

OPDS's Final Report to the Public Defense Services Commission on Service Delivery in Yamhill County

(January 5, 2006)

Introduction

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

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

This report presents the results of OPDS's preliminary investigation of conditions in Yamhill County's public defense delivery system. It also represents the first and third steps in PDSC's service delivery planning process.

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 provide 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 preliminary draft of this report and public comments in response to that draft and during its meetings in a county or region, PDSC will develop a Service Delivery Plan, which is set forth at the conclusion of the final version of this report. That plan may confirm the quality and cost-efficiency of the public defense delivery system and services in that region or

propose changes to improve the delivery of the region's public defense services. In either event, the Commission's Service Delivery Plans 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.

Finally, under the direction of PDSC, OPDS will implement the strategies or changes proposed in the Commission's Service Delivery Plan for that region. Any Service Delivery Plan that PDSC develops 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 contractors, and the wisdom of not trying to do everything at once, place constraints on the Commission's initial planning process in any region. PDSC's 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 establishing PDSC was based upon an approach to public defense management, widely supported by the state's judges and public defense attorneys, which separates Oregon's public defense function from the state's judicial function. Considered by most commentators and authorities across the country as a "best practice," this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, while judges remain responsible for appointing attorneys to represent eligible clients, the Commission is now responsible for the provision of competent public defense attorneys.

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

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

In December 2003, the Commission directed OPDS to form a 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 process and technical assistance projects for contractors and new standards to qualify individual attorneys across the state to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the Quality Assurance Task Force is planning site visits of the largest contractors in counties across the state, including Columbia, Jackson, Klamath, Multnomah and Umatilla Counties.

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

In accordance with its Strategic Plan for 2003-05, PDSC has developed a systematic process to address complaints over the behavior and performance of public defense contractors and individual attorneys. The Commission is also concerned about the “graying” of the public defense bar in Oregon and a potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

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

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

recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.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 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,

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).

resources, policies and practices, and that a viable balance has frequently been achieved among the available options for delivering public defense services.

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

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

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

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

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

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

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.³ As a result, PDSC expects public defender offices to share their

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

³ *Id.*

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

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

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

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

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

- 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.

OPDS's Preliminary Investigation in Yamhill County

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

PDSC's investigations of local delivery systems in counties or judicial districts across the state serve two other important functions. First, they provide useful information to public officials and other stakeholders in a local justice system about the condition and effectiveness of that system. The Commission has

discovered that “holding a mirror up” to local justice systems for all the community to see can, without any further action by the Commission, creates momentum for local reassessments and improvements. Second, the history, past practices and rumors in local justice systems can distort perceptions of current realities. PDSC’s investigations of public defense delivery systems can correct some of these local misperceptions.

On November 10, 2005 from 11:00 a.m. to 4:00 p.m., PDSC will held a public meeting in the Yamhill County Courthouse in McMinnville, Oregon. The purpose of that meeting was to (a) consider the results of OPDS’s investigation in the county as reported in a preliminary draft of this report, (b) receive testimony and comments from judges, the Commission’s local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the county’s public defense system and services, and (c) identify and analyze the issues that should be addressed in the Commission’s Service Delivery Plan for Yamhill County.

The preliminary draft of this report was intended to provide a framework to guide the Commission’s discussions about the condition of Yamhill County’s public defense system and services, and the range of policy options available to the Commission — from concluding that no changes are needed in the county to significantly restructuring the county’s delivery system. This preliminary draft also offered guidance to PDSC’s invited guests at its November 10th meeting, as well as the Commission’s contractors, public officials, justice professionals and other citizens who might have been interested in this planning process, about the kind of information and comments that would assist the Commission in improving Yamhill County’s public defense delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Yamhill County’s justice system could turn out to be the single most important factor contributing to the quality of this final version of OPDS’s report to the Commission and its Service Delivery Plan for Yamhill County. Accordingly, OPDS invited written comments from any interested public official or private citizen no later than November 7, 2005, to:

Peter Ozanne
Executive Director
Public Defense Services Commission
1320 Capital Street N.E., Suite 200
Salem, Oregon 97303

or no later than November 9 to Peter.A.Ozanne@opds.state.or.us.

A Demographic Snapshot of Yamhill County⁴

⁴ The following information was taken from Yamhill County’s official website and from data compiled by Southern Oregon University’s Southern Oregon Regional Services Institute, which is

Founded in 1843 as one of four original Oregon Counties, Yamhill County lies in the northern end of the Willamette Valley. According to its official website, the county's "718 square miles contain lush farmland, fine wineries, the world famous "Spruce Goose" and a historical heritage unsurpassed in Oregon."

Yamhill was the second of the four original districts created by the Provisional Legislature in 1843. Its boundaries were drawn to include all of the area from the Willamette River west to the Pacific Ocean and from the Yamhill River south to the California border. The Yamhill district consisted of 12,000 square miles from which twelve counties were eventually created. The county shares borders with Washington County to the north, Tillamook County to the west, Polk County to the south, and Marion and Clackamas Counties to the east.

The county was named for the original inhabitants of the area, the Yamhill Indians, a tribe of the Kalapooian family, who lived around the Yamhill River. The tribe was moved to the Grand Ronde Reservation in 1855. The earliest non-native settlers entered the area in 1814. Most were employees of the various fur companies operating in Oregon. Many of the American immigrants who came over the Oregon Trail during 1843-1844 settled in the Yamhill region, which became the agricultural center of the Willamette Valley.

With a 2003 population of 88,150, including 29,000 in McMinnville and 20,000 in Newberg, Yamhill County counts agricultural crops, lumber, education, international aviation, dental equipment, manufactured homes, pulp and paper and steel among the principal products of its commerce and industry. From 1990 to 2000, the county's population grew by 30 percent.

One-third of Yamhill County is covered with commercial timber, the economic mainstay of the western part of the county. Agriculture is the primary commercial activity in Yamhill County, however, with an agricultural labor force twice the state average. The county ranks seventh out of the Oregon's 36 counties in the annual market value of agricultural production, including wheat, barley, horticulture, and dairy farming. Yamhill County is also the center of Oregon's wine industry, with 19 wineries making up the largest concentration of wine makers producing the greatest number of award-winning wines in the state. Manufacturing jobs comprise 18 percent of the labor force, and service jobs make up about 28 percent.

Although Yamhill County is the home of Linfield College and George Fox University, the higher education level of its residents is relatively low, with 13.4 percent of its adult population holding a Bachelor's Degree and 7.2 percent with a graduate degree (compared to respective statewide averages of 16.4 percent and 8.7 percent). The county also has a relatively small proportion of professionals, scientists and managers in its workforce (6.5 percent in 2000,

contained in the Institute's [Oregon: A Statistical Overview](#) (May 2002) and [Oregon: A Demographic Profile](#) (May 2003).

compared to a state average of 8.9 percent). But 76 percent of the county's population of adults (25 years old or older) completed high school or received a GED, nearly the same as the statewide average of 78.6 percent.

In 2000, Yamhill County had one of the lowest unemployment rates in the state at 3.9 percent, compared to the statewide rate of 4.9 percent. The county also ranked 12th in per capita income among Oregon's 36 counties and had the fifth lowest percentage of residents living in poverty 9.2, compared to 11.6 percent in Oregon and 12.4 percent in the United States. Yamhill County has an average teen pregnancy rate of 16.4 per 1,000 residents (the statewide average is 16.7), but the fifth highest high school dropout rate in Oregon over the past decade.

The diversity of Yamhill County's population is slightly below average. Its non-white and Hispanic residents make up 15.7 percent of the county's population, compared to 16.5 percent for Oregon as a whole. With juveniles (aged 18 years old or younger) making up 26.9 percent of its total population, the county's "at risk" population (which tends to commit more criminal and juvenile offenses) is larger than the state's at-risk population of 24.7 percent.

In 2000, Yamhill County ranked 16th in "index crimes" among Oregon's 36 counties with a rate of 36.1 index crimes per 1,000 residents,⁵ compared to a statewide rate of 49.2 (and compared to Marion and Lane Counties' rates of 58 per 1,000 and Multnomah County's at 74.8). The public defense caseload in Yamhill County is 1.4 percent of Oregon's total caseload.

OPDS's Preliminary Findings in Yamhill County

Most public defense services in Yamhill County, as in Klamath County, are delivered under contract with PDSC by a single consortium, Yamhill County Defenders, Inc. (YCD).⁶ Incorporated in 1996 as a 501(c)(3) tax exempt, nonprofit corporation, YCD was awarded its first contract in 2002, modeling its

⁵ "Index crimes" are those crimes reported by the Oregon State Police in the Oregon Uniform Crime Reports, including murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft and arson. Oregon: A Statistical Overview at p. 122.

Index crime rates in Yamhill County have not been dropping as fast as in the state as a whole. From 1990 to 2000, the index crime rate in Yamhill County dropped by only 4 percent, while it dropped by 14 percent across the state. On the other hand, more serious crime rates of crimes against persons have been dropping faster in Yamhill County, with a decrease of 41.8 percent between 1990 and 2000 compared to the statewide decrease of 24.5 percent.

⁶ The following information is based upon YCD's answers to the "Questionnaire for Administrator of Consortium" developed by OPDS's Quality Assurance Task Force for use in its contractor site visit process (Questionnaire), YCD's Corporate Bylaws (Bylaws) and its Articles of Incorporation (Articles), all of which are attached in Appendix A.

According to YCD, attorneys outside the consortium, rather than YCD's attorneys, are appointed to represent allegedly mentally ill persons in civil commitment proceedings. Appendix A, Questionnaire, p. 4.

organizational structure and operations after Marion County's consortium, Marion County Association of Defenders, Ltd. (MCAD), apparently at the urging of the Indigent Defense Services Division (IDSD) of the State Court Administrator's Office. In particular, YCD adopted MCAD's hourly rate billing system and accounting methods.

YCD has a seven-member Board of Directors made up of consortium members and an Executive Director. Bob Suchy is currently YCD's Executive Director, having succeeded Carol Jones, who is now a Circuit Court Judge. The consortium has 24 members.

YCD's Board of Directors meets regularly throughout the year to conduct the consortium's business and "when needed, will also consider and follow-up on membership performance concerns, up to and including mentoring, monitoring, training, reprimanding or expelling a member."⁷ The Board is currently "taking into consideration the addition of a 'lay' member," pending discussions with the State Bar and other consortia about "how privacy interests are addressed."⁸

In addition to overseeing the management of the consortium,⁹ YCD expects its Executive Director to communicate effectively with its members, the courts and OPDS, mentor and train new members, identify and address problems with the conduct or performance of its attorneys, and inform members of relevant developments in the law. This half-time position is paid \$1,720 per month.¹⁰

According to YCD, the consortium originally included all of the attorneys in the county who practiced juvenile or criminal defense law in Yamhill County.¹¹ Apparently, YCD's membership still represents the vast majority of juvenile and criminal defense lawyers in the county. Among the consortium's 24 members, nine attorneys devote 75 percent or more of their time to the legal work of the consortium, 17 devote 50 percent or more of their time and only three spend as little as 20 percent of their time on consortium cases.¹² Most of YCD's need for new members appears to have been filled in the past by experienced public defense attorneys returning to the area or by additions to the law firms of existing

⁷ Id. at 1.

⁸ Id. This concern has been expressed by other consortia asked to consider outside or independent members on their boards of directors. Given the need for consortium members to preserve the privacy interests of their clients when talking among themselves, OPDS expects that YCD and other consortia should be able to address this privacy concern. After conferring with a number of consortium administrators at this year's annual Management Conference, OPDS is planning to form a Consortium Advisory Group in which administrators can share their experiences and insights for the purpose of addressing these kinds of concerns unique to consortia.

⁹ YCD's highly regarded office manager, Susan Hoyt, handles the day-to-day business operations of the consortium, including the administration of its contract with PDSC and dealings with CBS.

¹⁰ Appendix A, Questionnaire, pp.1-2.

¹¹ Id. at 2.

¹² Id. at 3. OPDS understands that eight of YCD's attorneys handle juvenile delinquency cases and four handle juvenile dependency cases.

consortium members. Additions to YCD's membership are subject to a majority vote of the Board of Directors and approval by the Presiding Judge.¹³

In response to the questionnaire provided by OPDS, YCD reports that the consortium, in close collaboration with the Circuit Court, has established or is developing a variety of practices and procedures to improve the quality of its lawyers' performance and delivery of its legal services:

. . . The presiding judge determines the level of proficiency [of YCD's new attorneys] and assigns cases appropriately. The [E]xecutive [D]irector monitors and observes the performance of [new] attorney[s] and discusses [their] performance with the court and sometimes the DA. The [E]xecutive [D]irector may recommend mentoring for individual attorneys when appropriate. Mentoring needs are determined from direct observation by the Executive Director; frequent discussions with judges about attorney performance and appropriateness. When an attorney is determined to be in "over his/her head," that attorney is counseled by the [E]xecutive [D]irector to accept cases at a lower level until sufficiently experienced. Formal Board action can result if an attorney does not respond to this informal prompt, but the judges maintain ultimate authority to assign cases commensurate with the attorney's ability.¹⁴

* * * * *

Currently there is a very strong and active collaborative environment among consortium attorneys. Newer attorneys are encouraged to seek help from the more experienced attorneys, and judges may appoint a more experienced attorney as a "second chair" when requested and appropriate. . . .

* * * * *

Adoption of a more formal mentoring system is in the development stage. The Board has authorized the Executive Director to study and propose a mentoring system and quality control measures for adoption by the [B]oard of [D]irectors. . . . A training manual is in the process of adoption and supplemental funding is necessary and has been requested for use in a mentoring program in the current contract proposal.¹⁵

¹³ Id.

¹⁴ Id. at 4.

¹⁵ Appendix A, Questionnaire, p. 5. In its responses to OPDS's questionnaire, YCD indicated that the consortium has also requested "supplemental funding" in its next contract with PDSC for CLE material, current publications from OCDLA and Westlaw. Assuming that any additional funds are available in PDSC's "maintenance-level" budget for 2005-07, OPDS would require YCD to show why (a) CLE and OCDLA materials currently acquired by its members cannot be shared among other consortium members and (b) cost-free online research services cannot be used by its members instead of Westlaw.

Cases are assigned by the court based on the court's determination of the skill level of the particular attorney. Attorneys are assigned cases at a higher level when the court feels they are competent to handle them. This is further monitored by the Executive Director through personally observing the attorney directly whenever possible; by the Presiding Judge; and by [the] Verification Specialist.¹⁶

The [E]xecutive [D]irector directly monitors attorney performance by reviewing dispositions and observing court performance. Routine informal meetings with the judges are conducted on a regular basis to obtain performance information and [ensure that] difficulties are addressed. Quality representation is perceived as one of the most important functions for the [E]xecutive [D]irector to oversee and YCD's current budget proposal includes [a] request for funding sufficient to provide adequate tools to set up, monitor, quantify, control and improve quality to the extent possible.¹⁷

YCD also described some of the things it does well and areas where improvement is needed, in part, as follows:

YCD member attorneys provide amazingly good defense services for indigent defendants given the constraints of our system and we interface very well with the court. Our structure seems to present the best features of "independent" defense and some economies of a public defender, and the result is better quality. We are enthusiastic and motivated to continue improving our effectiveness

¹⁶ Id. As in most counties, the Circuit Court in Yamhill County employs a Verification Specialist to determine whether defendants qualify for a court-appointed attorney. In addition, OPDS understands that the Verification Specialist in Yamhill County, with approximately 20 years of experience in this position, runs conflict of interest checks for YCD and assigns cases to YCD's members on a rotating basis in accordance with the attorneys' declared preferences and their qualifications to handle particular cases. As YCD observed in its responses to OPDS's questionnaire, this contribution of resources by the Circuit Court appears to reduce delays in assigning lawyers to clients and attorney withdrawals and substitutions arising from conflicts of interest:

Normally, conflicts are initially screened by Karla Fry, Court Verification Specialist. We are quite fortunate that her effort all but eliminates conflicts of the sort that would preclude an attorney from accepting the cases from the outset.

Id. at 5.

¹⁷ Id. at 7. YCD did not specify in this response to OPDS's questionnaire what the "adequate tools to . . . improve quality" would be or how much they would cost. Presumably, its current budget proposal does. In another response to OPDS's questionnaire, YCD does propose the addition of a "Staff Attorney to handle routine tasks . . . and stand-in [court] appearances . . . [, who] would also have an excellent vantage point to monitor quality control issues by handling all PV cases." Id. at 11. YCD also proposes that its Executive Director would fill this new position. Id. at 9.

as well as accommodate and endure the complex and dynamic nature of providing criminal justice in times of fiscal hardship. . . . We are becoming more and more comfortable with centralized control over some defense functions. We collaborate among ourselves very well

* * * * *

We are relatively new and are constantly evaluating ourselves and working to improve. Our interface with the juvenile system is poor and unfortunately little progress has been made in this area. Citizen Review [Board] Hearings are a crucial stage of dependency proceeding and attorneys are not attending them. We have added an experienced attorney who will handle only [j]uvenile cases as a step in rectifying this situation.

Improvement is needed in our ability to efficiently utilize investigators and to increase our effectiveness through mentoring, education, research, evaluation, and litigation support.

YCD could further improve overall responsiveness to immediate or emergency needs of the court and, in some cases, clients by having a Staff Attorney available on call.

YCD would like to see an Early Disposition Program implemented, improvement in the amount of time it takes to bring cases to trial and improvement in the case flow of those that are dismissed or end in a guilty plea.¹⁸

On October 13 and 14, 2005, John Potter, a member of the Public Defense Services Commission, and Peter Ozanne, the Commission's Executive Director, visited Yamhill County on behalf of OPDS. They met with YCD's members and with public officials and justice professionals in the county, including all four Circuit Court judges, the District Attorney and a senior member of his staff, managers of the Community Corrections Department, Juvenile Department and Sheriff's Office and members and staff of the Citizens Review Board.

OPDS was left with a general impression from its visit to Yamhill County that the county is an exceptionally agreeable place to practice criminal and juvenile law, with a spirit of cooperation and collaboration among participants in the justice system that is comparable to what the Commission found in Klamath County.¹⁹ All of the county's Circuit Court judges are clearly committed to ensuring high quality public defense services by offering feedback and advice to the attorneys who appear before them and by actively seeking out and counseling those

¹⁸ Id. at 10-11.

¹⁹ Indeed, one justice professional who met with OPDS reported that Klamath County and Yamhill County are considered by his professional peers across the state as comparable models for collaborative approaches to the administration of justice.

attorneys whose skills or work habits need improvement. The Court's Presiding Judge has long been recognized as a leader in adopting innovative court management practices and in promoting the delivery of high-quality legal services in Yamhill County's criminal and juvenile cases. Another member of the Court was a highly regarded criminal defense attorney who served as the first Executive Director of YCD. The Circuit Court also provides an unusual level of high-quality administrative support services to YCD by screening cases for conflicts-of-interest, assigning cases to the consortium's attorneys and monitoring the performance of those attorneys.

YCD and the District Attorney's Office experience the usual disagreements over charging practices, approaches to discovery and motion practice, and the use of experts and investigators.²⁰ Nevertheless, Yamhill County's District Attorney has a unique understanding and appreciation for the role of the defense based upon his experience as a criminal defense lawyer before assuming his current position and as a member of the Study Commission that led to the establishment of PDSC. As a result, most observers in the county consider the relationship between YCD and the District Attorney's Office to generally be positive, cooperative and constructive.²¹

The other justice professionals and managers in Yamhill County with whom OPDS spoke expressed a commitment to advancing their interests and viewpoints within an admittedly adversarial process and arriving at what they

²⁰ During a meeting with OPDS on October 14, Yamhill County's District Attorney complained about the practice of some criminal defense attorneys to wait until the last minute to disclose discoverable material to his office. He expressed his frustration about the apparent lack of any meaningful consequences for this violation of the spirit, if not the letter, of Oregon's discovery statutes.

The District Attorney also expressed his opinion that YCD's attorneys use investigators in too many less serious criminal cases in which the costs of professional investigators are not justified. In Yamhill County, like Marion County, the consortium's Executive Director reviews and approves all non-routine expenses requested by consortium attorneys, including expenses for investigators. In order to address any problems regarding the use of non-routine expenses effectively and without delay, OPDS urges local prosecutors, or anyone else concerned with specific expenditures for investigative services or other non-routine expenses, to report their concerns promptly to the Executive Directors of YCD or MCAD or the Director of the Lane County Public Defender's Office in the three counties where non-routine expenses are administered locally, and directly to OPDS in all other counties in the state.

²¹ Several observers pointed to one particular area of tension between Yamhill County's criminal defense bar and the District Attorney's Office. Apparently, the District Attorney has been especially committed to a policy of aggressively prosecuting "quality-of-life" crimes in the county in order to promote the growth of healthy and safe neighborhoods. See e.g., George L. Kelling and Catherine M. Coles, Fixing Broken Windows : Restoring Order And Reducing Crime In Our Communities (The Free Press, New York 1996). This policy may lead to charging practices that focus more aggressively on relatively low-level offenses and, as a result, limit the scope and effectiveness of Early Disposition Programs. While some people with whom OPDS spoke supported this policy, others predicted its demise as justice resources continue to shrink and rates of serious person crimes continue to increase in Yamhill County.

viewed as just results, but without sacrificing their personal and working relationships with other justice professionals, including YCD's attorneys. Although they consistently reported that a few of YCD's attorneys are difficult to work with and that the skill levels of the consortium's lawyers vary considerably, these observers generally gave YCD high marks for the legal skills of its lawyers and the lawyers' commitment to the interests of their clients.

The Circuit Court's judges, as well as the members of YCD, concurred in this positive assessment of the consortium's lawyers and legal services, crediting good fortune, the high quality of law practice in the county and the judiciary's deep commitment and active engagement in day-to-day efforts to ensure quality lawyering in the county. The Circuit Court also complemented YCD and its Executive Director for their commitment and support for innovative programs in the county, like Drug Court and a new mental health court, which is referred to as Case Coordinated Services currently under development. The judges, however, recognized the need for more formal training and mentoring programs for YCD's new or underperforming lawyers, expressing confidence the members of the consortium and the private bar would step forward to serve as the volunteer trainers and mentors in such programs.

1. YCD's management structure should be reconsidered. In addition to being the only PDSS contractor, other than MCAD, which is compensated on an hourly basis,²² YCD is unique among consortia in the state in terms of its organizational structure and operations. Rather than a consortium that manages all of its operations and the work of its members internally, YCD has many features of a court appointment list, albeit a well-managed one. While it appears from YCD's responses to OPDS's questionnaire that some of these features have changed or are in the process of changing, the Circuit Court in Yamhill County has, over the years, apparently directly managed or substantially controlled the admission and promotion of attorneys in YCD, the selection of its Executive Director,²³ the assignment of cases to YCD's attorneys, the monitoring and evaluation of the conduct and performance of those attorneys and their removal from the consortium. YCD's former Executive Director confirmed that all of the lawyers who practiced criminal and juvenile law in Yamhill County were originally admitted as members of YCD when the consortium was first formed. She also noted that YCD's members were free to leave and return to the consortium without satisfying internal admission or qualification standards, as long as they satisfied the qualification standards of the State Court Administrator's Office and the Circuit Court. While the former Executive Director was available to mentor consortium attorneys informally, YCD has historically had no formal quality assurance programs of its own. In effect, it appears to OPDS that YCD has been managed externally by the court during most of its existence, rather than

²² See the discussion below regarding YCD's hourly rate system.

²³ YCD's responses to OPDS's questionnaire indicated that its first Executive Director "was selected by vote of the members of YCD with the advice and consent of [the Presiding Judge]." Appendix A. Questionnaire, p. 2.

internally by the consortium's administrators or Board of Directors. As evidence that aspects of this management structure still exist, several justice professionals in Yamhill County with whom OPDS spoke had no idea who at YCD was in a position to receive complaints and resolve problems on behalf of the consortium. They were unaware of the identity of YCD's Directors or its Executive Director.²⁴

In light of the responses of YCD to OPDS's questionnaire, it seems clear to OPDS that YCD's Executive Director is personally committed to assuming more responsibility for managing the conduct and performance of the consortium's members and the quality of its legal services by developing internal quality assurance programs and procedures. Many, if not most, of those programs and procedures, however, have not yet been implemented. Although OPDS concluded from its meeting with the county's Circuit Court judges that there is judicial support for these measures, OPDS was not able to determine whether or not all of YCD's members support them.

Because OPDS has concluded from its visit to Yamhill County that the quality of the legal services delivered by YCD is generally quite good (with the exception of the specific issues outlined below), and because OPDS has not received serious complaints about the general quality of YCD's legal services from key participants in Yamhill County's justice system, the prospect of changing the consortium's current organizational structure and operations raises a question for PDSC of determining the right balance among important policies or principles. On the one hand, the Circuit Court's active support and engagement in efforts to ensure quality public defense services in Yamhill County, the county's unique culture of collaboration and the generally good quality of YCD's legal services suggest that the Commission should honor its commitment to respecting the unique cultures and effective ways of doing business in each of Oregon's 36 counties and, in this case, follow the admonition, "If it ain't broke, don't fix it!"

On the other hand, the first principle of the American Bar Association's "Ten Principles of a Public Defense System," which is reflected in Oregon's establishment of a Public Defense Services Commission, suggests that the Commission should ask YCD to assume more direct responsibility for managing the conduct and performance of its members and the quality of its legal services. That principle states: "[t]he public defense function, including the selection, funding, and payment of defense counsel [should be] independent."²⁵ The ABA explains its rationale for this principle as follows:

²⁴ In fairness, the current Executive Director, Bob Suchy, has only held the position since September 1, 2004. Furthermore, other observers, including judges, complimented Mr. Suchy on his responsiveness and his ability to work with other justice agencies and professionals to resolve problems.

²⁵ See also, the ABA's tenth principle:

- 10. Defense counsel [should be] supervised and systematically reviewed for quality and efficiency according to national and locally adopted standards.** The defender office (both professional and support staff),

The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contractor systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.

²⁶

.....

assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.

²⁶ *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings (ABA Standing Committee on Legal Aid and Indigent Defendants, December 2004), Appendix B, p. 48. Fortunately, thanks to a judicial tradition of respect for an independent defense function in Yamhill County and across the state, as well as support for the establishment of PDSC and OPDS, Oregon has not encountered the kinds of problems that the ABA's Standing Committee found and reported in *Gideon's Broken Promise*:

Judges and elected officials often exercise undue influence over indigent defense attorneys, threatening the professional independence of the defense function. In many localities, the selection and payment of counsel is still under the control of judges or other elected officials instead of an independent authority as recommended by national standards. Accordingly, lawyers must depend on judges to approve their compensation claims, as well as requests for expert and investigative services. Attorneys may be removed from court-appointed lists if they apply for fees considered by judges to be too high, creating a disincentive to spend adequate time on a case. In some places, elected judges award court appointments as favors to attorneys who support their campaigns for re-election. Sometimes, county officials respond to requests for modifications in contracts for indigent defense by threatening to terminate the current contract and award a new one to the lowest bidder.

Id. at 39 (emphasis in the original).

The National Legal Aid and Defender Association (NLADA), in collaboration with the U.S. Department of Justice's National Institute of Justice, has also developed a set of principles for the delivery of public defense services, including a goal "[t]o insure that the representation of clients is of high quality." To advance that goal, NLADA adopted as one of its objective that "[r]epresentaion on behalf of clients should remain free from improper judicial control," including, in relevant part, the following "criteria for compliance:"

- Staff recruitment and selection is (sic) made independent of judicial influence/interests.
- Staff retention and promotion are independent of judicial influence/interests
- Case assignment is not subject to judicial control.
- Defender office operational decisions are made independent of judicial control.

By citing the ABA's principle of independence of the public defense function, OPDS is not suggesting that the Yamhill County Circuit Court's administrative support of YCD's operations, the Court's critical views and input regarding the performance of YCD's lawyers, the judges' commendable efforts to improve the skills and performance of lawyers appearing in their courtrooms, or the close working relationship between the Court and YCD should in any way be discouraged. OPDS is suggesting, however, that PDSC, while encouraging these positive features of the collaboration between the Circuit Court and YCD, should consider the following advantages to the public defense system in Yamhill County and across the state of asking YCD to assume greater responsibility for managing the conduct and performance of its members and the quality of its legal services:

1. As the state agency responsible by statute for providing quality, cost-efficient public defense services in Oregon, the Commission has the authority and ability to hold consortia like YCD, rather than the courts, accountable for the delivery of those services;
2. By holding contractors like YCD primarily responsible for the admission, evaluation and discipline of its members, contractors are more likely to develop and implement effective and long-lasting programs and practices that promote the quality and cost-efficiency of public defense services in counties across the state;
3. If consortia like YCD develop and implement effective quality assurance programs and practices, problems in the conduct and performance of its attorneys can be addressed before the courts must resort to remedial or disciplinary action against individual lawyers and the general quality of Oregon's public defense services is more likely to improve as a result;
4. Because membership on Circuit Courts changes over time and the views of judges about their role in evaluating and managing the performance of lawyers vary, consortia like YCD should develop its own quality assurance "infrastructure" in order to promote the consistent, long-term quality of public defense services in the state.

2. YCD's operations provide PDSC with an opportunity to consider the merits of hourly contract rates. As the Commission is well aware, YCD is one of two consortia in the state that is compensated for its legal services on an hourly basis. The origins of this feature of YCD's operations are somewhat unclear.

-
- Continuity and stability of defender services are reasonably insulated from judicial change in the community.

Evaluation Design for Public Defender Offices (Law Enforcement Assistance Administration, October 1977). pp. I-10, I- 5-16.

Whether YCD's adoption of an hourly rate and MCAD's accounting system were encouraged by outside sources or eagerly sought by the founders of YCD, it is now clear that the members of YCD embrace this feature with enthusiasm and conviction.

PDSC is also well aware of the principal arguments in favor of hourly rate: (1) payment by the hour compensates attorneys for the work actually required to competently represent clients in actual cases, as opposed to case rates that treat classes of cases the same and encourage attorneys to "triage" cases by settling cases that should be fully litigated; and (2) an hourly rate system results in clients viewing their court-appointed counsel as "real lawyers" who will put in as much work as necessary to competently represent them, as opposed to lawyers working under case rate contracts whom clients may view as part of "the system" and willing to settle their cases simply to keep that system running. In addition, YCD and MCAD frequently point out that their legal services are cheaper on a per case basis than the average flat rate per case, either for the purpose of urging PDSC to retain their systems because they are cheaper or for the purpose of urging PDSC to pay them more because they are too cheap.

The Commission has also heard the arguments against hourly rates. They are often made by paying clients who complain about private attorneys racking up "billable hours" or letting "the meter run" to generate more revenue, or by prosecutors who believe that hourly rates in criminal cases result in too many frivolous motions, unnecessary trials and harsher sentences for defendants who are advised to reject reasonable settlement offers.²⁷ In addition, CBS has pointed out to the Commission that its prevailing contract case rate system encourages the development of skills and efficiencies in handling cases in high-volume public defense practices, and that the uniform adoption of case rates across the state will promote PDSC's policy of increasing the consistency of contract rates among similarly situated contractors.

OPDS offers three observations in response to the principal arguments in favor of hourly rates. First, it is unrealistic, if not unfair, to expect lawyers in YCD and MCAD to perform the same or comparable legal services as other contractors in the state at persistently lower rates of compensation over time -- without a loss in quality. In addition to basic fairness, OPDS believes that a presumption underlying the Commission's policy directing CBS to seek consistency in rates across the state is "you get what you pay for." In other words, lower rates for the same legal services will, over time, reduce the quality of those services.

Second, proponents of hourly rates argue that they promote clients' trust and confidence in their lawyers. OPDS appreciates the importance of promoting good client relationships. Nevertheless, OPDS is troubled by the implications that an express or implied recognition of this argument by PDSC would have for

²⁷ During a meeting with OPDS on October 14th, Yamhill County's District Attorney voiced these concerns.

the rest of Oregon's public defense system. Implicit in the argument that hourly rates allow its lawyers to work harder for their clients is the assertion that other lawyers in the state who are paid on a case rate basis are less diligent or competent. OPDS and PDSC knows this assertion is not true, based on their own assessments of the operations of contractors paid by case rates, whose services and operations are among the highest quality and most cost-efficient in the state.²⁸

Finally, arguments about contract rates create a false dichotomy between hourly rates and case rates. Whether public defense clients appreciate it or not, under any system of attorney compensation, the person or entity paying the bill will ask two questions: "What will this case cost me?" and "What is the 'going rate' for this type of case?" Whether the bill is being paid by a private person or by PDSC, no one will allow "the meter to run" without limits. That is why budgets and "change orders" have entered the world of private law practice, and why OPDS and CBS will always have a method to manage costs by establishing a prevailing or going rate in ordinary cases.²⁹

3. YCD's delivery of public defense services in juvenile cases calls for further inquiry. Based on reports by OPDS and at least two task forces of the Oregon State Bar, PDSC has concluded that the quality of juvenile law practice across the state varies to an unacceptable extent and, therefore, is in need of special attention. As a result, the Commission plans to devote at least two meetings and a separate service delivery planning process in 2006 to identifying programs and strategies to improve the quality of public defense services in juvenile delinquency and dependency cases in Oregon. In the mean time, OPDS and PDSC have increased their focus on these services in the course of developing other service delivery plans.

Based upon its visit to Yamhill County in October and YCD's responses to its questionnaire, OPDS is uncertain about where it might rank Yamhill County in terms of the quality of its public defense services in juvenile cases. OPDS is heartened by the fact that the Circuit Court judges in the county have a deep commitment to their juvenile court and to ensuring the quality of representation by the lawyers who appear in the court's delinquency and dependency cases. The judges encourage, support and rely upon the work of CASAs and the Citizens Review Board. The county's Presiding Judge has also been an active participant in the joint efforts of the Commission and the Oregon Judicial Department's Juvenile Court Improvement Project (JCIP) to establish a "Juvenile Training Academy" curriculum that may become mandatory for all juvenile

²⁸ See also, Chapter 5, Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Commitment Cases, Report of the Oregon State Bar's Indigent Defense Task Force II (September 25, 1996); The Spangenberg Group, "Assessment of the Oregon Adult Criminal Indigent Defense System (March 1996), pp. 84-96.

²⁹ On the other hand, CBS regularly grants attorney requests for additional credit in extraordinary cases under PDSC's case rate contracts and will continue to do so in the future.

practitioners and to offering a recent, highly successful continuing legal education program in Eugene, “Essentials of Juvenile Court Practice.” Most importantly, the Circuit Court’s judges expressed their opinion to OPDS that the quality of YCD’s representation in juvenile cases is good to excellent. And to improve those services even more, the Presiding Judge has collaborated with YCD to identify a lawyer in the consortium who specializes in juvenile law to serve as a liaison with other parts of the juvenile justice system, particularly in dependency cases.

In contrast to these favorable reports from the Court, OPDS received some critical reports from others regarding the quality of YCD’s juvenile representation, including from YCD itself.³⁰ During OPDS’s meeting with representatives of the county’s Juvenile Department and the Deputy District Attorney assigned to handle delinquency cases for the state, they reported that overall quality of YCD’s representation in delinquency cases was good. But they also observed enough instances of lawyers from YCD appearing in delinquency case who were unfamiliar with the relevant law and procedure to suggest that the consortium needed stronger programs to train and mentor some of its juvenile lawyers. On a related matter, these observers also reported instances in which the juvenile court appointed lawyers for minor delinquency cases in which they believed an attorney was unnecessary.³¹

Like many counties across the state, Yamhill County has a Citizens Review Board (CRB) that feels ignored by public defense lawyers, compared to the support and attention it receives from the Circuit Court. The staff and two Board members with whom OPDS spoke recognized the demands on YCD’s lawyers and the conflicts between CRB hearings and the Court’s calendar, which frequently prevent these lawyers from attending their hearings. They also praised the skill of a few YCD lawyers who have attended CRB hearings in the past. In addition to believing that more of YCD’s lawyers should attend the meetings in the interests of their parent or child clients, these CRB representatives have observed instances when YCD’s lawyers attended the Board’s hearings, but knew so little about the CRB and its processes that they were incapable of protecting or promoting their clients’ interests.

A recent report by JCIP entitled “Child Abuse and Neglect Case Processing in Oregon’s Courts: 2003-2004” contains findings that also suggest the need for further inquiry into the quality of YCD’s legal services in juvenile dependency cases.³² As part of that report, a survey by JCIP of the average length of dependency proceedings in counties across the state reveals that the length of those proceedings in Yamhill County are substantially below average. That

³⁰ See page 16, above.

³¹ OPDS has heard the opposite criticism from some members of the defense bar, however: that the juvenile court fails to appoint counsel in cases where an attorney is necessary.

³² This report is available online at www.ojd.state.or.us/jcip/index.htm.

survey reports the length in minutes of the statewide average and Yamhill County hearings for each dependency proceeding as follows:³³

<u>Proceeding</u>	<u>Statewide Average</u>	<u>Yamhill County</u>
Shelter	19	12
Jurisdiction	18	6
Trial	112	32
Disposition	23	6
Permanency	24	7
Review	20	8

There may be a number of explanations for the relatively short length of the proceedings in Yamhill County’s dependency cases. This data on its face, however, raises questions about the nature and extent of YCD’s advocacy on behalf of children and parents in these cases.

Finally, in its responses to OPDS’s questionnaire, YCD stated that “[o]ur interface with the juvenile system is poor and unfortunately little progress has been made in that area.”³⁴ Citing its lawyers’ failure to attend CRB hearings, YCD reported that it has added an experienced juvenile attorney to the consortium “as a step in rectifying this situation.”³⁵ The Commission’s November 10th meeting was designed to provide an opportunity for YCD to explain how this situation has improved and whether the consortium believes other steps must be taken to improve the quality of its juvenile defense services. The meeting also provided an opportunity for others to offer their assessments of the quality of public defense services in Yamhill County’s juvenile justice system.

PDSC’s November 10, 2005 Meeting in Yamhill County

PDSC welcomed Presiding Circuit Court Judge John Collins as its first guest presenter at the Commission’s November 10th meeting in McMinnville. Judge Collins first observed that the public defense services delivered by YCD in Yamhill County were generally very good and that the Court’s method of assigning cases to defense counsel and tracking conflicts of interest has ensured the timely and efficient appointment of public defense counsel. He also described the current delivery system in which YCD decides who will become members of the consortium and the Presiding Judge decides who is qualified to appear on the Court’s appointment lists. Judge Collins believes that this appointment system should be preserved because the Court’s involvement

³³ Child Abuse and Neglect Case Processing in Oregon’s Courts: 2003-2004 Assessment, A Report of the Oregon Judicial Department’s Juvenile Court Improvement Project (October 2004), Appendix A, p. 168.

³⁴ Appendix A, Questionnaire, p. 10

³⁵ Id.

ensures the continuing quality of public defense services in Yamhill County. Karla Fry, who has served for 21 years as the county's Verification Specialist, described the Court's method of assigning cases and tracking conflicts of interest in more detail. Judge Collins reported that YCD has overcome its previous resistance to the county's Early Disposition Program and is now participating in the program more effectively. He also complimented YCD on its commitment to providing first-rate services in Drug Court and noted general improvement in the quality of the consortium's juvenile representation. The consortium needs to improve its communication and services to the CRB and has agreed to designate a team leader to serve as a liaison and mentor for lawyers in juvenile dependency cases. Judge Collins has encouraged the attendance of YCD's attorneys at CLE programs on juvenile law and has recently recruited a sufficient number of YCD's attorneys to address a shortage of competent attorneys in dependency cases. He observed that YCD needs to develop more effective training, mentoring and performance evaluation programs. Judge Collins also expressed his support of the consortium's current compensation system based on hourly contract rates on the grounds that it encourages the necessary level of dedication and performance by attorneys in individual cases and promotes the attorneys' credibility with their clients.

Circuit Court Judge Carol Jones, who served as the first Executive Director of YCD, was the Commission's next guest presenter. Judge Jones expressed her agreement with Judge Collin's assessment of the legal services provided by YCD and elaborated on the advantages of the consortium's compensation system based upon hourly contract rates. She also described how and why the consortium was formed and explained why major changes in YCD's organizational structure and operations were unnecessary. Judge Jones did agree, however, that the consortium needs to develop more effective training, mentoring and evaluation programs, and that YCD's attorneys must be more responsive to the needs of their juvenile clients and the juvenile court.

Ryan Vogt and Roberta Charlton appeared on behalf of the Department of Human Services to provide their perspectives on the quality of public defense services in juvenile dependency cases. Although YCD provides a substantial number of able lawyers to handle dependency cases, the turnover rate in the consortium's juvenile dependency practice is high, with the best attorneys leaving this practice because of low pay and large caseloads, resulting in inexperienced attorneys handling more cases than they should. Mr. Vogt also noted the strong support and commitment of the Circuit Court to improving the quality of juvenile law practice and Judge Collin's efforts, in collaboration with YCD, to develop new practices and procedures to improve juvenile law practice in the county. Ms. Charlton related her professional experience with the juvenile consortium in Marion County and expressed the view that juvenile practice in Yamhill County would be greatly improved by the kind of professional experience, specialization and commitment offered by Marion County's Juvenile Advocacy Consortium. Mr.

Vogt agreed with this conclusion based upon his experience with a specialized juvenile consortium in Lane County.

Melissa Wade, an employee of the Oregon Judicial Department and staff to the Yamhill County Citizens Review Board, appeared before the Commission to report perceptions of staff and the Board's members regarding the quality of public defense practice before the CRB, which was similar in substance to the information conveyed to the Commission by the Preliminary Draft of this report. In addition to the infrequent appearance of YCD members before the CRB on behalf of their clients, Ms. Wade reported that most of the attorneys who have appeared recently failed to understand the CRB's processes or how they can advance the interests of their clients. She emphasized the strong support that the CRB receives from the Circuit Court and expressed optimism that, with the Court's support, the CRB and YCD can improve their lines of communication and increase a mutual understanding of their respective roles and challenges. One option would be to develop a training program that informed CRB members of the roles and demands facing public defense attorneys and informed YCD's juvenile law practitioners about the CRB's purpose and process and how to advance the interests of their clients before the Board.

District Attorney Brad Berry was the next guest presenter. He noted that justice officials and professionals in Yamhill County work together collaboratively and effectively, and that his office and YCD have always had a productive working relationship, whether the issues between them involve individual criminal cases and court programs like Drug Court or the kind of broad policy questions addressed by the Local Public Safety Coordinating Council. Any complaints that his office has had regarding the conduct or performance of YCD's lawyers, however, have been taken to the Presiding Judge, rather than to the consortium's management. Mr. Berry had two specific concerns about YCD's operations and law practice. First, his deputies have observed the "churning" of some cases, which should have been resolved without litigation, but in which YCD's lawyers filed unnecessary motions or proceeded to trial – apparently to generate more revenue under the consortium's hourly contract rate system. Mr. Berry wondered if some kind of "hybrid" billing system could be developed that compensates lawyers for work actually performed in most cases justifying that work, but places a cap on compensation for most "run-of-the-mill" cases. Second, his deputies have observed defense investigators sitting through the entire length of trials in relatively straightforward cases, which did not appear to call for the full-time assistance of an investigator. Mr. Berry wondered whether reasonable limitations on this practice have been or could be developed by PDSC or its contractors, and whether clients or lower-paid assistants could perform whatever functions these investigators may be serving for defense counsel in some of these trials.

Tim Loewen, the Director of Yamhill County's Juvenile Department, and Debra Markham, the Deputy District Attorney in charge of prosecuting juvenile

delinquency cases in the county, addressed the quality of YCD's defense services in juvenile delinquency cases. Mr. Loewen believes that the consortium is generally working well and is providing competent legal services. His observations were based primarily on a recent survey he conducted of the probation officers in his Department. These probation officers report that YCD's attorneys frequently fail to contact their clients prior to their first appearances. They also reported that a significant number of those lawyers are inexperienced and lack sufficient substantive knowledge to protect the interests of their clients. On the other hand, most of YCD's attorneys work cooperatively with the Juvenile Department's staff in attempting to reach reasonable resolutions in most delinquency cases. When Mr. Loewen has had a problem with a YCD lawyer in the past, he has contacted that attorney directly to resolve the problem, rather than the consortium's management. He believes that YCD's establishment of formal mentoring and training programs or the establishment of a statewide "training academy" should be a high priority. Debra Markham concurred in the observations of Mr. Loewen and his staff about the general quality of YCD's legal services in delinquency cases, problems with the turnover rate of the consortium's attorneys and their lack of experience, the need for internal mentoring and training programs or a juvenile training academy, and that more of the consortium's attorneys should consider specializing in juvenile law practice. Ms. Markham emphasized that juvenile law practice is increasingly becoming a uniquely demanding specialty, and she sees too many defense attorneys approaching delinquency cases as if they were criminal cases. She believes that early contacts and regular communication with juvenile clients is even more important than in criminal cases. Ms. Markham sees too many cases where attorneys fail to take the time or make the effort to relate to their clients and understand their needs.

The day's presentations to the Commission concluded with remarks by representatives of YCD, including Paula Lawrence, a consortium member and Chair of its Board of Directors, Bob Suchy, the Executive Director of YCD and Susan Hoyt, the consortium's administrator. Ms. Lawrence related some of the history behind the formation of YCD and the state of private law practice in Yamhill County, explained the organization's original purposes and goals, and described some of the efforts YCD has undertaken over time to manage itself and improve its services. Although Ms. Lawrence emphasized that YCD's Board and the consortium's members are open to adopting improvements in its operations and working with the Commission, they are uncertain about the feasibility of some of the programs and changes that PDSC has recommended elsewhere. For example, YCD has trouble understanding how it would be possible to include outside directors, who are not consortium members, on its Board without disclosing confidences and secrets of consortium clients in the course of Board proceedings. Moreover, based on her experience as a prosecutor and defense attorney in other counties, she believes that PDSC's prevailing per case contract rates encourage shortcuts in handling cases, too many plea agreements and substandard performance by defense attorneys. Ms.

Lawrence and the other members of YCD enthusiastically support the consortium's current hourly rate structure because it encourages performing the amount of legal work necessary to protect the interests of clients and handle their cases competently, and because it promotes clients' trust in the dedication and commitment of YCD's attorneys to protecting their rights and advancing their interests. Bob Suchy noted that he has been YCD's Executive Director for a relatively short time, but believes he has the support of all of his members and has established effective working relationships with the District Court, the District Attorney's Office and other key stakeholders in Yamhill County's criminal justice system. Mr. Suchy recognizes that he lacks experience in juvenile law practice and that YCD needs to strengthen its practice in this area. He believes that the greater attention he intends to devote to this practice area and the recent establishment of a "team leader" for juvenile dependency cases should lead to necessary improvements. Mr. Suchy described the consortium's database and the methods he uses to track cases and monitor the performance of YCD's attorneys. He also expressed his commitment and the commitment of his members to working cooperatively with the Commission and OPDS in order to improve the consortium's management practices and develop stronger internal programs for training, mentoring and evaluating its attorneys. While acknowledging the difficulty of determining what proportion of the caseloads of YCD's attorneys are made up of consortium cases, Mr. Suchy indicated that a majority of YCD's attorneys are specialists in criminal and juvenile law and devote most of their time to handling consortium cases. Susan Hoyt described some details of YCD's administrative processes and billing practices, pointed to some reasons beyond the control of the consortium for consortium attorneys' delays in contacting juvenile clients, and explained that a principal reason for establishing YCD was preservation of the independence and autonomy of the attorneys in Yamhill County's criminal and juvenile defense bar.

A Service Delivery Plan for Yamhill County

For their hospitality and cooperation throughout this service delivery planning process, PDSC wishes to express its appreciation to the judges and staff of the Yamhill County Circuit Court, the District Attorney, the County's Juvenile, Community Corrections and Sheriff's Departments, the staff and members of the local Citizens Review Board, the local office of the State Department of Human Services, YCD and the other participants in OPDS's initial investigations and the Commission's November 10th meeting in McMinnville.

PDSC incorporates in this Service Delivery Plan as its factual bases for the recommendations that follow: (a) YCD's responses to OPDS's questionnaire, which are attached as Appendix A, (b) the information that OPDS received during its visit to Yamhill County on October 13 and 14, 2005 and reported to PDSC in the Preliminary Draft of this report, and (c) the presentations and comments to the Commission at its November 10th meeting, which are summarized above.

Based upon these factual bases and the Commission's discussions and deliberations during and after its November 10th meeting, PDSC adopts the following four components of a Service Delivery Plan for Yamhill County:

1. YCD must assume greater responsibility for managing the performance and conduct of its members and for ensuring the quality of its legal services. PDSC agrees with OPDS's observation in this report that YCD has many features of a well-managed court appointment list, rather than a consortium. The Commission also agrees that the most important issue facing Yamhill County's public defense system is YCD's lack of internal practices and procedures necessary to manage the performance and conduct of its members, including programs to train, mentor and update the skills of the consortium's lawyers and systematic methods to identify and remedy problems in the performance and conduct of its lawyers.

PDSC concludes that there are no obstacles in Yamhill County external to YCD that would prevent the consortium from developing these important aspects of an effective consortium. Although the Circuit Court has historically been active in overseeing many aspects of YCD's operations, the Commission detects no resistance on the part of the Court to the consortium's assumption of greater responsibility for managing the performance and conduct of its lawyers and for the quality of its legal services. The Commission also finds that YCD's Executive Director is personally committed to assuming more management responsibilities and to developing internal quality assurance programs and procedures, and that the consortium's Board of Directors is apparently open to such changes. Therefore, PDSC requests YCD's Board of Directors and its Executive Director to report back to the Commission no later than September 1, 2006 regarding the steps they have taken, or are proposing to take, to assume greater responsibility for managing the performance and conduct of its lawyers and for ensuring the quality of its legal services.³⁶

The Commission emphasizes that, while it endorses the best practices formulated by the ABA and NLADA concerning the allocation of responsibilities between courts and public defense administrators like PDSC for overseeing court-appointed attorneys, which are cited earlier in

³⁶ PDSC remains convinced that YCD, like any other consortium, will benefit from the policy guidance, business expertise and local community support that can result from the addition of one or more outside members to its Board of Directors. The Commission does not understand why this change would present a unique risk of disclosing confidences and secrets of a consortium's clients. The Commission assumes that, in many if not most cases, board members who are members of a consortium cannot ethically discuss the details of their cases at their meetings due to conflicts of interest among individual consortium members. In any event, a board's meeting agendas can be structured in a way that permits outside board members to be excused in appropriate circumstances.

this report,³⁷ it does not intend to discourage the close working relationship between the Circuit Court and YCD, including the Court's current administrative support of YCD's operations, its regular input regarding the performance of YCD's lawyers and the commendable efforts of individual judges to encourage improvement in the skills and performance of lawyers who appear in their courtrooms. Instead, PDSC simply believes that the assumption of responsibility by consortia like YCD for the management of their members and quality assurance programs (a) enhances the Commission's ability to hold its contractors responsible for the quality of their services and thereby manage the state's public defense system more effectively, (b) increases the likelihood of the development of more systematic and effective quality assurance programs for consortia (c) promotes the prevention and early resolution of problems involving the performance and conduct of consortium attorneys, and (d) ensures that quality assurance programs affecting consortium attorneys will be long-lasting and administered consistently.³⁸

2. At this time, PDSC will not request YCD to reconsider its compensation and billing systems based upon hourly contract rates, but the Commission may request YCD to do so in the future. PDSC notes that Yamhill County's Circuit Court judges, as well as all of YCD's members, are enthusiastic supporters of the consortium's current hourly contract rates and its resulting compensation and billing systems. While the Commission understands and respects these viewpoints, it has a different perspective as the administrator of Oregon's entire public defense system. First, PDSC has failed to detect any less exertion of efforts or commitment to the rights and interests of public defense clients among the majority of attorneys in the state who operate under per case contract rates, in comparison to the efforts and commitment of YCD's or MCAD's lawyers who operate under hourly contract rates. Second, the chance of abuse under either system – for per case rates, excessive plea-bargaining, for hourly rates, over billing – appear to the Commission to be roughly similar and call for the same level of management oversight to prevent abuse. Third, in PDSC's view, any advantage of hourly rates to individual attorneys in terms of gaining the trust and confidence of their clients is outweighed by (a) the ability of all attorneys to gain that trust and confidence by their commitment to their clients' cases and by being responsive to their clients' needs, whatever the method of their compensation may be, and (b) the administrative efficiencies of the per case contract rates that both OPDS's Contract and Business Services Division and its predecessor agency, the Indigent Defense Service Division of the State Court Administrator's Office, have reported to the Commission.

³⁷ See pages 19-21, above.

³⁸ See page 21, above, for further discussion of the likely benefits of stronger consortium management and internal quality assurance programs.

In any event, PDSC does not believe that this is the time to request or direct YCD to adopt a per case contract rate. The consortium has other more important and immediate challenges to address as a result of this Service Delivery Plan. However, YCD should be prepared for the possibility of such a request from the Commission prior to future contract negotiations.

3. YCD, like many of PDSC's other contractors who provide legal representation in juvenile cases, needs to concentrate on improving the quality of its juvenile law practice. The Circuit Court and other informed observers in Yamhill County have advised PDSC that the overall quality of public defense services in juvenile court is good, and that the Court has taken additional steps, with YCD's cooperation, to improve those services. The Commission is particularly encouraged by the Presiding Judge's personal commitment to ensuring the quality of legal services in juvenile court and to recruiting more able attorneys to enter the practice of juvenile law in Yamhill County.

Nevertheless, the Commission has received enough credible reports regarding the turnover rate, inexperience and lack of substantive knowledge of some of YCD's juvenile lawyers, including the consortium's own assessment of the need to improve its juvenile law practice, to conclude that YCD needs to take more aggressive steps to improve the quality of the legal services that it provides in juvenile cases.³⁹ Accordingly, PDSC directs YCD to evaluate the experience and expertise of its current corps of juvenile lawyers and report back to Commission by September 1, 2006 on the steps the consortium has taken, or proposes to take, in order to address problems in the quality of its juvenile law practice. That report should include, but not be limited to, answers to the following questions:

- What type of internal juvenile law training and mentoring programs has YCD developed or established?
- How has the establishment of a juvenile law "team leader," in cooperation with the Circuit Court, improved the quality and delivery of YCD's juvenile legal services?

³⁹ These problems are by no means unique to YCD. OPDS has reported wide variations in the quality of juvenile law representation across the state due, to a significant degree, to (1) contractors' failure to appreciate the unique and growing demands of juvenile law practice and, therefore, the increasing advantages of specialization in this area of law practice and (2) an all too common tendency to assign juvenile cases to new and inexperienced attorneys as a "training ground" for eventual criminal law practice. As a result, PDSC intends to develop a special Service Delivery Plan for the statewide delivery of juvenile law services later this year (probably in April and May). YCD can expect to receive an invitation from the Commission to participate in this process and contribute its experience and expertise to PDSC's planning efforts.

- How many juvenile law CLE programs has each YCD attorney who practices juvenile law attended in the last four years?
 - To what extent does each of those attorneys specialize in juvenile law?
 - What steps has YCD taken to improve lines of communication with the CRB and to develop a mutual understanding of their respective roles and the challenges?
 - Has YCD considered or developed a specialized unit of juvenile law practitioners within the consortium, or in a separate consortium,⁴⁰ and what are the pros and cons of such changes?
4. PDSC requests YCD to participate in OPDS's new Consortium Advisory Group. OPDS has advised the Commission that, during the first quarter of 2006, it intends to establish a Consortium Advisory Group to (a) advise OPDS and the Commission on best practices that facilitate and strengthen the management and operations of public defense consortia across the state, and (b) exchange information about such practices among consortium managers. PDSC enthusiastically supports OPDS's establishment of this advisory group

Over the past six months, PDSC has conducted investigations and developed Services Delivery Plans involving three major consortia in diverse regions of the state. Those experiences have confirmed the Commission's judgment that consortia face unique challenges in managing their attorneys and caseloads, including the challenge of evaluating and addressing problems with the performance and conduct of professional peers and the need for effective internal management and outside policy guidance and business expertise. As a result of these unique challenges, PDSC has urged consortia to adopt systematic evaluation, training and mentoring programs and to form boards of directors with outside members in order to gain greater access to policy and business expertise and support from their local communities.

A Consortium Advisory Group can offer OPDS and the Commission valuable insights and experience, which will help to ensure that the best practices they identify and propose for consortia are both feasible and effective. Of equal importance, this group can provide consortium managers with a forum to exchange ideas about best practices and management techniques suitable to consortia and to develop other practical and effective methods and programs for implementation by consortia across the state. For these reasons, PDSC requests that an

⁴⁰ In preparing its September 1, 2006 report to PDSC, the Commission recommends that YCD consult with other consortia that handle juvenile cases, including the Juvenile Advocacy Consortium in Marion County, which has successfully established a first-rate consortium made up exclusively of highly qualified and very experienced juvenile law specialists.

appropriate representative of YCD serve and actively participate on OPDS's Consortium Advisory Group.⁴¹

⁴¹ PDSC has extended this invitation to YCD at this time simply because OPDS developed the idea of a Consortium Advisory Group contemporaneously with its completion of this report. The Commission understands that OPDS will extend similar invitations to virtually every consortium in the state. Nevertheless, YCD's apparent willingness to undertake positive changes in the management of its consortium is likely to lead to particularly valuable insights and contributions to the advisory group.