the information obtained by OPDS and an opportunity for the attorney and the employer or administrator to respond, OPDS shall determine whether all of the information available establishes or fails to establish that the attorney's representation with respect to the matter complained of has been unsatisfactory.

- i. If OPDS determines that the representation has been unsatisfactory it may take appropriate action to attempt to correct the problem.
- ii. If corrective action is not possible or if the attorney or the employer or consortium administrator fails to correct the conduct complained of in a timely manner, OPDS may take such additional action as is appropriate under the circumstances, including but not limited to suspension of the attorney from the appointment list for any or all case types or any action authorized under PDSC's contract with the attorney or the attorney's employer or consortium.
- k. OPDS shall notify the attorney and the employer or consortium administrator, if any, in writing of its finding and of any action taken or sanction imposed in response to a finding of unsatisfactory representation.
- l. If a complaint is resolved informally, no written notice to the complainant is required. If a complaint is not resolved informally, OPDS shall notify the complainant in writing of its finding and of any corrective action taken or sanction imposed in response to a finding of unsatisfactory representation.
- m. OPDS shall maintain a record of each complaint filed under this section and of any action taken in response to the complaint.

2. Complaints regarding payment from public funds of attorney fees and non-routine fees and expenses

- a. A complaint regarding payment from public funds of attorney fees or non-routine fees and expenses shall be made in writing and signed by the complainant.
- b. Upon receipt of a complaint under this paragraph, OPDS shall make an initial determination whether the complaint raises a facially reasonable claim regarding the payment from public funds of attorney fees or non-routine fees and expenses.
- c. If the complaint raises a facially reasonable claim, OPDS shall review records related to the attorney fees or non-routine expense authorization or payment.
- d. If the matter complained of is not resolved by a review of the records, OPDS shall contact the attorney or provider for an explanation. The attorney or provider may respond orally or in writing.
- e. If, after a review of the records and any additional information obtained from the attorney or provider, a reasonable concern remains that attorney

- fees or non-routine fees or expenses may have been unreasonable, OPDS shall notify the attorney or provider of its concern and shall conduct such further investigation as may appear appropriate under the circumstances.
- f. After completing its investigation, OPDS shall determine whether all of the information available establishes or fails to establish that the fee or expenditure complained of was unreasonable.
 - g. If OPDS determines that the fee or expense was unreasonable, it may take any or all of the following actions unless the fee or expense was specifically pre-authorized by OPDS and used for the purpose authorized:
 - i. decline payment for the goods or services in question;
 - ii. seek reimbursement for any funds determined to have been improperly obtained or used;
 - iii. warn the attorney or provider;
 - iv. upon approval by the executive director of OPDS, suspend the attorney's eligibility for appointment in public defense cases or decline to authorize future fees or expenses for the provider; and
 - v. take such additional measures as may be appropriate under the circumstances.
 - h. If a fee or expense determined to be unreasonable was specifically pre-authorized by OPDS and used for the purpose authorized, OPDS shall review its policies and procedures and take such action as appears appropriate to avoid future pre-authorization of unreasonable fees and expenses.
 - i. OPDS shall notify both the attorney or provider and the complainant in writing of its finding and of any action taken or sanction imposed in response to a finding that a fee or expense was unreasonable.
 - j. OPDS shall maintain a record of each complaint filed under this section and of any action taken in response to the complaint.
3. Nothing in the PDCPP prohibits OPDS from receiving information in any form from any source regarding the performance of public defense providers or the cost of public defense services, and taking such action as it deems appropriate.

MEMO

To: PDSC
cc: Peter Ozanne, Kathryn Aylward, Peter Gartlan, Rebecca Duncan, OCDLA, Contractors Advisory Group, Other Interested Persons
From: Ingrid Swenson
Date: 10/13/04
Re: Legal and Policy Issues relating to Confidentiality of PDSC Complaint Policy

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

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

OREGON PUBLIC RECORDS LAW

As explained in the Attorney General's Public Records and Meetings Manual¹, Jan., 2004 at p. 21:

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

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

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

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

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

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

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

Personnel discipline actions:

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

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

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

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

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

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

Internal Advisory Communications:

ORS 192.502(1) exempts:

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

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

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

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

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

Personal information:

ORS 192.502(2) exempts:

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

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

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

Confidential submissions

ORS 192.502(4) creates a conditional exemption for:

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

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

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

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

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

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

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

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

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

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

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

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

Transferred records

ORS 192.502(10) exempts:

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

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

ORS 40.225 to 40.295 – Evidentiary Privileges

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

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

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

NEED FOR PROTECTION OF CONFIDENTIAL SUBMISSIONS AND PRIVILEGED INFORMATION

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

Example 1.

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

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

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

Example 2.

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

Example 3.

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

RECOMMENDATION TO COMMISSION REGARDING CONFIDENTIALITY

The purposes for implementing a formal PDSC complaint policy are: to protect the interest of public defense clients in quality representation, to safeguard public funds allocated to OPDS for the representation of such clients, and to protect public defense counsel and other providers from unjust or unsubstantiated claims of improper conduct. Each of these purposes would appear to be better served by enhancing OPDS's ability to use all the resources at its disposal without jeopardizing clients' interests.

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

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

Proposed Policy Language

If the commission were to approve language to the following effect, it would not (and could not) create a new basis for exemption under the Public Records Law but would

facilitate appropriate assertion of existing exemptions: **“Submissions to OPDS may be made in confidence or may include information submitted in confidence. OPDS will not disclose such information, except as required by law, without the consent of the person making the submission”**.

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

Proposed Statutory Language

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

PRELIMINARY DRAFT
(10/22/04)

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

Introduction

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

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

This report, which examines the condition of Multnomah County's public defense delivery system, represents one of the first steps of that planning process in Oregon's largest county. Following receipt of comments from interested parties in response to this preliminary draft report and revision of this draft report by the Office of Public Defense Services (OPDS), PDSC will hold its regular monthly meeting on Friday, October 22, 2004 at 12:30 p.m. at the Kah-Nee-Ta Resort on the Warm Springs Indian Reservation, in conjunction with the PDSC's and OCDLA's Public Defense Management Conference, in order to receive further comment from interested parties in the county and to deliberate on the condition of the county's public defense delivery system and potential strategies to improve it. Those deliberations are expected to continue during the Commission's monthly meeting on November 18, 2004 in Portland at a time and location to be announced.

PDSC's Service Delivery Planning Process

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

opportunities for interested parties to present their perspectives and concerns to the Commission. Third, after considering OPDS's report and public comments in response to that report and during its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or propose changes to improve the delivery of the region's public defense services. In either event, the Commission's Service Delivery Plans will (a) take into account the local conditions, practices and resources unique to the region, (b) outline the structure and objectives of the region's delivery system and the roles and responsibilities of public defense contractors in the region, and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts. Fourth, under the direction of PDSC, OPDS will implement the strategies or changes proposed in the Commission's Service Delivery Plan for that region.

Because critical steps in PDSC's service delivery planning process will not yet have been completed, any findings and preliminary recommendations in the final version of this report may be reconsidered or revised, depending upon new information presented to the Commission and its deliberations at subsequent meetings, as well as additional research and investigations by OPDS that may be ordered by the Commission. Furthermore, any Service Delivery Plan that PDSC develops in a particular region will not be the "last word" on the service delivery system in that region, or on the quality and cost-efficiency of the region's public defense services. The limitations of PDSC's budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and its public defense contractors, and the wisdom of not trying "to do everything at once," all place constraints on the extent of the first planning process in any region. Indeed, PDSC's planning process is an ongoing one, calling for the Commission to return to each region of the state over time in order to develop new service delivery plans or revise old ones. The Commission may also return to some regions of the state on an expedited basis in order to address pressing problems in those regions.

Background and Context to the Service Delivery Planning Process

The 2001 legislation creating PDSC was based upon an approach to public defense management, supported by the state's judges and public defense attorneys, that Oregon's public defense function should be separated from its judicial function. Considered by most commentators and authorities across the country as a "best practice," this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, while judges remain responsible for appointing attorneys to represent eligible indigent clients, the Commission not the courts is primarily responsible for the provision of competent public defense attorneys.

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

efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at identifying best practice which can be shared with others and improving the internal operations and management practices of those offices and the quality of the legal services they provide.

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

In accordance with its Strategic Plan for 2003-05, PDSC has developed a systematic process to address complaints over the performance of public defense contractors and individual attorneys. The Commission is also concerned about the “graying” of the public defense bar in Oregon and 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. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

“Structure” versus “performance” in the delivery of public defense services. Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service delivery planning process. That process is aimed primarily at reviewing and improving the “structure” for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into “best practices,” recognize that careful attention to the structure of service delivery systems contributes significantly to

the ultimate quality and effectiveness of public defense services.¹ A public agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

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

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

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

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

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, seeking the most cost-efficient means to provide quality services in each region of the state.

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

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

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

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

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

organized as non-profit corporations with by boards of directors, managed by administrators who serve at the pleasure of their boards.

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

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

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

- Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP for a consortium and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 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

³ *Id.*

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 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, in which they no longer wish to practice law.

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

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

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

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

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

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

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

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

- Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as "overflow" from other types of providers. This organizational structure does not involve a contractual relationship between the attorneys and PDSC. Therefore, the only meaningful assurance of quality and

cost-efficiency, albeit a potentially significant one, is a rigorous, carefully administered qualification process for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

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

OPDS's Preliminary Observations Regarding the Service Delivery Planning Process in Multnomah County

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

These investigations serve two other important functions. First, they inform local public officials, participants and other stakeholders in a county's criminal and juvenile justice systems of the condition and effectiveness of important aspects of those systems. The Commission has already discovered that the function of "holding a mirror up" to local justice systems for all the community to see can, without any further action by the Commission, create its own momentum for self-reflection and improvement within that local community. Second, the history, past practices and rumors in a local justice system can distort perceptions about current realities. OPDS's investigations and reports on service delivery may serve to correct some of those misperceptions.

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

At this stage of the Commission's service delivery planning process, the Preliminary Draft is simply intended to provide a framework within which the Commission can begin its discussions regarding the condition of public defense service delivery in Multnomah County and the range of policy options available to the Commission—from concluding that no changes in the county are needed, to significantly restructuring the county's delivery system. This draft is also intended to offer some guidance to PDSC's contractors, public officials and justice professionals and other stakeholders in Multnomah County's criminal

and juvenile justice systems about the kind information and advice that is likely to assist the Commission in maintaining or improving the county's public defense delivery system. In the final analysis, the level of engagement and the quality of the input from all of these stakeholders may be the single most important factor in determining the quality of OPDS's final report to the Commission, and the effectiveness of the Commission's final decisions regarding service delivery in Multnomah County.

Therefore, on behalf of the Commission, OPDS urges all interested parties in Multnomah County to forward written comments regarding this Preliminary Draft, or any matter relating to the delivery of public defense services in the county, to Peter Ozanne, the Executive Director of OPDS at peter.a.ozanne@opds.state.or.us, or at OPDS, 1320 Capitol Street NE, Suite 200 Salem, Oregon 97303. The written comments received thus far are included in Appendix "A". Excerpts from the Commission's September 9, 2004 meeting minutes that include comments from special guests and those in attendance are included in Appendix "B." The readers of this report are also welcome to attend the Commission's October 22, 2004 meeting at 12:30 p.m. at the Kah-Nee-Tah Resort when the Commission will take further public comment.

A Demographic Snapshot of Multnomah County

With a 2001 population of 666,350, Multnomah County is the largest county in Oregon.⁴ As the home of at least five major institutions of higher education, the county's residents are relatively well-educated, with 20 percent of its adults over 25 years old possessing a Bachelor's Degree, 11 percent with post-graduate degrees and 45 percent of its high school graduates enrolling in college. As the leading center for commerce and industry in the state, Multnomah County has had a relatively low unemployment rate over recent years, below the state average in 2000 and the unemployment rates of 31 other Oregon counties. The county also has a relatively high proportion of professional, scientific and management workers in its workforce (11.4 percent, compared to Washington County with 11.9 percent) and the third highest per capita personal income in Oregon (at \$31,419 compared to Washington County at \$31,891 and Clackamas County at \$33,362).

Multnomah County's population is one of Oregon's most diverse counties, with non-white and Hispanic residents making up 23.5 percent of its population, compared to 16.5 percent for Oregon. The percentage of the county's individual residents living in poverty is 12.7, compared to 11.6 percent in Oregon and 12.4 percent in the United States.

With 22.3 percent of its population 18 years or younger (compared to 24.7 percent for the state as a whole), Multnomah County's "at risk" population, which tends to commit more criminal and juvenile offenses, is less than average. However, the county had the third

⁴ This demographic information was compiled by Southern Oregon University's Southern Oregon Regional Services Institute and appears in its Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

highest index crime rate in the state in 2000 (with 74.8 index crimes per 1,000 residents, compared to Lane County at 57.9, Marion County at 58.5 and the state at 49.2 per 1,000).⁵

The public defense caseload in Multnomah County is approximately 24 percent of the statewide total.

OPDS's Findings in Multnomah County

The following findings by OPDS are based upon (a) PDSC's discussions and public comments to the Commission since its preparations in early 2003 to assume responsibility for administering the state's Public Defense Services Account and the public defense contracting system, (b) discussions between public defense contractors in Multnomah County and OPDS staff over the past two years, (c) interviews of the county's public defense contractors by OPDS's Executive Director over the past 18 months, (d) interviews of the county's contractors, public officials on the Local Public Safety Coordinating Council and the Circuit Court's Criminal Justice Advisory Council, senior staff of the District Attorney's Office and the Department of Community Justice and Circuit Court Judges by OPDS's Executive Director over the past four months,⁶ and (e) comments by special guests and attendees at PDSC's September and October 2004 meetings.

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

Although there appear to be many accomplished lawyers providing public defense services in Multnomah County, some of the larger contractors have gained statewide and national reputations. Metropolitan Public Defender Services, Inc (MPD) and the Juvenile Rights Project (JRP) have been cited over many years as national models for the delivery of

⁵ 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.

⁶ Interviews with additional criminal and juvenile justice stakeholders in Multnomah County will continue through December 2004.

public defense services. The Portland Defense Consortium (PDC) is regarded throughout the metropolitan area as a group of lawyers with some of the most experienced and ablest advocates in the state's criminal defense bar. Multnomah Defenders, Inc. (MDI) has generated a large corps of distinguished graduates and a reputation for providing quality defense services in juvenile and misdemeanor cases.

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

Management and line staff of the Department of Community Justice (DCJ), which is responsible for administering corrections supervision and programs in Multnomah County, provided unique perspectives on the delivery of public defense services and the performance of contractors and defense attorneys in the county. Although parole and probation officers are sometimes in an adversarial relationship with defense attorneys, DCJ staff recognized the special legal and ethical obligations of defense attorneys and were generally complementary of the quality of PDSC's contractors and defense attorneys in Multnomah County. They emphasized that the most effective defense attorneys establish cooperative working relationships with parole and probation officers and collaborate with them as much as possible in exchanging information relevant to the appropriate sentence and corrections programs for offenders. They also noted that the least effective lawyers were unnecessarily adversarial in their personal dealings with DCJ staff, as well as in the courtroom, engaged in personal attacks on parole and probation officers and used information from private conversations and negotiations against them in judicial hearings, and failed to offer creative dispositional options and ideas to further the interests of their clients. DCJ's management and line staff were enthusiastic about the idea of holding local training programs with defense attorneys and corrections staff to share perspectives on their respective roles and the latest information on local corrections procedures and programs.

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

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

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

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

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

- Recognize that variations in contract rates is a problem that can only be resolved over several contract cycles or biennia;
- At the risk of using painfully familiar metaphors, recognize that the best solutions probably involve a "glide path" approach, as opposed to "running over a cliff," in the sense that comparative contract rates should be adjusted upward or downward on an incremental basis and on a multi-year timeline set by the Commission;
- In accordance with PDSC's normal practices and procedures, changes in contract rates should be part of the normal contract negotiation process, which is administered by OPDS and subject to the review and approval of the Commission;
- Acknowledge that strict uniformity in contract rates is unrealistic and that differences in rates of payment for similar cases or to contractors that appear to be similarly situated are justifiable, as long as the basis for such differences is rational and capable of articulation; and

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

Based upon public comment and PDSC's discussions at the Commission's September 2004 meeting, the Commission may wish to consider attaching monetary values to some of the foregoing rationale for the purposes of determining whether the higher rates associated with a particular rationale are justified and by whom the relevant service should be performed.

DCJ management and line staff reported long and productive working relationships with some of Multnomah County's larger contractors, such as MPD and MDI, in the course of designing and administering special corrections and court programs like a Drug Court, a Mental Health Court and Drug Treatment and Early Disposition Programs. However, they also expressed frustration with the lack of cooperation of these contractors from time to time. For example, while they worked closely with MPD over a number of years to design

and develop a post-adjudication Drug Court,⁷ including traveling out-of-state to visit model programs, DCJ staff reported that MPD's management failed to cooperate in the operation of the program and, as a result, its effectiveness has been compromised. MPD will no doubt have a different perspective on this matter. However, to the extent such activities by contractors serve to justify their higher contract rights, the Commission should consider whether the performance of these activities should be monitored and evaluated.

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

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

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

⁷ In a post-adjudication Drug Court, offenders must plead guilty to a criminal offense before gaining access to a drug treatment program, as opposed to a Drug Court diversion program in which offenders' charges are dismissed upon successful completion of treatment. Of course, the considerations of defense attorneys and the interests of their clients are quite different in these two programs.

could be justified on the grounds that all of PDSC's contractors are entitled to a clearer idea of the business risks they are assuming for the purposes of developing their business plans and recruiting new employees for the future.

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

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

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

Yet the problem of how to handle conflict of interest cases cost-efficiently in Multnomah County has probably not disappeared and may still deserve the Commission's attention.

To the extent that the handling of conflict of interest cases remains a significant problem, OPDS recommends to PDSC that the Commission take steps in this service delivery planning process to resolve, or at least further reduce, the problem. Fortunately, the Commission has access to the talents and experience of Ann Christian in addressing this issue. As part of her contract with PDSC to expand the Application/Contribution Program across the state, Ann agreed to study the issue of handling of conflict of interest cases and to develop more cost-efficient strategies and processes for the Commission's consideration. Ann plans to administer a survey of Multnomah County contractors and develop her proposals over the next few weeks.

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

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

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

6. Summary of Written Comments Submitted to PDSC. OPDS has received two written comments on behalf of the Commission. They are included in Appendix "A."

John Connors' written comments on behalf of the Multnomah County Office of Metropolitan Public Defender Services Inc. (MPD) outlined the office's accomplishments and unique contributions to the public defense system in the county. Judge Ed Jones comments questioned the wisdom and fairness of the differentials in contract rates between MPD and other contractors in Multnomah County, and challenged the soundness of the rationale offered to justify these differentials (see section 2., above).

7. Summary of Public Comment at PDSC's September 2004 Meeting. Three Circuit Court Judges, the District Attorney and the Director of MPD's Multnomah County Office delivered extensive comments regarding the delivery of public defense services at the Commission's September 9, 2004 meeting in Portland. (Excerpts of PDSC's September meeting minutes containing those comments are set forth in Appendix "B.") Other persons attending the September meeting had shorter comments and questions, and were assured of an opportunity to present further comments at the Commission's October or November 2004 meetings. The five individuals who presented comments to PDSC agreed, in general, that the issues identified by OPDS in the foregoing sections represent the most important challenges to the quality and cost-effectiveness of Multnomah County's service delivery system.

The Chief Criminal Judge for the Multnomah County Circuit Court, Julie Frantz, emphasized the importance and difficulty of managing late withdrawal and substitutions of defense attorneys on the basis of conflicts of interest and breakdowns in attorney-client relationships. Judge Frantz urged the Commission and the defense bar to pay special attention to the need for early and regular communications between defense attorneys and their clients in order to reduce the number of late withdrawals and substitutions. Judge Frantz also emphasized the importance of fair and adequate compensation for PDSC's contractors and the need to identify additional qualified expert psychologists for preparation of timely reports and evaluations.

Judge Elizabeth Welch, the Chief Family Court Judge in Multnomah County, described the many steps in the Court's juvenile dependency proceedings and the extraordinary demands the Court places on the Commission's juvenile law contractors. Judge Welch expressed the view that the experience and effectiveness of those contractors are outstanding, and that the quality of advocacy and law practice before the Family Court is exceptional. However, Judge Welch emphasized the immediate need for additional experienced and competent juvenile practitioners for the Family Court's appointment list, and the threat to the fairness of guardianship proceedings in Probate Court due to the unavailability of volunteer legal counsel and the absence of a legal right to counsel in those proceedings.

Judge Ed Jones elaborated on his written comments in Appendix "A" with regard to the unfairness to defense contractors and their clients caused by the differences in the compensation and contract rates the Commission pays to similarly situated contractors in Multnomah County. Although he praised the dedication of MPD's attorneys, staff and management, he criticized the logic of the rationale offered for that office's higher rates and urged the Commission to (a) attach monetary values to all legal services that are discretionary or that do not involve direct services to individual clients in pending cases and (b) entertain contract bids from other contractors to deliver those services.

District Attorney Mike Schrunk expressed his personal views regarding the importance of the defense function, the need for prosecutors, defense attorneys and the Circuit court to work closely and cooperatively together in order to ensure the quality of justice in

Multnomah County, and the special demands on defense attorneys and acute need to compensate them at levels comparable to the salaries of deputy district attorneys. Mike emphasized the importance of special efforts by defense attorneys to identify conflicts of interest early on in criminal proceedings and, while generally satisfied with most defense attorneys' requests for non-routine expenses, he highlighted the problem of delays in obtaining expert psychologist reports and evaluations once requests for these non-routine expenses are approved by OPDS. However, he recognized that a major part of the problem of untimely expert reports and evaluations, for both defense attorneys and prosecutors, is the unavailability of qualified experts; and he urged the Commission to work with his office and other prosecutors in the state to address that problem.

John Connors also elaborated on his written comments in Appendix "A" regarding the achievements and special contributions of MPD to the county's service delivery system. John urged the Commission to avoid imposing new requirements to establish the monetary value of the special services for which MPD receives no direct compensation and to support the unique mission and contributions of a public defenders office like MPD. John also reserved time at a subsequent PDSC meeting to present more support for his position and to address the Commission's requests for additional information regarding contract rates, costs of services and economies of scale.

OPDS's Recommendations

[NOTE: OPDS plans to submit its preliminary recommendations to PDSC following the Commission's deliberations at its October 22, 2004 meeting and its final recommendations to PDSC prior to the Commission's December 2004 meeting.]

Appendix "A"

PREPARED TESTIMONY
by Judge Edward Jones
before the
Public Defense Services Commission
September 9th, 2004

Before I got my current job, I was the director of MDI for 14 years. I negotiated many contracts with the State; those negotiations were often intense. We never got all we wanted, or even, in my opinion, all we needed to provide the level of service our clients were entitled to. Nonetheless, we did the best we could with the money we got. Part of our willingness to accept less than we needed was our awareness of the financial constraints under which the SCA operated. What I did not understand then, nor understand now, was why, given those constraints, some contractors were paid much more for exactly the same kind of case.

I don't mean I didn't understand the historical reasons for the disparity, I did. What has puzzled me is the persistence of that disparity, even into the present. I'm pleased that the Commission is willing to undertake an examination of the question.

I agree with John Connors that the lawyers and other staff at MPD have often been in the forefront of establishing and assuring excellent representation in virtually every area of law in which indigent defense contractors are found. I have no issue with their achievements; there is no court, or contractor, or criminal defense lawyer, or defendant who does not owe a debt to Metro. Much of what is good about our state's delivery of indigent defense services has its roots in the decades of work done at Metro. My concern is not with their history or their achievements, it is with their current budget, and the sacrifices that other contractors and their clients have made to allow Metro to have more money per case than anyone else.

To make my point clear, I would ask to the Commission to examine each item of "added value" described by Mr. Connors and ask, "How much additional

Appendix "A"

money in the current budget does that achievement justify?"

For example, since I submitted my comments to the Commission I been told of a spread sheet showing a \$300,000 difference between what Metro and MDI would be paid for the same group of cases under their current contracts. Accepting that number, I would ask what, during this budget cycle, the Commission has received for that additional \$300,000? I had expected that once this issue was raised the Commission would see something from Metro which identified how that additional money is being spent. Instead Metro has submitted a document which confuses their historic achievements with their current budget and offers nothing about the relationship between the added value they profess to provide and the additional money they receive. All contractors provide "added value": given what they are paid, they could hardly do otherwise. If "added value" explains the disparity, why isn't all "added value" treated the same? In my experience "added value" is neither bid on nor contracted for. There is no reason to believe that the added value described by Mr. Connors could not be obtained cheaper from other contractors, if they were given a chance to compete for the opportunity to provide it.

I don't mean to over simplify the contracting process or the difficulties that arise when apportioning costs among cases, but it must be possible to understand how the additional money is being spent. I believe that the Commission has an obligation to assure itself, the legislature, and the community that the money it is responsible for is being wisely spent. As I have said, I applaud the Commission's willingness to examine the current disparity in contract payments and await with great interest the results of that examination.

APPENDIX "B"

**COMMENTS OF DISTRICT ATTORNEY MIKE SCHRUNK
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 7-12 of the Minutes)**

- 479 M. Schrunk I'm Mike Schrunk and I know most of you. I am the District Attorney here and have been for 20 plus years. Prior to that time I actually took appointed criminal cases in the state, particularly conflict cases, and was on the Federal Public Defender's panel. So I have had some experience in the past defending criminal cases.
- 486 P. Ozanne Excuse me, I was actually going to introduce those people who you may not know. Jim Brown was a colleague of yours from Benton County. You know Chip Lazenby, Shaun McCrea from Eugene, Janet Stevens from Bend and the Bend Bulletin and John Potter with the Oregon Criminal Defense Lawyers Association. Barnes Ellis, who is our Chair and is expected soon. Thanks for coming Mike and thanks for inviting me to your offices last month.
- 498 M. Schrunk Peter, let me first of all commend you personally and the Commission for what you are doing. I really think you are on the right track and you are going the right direction. I reviewed and I sent around to my senior deputies the draft report, though not the same draft that you handed out today – the draft that was before the appendices were attached. I think we reviewed a 9/02 draft and this one is 9/09. I arranged for Peter to come in with representatives from my senior staff and mid-level staff – someone from each of the trial divisions handling everything from juvenile, misdemeanors, community court, person crimes; the full range – to speak in an open session where they could without recriminations make their comments. I think that was helpful. In fact, I set the ground rules and then I left the room so there would be no blow back on them.
- 423 P. Ozanne You did tell them to beat up on me though.
- 424 M. Schrunk Well I told them I needed Peter alive when they walked out of there. I have practiced law in this community before there was Public Defender's Office and I have seen the growth of the Public Defender's Office. I have seen by leaps and bounds the improvements of representation because of our local Public Defender's Office. I have sat on any number of court committees both as a private practitioner and as a deputy district attorney and then as the district attorney. I am convinced that we are going in the right direction, but there are still some things we can do. It is not perfect. As you know, you have taken on a heavy job just sitting on the Commission. No one likes to pay for the person who rapes someone's neighbor's daughter to be defended. No one particularly likes that requirement and wonders why tax money is being expended that way. That said, all of you wouldn't be here unless you believe in a true adversarial system of justice with a level playing field. I commend you for trying to make that happen and to keep pushing.
- Some of the areas that we'd like to define and we try to step back, not to say that I don't put my hands around Jim Hennings neck and shake him every once in awhile, nor does he stop from kicking me in the rear end if I am going the wrong way, and that is as it should be. That makes for a better system. But I think if you take the personalities out, and there are always going to be conflicts in a hotly contested trial, and there are going to be noses out of joint, but things will heal. But we have got to have a system that works, that is adequately funded. We suffered through a disaster when indigent defense could no longer represent

clients during what is referred to as the BRAC. And I think you have all heard the horror stories. One of the hallmarks I think of what happened here is we banded together and decided what would be prosecuted and what wouldn't be prosecuted. And believe it or not, we had an awful lot of good input from the defense bar. We tried to come out fighting the issues we needed to fight, but also holding hands and supporting the need for an adequate system. That said, there are some problems areas that I think need attention, that need monitoring. The conflict area, and there are two kinds of substitution conflicts. One is a conflict when there is a legitimate conflict. I think we need to pay attention to this and we need to work hard. Now we don't as prosecutors across the state probably come with completely clean hands, when I talk about conflicts. It is incumbent on us to make sure that we get early and complete police reports or investigative reports with a list of witnesses out. So we have to do that. But it is also incumbent upon appointed counsel to screen those things, to read them as expeditiously as possible, and to notify the court if they have a conflict. In any metropolitan area, maybe even more so in smaller communities, you are going to have conflicts because you have represented someone, you have represented someone's sister or a co-defendant or the state's chief witness. And those have got to be brought out early. Too often we see this brought out at the last minute and it is disruptive to the trial process, it is disruptive to the court process, to witnesses, to victims and doesn't serve the ends of justice. It gives everyone a black eye. And attached to the conflict issue is the substitution of counsel. When I say substitution of counsel, there is no apparent witness or representation or firm rule conflict. It is just when they get at each others throat, the client and counsel.

TAPE 1: SIDE B

001 M. Schrunk

I recognize that this usually happens as you get closer to trial. The client doesn't like the advice that he or she is getting. Quite frankly, that advice is frequently: "You are dead in the water and you are not going to get up and tell some lie in court." Then we get a substitution of counsel this way. There is a feeling in our office that this is pushed too far. Again, this is way too disruptive to the system. So again I would ask that the things that you can monitor, that you can take a hard look at, are the conflicts and substitution counsel.

And non-routine expenses, there are going to be expenses. Sometimes we feel that it is the defense counsel's job to ask and ask and ask and ask until they are denied by the court or denied somewhere along the way, and then assign that as an issue on appeal as error. That may be true or that may not be true, I don't know. I suspect it probably isn't. I would like to believe that all requests for non-routine expenses are legitimate. When those expenses are approved and the money is to be expended, when will that forensic work be done, when will that pathology report be done, when will that mental health report be done? Not that you get the money approved and I hire Dr. McCrea, but she is booked up for the next 90 days so we again set things over. We stop the wheels of justice until we get this one expert. I think paying more attention to when non-routine expenses are approved or authorized is a timeliness issue. If you are going to have ballistics, so be it. But let's make sure we have the time between the approval and the actual performance of the test, or whatever we are doing. Contract rates, I see that there are different rates paid to the various contractors in this community and certainly across the state. I know that this is a touchy subject and I know that you and Peter have inherited not a one size fits all system. Nor do I think one size fits all is correct, but I think the contract rate has got to include and recognize that the defense bar doesn't just represent an individual client. Their presence in the community is integral to the quality of

life, the quality of justice in the whole community. That means that the attorney has got to attend 7:00 a.m. meetings, local public safety council meetings. They have got to participate in numerable committees and they aren't billable. But someone has to have an office, and they need to have a support network to do these sorts of thing. We try in any high volume operation a lot of pilot projects. Pilot projects are important, whether they are drug courts, community courts or mental health courts, like they are doing down in Lane County. You need defense counsel to be involved in the planning process. Is that covered in the rate for a Class C felony or a Class A felony? I don't know. Maybe there is a legitimate reason for paying people just a flat fee and saying, "You don't have to participate." But I think what I am trying to say is we need the defense infrastructure in each community, certainly here and we need it supported. We are always going to pick at it and say they have too many investigators or legal assistants. But the fact of life is they need to participate with the courts, with the prosecution, with the victim's community and with the police community. They need to serve on committees. Their voice needs to be heard early on. So you have to factor that into when you set the rate for how you are going to pay and how you are going to contract. I just think that is crucial. The one thing in my troubled decades of prosecution that I learned is that we have got to work together and we have got to chose what we can disagree on. When we disagree, that is fine. That's what courts are for and you all know you are trial attorneys in here, for the most part. You know that you try less than 10 percent of the cases and the rest of it is done in negotiation, the rest of it is done in setting policy. What are the thresholds for a DA issue? What are the thresholds for entrance into a drug court? What are the thresholds for entrance into a mental health court? How do you staff a community court? How do you staff a fast plea an expedited plea court? These are things that need to be factored in when you figure out how you are going to contract with various defense contractors. Those are my comments. Again, I have read the draft report and I will start now that the Chairman has arrived.

[Barnes Ellis arrives at 10:55.]

057 M. Schrunk

I think those are the things you ought to take into account. Like I say, I am an unabashed fan of the indigent defense. I think it is a very high level in fact. I think they win cases they shouldn't. I chew people's rear ends in my office when that happens, but is the way it ought to be. It makes your District Attorney's Office better, it makes your police departments better and it makes your judges better when you have a proactive defense component in the community. That said, I could stand more guilty pleas. I will answer any questions or any areas you want to cover. And I think the report is a good first step. Those things that I highlighted, I would hope you will monitor them and will work on trying to figure out some sort of solutions.

068 J. Potter

Mike, you may recall last legislative session Max Williams had, early in the session, a long proceedings on extraordinary expenses, or what we are now calling non-routine expenses, about things that the defense may have purchased or done, and whether or not there were some inappropriate expenditure of funds. What I am gathering from your comments, though, is slightly different. If I understand what your office is saying, it may not be that the funds that were awarded were inappropriate, but that the time frames in which the funds are used, and the way that is being done, is slowing down the process or causing delays, is that what you are saying?

077 M. Schrunk

I think that is it, more than what is being accrued. Of course, we are always going to pick at it when you hire someone to read crystals about the witnesses or

for jury selection. You are always going to get someone who is going to fire at you. That is the nature of our business. My complaint is more if Dr. Potter is approved for up to \$5,000 for the examination of Mike Schrunk defendant, and you are booked out for 120 days, we don't do anything about it. We don't ensure that, when you are hired, you are available and you meet some sort of parameters. We all know, defenders, prosecutors and judges have more to do than we really want to do, so we kind of let things slide. When you let things slide, we are spending time that is not ours. Court dockets, witnesses fall off, we lose them. Local jails spend money housing people. We have a list here that we started monitoring between the defenders office and the courts and my office of cases where defendants have been in local custody over 150 days. Now a lot of them are just awaiting services and we are not clean either. The state mental hospital on aid and assists, we have to solve that problem and that is not your problem. But, hopefully, you can get your oar in the water on that. We have to be able to get fit to proceed hearings or evaluations done. So I guess my plea is, when those things are extended or approved, that someone says, "Hey, when is this going to be done?" and there is a time slot that is going to be done, this week or next week, but not 90 days from now.

- 101 J. Potter So is the person who might do that the judge? Or are you suggesting that we have a standard?
- 103 M. Schrunk I think that would be a question, when you are asked for extraordinary expenses: when will this be done? This should be part of the consideration. Will it be done, or since we got the money, we will never get it done?
- 106 Ron Fishback There is a shortage of qualified people, particularly in the mental health system. When I seek approval for funds, I typically ask two or three different professionals, when are they available, are they available to do it? It is kind of shocking how far out it is. We don't control their professional schedules.
- 107 M. Schrunk I agree with you.
- 108 Ron Fishback I have an evaluation now that was done, but I can't get it completed because the fellow is off on, as he put it, "murder row" up and down the valley, having to do other more pressing things before he can conclude matters in my case. It does drag things on.
- 111 M. Schrunk Ron, I do agree with you. I don't think that it is entirely your fault, nor is it entirely the deputy district attorney's fault nor the court's fault. I think all of us together have got to develop new experts. We can't hold out for Dr. Potter because we know he is the best and we know he is going to help our case. That is a consideration that we have to make. I would almost urge that we make the appointment before we get the funds or we determine the availability of the doctor. As you know, there is a cache of doctors that we use and we have the same problem. It is hard to say, "Well, let's explore Dr. Stevens because we know how Dr. Potter is going to come down, so let's take a chance on a new doctor." I think we have to. I guess the other thing that I have learned is when you look at a system or an agency, if you watch it, it will change. So I guess what I am saying is, if you pay attention to it, we will do a better job. It's like our 150 days in custody without anything happening. Now, all of sudden, we are getting this report monthly. And I know the defenders look it and I know judges look at it, and I know I look at it and ask questions of the people who are responsible for this case. You don't need to have any drastic policy. You just have to monitor it and it will change. And if it doesn't you can find out why. I'm not so much concerned about approving money for people to read crystals

or whatever because I think enough people have enough sense not to approve those kinds of extraordinary expenses. I think there may be probably one or two instances and, lord knows, prosecutors have those same kinds of problems.

132 J. Potter Well, possibly during this brainstorming session that we are having here, you mentioned when you are requesting the expense that you are asking the judge or asking the state and you are saying, "We have got Dr. Barnes as our No. 1 choice and he is available in 60 days." You are giving the court or the agency more information about when the expert would be available and that may then put everyone on notice as to what is going to happen on the front end.

138 M. Schrunk I would agree. And Ron Fishback, if he went and asked for his money and he said, "I've got Dr. Barnes or Dr. Potter, and they are available in 120 days." Whoever the approving authority is going to say, "Go back and renegotiate that time frame or find someone else." In some court systems, when you ask for things, you have to certify that this not going to cause undue delay. What's undue?

153 J. Potter Thanks Mike.

154 M. Schrunk You know, maybe it's just a grumpy old prosecutor, but we have the same problems. I am the last one to come in here and say that I have clean hands because we do things that delay the system too. Peter has asked me to point out some of the areas that were of concern.

156 J. Potter I think you have raised a new wrinkle because I didn't hear that concern being raised at the last legislative session.

161 C. Lazenby First of all, I am shocked and appalled that there is expert shopping going on in this field. So if you have any ideas, and I think it is beyond the scope of this Commission to figure out ways to open barriers of entry in this expert field. Do you have any ideas on how we could grow that field of experts, other than increasing resources in the system, which is the perennial answer.

166 M. Schrunk Chip, I don't know if you as a Commission can do it, but if you want to grow that the same way the district attorneys do it, they try collectively to try to push out for different experts. I think you can say, "Let's cultivate these different experts, or let's broaden our field to draw from." I think that is what we all need to do. There is no question about that. If you talk to the judges, they are in the same predicament that we have in a way. We become captive to someone else's schedule, which mucks up our schedule

177 C. Lazenby I wrote down notes of what you talked about, how important it is to be adequately funded, and you touched a little bit on the contract rates. In my other life before this, one the issues of parity kept coming up in the legislature, especially the disparity between what prosecutors are paid and how their offices are funded and the kinds of funds that we have. Traditionally, when the public defense side has tried to seek more funds, as you pointed out politically they are very unpopular, and what has consistently stymied efforts of getting parity has been the opposition of the District Attorney's Association. Are you signaling a change in direction that you are willing to work with us and try to get system parity?.

188 M. Schrunk For a long time some of you in this room have heard me in other forums advocate for a Criminal Justice Worker 1, 2, 3 and 4. I think it should be the standard for entry level attorneys, whether it be a Deputy District Attorney, a

Deputy Attorney General or a Deputy Defender. I think there needs to be – I don't mean to insult any of the fine young defense attorneys here, but I have interviewed literally hundreds of people for deputy district attorney and I find that 99.9% of them are the same men and women that end up defending. They believe in the system, they want the same goals, they believe in the same premise of advocacy. Yes, we have true believers on each side, you know, whatever that terms means. But they are by and large the same people. I don't see why there shouldn't be some sort of parity. We can make the argument that prosecutors review more cases. Well, there just has to be more prosecutors to review the cases that get rejected. But I think there needs to be some sort of parity. I'm not speaking for all district attorneys, as you well know. I try to work hard with the office that I am in to continually improve the salary structure and I have shared that with the defender agencies. The only thing that appalls me sometimes is that Hennings will get a hold of it and then I will get back that someone is claiming that Hennings is saying that my staff is overpaid. I say, "Jim, that's the wrong message. It is your staff that is underpaid."

217 Chair Ellis

Anything else? I will apologize later for my tardiness, but thank you.

218 P. Ozanne

Mike, if we have other questions, I will bring them to you and perhaps meet with your senior staff again. We would like to follow up as we go through this planning process. And knowing how cooperative you are, I know you would be willing to do that.

222 M. Schrunk

Good luck. I think the fact that you are coming around to various regions in the state and you are holding open hearings and you are taking input. That is important. Getting the public input, getting input from the stakeholders in the system, and then Peter coming around. Peter has a lot of credibility up here because he worked with our Public Safety Coordinating Counsel for a long time, and he has talked formally and informally with defense counsel and prosecutors. You are on the right track. Thanks for letting me spend this time with you. Good luck.

**COMMENTS OF JUDGE JULIE E. FRANTZ
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 12-19 of the Minutes)**

235 Judge Frantz

I'm Julie Frantz. I have been the Chief Criminal Judge for the last seven or eight years. First of all, I would like to compliment the Commission on the thoroughness of the draft report. The detail and the analysis, I really think it was a very thoughtful and thought-provoking report. I would like to start by echoing the last comment that was raised by Mike and Commissioners, and that is the parity issue. I strongly believe that it is absolutely critical and essential that defense counsel be paid on an equal basis with deputy district attorneys. There is no justification for otherwise, and that has historically has not been the case. That is something that has to be addressed. I might just digress for a moment. I did defense work for five years between 1975 and 80, and then I did civil work for about 14 years before being appointed to the bench 10 years ago. I have been impressed with the increased level of complex cases, the growth of those who are mentally ill and who are charged with crimes, and the complications in the system that that has caused and the necessity for defense counsel to be in various courtrooms at the same time. The difficulty of being able to easily access clients for the reasons we all know, budget problems. All of those things

have added a tremendous load to defense counsel's job. We never have been in a position to do more than simply count the number of cases that each individual attorney carries, rather than to be in a position to look at the magnitude of each case and look at the complications that are created by the types of cases and the issues that a particular client brings to the table. I see it as being significantly different than it was when I was practicing in this area 30 years ago. The elements are the same, but the growth of complexity and additional issues I think have dramatically increased. The level of competency of defense counsel is very high in this county. The dedication and commitment to clients and to working within system I think is something everyone can be proud of. The interaction between the District Attorney's office, defense counsel and law enforcement, and how it works in this county, is something I think we can be very proud of. I do believe that it is absolutely critical, as it was pointed out in the report, that there be clear criteria for those who are appointed, whether it be through a contracting firm, independent contractor attorneys, a consortium or a public defender's office – that there be well-established criteria for those who should be appointed on certain types of cases. And that goes beyond just experience. I think there needs to be evaluation of not only the competency, but the attentiveness that they pay to their clients.

That is going to segway into an area that I think is a big concern to the Commission, and that is the level of substitutions that create considerable expense. Let me move to that for a moment. I have made a concerted effort to only allow substitutions when there is virtually no alternative – when there is an active conflict when substitution is mandated or there is such a deterioration of the attorney/client relationship that the representation can simply not go forward, like threats or multiple bar complaints. I do not grant substitutions simply because there is a bar complaint. I will often conduct a little mini-session in my court to make a determination as to whether that is something that should be granted or denied and to see how that develops. There are times when the deterioration is too extensive, there is no communication between the parties, and both sides are saying, both the defense and the client, that they cannot proceed. That in itself is still not a reason. I am making a point of this because this seems to be one of the major criticisms – that is routine substitutions. I spend a great deal of time in my court trying to talk through the issue with defendants of the role of defense counsel -- that their job is to prepare the case for trial, to do everything that is possible to assess the case, and to provide the best feedback so the client can make the best decision for him or herself. There needs to be a desire to work together and listen to the advice of counsel. The attorney may be doing and is doing many things for the client that the client is not aware of. That being said, one of the major complaints that I hear is the lack of communication between attorneys and clients. If there is one thing that I could identify that defense counsel could improve and would save a great deal of anguish for defense counsel and reduce the level of frustration for clients and reduce the number of substitutions that come before me would be that defense counsel, on a regular basis, would have immediate contact with their client. Now that is not always possible because attorneys are in trial and they have heavy caseloads. But early face-to-face contacts or phone calls followed by face-to-face contacts would create confidence by the client in the attorney. If that doesn't happen very early on, there is frustration and distrust that develops, and it leads to motions for substitution in my court. If nothing else comes out of this process, that is the one thing that I would emphasize again and again: early contact and answering phone calls. Now, that being said, I think there are an increasing number of clients who are very difficult to manage and there is an increasing amount of legal information that gets floated around through the jail system. There are increasing numbers of what we refer to as jail

house lawyers that are providing bad advice to other inmates. Those issues make the job of defense counsel even more difficult. A lot of time has to be spent undoing that bad advice both by defense counsel and the court. There is also a greater number of clients who are preparing their own motions and who get into a struggle with their attorneys because their attorneys won't handle their motions or won't file the motions, and that creates a great deal of conflict. The standard in my court is that, if at all possible, we will work around that kind of conflict, and it works with the new ethics rules. If the conflict is clear and it is a natural conflict in accordance with the rules, there has to be a substitution, whether that happens in the first week, or it happens on the 120th day and trial is about to occur. Where I think money should be spent is on a system that uncovers conflicts prior to appointment of counsel. And I know we have a system in place and it sometimes works and it sometimes doesn't. That system should remain in a place. But a review should also be done again after the first couple of weeks, after the police reports have been received. There are witnesses who pop up at that time. There are unindicted co-defendants that create all kinds of problems. The earlier the substitution can be made, the less expensive it will be for the system and for indigent defense, and the more effective the representation will be for the client because, if any substitution needs to be made, it will happen very early on. That is a place to spend money.

With regard to the issue of psychologists, we used to have in Multnomah County a list of those we were approved. That was dismantled about six years ago because there was really no clear criteria for who should be on the list. There was not a good system for indigent defense to control the list. So now it is really by word-of-mouth who an attorney should pick to perform a psychological evaluation on a client. There are those who are more favored than others. You see their names coming in all the time. But there is an incredible shortage of psychologists to do examinations for the purposes of aid and assist, sexual examinations and other evaluations like GBI evaluations and diminished capacity. There is an extreme shortage and when we hit the summer months or we hit the holidays and psychologists go on vacation, we then spend September and October trying to catch up. By the time we almost turn the corner, the holiday season hits and the same thing happens over again. People just are not available. Any plan that would create a list of qualified psychologists would be extremely helpful. I think it would move cases along. I think the identification of the psychologist and the time when that psychologist will have the report back would be a very good approach. Often in my chambers when we have a settlement conference and I find that the psychologist's evaluation is not back, I require the defense counsel right then and there to get on the telephone and call the office and tell the psychologist that the report must be due back by X days because this case is going to trial. Or if we are not that close to the line, we get a date when that report will be back, or a date by which that evaluation will be done. Everybody has to be pushed in the system. There is no question about it. At the same time, there are things that have to be done in order for a case to be properly prepared to be tried.

There are constitutional rights that must be protected, and post conviction relief to be avoided at all costs because that is additional burden on the system. I started case management conferences about four months after Ballot Measure 11 was enacted. We did a study in the court regarding the number of Ballot Measure 11 cases that came through the system in one month and we found there were approximately 45 to 50. I determined that I could do 15 minute case management conferences in each case, with about 16 between 8 a.m. and 12 noon on Tuesday mornings. So I set up a system where, every 15 minutes, lawyers on either side come to my chambers without their clients. I have a

checklist that is prepared and we go down the checklist to make sure that such things as police reports have been confirmed, photographs of the evidence that is needed to be tested. Are there records that need to be subpoenaed from different counties? Are there psychologists' evaluations? I don't require defense attorneys to talk about that but, if it affects the timeline of the case, they do need to talk about it. There are probably about 30 or 40 boxes that we go through. Those 15 minutes conferences take place between 70 and 77 days after the initial appearance, the idea being that after 60 days there is a waiver and the defendant is going to be in custody. And the defense attorney has had adequate time to develop a relationship with the client and to get into the case enough so that we can talk about the particulars. By doing these case management conferences, we start the discussion of settlement going forward because any time two lawyers have to pick up a file and go into the judges chambers to talk about the case they have to know something about the case, to have thought about it. And the two lawyers start talking about what needs to be done and what the options might be for settlement. Often the settlement conference is set. By utilizing this system, I have been told by the sheriff that they have seen a dramatic change already in the length of time that an individual remains in custody because the cases are getting resolved earlier. Set-overs in felony matters are handled by Judge Koch and me. Misdemeanors and drug and property cases go through the CPC court. The CPC court, the Criminal Procedure Court, also does substitutions of attorney on the property and drug cases and in misdemeanor cases. The set-overs do not occur without a conference, unless the set-over would place the case within the 120 to 150 days for sex offense cases. So the attorneys have to come in, and we sit down and go over the reasons why the set-over is being requested. I hold the reins as tight as possible for the nearest date when the case can get tried. The other forum is in Judge Koch's court, the presiding court, where requests for set-overs are heard. I believe we are doing everything we can to keep those trial dates as close as possible to the 120 days, and only setting beyond that when there would be a serious issue that could come up on post conviction relief. For example, if the case was tried without the psychological report being back before a trial with a GBI defense.

With respect to the disparity of pay that is provided to different contractors, addressed at pages 12 and 13 of the draft report, I think you have done an excellent job of outlining a very complex issue that has multiple facets. I think the outline set forth in the report should be pursued. It is a very difficult situation for those who are underpaid for doing very complex cases and who have clients that are facing significant sentences if convicted. They look across the table and see others who are doing the same kind of work who are getting paid more. That is demoralizing and troublesome. On the other hand, there are some contracting firms, non-profits, who have an infrastructure that needs to be supported in order to provide the quality of services. That has to be taken into account in setting those costs. I think the goal should be to ensure quality services at a fair price, to use your terminology. It is a complex issue and it has to be inspected and evaluated. So I am open for questions. I know there are things I haven't addressed, but those are my initial thoughts.

546 J. Potter

In your experience, what percentage of the substitution of counsel requests that are raised in your courtroom, after hearing the arguments and chatting with these folks, what percentage do you approve?

551 Judge Frantz

Now just so it is clear, I only do the Ballot Measure 11 and A and B felony cases – those that are not on the property and drug docket that go to CPC. I assume you are talking about those that are not natural conflicts.

- 558 J. Potter Right.
- 558 Judge Frantz The percentage that are approved, I would say, and this is just a random guess, a gut reaction, probably about 15 to 20 percent. It is my goal, if at all possible, to keep the relationship together, so it is probably more like 10 to 15 percent. Sometimes the attorney and client can go to the jury room, if there is a communication problem, to sit down and talk about the case. Sometimes what I do is, when there is a substitution request, at the right time I ask the clients if they would agree to defer the motion for substitution and allow me to conduct a settlement conference. I get an agreement on the record to do that. We go to my chambers and talk about the case, and sometimes we are able to resolve the case right then and there. We go back on the record and again I ask the defendants if they are voluntarily withdrawing their motion for substitution of counsel. Of course, that is a case with no additional expense.
- 592 Chair Ellis I thought I understood you to say that a big factor that you think leads to these motions for substitution is lack of communication. The question I have, is there any observation you have as to any common characteristics that lead to that? I am just going to suggest some and you tell me what you observe. Is there is correlation between hourly compensation and per case unit compensation that you think may contribute to that? Is there a correlation between the experience level of the lawyer, either so young they don't do it or so old they don't do it? Is there any correlation between a MPD lawyer, various consortium lawyers and the other lawyers that appear? In other words, I am trying to see if there is something we can be thinking of from the contracting level to try and address the issue.
- 624 Judge Frantz I think it varies from individual-to-individual. I have seen across the board a level of dedication in each type of contracting situation, whether it is a public defender, an independent off the court-appointed list, somebody from a consortium, somebody from a small contracting firm. I have seen the same level of dedication, commitment, ability, responsiveness and attentiveness.
- TAPE 2: SIDE A**
- 001 Judge Frantz I have also seen the same level of lack of attentiveness and responsive to clients across the board.
- 002 Chair Ellis Does it tend to be repeated? So you see the same people involved?
- 003 Judge Frantz Yes.
- 003 Chair Ellis Is there is anyway that could get communicated either to contracting agency or the agency's staff?
- 005 Judge Frantz There are instances with individuals where I see the same issues coming up over and over. That could be shared.
- 008 Chair Ellis There is nothing we could be doing to make sure that it is communicated, so that it could be corrected?
- 009 Judge Frantz Well, I think you as a Commission have spoken to a number of judges and sought feedback from a number of judges in our courthouse, as well as I think you have spoken with the District Attorney's Office and others. So my understanding is that there has been quite a bit of feedback about the issues that

lead to concern about inattentiveness and lack of communication, lack of preparedness, competency.

- 016 Chair Ellis One other issue that I thought of, still on the substitution issue. On the conflict cases, you said that, if there is money, a place we should be spending it would to improve the conflict situation. Can you help us? First of all, what is there now and what do you see could be done?
- 021 Judge Frantz Well, Jim might be able to help out a little me with this. My understanding is that MPD still has a contract to review the police reports –
- 025 J. Hennings We don't review police reports because we don't have them. We don't have that information. Our review is when we get the case and if we see that that client is already represented by somebody and, if so, it goes to that person. We make sure that there is a strict rotation. The main area that we have problems with is that we don't get the information. We have talked with the District Attorney and Mike Schrunk would like to give us the information, but he does not have to do that. He would like to be able to submit it to us electronically. He would like his reports coming from the police department to come electronically. There is a great deal more that would we could do if there was further attention given within the first week or two when you start getting the police reports. The problem is we shouldn't get involved, we are mandated to get involved in the case once we are appointed, because that breaks the attorney/client relationship. But if we don't, then Julie sees it as a conflict request from the client. But at the same time, how deeply do we want to get involved in the case because we don't have the information? So there is an area I think the Commission, working with the other people in the justice system, should start pushing, and not only in this county but throughout the state. Early discovery of this type of information is necessary. The chief issuing deputy district attorney would love to have the time to let us know who the key witnesses are and the co-defendants. He doesn't have time because he has to issue cases every morning. So something as simple as that is preventing the district attorney from letting us know so we can determine those kinds of conflicts.
- 048 Chair Ellis Any other input on that?
- 049 Judge Frantz It is a very expensive process to put into place – to be able to track every witness in the police report before the case is assigned. It has to be done quickly. Judge Koch, Doug Bray and I have talked about it and we have talked about it at Criminal Justice Advisory Committee meetings. It is a very expensive process.
- 053 P. Ozanne Judge, just to follow up on the substitution issue. I certainly hope that our report indicated how much progress has been made in your courtroom. You were one of the first to alert people to the substitution issue. Of course, it is always a challenge for those of you in judicial management positions to manage the decisions of so many independently-elected officials in this courthouse. We suggested in our draft report, I think we referred to “run-of-the-mill” cases, which is not a very good term, that there may be substitution cases that occur below your radar screen. You were saying that you do Ballot Measure 11 and A and B felony cases. Mike Schrunk, when he just spoke to us, mentioned the effects of shining the spotlight on decisions or behaviors and how that could heighten the awareness of a problem and change decisions or behaviors simply because of the attention. Working with the Commission, is there any similar ground to be gained here with respect to other judges' substitution decisions?

- 066 Judge Frantz The key to it is having the same judge hear the motions and not having a motion for substitution be heard before one judge pertaining to one defendant and then another judge hearing the second motion for substitution and then a third judge hearing the third motion because there is an inclination by a judge to give the benefit of doubt to the defendant to work with another attorney. If it is the same judge who is always hearing the motions, that judge is going to be much more concerned about the fact that there has already been an attorney appointed for you, and you are only entitled to one attorney at taxpayer expense. There has to be a very sound reason to remove that attorney and appoint another attorney. So in the cases that I don't hear, they go to CPC court, the Criminal Procedure Court, where we change judges on a regular basis with three- month rotations. Sometimes judges are only there for a month at a time. There is constantly a push to have judges who are in those rotations understand the importance of holding the line on substitutions of attorneys, just like there is a push to let the judges hold the line on set-overs according to stated procedures. So that is the issue. If there is any criticism to be lodged against the judiciary, I think it is because there are constantly changing judges hearing these motions. There isn't that same sort of understanding of the importance of trying to keep the relationship together between the parties and the expense of not doing so.
- 097 Chair Ellis You referred to some bad advice that jail lawyers give. Is that something that is increasing in incidence because word gets out that that may be short-term perceived advantage?
- 099 Judge Frantz What I see is trends that defendants rely upon in order to get new attorneys. For example, someone will get a hold of the model ABA code and it will say that each attorney should not have more than X number of cases. Then they bring that in a basis for their attorney to be removed because the attorneys have more than X number of cases according to the code.
- 104 Chair Ellis They all do.
- 104 Judge Frantz They all do. So we try to avoid that conversation as much as possible. Then there will be the filing of bar complaints. There will be a rash of filings of bar complaints early on. That's why I hold a mini-hearing to make a determination of the legitimacy of the bar complaint. If you grant those motions, then you give the green light and then anyone who is dissatisfied and doesn't like the news that they are hearing from their attorney will file a similar motion.
- 113 Chair Ellis Do you think it is going down, up, or staying the same?
- 113 Judge Frantz It is definitely on the increase. Ballot Measure 11 consequences and property consequences, whatever, if there are significant sanctions that will be incurred if a person is found guilty and they are not happy with the assessment that the attorney is providing as to the probability of a more favorable outcome, the frustration that develops for the defendant becomes significant and the only person to blame is the attorney who is providing that advice. So I think in this era when we have very significant sanctions for criminal behavior, the frustration and taking it out on the defense attorney has created much more difficult relationships between defendants and their counsel.
- 126 Chair Ellis Do you see a higher correlation in the more serious crimes?
- 127 Judge Frantz Yes, I can only speak from recent experience.

- 128 Chair Ellis Which brings us back to the other point you made to improve the assignment criteria to get the more competent, experienced lawyers handling the more difficult cases.
- 132 Judge Frantz Right. And if a defendant threatens a lawyer on the 120th day and it is ready to go to trial, the consequence is not far away and there is a threat to the attorney, I take a look at how serious the threat is. It is not out of the realm of possibility for a client to throw a punch or to create some type of situation, either consciously and unconsciously, which creates a conflict that has to be addressed, even though it is very late in the case. The later the motion is brought, unless there is a clear conflict, the less likely it is that the motion will be granted. If there is a conflict that is brought early on, there usually is a possibility of working it out. When the conflict comes very late, often when it is about to go to trial, those are normally not allowed.
- 147 Chair Ellis Any other questions for Judge Frantz?
- 147 J. Connors Judge, you mentioned the 120 day rule a couple of times. It is my understanding that about 90 percent of the felonies in Multnomah County get done in that time frame. Does that sound right to you?
- 152 Judge Frantz Well, the Supreme Court requires that they be concluded within the 120 days. We are falling below that. We haven't attained that goal. It is 150 days for sex offender cases because it simply takes longer for the relationship to develop between the attorney and the client, and there is often more to do in those cases such as sexual evaluations and so forth. That is taken into account when we are talking about resolving the case in 120 days. But the truth of the matter is we are resolving less than that 90 percent within 120 days.
- 160 J. Connors Do you know how close we are?
- 162 Judge Frantz I think it is around 80 percent, give or take a couple of percentage points.
- 165 J. Connors Then the second thing I wanted to ask is you mentioned the complexity of the cases have increased. Having worked with you on the court and the mental health groups that you and Commissioner Naito have chaired, we have heard a lot that there are more mentally ill people in the jail. My sense is that this has played a big part in the complexity of the cases. Is that a growing problem.\?
- 170 Judge Frantz Absolutely. That is a great contributor, and it takes more time to deal with those cases and the psychologists to evolve relationships. Clients have to stay in custody longer. I think there is a lot serious lawyering going on. There are a lot more motions created by inmates and I think caseloads are heavy, so there is less time and it is more difficult for lawyers to access their clients. You know it is not possible to fax documents back and forth between lawyers and clients, so it means going out to Inverness Jail to get a 60 day waiver signed and that takes sometimes three hours of time. Sometimes Inverness is closed because they have run shutdowns. There are all kinds of factors that are making it so much more difficult for defense counsel to be able to have substitutive conversations with their clients and to get procedural matters taken care of. Of course, that takes away from the time that they have to prepare the cases and it adds to the frustration of the clients and the dissatisfaction with their attorneys because they are not seeing them as much.
- 191 Ron Fishback One of the things I have thought about over the years, and that the Commission might want to think about, is for some of these really difficult clients, say you

inherit someone who has had two or three lawyers before and it is a very serious case, often I will press for a second opinion. Sometimes what folks need is an outright substitution. But I think most of the time, but not always, Lawyer No. 2 gives the same advice as Lawyer No. 1. But if you could approve funds for a second opinion, I think it would be less expensive than an actual substitution. That lawyer could consult with trial counsel and review the work that has been done by the first lawyer at a very reasonable rate. This is just something to consider.

206 Judge Frantz

What I tell someone when there is just a total breakdown in the attorney-client relationship and they just can't proceed is that "you have the opportunity to work with one more attorney. You will not have a third attorney and, if you cannot work with this attorney, you may well find yourself in a position of representing yourself. These are extremely serious charges and you do not want that to happen." I tell them that up front so that they don't go through three or four lawyers. But there are extreme cases where substitution has to be granted, in my opinion, even though there is not an actual conflict as defined.

215 S. Gorham

Judge, how often do you follow through with that threat?

217 Judge Frantz

I have followed through on it and the case has gone out to trial. I have asked attorneys in the court if they can continue zealously representing the client and they say "yes." But if the situation has deteriorated where, as Ron was saying, we get another attorney in and client hears the same advice and we move the case to resolution. We determine if he or she will stay on and it goes out to trial and the defendant decides, "I better have an attorney." It does mean that trial gets set over and the attorney gets back on, and then the case often gets resolved. It has to be followed through on, or it has no affect. It is a hard thing to do from a judge's perspective because sending someone out to trial who is facing hundreds of months if found guilty causes a conflict in your conscience to do that. But the flip side of that is having four or five or six attorneys appointed to get to the same point. The other thing I do is ask to see if there is a legal advisor that can be appointed to make it absolutely clear to clients that they will be representing themselves because they are not going to get another attorney. That attorney might agree to stay on as a legal advisor to provide procedural information. It is a very awkward situation for an attorney to be a legal advisor. You are giving some legal advice but you are not controlling the presentation of the case. It is just setting the lawyer up for post conviction relief proceedings. So that is a very difficult situation for a lawyer to be in. I do know of one case that went to trial where someone insisted on representing himself. I think those cases where an attorney has been removed and a client has refused to go ahead with that attorney, those individuals have changed their minds ultimately and continued with the attorney or accepted a legal advisor.

260 Chair Ellis

Thank you.

**COMMENTS OF JUDGE EDWARD J. JONE
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 26-31 of the Minutes)**

- 045 Judge Jones I'm pleased to have the opportunity to do it. I am Ed Jones and I am a circuit court judge here in Multnomah County. But before I got this job, I was the Director of MDI for 14 years and I negotiated a lot of contracts with the state over those 14 years and those negotiations were often intense. We never got what we wanted or even, in my opinion, what we needed to provide the level of service we thought our clients were entitled to. But we did the best we could with the money we got. Part of our willingness to make due with less money than we thought our clients deserved was that we were aware of the financial constraints of the Indigent Defense Services Division and now those that you operate under. But what I didn't understand then, and I don't understand now, is, given those constraints, some contractors were paid much more for exactly the same kinds of cases. I don't mean to say that I don't understand the historical reasons for the disparity. I do. What puzzled me is the persistence of that disparity, even to the present. I am very pleased that the Commission has decided to undertake an examination of the question.
- I agree with John Connors that the lawyers and the staff at Metro have been in the forefront of establishing and assuring excellent public defense in this state. There is no doubt about it. I don't have any issue with their achievements. There is no court, no defense lawyer, no defendant that hasn't benefited from the work that Metro has done over the decades. It is absolutely the case. My concern isn't with their history or achievements. It is with their current budget and about the sacrifices that other contractors and other defendants have to make to allow Metro to have more money for every case. To make myself clear, I want to ask the Commission to look at the items with added value and that John set out in his document and ask yourself, "What is the current cost in this budget of each of those achievements? How much are you paying this year for each of those achievements?" Now in the draft report for today's meeting, on page 13, there are criteria that might justify relatively higher contract rates. They might rationalize higher contract rates. But if you actually sit down and say, "What is the current dollar cost in this contract for each of these achievements and are we getting our money's worth?" I think the answer you have to come to is: "We have no idea." For example, talk about the existence of an internal infrastructure. Well, that begs the question. That is why they get more because they have more people and that is where the money is directed. There office is like MDI and any other office, like your office. Frankly, that is where the money goes to the employees.
- 086 Chair Ellis Can I interrupt prematurely? Is there any data or information comparing what a comparably experienced lawyer at MDI gets relative to a counterpart at MPD?
- 089 Judge Jones Well, of course.
- 090 Chair Ellis At the individual level, as opposed to the contractor level?
- 091 Judge Jones Well, I would hope you have that data, frankly. It certainly wouldn't be that hard to get, if you didn't have it.
- 092 Chair Ellis Do you know if there is a disparity there?

- 092 Judge Jones Well at Metro pay scale, and John would know, but I think they run a little higher in the beginning and ultimately they go further up. I think there are some rationalizations that explain that. In other words, MDI lawyers top out sooner than Metro lawyers. The difference is small maybe \$1,000 or \$2,000, I am not even sure what it is.
- 098 J. Connors Closer to \$3,000, I think.
- 099 Judge Jones That is obviously one place the money goes. But when you look at the spread sheet, I have no idea and I can't vouch for these numbers, but it suggests that the same group of cases being done by each of the two offices generated over \$300,000 difference to you in costs. Now what did you get for your \$300,000, that is my question to you. Now, if you go down and look at the proposed suggestions, for example, a strong and effective management structure, you can have a strong and effective management structure in any defender's office if you are prepared to pay for it. But the reality is that the offices that have come along since Metro have not been given the opportunity. So to use that now as a reason to continue to give more money to Metro, it just doesn't make any sense. We go down and look at the capacity and willingness to raise legal challenges and handle test cases. Now how much does that cost? What is the dollar value of that? I mean, is it a \$100 extra a case or \$10 extra a case? Frankly, I don't think that any other law office would be any less capable, or has been historically any less capable, of raising those kinds of challenges. It simply isn't the case that any of the items laid out in the draft report can be connected to some justification for actually having more money. And that, in the final analysis, is the problem here – that you are examining why you are paying the extra money.
- 125 Chair Ellis John Connors, for example, the training that they do?
- 127 Judge Jones Yes, how many outside lawyers do you have attending one of Metro's training sessions? A second question: let's suppose that the cost of one trainer, full time, is a justifiable expense in an office the size of Metro. What does that average out to per case: one dollar, ten dollars? You certainly could figure it out. If you want to have that the trainer there, and frankly I think it is a good idea, fine, write it into the contract. But to justify a \$300,000 difference in a relatively small group of cases on the basis of having one lawyer doing some training, most of which is done internally, just strikes me as being – the reality is that most of the indigent defense training in this state is done through OCDLA.
- 137 Chair Ellis They do a lot of what I call CLE, but do you really think they do the training?
- 139 Judge Jones I don't know how many defender offices other than Metro have anybody working as a designated, paid trainer? Who is training those people? Let's suppose that training is a good idea. Should all the money we are spending on training be spent in one office?
- 144 C. Lazenby Let me ask you a question. Let's assume we take out all of the deltas out of the Metro budget and then we distribute the money evenly throughout all of the providers in the Metro area. What is the plus for indigent defense in this city if you do that? Or is there one?
- 149 Judge Jones There are a number of different issues there. If there are things that can be done that need to be done by somebody, then everybody should have a fair shot at providing that service. That hasn't happened. If it is something that can be spread around, it should be. So it depends on what the particular service is. One of the items listed on in the report was an institutional presence on behalf of

public defense. That is probably system-wide one of the greatest contributions that Metro makes to indigent defense – is the time that people in the administration and other lawyers spend involved in these public processes. Fine, what is the dollar value of that? How many extra dollars does it take to have that presence? The answer is, frankly, that it doesn't take any extra dollars. Lots of people do those things on their current salary. What justifies – and again I am just using that number because it is handy; I suspect the real number is larger looked out over the entire contract – how much of that \$300,000 in additional funds goes to providing that institutional presence on behalf of public defense? It is a necessary task, but how does it fit into the budget? What is the cost? Are you getting cost effectiveness with that money for that service? I don't know, but you should know.

171 C. Lazenby

I don't really have a point of view on this, as you probably know from knowing me, but let me just go down this line and talk about this a little more. I was around when the county was setting the first contracts here, and one of the reasons why we gravitated toward these larger and larger contracts was because of a perception that I think was valid – that there was a real inconsistency in quality and services, it just wasn't cost-effective.

176 Judge Jones

I am absolutely in favor of larger defender offices doing the bulk of the work in counties that can support an organization of that size. There is no question in mind that those offices provide a higher level of service largely, in my view, because of the group training, the sort of self-support that comes out of that kind of office. That was on one of the findings of a task force of the State Bar, when we made a statewide survey, when we looked at complaints about the quality of work and the better quality of work that was getting done in larger defender offices. That is a fact.

186 C. Lazenby

But your arguments, to a certain extent, result in decentralizing those services, if you are going to break down all the components and let them out for bid to see who is going to do them. You are dispersing those services amongst a lot of different –

191 Judge Jones

If you are not getting services now, then they need to be dispersed. That is a real question. That is the question that comes up with the training issue. Another one of these factors in the report – a capacity to handle high volume caseloads – well, if it costs more money to have high volume caseloads, why are we doing it? It doesn't make any sense to spend more money to have bigger caseloads. That's nuts. If you are not saving money by having bigger caseloads, you shouldn't be doing it. The benefits need to be pin downed, quantified and priced out. Maybe you will come to the conclusion that you are getting your money's worth for the extra money. But frankly, you ought to pay the same for the cases and sign a separate deal for the additional services, instead of hiding those additional services in increased case values. Because if everyone gets X amount of dollars to do a case and we say well we also need this service for drug court, to do a training session, to lobby, I guess we could call it that. Whatever it might be, fine, let's put a cost on it. Maybe Metro is the right place to get them done. They certainly have a good history to do them. Then give them a contract to do them. But then you know what you are spending and you are not hiding those services in your case cost. That is what has got us to where we are today. Anybody who looks at these numbers says, "How can this be fair?" Rather than sitting around trying to rationalize it, let's lay it out clearly. We pay X for that kind of case and, because the system needs these additional services, we buy it for a price.

- 222 C. Lazenby Judge, there is also an irony that you and I are getting into this conversation –
- 223 Judge Jones It's history.
- 224 C. Lazenby Yeah, but it seems to me as well that a lot of things I heard John mention are in the nature of the beast, and the reason why people get into this business and stay in this business. So to a certain extent, you look at Ron Fishback or Ken Walker and say, "I know that those guys do things that they don't get compensated for either." So don't we run the risk that, if we put a price tag on everything and there are no extras, we are ignoring what it means to be a true professional criminal defender.
- 226 Judge Jones In other words, we are only paying one office for the free work, and we aren't paying the others. I'm saying that I think a lot of contractors add a lot of "added value" because, frankly, with what you pay they couldn't do otherwise. But you can't do these contracts and not provide added value. Because if you were just doing what you were paid to do, you couldn't represent your clients. We all understand that. So everybody who has one of these contracts is giving you more, is subsidizing the payments you make. That is a fact. Frankly, if none of them get paid for it, then we would all lump it and everyone would understand. They wouldn't be happy, but they would understand. But why should one office get its "added value" recognized with a fat check, while other offices' added value results in nothing? That is my question. It seems to me that you have to know the answer.
- 247 J. Potter Let's switch gears just a little bit. You are on a brainstorming roll, but I want throw this idea out. Why do we have two large offices in Multnomah County? Why don't we have MDI and Metro PD merge together?
- 250 Judge Jones Frankly, I don't think there is any good reason except –
- 251 Chair Ellis Conflicts?
- 252 Judge Jones Well, the consortium model is probably the best response to conflict problems. Now I have been surprised to discover in many large jurisdictions that public defender offices solve conflict problems by never looking anything up. That is the way it is done in many big cities. They just don't look it up. I'm not recommending that, but we are one of the few jurisdictions that I am aware of where the defender offices take seriously their obligation not to take conflicts, and that clearly has some expense association with it. The consortium model does respond to that. Now, I think there are other big problems with consortia because, of course, to say they are management-thin hardly comes close to describing it. They have zero management, or as close to zero as any group of people trying to get a common task done can get by with. I don't think, frankly, that is a good idea, but it clearly has some advantages with regard to conflicts.
- Multnomah County is not a rationale system, not a rationale provider system. It is entirely a question of historically accident. MDI would not exist if Jim Hennings would have been willing to do traffic cases. There it is. That is why MDI was created, to do traffic offenses which Jim's office didn't want to do. Then, over time, as cases and numbers went up, it grew into more and more misdemeanors, into juvenile cases, and by the time we wanted to get into felonies it was a mature industry. There weren't many extra cases lying around and, frankly, the state over a period of years chose to sign many contracts, which have a big advantage for the state. That is not something the state was very successful with, with Metro and to a lesser extent with MDI, simply because,

once you get to a certain size, you have some leverage in the negotiation process that the little guy doesn't have. You have two caseloads you could be gone tomorrow. Everybody understands that. And when the comment in the first draft report about not being as good as a negotiator; well, when you have no where to go and nothing to stand on, it is hard to negotiate tough. On the other hand, if you have the bulk of the cases in the jurisdiction, it is possible to negotiate with a little more leverage, and that has been the history in this jurisdiction. Things have flowed towards those who have the ability to negotiate from a tough position and away from those who have not.

- 298 Chair Ellis Just to give the other side of that. If an organization has only one purpose and one buyer for that purpose, how much leverage do you think you really have?
- 300 Judge Jones Well, it is like the union shop that has one business union. They have to get along. I mean they can strangle each other but, bottom line, they have to come to an accommodation. The large contractors are in exactly that position with you or the State Court Administrator. It wouldn't be possible to say, "Metro, we are tired of you and you are not being reasonable, so you're out of business and we are going to hire somebody else."
- 307 Chair Ellis The other side of it is, it is not very realistic for Metro to say, "We are tired of you."
- 308 Judge Jones Right. That means you have a classic contractors-state negotiation that comes down to the last minute, and finally everybody is forced to get reasonable and get on with the life. They have to live with each other, and that is how it has been over all of the years it has been going on. But right now this notion of added value as an explanation for rate disparity, how come it can't it be costed out? Why shouldn't we have a clear set of standards?
- 319 J. Potter I want to come at this one more time. Let's say that we decide that there is some value, and we talked it out and concluded there is some added value – we decide that, as Connors said, having an institutional presence makes sense or, as Schrunk said, having a defense infrastructure in a large office makes sense – then why aren't we combining these two offices? Why doesn't MDI and Metro combine? And if that were the case, would be saving money? We have two administrative processes with the two offices. Couldn't we reduce the average cost per case by doing that?
- 326 Judge Jones You would think so. But when you look at the numbers and the bigger the office, the more cost. So I guess the answer is "no," although I can't understand why that is. I mean, you would think there would be economies of scale – that if you got a 50-lawyer office, you could do a drunk-driving offense for 10 or 15 percent less than a five lawyer office. But you guys haven't achieved that. In fact, the bigger the office, the more money you pay.
- 334 C. Lazenby You have already explained why that occurs. You explained that the smaller groups don't have the leverage and the negotiations to get the true cost. So really the argument may not be that MPD is getting paid too much. The argument may be that the other contractors need to be paid more.
- 338 Judge Jones I don't disagree with that. Don't get me wrong, nobody is getting enough money to do the work you expect them to do. Really, the issue you have is how to share the pain, not how to divide up the extra cash. I wish our discussion was, "Let's divide up the money in a way we can all be happy with," but that isn't it.

What you guys are dividing up is the suffering and you are not dividing it fairly, in my opinion. That is pretty much what I have to say.

- 346 P. Ozanne Judge, I would like to follow up with on Chip asked. And maybe I just didn't hear your answer. I certainly understand all of your arguments we have to track and manage costs. And merger of the larger offices might make some sense, as I understand you. Disaggregating cost, and you might have been out of the room when we talked about this with John Connors, the reason you would do that, it seems to me, is to encourage other people to bid on the disaggregated services. There also would apparently be some competitive dynamic that would perhaps increase our cost savings. So, on the one hand, as Chip was saying, you are apparently advocating structurally for larger organizations and, on the other, you seem to be suggesting that we should move toward a competitive market model that would tend to atomize the organizational structure for our contracting system. How would you handle this if you were the administrator in our position? What is your advice in that regard?
- 364 Judge Jones Well, we can talk about the ideal system for Multnomah County. Even assuming we could agree on what it would be, and I can give you a view on that, I don't think you can get there from here, at least not in the next decade or two. In some ways, the biggest problem over time is that contracts proliferate and, up until very recently, they never went away. In each new situation, it would present a problem for the Commission or the State Court Administrator and they would respond with some new contract to solve that problem, or some side deal with an existing contractor to solve that problem. And the things just have gone unimproved might be one way to describe it
- 377 P. Ozanne Unless I am misunderstanding you, by costing out these various services and putting them out for bid we would be encouraging the formation of boutique contractors that would be saying, "We will do drug court, we will do the lobbying, we'll do such and such for less money --
- 380 Judge Jones If you can get the service. Now the institutional presence issue is an interesting one. You can't bid that out. That doesn't make any sense. The people who are there from indigent defense should be the people who are deeply involved because they are doing it everyday. But, for the life of me, I can't understand how that service fits into a budget number or why it would justify an extra \$20 a case.
- 391 J. Stevens If you can't justify it, and I think you are probably right that you can't, then doesn't the Commission have the obligation to say, "We'll take away that \$20 and hire more lawyers somewhere else where we need them more."
- 396 Judge Jones If you start with the assumption that you are spending apparently more money than you could get those same cases done elsewhere and then say, "What am I getting for that money?" Until you know for sure what that money is going to, you can't make a decision about whether it is wisely spent. And, frankly, a lot of these items don't have any demonstrable cash value. You know, "we do the big cases, we win in the Supreme Court" – every lawyer's dream, but isn't because we pay them more and, therefore, they get better people. Or is it because we have smaller caseloads, which cost more money, so the lawyers have time to do those impact cases? I can think of six different explanations for why one office would have more presence in the Supreme Court than another, and each one of them might come down to some sort of a budget issue. But you have to decide what it is. Why is it that they are in the Supreme Court more often, smaller caseloads, smarter lawyers, what is it? If paying them an extra

\$3,000 wins more cases, then I am all for it. But, frankly, there are a lot people, and I am probably going to regret saying this, in the system which no extra amount of money is going to make into a good lawyer.

422 Chair Ellis

That was pretty well phrased.

423 Judge Jones

When they get hired in a public defenders office, they have already decided that getting rich is not their life goal. They ought to get paid a decent wage and many of them don't. But I don't think that money produces better lawyers. It just produces people who can pay off their loans and feed their kids.

434 Chair Ellis

Thank you.

**COMMENTS OF JUDGE ELIZABETH WELCH
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 31-35 of the Minutes)**

441 Judge Welch

I am Elizabeth Welch and I am the Chief Family Court Judge for Multnomah County. I just have a couple of issues. They are not very dramatic and they are not very messy. The first thing I want to say is that, in the year that this change-over has occurred, as far as I know as the person who signed most of the paperwork to appoint and compensate and approve fees, and I don't have to do that anymore, it was absolutely a seamless transition. We have had no problems whatsoever with this new function, absolutely none.

I am going to talk now mainly about juvenile court, which is a very small part and on the edges of what you have been talking about while I have been sitting here. One of the advantages we have enjoyed over the years, and I have been involved in one capacity or another for 35 years back when I started in the DA's office for juvenile court and the system is so much better that it is absolutely breathtaking, one of the reasons for that is the quality of work that is being done by defense attorneys in juvenile court. We benefit mainly by the fact that juvenile court is not a place you go when you are being punished or when they shouldn't have hired you in the first place either, in the DA's office or in a defender organization. We have wonderful lawyers who stay in the system to become extremely expert and it is a very, very challenging job and very different from criminal defense. We are very grateful to the Public Defender's Office and MDI and some of the other firms that have contracts. They don't simply move people in and out, and that allows people to become very capable and very, very, effective. You can always be better, but I am very happy 99 percent of the time with the quality of representation that we see in the juvenile court. One of the things that I am hoping, as this system that you are administering gets on its way and looks at new issues and how to better do the job, the issue of conflicts is, of course, a pain in the neck for people who are trying to run an efficient system. You have to get off the case and now we have to postpone the trial and all that sort of stuff.

I don't know if all of you have an understanding of what a juvenile court case looks like. I am not talking about delinquency. That is just like the criminal model, except there is no jury and it is simpler. The dependency case model is something I should tell you a little bit about, just to make sure you understand. A dependency case is a case where the children are removed from the parents because the parents aren't very good at that job. In the typical dependency case there is one mother and typically two or three fathers for the children who we

are dealing with. And then there are the kids. These people all probably need to be represented. If you add that into the calculus of conflicts in the criminal context, you will go absolutely bonkers. MPD is appointed to represent the mother in a dependency case. They check their records and they discover that, eight years ago, they represented one of the fathers in a criminal matter. They can't take the case. It is a mess. When you talk about making law firms all into one, what that means is there are people who simply would not get represented. It would be a disaster from our standpoint to do that. Most of our conflicts are with the Metropolitan Public Defender because they have such a broad range of representation of the adults, and because they have been around for a long time.

The solution for the conflicts, of course, is an appointment list, and our appointment list is so pathetic that it is embarrassing. We rely on that because there are only X number of contractors, and we need a lawyer for the momma in a determination case and no one can represent her because of all these conflicts. So we fall back on the appointment list. Our appointment list is horrible. We can't get anyone to be on it anymore for all of the obvious reasons. We have a list that is kind of a public list and then we have people that we actually appoint off it. I am just being honest and I'm not going to name any names. But most of the lawyers on that list we have decided we are not appointing because they are not competent lawyers. They don't do enough work at the juvenile court or they are just not competent lawyers, and we are in terrible distress. We have no lawyers to help us out on these conflict situations, which are numerous.

The other thing that I want to make sure you are aware of in Multnomah County, we have a very elaborate system in juvenile court. We have many kinds of hearings that we invented. We place a lot of demands on the lawyers who represent kids and parents. Again, if the model in your head is the criminal model, I have to ask you to try and suspend that and think about a hearing that occurs the first day the case is in the system. A lawyer from one of the firms picks up a case in what we call shelter hearings. There is a second hearing, which in about 50 percent of the cases happens in about two weeks. We have a pretrial conference, a JSC or Judicial Settlement Conference, in everyone of these cases. The lawyers are expected to be prepared, to have worked with their clients and to be ready to settle the majority of these cases at that point. Then just a trickle of them go on to trial. After there is adjudication and the children are made wards of the court, there are family decision meetings. Actually, they happen before and are called by the Department of Human Services, which most lawyers feel obliged to attend, especially if their client has a shot at getting their kids rather than a hopeless case scenario. There is also a Citizen's Review Board. The demands that we place on the lawyers who are in these contract agencies is horrendous. And then we top that off by operating in two physically different locations. We have judges here and we have judges at 68th and Halsey and they have hearings back and forth during the day. We try to minimize that, but it is a pain in the neck for them and it is a pain in the neck for us because it slows us down, because we have to wait for people, because they run overtime, and all of that. The fact that we operate out of two buildings, I'm surprised Jim Hennings can hold on to some of these folks. So, what I am saying as sort of the caretaker and spokesman for the system is I want you to be aware of how hard these lawyers work. We think they are wonderful with a few minor exceptions. They are wonderful, hardworking, dedicated and of course underpaid. But mainly we want to help you find ways to compensate them better and to get us more people on that appointment list to relieve some of the strain.

There is one other subject that I just want to open up to you, but there is no obligation on your organization's part to deal with this. I am, among other

things, the Chief Probate Judge in Multnomah County. There is a problem in the probate area that one of these days is going to actually hit the world and people are finally going to recognize it. The human impact between a civil commitment, in which people have a full bore right to counsel, and the establishment of a guardianship is that a guardianship lasts forever, unless it is actually terminated by the court. There are people whose liberty is at stake, their right to chose where they live, their right to have all of the decisions about their life made for them against their will, have no right to representation in this state. What we do in Multnomah County, much to the distress of the few other probate judges that are in the state, is that we do the old style when Mr. Ellis and I were young lawyers and that is, if you were in the wrong courtroom at the wrong time, you got told that you were going to represent this person and you were not going to get paid. Because the elder law bar in this state and, in particular, in this community are such good folks, they do it. They just take the appointments and they represent the people. Most of them don't have much of a case in fighting off the guardianship, but they absolutely have no right to representation, unless of course they can hire a lawyer and pay for. But if they can't, there is no money and there is no attention being paid to this issue. I know it is not on your plate, but I'm just mentioning it. I would glad to talk about anything else you would like.

- 645 Chair Ellis Questions?
- 646 S. McCrea Do you have any suggestions about what we could do to help you in terms of your appointment list?
- 648 Judge Welch Well, again, I make the assumption that the reason people are not on the list is because the compensation isn't that good. I haven't taken a survey, but I did send a letter out about three or four years ago to domestic relationship types. They would be most obvious, although there might be other people. I said in my letter that this is good stuff; that you are representing children, you are on the side of angels. I think maybe one person responded and I think I sent out 50 letters. It is tough stuff.
- 008 Chair Ellis You indicated you had an informal or unofficial quality screen on the appointment. Do you think it would be useful to consider something more formal with criteria for inclusion on the list, or some kind of advisory committee that would screen people on the list? It is troublesome to hear people may think they are on the list, but the reality is they are not qualified and are not being used.
- 015 Judge Welch I don't know how people get on the list. I mean I know there is a process, but I just don't know exactly how it works. But there are people that have been on it forever. I shouldn't be this ignorant as to how they get on there. We have asked, and I don't know if it has gotten to you yet, it was a long time ago, to be given permission to take some people off the list and we haven't gotten an answer yet.
- 020 Chair Ellis Who did you ask?
- 021 Judge Welch Well, I asked the trial court administrator. Have you received a request, Mr. Ozanne?
- 022 P. Ozanne We are thinking about that statewide, in terms of qualifying people for appointment lists, in general. As we do that, which we are doing in Lane County as we develop a new court-appointment system there, it is a learning

experience for us. We expect that in any court, including your court, we will to apply this experience to screening qualified applicants for appointments. But I hear you saying it is not so much screening; it is finding somebody who is competent. The two would go hand-in-hand, I expect.

- 029 Judge Welch Obviously, we have to appoint the people who we have. If somebody needs a lawyer, at least somebody said this person was a lawyer. Mr. Ozanne mentioned something about the idea of people in this field should just represent parents and some lawyers should just represent kids, and maybe there is some desire on the part of the lawyers to do that. I haven't had much time to think about that. But there is one law firm that just represents children, the Juvenile Rights Project, although that is not even 100 percent; it is 97 1/2 percent. Meaning no disrespect to the Juvenile Rights Project, I think it is a dangerous idea that the system can become specialized that way. I can understand having done it myself, having appeared a little bit in juvenile court when I was in private practice, and then representing kids. First of all, anybody would rather represent the kids than the parents for obvious reasons. It would kind of be like being a prosecutor and a defender, one in the morning and one in the afternoon, because when you are representing parents – the system is a good system in my opinion the screening that DHS does is a good screening – you don't get to fall off a log and secure dismissal of cases. Most of the cases have a lot of substance to them. Some of them are a little bit marginal, so if you are representing parents you are very much in the criminal law context. Your client has committed a crime, now how do we mitigate the damages and give them the best shot at recovering their parental responsibilities and rights. And then in the afternoon, you represent a child, where you want to see absolute purity and perfection in the parental function before you want to participate in the return of the child to these always somewhat marginal situations. Obviously, it would make you crazy to have to do both of those things, and I sympathize with that. The crazy making that goes on in private practice is there for lots of us though, where we present people on eight different positions. I think it is important that, as people mature in their professions, they understand that there are two sides to issues and that the world is not made up of Donna Reeds and Robert Youngs. That is not what the world looks like and sometimes we have to make due with parents who are not perfect by a long shot. But the kids are better off with a parent, rather than disconnecting them from everyone.
- 065 Chair Ellis Metro provides both juvenile service and criminal service. I'm not sure if there is anyone else who is doing both. My question for you, from your vantage point, is that a plus with Metro, a minus, or is it neutral?
- 069 Judge Welch Well, I think it is a minus simply because of the conflicts that we all have to live with as a result. I think way over half of the conflicts are out of that firm, and I don't know how many firms serve our juvenile court.
- 075 I. Swenson Eight.
- 075 Judge Welch As an example of the virtue of having Metro, we have a program that we started here about four years ago called the Family Probation Program. It is a wonderful program. What we do is, on the first day that a dependency case hits the door, we have a person whose sole job is to do a criminal records check. This woman has contact with all the databases in the state to find out if any of the parents are involved in the system or have a history in the system. It is a wonderful program that lets us know on day one a lot more about the parents than we normally do. If the case is adjudicated in the juvenile court as a dependency case, and we know that dad is on probation in Multnomah County,

that adjudication on dad is transferred to the judge who is handling the juvenile case so we have one judge and one family, so there is continuity. Having been the pigeon who started this, the virtue of having probation violation determinations made in the context of the family chaos that is going on is absolutely fabulous, and everybody who has been involved it – some of them kicking and screaming, the DA the defense bar, the probation department – agree it is a wonderful program. One of the biggest questions we had is are we going to have two lawyers for dad, one for the PV and one for the juvenile dependency case. And the answer is sometimes we have to have two lawyers, but sometimes we don't. And when we don't have to have two lawyers is when Jim Hennings, operation involved in the case. Then we have one lawyer. We have lots of lawyers out in the community who are getting involved in this, but the consistency saves money and it is a very good system.

I guess the real point I want to make is that we have had very good luck with the very collaborative approach that we have here in Multnomah County. We have had great support in the past from the State Court Administrator being able to flex around and do some of these unusual things. Basically, there is nothing terribly wrong with our system and please don't do anything to that.

**COMMENTS OF JOHN CONNORS
AT THE SEPTEMBER 9, 2004 PDSC MEETING
(Excerpts from pages 21-26 of the Minutes)**

258 J. Connors

Well, the obvious questions for you are the cost of cases and efficiency. I wanted to address both of those. Just by way of background, I think keeping in mind the volume of work we do, the Portland office does 13,000 cases per year, which range all the way from second chair in a death penalty cases, seven murder cases, to a substantial, 60 percent, of the Measure 11 cases in the county and all of the other felony cases. Juvenile cases, the lawyers typically handle about five or six termination cases a year. We do almost all of the civil commitment cases for the whole county and we staff most of the specialty courts including STOP, which some years has been as many as 700 cases a year, with one lawyer and one team. We also have the case assignment project, which I will talk about more in a little while. It is important to see that the Portland office does 13,000 cases with a staff 40 of lawyers; a total staff of 96 people, six of whom are administrative. The studies we have done show that that is a significantly low amount for that big of a staff.

Of course I am biased, but I think in terms of a quality issue, just about any way you can measure that or anyway you can test it, I think the quality of our work has been excellent. I mentioned that an 18-month statistical study showed that about 60 percent of the charges we handle go away. More specifically, that breaks down to about 1/3 of the cases where our clients are found guilty of lesser crimes. Only about 1/3 of them are actually found guilty of the charges against them. The office historically has had about a 7 percent trial rate. We have had about a 9 or 10 percent trial rate on the Measure 11 cases, which is way above the national standards that I understand is between 1% and 3% in terms of trial rate. Obviously, we are concerned about the conflicts. About a year or a year and a half ago, we instituted a practice within the office that no one could get off a case without it being reviewed by a manager. I would say almost all of the cases we get off of are based on actual conflicts. We have worked hard and struggled with conflicts, and we are optimistic that the rules

will get changed so we are not getting off cases we don't want to get off or where witnesses or victims in cases are former clients and the lawyer that handled the case is long since gone. But it has been my experience that there are very few cases that we are getting off of, based on personality clashes or that type of issue. Judge Frantz mentioned the list of cases over 150 days old. When that study came out, we were glad to hear that only 15 of the 89 cases were ours. Again, we handle almost 60 percent of the Measure 11 cases, and again six or seven murder cases a year, so I think that is statistically significant. That is in addition to all of the anecdotal stories about some of our programs that result in drug-free babies being born to the STOP program and things like that. So you can ask me what I think about the quality, but any of standards that I have heard about being used, the quality is high and the description that it is very high to excellent is an accurate one.

So the bulk of my comments are about this efficiency question. Just to be really clear on the charge and the cost per case, I think it is important to keep in mind a couple of things. Maybe I have mentioned this in the past but because this is such an important issue and you want to be fair in terms of the cost per case and be efficient. Keep in mind our cost for the case involves the cost of the investigation. We do those 13,000 cases with 11 investigators, and that means we can investigate every misdemeanor. We don't have to go back for state funds on those seven murder cases. That is all included, and I think that is an important part of your analysis. The second thing that we have in-house, a crucial part of our legal system, is the alternative court. Part of what they do is find drug treatment programs, so that people don't come back. They get people hooked up in anger management programs. They help people find contacts for jobs, and we work closely with some of the employment offices – not only on specific cases, but on a system-wide basis. People that work on tracking these resources throughout the state have done studies on things like juvenile sex offender treatment programs. That information is available simply by people calling and asking for it. People from around the state call and use our office for that resource, not to mention some more specific things along the lines like a list of experts that we keep in our database and make available to people, like the clothing room that through donations we make available to anybody that has a client who needs to get dressed up for court, like our training sessions that have always been opened to anybody who wants to attend, and we have a library that is frequently used by lawyers outside our office.

- 341 Chair Ellis How many lawyers outside of your office are coming to the training sessions?
- 343 J. Connors Not enough. When we specifically advertise it, we typically get between four or five. Some of trial skills programs that we have put on, we have specifically invited people from other offices and have let them participate. But it is not as big a number as it should be. I think that is for a lot of good reasons and probably the main one is that people are busy.
- 347 Chair Ellis Would you share your brief bank?
- 348 J. Connors We would. I don't know of any specific requests that have come from outside recently. But I know historically we have. Part of what is happening based on the lists is a lot of documents get sent back and forth and it is sort of the same answer with respect to the training because OCDLA has so many programs in a year. I think a lot of the people outside our office rely more on them. But that is something we talked about a lot, and have talked with John Potter about. We would be glad to work with the Commission to try to get a more coordinated effort along those lines.

Getting back to the cost per case issue in the memo, I mentioned that the duty attorney calls and literally we take turns dealing with those calls and questions. Typically, I would say there are 20 a day. The expungements – there are all the people who are coming back to court after three to 10 years after their convictions, usually because they want to get a better job. We literally handle hundreds of those cases per year, in coordination with the Federal Defender's Office. That was a program started when Judge Abraham was Chief Criminal Judge about 10 years ago, and Steve Wax realized he was calling me on a pretty regular basis to coordinate records on cases. We went to Judge Abram to formalize that process. It is usually two or three cases per month and it is usually people who get charged in state court. We get appointed and get credit, but just as often, it is the behind the scenes coordination that doesn't count as a case for us. The out-of-state warrants, again probably between three and four cases a month, people calling or writing from places like Oklahoma, Georgia, Florida, those are all examples within the last month. They have been kicked off their SSI because they have an outstanding warrant. These are people who are usually very, very sick and often mentally ill. Again, this is a task that we agreed to do because we were in the best position to do it. Some cases, Judge Frantz would call and ask us to do it. Sometimes the DA would call and ask us to do it. In terms of the amount we get paid, in terms of the number of cases, it is not counted anywhere. Juvenile cases – I am pretty confident we are not the only office that does this, but there is a lot more that we do, like early expulsion hearings, if someone is looking at getting kicked out of school, like appearing with some of our child clients at Grand Jury when they have been victims of abuse. More and more we are pushed to handle aspects of family law cases, such as custody issues with respect to divorce proceedings that might be going on at the same time as a juvenile case. That is something I know Kathryn and others have tried to be fair about the payments. But the resources, as I understand it, haven't been there and that is an issue. We just try to do the right thing without it being counted as much as it needs to. Appeals – lawyers will handle appeals often because they want to protect the judge's ruling or just because they want to protect what was good law. We recommend and encourage the newer lawyers to handle appeals early on in their careers. Again, that is something that is not specifically counted toward our quota, but it something we have done. I think a fair estimate would probably be about six appeals per year, which isn't a huge number.

I think you are starting to get the message here that there is a lot more that we do than initially meets the eye. The case assignment project was a good example of this approach. I think Ann Christian was frustrated that newer judges and JC threes that didn't know who should get what case. There would often be quarrels bordering on fistfights among the contractors on who should get a case. The court really didn't have the staff to provide any real guidance on those issues. Finally, we agreed to do that for money credit, but not for case credit. It is a significant project, and it eliminates a lot of conflicts up front. I think Jim undersold our work in that department somewhat. The problem came when the DA's office changed computer systems and they could no longer get us the list of co-defendants and potential co-defendants. So we could check our computers and send out a list to the other contractors, but we still captured many, many conflicts before they are even assigned and avoided the issue of whether or not anybody has to be paid. Then, finally, Judge Frantz touched on this, but there is quite a bit of start-up work with things like the STOP court or the Community Court. Literally, when the Community Court was being started, a lawyer that was going to staff that was going to meetings in the community on a weekly basis to listen to people in the community, to hear why they thought somebody

who had left a vacant car in the neighborhood should be punished more severely than somebody who was actually charged with theft or prostitution. It is just part of the infrastructure that we provide. Part of the point I want to make is the cost per case is misleading, unless you find a way to count all these things, and I think it would be counterproductive to make us count all these different things because of all the time we would spend doing that.

- 438 Chair Ellis I was going to ask as I was listening to you whether you think we ought change the contracting method to buy these extra services on a disaggregated basis?
- 442 J. Connors No, I think if it is not broken don't break it would be my notion. But I'm just trying to give you a more complete and accurate picture of that infrastructure and some of what we have able to learn and do over the last 33 years. We have learned from our mistakes. We have had a lot of wonderful opportunities to help be part of Community Court and STOP Court and those sorts of things. I think right now our biggest practical problem is going to be the change in the federal law with respect to hourly workers and the fact that our investigators and legal assistants are now going to be limited to a 40 hour week because we can't pay overtime, and how we are going to struggle with getting the 13,000 cases done within those 40 hour limits. But that is something that we have a good start on. We are confident we can get the work done with a lot more organization and planning, which to me is more important than having us count all this other stuff. I think you should just let us deal with that issue. The ethics and flexibility that has been a hallmark of our office –
- 461 P. Ozanne May I follow up on that? John, there have been comments over time, and I am sure you have heard them too, that we should disaggregate or at least more closely track what we are paying for in the context of our duty to administer limited taxpayers' funds. And how can we be assured that we are getting some savings through economies of scale? In fact, we have listed some of the same factors in the staff report that you have mentioned as needing to be accounted for. But should these factors also be quantified in dollar terms? And at some point, aren't there presumably some offsetting savings that come from a large office with lots of cases? How can we be sure that we are getting those advantages? Is it realistic to try to determine that we are getting these advantages with an office like yours?
- 275 J. Connors I think it is a very realistic and very important. The memo was sort of the first try to capture some of that. I know, based on the meetings I have attended of the Contractors Advisory Group, that it is a whole mind-set that you are trying struggle through, in terms of how do you measure quality and how do you measure contribution. All I can say it is an important issue and that we will keep working with you and the Commission.
- 484 P. Ozanne Not only quality, because you have spoken to that, but also dollars and the sense that are we, by configurations like your office compared to others, enjoying economies of scale and getting some dollars savings. I'm trying to figure out how we can measure that, and maybe disaggregating and costing out the services provided would be one way. I'm just wondering if you have any thoughts on that.
- 496 J. Connors Well, I think it does get into the issue. We have struggled to get the work done and be everywhere we are supposed to be. The reality that Judge Frantz described is a very real reality. You know, you talk about economies of scale, and part of why we were able to deal with the BRAC crisis, and in part why we are able to work with new programs such as when Mike Schrunck gets a federal

grant to start new Community Courts, we can make our best efforts to staff these functions within those our current budget and within our current structure because we have some flexibility. You know part of that is the whole CSL case-weighting system that helps us. For example, when there aren't as many Measure 11 cases assigned in a year but there are more misdemeanors, which is currently what is happening, we can adjust. So the significance and the savings based on economies of scale are usually significant. The terms of how you actually count all that, I can say is based on things like the fact that our structure and the economies of scale allow our lawyers to do way more cases than national standards. Juvenile lawyers handle somewhere between 400 and 500 cases a year. The misdemeanor lawyers handle somewhere around 500 cases a year. The minor felony lawyers handle somewhere in the neighborhood of 350 to 400 cases a year. Major felony lawyers, people handling Measure 11 and murder cases, do significantly more. The only thing I think, it is just sort of an attitude and an ethic, that because we are a public defender office and we are non-profit organization for many years, we do more cases than we have contracted for because, come December, we don't want to say to the system, "No, we are done, we are not going to pick up cases." So those are all hard things to count and measure, but it all adds up to a picture that I think says we are very cost efficient.

Let me just – I see Judge Welch has arrived – there are just a couple of reasons why I think the structure works, and I just want to touch on those before you call Judge Welch. One is we have always hired people and trained people under the notion that being a public defender is a vocation. I will talk about that in a second. But we not only see ourselves as needing to be excellent legal technicians, we really train and hire people with good trial skills and constantly push that. We try to have our written product as legal technicians to be excellent. We don't want people to ever feel that they get second rate lawyers. We feel that we really are the experts because this is what we do all the time.

557 Chair Ellis

Is your hiring still predominately entry level lawyers, or do you do much lateral hiring?

559 J. Connors

Predominately. We do some. I guess no more than 10 percent. The other part of that is we really do hire people and train people to be counselors. They have to be able to talk to clients about problems. They have to be willing to talk to clients to encourage them to do things to get them out of this system, and that has been a really important part. We don't have a lot of rules in this office. But the ones we do have are really important things, like the client comes first. And a big component of this is that, if you really train and teach people that part of what we do, it give clients respect. And hopefully, when we give clients respect, they will develop respect for themselves and the system, society and laws. Maybe that is the reason they don't come back through the system and cost the state more money.

574 Chair Ellis

Can you give us your opinion on the issue that Judge Frantz is addressing – not conflict substitution cases, but relationship substitution cases. How much of that do you see, and how does your office handle it?

581 J. Connors

I believe that I get most of the complaints by phone and I am very confident that almost all of the written complaints get directed to me. Both Jim and I review all of the post conviction claims and any other claims along those lines. In part, because of the structure and because we have the team approach – a legal assistant and an investigator working on almost every case – we really do make it a priority for somebody in the office to see their clients within 24 hours. And

we make it a big priority, in terms of the structure, that when the client calls somebody from the team he or she should be available. So, if the lawyer is in court all day, the legal assistant should be back in the office and they can field questions from the client and the client's family, and do all the kinds of things that relieve the kind of pressure that Judge Frantz described. From my experience, there are complaints and we try to meet them both in terms of the client and their family. When Peter had his former job as part of the study on minority representation in Portland, he brought to my attention some families of clients of minorities in prison on Measure 11 cases. They weren't even necessarily our clients, but we met with them and tried to resolve their issues and garner respect for indigent defense, particularly from the black community. We have always been very, very careful to communicate to the judge that, if there is any kind of complaint, we want to know about it right away. We would much rather deal with the problem early on and consistently than to have it fester. I think we have a good record with the judges. I can tell you from at least a half a dozen uncomfortable meetings I have had with judges about complaints that they also go the other way. I think part of the system Mike Schrunk described of the system working well together is absolutely true. I'm sure there are complaints but, if we can deal with them, I think they are pretty minimal.

626 Chair Ellis

Going back to the disaggregation issue, if I can call it that. I am kind of torn listening to you and reading your report because, on the one hand, all of the things you describe are valuable and good. And they are important to do. I also think it important that Salem doesn't direct everything in terms of complete disaggregation. On the other hand, I am sure you sense that there are other defense providers who feel aggrieved at the rate disparity that exists. They may understand some of what you said, and they may have the sense that it is more that you guys have been good bargainers, and you that have been at it for a long time and history kind of unfolded and it happened that way. Is there some way that, without converting the contract to a complete disaggregation where, for example, we buy X dollars worth of community involvement and, you know, that is just taking a nonsensical example –

TAPE 3: SIDE AB

001 Chair Ellis

Is there some way to build in enough information to be able to better understand both, at the Commission level and at your compatriots' level, what this incremental cost is producing in the way of services?

003 J. Connors

Well, let me try to answer your question in the way Judge Frantz addressed it. I think she really hit the nail on the head when she said the issue is not so much whether we get paid more than anybody else. It would be easy for you to just let us divide and conquer each other. I think we all lose in that sort of situation. And the quality and leadership we provide would be severely damaged. Once you lose all those efficiencies, I don't think you get them back. It is different to be a public defender. The real issue is we do make 30 percent less than the DA's. Over the course of the first 10 years a Deputy District Attorney is going to make a \$100,000 more than one of our new lawyers. Coincidentally, that probably matches the debt load of that new lawyer. We don't have the opportunity for a client to come in and put down \$40,000 to handle a Measure 11 case because, by law, we are only allowed to do the cases we are assigned. That ethic and that notion that being a public defender is a special vocation had the entire office sign up for two weeks of unpaid leave during BRAC, and some people went more than that to get through the crisis. If you start to nickel and dime public defenders, and disrespect that notion that it is a vocation, all the kinds of efficiencies that I described, and all the leadership and the kind of

quality that the whole system comes to expect because of the way we have done business for 33 years, will be lost. You are going to lose a lot. I will think more about how you disaggregate that out and measure it. But I guess my message to you is you have got the record. I don't know how else you want us to demonstrate cost-effectiveness or quality. I think the record speaks for itself. If you want us to think more about exactly how to line item all these factors, we will. But I think it is sort of missing the boat and missing the point. There is a lot we do that you can't really quantify in terms of a dollar cost. The state has learned the hard way for many, many years. We can't afford the \$40 an hour rate. If you want to get into that mentality, it won't cover our costs anyway. That is probably not a direct answer to your question.

October 14, 2004

MEMORANDUM

TO: Public Defense Services Commission
FR: Peter Ozanne
RE: Topics for the Commission's November 19, 2004 Retreat in Portland

It looks like all or most members of the Commission will be able to attend a day-long Retreat in Portland on November 19, 2004, which will follow the Commission's afternoon meeting in Portland on November 18.

Here are some discussion topics for your consideration. I welcome your ideas.

- (1) a general OPDS progress report (tracking my "marching orders" from my 2003 employee evaluation by the Commission);
- (2) updates on other initiatives (e.g., juvenile law improvements) and OPDS office operations, most notably, employee evaluations;
- (3) potential legislation for the 2005 session;
- (4) revisions and updates to the Commission's Strategic Plan for 2005-07;
- (5) a discussion on more "intangible" Performance Measures for PDSC and OPDS (a perplexing problem that I now think we can solve by identifying management standards and best practices that ensure quality and cost-efficient lawyering and that surface as a result of our contractor site visit process -- the PLF has also offered to help -- which we can "encourage" or require contractors to adopt over time, and which we can track and regularly report to the Legislature's Audit Committee as to statewide levels of compliance);
- (6) 2005-07 budget advocacy strategies;
- (7) directions to take with regard to qualifications for court-appointment lists, especially for death penalty cases;
- (8) discussion of more systematic (or at least more formal) ways to evaluate the legal qualifications of new or old contractors at contract time;
- (9) the "administrative" versus "the market" models of contract administration and the feasibility of a more standardized statewide rate structure;
- (10) discuss the Commission's service delivery planning process, where we go next and how it can be improved.