

Members

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



Ex-Officio Member

Chief Justice Paul J. DeMuniz

Executive Director

Peter A. Ozanne

PUBLIC DEFENSE SERVICES COMMISSION

Thursday, August 10, 2006 Meeting*

9:00 a.m. to 1:00 p.m.

Office of Public Defense Services

Capitol & Gaines Building
Basement Conference Room
1320 Capitol Street N.E.
Salem, Oregon

AGENDA

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|--|------------------------|
| 1. Action Item: Approval of the Minutes of PDSC's June 15, 2006 Meeting (<i>Attachment 1</i>) | Barnes Ellis |
| 2. OPDS's Monthly Report (<i>Attachment 2</i>) | OPDS's Management Team |
| 3. Presentations on Challenges Facing Public Defense Attorneys In Juvenile Delinquency Cases** (<i>Attachment 3</i>) | Peter Ozanne |
| 4. Action Item: Review and Approval of OPDS's Proposed September Emergency Board Presentation & Proposed 2007-09 Budget (<i>Attachment 4</i>) | Kathryn Aylward |
| 5. Executive Session:*** Review of the Search for PDSC's Executive Director | Barnes Ellis |

Notes

**PDSC's next meeting is scheduled for Thursday, September 14, 2006 from 11:00 a.m. to 4:00 p.m. at the Clatsop County Courthouse in Astoria, OR.*

***Presentations may be taken out of order in order to accommodate the schedules of the Commission's guests.*

****The Executive Session will be held at approximately 12:00 p.m. pursuant to ORS 192.660(2)(f) and (h).*

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MEETING MINUTES

June 15, 2006 Meeting

Inn of the Seventh Mountain
Bend, Oregon

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

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Becky Duncan
Ingrid Swenson

[Tape 1, Side A]

03-079 Chairman Ellis announced Peter Ozanne's resignation as Executive Director and the Commission's search for his successor.

Agenda Item No. 1 Approval of the minutes of PDSC's May 11, 2006 Meeting

079-124 **MOTION:** Jim Brown moved to approve the minutes; Janet Stevens seconded the motion; hearing no objection the motion carried; **VOTE 4-0.**

Agenda Item No 2 OPDS's Monthly Report

125-190 Peter Ozanne submitted the final version of OPDS's Report on Service Delivery and PDSC's Service Delivery Plan for Judicial District No. 7. Peter Gartlan reported on personnel changes and the status of the caseload at OPDS's Legal Services Division.

Agenda Item No. 4 Report of OPDS's Quality Assurance Task Force on the Contractor's Site Visits

190- [Side B] -509 Jim Arneson, Chairman of OPDS's Quality Assurance Task Force, and Ingrid Swenson reported on the progress of OPDS's Contractor Site Visit process.

Agenda Item No. 5 Status Report from the Lane County Public Defense Panel

510- [Tape 2] -403 Marc Friedman, the administrator of Lane County's Public Defense Panel, reported on the administration, operations and progress of the panel.

[Ten minutes recess]

- 418 - [Side B] -097 Steve Gorham and Olcott Thompson presented MCAD's interim report on the consortium's progress in implementing quality assurance processes and management best practices.
- Agenda Item No. 6 Discussion of Delivery of Public Defense Services in Juvenile Dependency Appeals**
- 099-402 Peter Ozanne and Kathryn Aylward presented OPDS's proposal for the addition of four attorneys at OPDS's Legal Services Division to handle appeals in juvenile dependency cases.
- 347 Chair Ellis Chairman Ellis entertained a motion to direct OPDS to prepare a policy package to be presented in connection with PDSC's 2007-09 budget for the purpose of adding four FTE attorneys at the Legal Services Division to handle juvenile dependency appeals.
- MOTION:** Shaun McCrea moved to approve the motion; Janet Stevens seconded the motion. Hearing no objection the motion carried; **VOTE: 5-0.**
- Agenda Item No. 3 Discussion of OPDS's Response to the Enactment of "Jessica's Law" in the April 2006 Special Session of the Legislature**
- 410- [Tape 3] -413 Kathryn Aylward presented OPDS's analysis of the impact of "Jessica's Law," which was enacted by the legislature during its 2006 special session, and OPDS's proposed options for addressing the costs of defense of cases arising under the new law.
- Chairman Ellis entertained a motion (1) to provide contractors with the option of negotiating compensation rates for cases arising under Jessica's Law either under the hourly rate for non-capital murder cases or triple the case unit rate for Ballot Measure 11 cases and (2) to prepare a presentation for the September 2006 Emergency Board meeting that put the Legislature on notice that Jessica's Law will result in increased costs to delivery of public defense services in Oregon, which could, depending on prosecutors' charging practices, have a significant fiscal impact.
- MOTION:** John Potter moved to approve; Janet Stevens seconded the motion; Hearing no objection the motion carried: **VOTE 5-0.**
- 465 Chairman Ellis entertained a motion to adjourn the public meeting and proceed with an Executive Session regarding the Commission's search for a new Executive Director.
- MOTION:** Shaun McCrea moved to adjourn the meeting; Janet Stevens seconded the motion: hearing no objection, the motion carried: **VOTE 5-0.**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL MEETING TRANSCRIPT

June 15, 2006 Meeting

Inn of the Seventh Mountain
Bend, Oregon

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

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Becky Duncan
Ingrid Swenson

[Tape 1, Side A]

03 Chair Ellis [Meeting called to order at 9:15 a.m.] I believe at least one other Commission member is on the way, but I think we probably ought to go ahead and get started. I think everyone knows that Peter Ozanne has made a very foolish decision to move to Arizona, or at least go manage the Maricopa County criminal justice system. I understand he may keep his home in Oregon but work down there. He has advised all of us that, by the end of September, he does plan to step down as Executive Director. I want to say a couple of things now and we will have another statement at another appropriate time. First of all, Peter's decision was his. The Commission has been very happy with his performance. I think this whole program in the last four years has made enormous progress and strides. I understand what Peter's thought process is, and I can assure you there is nothing about his decision to make this change that reflects any unhappiness on his part, other than possibly his compensation level, which we all would like to see higher. We wish him well and he is going to help us in the transition.

Let me just say regarding the transition that there will be an executive session of the Commission later this morning and we will be reviewing how to proceed in the selection of Peter's successor. I can only speak for myself because the Commission as a whole hasn't met on it, but I am predicting that there will be a full-scale search. We certainly know there are a lot of people in the state who are qualified, able and may make excellent choices. We will search out-of-the-state as well because it is a very important position. It is our hope to move fairly promptly, but a search of that kind does take some time. So it is not clear yet whether we will be able to get the word out to all the places it should get out to, allow time for applicants to express their interest, create forms and do all that has to be done; and then the Commission will have to review those applications and screen them. The last time, we conducted a lot of personal interviews of applicants, and I suspect that will happen again. We will be looking to the provider community for input. To the extent we can, we hope to make this a process that is inclusive. Our hope is that it will be seamless – that there will be a person who we are all satisfied with ready to go when Peter leaves in September, but that may not happen. If it doesn't happen, we will just have to manage the program as best we can

under those circumstances. That is the concept and I would certainly welcome any input any of you wants to give us as to how we go about the task of trying to find someone to succeed Peter. I don't know if we will ever fully replace him, but we will do our best.

050 P. Ozanne Thanks, Barnes. May I say just a few words. I sent out an email this morning to the people who follow our meetings and are on our mailing list. It will go out more generally after this meeting. I also sent another message to my colleagues at OPDS. As I said in both messages this has certainly been one of the most fulfilling jobs I've had and may well be the most fulfilling. Ideally, I would have preferred to stay through the upcoming legislative session. But I think we are really in a position, thanks to a lot of help from the people in this room, to make some real gains in the Legislature. For example, Jim Arneson is here today to talk about our contractor site visit process, which is building great credibility in the Legislature and across the state. Moreover, the Commission has gotten out and around the state and learned a lot about the public defense delivery system and how to improve it. So we will have a credible presentation to make to the Legislature about the public defense system's needs and what is needed for it to continue operating. We also now know what quality representation is and what it takes to insure it. So I think we can make a great case for additional legislative support and there are plenty of people here in the room, certainly including the Commission's members, who can make that presentation to the Legislature. I certainly wanted to be here for that. We will have an important Emergency Board presentation in September and I will be here for that. I want to thank all of you for your friendship and support. I know a lot of people in the audience have voluntarily stepped forward to help us evaluate and improve the public defense system and to work on a lot of advisory groups and task forces. I have really appreciated that. As I said in my e-mail message, I admire what all of you do and it has been a great privilege to work with you. It has also been a great pleasure to work with the Commission. Obviously, I am leaving with mixed feelings. Thank you all.

074 Chair Ellis Let me just add that I have had a chance to talk with each of the senior managers and I think the team spirit is very much intact. I think we will do fine here, notwithstanding Peter's declaring victory and moving on.

Agenda Item No. 1 Approval of the minutes of PDSC's May 11, 2006 Meeting

079 Chair Ellis Are there any changes or additions to the minutes from May 11?

080 J. Potter Mr. Chair, I note two typos: on page 15 in the middle of the page where Mr. Greenfield is saying "in the not very distance past probably when you, when you" – there are two "when yous."

088 Chair Ellis What page are you on?

087 J. Potter Page 15. There are two "when you" in that sentence. Then on page 28 where Kathryn is talking at line 001, it says "and increase the penalty from 100 to 200 months." I think she meant 300 months.

092 Chair Ellis I have two other corrections. They both happen to be me talking, so it is probably the way I pronounce things. On page 16 in the middle where it says "You are like a subjective parent;" I meant "surrogate parent." On page 26 where it says "I didn't quite like the analog of business development" it should be "analogy."

099 I. Swenson On page 25, Angela Sherbo is talking and there are two initials there. Instead of "FTM," it should be "FDM" and instead of "DTM," it is "TDM".

105 J. Stevens What page are we on?

105 I. Swenson Page 25.

- 107 Chair Ellis So Jim, you didn't read it?
- 107 J. Brown I say, on page 27, that I used the word "fine" and that was correctly recorded.
- 109 J. Potter In that case, Ingrid, on page 24 the same applies at the bottom page: "FTM" to "FDM."
- 112 Chair Ellis With those corrections; is there a motion to approve both the official minutes, which is the short version, and the unofficial version, which is the transcript?
MOTION: Jim Brown moved to approve the minutes; Janet Stevens seconded the motion; hearing no objection the motion carried; **VOTE 4-0.**
- 118 Chair Ellis Once again, I must say I get a lot of benefit from the transcript. Rereading that reminded me just how much information we were getting on juvenile dependency last time. I really thought it was a very helpful meeting.
- 121 P. Ozanne Mr. Chair, we will prepare a report to highlight the issues. It will probably be delivered in August, so the Commission will have a report on juvenile dependency with the critical issues highlighted and with an opportunity to discuss them.
- 124 Chair Ellis Good. Let's move on to the OPDS monthly report.
- Agenda Item No 2 OPDS's Monthly Report**
- 125 P. Ozanne The only issue that I have is Attachment 2. That is the final report dated June 8, 2006 on service delivery in Judicial District 7, which includes Hood River, Wasco, Gilliam, Sherman and Wheeler Counties. The Commission approved the report last time, subject to a few changes which have been made toward the end of the report – in particular, on pages 22 through 24. I eliminated a reference to business development at the direction of the Chair. It was also my understanding of the sense of the Commission was that the legislative forums I suggest should be more generic, rather than just focusing on Jack Morris' firm. Those are all the changes I understood the Commission had directed me to make. I am simply submitting the final report now to confirm that I accurately understood the Commission's directions.
- 142 Chair Ellis I think we went through this last time and we have approved it. You got all the typos I knew about, as well as the two substantive changes. So, is there anything else?
- 145 P. Ozanne I think Pete or Becky has a report on the Legal Services Division.
- 147 Chair Ellis Do you expect a call from the Supreme Court on Monday?
- 147 P. Gartlan Yes.
- 147 Chair Ellis That is the model. The Supreme Court of United States delivers opinions on Mondays. The last Monday of the term is this coming Monday and Peter's case, we think, is going to be decided then, right?
- 150 P. Gartlan I don't know if they will decide all of them. Some of them do drag on into the summer. But the odds are we will have an opinion next week. Most of our update is about personnel. We are now up to a full compliment of secretaries. We hired two new secretaries within the last couple of months: Bela Lemmon and Alea Albers. Bela is from DOJ and Alea is from the Department of Revenue. They both seem to be working in really nicely. We are really happy about that. We will be hiring two new deputies at the end of the summer. Jennelle Barton has announced that she is leaving for the Legislative Counsel's Office. She is leaving us after seven years and we are sorry to see her go. So we will be hiring for her position. We are at the tail end of the personnel evaluation process. I think we have three or four attorneys left.

Then we will evaluate the secretaries. That should all occur next week and that will wrap up the evaluation process.

169 Chair Ellis That is oral to them and written to the file?

170 P. Gartlan Correct. It is a very elaborate process. Becky is the creator of it and it is incredibly informative. What we have found is that people really appreciate and enjoy the feedback, even if sometimes it may be information that may not be easy to hear. They appreciate it and they gain from having some structured feedback. It is going well and it should be completed relatively soon.

I know the Commission is always interested in the backlog report and our backlog is 180. To give you some historical perspective, it was over 200 during all of 2005. So it trending downward, but it is still unacceptably high.

182 Chair Ellis That is in units of days when you say 180?

183 P. Gartlan 180 is the number of cases in the backlog.

185 Chair Ellis Not the length?

185 P. Gartlan That represents cases that are over 210 days old – from 210 to 250 days old.

188 Chair Ellis Anything else?

189 P. Gartlan No, that is all.

189 Chair Ellis Kathryn or Ingrid?

190 K. Aylward Nothing other than what's on the agenda.

Agenda Item No. 4 Report of OPDS's Quality Assurance Task Force on the Contractor's Site Visits

190 Chair Ellis I am going to suggest that we move topic three down a little bit. I know there is going to be discussion on it, which we welcome. I would like to go Item No. 4, which is the report of the OPDS Quality Assurance Task Force on the contractor's site visits. This is Attachment 4, which identifies the providers that have been the hosts of the site visits over the last two years. There are 10 of those site visits that have occurred and it identifies who participated on the site visit teams. Peter, if you and Ingrid and Jim Arneson want to summarize for us, that would be helpful.

203 P. Ozanne I have already commented a bit. I will turn it over to Ingrid and Jim. This has been a tremendous effort. I know the Commission is very pleased with this effort by volunteer attorneys who are obviously busy with their own practices. I usually call to invite people to serve on the site visit teams. I have had only one instance where someone couldn't do it and that was because of a conflict with a trial. People have stepped up to contribute to this effort. I think it is not only the right thing to do; I also think it is really going to put the public defense system in a good position in terms of our collective credibility and our requests for additional resources. With that I will turn it over to Ingrid, who has been spending a large portion of her time staffing this project and writing reports for each site visit, which the Commission doesn't see, but which are equal to or more detailed than the reports you get from me regarding service delivery plans. Ingrid does a remarkable job preparing these reports in a relatively short period of time and getting them out to people on the site visit teams and contractors.

- 216 Chair Ellis Let me mention before we go to Jim and Ingrid, we are very happy to have Joe O’Leary here, who is the Governor’s assistant on issues relating to the criminal justice system of which this is obviously a part. I think this report is the kind of thing that you want to be hearing so with that in mind . . .
- 222 J. Arneson Mr. Chair and members of the Commission, it has been a very exciting time to be involved in this process. I know that periodically you get reviews from Peter on how this process is working, but when you have a couple of years to look back and summarize, as I have done in the last week getting prepared for this, one becomes even more impressed with the work that all of the folks have put into this task. As usual, Ingrid deserves much of the credit for what has occurred. She has really undertaken a massive project in putting together the reviews of all of these counties and all of these contractors. The amount of work and detail that goes into it is really just incredible. Each time there is a site visit Ingrid needs to contact contractors that we are going to be visiting. She then needs to learn who it is in the community that are going to be the ones from whom we will seek the information that will provide the site team with the progress and the evaluation of the different contractors. It is also a matter of coordinating a site team, lining up people who represent private attorneys, public defender offices, and consortiums. In some cases, it is drawing on law enforcement personnel and trial court administrators, depending on the county that we are visiting. Then putting the site team together and coordinating the incredible number of people that are contacted and interviewed during this process. Questionnaires are sent out generally to between 20 and 40 individuals. These are very detailed questionnaires that require a fair amount of work –
- 251 Chair Ellis These are system participants?
- 251 J. Arneson These would be judges, district attorneys and deputy district attorneys, probation officers, jail personnel, law enforcement. If we are doing juvenile contractors, then it would be DHS or CWP, the agency, and it would be juvenile judges and juvenile departments.
- 258 Chair Ellis You are the proponent of client feedback.
- 259 J. Arneson I am the proponent of client feedback. You know, I would have to say that after two years we are maybe that much farther towards accomplishing the goal. It has been one of my great frustrations. Our next quality assurance meeting is devoted to coming up with some method of gaining access to client feedback that doesn’t depend on questionnaires developed by a contractor’s office. You probably know that our office has been doing client questionnaires that we send out when we are through with our case. We use those to get some sort of feedback about how clients feel we are doing our job. There are some offices around the state that are developing such a method. There are several problems with it. It is very staff intensive. It takes a huge amount of staff attention to develop the questionnaires, to send them out and to review them. The feedback that you get, or the return rate, is going to depend on the location. We get a pretty good return rate. We get about one-third even from our juvenile clients who are at the age, at least, where they can provide some sort of feedback. I want to look at some method of going directly to clients and getting the feedback in the same way that we go directly to judges, and to deputy district attorneys – some method of getting direct feedback. I hope we will be able to come up with that method, but we will know after our next meeting. Just a bit more overview on this whole process: as the attachment indicates, we have done 10 site visits. That is over a two-year period, so we are averaging five a year. We have had, I think, 50 team members. These are folks from the entire range that I have mentioned – private attorneys to public defenders, and occasionally system folks like trial court administrators. Many of the participants have engaged in more than one site visit. These site visits involve an incredible amount of time. There is not only the two to three days that you take at the site visit when you are interviewing this huge array of people; then, after the visit occurs, you are reviewing drafts of material that Ingrid is preparing and distributing, and providing input and approving the final draft of the document. It is a very time-consuming project and we really appreciate the amount of time that has been donated and

volunteered in this whole process. One of the things that we have learned – those of us who have participated – is that, regardless of how the folks feel that we evaluate, the team members get an incredible amount of experience and information. It is very enlightening to be able to go to another county and another office and do the kind of in-depth evaluation that we do of a system and an office. You get lots of ideas and lots of feedback about how you might do things differently and how your own county or agency might work differently. I think either Ingrid or Peter mentioned in their summary that we have evaluated contractors who serve 40 percent of our client base, which is an enormous number in itself. The types of contractors have been mixed across all the types of contractors that you folks contract with. So we have done seven public defender offices, eight consortiums and six private law firms. Then we have done seven contractors that I think would fall into the category of private, non-profit law firms that provide juvenile services or some type of indigent defense. The types of folks in the system that we interview are really just an incredible sampling of the system in the particular area where we go. We always interview judges; they are kind of the mainstay or the central focus of any evaluation. We almost always go to deputy district attorneys, or to the district attorneys and to the folks doing criminal defense; also court staff, private attorneys, legal assistants, investigators, assistant attorney generals, probation and parole officers, juvenile departments, DHS. The list really goes on and on. The amount of information in the sampling that we get through the site evaluation process is really incredible. We gather a tremendous amount of information in these two to three day visits. We have visited foster parents. We have interviewed psychologists who appear as experts in juvenile cases and the board of directors of the various organizations. It is so much information at times that you wonder if we can do something with it. Again, what Ingrid does in terms of structuring this in a way that the information is put in a form that is useful is incredible. She gathers all of the information, gets input from everybody, and then sends out rough drafts of all of the information that is gathered. Once she is satisfied that the team members have provided the information that they obtained as a result of the site visit, she then sends it out to the contractors that we evaluated so that she can be certain that the reporting that she is doing about the way that the system operates is correct. It is not only an evaluation of those contractors; it is an evaluation of how they operate within the system and whether there are things that the contractors can do to make the systems work better. For example, many times during a visit, the site team has found that legal representation is not taking place at the first appearance, whether it is a shelter hearing for a juvenile where DHS is getting involved in taking the child away, or an accused adult. Many times, there is not a lawyer present at that first appearance. One of the things that the site team is constantly finding, and is constantly urging folks to work on, is to negotiate with the state office to be sure there is somebody who is responsible for providing that representation at the first appearance because it is an expensive process to have a lawyer there all the time for these first appearances; and then providing the initiative and the motivation for the contractors to be sure that they are moving the system along, so that folks do have this representation at the first appearance. It is a critical stage in any kind of representation, whether your kid is being yanked out of your home, your juvenile was put into detention system, or you are an adult who has been put into jail. That is an extremely important time to have a lawyer there to assist you through the process. The amount of information that we get back from the contractors is also pretty impressive. The goal generally is not to obtain information about how individual attorneys are doing. The goal is to evaluate a contractor overall. But as you might imagine, when you are talking to people in the system and you are saying, “How is James Arneson’s office doing in terms of contracting?” they will say some attorneys are doing a good job and some aren’t. So you also get feedback on individual lawyers. The goal is not to do an evaluation of lawyers who we get either good or bad information on. The goal is to provide the information to the contractors so that they can do an effective job of supervising their staff and supervising their office to provide the services that they are contracted to provide. Some of the issues that have come up throughout the state: one of the main ones is children visits. I am sure this is an issue that you have heard about when you have talked about representation in dependency cases. One problem has been making sure that the lawyers are getting out and seeing their children clients. It is important that they do that, not only because they are contracted to do it,

but because in visiting the children you see the kind of home they are in and you can see how foster parents are doing. And you can return to the home and you can see how the parents are doing. You need to get a feel for how the children are interacting with their environment. If they are in a foster home and they are unhappy and so forth, it is important to know that. It is important for a lawyer to meet individually with a child to discuss the situation and to take steps to be sure that the kids really have representation. So it is not just a matter of reviewing reports prepared by case workers and then giving your opinion in court. That has been one of the issues that has come up frequently. Another issue that we have seen fairly often is being certain that lawyers see their clients within the time that the contract advises – 24 hours. Many of these issues that we find, the site teams believe and the quality assurance team believes, are not the result of sloth on the part of lawyers; they are the result of caseloads that are too high. We have found that, throughout the entire system, it is common for contractors to be taking too many cases in order to obtain enough money to provide a reasonable rate of compensation. On average, we are 130 percent above the numbers that are recommended by the Commission. We have found in site visits that it is not uncommon to be double the number of cases that are recommended; so it would be 200 percent of the cases that are recommended for legal representation. There is no way that you can carry caseloads ranging from 130 to 200 percent and provide the kind of representation that we are obligated to provide, both by the Constitution and the contract that we sign with the Office of Public Defense Services. Getting over within 24 hours is something that depends on the kind of support staff you have and the number of clients you have. Children visits are the same. They are incredibly time intensive, especially in counties where it takes awhile to get out to the home; where it is not just a five or ten minute stop to see the children. Other issues that have come up are issues that relate to the organization of public defender offices – things that we can learn from offices that we can share around the state. I will provide you, and you have probably already seen it, with our proposed best practices list. Much of what we obtain is information about things that are working well and in offices that are running well; or supervising that is going well or evaluations that are handled well. We want to develop a best practices list that offices can use as a blueprint for an effective law practice or an effective law office. Another area that we have encountered is not using enough of OPDS's extraordinary expense procedure. I know the complaints that we hear in the Legislature are that we are an organization that is just hell-bent on spending ridiculous sums of money on ridiculous experts. But in fact, that isn't what we find when we do the site visits and evaluations. We find that there are many times that lawyers are not getting evaluations of parents when there should be evaluations of parents. There are children who are not getting evaluated when they could, and where experts are not being utilized in adult cases when they could be. And where immigration lawyers are not being utilized in cases where a conviction will have huge collateral consequences for someone who does not have the appropriate papers to be in the country. The site visit process, I think, has been very effective. It has met with remarkably little resistance when you think of a process of having your peers come in, interviewing everybody that you come into contact with in your professional life, getting feedback and then preparing a written report that goes to the person with whom you are contracting. That is a very threatening process. I have been through it from both sides, and I definitely prefer being on the site team rather than being evaluated. Considering the amount of threat that is involved in this process, we have had incredible cooperation throughout, both in terms of setting up our visits and assisting in the visits, and in terms of being open in providing the information and the access to the individuals on the teams so that we can get good, quality information. I don't know if you have the most recent list of best practices. If you do not, I will provide you with a copy and I will put a copy on the table for folks who have not received the list. It is a list obviously that is intended not to be detail-oriented, but to be, in general, the best practices for public defender offices and generally for all kinds of offices doing public defense representation. What I would like to leave you with is I would hope that the amount of information that we have obtained will provide you with the detail you need to do your best to persuade the Legislature that the numbers need to be increased in terms of compensation for lawyers. I think it is fair to say that in the last 15 years, the only way to get an increase in your take home pay was to take more cases. Contractors have, contracting period after

contracting period, been increasing the number of cases they take because the amount per case is not enough. We have a situation where, although most lawyers are attempting to meet the terms of their contracts by filing motions, seeking extraordinary expenses, visiting their clients when they are supposed to, it is extremely difficult to do it when caseloads are running at the levels that they are running. I would hope that we have provided at least a base of information that can be taken to the Legislature to help us get levels of compensation that would not require these very high caseloads.

584 Chair Ellis

It is almost the reverse of the way you describe it. The provider trying to improve his economic circumstances pushes to take more cases than the provider should. What we really have is a combination of under compensated current providers and an insufficient number of current providers, and you really need both.

594 J. Arneson

Yes, obviously, if we are going to get caseloads to a level where that they should be to get the kind of representation everybody desires, we need to be better paid per case, and we need more lawyers.

600 Chair Ellis

I was very impressed with the meeting that we had last time with the juvenile lawyers in Portland and how much of the service requires personal presence. It is not like something that you can improve with technology and efficiency, or even improve with lower-cost assistants in an office. Those personal service contacts can't be delegated.

611 J. Arneson

Exactly. It has only been for the last two years that I have been doing dependency work, but in that period of time it has become clear to me that it is so lawyer intensive. These initials that Ingrid talked about, which you heard about last time – the FDMs and the DTMs – these are critical stages in the representation of parents and children because these are the times when you lay out the plans for the return of the child to the home, or when you are making plans when it is relatively clear to you that the parents aren't going to be able to get it together for the child to return home. The time that you are spending both with the parents and with the agency people to assist in developing these plans is critical. Most of the work really is occurring outside of the courtroom. The courtroom, as it is generally referred to, is a review process to find out how things are going. But so much of the work goes on outside the courtroom, either in the homes or those agencies.

637 Chair Ellis

Ingrid, did you have input that you wanted to share before we get to questions?

639 I. Swenson

Mr. Chair, I just wanted to remind you who our oversight body is because, from the very beginning of this process, it has been the product of their agreed-upon approach to what these evaluations should look like – how often they occur and so forth. Jim has been our chair since the beginning. Jim Hennings has also served on that committee since the beginning, and Ron Gray from Clackamas County, Tom Sermak and Greg Hazarabedian from Lane County,

[Tape 1; Side B]

047 I. Swenson

and Janet Merrell from the Juvenile Rights Project serve on the committee. And we recently added two new members, Jennifer Kimble from the high desert and Dick Garbutt from Klamath County. They meet regularly, they oversee the entire process, and they make the decisions about how to go forward.

050 Chair Ellis

I wanted to ask: I know when we started this process we were very sensitive that it not be viewed like the quality police – that it be viewed more as a peer support process with a cross-pollination of ideas. We are not here to file a report that sits on somebody's desk and adds an element of toxicity when your contract comes up. What I wanted to ask is that the Commission has not received any of the reports and that was consistent with a retreat we had when we talked about how to plan this whole program for the reasons I have just indicated. I wanted to ask what does happen (a) with the documentation because you mentioned written

reports; b) with follow up because it is like everything in life; I assume you can go there, you can have good interchanges, have a good couple of days and everybody feels good and goes back to where they were before, and (c) how can we get the benefit of what you are learning without converting to quality police state, which is not what we wanted? That is my three-pronged question.

070 J. Arneson

Why don't I take it first and then, as usual, Ingrid can fill in all the gaps and holes. The approach has been a very delicate one, as you have described from the beginning. I don't know that I am confident that they don't feel like we are quality police when we come in. I know that it causes anxiety to be evaluated. I certainly felt anxiety when I was evaluated. I felt threatened when negative information was imparted to me. I am assuming that, as a chair of the committee that oversees the evaluation, I probably am more immunized than most people would be who have been evaluated. I don't think there is any way to avoid the feeling that somebody is coming in to snoop or look into your business. I don't think there is any way to avoid that. We made two important decisions. The initial one was the one that you were describing, where information would not be given to the Commission. Information would be shared with Peter, who would not share it with the contracting side of the organization, so that people could have some assurance that this process was truly for the purpose of increasing quality with the current crop of contractors that we have, rather than weeding out the crop and increasing quality that way. We did make, I think, a subtle change. I believe it was December of this last year when we thought it was essential for the purpose of oversight. The slight modification that we made was that, if we find information that we think significantly relates to the quality of the representation of clients, we will bring that information to the attention of the contracting side of the organization, or Peter can bring it to their attention. But we would provide none of the details and it would be the task of the contracting side to investigate and determine whether, in fact, there was a breach of quality representation. So the information that might be used to the detriment of the contractor is not coming directly from the site visit team. There is also the assurance that it is going to be investigated independently to develop the information that the contracting side might want to use to review the conditions on the contract or to seek another contractor. We think that strikes the balance that is appropriate. Our mission, after all, is to provide quality representation for indigent clients. Through this process, we think we can still provide people the assurance that the information is privileged and confidential, but we can also provide a heads up to the contracting side of OPDS to investigate particular claims or complaints that we are running into. In terms of the follow up, that has been a critical issue. What we had decided is that Peter follows up one year after the evaluation. Peter sends out a letter to the contractor saying "I have reviewed your evaluation. I see some of the issues that we agreed that would be ones that you would take a look at. Could you please tell me what steps you have taken to address the issues that were identified?" My gut feeling is that we don't have the amount of support staff to follow up to the level that we should follow up. But that is certainly one step that we have taken to address follow up. We are gathering all this information and suggesting all these changes, and then being certain that it just doesn't fall into a deep hole.

134 Chair Ellis

What happens with the documentation?

135 J. Arneson

The documentation, as I understand it, stays with Peter, but I suspect Ingrid can address that.

137 I. Swenson

Mr. Chair, all of these reports are labeled confidential. When we finally reach a final version of the report, it goes to the contractor, to Peter and now to Kathryn, as Jim indicated. I keep copies of the reports and all the supporting documents in my files. The contractors are free to do with them as they wish. We have had an abbreviated discussion of some of the problems that arise when a particular contractor decides that they are going to share a piece of this with a judge or with someone else. It really isn't intended for public consumption. Yet we have not restricted what contractors can do with it. But it is something we need to look at it. It isn't often that pieces of that report go elsewhere.

- 149 Chair Ellis Have you had any contractors say, “Thanks, but no thanks?”
- 150 I. Swenson No. Peter makes the initial contact.
- 151 Chair Ellis I am very impressed with the number of providers and the range, both in terms of geography and types of providers who have been on the review teams. The ones from PDs are exactly what we were hoping would do it. I am quite impressed that there also seem to be a number from the private firm sector. My question is, do we compensate those private firm lawyers for the three days of time, and that is the time on site, which is in addition to the time thinking about it beforehand and participating in the drafting process afterwards?
- 163 J. Arneson No, this is for the good of the order. These are folks, generally, who I know because they have been so generous in other organizations. So they are known for that oftentimes. I think it is remarkable.
- 168 Chair Ellis I think it is remarkable too. I guess my question is, should we offer some compensation for that?
- 170 P. Ozanne We do cover their expenses but, yes, I think it might be great to do that. We certainly hope this process produces results in the Legislature, which is part of the reason people voluntarily participate. But it may not last forever. So I think it is something that the Commission should consider.
- 175 Chair Ellis I really like the mood of this whole program because, from the provider side, it is almost collegial, even though we have a lot of people who are contracting either directly or indirectly. I like that collegiality and the voluntarism is part of that. But if it gets to a point where it gets hard to get participation from the private side, I really do think we ought to consider some compensation. How do you decide who you are going to visit? It sounds a little like you do it by trying to get the biggest bang for the buck and go to those offices that are handling the largest caseloads. Although, as I look at the list, that can’t have been the driving criteria, because there are some here that are obviously much smaller. Do you do it from the standpoint of, “here's somebody who might have more of a need than someone else,” or is it random?
- 192 J. Arneson It is not random. I think you are correct. The initial goal, and certainly one of the considerations throughout, is we are devoting this incredible amount of resources to this process, so let’s be certain that we cover a fair amount of the client base in doing the evaluations. Let’s not spend two years and evaluate only five percent of the client base. It has really been a mix. It has been tempting to cover some of the larger public defender offices. It has been geographically driven, so that we are certain we are getting out to all areas of the state. There have been occasions when we have heard that there may be a need for intervention, and we have done it in response in those cases. There have been situations like our county because the county was small enough to cover all of the contractors in that particular county.
- 209 Chair Ellis I saw that in Jackson County you had four contractors.
- 210 J. Arneson Yes, in Jackson County we covered everybody, I guess. I would say it has been eclectic. There has not been a single driving force. But certainly, one of the concerns that we wanted to address was to ensure that we got a substantial amount of the client base covered in our two years.
- 216 Chair Ellis I remember now the third prong. I had asked how can we get the benefit of lessons learned, or observations you make; not so much on particular contractors, but we are constantly trying to be sure we have got the right mix, that we have got the right size contractors, whether

combining juvenile and criminal has more benefits or more detriments, and whether consortia as a provider model has some real benefits. How do we get the benefit of what you all are learning in order to address those issues?

228 J. Arneson

That is something that I think Peter is in a good position to answer.

229 P. Ozanne

I'll try. Mr. Chair, as you may remember, one of the issues was a concern on the Legislature's part that we have some way of measuring performance, as with all of the state agencies. We went through that exercise with the performance measure group, the Legislature's Audit Committee. Performance measurement is very critical and it is increasingly wired into the budget process. We spent a great deal of time thinking out loud with that committee about what we could use as performance measures: the number of acquittals, the number of jury trials? We realized none of these proposed measures were really very meaningful. The numbers weren't large enough. So we built the performance measures around this site visit process instead. We certainly have other, more specific performance measures for our agency. But what we are saying through this site visit process is that we are reporting to the Legislature through my biennial report to the Commission on the progress we have made with site visits and on the extent to which contractors have adopted best practices as a result of this process. I am currently drafting that report for 2007-09, and I am sure my successor and my colleagues here will amend it as time goes by and events unfold before the next legislative session.

251 Chair Ellis

So we are not going to have a situation where all this effort we expended and all this wisdom and knowledge we gained will be leaving with you. What you describe as performance measures, I understand that process. It doesn't quite address what I am asking, which is will we get some feedback in terms of the issues I described: the number of providers that are right for the size of a community? You may not want to have as large a concentration as we do in some communities. And you may or may not find that PDs versus private firms, versus consortia, versus something along the lines that we are developing in Lane County are effective. I keep wanting to get feedback on those issues.

267 P. Ozanne

I believe those questions and answers are addressed through the Commission's own service delivery planning process as it visits counties and reviews county systems on its own. There is certainly an overlap between the service delivery planning process and the site visit process, and we have struggled with this in the Quality Assurance Task Force as teams go out and review more than one contractor. The original idea was really to focus on one contractor and its performance and operations during the site visit process, and there was the notion that the Commission would look at structural issues like the ones you have mentioned in the course of its planning process.

280 I. Swenson

My only comment, Mr. Chair, would be that, on occasion, the site teams have made structural recommendations to OPDS about how they should view these contractors and things they might do to adjust the case sizes, the number of attorneys, things like that. But when we do a site visit that involves all of the contractors within the county, it is almost inevitable that part of the feedback that we get from people is whether the system is working or whether there aren't enough lawyers or there isn't enough leadership, or something like that. And we do provide that feedback to OPDS.

290 P. Ozanne

I would think that such information would be fair game to present to the Commission as long as we don't identify the contractors.

294 J. Potter

Jim, this sort of takes off on the performance measurement decision that Peter was talking about. Have you ever run into a contractor that says to you, "Well we may not be meeting the best practices, we may not be doing all of the things that you think we should be doing, but at the end of the day the result is appropriate"? Whether or not they say that, part two of my question is, is there a way to measure best practices against appropriate results? Do we know

what is happening out in the field? Are we questioning the result that is taking place, or are we simply looking at what we consider to be best practices and saying you should be doing that?

303 J. Arneson

What I have seen in reviewing the reports is a significant variety or a range of practices among the counties and in different types of legal services. For example, some PDs or some counties will have a relatively high rate of trials on Measure 11 cases. Other counties will not. There is no way that a site team has been able to say one contractor that goes to trial all the time is better than one that doesn't go to the trial. What the site team attempts to do is to seek feedback about why there is the disparity. Is it because the district attorney's office is engaged in no plea bargains and, therefore, folks have to go to trial? Is it because of the difference in the philosophy in the office about what they should be doing? Is it inexperience, where lawyers are not able to negotiate these cases rapidly or effectively? And in those counties where they are not going to trial, because certainly those of us who have spent most of our adult life doing criminal defense, you get very suspicious when you see an office that isn't going to trial very often. But I don't think we have been able to reach the conclusion that this factor alone determines the quality of representation that is occurring in an office. I don't think we have had lawyers say, "This is the best practice, but thanks, but no thanks. We are going to continue doing it the way we do it." Certainly, there are some practices where it doesn't make any difference what the result is. They still need to be done. For example, visiting clients in jail within 24 hours and seeing children in foster homes. You may think you are doing effective representation, but if those who contract with you and those who are in a position to decide what the standards for representation are disagree, then you have got to do it.

349 P. Ozanne

John, your question is one that we have constantly encountered in the Legislature, and it is a very good question. When intelligent legislators ask that question – how does this really affect quality and how do we measure quality? – without being flippant, my answer is "Well, one thing is when you give us \$166 million and only six contract staff to manage it, we are not going to be able to go out there and figure out the answer to your question. All we have right now are teams of volunteers and our collective professional judgment that our list of best practices in public defense management will produce quality cost-efficient services." Moreover, these kinds of best practices are what the legal profession and groups like the ABA have always used to promote and ensure quality legal services. On the other hand, with adequate staff, if you wanted to find out whether lawyers were performing well in County A, where there was a higher rate of negotiations, than in County B, where there was a higher trial rate, you would need to drill down into the data and analyze it carefully, and maybe even on a case-by-case basis. You would need people to go into case files, code their contents and compare that data to other counties, and perhaps even have people in watching court appearances. Those kinds of evaluations are rarely funded by state Legislatures and, historically around the country, have been done on a one-shot basis with a federal grant. What we are really working with, and all we can afford to do with the resources we are given, is to identify proxies for quality performance and services. In other words, we are saying, as the legal profession generally does, "Here are our professional standards or best practices that should be followed to produce good results in terms of quality and cost-efficiency." Rarely, if ever, has anyone actually gone out and measured quality in the field on a systematic and consistent basis. It takes a lot of resources that legislators are not willing to provide. I guess the best answer in the Legislature is: "Senator, if you provide us with the staff and resources, we will go out and measure the performance of our lawyers and confirm what it is among our best practices that makes a difference."

375 Chair Ellis

Any other questions on this? Jim, thanks very much for the work you have done and for the presentation.

377 J. Hennings

I wanted to make a couple of observation, if I may?

- 378 Chair Ellis You may.
- 379 J. Hennings These comments are not in order of importance. Earlier on you said in response to having to increase their economic position, contractors were taking more cases. I urge you to look at it in a slightly different fashion; it is in order to maintain their economic position because there has never been budgeting for cost-of-living increases. A good example of that is a document I provided to Peter about a month ago comparing over time MPD salaries against district attorney salaries in Multnomah County. Because there is no cost-of-living increase for MPD, and never has been in terms of the budget, and because the district attorneys get a cost-of-living increase every year, within four years the starting salary of a district attorney will be more than the top range of my attorneys. So, really it is not in order to improve their economic position why contractors are taking more cases; it is really in order to try and maintain their position.
- 398 Chair Ellis I accept the change. By the word “improve,” I was using as a bench mark what it would be if they didn’t take the extra cases; not an absolute improvement.
- 401 J. Hennings One of the things that Jim didn’t talk about that I think it is important: many of the volunteer team members have volunteered to provide technical assistance after the team visit. They sometimes have traveled back to the community in order to work with the contractor to improve how they do business. I think it is important to understand that it is not just the three days and not just the writing. There is in the field a real desire to make sure that all of us are doing a better job. That means we are available to sit down and not just write a report and leave, but to go back and help people think through how they can do a better job.
- 412 Chair Ellis I am impressed with the degree of collegiality that we are hearing here.
- 414 J. Hennings Along that line, I really urge you to think about compensation for the team members. I think part of the value is that this is a group effort, by the field, in order to improve all of us. I am afraid that compensation may change that but, if you do want to look at compensation, it ought to be after the field is appropriately compensated. I think that is important. The other thing and I’ve mentioned this before: this has never been done in any other state where a state internally in collaboration with the field has evaluated itself. I have talked to some people on the East Coast who are very, very impressed with this particular process and are interested in tracking it and seeing what is going on here because this may be a model that ought to be used elsewhere.
- 428 Chair Ellis Hasn’t NLADA done this?
- 428 J. Hennings No. It is outside evaluators. NLADA runs a service in which you can hire them to come in. Also, American University runs a service where you can hire them to come in. There are other services like that, but basically you are hiring experts to come in, usually in response to a problem. This site visit process is not necessarily in response to a problem.
- 435 Chair Ellis So like a paid management consultant?
- 435 J. Hennings This is very, very different. It is always people from outside the state. I think you ought to really make sure that this works. Better management is the goal, not the delivery system, and I think it is important to remember that. We are committed to making the best management decisions that we can to help each of the contractors make the best management decisions. One of the things we are going to have to talk about is management data. It seems to me one of the best practices has to be that the contractors have to manage the scarce resources they have. We can’t manage without management data. So one of the best practices I think we are tending towards is there is a certain minimal amount of data you ought to be using in order to manage your scarce resources. I think this is a going to be a deliverable that we can get to the Legislature. Basically though, this is a remarkable process and you have mentioned that, and

I know you understand it, but I really think that it is so amazing that the field has stepped forward like it has in order to do what we are doing. I will second what Jim said; it is exciting to be on an evaluation team because you learn something when you do.

- 460 Chair Ellis Thank you. Those are great remarks.
- 461 Bob Homan Can I second one of Jim's comments? I think the idea of compensating evaluators is going to send the wrong impression. People are going to think that people are paid to come in to evaluate. I think the volunteer system appears to really be working and I think it feels better.
- 467 D. McDonald Mr. Chair, David McDonald. I want to agree with Bob and Jim on that point. I had the honor of being asked to do one of these in September. When I was first asked by Ingrid, she even told me she was going to compensate us for lodging and travel there. I said that it would be my pleasure to do it and not to be compensated that way also. I think it is so important that members of our legal community go out and participate in this. To pay us to do it would cheapen the process. We don't pay Mr. Arneson for being on the committee, or Mr. Hennings. I don't think we pay any of you for doing all the work that you do. I don't think it is necessary to get quality people to go out and do these evaluations by paying them \$50 or \$90 an hour, whatever it happens to be under their hourly rate. It just is important for us as a community of providers for people who are accused, to understand and be proud of the services that are being provided. It benefits all of us if we participate.
- 489 Chair Ellis What a great statement. Thank you for that. Let me see if I have the sense of the Commission. It has been presented to us that the quality of this process would be enhanced if we did not pay for it. Are we okay with that?
- 496 S. O'Connell Mr. Chair my name is Shannon O'Connell. I am a private attorney and lucky to work with my father Des. I must say, I don't know how the public defender office has a 150 caseload and can manage that caseload. I am fortunate enough to have at one time 15 to 30 cases that I can sit with, think about and work on. And I have the ability to have a mentor such as my father to bounce things off of. What I want to say is the volunteer system is something I want to be a part of and I have no interest in public funds. This is not what this is about. The system is broken and I just want to say that it is really tragic that the public defenders have to be a part of that system.
- 509 Chair Ellis Thank you. Thank you all.

Agenda Item No. 5 Status Report from the Lane County Public Defense Panel

- 510 Chair Ellis I want to go ahead with Item No. 5. This is the status report from the Lane County Public Defense panel. It is Attachment No. 5. Just to review the history, the Commission had two meetings in Lane County about a year and a half ago.
- 520 M. Friedman That is about right. We have been in existence officially since April of 2005. It was probably originally discussed two summers ago when it was first raised – when there was some discussion about what to do with Lane County. I think you ultimately acted on it sometime in the fall or winter.
- 527 Chair Ellis This is the piece in Lane County not served by the Lane County Public Defender. To just remind everybody where we were, our meetings in Lane County, with the judges in particular, the appointment process was the fallback and they just had a lot of issues with it. There were lawyers that probably shouldn't have been on the list that were on the list. The list didn't exist. You ask to see a copy of it and nobody quite knew where it was. The manner of assigning to these individuals was haphazard, random, undocumented and wasn't matching lawyers with the level of seriousness of the case. There was no real mentoring. There was just no structure to it. Frankly, it was not a good scene. There was a lot of push within the

Commission to develop a smaller group of consortium lawyers. There was a lot of push back from the provider community, including some of our Commissioners from Lane County, who thought that was not consistent with the sense of the community about how they wanted it to be done. We had some very serious concerns that we just didn't want to leave it where it was. So Shaun took the leadership on this, as did John. We are really interested in how it is going. Why don't you give your report?

563 M. Friedman First of all, I do want to thank the Commission for allowing this experiment to happen. I believe it has been successful and we certainly have far more steps to take. Essentially what happened is we officially came into existence last April, 2005. During the period from April to September, working both with the Commission and the Oversight Committee and the judges, we were able to formulate a system for actually going through and screening all the attorneys at the time. There certainly was a problem in terms of determining who was actually on the list because there had been a variety of lists and because there had been some changes in whether it was the custody referee who was doing the appointments and then subsequently the court that was actually doing appointments. So there had never really been a clear definition of who was on the list and who was qualified to do what. The judges had expressed concerns about the quality of representation with regard to some attorneys and issues with regard to the size of the panel. The fact is that basically no one was watching, and no one was actually determining what cases were going where. It was pretty haphazard. Essentially, what we did is we required everyone who was then taking indigent cases to apply for membership on the panel. We opened it up for anyone, whether they had been taking cases before or not. We basically had a formal application process and screened all those applicants. From the Bar we received reports on complaints, and essentially complete backgrounds on everyone. Attorneys that I felt required further review were interviewed personally.

607 Chair Ellis When you say we?

608 M. Friedman "We" essentially means me and eventually presenting that to an Oversight Committee, which you folks formed. The Oversight Committee has consisted of Shaun, originally Senior Judge Jack Mattison, there was a member and still is a member from the public defender –

614 Chair Ellis Tom Sermak.

614 M. Friedman Right. Tony Rosta who is a local Lane County attorney and Liane Richardson who is also a former district attorney, who is now part of the law school. They were the Oversight Committee. Essentially, after a preliminary screening on my part, this whole list was then placed before the Oversight Committee. The court had a direct input essentially through Judge Mattison. Eventually, there was some push and pull in terms of who was on the list. Certainly the size of the panel has always been an open question. It was the Oversight Committee's feeling that what we needed to do was allow this to be an open panel, and it remains an open panel, and I will address that. We continue to have new members and some people leave. People that perhaps had been taking a higher level of cases were actually bounced back from that. Someone who had been asked to be qualified to take Measure 11 was determined not to be qualified to do Measure 11 cases. There were, in fact, some panel members that had asked to do major felony cases. We essentially created a list for misdemeanors, minor felonies, major felonies, and Measure 11 cases, civil commitments, a little bit of post-conviction work and some appellate work only when Salem doesn't have somebody to handle it. We essentially determined who was qualified to do what. Appointments have subsequently been based upon that.

[Tape 2; Side A]

001 M. Friedman One of things we were noting before was the need for coverage at arraignments. One of the things that the court asked us to do was to ensure that we would always have attorneys

covering arraignments. That was part of our original plan and we have been able to facilitate that – to always have attorneys covering arraignments in the morning and afternoon. Essentially, we set up a process whereby the arraignment attorney was primarily responsible for receiving any court appointments that might come in at that time. The basic nature of our appointments is that we do the overflow; we handle the conflicts from Lane County Public Defender’s Office. They are still the primary contractor in Lane County. The panel covers everything else and I think the sort of the relationship that we have had with Lane County Public Defenders has been quite complimentary. I think we have been able to work well because, in addition to picking up obvious conflict cases, we also handle cases if they withdraw in case they discover a conflict later. We are able to come right in and handle that case. The system that we set up with the court allows us to receive notice of all of the cases that are going to be arraigned. For instance, for 8:30 arraignments, we receive notice the afternoon before. We have lists of attorneys who are prescheduled to handle those arraignments; so that they know well in advance that they are going to be the person who is covering. If they are qualified to take a case that would go to the panel, then they would take that case. If they are not qualified; or we have basically have a set standard, so that a single attorney will not receive more than two to three cases at a single arraignment. Then we also have the attorneys who will essentially stand in for another attorney who is going to get that appointment. In Lane County there is a 1:30 in-custody arraignment so, again, we have an attorney who stands in for that. We have been able to facilitate things by receiving dockets from the court and being able to coordinate with the public defender’s office in terms of when they can get their conflicts to us. We are able to have that set so that, by the time someone appears, generally we have our docket to our attorney and to the court, letting them know who is going to be covering and who is going to be appointed. That part of the process has been pretty smooth. One of the things that the court has asked us to do, and was certainly part of the consideration of the Oversight Committee, was, to the extent possible, being able to determine the right attorney for the right case. One of the problems that existed before was that appointments were relatively random. To be honest with you, for the most part, it probably doesn’t make a big difference. But there are always those unique cases where there is either a particularly difficult defendant or mental health issues – things like that. We have been able to identify attorneys who perhaps are better suited to handle those cases. So we will make that type of appointment from the get go, and that hopefully avoids the need for someone having to withdraw from the case once they are into it.

046 Chair Ellis

I thought the court indicated that the tiers of competency also get matched to cases?

047 M. Friedman

Exactly. That is why, for instance, if someone who is covering arraignment who is only qualified to handle lesser felonies, and a major felony shows up on the docket, they will not get that case. We will have already assigned an attorney who is qualified. Part of our process has been to ensure, and I think we have been pretty successful, that the attorney who is actually going to represent the client will see them within the 24 hours. But there is always an attorney there at that first appearance in court. We have been able to handle that part of the process. Again, as I said, the panel has been an open panel. There has been a certain amount of give and take. We have been very willing to accompany attorneys’ schedules. So there are a certain number of attorneys who have decided to become inactive for a period of time. My feeling is that we have a sufficient number of attorneys. That hasn’t been a problem to date. Additionally, we have some people who simply, because of their workload or whatever, have left the community and have withdrawn completely from the panel. Again, we have been able to accommodate that. We have had new people come into the panel. Since I wrote this report, just last month we had three new members, one of whom was major felony qualified, one felony qualified and one basically new attorney, simply misdemeanor qualified. We have two new applicants pending review at this point in time. So again, this idea of an open panel seems to be working. One of the other things that was always a concern of the court, and certainly a concern of this Commission and the Oversight Committee, has been the need to mentor attorneys. We have been able to facilitate that. I don’t know if we have been able to do it as much as I would like, but we certainly have been able to accommodate that. For

instance, we have already had some attorneys who have been able to move up from simple misdemeanor status to minor felony status, based upon the fact they have worked with more senior attorneys in handling cases. The understanding has always been that there is an experienced attorney handling the case and, if somebody else wants to work with them on a mentorship status, which is simply on an unpaid basis. So again, that is something that we have been able to accommodate and something, certainly my hope is, that we can make more available over time. In terms of my duties, I have a staff person who primarily handles the administration, in terms of making the appointments, handling the docket – making sure that happens. Again, when there are instances of particular concern, I am always there to make the appointment on those cases. Additionally, I have been spending some amount of time – perhaps not enough – going to court and watching attorneys. My focus has been where the court has advised me that there may be an issue. I have always been able to go in and see those instances – those instances where the court says “Hey, you need to see what is going on here.” Fortunately, they have been few and far between.

- 089 Chair Ellis But you know, until this program was established, the court had no place to go, other than some judge unilaterally trying to act. And I know there was a history in Lane County that made this very controversial.
- 092 M. Friedman I have got to tell you that, right when we first came into existence, there was a certain amount of resistance – not from the presiding judge; I think we have a pretty good working relationship with the presiding judge, which is Judge Bearden. In fact, one of the recent changes is that Judge Mattison has just resigned from the Oversight Committee and it is my understanding that the new judicial member of the Oversight Committee is actually going to be the presiding judge, Judge Bearden. That is a change that is in process now. But I have been able to meet with her, probably I would say at least once every six or eight weeks, on a regular basis. I get together and just touch base with her on things. Additionally, there have been some other processes going on that have involved both the court and district attorney’s office and the public defender’s office, so it has allowed some other opportunities in terms of process that is happening in Lane County – in terms of how 35-day call is handled, and in terms of increasing settlement conferences.
- 105 Chair Ellis Let me just raise something that you remind me of. I am frankly comfortable with how it is being handled, but I know a senior status retired Supreme Court judge that was invited to serve on the MPD board concluded that it would be a conflict and he shouldn’t do it. I am asking myself, is that real or not and I don’t think it is real. Historically, judges did all the appointing and then presided over the trials for those appointed lawyers who appeared. So it is much more remote for a judge to be on a supervisory committee, the kind we are talking about. I don’t see a problem but, Jim, you remember this episode.
- 117 J. Hennings I believe that he actually contacted the Judicial Fitness Commission before he made that response. But I agree with you. I don’t understand the conflict.
- 120 Chair Ellis I don’t, and I think where I am is, let’s acknowledge that we looked at it and, unless somebody on the Commission has a different view, I think I would leave things the way they are.
- 122 M. Friedman The only thing I would say, and Shaun can correct me if I am wrong, my understanding is that when you originally created the panel, or allowed the creation of the panel, you directed that there would be a judicial representative on the Oversight Committee, and that is how Judge Mattison was originally appointed.
- 128 Chair Ellis I could see some difference between a judge on a board of directors of an entity, where a lawyer employed by the entity appears before that judge. Somebody might find that more of a problem than a judge sitting on a supervisory committee with you as a director of the

enterprise and ultimately the lawyers and the independent practitioner. So maybe there was an issue there, but I don't see it here.

- 135 S. McCrea Mr. Chair, I looked at what I consider our marching orders and the Commission did indicate, as Marc says, that there would be a judicial representative, and the implication was that it would be the presiding judge or her designee. So it seemed, if she wanted to do it herself, that it was what we had authorized. So I don't see a problem with it.
- 139 Chair Ellis Okay. The record will stand. We have looked at it and we are not being blindsided here. It is a deliberate choice and we think we are right. Go ahead.
- 141 M. Friedman Another thing: again, the Lane County experience is unique. Our attorneys are paid on an hourly basis: \$40 an hour for the bulk of the cases, \$50 for Measure 11 cases. Part of the system that we have put in place is, to be honest with you, copied from the Federal Defender. I have created a voucher that I do not forward to Salem. Every time a bill is submitted to my office, I review it. If I have questions about a bill, I will contact the attorney and see whether or not we can resolve it. If there is a need to be re-billed, I direct that they re-bill it before I forward it on to Salem. But part of what we are doing is that every bill comes with a voucher, which has allowed me to gather a certain amount of statistical information in terms of the work that has been done on a case. This essentially is not part of the standard billing process. At this point, I have gathered this information and it is useful for me in terms creating some comparisons – particularly, for instance, for one single attorney and whether his billing seems to be in line, and to understand why there can be quirks – large bills and things like that. It is a useful tool. The Commission may want to consider something like that. I know the federal Defender has had it for a long time and I think, if nothing else, it is a useful statistical tool. One of the other things that I thought about doing, but have not included as part of the voucher system, but might want to do at some other point: although the voucher system looks at outcomes, it doesn't specifically address the issue of a particular district attorney being involved in cases and things like that. I think that is a relevant question, which you may want to start asking because I think that reflects upon how particular cases are handled. It goes back to the question that you raised before in terms of the number of trials versus settled cases. Working with the Lane County Public Defender's Office, I think, has been extremely smooth. We have tried to systematize certain things that we do on a regular basis, like with substitutions and withdrawals. In Lane County, the process had always been that, if the public defender's office has to get out of a case, they would have to do a withdrawal. The system that we have put into the place, and the court has essentially blessed, is that, if a matter is not set for trial, a simple substitution is enough. So what happens is, the public defender's office advises us that they have a got a conflict, we designate who the attorney is, a substitution form is actually done by the public defender's office, and it gets sent on to the court and everything is done. If a case is set for trial, we do have to bring it in front of the judge to do a withdrawal.
- 186 Chair Ellis I thought one of the interesting pieces of information in your report was that, on multiple defendant cases, they are getting appointed directly through you because the potential for conflict is so high.
- 190 M. Friedman Exactly.
- 191 Chair Ellis I thought that was somebody thinking.
- 191 M. Friedman One of the things right from the beginning was that it was ridiculous to have five different attorneys for the same client. It is automatic within our system that, if we know who the client's attorney is, that attorney has that first appointment and she gets all the others. There is the rare case where somebody has been charged and you might have an attorney that is qualified to do minor felonies and, low and behold, a Measure 11 comes down the pipe. But that is the exception to the rule.

- 198 Chair Ellis Maybe I misread the sentence. It is on page four of your report. You are talking about multiple offenses, same defendant.
- 200 M. Friedman Yes. I was going to say the flip side of that is –
- 200 Chair Ellis Where you have multiple defendants, you know there are going to be conflicts.
- 201 M. Friedman Exactly. The other piece of it is that the court recognized and has asked us to do: I have to confirm this with the PD's office, but the court seemed to have a problem in cases, particularly property cases, where there was a potential for many, many witnesses and the possibility of the public defender's office having conflicts. So they had essentially directed –
- 208 Chair Ellis Hidden conflicts, where you don't know from the first workup who the witnesses are?
- 209 M. Friedman We don't have that since each attorney is independent. They directed that those cases automatically come to us. I think that has been happening for the most part. Again, that avoids the need for someone down the road to get well into a case and have to withdraw from that case. That part of it is working pretty well also.
- 214 Chair Ellis It is interesting, because one of our charges is cost-effectiveness, and there are ways of getting at cost-effectiveness that don't cut into fair compensation for the attorneys, and this is one of them – the conflict issue.
- 217 M. Friedman I think it is working well. One of the things that we are trying to increase: we recently had our first co-CLE with the public defender's office with regard to the process that Lane County now uses in terms of release because they have come up with a new system. We have had a CLE on that.
- 225 S. McCrea And it didn't help?
- 226 M. Friedman It is certainly our hope that we can do more with the public defender's office in that regard. Otherwise, we essentially are the face of the panel attorneys in Lane County. Things are working and I am looking forward to going at this for another year and maybe we'll report further progress. Again, I think one of the things that I would look forward to doing is increasing the number of mentorship opportunities that are out there for the panel. But I generally think things are running pretty smoothly. Obviously, I will second everyone else's comments: the issue, particularly for Lane County attorneys because they are paid on an hourly basis, is that the hourly rate is too darn low.
- 239 Chair Ellis Shaun, do you want to comment at all because you had a lot to do with it?
- 240 S. McCrea Yes, and I co-opted John. John has been an ex-officio member at the Oversight Committee meetings. I want to compliment the Oversight Committee because Tom Sermak, Liane Richardson, Tony Rosta and Judge Mattison have been great and they have put in a lot of time and energy and continue to do so. We are sorry to see Judge Mattison go off of the committee because he brought a unique prospective. We had a lot more meetings before the panel got up and running. Since Marc has come on as administrator, we have become more reactive because Marc has done such a great job of keeping things going. One of the things that I especially want to compliment Marc about is the communication with everybody – with the Oversight Committee, with the courts, with the attorneys, with the public defender's office. I think it has made an amazing difference in how the indigent defense program is administered in Lane County. For me, I know that it is successful because I haven't gotten very many complaints from people on the panel. I have gotten a few, and probably the biggest point of concern that has come my way, both in terms of panel attorneys and my own indirect experience, is the fact that we have a duty attorney for arraignments. Apparently, the duty

attorney does not get paid for the time that he or she is in court doing the arraignments. They get appointments, but that means that that person is in court for maybe a whole morning, or for hours in the afternoon. The bottom line based on my own direct experience is that my associate, Peter Gorn, was doing these arraignments one to two times a month and would be over there for hours on end. It reached the point that, between his court appointed cases and his time doing arraignments, I just couldn't afford to be paying the state \$24 an hour for the privilege of having him doing court-appointed cases. I am in the same position Shannon is: I am a private practitioner, I have got my father as a mentor, but it is getting him into the office now that is difficult; and one of things that I was hopeful would happen with my associate, Peter, is that he would get some trial experience, or at least be able to get some motion experience and that sort of thing. Instead, he was not getting any of that kind of thing and, ultimately, he and I talked about it and I took him off the panel with his consent because we just couldn't do it. That is the difficulty for a private practitioner in Lane County in trying to both mentor and provide some public service and be part of the program. But overall, I think it is going well and it is successful. And, as I said, my compliments to the Oversight Committee, to John for his help and to Marc for being willing to do this and continue doing it and to be open to the suggestions and concerns of the all of the parties who he has to deal with in the system.

- 287 M. Friedman Can I just respond to one thing, because this is something that has just recently been resolved: the issue of payment for arraignments. I have been in discussions with Kathryn on this question. Again, perhaps there was some confusion, but I don't think there has ever been any question that attorneys should be paid for the arraignments. There was a question of how that was going to happen. What had been occurring was that, if attorneys picked up a case at arraignments, they would bill on that case for arraignments. That didn't seem to be a problem. But there are always situations where they were there, but there was no appointment. So there is no case to pick up, or they were covering for somebody else, and that happens quite often. Somebody gets picked up on a bench warrant and there is no appointment. So what we have agreed upon, and I think it is supposed to be reflected in the new contract, is this: the administrator's office will receive payment for arraignments and the administrator, in turn, will separately assign panel attorneys to cover arraignments. That is essentially what Kathryn and I have worked on and I think –
- 306 K. Aylward Can I say, we are not paying the administrator's office to cover arraignments. You can administrator the panel in whatever way works for the court and system to keep it moving. It is up to you to decide how you do that.
- 311 S. McCrea So noted.
- 312 M. Friedman There will be funds available for me to directly compensate the panel attorneys that are going to handle arraignments. It is my intention that all panel attorneys will be paid both for any time that they may be owed right now, as well as from July 1 on they will be paid.
- 316 G. Hazarabedian Mr. Chair, I would like to say that we at the public defender's office are really pleased with Marc and his staff and their attitude toward working out the way our offices mesh together in this new system. I think it is largely due to that attitude and cooperation that this thing is working out well. As previously stated by somebody in this room, when one part of the defense function is working well, it is good for all of us. I think that is what is happening in Lane County.
- 322 Chair Ellis It is obviously reciprocal. You are really helping to make this work too.
- 324 G. Hazarabedian We are trying.
- 325 Chair Ellis Marc, I had a question. One of the concerns that the Commission had when we reviewed this in Lane County is, do you end up with practitioners for whom criminal defense is a relatively

small percentage of their practice and so they don't become specialized enough – they don't stay current with the intricacies of the law, they don't have that kind of specialist approach. One observation on page three: you say other attorneys have chosen to restrict the volume of cases they will accept and, as you put it in the report, that is sort of a positive, meaning that others get to have a more meaningful caseload. I just would caution that, in this whole area, we are concerned about the issue. It seemed to me that you are probably now at about a total of 31 or 33?

- 343 M. Friedman It is right around 32 right now.
- 344 Chair Ellis Versus 40 on the old list. It is my sense that this still may be more members than is consistent with this specialization concern. I know there is sensitivity about not being heavy handed. But I think you know the concern we have.
- 351 M. Friedman Absolutely. At the present time, there are probably about five attorneys who are inactive. In other words, they are not taking any cases at all. There are a number of attorneys, some of the more experienced attorneys, who are simply saying, "Don't give me anything other than a Measure 11 case." The way we apply that is that they still stay on the rotation.
- 357 Chair Ellis If they have private cases they are doing, so they are specialists on criminal defense – that is fine. I have no problem with that.
- 359 M. Friedman A number of the people I am thinking are taking capital cases. So they are on the list, they remain active, but they have got other cases they are doing.
- 362 Chair Ellis That model works.
- 362 M. Friedman Certainly, there are some attorneys who are taking a significant number of cases. But they are essentially criminal defense attorneys and, between what they are getting from the panel and their private retained cases, they are making a living. There are number of attorneys on the panel that are taking a reasonable number of cases and are doing some other area of law, whether it be domestic relations or other things like that. One of the things we are trying to keep tabs on is making sure that people are staying current and are providing the degree of representation that they should. I think the hardest struggle for us is we have a number of attorneys who are misdemeanor qualified or minor felony qualified and who are trying to improve their skills.
- 377 Chair Ellis I saw, and I thought it was great, that some of those lawyers on a non-compensated basis are assisting the experienced lawyers in major cases. I am assuming you are not doing any juvenile?
- 381 M. Friedman There is a juvenile consortium and we are not a part of that. There was one case that came up this year where the court called us. The juvenile consortium was conflicted out and I ended up stepping in and doing the case myself because they just needed somebody for a very short period of time.
- 387 Chair Ellis Any other questions or comments?
- 388 J. Potter You led off by saying this was an experiment and we all regarded it as an experiment. It made some people a little bit nervous. You reported that the judges are feeling good about it, the lawyers are feeling good about it and we heard that the PD's office is feeling good about. In your relationship with OPDS and the staff, are they feeling good about it? Do you need more support, less support, what is your sense?
- 394 M. Friedman Well, I guess I would defer to OPDS to answer that question in terms of how they feel about us. I think we are getting along well. I am happy with the relationship.

- 398 Chair Ellis The record should show Kathryn Aylward put a thumb up.
- 400 ?? I just wanted to point out that I am on the Lane County panel and I am also getting appointments from Douglas County because they have conflicts and not enough lawyers. So that won't be reflected in Marc's statistics, for instance.
- 403 Chair Ellis But that is consistent with the concern that I was expressing, and that is fine. I think that is great. Marc, thank you very much; we appreciate it. Shaun just kicked me in the right shin. We will take a 10 minute recess and, Steve, I would like to have you present for about five minutes when we come back because I saw your report and I thought it was helpful. If the Commission members can look at the MCAD report before we resume.
- [Ten minutes recess]
- 418 Chair Ellis If we could resume. Steve do you want to come forward. I received my copy of your report when I checked in, so I got to read it last night. Others hopefully had a chance to read it before the break, if they hadn't seen it before.
- 423 J. Potter It was emailed to us.
- 423 Chair Ellis MCAD has now submitted its second report since our on-site meetings a year ago. Steve, we appreciate that. If you want to summarize it a little, that would be great.
- 427 S. Gorham I will, and with me is Olcott Thompson, our board chair.
- 428 Chair Ellis Welcome.
- 429 S. Gorham We have been progressing since last summer to take the Commission's concerns and see how we can improve our system in Marion County and MCAD. We submitted our first update two meetings ago for you, where we had done our biggest substantial change. We organized small work groups to help mentor and work through substantive criminal law issues and we described it a little bit here in the plan. We have had two months of history with that. It seems to be working rather well. The MCAD members themselves I think have taken favorably to it. We have had very few, if any, negative comments about it. We hope that it will continue to help improve the quality of our representation. As you also can see, we have changed our board structure so we have three outside members. They are appointed by the Marion County presiding judge, one of them, the Willamette Law School is another and the Marion County Bar is the other. We have been very happy and successful with the actual members that they have appointed. One of the comments you heard was about the judiciary. We did not want the judiciary to actually be on our board, but the judiciary appointed one of our county's trial court administrator's assistants and he has been extremely helpful as an outside member on the board.
- 465 Chair Ellis The three is out of how large a board?
- 465 S. Gorham It will end up being nine. We originally had nine. We increased it to accommodate the three, and then have slowly gone back to nine.
- 469 O. Thompson We are currently at 11 and this time next year we will be 10. Electing three, if you will, inside members every year, we are dropping down to two. We didn't want to kick anybody off.
- 473 S. Gorham So we eventually will have nine. Three of the nine will be outside members. So a third of the board will be outside members. Again, we have been extremely happy with the input. One of the things that we would encourage any consortium that has a board that they don't need to

be afraid of outside members. They just help with their comments and their perspectives. So that has been a very favorable thing. One of the things we have done is we have just admitted three new members: two new law school graduates and one who has been practicing primarily in Polk County for awhile and is a seasoned criminal defense lawyer. We just admitted them in the last month and we are preparing to mentor them and start to have them in work groups so that they can be successful within our system. As you can also see, we have established an education plan, which I think was informal in the past. Now it is going to be formalized. That is set out in the attachment that you have. For the future, one of the largest areas that we really need to examine – and, unfortunately, because our system has been in turmoil because of the courthouse being unavailable since last November; the whole system in Marion County has been in turmoil, having court in various different locations in Salem and Marion County. Sometimes I know there are trials in the fire station in Brooks. So it is now a very dispersed system. MCAD has been intimately involved in helping manage that. The system has been concentrated on primarily how to manage that dispersed system. One of the changes that we had hoped would be accomplished by our final report probably won't be. But we have started to progress on that, and that is how to exactly match attorney qualifications with cases. As you know, we have the attorney-of-the-day system and there has been some criticism of that system. We are starting to examine how to modify that, if we should modify it. One of the biggest issues there is we just don't want to do it autocratically ourselves. We could probably do it autocratically ourselves, but we want to have the court and the district attorney – the three pillars of the criminal justice system – involved in that planning. We are starting to do it, as we started to do the work group planning within MCAD. Then we will eventually bring in the district attorney's office and the court to see what our initial ideas are, and also how the court wants to deal with that. One of the big issues, and I think you heard it from Lane County, is the courts, at least our courts, really want the attorney who is going to be handling the case present in court at the beginning of the case. We think that is important. How important in relation to other issues we are not sure yet, but our court system, at least right now, feels that it is important. That is one reason we have the attorney-of-the-day system.

- 549 Chair Ellis Are you in pretty good touch with Lane County because there are a lot of parallels between the MCAD model and the Lane County model? They are not identical, but there are a lot of parallels.
- 555 S. Gorham I think there are things that we can learn from each other. We are in touch in the sense that we are open to any contact that Marc wants to have with us and, hopefully, the fact that we have been doing this for awhile, with in essence court-appointed individual attorneys even though we are a consortium, will help that expertise. Some of the things that Marc was saying remind me of the infancy of our group. One of the things that he said in answer to one of your questions, Mr. Chair, and we may not have expressed this as well as we should have in the past, where we have attorneys doing maybe 50 percent criminal defense work or 80 percent indigent criminal defense work. If we are talking about an 80 percent person who is a member of MCAD, 20 or 19 percent of the other work they are doing is criminal defense work. It is private, but it is criminal defense work. We were not as articulate in the past in saying that they are criminal defense professionals. They just may not be doing a 100 percent indigent criminal defense work.
- 583 Chair Ellis You heard my comments.
- 583 O. Thompson I expect that as we thrash out the issues internally we will be talking to Lane County to see if maybe they tried something that we are thinking about. They can tell us if it does or does not work. The same with Clackamas County.
- 588 Chair Ellis When we were on site, and I think you are going to tell me that this has been handled, I believe it has partially through your disciplinary process; but one of the big, big issues the judges had was lawyers who wouldn't stay in contact. They wouldn't answer their calls, they would overload their voice mail boxes, and they were just out of touch. That really, of all the

things we heard, was the one that just jarred the most. That is just dysfunction. Give me some good news on that.

- 602 O. Thompson Last fall we adopted a communication policy, which we sent a copy to you two months ago.
- 605 Chair Ellis Right, I remember that.
- 605 O. Thompson You can't have full voice mail boxes. My understanding is that Steve has on occasion checked. Certainly, when I have called people and gotten that message, I have talked to those folks right away.
- 611 Chair Ellis It is better than the system my office has, which is when my e-mail gets overloaded, they send me 50 messages telling me my e-mail is overloaded.
- 615 O. Thompson There is no really great way to check whether people are checking their e-mails daily. Everybody has to have e-mail.
- 619 Chair Ellis You could make it mandatory that they respond to each e-mail. That is a good way to do it.
- 620 S. Gorham We have done what I call "tests" periodically to do just that, where I send out a test message and expect responses from people who we may have doubts about whether they are, in fact, reading their e-mails. I would say, in 95 percent of those cases, they are responding. When they are not responding to the e-mails, I am immediately on the telephone to them. I am happy to say that most of our members now do have cell phones, and I am glad to say that, at least for me, when I call them on their cell phone and I get voice mail I almost –
- 642 Chair Ellis No place to put it in their horse and buggy?
- 643 S. Gorham I think that may have been the case. I am getting very few current concerns from the judges.

TAPE 2; SIDE B

- 048 S. Gorham Like I said, the attorneys have immediately been getting back to me. Usually it is just a telephone call from the judge, this person hasn't responded, and usually it is a very short period of time when they haven't responded – a couple of hours at the most. I will call the attorney and usually I will get them within an hour, and then they respond to the judge immediately. I think it is working pretty darn well.
- 054 O. Thompson In talking to the judges, there haven't been concerns that we aren't responding anymore.
- 056 Chair Ellis Good. This is part of our two-pronged strategy in Marion County. Ten things you are doing to make MCAD more effective. Peter, do you want to give a summary on where we are on the Marion Public Defender Office?
- 060 P. Ozanne We now have four charter board members. We have a chair, John Hemann, who is a retired partner in a prominent Salem law firm and was a former partner of the Chief Justice. Bob Cannon, who started in the State Public Defender's Office and has been Marion County Counsel. He is currently acting as a pro tem judge in the region, so he is familiar with the lawyers in Marion County. Theresa Cox, who is the Executive Director of Mid-Willamette Valley Social Action Network, which is the largest social service provider in the region. She has both been a member on large community-based boards and currently reports to a community-based board herself. And, obviously, has some familiarity with the issues that many of our clients face. Then Scotta Callister, who is the editor of the *Keizer Times* and a friend and, I believe, a classmate of Janet Steven's.
- 073 J. Stevens Former roommate.

- 074 P. Ozanne She is a local businesswoman, who is also familiar with the community. So we have four strong board members. We are still looking for an experienced criminal defense lawyer, who no longer takes court appointments. We would like to have seven people on the board. We have a list of prominent business people who we would like to add. We may also recruit an immigration lawyer, who would obviously also be familiar with the issues many public defense clients face. The expectation is that the board will begin meeting in late August or early September, and meet with the Steering Committee, which Barnes attended, that included a group of public officials and prominent citizens, in order get their input and exchange ideas with them. The board would also begin the recruitment process for a director of the office. With the uncertainty of our current and future budget, progress in establishing the office will depend upon the availability of funding which, in turn, depends on how we do before the Emergency Board in late September and before the Legislature in the next session. I would expect that the office will begin operating sometime during the first quarter of 2007, at least that is what we are currently saying. Kathryn has priced the operation out at a six-person office plus support staff, but it may take awhile to achieve that level of staffing.
- 093 Chair Ellis I think this is great on both fronts. I think we are making really good progress. Any other thoughts or comments?
- 094 S. Gorham I would just like to mention that Bob Cannon was always, at least in Salem, the person that we would call about legal issues. He has a superb legal mind and is a good person.
- 097 Chair Ellis Olcutt and Steve, thank you both. We appreciate it.
- Agenda Item No. 6 Discussion of Delivery of Public Defense Services in Juvenile Dependency Appeals**
- 099 Chair Ellis Kathryn and Peter, do you want to present on the Delivery of Public Defense Services in Juvenile Dependency Appeals, which is Attachment 6?
- 102 P. Ozanne I will let Kathryn present this item because she has prepared a memo that goes into some detail. I would only say that we originally had this on the agenda for juvenile dependency practice, in general, but we concluded that you would have so much on our plate at this meeting that I will come back in August with a report on juvenile dependency after conferring with Ingrid and others. What we are doing here is just focusing on appeals in dependency cases. Kathryn and I are serving on what we will call the “Brewer Committee” which is led and initiated by Chief Judge David Brewer of the Court of Appeals. The concern has been that –
- 110 Chair Ellis Who, by the way, was a member of the Study Commission that created this Commission and he was a great contributor.
- 111 P. Ozanne He was a highly regarded trial judge and is a real dynamo. Judge Brewer is moving this issue along. A primary concern in dependency, as you heard last meeting, is that many of these cases seem to never end, or at least take a long time. Particularly with dependency, you have children and parents in the process of family changes and, if you have long delays in the appeal process, it really adds to the difficulties in terms of the impact on the people involved, including the stability of families and alternative placements. There is a very deep concern about these delays in dependency appeals. There is also a concern in the Legislature –
- 119 Chair Ellis Let me just pause with regard to the delay issue. There are delays in the direct appeals of criminal cases. In both places, delay is a sensitive issue. But this to me is very sensitive, where you have issues of child placements and determining who is really responsible for children.

123 P. Ozanne

Exactly. Practitioners talk about the frozen record: the record is a couple of years out of date in many appeals, but the family and child is moving on with their lives and there situations change. How do you keep up with that and how relevant is the whole appellate process? At a minimum, appeals ought to be processed with as much dispatch as possible. In the course of the discussions by the Brewer Committee, and thanks to having Kathryn there, we have had a really good exchange about the kinds of services and that our Legal Services and Contract and Business Services Divisions can offer, in light of their experience handling and streamlining the criminal appeals process. I would say, in general, leaving the more detailed discussion to Kathryn, that the Brewer Committee has been very impressed with how we handle appeals in terms of expediting the filing of notices of appeal and preparing transcripts and proposing the adaption of those processes in the criminal area to the juvenile area. Of course, the bottom line of our proposal to the committee is, as Kathryn has pointed out in her memo, is a proposal to handle juvenile appeals with state FTE. We know how difficult that sales pitch is to the Legislature. But I think we have some pretty appealing points to make. We have heard discussions about doubling the rates for lawyers in dependency cases. In comparison to that idea, our proposal looks pretty good economically. We are sure, and David Brewer and his colleagues on the Court of Appeals seem convinced that in light of the work of our Legal Services Division, that having a full-time specialists in the juvenile appeal area is the most effective way to provide quality legal services in juvenile dependency cases. With that, Kathryn, I will turn it over to you.

144 K. Aylward

Thank you. One of the things that was an improvement in how the Legal Services Division operates was that they began sending transcript fee statements. Actually our office issues fee statements for anything that we will be paying for. So with transcripts, instead of having Legal Services Division prepare an order for the trial court to sign for production of transcript at state expense, I thought let's just send them a fee statement, and when they have that they know they will get paid. We set it up so Legal Services Division can send that PDF document electronically to the transcript coordinator in each county. I think that is working very well. They get notice sooner. There are no questions about what should be part of the record. So that is going well. For a long time, I had been thinking that, once the two entities were put together, we really ought to coordinate how appeals are handled in a more centralized way. What happens now with civil cases and juvenile cases is that the trial attorney often tries to find the appellate attorney, so that if the trial attorney files the notice of appeal, the Court of Appeals presumes that this is the attorney of record and their name gets put in the system. So any future mailings come to the trial attorney, who really does not want his name attached to the appellate case. What they try to do is to actually get an order appointing appellate counsel and a name filled in right away. So they call our office to make suggestions and sometimes the court keeps a list. All of these things add to the delay. Then there is always the problem of who is going to file the notice of appeal. Sometimes the appellate attorney will say: "I will do it because I know how to do it and I will do it right." Sometimes they will say, until that notice is filed, "I am not appointed and I am not going to get paid so, if you are not going to pay me to file the notice of appeal, then make the trial attorney to do it." We find ourselves brokering these kinds of arrangements and getting caught in the middle. The other thing that happens is that the trial attorney will prepare an order for production of the transcript that says, "Serve mom's attorney, dad's attorney and the child's attorney." The transcript coordinator doesn't know that child doesn't have an attorney on appeal, so they make an extra copy, send it to the trial level attorney who says, "I don't need this," and throws it in a file somewhere. We can't pay for that copy because there is no appointed counsel on appeal for the child. So the transcriptionist doesn't get paid. It is just a mess. It seemed to us that, if we could develop an online form that applied to juvenile cases, then all we would say to trial attorneys is "Look, you know how slick and easy it is when you want to appeal. You submit the appeal in just a slightly different form, you fill out it and click submit and your task is finished." Our office will send a fee statement and find an attorney and have that process run smoothly. When we were discussing this, the Brewer Committee said: "Well, we don't see a downside." Some of the trial attorneys that were there said: "Hey, that works great for us." So we are proceeding with this process. I have already prepared the online forms with the

help of attorneys who provided input, and we've done the technical side of it. The next step is that we probably need to hire a paralegal to actually administer this process. The next question that came up in the committee is whether it would actually be a better model to have FTE, state employee attorneys, to handle these appeals: what would something like that look like and how many of the cases would they be able to handle? I estimated – we don't have good information on juvenile appeals in terms of the relationship of the parties; we don't necessarily know when mom appeals does dad always appeal, does he never appeal also, so it is a little bit difficult for us to determine what the conflict rate would be – even as few as four FTE attorneys could probably handle 75 percent of the juvenile dependency appellate caseload.

- 202 Chair Ellis Always on the terminated parent's side?
- 203 K. Aylward That is something I am hoping the committee will discuss further. There is some question about whether children need representation on appeal.
- 205 P. Ozanne The overwhelming number of appeals are by parents.
- 206 Chair Ellis Right.
- 206 K. Aylward If it is mom against the state on appeal, the child's attorney will either be siding with one side or the other. And if mom's attorney or the state is filing the opening brief, they could submit a supplemental brief. But I feel like, on one side or the other, we have two attorneys working toward the same goal, but I'm just not sure about that. If the Brewer Committee says, "Oh absolutely, the child needs counsel on appeal," then I have no objection to it. It just doesn't happen very often.
- 215 Chair Ellis I still have the same problem I had when we met with the juvenile people. Who does the lawyer for the child take direction from? We got an interesting set of answers that don't exactly convince me that, on the legal issues on appeal, it really makes sense.
- 221 K. Aylward In any case, I would recommend to the Commission that we at least submit a policy option package with our next budget that includes the four FTE attorneys in order to allow our office to handle juvenile dependency appeals.
- 226 Chair Ellis Can I ask a couple of questions about the memo?
- 226 K. Aylward Certainly.
- 227 Chair Ellis I didn't understand the line in the box that had the numbers in it that is called 75 percent reduction in non-employee attorney expenditures. What is that?
- 229 K. Aylward If we are spending \$300,000 a year now to pay hourly paid attorneys to do 100 percent of the work, and if we take 75 percent of it in-house, then we are paying for employees, but we are no longer paying for 75 percent.
- 233 Chair Ellis Okay. So it was the off-loading to private attorney appointments that would be a saving under this program?
- 235 K. Aylward Correct. The money we are not going to have to pay outside attorneys subsidizes the cost of FTEs.
- 237 Chair Ellis Then it seemed to me, on the top of that page, when you said you would still have some assignments to attorneys on the private bar list, I am assuming that will move toward specialty contractors in juvenile law.

- 242 K. Aylward Absolutely. In fact, as part of reviewing the appointment lists and recertification of attorneys, I submitted to the Court of Appeals a list of appellate attorneys for some feedback and got extremely positive feedback on a small number of attorneys who the court said were absolutely excellent, fantastic advocates and, on top of their workload, didn't ask for repeated extensions. This is the other thing. It is a minor delay when you lose a day or two finding an attorney. But the court's concern is that if there are either extensions for production of the transcript, which can happen – but again, that is less likely to happen if you get that transcriptionist going the day you know you are going to have an appeal – but, when attorneys file repeated motions for extensions of time to file, that really adds to delay. The court needs that to stop if they are going to meet the timelines that are appropriate. That is the first thing they asked me: "What is the guarantee that your in-house attorneys won't be overworked and also move for extensions?" Well, the answer is you hire new people with absolutely no work on their desks and you say, "Here is a case. You have 21 days to get that brief filed and, when you're done with that one, come back and I will give another case." If you can't take 75 percent of the work load because they can't stay on top of it, then more cases go out to the private bar. I think in these cases it is absolutely crucial that attorneys have as much time and as little work as they need to be able to meet the deadlines.
- 265 Chair Ellis I was really impressed with the meeting last time and how complicated the legal issues are in the juvenile area. I had no clue about the overlay of federal statutes on the state law. So I think having specialists on appeal, and tell me if I am wrong and, Peter, maybe you are the one I ought to address this to, but I assume these juvenile appeals are not a review on the record of the judgment; it is probably more on legal issues isn't it?
- 273 P. Gartlan I don't know personally, so that is why I have asked around. Apparently, it is the other way around for reasons that I don't quite understand. It is fact intensive with a long record and factual questions pretty much on appeal.
- 277 P. Ozanne The Brewer Committee is also looking at *de novo* review in juvenile dependency cases in Oregon. We found from a national survey that only a handful of states still have *de novo* review. It has been explained by scholars as an artifact of the common law division between law and equity. Juvenile dependency cases being cases in equity, nobody otherwise really thought it through. But there are no powerful interest groups out there who strongly support *de novo* review, like family law and worker's comp. practitioners. They will make it daunting for the committee to make any changes to *de novo* review and looking it. We are certainly in the minority of states that have it.
- 286 Chair Ellis Well, I am wrong once again. But maybe I am not wrong in terms of where it ought to go.
- 288 P. Ozanne Well, as I believe Ingrid would say, there are a lot of legal issues that are addressed, but it is the morass of facts that must be reviewed to ensure the quality of legal services in this area of law.
- 291 Chair Ellis But even with the morass of facts, it is a very specialized area.
- 292 P. Ozanne Oh yes.
- 293 Chair Ellis Any other questions here?
- 293 J. Stevens Just what is *de novo* review?
- 294 Chair Ellis Where the appellate court says, "We will decide ourselves what the facts are and not defer to the trial court."
- 295 J. Stevens So, effectively starting over again.

- 296 Chair Ellis Yes, but the appeals court will do it on the record. How you do it with regard to issues like the ones in dependency cases based on a written record, I don't know.
- 300 J. Leary Mr. Chair, for the record, Joe O'Leary from the Governor's office. I just want to take a brief opportunity here to mention that the issue about the Brewer Committee on juvenile appeals is one very important piece of a broader movement that I want to alert you to. I know staff is aware of it and has been working with me and members of the Legislature at the highest levels. The Speaker of the House, the Senate Majority Leader, and the Chair of the House Judiciary Committee are working on some substantive issues relating to juvenile dependency cases. Some of them relate to the statutes and the legal issues and some of them relate to attorney compensation. I should say attorney compensation and quality assurance because those go hand in hand. Some of them relate to appellate issues and the members of the legislative work group are keyed into those, and some legislators are also members of the Brewer Committee. I want to leave you with the impression that this has the potential to be an issue that has a lot of momentum behind it in the next session.
- 320 Chair Ellis Particularly if the same person continues as the Senate Majority Leader.
- 321 J. Leary Correct, although I shouldn't say anymore. I just want to raise that. Although I am now an employee of the Executive Branch, I have been asked to be a member of the legislative work group and my new boss has given his support. I know that group has asked me to reach out to both the Commission, the Criminal Defense Lawyers Association and the Juvenile Rights Project and others who are involved in these conversations, so that we can approach this issue not in silos, but with a unified voice. That's not to say that these issues are not tricky and it's not to say that everybody is going to agree on everything that comes out of it. But I think it is potentially a great opportunity to do some good in the next session.
- 335 J. Potter Did I hear, Joe, that there is a first meeting of this work group next Tuesday?
- 337 J. Leary The work group has already been meeting. There is a meeting next Tuesday that I was asked to convene with the Criminal Defense Lawyers, the Juvenile Rights Project and members of the Commission and probably some others to start to discuss and vent issues surrounding compensation and quality assurance matters. Because I think it is viewed right now by the work group as an issue that is going to require intensive partnership to be postured correctly.
- 347 Chair Ellis This is something that probably does call for a Commission vote and that is the question of whether we want to ask staff to prepare a policy package to be presented in connection with our 2007-09 budget to add four FTE attorneys to handle juvenile dependency appeals.
MOTION: Shaun McCrea moved to approve the motion; Janet Stevens seconded the motion.
- Is there discussion among the Commission on this? Obviously, another way to go is to keep it privatized and seek more funding and do the appointments through an outside means. I think my own reaction in this area, and this kind of ties with the next subject we are going to talk about: the ramp up and need for these services is real, and it does seem to me that the desirability of specialization is also very real. It also seems to me that all of these factors on timing, particularly in the transition between trial and appeal, would be far better served if we had this identified group of FTE that can do it. I am not hearing from Mr. Gartlan about any concerns that this would overload the management structure of LSD and, frankly, that is one of the assets that we have. We have a wonderfully managed group of FTEs. Adding four, even though in a new area, we still get to use the same management structure that is there now. Am I right, Peter?
- 378 P. Gartlan Yes.
- 378 Chair Ellis Becky, was that a nod from you?

- 379 Chair Ellis Good. I think everything points to making this package. I know the Legislature has been reluctant to add FTEs, but here is a place where there is no risk of under utilization of the resource. So it cries out for FTEs and I am not hearing a big dissatisfaction with FTEs as the principle way we address appellate work generally. With all those comments, I think it is the right way to go.
- 390 J. Potter On the numbers, Kathryn, I want to make sure I understand the services and supplies. Does that include all the office space? You must have office space existing within the building.
- 393 K. Aylward We do, at the moment. We may not in 12 months' time, but there has been a lot of space vacant in the building for over a year. It is not a popular location. The basement floods and the roof leaks. It may stay vacant for some time.
- 399 Chair Ellis So you like to be in the middle.
- 400 K. Aylward That is right. So there is space in the building. The 16 percent is just the standard, if you look at our entire budget, all of our services and supplies. So that includes rent and government service charges.
- 401 J. Potter Okay.
- 402 Chair Ellis Any other questions? There has been a motion and a second that staff prepare a policy package for the 2007-09 budget to provide for the addition of four FTE attorneys to handle juvenile dependency appeals. Hearing no objection the motion carries; **VOTE: 5-0.**
- Agenda Item No. 3 Discussion of OPDS's Response to the Enactment of "Jessica's Law" in the April 2006 Special Session of the Legislature**
- 410 Chair Ellis Kathryn, you stay there because this involves two related topics: our upcoming September presentation to the E-Board and our response to the economic costs implicit in the special session's decision to adopt what is called "Jessica's Law." If you could present on both of those topics, I think I would suggest that we address them together
- 420 P. Ozanne May I just say, Barnes, it is good that we have Robin LaMonte here, who may have some reality checks for us as we go through the discussion.
- 423 Chair Ellis Welcome Robin. It is always nice to see you.
- 424 J. Stevens Could you start by reminding me what "Jessica's Law" is?
- 425 K. Aylward "Jessica's Law" was House Bill 3511. It increases the mandatory minimum sentence for first degree rape, first degree sodomy, first degree unlawful sexual penetration and first degree kidnapping in the furtherance of commission or attempted commission of the preceding charges from a 100 month minimum to a 300 month minimum when the victim is under 12. That is only for an adult offender. In looking at this, I took a very simplistic approach. If the sentence is tripled, let's assume the cost of representation is tripled. Now I don't necessarily know that this has validity. But in the absence of any other way to know how much these cases will cost or how many there will be, it seemed to be a reasonable starting point. Our average cost for Measure 11 cases is \$2,000. So I assumed that we would be looking at something like \$6,000 – an additional \$4,000 per case. I then estimated the number of cases which, again, was a pretty rough estimate because we don't have any statistics on victims' ages. I then came up with a total figure and presented that as the fiscal impact statement to this special session. As we discussed at the last meeting, there were no appropriations that resulted for us from the special session, or anyone as far as I know. I spoke with Legislative Fiscal Office about this approach and what our next steps should be. The advice was that, in

the same way that when Measure 11 was enacted, you need to collect data, you need to be able to come to an Emergency Board and say, "Alright, this is now what we are seeing happening; and this is a reliable prediction of what the cost and impact for this biennium will be," and then receive any additional funding that is necessary through that approach. I had a little bit of concern that between now and the end of August, when the materials for the September meeting are due, that we might not have any data. As far as now, certainly none of our contractors have called up yet to say "Okay, I have got one of these, let's talk money."

- 465 Chair Ellis Why can't we circulate to the providers and try to get retro data on cases involving 12 year old victims in sexual offenses with adults. It won't be scientific, but I have to believe in this room there are people who have some sense of how frequent this issue is.
- 474 K. Aylward We do have some retro data. We used to have a case type called SO12. It was not exactly these offenses but it was sex offenses where the victim was under 12. So we took a look at the ratio of SO12s to other kinds of Measure 11s, and that was the basis for my estimate of how many of these cases there would be. We know how many Measure 11s there are and, historically, some percentage had young victims. I would welcome any input and a methodology for making better prediction, but I think it is still a pretty good prediction.
- 485 Chair Ellis Anything is going to be trying to extrapolate from history to project of the future. I don't care what field you are in; that is always fraught with some problems. But wouldn't circulating the provider community, which I know you can do very efficiently, get people to tell us what they can as to the frequency of these cases and their own practice and experience? That will give us a lot more credibility, I would think, if we do make a push in September with the E-Board to cover what we certainly know are going to be incremental costs from this new law this biennium, as opposed to pushing it all into a future biennium.
- 502 K. Aylward I had another concern. I have submitted a report to the Commission concerning our budget this biennium in terms of caseload prediction. We are within a handful of cases.
- 508 Chair Ellis For the Commissioners, this is the May interim report that Kathryn drafted and Peter re-circulated to all of us in an email of June 7. I don't know if the rest of you brought yours with you, but it is worth going through it. I thought it was a very powerful document.
- 515 K. Aylward Thank you. I haven't re-read it since I wrote it and I don't have it with me. Basically, what we were realizing is that I would watch the money every month and I would go "What is happening. Why are we spending so much money?" I would look at the caseload and say, "Man, I nailed it! I have got it!"
- 521 Chair Ellis .08
- 522 K. Aylward .008. So why are we spending all this money? People would say, "Oh, maybe it is death penalty cases, or maybe you are approving more expenses than you used to." I tore everything apart. We looked at the statistics and we tried to figure it out. Were we just being a little bit more free with the pen than the judges, is that why? Are we saying "yes" all the time? Finally, what I tracked it down to was a handful of things that, over the biennium, have chipped away at the amount of money that we actually have to spend. Primarily, it is death penalty cases that never die. We have cases that go through appeal and then PCR. Sometimes there is another trial and then another appeal and another trial, so we are carrying the expense of cases for years.
- 540 Chair Ellis This is an example of no good deed goes unpunished.
- 541 K. Aylward Exactly.

- 542 Chair Ellis The provider successfully gains a victory in a death penalty case and it just doubled the caseload.
- 544 K. Aylward The first biennium over 20 years ago, there were some cases. Okay, we have got that in our budget and even the next biennium. We are still paying a bit on those old ones and we have got a few more. Well, we have got a little bit of COLA money, so we will keep the \$40 an hour at \$40 because we have to pay for old death penalty cases. If that goes on biennia after biennia, the \$40 an hour guys are saying “Well wait a minute, hasn’t there been a COLA here and there and here and there? How come we are still at \$40?” It is because we are paying for death penalty cases that aren’t incorporated into our budget. That I think was the big one.
- 556 Chair Ellis The volume of appeals is huge.
- 558 K. Aylward Well, the number of appeals, especially in juvenile cases and, again, because LSD is a closed system and can take X number of cases, as the caseload grows over time, our appellate caseload that the account pays for grows. That was never something we really looked at. We had 350,000 trial-levels and a few 1,000 appeals and you think that is not going to make a difference. But, over time, it grows and grows and grows, and then it becomes significant.
- 569 P. Ozanne And some people wouldn’t do the work.
- 570 K. Aylward You heard Marc Friedman say \$50 an hour on Measure 11s. I cringe and think, “Are there other people out there who will now say, ‘Well, wait a minute, how come they get more than I do?’” Well, with the panel, the rationale was you cull the list and get the best of the best. We’ve got a new system going here. We think we can do that. But increasingly, attorneys are saying, “I will not take a Measure 11 case for \$40 an hour.” We have no choice. We have to say yes. The court is calling and they need an attorney. We call everybody in town and nobody wants it; nobody will touch it. When I finally say “Well, would you do it for \$50?” Even then, it is grudgingly accepted. Now, we are paying a lot of people \$50 an hour on Measure 11 cases. Little things like the mileage are going up –
- 587 Chair Ellis It may be little, but it is \$300,000.
- 588 K. Aylward It is a 25 percent increase in the mileage rate on an item which for our budget is huge. You take most state agencies, they need mileage for a few employee reimbursements or whatever. For us, it is a significant chunk because we are having investigators and attorneys driving all over the state and because you can’t find anybody to take a case locally. You have to get the guy from eastern Oregon to take a Multnomah case. So they are driving back and forth and we are spending a lot more. Even if their little COLA allows a 2.4 percent inflationary increase, you just bumped up 25 percent on a big piece of what our expenditures are. How are we going to do that? It is just impossible. We also had an example last meeting or the meeting before, and this happened probably three or four times, where a death penalty lawyer has one case at \$55 an hour. You need somebody and you want them to take a second case and they cannot bill their full-time at \$55 an hour. So you have to say, “Okay, fine let’s do a contract, which takes \$75 an hour.” There is just no alternative. It has been very difficult to incorporate these kinds of things into our budget and to actually look at them. Part of the problem was that, until we were centralized and actually looking at these things, it was very difficult because those things were paid in the courts. You couldn’t see patterns; you wouldn’t know when bills would come in. They were being approved by judges, so you couldn’t analyze the consistency or the time of what was being approved because we had no data. I think this is something I think about it and I think it seems kind of lame not to have seen it: “You must have realized that you are paying these bills on old death penalty cases.” I just never tied it together with what was happening.

- 627 Chair Ellis It looked to me, and you will see my notes on the copy, but of the total of amount \$7,000,000, 70 percent of that was from two areas: the growth in appeals and the carry over of death penalty cases.
- 636 K. Aylward I have a little bit of a concern when we go to an Emergency Board we don't want to come in with this huge long laundry list saying, "Oh yeah, our rent went up, and our pens cost more." We really want to say, "Look, we are managing the best that we can, we are controlling expenses, but these are big hits that we can do nothing about." I felt like including a request for "Jessica's Law," even though we didn't have actual historical data like we do for these requests. Frankly, many people would think this item was small. If we go in and say "I need \$1.5 million for Jessica's Law" and the DA's are saying it will be one case in ten years, I just didn't want to undermine what we absolutely cannot do without and what we have to build into our future budgets because we are going to face this every biennium if we don't anticipate it.
- 657 Chair Ellis I have two conflicting thoughts. One is, I do believe in striking while the iron is hot and I certainly think that the Legislature's fiscal responsibility means that if they are going to quadruple the number or length of sanctions on a particular crime it requires our providers to incur not just significant time, but the responsibility level goes way up.
- [Tape 3: Side A]
- 005 Chair Ellis It is not just additional time because the magnitude of sanction does drive things. It is the responsibility factor, which means that you have got lawyers, who are really qualified, and the comparison to murder is interesting at the sanction level. But I was pretty impressed with the input we got last meeting that these cases, in many ways, are harder than murder: (a) you still have a victim and then, given the age of the victim, it is obviously very difficult to deal with; (b) it is not clear a crime has been committed – at least in murder you normally have a *corpus delicti*, and (c) these are pattern cases, so it not a single event case. It is going to be a pattern, and I bet in all these cases there are psychiatric issues that are complex. That being said, it does seem to me that the E-Board ought to hear about this because I absolutely believe, when the special session does this in the 30 seconds it took to do it, they need to know that it carries fiscal consequences. And we need to deal with our providers. To the extent in this biennium these cases emerge, we must deal fairly with them. I know you agree with that, and I think everybody on the Commission agrees with that. I think the issue for me is what do we say to the E-Board, not do we say something at all; and on that I am obviously open. I think it is an issue we should include in what we address. It is clearly an exogenous event that has occurred and something we had no ability to plan for when we submitted our last budget. It is here and there is a significant number of months left in the current biennium.
- 036 P. Ozanne The question is do we ask for money? I suppose one of the realities is how much money is in the E-Board fund. Maybe Robin can tell us something about that too. We certainly want to alert the Legislature about the likely increases in workloads and costs we're facing.
- 041 Chair Ellis The Legislature has had a pattern with us of being afraid that, if they just gave us all the money we asked for, maybe we didn't need it. They did this business of, "We will give you so much and we will earmark the money. You have to come back to the E-Board and prove that you really do need it." It is not quite that way this biennium as it was the biennium before. I think there is a mind set that if we get to a point near the end of a biennium and we can document our needs, I don't believe that they will be shocked or offended. I absolutely think we need to include a statement on this. What should be in the statement I understand is a hard question. I was hoping that we would be able to accumulate more than the data that you presented earlier, but I don't know.
- 053 K. Aylward There may not be a case. I may have been way off. There may be one in ten years; at least there hasn't been one yet.

- 056 S. Gorham Mr. Chair, would that be a three strikes sex case?
- 057 Chair Ellis Right.
- 057 S. Gorham I think we have only one in Marion County and we definitely spent more resources on that case because of the potential penalty of a life sentence. We used a mitigation investigator where we normally won't use a mitigation investigator; and we pay a mitigation investigator the death penalty rate because that was appropriate. That is at least some potential data that might be out there. The three strikes law has been out there at least for a session or two.
- 066 Chair Ellis What is the schedule? There is an E-Board meeting in September and I assume there is at least one more.
- 067 K. Aylward There is one in December.
- 069 R. LaMonte First of all, with regard to "Jessica's Law," the Legislature recognized there was a fiscal impact to PDSC from the bill. But they also recognized that they didn't have any data and that is exactly what they asked for: "If you get a case, come back and tell us exactly how much it cost and then we will reimburse you," because the Legislature didn't want to allocate money for something that might not materialize, or for a number of things that might not materialize. It wasn't that they weren't willing to pay for it. That is the first point. If you are still speculating when it comes time to go in front of the E-Board and you haven't done anything better than the fiscal impact that you turned in when the bill was in front of the special session, that is one point. You already have another serious problem with a known shortfall in your budget right now, which is what is coming to the E-Board in September. That I think really needs to be the focus of what you are bringing to the E-Board in September – your known shortfall. The Emergency Fund may or may not still exist after this upcoming E-Board meeting, so the amount available to allocate in September could be seriously limited. What may end up happening is that there is a reservation made for any funds that revert to the Emergency Board from the special purpose appropriations, and any such appropriation will occur in December. The final point relates to going to the session in January 15 or whatever with some of these issues. If, in fact, there is a shortfall because of "Jessica's Law" in this biennium, there can be a supplemental appropriation of this biennium by the next Legislature. So you have several avenues. But you need to be aware of the fact that resources are now really limited.
- 097 Chair Ellis I knew these issues were kind of dovetailed, so that is why we are doing them together. That pushes us to the question of what should we do with our contractors now on this effort, if you want to address that?
- 101 K. Aylward In spite of what contractors may think, I have quite an open mind about this. It seems to me that there are a variety of situations among contractors. For example, there is a district attorney who files one count and then says, "Yeah, but I have all these other things that I could file," and the defense attorney has to deal with the potential of those non-filed charges with just as much effort as if they were filed. But under the contract, they don't get credit for anything that wasn't filed. For that person, if you have a system where they were getting credit by the number of counts, they would say "That doesn't work for us. We will take the 'Jessica's Law' cases, but we want to do them hourly because we know we have got hours sitting out there. So for us, it works better to do it hourly and because they are harder we should have an increase in the hourly rate." For them, that might work well. For somebody else, who maybe doesn't have a murder rate but has a Measure 11 rate, they would say, "It is three times the sentence and I want three times my Measure 11 rate." If that is the only way to negotiate this, at least I feel like a presentation to the Emergency Board should say, "We did our best to try and negotiate as little as possible for these cases. We didn't just say here is your murder rate and throw the money out, we fought for it."

- 121 Chair Ellis I wouldn't phrase it that we tried to negotiate for as little as possible. I would rather phrase it that we negotiated a fair rate, given these circumstances, and that the providers have a lot to say about the circumstances under this law. That is just a suggestion.
- 126 K. Aylward One of the things to think about are charging practices and the multiple counts and incident dates. Because, if your Measure 11 rate is \$1,600 and you triple that, that is \$4,800 and you have five counts that is a big number, quite a bit bigger. It could be double your murder rate. So to say, "We want the murder rate" may be appropriate, depending on all of the circumstances in a particular contract and the situation in a particular county in terms of charging practices. I would just suggest that there be flexibility, so that contractors can choose what may work best for them.
- 137 A. Hamalian I work primarily in Multnomah County. I don't know how you factor this in, but I think "Jessica's Law" actually makes those cases more difficult than murder cases in my experience and here is why, at least in our county. First and foremost, though there could be more evidence gathered by the state or evidence can improve with more facts, generally speaking when you have a murder case you have a body and there are not a lot more counts that are going to show up. With these types of cases, a lot of times what you see is they get one or two victims, they charge the case and, as the case develops, there are more and more people who come to light and might have been affected by this conduct. So it makes the case worse for these attorneys. Another thing that is going to be difficult for these cases is that, in Multnomah County, when you get a murder case, you are automatically assigned to a special judge. You automatically don't have to comply with the statutory timelines that the presiding court has set, and you have some time to understand your case, to work case and to work your other cases that are part of your caseload. With one of these cases, we have pretty much got 180 days; that is it. I doubt that the judges are going to change that. Another problem that is associated with it is now the DA no longer has a reason to give you an offer. For instance in a murder case, the district attorney's policy in Multnomah County is: "We don't make offers on murder cases; you make us an offer." Now we have a situation where we have a client who has to come up with a decision either to make an offer of how many years or decades of their life they are willing to agree to give up to the state in order to forego an opportunity to go to trial. Quite frankly, having done a lot of these cases, especially where there is an initial denial of the conduct, I don't see how they are going to resolve these cases now, where you used to say your worst scenario is 15 years in prison. Now you can say your worst-case scenario is 25 years in prison. Clients are going to say, "Let's go to trial." Now you are going to have cases that you are going to need to prepare for trial. They are not going to resolve with a settlement conference. The odds are, like murder cases, they are going to resolve very shortly before trial. I don't know how you put that much time and effort into a case for \$3,200. I think the only way to deal with these cases fairly is to bill them hourly because I think that reflects the amount of time you put into them. I guarantee you it is going to increase the length of time that the case can be resolved because the offers are going to be far worse than they were when these cases fell under the guise of Measure 11. Quite frankly, they are going to inhibit the ability of an attorney to have a bigger caseload when they are handling these types of sex abuse cases.
- 179 J. Hennings I think you have some policy decisions to make and I would at least mention some of them. You heard earlier that, on average, your contract caseloads are 30 percent above your standards throughout the state.
- 183 Chair Ellis The case volume?
- 183 J. Hennings No, the number of cases that are handled. As I was about to say though, Peter is going to Maricopa County where by case law there are standards set that are lower than your standards in terms of how many cases can you handle. But right now, you have on average out there of contractors doing 133 percent. You have heard testimony that sometimes it is 200 percent

and sometimes it is 185 percent. Last year you had contractors who are overloaded to begin with. You have some evidence, and you just heard some of it right here just a few minutes ago, about what these cases are going to cost in terms of time. I can tell you what my board told me to look at it and understand Steve Houze and Susan Mandeborg are on my board – some very experienced criminal defense attorneys. When they looked at it, what I was instructed was: “If you take one of these cases, you have to treat it as a murder case, which means two attorneys.” We assign murder cases to two attorneys, and at least the head one is murder-qualified. One of your policy decisions is to decide what your qualifications are going to be. Is it going to be Measure 11, or it is going to be murder-qualified? I suggest murder-qualified is what the standard should be. One thing you have to think about: if there is a conviction and this person goes to the penitentiary for 25 years, you have got 25 years of appeals, post-conviction, federal post-conviction, malpractice against the attorneys, bar complaints against the attorneys; you are talking about a huge, huge trail.

209 Chair Ellis

You are making my head ache.

210 J. Hennings

If you don't do it right. You had better pay enough to make sure that it is done right the first time around. These cases are definitely as complicated as a murder case, and I think a good case can be made that they are actually more complicated. You have a problem between now and the end of the year in terms of telling the field what you are going to do. If you are telling the field, “When you get one of these cases and come back and negotiate it,” are we going to start working on those cases? Do you really want a delay built in while we are negotiating what it is going to cost? Are you authorizing staff by saying, “If you can't make a deal with the particular group, make it with some other group?” Do you really want the case not to be worked on from day one? I suggest to you as a policy matter (1) you have to establish what the competency level is of the people who are doing the case; and (2) you ought to say, “Here is the working assumption of what you are going to get compensated,” so that we can get the attorneys into those cases immediately, without every single case having to go through a process of negotiating what we are going to get paid. Peter at Hood River said we were pushing toward a take it or leave it type of situation. I think this is a case where you may have to say it is a take it or leave situation, if you fairly value these particular types of cases. It doesn't make any difference what jurisdiction you are in. On murder cases we only get one credit, at least on my contract we only get one credit. So it doesn't make any difference how many counts. What really is at issue is that somebody is going to go to the penitentiary for 25 years on a very, very difficult case. The sex cases and psychiatric cases are extraordinarily difficult. I think as a policy matter you ought to set the rate. I think it is a good time to do it because, as you have heard, there have been no filings yet under “Jessica's Law.” My own estimate is that there is going to be less than a handful before the end of this biennium.

242 Chair Ellis

One of the suggestions, Kathryn, was to do these at an hourly rate, and I assume that is the \$55 level.

245 K. Aylward

\$50. Well, we have never approved anything higher than \$50 an hour, except on capital cases, because once you open the floodgates So we really tried to stick to \$50. But you can decide that these cases are just the same as capital cases, and so the rate should be \$55 an hour. Those are rates that are set in our policy only, and the Commission could change that policy. But again, you are walking that balancing act between what is necessary, and spending money you don't have without permission –

257 Chair Ellis

I was just trying to get a reaction from you but is that a way that we think –

260 K. Aylward

It is interesting because I said to one contractor, “If you want these cases, you can take them hourly at \$50 and after a while – I could hear the calculator tapping – he said “Oh, well, that is not very good.” He figured out that, if there were, on average, two or three counts in a case, then his Measure 11 rate was better than pay for the number of hours he would anticipate

working on that case. Hourly was not a good deal. So I am fine with hourly, if it works for people.

- 269 Chair Ellis Help me understand. If the reference is made to the murder rate in the contracts that have it, what would that be?
- 270 K. Aylward It is anywhere between \$10,000 and \$29,000.
- 273 Chair Ellis I think Jim has a valid point that we ought to at least try at this point to identify, if we can, where, in the hierarchy of severity, we can put these cases. I guess I am not yet at the capital level, but I am at the murder level in my own kind of mind. I think we ought to at least indicate what we were thinking about, so that contractors aren't caught blind. If we are thinking a unit rate, that would be the murder equivalent, or an hourly rate that the contractors have –
- 286 K. Aylward Money wise I think it is probably a wash. You can make it the murder rate or you can make it three times the existing rate and pay it by count. Probably you will come out with about the same amount of money. I like one better –
- 289 Chair Ellis You like units?
- 290 K. Aylward Yes.
- 291 Chair Ellis You have always liked units?
- 291 K. Aylward Yes, and there are reasons for that. I think especially when you are talking about a case having multiple counts actually means more work. With each count, you have to be investigating all kinds of different things. So it just seems that, if you say they are going to be a murder rate and you get one credit for that case, you might get a case that has one count or a case that has five counts. So you are setting a flat rate of \$15,000 or \$20,000, whatever murder rate is, and you could get a case that is five times as hard as the cases the next person got for that same amount of money. It just seems to me that, if you do it by counts, then you are probably going to end up with the same amount of money and you are going to be assured that it is more closely tied to the amount of work that that particular case takes. I don't feel strongly about it either way.
- 305 J. Potter Can it go both ways? Can you just have a decision that provides both: \$50 an hour if you took the hourly rate or three times the Measure 11 rate if you took the Measure 11 rate? Then you and the contractor look at the particular case and see if it multiple counts case. What kind of a case is it? Then you come up with the most favorable and appropriate way to handle that.
- 313 K. Aylward I think that is what I was trying to suggest in my recommendation.
- 314 Chair Ellis I think they want a little more assurance where we are going.
- 316 K. Aylward Okay. Three times the Measure 11 rate or the murder rate, which is 50 bucks an hour. You pick or some combination thereof.
- 318 Chair Ellis That is actually where I thought we ought to come out. Is there consensus? This would be a remarkable outcome for this group.
- 322 J. Brown I just feel like we are throwing darts, and I am not really comfortable with it.
- 324 Chair Ellis We are not throwing darts because this only happens if a real case comes up.

- 327 S. McCrea Barnes, the DA's are going to have their annual meeting after we have the Criminal Defense Lawyer's annual meeting. I project after the DA's meeting that these cases are going to come up because the word is going to get around. Maybe I am playing devil's advocate, but if I were a DA, I would sure want to use this because it gives you leverage.
- 333 Chair Ellis I think they are going to have no choice but to use it. Bill Riley is going to go on national television, if they don't use it.
- 335 J. Brown My difficulty is assessing the distance of the journey, when we only see one side of the mountain.
- 340 Chair Ellis But we have that with everything we do.
- 341 J. Brown But we have a history and this is a new species. We talked at our last meeting about getting some input about what the prosecutors intended, how they assessed it and how they valued their efforts. It just seems like we need to have a more informed basis for judging.
- 349 Chair Ellis There are two issues. One is what we say to the provider community and the other is what we say to the E-Board. Let me see if there isn't a way to bring this together. I am very attracted to a statement to the provider community: "You get one of these. Kathryn is prepared to deal with you on either the hourly or triple the Measure 11 rate. We recognize all the factors we have talked about." What we say to the E-Board in September is: "We have had to do that in the event these cases start coming. We don't have any cases yet (and, hopefully, that will still be true in September), but you need to know that, if they come with some frequency, this is going to be a significant incremental cost this biennium." I know Robin is saying we may or may not be able to go back for more funding. But I think the session is going to be there, and I think this is a reasonable way to handle both pieces of the puzzle. That is where I want to go.
- 369 J. Brown Perhaps there is something I am missing. If it is presented in that manner I am fine with it.
- 371 Chair Ellis Is there a motion?
MOTION: John Potter moved to approve; Janet Stevens seconded the motion; further discussion?
- 372 J. Brown No. Let me just say what I thought what I was hearing was a commitment to the leaps and bounds of how large the cost will be. I guess what I am taking from where we are is that we are going forward mindful of an expected increase in cost and effort, but without committing that these are necessarily "super murders" or something like that. I think we are going to have to be cautious.
- 364 Chair Ellis We are committing to the providers that get one. In answer to Jim's question, we are obviously treating these at a higher level, a murder level, but not capital murder level. That is how I would describe it. We are committing to the provider community that, if you get one, Kathryn is going to negotiate with you on either one of these models. We want the providers to know that. What we are going to tell the E-Board is we thought that was a fair way to deal with this for all the reasons that have been said. Frankly, this is a very difficult area and we will know more in September. There still may not have been one of these cases, but that gets our oar in the water if, during the balance of the biennium, the cases come at us harder than they have so far.
- 400 J. Stevens So, this is effectively an interim plan until we know what is going on?
- 402 B. Homan I would suggest that for the three strikes, life imprisonment cases as well, since they are going to still be hanging out there too. We have never addressed those as being different.

- 406 K. Aylward Frankly, that was because Lane PD was the only contractor that brought it up. So it didn't get a lot of attention. This was years ago so, if nobody else was complaining about them, it couldn't have been that big of deal. So it didn't ever get dealt with in your contract. But this is the kind of feedback we need from other people – to be saying how many of these kinds of cases others are getting.
- 411 Bob Homan I think we have had two.
- 413 Chair Ellis What I would like to suggest is that we put that on the next agenda. I don't want today to become a Christmas tree. Any other thoughts? There is a motion and a second any further discussion? Hearing no objection the motion carries: **VOTE 5-0.**
- Thank you Kathryn, that was very helpful. I believe that completes our open agenda unless there is some other issues that we wish to talk about.
- 427 J. Potter Mr. Chair, OCDLA had a legislative lobbyist named Kelly Skye, who was working on substantive issues. Kelly is now with the Governor's office and we have hired Ann Christian to replace her.
- 431 J. Brown Mindful of where we are in the schedule. One concern that I have had from the start, and I am reminded again of it today: I am enormously appreciative, in terms of the effort, energy and the professionalism, of what Pete and his people have done with the appellate backlog. I am aware of the extenuating circumstances that made that even more difficult recently to work it down. I think it is unacceptable and I think we all share in the responsibility. To have someone incarcerated and have to wait for as much as a year before the opening brief is filed is unacceptable. I would like to work in an orderly way in, say, two years from now, that there be – other than in extraordinary circumstances – no extensions on appeals. How we get from here to there – I know that this will impact us – but I would like to submit for consideration as a future discussion item how we might meet that goal, whether it is with a law school through clinic programs to assist on a certain number of briefs or whether we might not partner with the state bar to farm out case. But at least let's get the topic out there.
- 465 Chair Ellis Can you two talk between now and our next meeting? I would really love to see the day that it is the AG's office that hits the bottom. It always has bothered me that the defense side, which is "let my people go, but not for another year until I am ready to talk about" – it has always been a disconnect. Is there is a motion to adjourn the open part of the meeting? **MOTION:** Shaun McCrea moved to adjourn the meeting; Janet Stevens second the motion: hearing no objection, the motion carried: **VOTE 5-0.**

Attachment 2

REC'D JUN 26 2006

KLAMATH DEFENDER SERVICES, INC.

*635 Main Street
Klamath Falls, OR 97601
(541) 884-0333*

June 22, 2006

Peter Ozanne
Executive Director
Office of Public Defense Services
1320 Capitol Street NE
Salem, OR 97303-6449

RE: Response to OPDS Recommendations and Concerns From Site Visit; August, 2005

There were four areas of concern generated from the OPDS meeting on October 21, 2005. Basically, they include:

1. the philosophy of providing quality service at a reasonable price;
2. lack of an "outside" board member to interface with the public, the local political powers and other providers in the criminal justice delivery system;
3. the Citizen Review Boards perception of lack of contact with client;
4. the lack of a more formal and effective policies for dealing with problems and complaints about the performance of KDS contractor attorneys.

Regarding the first concern, it has always been a KDS policy to provide quality service in the most effective and cost efficient manner. Over the years there has been competition from other groups seeking state funding for indigent services. Without exception, KDS was forced to accept a lower contract amount in order to secure a renewal of its contract. Unfortunately, once a contract amount was in place, it was virtually impossible to raise that amount in the next biennium, short of increased case counts. Hence there was a need to be creative with how the service delivery plan was implemented. It is a source of some pride that we could still feel like we were making a decent living while still providing a high level of service.

It is interesting to note the concern of the OPDS that case loads are too high for the attorney provider, and on the other hand, respond to additional funding requests that we are stuck with the present contract amounts because there are no additional funds available.

We believe that a model delivery plan that relies on multiple "part-time" attorneys to reduce the case per attorney ratio is counter productive. It does not allow the attorney to become really proficient in this area of the law and it encourages loss of focus on who the real "client" of the attorney is. We want attorneys who are dedicated to Indigent

June 22, 2006

Peter Ozanne

Page -2-

Defense. Part-timers can too easily come and go. We believe that making KDS the primary source of revenue for the contract attorney encourages that attorney to be very careful in providing the needed services asked of him or her in fear of losing that source of funding. It would be analogous to a civil attorney having a major bank as his biggest client. That attorney is going to make sure that "client" is priority and that adequate work and attention is paid to ensure the client remains with that firm.

That being said, the other aspect that allows KDS to provide quality service at a low price, is the consortium model itself. All of our attorneys have a small civil practice on the side. Some attorneys have elected not to do so but most are engaged in a private practice to some degree.

We believe a well rounded attorney is more beneficial in the long run because that additional experience serves us well in many areas of criminal as well as juvenile law. The most important aspect is knowledge of family law and surprisingly bankruptcy when dealing with problems in the dependency arena.

It was the position of Indigent Defense several years ago that a private practice was a great value from not only an "experience" perspective but also as a kind of "subsidy" for Indigent Defense. It allowed attorneys the opportunity to make money to supplement the low payments from Indigent Defense. This approach provided an ability to accept lowered indigent payments and still be able to survive both personally and professionally.

As for too few trials: We do not believe the system encourages settlement short of trial. We try the cases that need to be tried. We are fortunate to have highly experienced attorneys and it is often the case that a "deal" is just too good to pass up especially in light of Measure 11 dispositions. The legislature is making plea bargaining a fact of life with harsher mandatory sentences and long term impacts as in sex offender registration requirements.

As for FTA's, the District Attorney files those routinely. Many times they know it is a bargaining chip and it prevents pre-trial release in the future. As a practical matter, those cases are usually "slam dunks" and the DA's know it. Not to mention it makes their case numbers look better when it comes to their budgeting process.

Concern #2 and #4

These two concerns are very closely related. To solve the problems perceived by the Commission in its report, KDS has amended its bylaws to provide for an "Advisory Board" to assist in getting the word out to the public and to provide an independent means to address policy matters and problems with KDS attorneys.

June 22, 2006
Peter Ozanne
Page -3-

That board is presently made up of the head of the local Chamber of Commerce, the city manager and a very well respected local attorney. All of these persons are very well connected and it was surprising to me just how ill informed they were about indigent defense when they were being recruited. So it was good we made the contact.

In all honesty, we have just recently gotten the bylaws back from our attorney and have not yet had a formal meeting with this advisory board. That is scheduled for mid July. We will meet with each member individually first and then all three. It is envisioned they will meet twice a year routinely and such other times as they are needed for help with policy decisions and/or complaints about attorneys.

KDS has dedicated one of our attorneys to represent us on the Local Public Safety Coordinating Council. We also have an attorney who participates on the Courthouse Security Committee.

Concern #3

As of January 1, 2006 we hired a person we call a Dependency Case Manager. We budgeted this position into our present contract. One of her responsibilities includes attending every CRB as a representative of the children's attorney.

In addition, she makes the initial contact with the children within 48 hours. She also makes random home checks on all the children in care or at home and reports her findings to the respective attorneys. As part of this process, she often arranges meetings with the children and their attorneys and takes photos of the children in their respective homes for the attorney's file as well as the court file.

She has developed a very close relationship with DHS and often travels with the worker to visit children in residential treatment facilities around the state.

She has already become an "institution" in the system and is often relied on by the court for her slant on the case or what information she has found.

We believe she is very well received by the Citizen Review Board. The notes from those meetings are also forwarded to the respective attorney if they could not attend.

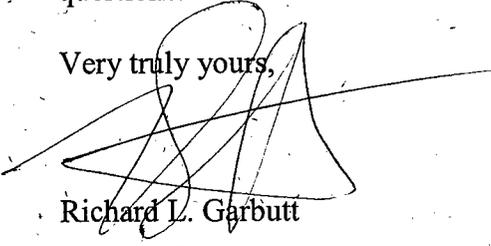
We have just recently had our board approve the hiring of a two part time professionals to attend CRB meetings on behalf of the parent's attorneys. They will meet with the attorney before the meeting and present any concerns or information from the parent's perspective. They will then debrief with the attorney after the meeting.

June 22, 2006
Peter Ozanne
Page -4-

We have one attorney committed to this position and are looking for another. However, we may be forced to use an experienced former case worker with DHS if we cannot find an attorney.

I hope this addresses our response to OPDS's concerns. We are open to follow-up questions.

Very truly yours,



Richard L. Garbutt

RLG:de

DRAFT

(August 7, 2006)

OFFICE OF PUBLIC DEFENSE SERVICES REPORT TO THE PUBLIC DEFENSE SERVICES COMMISSION

Critical Issues in the Delivery of Public Defense Services in Juvenile Dependency Cases

As the Public Defense Services Commission (PDSC) observed in its Strategic Plan for 2005-07, the Commission has made improvement in the quality of public defense services in juvenile cases a top priority:

Reports of the Oregon State Bar's indigent defense task forces identified the need to improve the quality of juvenile defense services across the state.¹ The quality of defense representation in juvenile and family law cases is critical to the health and safety of Oregon's communities. Therefore, PDSC has made the improvement of juvenile public defense services one of its highest priorities.

In accordance with this priority, the Commission authorized its administrative agency, the Office of Public Defense Services (OPDS), to establish a Quality Assurance Task Force and support the Task Force's development of a contractor site visit process to evaluate and improve the operations and services of public defense contractors across the state, including contractors specializing in juvenile legal services. As of the date of this report, site visit teams have evaluated the operations and services of 20 juvenile defense contractors.

In order to gain further perspective on the quality of public defense services in Oregon's juvenile dependency cases, PDSC held its May 11, 2006 meeting at the juvenile detention facility and courthouse in Portland.² In the course of that meeting, the Commission heard from five legal experts on the challenges facing public defense attorneys in their representation of parents and children in dependency cases.³

¹ See Indigent Defense Task Force IIIb Report (January 12, 2001) ("Task Force IIIb Report"); Indigent Defense Task Force III Report (May 22, 2000) ("Task Force III Report"); Indigent Defense Task Force II Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Commitment Cases (September 25, 1996) (Task Force II Report").

² PDSC plans to hear from legal experts in the delivery of public defense services in juvenile delinquency cases at its August 10, 2006 meeting in Salem.

³ A transcript of the relevant portions of PDSC's May 11, 2006 meeting is attached in Appendix A. The background reading material submitted to the Commission in preparation for its May 11, 2006 meeting – excerpts from the Report of the Oregon Judicial Department's Juvenile Court Improvement Project, "Child Abuse and Neglect Case Processing in Oregon's Courts: 2003-2004 Assessment" – is attached in Appendix B.

This report is based on general findings and conclusions of the State Bar's task force on indigent defense,⁴ reports of OPDS's site visit teams, the experiences of OPDS's staff and the testimony of PDSC's guests at its May 11, 2006 meeting. Based upon those sources of information, OPDS has identified six critical issues in the delivery of public defense services in juvenile dependency cases:

- unacceptable variations in the quality of legal services;
- excessive caseloads;
- the appointment of counsel for multiple parties;
- variations in juvenile court procedures and practices across the state;
- the need for specialty training in dependency law practice; and
- delays in dependency appeals.

Five Critical Issues

1. Unacceptable variations in the quality of legal services in juvenile dependency cases.

Following its investigation of public defense services in juvenile dependency cases in 1996, the Oregon State Bar's Indigent Defense Task Force emphasized the importance of quality in the delivery of legal services in juvenile dependency cases:

At stake for children is their liberty, their right to membership in their family of origin and their right to be safe, healthy and protected. At stake for parents is their right to raise their children as they think best without state interference, and ultimately, the absolute and final termination of their parental rights.⁵

Unfortunately, the following assessment of the quality of those services by the Bar's Indigent Defense Task Force in 2001 is still timely and accurate:

Throughout the state, concern for the quality of representation in certain kinds of cases is voiced. Juvenile court representation is widely viewed as an area in which representation is often

⁴ See note 1, above.

⁵ Task Force II Report, Ch. 3.

inadequate. Parents in dependency actions who face possible termination of their parental rights are viewed as routinely receiving some of the poorest representation.⁶

OPDS's contractor site visit teams have consistently noted that, although many dedicated juvenile lawyers across the state provide excellent legal services to both parents and children, there are far too many lawyers who lack the necessary interest, commitment, skills or training to deliver adequate legal services in dependency cases. Among the shortcomings in legal representation regularly reported to the site visit teams, as well as to OPDS's staff, are failures of juvenile dependency lawyers to (a) communicate with clients upon appointment in dependency cases and throughout those cases,⁷ (b) attend or adequately prepare for shelter and detention hearings or subsequent hearings in which the interests of dependency clients are significantly affected, (c) zealously represent the interests of clients in those hearings, (d) prepare and argue motions having the potential to advance clients' interests, (e) conduct adequate investigations, including home visits and psychological evaluations, or explore settlement options and (f) familiarize themselves with relevant treatment and rehabilitation programs or other potential dispositions.

OPDS and its contractor site visit teams have found these types of problems in the quality of dependency representation to be particularly acute in less populous areas of the state, where there is already an overall shortage of lawyers, as well as a shortage of lawyers qualified to provide public defense services.

⁶ Task Force IIIb Report, p. 8.

⁷ See e.g., Oregon Judicial Department's Juvenile Court Improvement Project, "Child Abuse and Neglect Case Processing in Oregon's Courts: 2003-2004 Assessment," in Appendix B:

[Juvenile court] participants [in the study counties] routinely expressed concern about attorneys delaying contact with adult clients until shortly before scheduled court appearances and rarely contacting child clients. Reassessment team members observed attorneys in court and CRB reviews who appeared to be meeting their clients for the first time or for the first time since the last court appearance, validating reports from juvenile court participants. Thirty percent of respondents to the statewide survey reported that they believe that attorneys only rarely or occasionally (less than 35% of the time) contact clients before the day of a court appearance. ... Attorney contact with child clients was also concerning. ... The reassessment team surveyed foster parents statewide about contact by attorneys for children in their care. About half of those responding indicated that the court-appointed counsel rarely (less than 5% of the time) called within one week of appointment and only 9% indicated that counsel usually (more than 75% of the time) made contact within the first week after appointment. Similarly, about half of those responding indicated that court-appointed counsel rarely met the children in the home of the foster parent before they went to court for the first time, while 13% reported that the attorneys usually meet the children in the home prior to the first court appearance. 37% of court participants statewide reported that they believed that attorneys for children visited their clients in their homes rarely or occasionally.

Nevertheless, even in urban centers of the state where most of Oregon’s lawyers practice, juvenile courts frequently report to PDSC and OPDS that once they have appointed juvenile law specialists from the Commission’s local contractors in a multi-party dependency case, these courts are unable to find qualified juvenile lawyers on their appointment lists who are capable of competently representing the remaining parties in the case.⁸

OPDS concludes that, after years of insufficient state funding for public defense and attorney compensation that has failed to keep up with inflation or roughly approximated compensation rates in the private market for attorneys, the law of supply and demand is finally taking its toll. As the price or compensation for public defense services has dropped in relation to compensation for other legal services, the supply of competent lawyers willing and able to accept court appointments, in general, and juvenile court appointments, in particular, has fallen substantially behind the demand for such services. As a result, lawyers willing to accept court appointments in juvenile dependency cases at the rates of compensation PDSC is able to offer are increasingly unable to handle these cases competently. As one presiding juvenile court judge put it:

. . . [W]e fall back on a list of lawyers who are willing to be appointed at \$40 an hour and, guess what: the ones who are willing to do this aren’t very good.⁹

Moreover, according to the findings of OPDS’s site visit teams, lawyers who are good are increasingly taking more cases than they can competently handle in order to generate sufficient revenue to produce a living wage for themselves or their colleagues. As a result, even competent lawyers cannot investigate and prepare their cases as they should, or attend the increasing number of formal and informal hearings that juvenile courts and the Department of Human Services (DHS) are holding in dependency cases.

2. Excessive juvenile dependency caseloads. OPDS recently estimated that, on average, Oregon’s public defense attorneys handle caseloads that are 130 percent greater than the caseloads recommended by PDSC in its Request for Proposals from prospective contractors. Based on the reports of OPDS’s contractor site visit teams and OPDS’s familiarity with PDSC’s contracts, the average caseloads of juvenile dependency attorneys may even be greater than 130 percent of PDSC’s recommended caseload.¹⁰ One contractor site visit team reported the inevitable consequences of such excessive dependency caseloads, even for a contractor that was well-regarded in the county, as follows:

⁸ See *e.g.*, Appendix A, p. 8.

⁹ *Id.*

¹⁰ PDSC’s Request for Proposals recommends an annual caseload of 250 juvenile cases (delinquency and dependency) for an individual attorney.

The attorneys are overtaxed; they are often double and triple booked. Often they have not met their clients before court; they sometimes fail to appear for pretrial conferences or come unprepared. Some improvement has been noted with the addition of new associates. . . .

. . . [P]eople with caseloads of 200 cases cannot be doing a good job; they don't attend the [necessary] meetings and aren't there to advocate at critical times.¹¹

Even if attorneys choose to limit themselves to the dependency caseloads recommended by PDSC, a dependency case today is far different from a dependency case when these caseload standards were first established more than 10 years ago. As a result, the demands of dependency caseloads have increased substantially and the capacity of dependency attorneys to handle the same size caseloads has decreased substantially.¹² Juvenile judges have added formal hearings to the dependency court process and now set multiple review hearings to monitor the progress of children and parents subject to the jurisdiction of those courts. DHS has added informal family decision and team decision meetings to the process, which affect the interests of dependency clients and call for the presence of legal counsel. Citizen Review Boards serve the function of "foster care review boards" in accordance with federal mandates, sometimes issuing reports to the juvenile courts that influence the status of dependency cases and create the need for an attorney's participation.¹³

¹¹ In order to ensure the cooperation and support of the public defense community, PDSC has agreed to preserve the confidentiality of the reports of OPDS's contractor site visit teams and limit the reports' distribution to the head of the contractor's office and to OPDS's Quality Assurance Task Force and management.

¹² A senior attorney at the Juvenile Rights Project made this point during PDSC May 11, 2006 meeting:

. . . We have too much work to continue to do the high quality work that we expect from ourselves and our staff. Particularly with people like myself and Ingrid [Swenson] and others who have done this work for a long time, we started . . . when caseloads were lower. So I have expectations of my staff about how they are going to handle a case when I had less cases. The amount of research I was able to do, the amount of collateral issues I was able to address, the amount of times I was able to advise someone – all of those things we are just not able to do in the same way now. Appendix A, p. 11.

¹³ Multnomah County's Presiding Juvenile Court Judge described some of these developments to PDSC:

. . . [O]ne of the things we initiated several years ago is a second shelter hearing, which is held for a variety of purposes and not in every case. . . . [W]e are holding these second shelter hearings in about 25 percent of the cases. Another thing that we started doing many, many years before was a pretrial settlement conference in every dependency case. . . . The family decision meetings and team decision meetings are internal, problematic meetings that [DHS] case workers and facilitators run in most cases. The judge is involved, though it is not a judicial proceeding.

After receiving reports on these developments during PDSC's May 11, 2006 meeting, the Commission's Chair observed:

. . . [J]ust to get a sense of the scope of the problem of lawyers trying to do what they are being asked to do; a single case typically involves at least nine, and could be quite a bit more appearances.¹⁴

In addition, new federal mandates under the 1997 Adoption and Safe Families Act have established timelines to reduce children's time in foster care and expedite permanent placements. As a result, even more demands have been added to a dependency case and to the caseloads of Oregon's already overworked dependency attorneys.¹⁵

Finally, dependency cases last a long time and require an attorney's continuing attention:

. . . [I]n adult criminal court, by and large, once the case is tried and you have a conviction rather than an acquittal, the lawyer's work is basically done. . . . In dependency cases, . . . these . . . cases go on constantly. That is where the bulk of the work is in dependency cases. After the adjudication, they literally last years.¹⁶

3. The appointment of counsel for multiple parties in dependency cases. Financially eligible families have rights to court-appointed attorneys in dependency cases; however, those rights are not absolute. Parents are entitled to be represented by an attorney when "the nature of the proceedings and due

* * * * *

. . . In the interim between the initial appearance and the actual trial, we set what is called a best interest hearing, and that is set with the original judge in the case. The real purpose of that best interest hearing is to talk very frankly with the parent about the probable outcome of the case. . . . That is also a time-consuming process for the attorneys, particularly the attorney who is representing the parents.

. . . After adjudication, the law requires that cases be reviewed by the Citizens Review Board. . . . One of the issues, of course, is how many of these different things do you have to do, and what are the minimum standards for effective, zealous representation of your client . . . Appendix A, pp. 5-7.

The juvenile court judges in Klamath County advised PDSC of their belief that Klamath County had one of the highest rates of dependency review hearings in the state. Although they expressed concern for the effects on the caseloads of court-appointed counsel in their county and on the state's public defense budget, these judges believe that these costs are justified because multiple review hearings promote the best interests of children and families. "OPDS's Report to the Public Defense Commission on Service Delivery in Klamath County" (November 2005), p.8.

¹⁴ Appendix A, p. 7.

¹⁵ Appendix B, p.3; Appendix A, p. 2.

¹⁶ *Id.* at 14.

process so require;” children are entitled to legal counsel whenever a request is made or upon the court’s own motion.¹⁷

There are usually multiple parties in dependency cases:

. . . It is not uncommon to have a family with four or five children, with one mother and four or five fathers. . . .¹⁸

Consequently, numerous court-appointed counsel are frequently required to handle these cases. For example, according to the Chief Family Law Judge in Multnomah County:

. . . [I]t is absolutely unheard of in Multnomah County for two parents to have the same attorney. . . . We appoint attorneys for children in dependency cases automatically.¹⁹

This presents two challenges for PDSC. First, the Commission and OPDS must ensure the presence of numerous qualified legal counsel in dependency cases, frequently on short notice, from a shrinking supply of lawyers with the expertise to handle these cases. As PDSC’s Chair observed:

From our point of view, this is a real challenge because you are looking at as many as three lawyers per case or more, three to four times of day [in Multnomah County], with . . . the hope that the lawyer gets identified to the client soon enough to at least read the case work-up and maybe meet the clients²⁰

Second, the need for a relatively large number of legal counsel in dependency cases increases the chances of conflicts of interest. Moreover, an experienced juvenile attorney pointed out to the Commission that the nature of dependency cases makes those chances even greater:

I think there is something inherent in the dependency process that causes conflicts to arise later. Partially, it is discovering a conflict that preexisted the appointment, but there is something unique about the dependency process where the lawyers are continued from hearing to hearing. There is really no cessation of the case for quite some time, so conflicts arise. . . .

* * * * *

¹⁷ ORS 419B.205 (1); ORS 419B.195 (1); Appendix B, p. 17.

¹⁸ Appendix A, p. 5.

¹⁹ Appendix A, p. 2. Generally speaking, juvenile judges in Multnomah County do not appoint separate counsel for children in dependency cases. *Id.* at 4.

²⁰ *Id.*

. . . By the very nature of the system, we have a number of children with multiple, emotional or behavioral disturbances who are placed close together in the same location and bad things happen. These are bad things between two clients of the same firm.²¹

4. The need for specialty training in juvenile dependency law practice. The following observation by the Oregon State Bar's Task Force on Indigent Defense in 1996 regarding the expertise required to represent parties in dependency cases is even truer today than it was 10 years ago:

Practice in juvenile dependency cases is unique and challenging, requiring continual training to assure the best legal representation of clients. Juvenile dependency cases may be as different and varied as the children and families involved in them.²²

An experienced juvenile dependency attorney who appeared before PDSC on May 11, 2006 presented the Commission with a clear picture of the knowledge and skills necessary to practice this specialty:

Dependency law is really statutory, where we have the juvenile code that tells you what the bases for jurisdiction are and what you must prove for the state to intervene into the family. The codes tell you that and it tells you the stages of the proceeding. But there are so many other areas of the law, including federal statutes that we need to incorporate every single day, which fund foster care and set requirements on the court. It has multiple meanings and connotations that you have to know about if you are practicing in this area. For example, in this state, if you are related to the child who is placed up for foster care, you may or may not be able to receive funds, and that is based on federal statute. If you are a juvenile court lawyer, you need to know what that says. If you have a client in alcohol and drug treatment, you need to know the law under Title 19 of the Social Security Act. Even if you understand them, you probably aren't going to get that client in alcohol and drug treatment in the time set by the federal statute. We also have federal statutes that regulate how we do business when an Indian child is involved. We were talking about the possible parties. You have mom, you have dad, you have the children, you have the tribe; and there are CASAs or special advocates and other family members who might intervene. So you have a hearing where you might have eight different representatives that are governed by not only the juvenile codes, which is relatively manageable, but multiple federal statutes in areas that are related, but not specific to child welfare. We also have the relationship between juvenile

²¹ *Id.* at 9.

²² Task Force II Report, Ch. 3.

dependency work and domestic relations law. You have the Interstate Compact and Placement of Children laws. You would think that if you were appearing in front of Judge Welch [in Multnomah County] with two parents who are in jail, and the child needed placement with an aunt in Vancouver[, Washington], you are home free. Not so; not so at all. It is far more complicated. There is a vast amount of information that each of us needs to know. If we don't know it, we at least need to know that it is out there to look for.²³

The response to this presentation by PDSC's Chair framed the issue:

How is some poor law-trained person on the appointment list going to know all this?

The answer to that question is, of course, specialty training.

²³ Appendix A, pp. 11-12. See also OSB's Task Force IIIb Report, "Conclusions, Goals and Recommendations."

In addition to knowledge of criminal law and juvenile court procedure, counsel in delinquency cases must understand the developmental needs of children and be familiar with community resources. Frequently, a child has been the victim of abuse, poverty, and neglect, and has drug and alcohol problems. In delinquency cases, it becomes important for counsel to understand child development issues that may directly impact the child's understanding of the court proceedings, ability to remember and identify witnesses and evidence, and competency to waive constitutional warnings concerning admissions or confessions. Sustained efforts at pretrial release for children require more knowledge of community programming for the child and the family than is generally necessary for adults. Finally, children in crisis have difficulty in forming relationships with strangers; the staff turnover that can plague small contract offices is often particularly damaging to the quality of a child's representation.

Unlike other areas of representation, dependency cases in juvenile court have a tendency to go on for years, requiring lawyers to get involved in many details of their clients personal lives, and often involve repeated court appearances. As challenging as they are, these cases are likely to become even more of a financial burden on appointed lawyers, given the duration of cases and the current trend to consolidate juvenile cases with criminal matters and domestic matters involving the same family. Lawyers appointed on juvenile matters should have, as most do, experience in criminal trial practice. Few, unfortunately, have any experience in domestic relations. Whatever the efficiencies to the court or the families involved, consolidation of case types presents a significant additional challenge to the lawyers' ability to provide competent representation. If the courts expect appointed lawyers to handle consolidated dependency, termination, criminal and domestic relations matters, practitioners must be adequately trained, insured, and paid.

At PDSC's direction, OPDS has taken steps to address the need for specialty training for juvenile dependency lawyers.²⁴ In collaboration with the Oregon Judicial Department's Juvenile Court Improvement Project (JCIP), OPDS has participated in the development of a Juvenile Training Academy, which is offering specialty training programs for dependency attorneys across the state

5. Delays in dependency appeals. As in other areas of the law, the appellate process ensures fairness in juvenile dependency cases. While appellate lawyers need time to brief and argue their clients' cases, appeals should not unduly delay dispositions that have powerful impacts on the well-being of children and families. Not surprisingly, numerous commentators and organizations across the country have called for practices and procedures to expedite appeals in a field of law where the interests of children and families are at stake.

In September 2005, Oregon sent a delegation headed by Court of Appeals Chief Judge David Brewer to the Pew Commission's Justice for Children Summit, which identified reform of the appellate system for dependency appeals as a priority. JCIP's 2004 report, *Child Abuse and Neglect Case Processing in Oregon's Courts: 2003-2004 Assessment*, had found that Oregon's expedited appellate process is no longer a best practice and recommended that the Court of Appeals convene a workgroup to develop strategies to expedite filing and briefing of dependency appeals. Following further findings and recommendation by JCIP's staff regarding appellate court practices in dependency appeals, Judge Brewer and the Chief Justice established a Work Group on Juvenile Court Case Disposition Time Improvement (the "Dependency Appeals Work Group") to examine JCIP's research, findings and recommendations and to develop proposals to expedite juvenile dependency appeals. OPDS has two representatives on the Dependency Appeals Work Group.

Among the proposals approved by that Work Group are OPDS's proposals to (1) process notices of appeals and requests for transcripts in the same manner as the criminal appeals are processed by OPDS and (2) handle dependency

²⁴ In addition, OPDS staff assisted in the revision of the bar's performance standards for representation in juvenile cases, and participates in the planning of CLE trainings for juvenile lawyers by the Oregon Criminal Defense Lawyers Association, the Juvenile Law Section of the Oregon State Bar and the Juvenile Law Training Academy. OPDS has also provided financial support for the preparation, publication and distribution of the JRP Reader – a periodic publication that includes topical information for juvenile court practitioners. OPDS is working with other interested groups and individuals to explore the creation of a resource center for juvenile lawyers that would include a web site, a brief bank, access to legal expertise and other support.

OPDS staff also serves on the Juvenile Code Revision Workgroup of the Oregon Law Commission. The workgroup, chaired by Senator Kate Brown, has been working for several legislative sessions to revise the juvenile code to clarify the law for the benefit of both practitioners and the public, to improve the law, and to codify good practices and procedures in order to bring some uniformity to practice throughout the state.

appeals by additional specialist appellate lawyers in OPDS's Legal Services Division. Those two proposals are attached in Appendix C.

Three Conclusions

Based upon the sources described above and PDSC's previous deliberations, OPDS has identified the following three finding or conclusions for the Commission's consideration with regard to the foregoing issues:

1. Adequate state funding for public defense is essential to improving the quality of legal services in juvenile dependency cases in order to (a) retain and recruit qualified attorneys and (b) reduce the excessive dependency caseloads of currently qualified attorneys.

The State Bar's Task Force on Indigent Defense has repeatedly emphasized this point in reports over the past decade:

The theme that arose again and again, throughout our many interviews, was that funding is the key to fulfilling the state's obligation to provide adequate representation to people charged with crimes or facing other serious restrictions of their liberties. Although some mechanisms exist for promoting high quality indigent defense services, those mechanisms are dependent, finally, on a provider organization's ability to fund them. Supervision and training require time, and that time can only be provided when adequate funding is available. Perhaps most importantly, based on the responses we received from participants across the criminal justice spectrum, sufficient funding must be available to adequately staff provider organizations so that caseloads do not overwhelm the ability of individual attorneys to perform necessary services.²⁵

In recognition of this reality, as well as the currently shrinking supply of qualified lawyers to handle juvenile dependency cases, PDSC has decided to highlight the importance of adequately funded public defense services for the continuing operation of the juvenile dependency system and the well-being of Oregon's children and families during its presentations before the 2007 legislature.

2. Increases in public defense funding for juvenile dependency cases must be accompanied by new or expanded specialty training programs.

To ensure that the legislature's increased funding of public defense services in dependency cases improves the quality of those services, PDSC should design new specialty training programs, or expand the training programs already under development by JCIP and OPDS. These programs should be designed to

²⁵ Task Force III Report, "Summary."

increase the skills of current dependency attorneys that PDSC has retained with increased state funding and to develop the skills of new dependency attorneys that PDSC has recruited with that funding.

3. In accordance with OPDS's proposals to the Dependency Appeals Work Group, PDSC should propose a Budget Policy Package to the 2007 legislature that funds additional specialist appellate attorneys at OPDS's Legal Services Division to handle dependency appeals more efficiently and effectively.

PDSC has already reached this conclusion. At its June 15, 2006 meeting in Bend, the Commission approved OPDS's proposal for a 2007-09 Budget Policy Package to add four juvenile appellate lawyers to the Legal Services Division's staff. That proposal is attached in Appendix C.

Appendix A

PUBLIC DEFENSE SERVICES COMMISSION

EXCERPTS FROM THE
UNOFFICIAL MEETING TRANSCRIPT

May 11, 2006 Meeting

Multnomah County Juvenile Justice Complex
(Donald E. Long Center)
Courtroom No. 2
1401 N.E. 68th Avenue
Portland, Oregon

MEMBERS PRESENT: Barnes Ellis
Jim Brown
Mike Greenfield
Chip Lazenby
Janet Stevens (by phone)

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Ingrid Swenson
Laura Anson

[Tape 1, Side A]

011 I. Swenson I would like to make a very brief introduction before Judge Welch makes her comments. I wanted to mention that this is the first of two meetings that the Commission is going to devote to a discussion on juvenile court practice. There are a lot of good reasons why the Commission might want to focus its attention on the juvenile court practice, one of which is the importance and gravity of the work that juvenile court practitioners are involved in by representing children. Another is that this practice represents, at the trial court level, approximately 25 percent of public defense practice.

There have been a number of studies conducted by different bodies, the State Bar for one and the Juvenile Court Improvement Project for another, which have found deficiencies in the quality of representation for public defense clients across the state. For all those reasons, we wanted to spend some time talking about what the practice is about. Today, the focus is on dependency cases. In June, we will talk a little bit more about dependency but also about delinquency. The goal of the presentation this morning is to let you know more about the practice, how the court works and some of the important elements involved in the practice. Also, we are going to talk about some of the challenges that are faced by the practitioners. We have a panel of experts, and I'm sure you have met them all by now, but I will make a brief introduction of them. Judge Elizabeth Welch has been a family court judge in Multnomah County since 1989. She has been the Chief Judge since 1993. She serves on many boards, commissions and task forces. I think the most remarkable thing that practitioners say about her is that she has been able to bring together the entire juvenile court community, and not to just process the cases but to improve the practice. Leslie Harris is a professor at the University of Oregon Law School. She is the co-author of two books and has published numerous articles on juvenile law. She currently serves on a number of task forces relating to improvement of juvenile court practice. She recently chaired the site team

evaluation here in Multnomah County to evaluate juvenile public defense contractors. She has also taught many of the practitioners who are here. Angela Sherbo has been a legal aid and public defense attorney for almost 30 years. She has been with the Juvenile Rights Project for more than 20 years and currently serves as the senior supervising attorney in that office. She has briefed and argued many of the key cases in the juvenile jurisprudence in Oregon. Lindsay Partridge is also here and will you join us. Lindsay is in private practice in Marion County and is a member of the Juvenile Advocacy Consortium there. As you will recall, we reviewed the work of that consortium last year when we were in Marion County. He is the past president of the Marion County Bar Association and has served on many committees. So now I would like to start with Judge Welch.

066 Judge Welch

I took Ingrid at her word and I put together the ABC's of a juvenile dependency case. Some of this is kind of basic, but it won't take very long. I wanted to make sure that everybody understands what a dependency case is and what we do with a dependency case. Of course, the theme of it is to highlight for you the demands that the process makes on lawyers who represent children and parents. First of all, just to know what a dependency case looks like now, and that has changed a lot over the years: I think the general public probably thinks that dependency, if they think of it at all, as meaning child abuse. We actually have few child abuse cases. It is mainly neglect. We are talking about a population here that would be very familiar to anybody who is involved with the justice system; that is, to a great extent, the children of people who are otherwise engaged, or have been, or will be in the criminal justice system. The profile of a typical parent in a juvenile court case – of the cases we see, we continue to estimate that 80 percent of them have at least one parent that has either a drug or an alcohol problem. The prevalence of mental illness and developmental delay among these people is very high. The prevalence of domestic violence is very high. Those are the primary characteristics of the families that we see. They are poor people. There are a few middle class people, but very, very few. Anybody who has done this kind of work, as those of us sitting at this table have done, know that drug use is, to a great degree, a matter of people medicating themselves because they have significant mental health problems. That is certainly my view. In a typical case – one common form that it takes is a parent or parents are arrested for operating a meth operation, or for leaving their children longer than they should with a babysitter or a relative because they are busy pursuing their addiction. We do get some cases where people are in jail or in prison. Some other general matters covered by the facts on the front page: our practice is, and has been for many years, that everybody gets a lawyer in juvenile dependency cases. One of the things that I suppose is controversial – not necessarily around here but maybe elsewhere in Oregon – is whether parents actually need to have separate counsel.

113 Chair Ellis

Separate from each other?

113 Judge Welch

Yes. In other words, it is absolutely unheard of in Multnomah County that two parents have the same attorney. It is a complicated issue. We appoint attorneys for children in dependency cases automatically. You have to understand that there has already been a fair amount of screening before a petition is filed in a case, at least now. That has changed a lot over the years. DHS does a lot of work with families. So, if the situation is not severe, they will have perhaps worked with the family already. When the petition is filed, it is not usually the first time there has been contact between the parties. As I mentioned, common features of a case are domestic violence and mental illness. A formal case never has just one issue. The parents have multiple problems: criminality, mental health, domestic violence and, almost always, drug and alcohol abuse. Another really basic thing that permeates the problems that we have in administering this system is the Adoption and Safe Families Act, which was passed in about '96. The Feds got involved and the basic theme is that kids should not be in foster care for very long. I am not going to go into a lot of detail about this. You may or may not want to know more about it, but what it has done is basically set a period of one-year as being the guideline for how long a child should be waiting for their parents to deal with their issues. Of course, when you see what the underlying problems that these families have, they aren't

exactly solvable issues in the first place. Whether it is mental health or drug and alcohol addiction, those things usually don't get addressed successfully, and certainly not quickly.

- 146 Chair Ellis Were those standards and mandates tied to some federal money?
- 148 Judge Welch Oh no!
- 149 Chair Ellis Regarding interstate commerce? What is the theory?
- 149 Judge Welch I think most of us pretty much agree with the goals of the Act. We might argue a little bit about how long the time frame should be and how flexible the administration of that time frame should be. What would happen in the past before the Act is that the parent would enter treatment, succeed, relapse, enter treatment, succeed and relapse. That is kind of the history of my career. I have been doing this for a long time.
- 157 Chair Ellis What is the federal hook, if they are not giving you money?
- 158 Leslie Harris It is federal foster care money.
- 158 Chair Ellis So it is tied to money?
- 158 L. Harris There is tons of money tied to it. You don't get more. It is just, if you don't do it, you don't get any.
- 161 Chair Ellis So they conditioned the money they were already granting to comply?
- 163 Judge Welch Basically, what we tell people, what their lawyers tell them, what their caseworkers tell them, is, "You have got a year to show that you are making significant progress. You don't necessarily have to be all the way to being a full-time parent; but we would like to see significant improvement. The court has to be satisfied and the state has to be satisfied that you are serious about being a parent or the state is obliged to initiate a concurrent plan, which is an alternative permanent plan for a child." That presumes under the plan that every case involves an attorney hearing. It is very rare in this county, at least, that this isn't initially the plan – that the parent is a candidate for having the child returned to them. But the state is also obliged by state law to identify what other plan we can follow, if that doesn't happen. That is almost always the kind of case that we are talking about with adoption – not necessarily stranger adoption, adoption by a foster parent, adoption by a relative. You should know, for instance, that I just discussed this with child welfare for the state. Approximately 70 percent of the kids who are going through the process will be adopted by their current caregiver.
- 184 Chair Ellis What is the predominant age you are looking at.
- 183 Judge Welch Of the parent?
- 184 Chair Ellis No, of the children.
- 184 Judge Welch In this context, we are talking about pretty young children. They are usually up to 10, 11, 12 years of age. Maybe the eldest child in the family might be a little bit older. We are talking about pretty young children. From birth we sometimes take these children away the day they are born, right out of the hospital. The parent either already has children in the system or the children are born with drug dependencies. I don't have a number of the average age, but many, many are little tiny kids.
- 194 Angela Sherbo From zero to six is the fastest growing age group in foster care. It is zero to six, six to twelve and twelve and up pretty much divided equally.

- 198 Judge Welch What I have tried to do on the beginning of the second page of my handout is to identify the things that the law requires, in terms of parents represented by lawyers. A dependency petition is filed and the hearing has to be held within 24 hours from the removal of a child from parental custody. Those are called shelter hearings and they are held here every day in the afternoon. The practice here is to appoint, or at least tentatively appoint, counsel for all parents prior to the actual appearance. The reason for that is so that those lawyers will have an opportunity to review whatever material there is prior to the shelter hearing. They are not just walking in there with a client that they have never met and a case that they have never had any information about. That is a first step.
- 216 Chair Ellis In the shelter hearing, each parent has counsel and each child has counsel?
- 217 Judge Welch No. Children won't have separate counsel, generally speaking,
- 218 Chair Ellis So a sibling group would have one counsel?
- 219 Judge Welch There are exceptions to that, but usually not separate counsel at the beginning of a case. But maybe later. There may be issues that arise that require separate counsel for children. The issue at a shelter hearing is not so much whether there is a case – that the state has a case or not – but whether the children need to be removed from the parent.
- 228 Chair Ellis Let me get a sense of this. The shelter hearing is only when DHS wants to remove the child immediately?
- 231 Judge Welch And has.
- 232 Chair Ellis What is the frequency here of shelter hearings?
- 233 Judge Welch We have shelter hearings involving around 100 kids a month – an average of about 60 cases. The average case has about one and a half kids.
- 239 Chair Ellis So you may have three or four a day.
- 239 M. Greenfield Of the 100 or so, how many of those are the first time the court has seen this particular person?
- 241 Judge Welch I don't know how long it has been since you were involved in the day-to-day workings of the juvenile system, but the cases are much worse than they used to be. One of the reasons for that is because DHS is doing a very good job.
- 249 Chair Ellis From our point of view, this is a real challenge because you are looking at as many as three lawyers per case or more, three to four times a day, with a 24-hour rule and the hope that the lawyer gets identified to the client soon enough to at least read the case workup and maybe meet the clients, within that 24-hour period.
- 256 Judge Welch Well, it is less than 24 hours. It is more like an hour or two between knowing they are representing somebody and the actual shelter hearing.
- 259 Chair Ellis I assume, and it must be true, that it is deemed a conflict between the children and the parents, so you can't have lawyers from the same source representing both.
- 262 Judge Welch That is why the Juvenile Rights Projects is so important.
- 262 Chair Ellis We'll get back to that.

- 263 Judge Welch My comment about multiple dads is not unusual. It is not uncommon to have a family with four or five children, with one mother and with four or five fathers. The next step in the adjudication process from a statutory standpoint is a rule that you are supposed to do that within 60 days. I think somebody snuck that out of the statute, but it is still the standard.
- 265 Chair Ellis You still apply it anyway?
- 265 Judge Welch The adjudication process, generally speaking in Portland, does not involve an actual trial. Most of the cases are resolved and I'll get back to some of our best practices issues. But that is the next step. It is supposed to happen within 60 days of the petition being filed. After adjudication, the law requires that cases be reviewed by the Citizen's Review Board. I don't know if you have had much exposure to that in the context of your work. The Citizen's Review Board has been around now for about 30 years. It is operated out of the State Court Administrator's Office. They are supposed to review every six months all children who are in substitute care. The court also reviews cases. There is kind of an ongoing dialogue about when the CRB should be involved and when the court should be involved, in terms of local practices. I want you to understand that this is not an insignificant issue from the point of the lawyers. One of the issues, of course, is how many of these different things do you have to do, and what are the minimum standards for effective, zealous representation of your client – that is, assuming we are talking about the parent's attorney because they probably have the most demanding assignment. If the court is regularly reviewing a case, and our court does, then we often cancel the Citizen Review Board hearing. The judge has already reviewed the case. You will find in different counties that this practice varies dramatically. We probably are the least reliant on the Citizen's Review Board of any county in the state. Another kind of hearing is a permanency hearing. That is required within one year of the finding of jurisdiction. The court is to hold a hearing for the purposes of determining whether the permanent plan should be changed to the concurrent plan. When this system went into effect we were terrified that we were going to have hundreds of hotly contested permanency hearings about whether adoption should be the plan or should the parent get some time to try to address their issues. The fact is that we just don't have a lot of contested permanency hearings. I don't know how true that is elsewhere. I think it has to do with the communication with the bar. It has also to do with how the district attorney's office does its job, or whoever is prosecuting that termination of parental of rights. We are blessed with an extremely good contingent from the district attorney's office that does this.
- 336 Chair Ellis The termination of parental rights is separate?
- 338 Judge Welch It is the next step. In order to initiate termination, a new petition is filed by the state alleging under the termination statute that this case should have that happen. We have fairly elaborate system to do this that I won't try to describe to you now. In any event, the state has the option to file one of these petitions whenever they deem that they have a case and wish to move forward.
- 349 J. Brown Judge, at some point, does the responsibility shift from the District Attorney to the Attorney General?
- 350 Judge Welch Not in this county. But it does on paper because so many of the counties have relied on the Attorney General's Office to do this kind of work. The state actually pays the lawyers in the district attorney's office to do these cases. They are county employees, but they are actually funded by the state. When a termination petition is filed and the matter is set for trial, those are the things that happen in virtually every case. I would like to go back and tell you a little bit more about some things that we are doing that are a little bit different. Going back to the shelter hearing, one of the things we initiated several years ago is a second shelter hearing, which is held for a variety of purposes and not in every case. It is a decision that is made by the presiding judge at the time of the first shelter hearing – whether there are issues that need to be quickly addressed. A typical time between the first and second shelter hearing is two

weeks. It is often done because there are no parents present at the time of the first shelter hearing because they are in jail and will be out fairly soon. Sometimes we will have second shelter hearings because the state's case is kind of skinny and there is a pretty good chance that the kids can go home and the judge wants to monitor that. We started this, as I said, several years ago. At this point, we are holding these second shelter hearings in about 25 percent of the cases. Another thing that we started doing many, many years before was a pretrial settlement conference in every dependency case. So at a shelter hearing on day one the judge makes a decision about whether or not the children are to remain in protective custody or are being returned to a parent. We also decide whether there is a shelter hearing, and, if so, setting it on a specific judge's calendar at a specific time so everybody leaves the courtroom knowing the next date. The other thing that happens is the pretrial settlement conference in each case, which is also scheduled with a specific judicial officer with a specific date and time 42 days in advance. What happens is everybody meets outside the presence of the court for about an hour conference – what we affectionately refer to as plea bargaining over language and over whether the proof is adequate or strong enough in certain subject areas. Frequently, a very, very large percentage of the cases is resolved as a result of that pretrial conference. They come in to see the judge and announce their decision about how they are going to handle their case. Sometimes the judge won't agree with what is being done, so we send them back to the drawing board. But the overwhelming majority of our cases are resolved by this warm up settlement hearing. If it is not settled at that point, subsequent judicial settlement conferences may be held. For instance, the lawyers have not had the opportunity to fully consult with their client about their options, their choices and the likely outcome. Then they say "Judge, I think if we had another settlement conference, we will probably be able to settle this. But I just need a little more time with my client." You can understand that if you have had to tell a criminal defendant what the likely outcome is. Telling a parent, particularly a young and not very functional one, that they may or may not get their children back, this is heavy stuff. It is hard work to represent these parents and explain to them how this whole process works and what the consequences may be. We do set subsequent judicial settlement conferences when the first one doesn't work, and sometimes we don't. We set the matters for trial and we try to set them within the 60 days. But we are not particularly successful in doing that because of the nature of the system. It is a very busy system and lots of lawyers, relatively speaking, are scheduled up to their ears for all of the reasons that I am laying out for you. So finding time when five lawyers and a judge can mesh their schedules is very frustrating, hard work. The family decision meetings and team decision meetings are internal, problematic meetings that case workers and facilitators run in most cases. The judge is involved, though it is not a judicial proceeding. Whether lawyers go to these gatherings is not based on a pattern or set of principles that I have been able to discern. I am a little bit too far removed from it to know. It is a lawyer-by-lawyer thing. It is a professional judgment about whether the meeting is necessary or not because major decisions are made in these meetings.

461 Chair Ellis

This is something set up by DHS?

461 Judge Welch

They tend to involve extended families. The parents are there, the case worker is there, and service providers are there. They ask, "How is momma doing. Is she doing well enough to make this step in the process, which is returning the child?" Placing the child with her in a residential drug treatment program – lots of very important decisions such as the level of parenting time and who will supervise it – a lot of very, very important decisions are made. Again, you have with the CRBs and all these hearing processes, a lot of demands on lawyers. Now, what a lot of lawyers do – and there are people here who are in a position to tell you the details of this – is that they maybe don't go themselves, but they will send a paralegal from their offices or a social worker who works in their firm to at least be there to speak for the parent or help the parent navigate this. There are a lot of demands. I want to talk a little bit about our termination process.

- 482 Chair Ellis Let me just see, the process you described by my account involves, typically, nine appearances by lawyers.
- 489 Judge Welch There can be multiple reviews.
- 490 Chair Ellis I understand that, but just to get a sense of the scope of the problem of lawyers trying to do what they are being asked to do: a single case typically involves at least nine, and could be quite a bit more, appearances?
- 497 Judge Welch I think “Byzantine” is probably a pretty good word to describe these processes. A termination petition is filed by the state, the parents are served, and they are ordered to appear. If they appear, we set trial dates. If they don’t appear we default them and terminate their parental rights. We have a changing process for how these cases are managed through the trial stage. I can tell you about best-interest hearings real quickly. One of the things we do here in Portland, which we have been doing now for about 15 years and we are very proud of and think is very important, is that, whatever judge adjudicates the case, the judge keeps the case for all subsequent hearings. The parents have appeared and they have asked for a trial, or at least they have indicated they are contesting the process. We set trial dates about four, five or six months out from the appearance only because of the volume that we run. In the interim between the initial appearance and the actual trial, we set what is called a best interest hearing, and that is set with the original judge in the case. The real purpose of that best interest hearing is to talk very frankly with the parent about the probable outcome of the case. In other words, what we do in these hearings is we say to the lawyer, “Run down your case, what does your case look like?” We want a quick summary of the strength of the case and who some of the witnesses are. Then we have the attorney for the child or children add comments to that. Then we ask the parents’ attorneys to do that. What happens, practically speaking, is that most cases go away by default, or the parent agrees to terminate their parental rights. That is also a time-consuming process for attorneys, particularly the attorney who is representing the parents. We have to have legal advisors to tell the parties what the choices are and what the implications are. We have a lot of openness now with adoptions, particularly when kids are being adopted by their grandparents, which is not unusual. One of the biological parents is connected to these people, so they obviously have some prospect of having a future relationship with the child. These are the people that are most likely to be agreeable to terminating their parental rights. Openness is becoming the rule rather than the exception. Thirty years ago, that was considered absolutely contemptible – that there would be any knowledge of who the adopting parent was and vice-versus. As you can see, we keep these lawyers pretty busy and, added to that, we operate out of two courthouses. There is a nice long chunk of the interstate in between. We worry about that. The judges have had some lengthy discussions about what we could do to minimize these demands, but we haven’t come up with anything. These hearings are held at all sorts of different locations. We certainly don’t do this to drive lawyers crazy. I have attached to the handout, just so you know what you have, a description of the best interests hearing. I have also given you our juvenile court procedure manual, though it hasn’t been updated now for several years.
- 633 Chair Ellis You are on a 10:00 schedule. Are the rest of you able to stay longer? Why don’t we address questions to Judge Welch while she still has time?
- 641 Judge Welch I told Ingrid that I would be able to come back at 11:00.
- 644 I. Swenson We planned a panel discussion.
- 646 Chair Ellis What would be the best from your point of view?
- 648 Judge Welch I have a few minutes.

- 649 Chair Ellis Obviously, we are interested in how the assignment of lawyers is being handled and what your observations are, just make it a broad topic, with regard to the quality of lawyering and the availability of lawyers.
- 658 Judge Welch Generally speaking, my response is very, very positive. Because I have been doing this for a long time, one of the things that happens on the DA's side, and on the side of representation of children, is that juvenile court has ceased to be a dumping ground for lawyers. This is a place where people come who really care about this work. The judges in this jurisdiction are all doing family law voluntarily, all nine of us. We have lawyers who fit that description as well such as the lawyers in the Public Defender's office, MDI and JRP. The people who are doing this are experts. They are excellent, they are very committed and they work very hard. Overwhelmingly, with all these firms, we are very, very happy. There is frustration because they are not on time because they are driving back and forth or they are overcommitted. We are hoping this consortium that you have set up can help out a little bit. The single biggest problem we have, and I think the consortium is probably going to make it worse, is the appointment list where there is a conflict or where we just run out of lawyers. You can imagine the conflicts when you start out with three or four lawyers, and three of the clients have criminal histories and have lawyers from the Public Defender's Office. It is just a rat's nest. But we fall back on a list of lawyers who are willing to be appointed at \$40 an hour and, guess what: the ones who are willing to do this aren't very good. We need to have more lawyers available when there are conflicts.
- 720 Chair Ellis Some of our contractors combine criminal defense lawyers with juvenile lawyers. Some are specialist juvenile lawyers. I am interested in if you see either any synergies or any disadvantages?
- 728 Judge Welch Yes I do.
- [Tape 1; Side B]
- 010 Judge Welch We have a program going, for instance, where Day 1 we identify before the shelter hearing the criminal history of all the adults who are involved. We know what their status is – if they are on probation, if they are in prison, or whatever. We started doing this several years ago. It changes the whole synergy of how things work. You know what is going on and who you are dealing with. What we moved to is that, if a parent is on active probation in Multnomah County, the probation of that parent is moved to the judge handling the juvenile dependency. So, if I have this case and daddy is on probation for domestic violence or a neglect charge, I become the probation judge for that dad. I think I had mentioned this process to you the other time I appeared. What goes on in those hearings is absolutely breathtaking because the whole system comes together. We work with the Public Defender's Office at that time to do this in a way that really works. In other words, the lawyer on the probation revocation would, generally speaking, be somebody who didn't know about the dependency case. If we have the combined hearings where we are reviewing dependency case and daddy's probation, it is very effective joinder of issues.
- 036 Chair Ellis The PD lawyer that was handling the criminal case will also migrate there?
- 037 Judge Welch It would probably go the other way around.
- 039 J. Connors I think the expectation in our office is that the juvenile lawyer would handle everything.
- 040 Judge Welch Those kind of integrated systems, we are really big on here. It is helpful. I don't see any particular detriment.
- 045 Chair Ellis Let me suggest one. I would think the risk of conflict would be much higher. The question I have is, in the criminal defense area, if conflicts are out there, they are not identified right at

the beginning. The lawyer gets part way through the case and the conflict becomes apparent. Then the lawyer has to withdraw and the public funds that we administer end up being paid twice for the same case. I would think, based on your description of the process, that there would be a huge risk of conflicts. The question I have for you is how often does a conflict happen partway into the process, when you have to reappoint and start over?

- 057 Judge Welch I would say it is getting better with regard to how far into the process we are when conflicts are recognized. The firms are doing a better job of trying to nail that down. I wish I could give you a definitive answer. We sign substitute orders every day because of conflict issues.
- 064 Chair Ellis Do you see any way to improve on that? I don't know what data sources are available at the inception, but obviously that would be a big help.
- 067 Judge Welch I frankly hadn't thought that much about it. If MPD and MDI weren't here –
- 068 Chair Ellis Or if they broke up between the juvenile group and the criminal defense group.
- 070 Judge Welch I think from a selfish prospective that is not as big an issue for the court. It is probably more important to the law firms than us.
- 075 Chair Ellis It may complicate the contracts that we have, which tend to be on a case basis, as opposed to a smaller granular basis. On a particular case, you get two out of five appearances and then the conflict is recognized. Then someone is brought in and counting twice is the problem.
- 080 A. Sherbo I think there is something inherent in the dependency process that causes conflicts to arise later. Partially it is discovering a conflict that preexisted the appointment, but there is something unique about the dependency process where the lawyers are continued from hearing to hearing. There is really no cessation of the case for quite some time, so conflicts arise. You will end up representing two clients –
- 087 C. Lazenby Give us a little more detail.
- 088 A. Sherbo We had a case yesterday where we have two dependent young men in the same foster home that assaulted each other. We were representing both of them and now we have a conflict. It wasn't something that could have been identified. By the very nature of the system, we have a number of children with multiple, emotional or behavioral disturbances who are placed close together in the same location and bad things happen. These are bad things between two clients of the same firm. So that is something that is unique to children and their lawyers.
- 100 Chair Ellis There is a tension that we have to sort out. On the one hand, there are lots of economies of scale by dealing with larger contracting groups. They support each other, their training is better. But to the extent we deal with larger, integrated groups, the more we run the risk of these conflicts. What I am trying to get a sense of is, from your perspective, do you think we should be trying to break up into smaller contractors, or are we okay at the concentration levels that we have currently?
- 109 A. Sherbo Someone else can answer that question. You have identified the ups and downs. Our firm has a number of lawyers who have a lot experience in a lot of different areas. We train and mentor younger lawyers and the advantage that we have, in response to one of the other issues that was raised, is scheduling. If we were a two-person office, we could not tell the judge that we can cover all the hearings. I have a hearing before another judge at 10:00 on Tuesday, and I am supposed to be downtown before another judge. If we didn't have someone to help cover cases, things would grind much more slowly, I think. It is not ideal, obviously.
- 122 Chair Ellis Do you have a suggestion for us, or are we alright with our current number of providers and their concentration? Should we be moving in one direction or another?

- 126 A. Sherbo I feel put on the spot.
- 127 L. Harris You should say you need to think about this.
- 127 A. Sherbo I can really only speak for my office. I feel like the quality of the work that we perform, under the constraints of the system as a whole, is excellent. I wouldn't want to see us much bigger or much smaller. I think we do have a problem in the community that Judge Welch mentioned because we just don't have enough people when we have three fathers, a mother, and children, and they have prior representation. We don't have enough lawyers to cover all that.
- 137 Chair Ellis Tell me a little bit about your organization.
- 139 Judge Welch I think I need to go.
- 140 I. Swenson Mr. Chair, if I can say a couple of things. First of all, I think the juvenile lawyers in those firms have the benefit of training, but the fact that they are part of one firm creates conflicts.
- 149 A. Sherbo They bring an awfully good perspective from my point of view. I work for the Juvenile Rights Project. We exclusively represent children and young people up to, say, 25. I would say about 70 percent of our work is dependency, and most of that work is representing children and teenagers. We are expanding our representation, at the request of the community, and by my desire as well, into representation of parents.
- 155 Chair Ellis It is not like labor work, for example, where you either do employees or employers?
- 156 A. Sherbo It is more like divorce work, where you do husbands and wives. We don't have a very large volume of delinquency cases and we don't do any adult cases, with the exception of a few Measure 11s that we have contracted for in the last contracting session. The expertise in criminal law that the firms that do both bring to delinquency work I think is very high.
- 164 Chair Ellis How many lawyers in the JRP?
- 164 A. Sherbo I think we have 18.
- 166 Chair Ellis They all do juvenile work exclusively?
- 166 A. Sherbo Well, they don't do adult criminal work. Our office is somewhat of a hybrid between a public defender office and a specialty legal aid office. We have a number of lawyers who are funded from other sources, who are representing children in other courts. We have a project where we represent children in special education. That is funded entirely from another source. We have, among the 18 people that I mentioned, several people who are exclusively doing that.
- 174 Chair Ellis You are organized as a non-profit corporation?
- 174 A. Sherbo Yes, that is correct.
- 175 Chair Ellis Tell me a little bit about the structure. Do you have a board?
- 176 A. Sherbo We have a board.
- 177 Chair Ellis Are they providers or outsiders?

- 177 A. Sherbo They are community members. They are not providers. It is a relatively recent board and it is growing. It is made up of people who have a particular interest in children and youth issues. We have a pediatric nurse practitioner, who we developed a relationship with over the years.
- 186 Chair Ellis You mentioned you are funded by multiple sources. Are we talking three or four sources besides OPDS?
- 187 A. Sherbo I think OPDS is probably by far the largest provider. We have employed several people to do the school education through grants, and then we have smaller pieces of funding. The work that we do which is funded by you is defense work, that is where we started –
- 198 Chair Ellis That is 90 percent plus of your budget?
- 200 A. Sherbo I don't know. I am a supervising attorney, not the director. I am not very good with numbers. My guess is that well over half is from OPDS funding. What we have found is the defense work informs the other work. For example, a child's expulsion from school has a direct impact on a juvenile court case. A dependent child who has finally found a foster home, which is a good match, but they are about to be expelled from school, might lose his placement. The child, by the terms of their probation, is required to attend school and has special education needs that aren't being met. So there is such an interrelationship between those pieces of a child's life. I think I was originally asked to talk a little bit about how difficult and complex the work is. Here is what I understood you wanted to hear, both about the quality and the challenges. I felt, when I talked to Ingrid, what I needed to walk is a fine line between bragging about ourselves and whining to you about our needs. I will do my best to walk that line. If you see me going too far in one direction let me know. We provide excellent work, but it is at the expense of family time and leisure time. We have too much work to continue to do the high quality that we expect from ourselves and our staff. Particularly with people like myself and Ingrid and others who have done this for a long time, we started, in my opinion, when the caseloads were lower. So I have expectations of my staff about how they are going to handle a case that are somewhat based on how I was able to handle that case when I had less cases. The amount of research I was able to do, the amount of collateral issues I was able to address, the amount of times I was able to advise someone – all of those things we are just not able to do in the same way now. I think Judge Welch gave you an excellent view of what happens here in this building, step-by-step-by-step, and she told you a little bit about what happens outside of this building. I want to talk to you a little bit about the things that we do, those areas of law that intersect with what we are trying to do and what you all see as the key events: the shelter hearing, the settlement conference or the trial. Dependency law is really statutory, where we have the juvenile code that tells you what the bases for jurisdiction are and what you must prove for the state to intervene into a family. The code tells you that and it tells you the stages of the proceeding. But there are so many other areas for the law, including federal statutes that we need to incorporate every single day, which fund foster care and set requirements on the court. It has multiple meanings and connotations that you have to know about if you are practicing in this area. For example, in this state, if you are related to the child who is placed up for foster care, you may or may not be able to receive funds, and that is based on federal statute. If you are a juvenile court lawyer, you need to know what that says. If you have a client in drug or alcohol treatment, you need to know the law under Title 19 of the Social Security Act. Even if you understand them, you probably aren't going to get that client in drug or alcohol treatment in the time set by the federal statutes. We also have federal statutes that regulate how we do business when an Indian child is involved. We were talking about the possible parties. You have mom, you have dad, you have the children, you have the tribe; and there are CASAs or special advocates and other family members who might intervene. So you have a hearing where you might have eight different representatives that are governed by not only the juvenile code, which is relatively manageable, but multiple federal statutes in areas that are related, but not specific to child welfare. We also have the relationship between juvenile dependency work and domestic relations law. You have the Interstate Compact and Placement of Children laws. You would

think that if you were appearing in front of Judge Welch with two parents who are in jail, and the child needed placement with an aunt in Vancouver, you are home free. Not so; not so at all. It is far more complicated. There is a vast amount of information that each of us needs to know. If we don't know it, we at least need to know that it is out there to look for. When I was talking about trying to present the complexity of this to you, I have done this for 30 years nearly every week, with every single one of those issues. But someone can still come up with a fact pattern or a legal issue that we don't know.

300 Chair Ellis How is some poor law-trained person on the appointment list possibly going to know all this?

303 A. Sherbo I wouldn't know, in this county at least, if there are poor people on that list who only do one or two cases a year. I would say that is a bad system to have somebody who only does one or two cases. My guess is the people here do more. It is sort of a problem where you have an area of law you are proud of and you feel it is so complex that nobody else can do it. I don't mean to be making that statement.

309 Chair Ellis You have me persuaded.

310 A. Sherbo There are general practitioners who do a lot of good work in a lot of different areas. I think this is really complicated work, which has been perceived as simple. So the difference between its difficulty and the perception of it is really a problem as well. The other difficulties of the work have to do with communication with the client. For us, it is primarily children. You have a full set of skills to learn in order to communicate with someone who is 13. There are really important issues, like: "What do you expect your placement to be?" "What do you want it to be?" "Well, I can't achieve that for you;" "There's only a 30 percent chance of achieving that for you, but I might go this other route." These are very difficult communication issues – kids being influenced; being careful not to influence them, but to counsel them. It is time consuming.

325 Chair Ellis You mentioned you have been doing this a long time and your colleagues have been doing it for a long time. Of the 18 lawyers in your group, what is the turnover, what is the average experience level and the age of attorneys?

331 A. Sherbo We have a good number of people with a seven or more years of experience. We feel like, despite the poor pay and the long hours and the emotional drain of the work, that our firm provides support. There is a lot collegiality and a lot of people who really love the work. I will tell you, we have a lot of people who have spouses that have what I will call a real job. They are able to make the sacrifice to work for us long-term. We have just lost a very capable young attorney to go into private practice. We have been unable to hire a number of people who couldn't afford to come to work for us.

343 Chair Ellis How hard is it to recruit when you do have an opening?

344 A. Sherbo We have a number of applicants every time we have an opening. We have really tried to emphasize major felony qualified work because we do have Measure 11 cases. We did just hire a qualified attorney.

352 Chair Ellis In the criminal defense practice there was, and I think there still is, a model to hire a lot of young lawyers who want to get trial experience. It sounds to me like your field is one that lends itself more to a long-term commitment and career.

361 A. Sherbo I think that is correct for a couple reasons. Number one, it is kind of a calling. It is very interesting legal work. The number of issues that come up on a given day is rewarding, intermittently at least, when you have success. Also, as Judge Welch said, there is not nearly as much trial work.

- 372 Chair Ellis What are you finding in attracting new entry-level attorneys, in terms of those who have law school debt? Is that a big issue?
- 375 A. Sherbo That is huge. That is one of the most recent revelations we have had. The young man who just left us could not afford to pay his school loans and work for us. We have a great relationship with Professor Harris, who teaches juvenile law. She sends us wonderful students every summer, and we hire a lot those.
- 392 L. Harris You might be interested to know that the federal legislation provides for forgiveness of debt for prosecutors and not defenders.
- 393 Chair Ellis I know that. The current bill only provides it for criminal defenders not juvenile lawyers.
- 398 A. Sherbo I think there might be some national organizations who have recommended similar loan forgiveness for juvenile court practitioners.
- 402 Chair Ellis We are migrating that way.
- 406 L. Partridge I agree with Angela. Do you have any questions?
- 407 Chair Ellis I was interested, from the law school point-of-view, are you finding a lot of interested students?
- 411 L. Harris Yes. I am trying to figure out how to put this into perspective for you. Let me tell you just a little bit about where I am coming from and frame what I am doing. I have been teaching at the University of Oregon since 1982. I teach children and the law, and have since I came there. Before that I was public defender in Washington D.C., where I did a lot of juvenile court work. I have been working with juvenile court since I came here. I have been on the Juvenile Court Improvement Project Advisory Board since it began. I have been part of Ingrid's work group, which she doesn't claim ownership of – the Juvenile Law Training Academy – since it began. I was the head of your contractor site team that did the evaluation of the Multnomah County juvenile contractors in December. To some extent, I can answer questions about other parts of the state. I would tell you that your best functioning juvenile court and your best set of lawyers is in Multnomah County. The rest of the state doesn't necessarily look like this county.
- 431 L. Partridge I might not necessarily agree with Professor Harris.
- 433 L. Harris I just said "not necessarily."
- 434 Chair Ellis We had two meetings in Marion County and we heard some very positive things.
- 435 L. Harris I also head a project at the law school, which is a child advocacy project. It was set up with money from a donor, but it is really for the students who come in and say they want to do child advocacy work. Besides children and the law, I teach family law. So I rarely run into people coming into law school saying, "My heart is on fire to do divorces." They all want to represent children. So, yes, there is a lot interest. I will tell you that part of the reason Angela can recruit is that JRP is regarded as the place to go in this state if you want to represent children. There are other lawyers with these skills, but they don't have the reputation of JRP. There are wonderful students, who come with great backgrounds and want to do this kind of work. As it happens, I was just meeting the day before yesterday with three students who were awarded fellowships for this child advocacy project. They get money. Part of what I am doing with the money that the donor gave us is to give, in essence, scholarships to some students to try to reduce their loans. This one woman, who is fabulous, worked in juvenile corrections before she came to law school and she is about 30. She is going to work for JRP this summer and got out of college with very little debt. She said after her first year in law

school that she had \$30,000 in debt already. So the debt issue is huge even in public law schools, essentially because of the de-funding of higher education. Seventeen percent of the costs of higher education are paid by the state now. The public schools are basically private law schools in the sense that they rely on tuition; so it's totally different from when we went to law school. When I went to law school, I came out with no debt because I saved money and I worked. It is completely different now, and that is a big problem. It does mean that more and more people can't do this kind of work. What Peter asked me to do was to talk about, from a more national perspective, representation of juveniles and emerging challenges. I don't know which way you want to go?

- 482 Chair Ellis I think the latter, but let me put a question out there in the course of your response, if you can work this in. The biggest growth component in a public defense office is juvenile representation. Criminal defense is obviously a big part of what we do but, in terms of growth in incremental expenses, it is less of a challenge. I would like to understand better what is happening in the juvenile area.
- 497 L. Harris I would guess that the biggest contributor to increasing costs is the dependency cases, not the delinquency caseload. I was all prepared to tell you all the reasons why I think it is harder to be a lawyer in a dependency case than to be a lawyer in an adult criminal case or a delinquency case. I think that you have to master more subject matters. You have to master greater area of laws and related materials, and I think you have to do more work. One of the reasons is because, as you all know I'm sure, in adult criminal court, by and large, once the case is tried and you have a conviction rather than an acquittal, the lawyer's work is basically done. There is so little discretion with regard to sentencing anymore, and once someone is sentenced if they are sent to some kind of facility, the court loses jurisdiction and they go away. On the juvenile side with delinquency, there is more discretion on the sentencing but, once again, in Oregon now, once a kid is committed to the Youth Authority, the case is over. In dependency cases, as Judge Welch was telling you, these dependency cases go on constantly. That is where the bulk of the work is in dependency cases. After the adjudication, they literally last for years.
- 529 Chair Ellis Which raises a question that I will be interested in. I believe our contracts with both of you are on a case unit basis. The definition of "case" I think I am hearing is a very elastic concept which, in terms of fairness of how we deal with other contractors, is an issue. When we get back to you, I would like to hear your thoughts on that.
- 538 L. Harris The other thing that I think is important for you to know is that the quality of representation – the quality of the work that lawyers do – in juvenile cases continues to be a big issue in this state and nationwide. The Oregon juvenile courts in the last 15 years have had at least four major episodes of being studied. Every one of those studies has come back identifying as a major problem the adequacy of representation of private parties. You have got the Juvenile Court Improvement Project assessment materials, but that is just the latest of a string of studies. The Juvenile Court Improvement Project has done a lot of good in this state on many issues, including that they try to do a lot of special training so everyone, including lawyers, will get up to speed and improve the quality of work that they do. But they have had mixed success. I have to tell you that the work that has been done in the last couple of years headed by you – that is to say, by Ingrid – has made a huge difference. I think it is very clearly because you all are the ones who pay these lawyers and you all are the ones that these lawyers listen to. I do want to take this chance to give the maximum praise I possibly can, first of all, to Peter Ozanne for making this a priority, and for having incredible wisdom and good luck to hire Ingrid. She is remarkable. She is so respected; and she has provided so much leadership. She has created this Juvenile Training Academy, even though she won't own it. She is initiating this site visit review process, and it is making a big difference. I think it is really important. I know it costs money to do all this stuff, but I want you know it is really important. On top of all of the stuff about why juvenile law is already complex, I am supposed to tell you how it is going to get worse. You already know about the more complex

hearings. That was already talked about adequately. You know about the push timeline under the federal law.

592 Chair Ellis

The 24 hours –

593 L. Harris

No. Basically, at the national level, it is called the 15-22 months rule.

595 Chair Ellis

The one year thing.

595 L. Harris

What that means is the lawyer for the kid and the parent who is doing a good job simply has got to step it up and can't let things slide. The lawyer has to be on top of things at all times, and it has made things go faster. The push for permanency, which is what this is related to, is creating some important issues. As Judge Welch said, here in Oregon, adoption is the one-size-fits-all solution to the case when the kids can't go home. Across the country, it is increasingly recognized that this is not the best outcome for many children. But there is a lot of resistance, institutionally and structurally, to say maybe we shouldn't be doing adoption. Maybe we should be doing some other permanent plan for this child that doesn't involve completely terminated the child's relationship with the parents. For the lawyers representing the kids, as well as the parents, first of all, they have to keep figuring this out. And then they have a lot of difficulty dealing with the institutional resistance. At a philosophical level, they have a lot of educating to do when they want to do this, and then the case actually becomes more complex. You have to figure out what is that alternative permanent plan. Oregon has got the proper statutes for this. But my observation is that adoption is still so dominant, and these other things are used less, or are not used as much as they ought to be. Another problem is related to what Judge Welch was saying about complex families. In the not very distant past, probably when you when you were in juvenile court, Mr. Greenfield, you just didn't see fathers. The fact that these children had fathers was sort of completely ignored, which I always love, because the very first case in front of the Supreme Court of the United States about father's rights is about a juvenile court case. But everybody totally ignored fathers until recently. Now you are really trying to figure out father's issues for a variety of reasons. It is complicated: practically speaking, not only because one family may have several fathers, but because you might not actually know who the father is. The last legislative term, I worked on legislation when Senator Brown was actually the chair of the overall group about trying to deal with fathers in juvenile cases. Because of some of the complexities of the law, it is not at all uncommon in juvenile court for there to be a couple guys who are presumed to be the father of a child. You have to choose. Figuring out how you sort that out legally -

655 Chair Ellis

You are talking not just about multiple fathers where you have a sibling?

656 L. Harris

No, I am talking about one kid with several father.

[Tape 2; Side A]

002 L. Harris

You might think, "Well, that is simple, just do an DNA test." But it is not that simple because there are legal complexities. It is not simple because it assumes that all you care about is biological parenthood, which isn't necessarily the case. It is hard to resolve these issues, not only because our laws are not all that straightened out, but also because there are different constituencies. You have got the child support people coming in and pushing one way. You have the fathers' advocacy groups coming in and pushing another way. In a very complex area, this stuff needs to be sorted out quickly. There are trends occurring in other states where it is going to be increasingly important for people, especially who are advocates for kids, to know about various ways to deal with de facto parents, who are not biological parents.

012 Chair Ellis

Let me ask, and I am sure this will sound naïve in this room, but if I am a lawyer appointed to represent a two-year-old, where do I get my direction?

- 013 L. Harris Make it up yourself.
- 014 Chair Ellis What?
- 015 L. Harris You make it up yourself.
- 015 Chair Ellis Help me out. How do you decide what is in the best interest of the child?
- 017 L. Harris It is easier to tell you what happens for a two-year-old than a seven-year-old. One of the things with a two-year-old is you have to do what Angela is talking about. You have to figure out how to talk to a very little child. But if you have a very little child, they really aren't going to direct you. They aren't going to instruct you. So you are going to get information from other sources, such as therapists and so forth, to figure out what is going on. But you are put in an odd position as a lawyer.
- 021 Chair Ellis You are like a subjective parent, almost.
- 025 L. Harris You make your own choices. Some people try to structure that by saying, for example, "I am going to have a presumption in favor of keeping the child with the parent," or something like that. You just make it up yourself. The reason I said a seven-year-old is harder because there is a lot of debate about what age a child becomes old enough that they really should be directing the lawyer. JRP's position and the new standards say "7," but there are lots of other people who disagree. If Judge Welch was here, she would say, "I wouldn't even listen to a lawyer that says that." I have heard her say that, but I don't know if she would tell you that now. It is very complicated when you get to children who are a little bit older. How much do you take direction from them, as opposed to, again, making it up yourself? The standards call for the appointments of guardians, but that isn't something that is common in most cases. It could have happened that CASAs would have been developed to fit that mold, but they aren't in this state. In this state, CASAs are separate, independent parties, so they are not the one who directs the attorney for the child. For a little child, you have got the two best interests speakers, the CASA and the defense lawyer.
- 043 A. Sherbo I think the impression is that why couldn't the state's lawyer represent the child, couldn't the parent's lawyer represent the child, or why do we need a lawyer for a two-year-old?
- 045 Chair Ellis We haven't gone that far.
- 046 A. Sherbo What is the value added of having a lawyer for a two-year-old?
- 046 Chair Ellis How does the system work?
- 047 L. Partridge One of the things that I would like to tell you about: if I am representing a two-year-old and why you need a attorney for that child. An attorney general or district attorney deals with DHS and liability issues. I don't mean that in a critical way because what happens is that, if you have a two-year-old, and let's say they are not going to be returned home under a permanent plan, then you have to look and see where is this child going to go to be raised for that 16 years plus. DHS may look at other relatives and rule them out because they can't certify them. They have a whole process they have to go through, which is somewhat mandated by federal law as to who they can certify as a caretaker for that child and who they can't. I just recently had a case – and I hate to tell war stories – to illustrate, where the child had been with the grandmother from birth because the mother was fairly absent and the father was not in the picture. The child got removed because there was a search warrant served next door to the apartment she was in and, while they were there, the police saw what we would call a "dirty house case," which usually means there was some drug component involved. The child comes into the foster care system, the system takes protective custody of that child, and then you say, "Well, where does this child go?" Obviously, if I was representing the

child and sending him to the grandmother seemed to be the best idea, the problem is DHS wouldn't certify her because she had a criminal history. It was, I think, seven or eight years old for a prior drug offense. That, coupled with the condition the apartment was in – there were drugs in that apartment – they wouldn't certify her as a placement resource. So, as the child's attorney, I was really having to push DHS to say, "Hey, let's get around your certification process and see if there is another way we can do this." Ultimately, while they weren't willing to do that, I was able to approach the juvenile court judge and say, "Let's get DHS out of this case and let's talk about guardianship for this grandmother." So, if you don't have a child's attorney, I don't know how that ever happens for a two-year-old. Otherwise, what would have happened with this child is that the child would have been in foster care. They would have gone through a termination process with the parents, and then they would have had to look for an adoptive home, which never would have been that grandmother. It would have been some stranger adoption and, 15 years from now, I'll tell you whether that was a good or bad decision. At least by having a child's attorney, we have that option to go to the juvenile court judge.

079 L. Harris

Another reason why it is important to have the children's attorney, I would say the agency has their own agency. They have their own institutional structures and, very often, what the lawyer for the child is doing is pushing against them. One of the things that is happening, there are studies coming out, including studies based on Oregon's population, that show what a bad prognosis kids who are in long-term foster care have. They are set up to have so many life failures; and they come in damaged. But, traditionally, the system hasn't paid that much attention to them. The whole structure, as it has been explained to you, is really focused on the parent – trying to identify what is the issue with the parents. Can we fix them up so the kid can go back or not? Very often, the kid who is coming in damaged and has issues hasn't had things done for them – anything as simple as getting medical care or their educational needs attended to and so forth. There is now increasing attention to the idea that lawyers for the kids need to be pushing for services for the kids independently of this question of whether they go back to their parents or not. This last year, the Juvenile Rights Project got some legislation passed that will really help some kids. It requires that kids in foster care be able to stay in the school they came from, if that is in their educational best interests, which wasn't possible before. This is great legislation, but there are implementation issues. Lawyers have to know about it. Lawyers have to push it. It is going to be another one of those things where lawyers are having to do things. There is a case that I worked on with Angela involving a child who had moved 12 times in 18 months. She had her issues, obviously. But the core of that was a problem with the agency not taking care of her adequately. Juvenile Rights Project was working on that in representing that child. It is really important to have lawyers for kids, and not all counties appoint lawyers for kids, certainly, not in every case. I can't tell you that lawyers always do a very good job, which is regrettable. But that goes back to the quality issue. Lots of studies show that, if you want to get good outcomes in juvenile court, it turns on the quality of the lawyers. That is incredible important.

112 Chair Ellis

So, when the legislature asks us if we are funding too many lawyers and why do you have to have lawyers for all these children and parents, etc., you are comfortable with the way the system is working now?

116 L. Harris

No. I think sometimes this is a problem of implementation and not theory. I think there are times when lawyers who are appointed for kids don't provide adequate representation.

120 C. Lazenby

Another aspect of that: I understand in felony cases, where you ended up having represented the co-defendant, there is a conflict. But, overall, in the juvenile law area, are the conflicts really more sort of technical? If we could wave a magic wand and, let's say, we could get 31 votes in one house and 16 votes in another to change the law about conflicts for lawyers practicing in the area, is it possible to get rid of the sort of standard view of conflicts? Could you see a way that could actually help, because the system does a lot more social management as opposed to strict legal representation? I am not diminishing the legal representation aspect.

I am actually acknowledging that you do much more than just pure legal representation. If it is possible, if not, just say, "Chip you are crazy." You have said that before, Angela.

- 133 A. Sherbo Not for decades.
- 133 C. Lazenby Is it possible that some of those conflicts are really more apparent than real? You talked about the case where you were representing two kids, and now you have assault charge with one of them. There is going to be a legal disposition of the assault case, but continuing treatment and placement in the dependency case.
- 139 L. Harris Could you keep representing the victim?
- 140 A. Sherbo I don't think we can keep representing either of them. I think it is a tragedy that we can't because, in this particular instance, we have had a very long-term relationship with one of them and have provided him with really superb services. I don't know the answer to your question, Chip. All I can tell you is that we take every one of those potential conflicts to a group in our office. The individual attorney doesn't make that decision. It is always evaluated by supervisors and several other people. We are doing what we can internally, and then there is real reluctance to stop representing somebody who you have formed a relationship with. I don't believe we have conflicted off of any cases where we should not have.
- 158 L. Partridge I can tell you, in Marion County, we have a consortium system and I don't think it is an issue. In Multnomah County, it seems to be a much bigger issue with its system. But in our system it is not really an issue. If we have an apparent conflict at the beginning, someone else just takes the case. I don't believe it is any additional cost to indigent defense. It may be a minimal cost to the court in having to reschedule a court appearance. I know there has been a big debate statewide about what is the best system to provide the best services, but clearly I think one benefit of a consortium is the handling of conflicts.
- 173 A. Sherbo So you are starting with criminal defense, where that people were being appointed counsel regularly in accordance with constitutional court rulings. In juvenile cases, people were not being appointed counsel. In *State ex rel Juvenile Department v. Grannis* the Court of Appeals first recognized a constitutional right to counsel on a case-by-case basis for parents in Oregon dependency cases. That case was decided in 1983 or 84, so it has just been since then that counsel has been appointed for parents in juvenile dependency cases. The statute has also been changed. So counsel have been appointed in dependency cases for a considerable period of time, but it is obviously not nearly as long as in criminal cases.
- 186 L. Harris The other thing is, it is my understanding that the number of criminal cases is fairly stable, at least nationwide. That is not true in dependency cases.
- 189 C. Lazenby People who are younger are having children. Caseloads for dependency are going to get larger.
- 191 L. Harris Everybody always says it is drugs. I am not convinced about the drug arguments because meth has been around a long time, but I haven't seen any studies on the subject.
- 194 L. Partridge Part of it is, and I'm not a policy person and I don't really know about stats, but from my perspective, every time you fund a dollar for law enforcement, and I am not saying that is a bad decision, one of the things that happened in our county is that the police and the District Attorney's Office got a grant for a Child Endangered Services Project. So the police were much more involved in going out on DHS hotline referrals and taking a look at the situation, which led to a lot more criminal mistreatment charges, which led to a lot more juvenile dependency petitions and which created a huge spike in the caseload. When I did criminal work for about nine years before I did juvenile work, very rarely did we ever have a criminal

mistreatment case. Now, there are some folks in the back of the room that do this in Marion County probably six or seven a day. That is a direct result of that grant in Marion County, and I'm not saying that was a bad thing for the community to do. But people have to understand that this has a commensurate impact on the juvenile justice system.

- 220 L. Harris The other area of growth in cases is due to this whole idea that a family and a home in which there is domestic violence should be regarded as a potential dependency case, even where the child is not the victim of domestic violence. That is something that is new within the last ten years. The whole idea that a child being exposed to domestic violence can itself be child maltreatment causes more interventions. In Lane County, people tell me that the number of cases involving domestic violence is over half of the caseload. You get those kinds of spill-overs.
- 222 Chair Ellis I have a question and I would be interested in your thoughts. What has been the reaction of DHS case workers to this increase in legal representation? Do they fight it?
- 229 L. Partridge Are you talking about appointing attorneys for children?
- 230 Chair Ellis Right.
- 230 L. Partridge My perception is that they like it. In my county, very rarely are the case workers represented. There is not an attorney, there is no DA, there is not an attorney general present. It is very problematic as an attorney when you are trying to negotiate a case. Essentially, what I am doing, as a parent's attorney and sometimes as the child's attorney as well, is negotiating with the DHS worker over the language in the petition. I have real concerns about the ethics of that on the part of DHS and the Attorney General's Office and the District Attorney's Office, but that is another subject. But what you find as a child's attorney is that a lot of times, if you have a younger case worker who doesn't have a lot of experience, they will be ready to give away the farm to one of the parent's attorneys. As the child's attorney, you say, "Wait a minute. Hold off here. Let me get the DA on the phone." We will call the DA and basically say, "Okay, what do you have that is going to substantiate this?" If the child's attorney wasn't there, that would be negotiated in a way that would be much more beneficial for the parent.
- 247 A. Sherbo We tend to disagree with them fairly frequently and not necessarily with respect to a simple issue of jurisdiction versus no jurisdiction. Once a child is in the custody of DHS, I look at that as I continue to represent the child. I recognize the duty of ensuring that the child's parent, who is now the state instead of the parent, provides adequate care for that child. Often times, that is just not the case. I represented a 21-year-old developmentally disabled mother who gave birth on April 14, and her baby will be in his third placement next week. There is serious damage done by an under-funded, poorly trained, public child welfare agency. The role of the children's attorney and the role of the parent's attorney, I think, in addition to all the other roles, is holding these people accountable. Ingrid and I both sit on a work group chaired by Hardy Myers that is addressing the issue of representation of DHS case workers. There was quite a push, last session, to basically fund more agency staff. I think the work group that Ingrid and I sit on is basically taking a step back and saying "What would a model system look like that had everyone represented – the state, the child, the parent?"
- 278 Chair Ellis Normally, my vice-chair, Shaun McCrea, kicks me about now. We have been going two hours, so why don't we take about a ten minute recess.
- [Break at 11:10 to 11:16 a.m.]
- 304 Chair Ellis Let me just say to the Commissioners that I need ten minutes notice if anybody is going to have to leave early so that we can get a couple of votes.

- 307 M. Greenfield Define “early.”
- 307 Chair Ellis 1:00 p.m. is what the agenda says. I want to welcome Senate Majority Leader Brown, who is here.
- 311 Senator Brown Thank you.
- 311 Chair Ellis By way of background, this Commission is the result of a two-year study commission of which Senator Brown was a member, and we appreciated her work. Do you have some thoughts you want to share with us?
- 315 Senator Brown I just have some really brief comments. I believe I know all of you although, Mr. Brown, I don’t believe you and I have met. I am Kate Brown and I represent a little bit of northeast Portland, a lot of southeast Portland and the City of Milwaukie. I have served in the legislature since 1991 and I am one of the old ladies in the legislature at this point. I am also a lawyer by training. I have practiced family law, done a bit of juvenile law and a bit of probation violation hearings in the early 90s, before the legislature took that practice away. I practiced juvenile law during the 90s until about 1998. I left, frankly because my legislative duties were getting to be overwhelming, but also because the caseload was higher. I remember I had over a 100 cases and I was practicing 20 hours a week. It just didn’t feel like I could do a good enough job. I don’t think, frankly, those caseloads are that uncommon today. I chose to come back to practice during this year and spoke to Juvenile Rights Project. They agreed to take me on for a year, half-time. My reason for doing that was that I know that the juvenile justice system is really struggling and I was hoping to find the silver bullet to fix the system. I am frankly overwhelmed by the enormity of the issues in the system at this point in time. I am really struggling about where do you start to fix the system. Two things that I would share with you – and I am representing mostly children. I represented parents the last time I was in juvenile court in 1998. Most of my caseload now is children. I have about 55 cases right now. The two things that have struck me in terms of my colleagues out here is the number and size of the caseloads that they have. It is just incredible. The other issue is the level of damage that we are seeing in children. I have a number of cases where they have 12, 13 and 14 reports on the family before the juvenile justice system gets involved and a petition is filed. By the time we see these children, they are very severely damaged. So firms like Juvenile Rights Project, with the School Works program on the side, really help to repair these kids. The last thing I would say is I am really in awe of my lawyer colleagues who handle these cases. They don’t do it for the money. They do it because of the ability to put families or try and put families back together again. The judges also have these enormous caseloads. I know they bring these huge piles of file home every night, and they know their cases very well. I am very concerned about the DHS caseworkers as well. Both the qualifications and the number of cases the caseworkers have are just incredible. That is all the comments I have. I am happy to answer your questions. I am no means the expert that Professor Harris and Angela Sherbo are.
- 370 Chair Ellis I have a general question of all of you out there. Do you have any suggestions about how we could do our job better, or how PDSC could handle its contract relationship with providers better?
- 374 L. Partridge I have a couple of thoughts that, if I had a magic wand, I would like to see. The first is a more coordinated process for how we deal with appeals from juvenile court. It is a different process when you have a criminal case and how you effectuate that from the circuit court than in a juvenile case.
- 381 Chair Ellis Is your question how appeals are staffed? Whether it should be by the Legal Services Division?

- 384 L. Partridge I think the level of professionalism and quality of the lawyers who handle criminal appeals is very good in Oregon. I am concerned that, in juvenile issues, it is kind of an individual system and the quality varies greatly in those appeals. There are some people who do very excellent work and some who don't.
- 391 Chair Ellis Help me out because, on the criminal side, almost everything gets appealed since there is no downside. On the juvenile side, what percentage of the cases end up with some sort of appeal and who makes the decision about that?
- 395 L. Partridge I couldn't give you a percentage. But, for instance, if you have a termination of parental rights trial and I am representing a parent and the trial court judge agrees to terminate the parental rights, almost certainly that parent is going to file an appeal. What is going to happen actually is, as the trial court attorney, I have got to file the notice of appeal with the Court of Appeals. And I am going to file a motion with my trial court to appoint somebody to handle the appeal. I am not going to do the appeal myself. It is kind of the luck of the draw about who gets that case, so the quality of work that happens by chance.
- 405 Chair Ellis It is the juvenile court judge that appoints the appellate lawyer?
- 409 L. Partridge Correct. They have a list. I don't know how it works everywhere. It may be different other places but, in Marion County, they have a list of folks. I don't know how that list is generated or where it comes from, but there is a list of people who will do appeals. Peter or Ingrid may understand it much better than I do. I just wanted to say that is one of my perceptions I have. The other issue I would like to see, if I had a magic wand, would be some type of clearinghouse where, if I had a question there was some kind of process to address technical issues, I could call in and have some consultation with someone who was more knowledgeable. I don't know if that is as big an issue. For instance, if you practice at the Juvenile Rights Project, you can probably walk down the hall and talk to Angela. But if I was out in some place where it –
- 423 Chair Ellis Hood River.
- 423 L. Partridge Well, Jack does a good job, so that is probably not a good example either. But it would be good to be able to call in and say, "Well, I have this issue about what we call the Interstate Compact Agreement where I have got to figure out how to get this kid into some foster care here – you know, six miles across the river to Vancouver." That is a very complicated process. The problem is, when you are triaging cases – and that is basically what we are doing – we need the type of knowledge and skill that a more surgical qualification demands, so you could call into Salem or some resource and say, "How does this work?" or with an immigration issue, for instance. I know that is a hot topic, politically, but immigration issues permeate a lot of our work.
- 438 Chair Ellis In Marion County, I am sure it does.
- 438 L. Partridge If I have a kid that is in foster care and the parent has a criminal charge and faces deportation, are they really going to get deported or are they not? It makes a huge difference in your case planning on what you are trying to do with that child. If you had advice that was telling you, "Hey, that parent is going to wind up being deported to Mexico," you could do a permanent plan under those circumstances. It would be a lot different if the parent is probably going to get released. Then we are going to try and work to reunite them.
- 447 Chair Ellis Let's take your first topic first. Is this an area where there would be an advantage to having the group that provides the trial services stay with the case on appeal or not?
- 453 A. Sherbo I think we are in a unique situation because we actually do have a contract to do appeals. There are some obvious situations where you can't handle the appeal. I just filed an appeal

the other day and we asked to have our office appointed. I know that the public defenders are satisfied because they are able to quickly get appellate services.

- 471 Chair Ellis Let me ask this question. I have talked a lot about the range of conflicts that exist. I assume that probably makes it potentially difficult to have an LSD lawyer – the full-time lawyers that we have to do appellate work – as the predominant appellate provider for juvenile cases because we would still have those conflicts.
- 479 L. Partridge Absolutely, that is right.
- 480 Chair Ellis Aren't we almost driven, on the appellate side, to do this on a contract basis, rather than on an LSD basis?
- 483 A. Sherbo I don't know enough about it.
- 487 Chair Ellis What is your view as to the way appeals have been staffed to this point? Are you comfortable with it, or do you think that it is an area that could be done better?
- 491 A. Sherbo We did them internally, and I thought that was a good thing for office. It teaches you how to preserve error and it enabled us to identify issues. It was very helpful. None of the trial lawyers do it now. We have a woman on staff who is a fantastic lawyer, and she does them. I will say that I just recently read an appellate case in which the Court of Appeals, with respect to mother's counsel's filing of a *Balfour* in the appeal of a dependency case for which the court appointed a health care representative. It has a number of fascinating issues of law in it, and it was inconceivable to me that someone could have been handed that transcript and appellate file and said there was nothing to appeal. So that has sort of piqued my interest in the appellate process and how appeals of juvenile court cases are being handled. But I haven't really thought much more about it.
- 523 Chair Ellis Any other thoughts on the appellate process?
- 525 L. Harris I think the idea of having trial lawyers do their own appeals would probably not work.
- 528 Chair Ellis It might not be for particular trial lawyers. I know in private civil practice, a lot of us who do trial work like to stay through the appeals.
- 535 L. Harris There is contact between the appellate lawyer and the trial lawyer at some level. We can talk to each other, so it is not like there is no contact at all. I would guess the way it is organized, for example, in a place where you have a consortium –
- 540 Chair Ellis That is probably not a good model.
- 543 L. Harris I don't know that the various public defender offices around the country want to hire appellate lawyers to do their juvenile cases.
- 546 S. Gorham Even though you will have a lot of conflicts, having an appellate office that does them certainly wouldn't hurt -- kind of like LSD doing one of the appellate cases and then the other gets conflicted out.
- 558 Chair Ellis We, rightly or wrongly, feel that it is a very uphill battle for us to gain additional FTE positions, which is the model that we use to handle criminal appeals. There is a view within the Commission to have – but it hasn't decided yet – that PCRs do lend themselves to having FTE. We are probably reaching a point of a trade between expanding juvenile appellate FTE versus PCR FTE.

572 L. Harris I suspect, for quality purposes, you would better off having a dedicated office. DOJ certainly does it. They don't have random people doing their juvenile court appeals. They have lawyers who are specialized.

577 Chair Ellis I can certainly see getting a specialty contractor or two, where you have the benefit of specialization, but without the conflict problem. Let me ask the two providers a question, which I alluded to earlier and we haven't gotten back to. Given the nature of what is a case, are we contracting with you in the most rational way? Are there comments on how to do this more fairly? And from our point of view, fairness is a two-way street.

590 L. Partridge I have no idea how to answer that question.

592 A. Sherbo I was hoping he would answer it and talk about it for a very long time. I think with me you probably have the wrong person.

600 L. Partridge Are you talking in the context of a case counting system over a contracting method?

601 Chair Ellis Yes.

601 L. Partridge I have experience under both. The MCAD contract, as you know, is an hourly based system and the juvenile advocacy consortium is a case-count system. For me, what the biggest difference is, and I always come back to this, administratively, the cost to me is much less in a case-cost system than an hourly system. The amount of time that it takes to prepare hourly bills and do hourly statements is much more than it is with a case-count system. The other thing, in a case-count system, what I have found to be advantageous is what the state does. They project a caseload for a certain amount of money based on a certain case mix and then, every month, write a check. That makes it much easier to run your office because you have a much more steady case flow; whereas, if you are billing hourly, it might be that, if I am tied up in a trial and I am just a small one-person office, I may not have a period of time to get that together. So the cash flow goes up and down, and it makes it harder to run your office. I am a big proponent of the case-count system versus the hourly system. I know there is some perception that in a case-count system you are somehow selling your client out, and I think that is ridiculous.

[Tape 2; Side B]

049 Chair Ellis Any other comments on how our contracting is going?

051 J. Connors My sense is the Multnomah contractors would say that it's better and fairer to count cases instead of hours. It's also important to decide which work needs to be covered and pay for it. For example, CRB's, school hearings, judicial settlement conferences, case planning meetings all seem to be important events and perhaps necessary appearances in the history of these types of cases. The Commission should consider increasing the cost of these cases to reflect the increased complexity and number of appearances in these cases.

057 Chair Ellis We did hear in one of the smaller communities that there were complaints by the CRB that the lawyers weren't coming to its hearings.

061 G. Hazarabedian I would add that, several years ago, I practiced juvenile law. I make sure our office sends bodies to CRB hearings. A whole lot of stuff gets brought up and talked about there.

082 Chair Ellis Do any of you have any benchmarks or gauges to give us an indication of how Oregon compares with other states, both in terms of how we are going about the provision of lawyers in dependency cases and the quality of services those lawyers provide – whether our state is approaching it differently, better or not as well?

- 090 L. Harris I could find those things out but, what I know is sufficiently vague not to answer at this point. I can tell you that this is a pervasive issue – the issue of how you provide the lawyers, whether they are appointed to children and the quality issue. Oregon is certainly not alone in struggling with this issue.
- 096 Chair Ellis I assume that.
- 096 Judge Welch My sense is that there is a huge variation of practice within Oregon. At a recent meeting, a judge from another county stated that he did not appoint lawyers for children . . . period.
- 103 Chair Ellis I think I know what you are saying is true.
- 104 Judge Welch In El Paso, they did not begin appointing counsel for parents in termination of parental rights cases until three or four years ago. Our process would be a lot more efficient if we didn't have to deal with attorneys. We could get through a termination trial a lot faster.
- Another issue relates to the appointment of separate counsel for parents where they are in the same household and are seemingly acting together. We have come to the point where separate counsel is appointed for each parent based upon counsel's advice to the court as well as the issues that tend to arise over the life of a dependency case. I know that the practice around the state and elsewhere is variable on this issue as well.
- 118 A. Sherbo I have never handled a case where I thought two parents could be handled by the same attorney.
- 121 I. Swenson I had such a case. It was a case where both parents insisted that they would not accept representation unless they had the same lawyers. But it doesn't work well.
- 129 Senator Brown Mr. Chair, I think in circumstances like this, we end up paying double in the end, when there isn't proper representation up-front. I know there was a case out of Coos County that one of my colleagues, Representative Krieger, and a special committee examined. They were very, very concerned about the inadequacy of counsel in that case. And Rep. Krieger is very concerned about our state paying the basic costs of representation up-front, and that the costs go up two or three times more by the time cases reach the Court of Appeals level because we failed to pay a nickel up-front. I know that the legislature is very concerned about this issue.
- 138 Chair Ellis Other questions for our panel?
- 139 M. Greenfield Without putting anybody on the spot, I would just offer an opinion that people could argue that the CRBs were created to solve the problems of DHS inefficiencies and some implications that the courts weren't paying attention. My view currently would be that, among all of the rats' nests and the confusion in the workload, that the CRBs would be a wonderful place to look to see if that is really something that is adding value commensurate with what it is costing us under the current system. I just would ask anybody's opinion.
- 148 Senator Brown Mr. Chair, I am happy to give my opinion. In Multnomah County, the CRB system is irrelevant. I don't know whether that is true in other counties, but in Multnomah County it is.
- 150 L. Partridge I think we attend CRB hearings more in Marion County than it sounds like in Multnomah County. We have not been able to cover them like we would like to because of the caseloads. By and large, a lot of those CRB hearings are not a valuable process, and I would agree that a lot of FTM and DTM hearings would be a much more valuable use of our attorneys' time. The problem is making a judgment call as to which ones are going to make a difference and which ones aren't. A lot of times, I find that the CRB coordinators, at least in Marion County, are pretty knowledgeable about DHS rules and regulations. They are going through and reviewing whether DHS is in compliance with what they are supposed to do. Frankly, I have

gone to a lot of CRB hearings where there were issues that I didn't even know were issues. The expectation is that attorneys show up for every CRB hearing, but even the CRB coordinators I think would agree that this is not appropriate.

166 L. Harris

One thing that I learned from the Multnomah County review is that there are a lot of variations, even within that one county. So I am sure, across the state, the extent to which the offices have a well-educated legal assistant, and I understand that that is partly philosophical within the offices whether they are going to put their money into that, they do solve this issue partly by sending legal assistants to participate in these hearings. I don't know whether it is appropriate for the Commission to do more structuring of that decision-making than you do, but it is something that you might ask about and you might think about.

179 A. Sherbo

If the requirement of a review is federal, the choice about whether it is an administrative body or not should be considered in light of the reality that there would still be periodic reviews before some kind of fact-finder. Those are occasions when attorneys ought to be present and prepared for them. The FTMs or the DTMs are things that have increased over time and added to our workload substantially, particularly in this county with the addition of the branch in Gresham. It is a long haul out to that branch. I think our office has kept track of the number of those events that we have added. There is a question of whether we ought to be compensated for adding that event, or whether the compensation that we get for handling a case up to the point is sufficient. I might decide that I am going to write some sort of memorandum. I am not billing you for that time. That is work that I am obligated to conduct between the two events. I think it is a wise thing for us to have these events. The bigger question is what is adequate compensation for the work that we do between court appearances that is necessary for you to properly represent your client.

213 Chair Ellis

Any other questions or comments? I want to thank all of you. We appreciate it very much.

Appendix B

*** PART I: BACKGROUND ***

SECTION 1: MISSION AND HISTORY OF THE JUVENILE COURT

The goal of Oregon's Juvenile Court in the dependency arena is to protect children, preserving families whenever possible.

Oregon Courts insure that children "in the system" are safe, that appropriate measures are taken to address and promote their health and well-being, and that they get out as timely as possible into safe and permanent homes.

HISTORY OF THE JUVENILE COURT: THE EARLY HISTORY OF CHILD WELFARE LAWS IN AMERICA

American child welfare policy has "been marked by a tension between two missions: an emphasis on rescuing children from abusive or neglectful families on the one hand, and efforts to support and preserve their families on the other" (Schene 24). From colonial times until the turn of the twentieth century, child protection efforts focused on the poorest citizens and immigrants and removed their children to orphanages or indentured servitude with no concern for the children's return.

In the 20th century, child advocates shifted their focus, discovering that "the best place for normal children was in their own homes" (Bremmer). In 1909, the White House Conference on Children concluded that the "[c]hildren of parents of worthy character, suffering from temporary misfortune, and children of reasonably efficient and deserving mothers who are without the support of the normal breadwinner, should as a rule be kept with their parents, such aid being given as may be necessary to maintain suitable homes for the rearing of the children. Except in unusual circumstances, the home should not be broken up for reasons of poverty, but only for considerations of inefficiency or immorality" (Roosevelt).

In response to this changed thinking, states enacted mothers' aid laws. Ultimately, Congress created the federal Aid to Families with Dependent Children program through Titles IV and V (ultimately IV-B) of the Social Security Act of 1935 (Jones). Government support for families led to a decline in the number of children in foster care (Kadushin).

CHILD WELFARE LAWS FROM 1970 TO THE PRESENT DAY

By the late 1970s, between 500,000 and 750,000 children were in publicly funded foster care at any one time. Numerous state and national studies conducted during the 1970s documented the many problems facing children who were at risk of placement or already in out-of-home care (Fanshel & Shinn and Shyne & Schroeder). Legal experts analyzed the problems in the legal system that contributed to this situation (Goldstein et al., Mnookin, Wald, tenBroek).

These studies revealed that many children spent their formative years drifting from one foster home to another without ever establishing bonds with either their biological or foster families. The state made little or no effort to reunite these children with their families or provide them with permanent and stable substitute homes.

This research formed the basis for much litigation on behalf of foster children. In 1977, the U.S. Supreme Court relied heavily on the literature when it noted:

[C]hildren often stay in "temporary" foster care for much longer than contemplated by the theory of the system...indeed, many children apparently remain in this "limbo" indefinitely.... It is not surprising then that many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents.

Yet such ties do not seem to be regarded as obstacles to transfer of the child from one foster placement to another. The record in this case indicated that nearly 60% of children in foster care in New York City have experienced more than one placement, and about 28% have experienced three or more. The intended stability of the foster home management is further damaged by the rapid turnover among social work professional who supervise the foster-care arrangements on behalf of the State. Moreover, even when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable home life through final termination of parental ties and adoption into a new permanent family.

Smith v. Organization of Foster Families, 431 U.S. 816, 833-38, 97 S. Ct. 2094, 53 L. Ed.2d 14 (1977)

By the late 1970s, the stage was set for wholesale reform of the country's child welfare system.

FEDERAL RESPONSE

Against this backdrop, Congress amended Title IV-B and IV-E of the Social Security Act in 1980. Commonly known as P.L. 96-272, the Adoption Assistance and Child Welfare Act of 1980 was designed to reduce unnecessary use of foster care. To receive federal foster care funds, each state had to provide a system of case planning, case review and services to prevent unnecessary removal of children from their homes and promote reunification. The Act also provided subsidies to promote expeditious permanent placements for children who cannot safely reunite with their families.

During the same period, removal of Native American children from their families of origin was particularly high. In 1974, approximately 25 to 35% of all Native American children lived in adoptive or foster homes (U. S. House of Representatives 7531). Eighty-five percent of those children were in non-Native American homes.

In response, Congress passed the Indian Child Welfare Act (ICWA), 25 United States Code (USC) 1901, et seq, in 1978. ICWA did three things:

- imposed federal procedural protections on child custody proceedings in state courts,
- set high standards for removal of a Native American child from the child's family of origin, and
- required that state agencies actively work to prevent the removal of Native American children from their homes or provide reunification services to families when the state did remove children.

Both P.L. 96-272 and ICWA assigned oversight responsibilities to state juvenile courts. Under both laws, the juvenile court is responsible for ensuring that state child welfare agencies make efforts to provide services to help reunify the family. Under ICWA, the court ensures that the state identifies Native American children and that Native American tribes have notice and an opportunity to participate in proceedings involving children who are members of a tribe or are eligible for tribal membership.

THE ADOPTION AND SAFE FAMILIES ACT (ASFA)

In 1997, Congress passed The Adoption and Safe Families Act (Public Law 105-89); ASFA made the most significant changes to federal child welfare law since 1980 by addressing three primary concerns:

- Children continued to remain too long in foster care.
- The child welfare system favored family preservation and reunification over children's health and safety.
- States were not devoting enough effort to adoption as a permanent placement option for abused and neglected children

ASFA clarified that all removal and reasonable efforts decisions were based on a child's health and safety. The timelines for providing reunification services were shortened in an effort to place children in permanent homes sooner. ASFA also encouraged states to expedite permanency decisions through concurrent planning and other innovative approaches. Finally, ASFA established performance standards that create financial penalties for child welfare systems that fail to show improvement in child welfare outcomes.

SECTION 7: INITIATING A JUVENILE COURT DEPENDENCY PROCEEDING

FILING A PETITION

Any person in Oregon with personal knowledge about an abused or neglected child may file a petition in juvenile court (ORS 419B.809(1),(3)). Department of Human Services (DHS) child welfare caseworkers and juvenile department staff may file petitions based on information and belief (ORS 419B.809(3)). Typically, DHS assesses the safety needs of children before a petition is filed. Depending on the county, either DHS or the juvenile department is responsible for drafting and filing the petition itself. Respondents to the statewide survey for the reassessment report that in at least half of Oregon counties, the responsibility for drafting and filing petitions now rests with DHS.

INITIAL SERVICE OF SUMMONS

Adequate notice is not only constitutionally required but key to ensuring participant presence in court. Non-custodial parents cannot come forward to participate in reunification services if they are unaware of court involvement. Additionally, notifying absent parents gives them the opportunity to come forward to be reunited with their children or pay support. Because of this, notice should be provided at the earliest possible stage of the dependency proceeding to all parties, including custodial and noncustodial parents, putative fathers and others with legal custody.

In Oregon, the party filing the petition must serve summons on the parents, including putative fathers in some instances, and on children age 12 and over (ORS 419B.839(1)). Statutory revisions to conform with ASFA reduced the amount of time available for service from sixty to thirty days after the petition is filed (ORS 419B.812(3)). The juvenile code now specifies that the summons include information regarding the jurisdictional allegations, availability of legal assistance, and the consequences of failure to appear at court hearings (ORS 419B.815(4)). A specific form for a summons is set out in statute as well (ORS 419B.818). When the petition involves a child covered by the Indian Child Welfare Act, DHS must notify the tribe of the proceeding (ORS 419B.878). The court may order parents to participate in services only if they have been properly summoned (ORS 419B.385 and ORS 419B.387). Throughout the state, summons are most commonly issued and served by the county juvenile departments.

THE COURTS SHOULD ENSURE ADEQUATE NOTICE BY:

- Requiring quick and diligent notification efforts by the social service agency;
- Requiring both oral and written notification in language understandable to each party and witness;
- Requiring notice to include reason for removal, purpose of hearing, availability of legal assistance; and
- Requiring caseworkers to encourage attendance of parents and other parties.

Resource Guidelines, p.36

SECTION 8: SHELTER HEARINGS

CURRENT OREGON LAW AND PRACTICES

When the state removes a child from home on an emergency basis, the juvenile court must hold a hearing within 24 hours of removal, excluding Saturdays, Sundays, and judicial holidays (ORS 419B.183). The person removing the child must make efforts to notify parents of shelter hearings (ORS 419B.171). Parents may be notified by the juvenile department, DHS, or law enforcement. Different Oregon communities refer to these hearings as preliminary hearings, shelter-care hearings, and 24-hour hearings. This report calls them shelter hearings.

At shelter hearings, the court must decide whether the child can be safely maintained in or returned to the home pending the disposition of the petition. The outcome of a case where a child remains at home with services to the family is predictably different from the outcome where the child is placed in foster care and visits with the family weekly for an hour. The court and participants in the shelter hearing must analyze the facts surrounding the initial removal and consider what steps might be taken to ensure the child's safety in the home.

Because shelter decisions have profound effects on the lives of the people before the court and substantial influence on the course of the case, the judicial officer must insist on a thorough presentation of all relevant information. National standards support this careful approach.

At the shelter hearing the court must give parents the "opportunity to present evidence to the court...that the child...can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process prior to adjudication" (ORS 419B.185(1)). Both state and federal law require the court to make written findings at the shelter hearing regarding:

- DHS's reasonable or active efforts to prevent removal;
- Future services the agency should provide to promote reunification;
- Where removal is ordered, that removal or continuation in care is in the child's best interest;
- Whether the child is a member or eligible for membership in a Native American Tribe; and consequently covered by the Indian Child Welfare Act (ORS 419B.185).

When making a reasonable efforts finding, judges must specify the services DHS provided to prevent removal of the child (ORS 419B.185(1)(a)). DHS must assist the court by submitting a written affidavit outlining services provided in support of a reasonable efforts finding (ORS 419B.185(2)). Since 1997, state law has also required DHS to give priority to relatives as placement resources and report to the court on the efforts made to place children with family (ORS 419B.192(1)).

Shelter hearings are the court's first opportunity to make inquiry and orders on issues that will recur throughout the life of a juvenile court case. The court should inquire about paternity, absent parents and efforts to locate them, appointment of counsel and CASA for parents and children, ICWA applicability, and

preliminary services available for families. The court may also set next court dates and direct staff or DHS to serve parents with summons for further proceedings (*Resource Guidelines* 37-39).

SECTION 9: JURISDICTIONAL AND DISPOSITIONAL HEARINGS

The jurisdictional hearing is critical to ensuring due process and important in resolving dependency cases. Families who have an adversarial relationship with DHS or disagree with the basis for jurisdiction may need the court to make a judicial determination of jurisdictional facts before they will engage in services. Where a family opposes particular services, the jurisdictional hearing is key to determining which services are appropriate for the family.

Parties to the petition must admit or deny allegations pertaining to them within 30 days of the petition's filing (ORS 419B.305(2)) and should exchange discovery within 30 days after the petition is filed (ORS 419B.881). The court must schedule a contested hearing and notify parties of the date and time either orally or in a written order (ORS 419B.816(1)). The order must include an admonition that the court will proceed, regardless of whether the party appears at the next hearing (ORS 419B.816(3)). The court must hold a jurisdictional hearing within 60 days of filing a petition (ORS 419B.305(1)). Continuances are granted only by a written order establishing that good cause to extend beyond 60 days exists (Id.). The case must be given the highest scheduling priority if a continuance is granted (ORS 419B.305(4)).

Between the shelter and jurisdictional hearings is generally when DHS caseworkers develop initial service agreements. Attorneys meet with clients, receive discovery and conduct their own investigation. In many cases, DHS also holds a "Family Decision Meeting," a facilitated meeting designed to engage families and other people important to the child in the case planning process, advise parents of ASFA timelines, and explain the consequence of noncompliance with services (ORS 417.365; OAR 413-040-0031).

ORS 419B.310(1) provides that "the court without a jury" decides jurisdictional issues. Unlike the preliminary hearings and subsequent review hearings, the rules of evidence apply to jurisdictional hearings, and jurisdictional allegations must be proven by a preponderance of the evidence, except for Native American children who are tribal members or eligible for membership, in which case ICWA requires the evidence be clear and convincing (ORS 419B.310(3); 25 USC 1912(e)).

The court must hold a dispositional hearing within 28 days of the jurisdictional hearing, unless there is good cause to extend the time, and enter "an appropriate order directing the disposition of the case" (ORS 419B.325(1); Uniform Trial Court Rules (UTCRC) 11.050). Most often, dispositional hearings immediately follow the jurisdictional hearing.

If the court finds that the allegations of the petition have not been proven by a preponderance of the evidence, the appropriate disposition is dismissal. If the court finds the child within its jurisdiction, the court has options for disposition (ORS 419B.331). It may allow the parents to retain legal custody with particular conditions of protective supervision, appoint a guardian if a party or intervener so petitions (ORS 419B.366), or as in the vast majority of the cases, temporarily commit the child to DHS for care and placement (ORS 419B.337(1)).

The dispositional phase of a dependency proceeding is a critical step in ensuring permanency for the child. The court's dispositional order sets the expectations for the parents' progress and DHS's provision of services for the case. Oregon law grants juvenile court judges the authority to specify the particular type of

care, supervision or services to be provided by DHS to children placed in the DHS custody and to the children's parents or guardians. (ORS 419B.337(2)).

Before dispositional hearings, the judge considers written dispositional reports from DHS, CASA, and other parties. DHS must distribute its written reports on its investigation to all participants at least seven days prior to the dispositional hearing (UTCR 11.060(1)). Other parties are required to distribute any reports or witness statements within three days of the dispositional hearing (ORS 419B.881(2)(a)(B)). National standards support early distribution of proposed dispositional plans so all parties can fully participate in the hearings (*Resource Guidelines* 56).

The DHS report contains the Agency's case plan for providing services to the family. The case plan must

- have a rational relationship to the jurisdictional allegations,
- incorporate the perspective of the family,
- be integrated with other service agencies, and
- include a concurrent plan that the agency intends to implement if the parent is unable to make sufficient progress for the child to return home (ORS 419B.343(1),(2)).

If the current plan is something other than return to parent, the case plan should specify the current permanent plan (ORS 419B.343(2)). The case plans of all children age 16 and older must include independent living services; the Agency should include independent living services in the case plans of children ages 14 and 15 if appropriate (ORS 419B.343(3)).

At the dispositional hearing, the court must review the Agency's case plan to ensure that it is adequate to meet the child's needs (ORS 419B.343(1)). The court reassesses reasonable or active efforts and, as at the shelter hearing, must briefly describe the services DHS provided to justify the findings (ORS 419B.340(2)). If necessary, the court must make a new finding that removal from the home (or continuation in care) is in the child's best interest (ORS 419B.340(1)).

ASFA added new responsibilities for the court at disposition. Now, Oregon and federal law require that the court review the DHS case plan and make reasonable or active (in cases subject to the ICWA) efforts findings regarding the agency's reunification and preventative services (ORS 419B.340(2),(7)). In making the finding, the court must consider the health and safety of the child as the paramount concern (ORS 419B.337(1)(b)). DHS can ask the court to be relieved of making reasonable or active efforts when there is a judicial determination that certain aggravated circumstances exist (ORS 419B.340(5)). Because of the strict timelines for reunification, the order (as well as the record) should document that the court advised the parents of the urgency of complying with the approved case plan.

Jurisdictional hearings end the investigation and fact finding stages of dependency proceedings. This is the last opportunity for parties to debate the state's intervention into family life. Dispositional hearings are generally combined with jurisdictional hearings and are the court's opportunity to provide their expectations to families and DHS. Participation by all parties as well as thorough judicial inquiry are important to successful hearings.

Dispositional orders should be written in easily understandable language so that parents and all parties fully understand the court's order; they should explicitly state:

- the legal disposition of the case, including the custody of the child, based upon the statutory options provided under state law;
- the long-term plan for the child (e.g., maintenance of the child in the home of a parent, reunification with a parent or relative, permanent placement of child with a relative, placement of the child in a permanent adoptive home);
- whether there is a plan for monitoring the implementation of the service plan and assuring the child's continued well-being;
- the evidence or legal basis upon which the order is made when placement or services are ordered that were not agreed upon by the parties;
- the terms of parental visitation;
- parental responsibilities for child support; and
- scheduled date and time of next hearing, if needed.

Resource Guidelines, p. 61

SECTION 10: REVIEWS - COURT AND CRB

CURRENT OREGON LAW AND PRACTICES

Once the court approves the initial disposition for a dependency case, there are a variety of state and federal review mechanisms to ensure agency and party compliance with the case plan. Judicial and citizen oversight of dependency cases allow for re-examination of case planning goals and adjustments that reflect the parents' progress and the child's needs. Periodic, rigorous review is critical, particularly when children are placed out of the home. ASFA timelines heighten the importance of careful monitoring of DHS service delivery, concurrent planning and parent's progress.

Review by the CRB

Except for permanency hearings, reviews under state law shall be conducted by an administrative or citizen "foster care review board." In Oregon, the Citizen Review Board (CRB) fulfills this function in 33 out of 36 counties (ORS 419A.090 et seq.). Local Citizen Review Boards have between three and five citizens "with special knowledge or interest in foster care and child welfare which may include but shall not be limited to adoptive parents and members of the profession of law, medicine, psychology, social work, and education" (ORS 419A.092(1)(a)).

"Review hearings are necessary because continuation of a child in foster care for an extended time has a negative effect on a child and family. A child in foster care forms new relationships which may weaken his or her emotional ties to biological family members. A child shifted among foster homes may lose the ability to form strong emotional bonds with a permanent family. A careful decision concerning the future of every child is needed as soon as possible. Review hearings can help ensure that decisions concerning a child's future are made at regular intervals and implemented expeditiously."

Resource Guidelines, p. 66

When CRB reviews a case, reports otherwise submitted to the court are submitted to the them. Reviews commence six months after a child enters care and every six months thereafter unless a review is conducted by the court (ORS 419A.106(1)(a)). CRBs invite participation from parents, mature children, advocates, CASAs, attorneys, foster parents, involved relatives, service providers, and other interested parties. The court can cancel a CRB review if it conducts a review within 60 days of the scheduled CRB (ORS 419A.106(1)(b)). CRB sends a *Findings and Recommendations* document to the court and DHS for each review conducted. DHS must give CRB written notice they do not intend to implement the recommendations (ORS 419A.120(1)). In 2003, CRB also assumed responsibility for reviewing the status of children in guardianships established by the juvenile court (ORS 419A.109).

CRB findings become part of the juvenile court file (ORS 419A.120(2)). The court, upon review of the CRB findings and recommendations, has the opportunity to make modifications or set a separate court hearing to pursue issues raised at the board review. The court must also inform the CRB in writing if it modifies, alters, or takes action on a recommendation (ORS 419A.120(1)). In some counties, the court formally approves the recommendations and orders that the recommendations be implemented.

Court Review

DHS must file a report with the juvenile court or the CRB six months after a child is placed in substitute care and at least every six months thereafter (ORS 419B.443(1), ORS 419B.446). The report must contain

- a description of the problems that resulted in placement
- a discussion of services for the child and family
- a proposed treatment plan that includes visitation, expectations of the parents and children
- a proposed timetable for achieving the current permanent plan

ORS 419B.443(1)(a-e).

The court must send the report to parents (and tribes if the case is governed by ICWA) and inform them whether the court will set a hearing (ORS 419B.452). The court or any party may request a review hearing so that the court may "order modifications in the care, placement, and supervision of the child" (ORS 419B.449(1)). The court must hold the review within 30 days of the request (ORS 419B.449(1)(b)). If parents' rights have been terminated and the child has not been placed in an adoptive home, the court must hold a hearing upon receipt of DHS' six-month report (ORS 419B.449(1)(a)).

Review hearings should consider DHS' efforts to return children to their parents or to implement the permanent plan if it is other than return to parent (ORS 419B.449(2)). The court order should state why continued foster care is necessary and include the expected time for return or other permanent placement. In addition, the court must review the agency's efforts to implement a concurrent plan, including efforts to identify or select an adoptive home (ORS 419B.449(3)).

It is critical that review hearings involve all parties and interested persons, including foster parents. It is particularly important that service providers for parents and children be available or thoroughly interviewed before review hearings. (*Resource Guidelines 70*).

When the court reviews a case plan, the key issues to be addressed at a review hearing are:

- Whether the agency is making reasonable efforts to rehabilitate the family and eliminate the need for placement of a child.
- Whether services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances.
- Whether the child is in an appropriate placement which adequately meets all physical, emotional and educational needs.
- Whether the terms of visitation need to be modified.
- Whether the terms of child support need to be set or adjusted.
- Whether any additional court orders need to be made to move the case toward successful completion.
- What time frame should be followed to achieve reunification or other permanent plan for each child.

Resource Guidelines, pp. 70-72

SECTION 11: PERMANENCY HEARINGS

CURRENT OREGON LAW AND PRACTICES

Permanency hearings are the most significant change to dependency proceedings related to ASFA. Permanency hearings are post-dispositional hearings to select the permanent plan for children in foster care. Before ASFA, the court and child-welfare agencies had 18 months after removing a child to work with parents before designating the final permanent plan. Now, both state and federal law require permanency hearings 12 months after jurisdiction and no later than 14 months after the child's placement (ORS 419B.470(2)). When the court decides that reunification services are not required, the court must hold the permanency hearing within 30 days (ORS 419B.470(1)).

"The court is responsible to schedule and conduct the permanency hearing for a time and date certain that fall within the statutory maximum time frames."

Adoption Guidelines, p.19

At the permanency hearing, the court makes many of the same findings made at review hearings and CRB reviews. The court makes reasonable efforts findings regarding DHS services; may order modifications of the care, placement, and supervision of the child; and may also order changes to the case plan (ORS 419B.476(2)). The primary purpose of the hearing, however, is to make a permanent plan for the child.

ASFA prioritizes permanency goals for children in foster care in the following order:

- Safe return home to a parent
- Adoption, by a relative or non-relative
- Guardianship
- Another planned permanent living arrangement

When the court approves a permanent placement, the order must explain why it did not choose more preferred plans. When the plan is return to parent and the court has found that DHS has made reasonable efforts to provide reunification services, the court must first ask whether the parents have made sufficient progress for the child to safely return home (ORS 419B.476(2)(a)). If the parents are not prepared to take custody of their child(ren) immediately, the court may order the parents to participate in specific services for a specific period if participation in those services will result in reunification within a reasonable time (ORS 419B.476(4)(c)). If the court concludes that the parents have not made sufficient progress and that more services will not result in returning the child to a parent in a reasonable time, the court must consider alternative permanent plans.

Following ASFA's priorities, adoption is the preferred plan for children who are not able to safely return to their parents' care. If the court approves a guardianship, the order must explain why adoption is not in the child's best interest (ORS 419B.476(5)(e)). The least favored permanent plan is "planned permanent living arrangement." To justify that plan, the court must show a compelling reason why each of the more permanent plans is not in the child's best interests (ORS 419B.476(5)(f)).

Once the court approves a permanent plan, the agency must work quickly to achieve it. The court order from a permanency hearing must be entered within twenty days of the hearing and must include specific timelines for achieving the permanent plan (ORS 419B.476(5)(b)). The court may also monitor DHS's permanent planning efforts by reviewing the efforts made to identify and select an adoptive resource (ORS 419B.476(4)(e)).

SECTION 12: TERMINATION PROCEEDINGS

CURRENT OREGON LAW AND PRACTICES

When parents fail to make sufficient progress to have their children safely returned within a reasonable time, the state or child may move to sever the parent-child relationship so that the child may be adopted (ORS 419B.500). DHS is required to file a petition to terminate parental rights (unless there is a compelling reason not to) when:

- a child has been in care for 15 out of the last 22 months,
- a parent has been convicted of murder or voluntary manslaughter of another child of the parent,
- a parent has been convicted of aiding, abetting, attempting or conspiracy to commit murder or voluntary manslaughter of a child of the parent,
- a parent has been convicted of felony assault that resulted in serious physical injury to a child of the parent, or
- a parent has abandoned the child. (ORS 419B.498(1))

Because termination has enormous consequences, the law requires a new round of procedural protections for parents and children. A petition stating grounds for termination must be served on the parents (ORS 419B.819(1)). Attempts must be made to find parents who were absent at the jurisdictional stage. Indigent parents are appointed counsel (ORS 419B.518). At trial, the state or child must prove the allegations by clear and convincing evidence rather than the "preponderance" standard required in dependency proceedings. If a child is subject to ICWA, the state must prove the allegations beyond a reasonable doubt (ORS 419B.521(1)).

National standards support the use of pretrial conferences "to check delays in the appointment of counsel, ensure early notice to parties and expedite discovery. They can also resolve evidentiary issues prior to trial" (*Resource Guidelines* 93). No such standardized process exists in Oregon but Oregon does encourage mediation in cases involving termination (ORS 419B.517).

The state or child can file to terminate parental rights in cases of extreme conduct without proving reasonable efforts (ORS 419B.502). These provisions parallel, for the most part, the "aggravated circumstances" that release DHS from providing reasonable effort to families at jurisdiction.

Adoption 2002 recommends that, in cases where reasonable efforts are not required at jurisdiction, they should not be required for termination of parental rights in order to avoid leaving children in foster care limbo:

State law should ensure that for those circumstances in which reunification services are not required, there are applicable grounds for the termination of parental rights. While the criteria for not requiring reasonable efforts need not be the same as grounds for termination, they reasoned, the State should take care to avoid situations in which a child will remain in foster care without efforts to reunify his or her family. In this situation, it is not possible to terminate parental rights although adoption is in the child's best interests.

Adoption 2002

Oregon law does not require DHS to make reasonable efforts if excused by a court, either at disposition or termination, when parents kill, attempt to kill, starve, torture or sexually abuse a child (ORS 419B.340(5), ORS 419B.502). Parents with prior involuntary terminations are not entitled to reunification services when they have not ameliorated their condition. In cases where parental abuse or neglect has caused serious physical injury to a child or where a parent has "unlawfully caused the death of another parent," Oregon courts may make a finding that reasonable efforts are not needed at disposition (ORS 419B.340(5)(a)(c), (G)). However, there is no corresponding provision in Oregon's termination statute.

SECTION 13: APPEALS OF JUVENILE ORDERS

CURRENT OREGON LAW AND PRACTICES

The appellate process serves to ensure fairness in the juvenile dependency system. Parties need adequate time to address appealable issues, but it is important that the appellate process does not unduly delay permanency for children. *Adoption 2002* recommends that State law establish specific guidelines to expedite appeals in child welfare cases. These guidelines should include setting a short deadline for notice of appeal; setting short deadlines for preparation of transcripts and records for appeal; setting a special tight briefing schedule; and setting time limits or guidelines for deliberations and issuance of decisions.

The National Council of Juvenile and Family court Judge's Adoption and Permanency Guidelines (Permanency Guidelines) recommend a timeline that resolves termination appeals within 150 days of notice of appeal (p.40). In Oregon, any person whose rights or duties are adversely affected by a juvenile court judgement has a right to appeal (ORS 419A.200(1)). Notice of appeal must be filed within 30 days of entry of the judgement and must be served on all parties who have appeared in the proceeding, the trial court administrator, the transcript coordinator, and the Court of Appeals (ORS 419A.200(3)(c)).

"Judgements" for appeal purpose are:

- any order dismissing or disposing of a petition,
- orders finding a child within the jurisdiction of the court, or
- any order entered after disposition that adversely effects the appellant including orders from permanency hearings (ORS 419A.205(1)).

Children and parents are entitled to court-appointed counsel for the appeal, subject to trial-level limitations (ORS 419.211(2)(b)). The Court of Appeals reviews all juvenile appeals by examining a transcript of the proceedings and any records or evidence admitted at trial and determining whether the trial court made the correct factual finding(s).

*** PART IV ***

SECTION 16: QUALITY OF REPRESENTATION AND ADVOCACY

For courts to fulfill their federal and state obligations, judges must be provided with accurate and complete information. The court system depends on each party's ability to discover and present evidence and to advocate effectively. In most instances, this means that parties to court proceedings should be represented by counsel. Of equal importance is quality of representation.

This section discusses attorneys who appear in juvenile court dependency proceedings. The reassessment team collected data about frequency of appearances by attorneys for parents, children, caseworkers (through the Department of Justice) and "the State" (through local district attorneys). The team observed attorneys in court proceedings in each of the five study counties and interviewed lawyers and other court participants about representation issues. Foster parents and other juvenile court participants responded to survey questions about quality of representation.

Data about Court Appointed Special Advocates is included here. CASAs are parties to juvenile court dependency proceedings, not representatives. However, because their role in juvenile court is to advocate for the best interest of abused and neglected children, they are discussed in this section.

COURT APPOINTED COUNSEL FOR PARENTS AND CHILDREN

ROLES AND RESPONSIBILITIES FOR ATTORNEYS

Indigent families have a right to court appointed counsel. Parents are entitled to be represented by a court-appointed attorney when "the nature of the proceedings and due process so require" (ORS 419B.205(1)). Children are entitled to court appointed counsel whenever a request is made or upon the court's own motion (ORS 419B.195(1)).

The court appoints attorneys for parents and children who are eligible for public defense services. Some attorneys are compensated for court-appointed work on an hourly basis. Others have entered into contracts with the Public Defense Services Commission (PDSC) to provide representation in certain categories of cases at specified rates. Most public defense representation in juvenile dependency proceedings is provided pursuant to contracts. PDSC, established in 2001, took over responsibility for indigent defense from the State Court Administrator in 2003. ORS 151.216(1)(a) charges PDSC to "establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice."

PDSC contracts with attorney providers for services in specific counties. For the most part, attorneys contract to represent parents and children in a set number of hearings (jurisdiction/disposition hearings, reviews, CRBs,

and terminations) throughout the year and are paid a twelfth of their annual contract amount on a monthly basis. Contract attorneys may be sole practitioners or consortia or non-profit public defender corporations depending on the particular county. Each year, PDSC contracts for thousands of appointments for parents and children in juvenile court dependency proceedings.

The performance of court-appointed counsel in dependency cases is governed by a variety of standards. Parents are entitled to “adequate representation” in dependency cases, just as they are in criminal proceedings (*State ex rel Juv. Dept. v. Geist*, 310 Or 176, 796 P2d 1193 (1990)). Court-appointed counsel for parents and children must meet the qualification standards for court-appointed counsel to represent indigent persons at state expense (*Qualification Standards*) that are developed and maintained by the Public Defense Services Commission (PDSC,). These standards were adopted by the State Court Administrator’s Office of the Oregon Judicial Department and implemented by the Indigent Defense Services Division of that department before the transfer of responsibility for trial level public defense services to the PDSC in 2003. These standards address issues such as caseload size, adequate support staff, experience, and familiarity with applicable law. The standards also create procedures for disqualifying attorneys from eligibility for court appointments.

In 1996, the Oregon State Bar adopted the following principles and performance standards (*OSB Principles and Standards*) for representation of parents and children in dependency proceedings: “The General Principles for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases, “General Standards for Representation in All Criminal, Delinquency, Dependency and Civil Commitment Cases” and “Specific Standards for Representation in Juvenile Dependency Cases.” The OSB Principles and Standards address conflict of interest, attorney obligations to child clients, adequate client contact, and standards for investigation and practice at each stage of dependency proceedings (Oregon State Bar Indigent Defense Task Force 29-34). The principles are mandatory; the standards are aspirational. Familiarity (though not compliance) with these standards is required by both the Qualification Standards and the PDSC model contract for public defense providers.

Quality of Representation

The reassessment focused on a fundamental component of representation to assess quality – client contact. Creating and maintaining a relationship with a client is critical to effective representation (OSB Standard 3.5). The OSB Principles and Standards recommend that attorneys meet and conduct an initial interview within 72 hours of appointment and confer with their clients “as often as necessary after the initial interview to ascertain all relevant facts and otherwise necessary information” (OSB Standard 3.5.7). The PDSC model contract requires that a contractor must “arrange for” contact with out-of-custody clients within 72 hours of appointment, including notification of a scheduled interview time or what the client must do to schedule an interview time (PDSC model contract 7.1.4.2). The goal of these standards is to ensure that parents and children have well-informed, active representation at the earliest possible time in dependency proceedings. Survey and interview results suggest that these standards are not being met.

Juvenile court participants in the study counties routinely reported that their juvenile defense bar had a high level of expertise in juvenile legal issues. Participants also consistently reported that some practitioners provided high quality legal services to parents and children alike. However, participants routinely expressed concern about attorneys delaying contact with adult clients until shortly before scheduled court appearances

and rarely contacting child clients.

Reassessment team members observed attorneys in court and CRB reviews who appeared to be meeting their clients for the first time or for the first time since the last court appearance, validating reports from juvenile court participants. Thirty percent of respondents to the statewide survey reported that they believe that attorneys only rarely or occasionally (less than 35% of the time) contact clients before the day of a court appearance.

Attorneys reported several barriers to early contact with clients. Attorneys reported that delay in receiving notice of appointment slowed initial contact with clients. While most counties initiate appointment of counsel for parents and children at shelter hearings, in many counties attorneys are not present at the time of appointment and are not notified of their appointment until after the hearing. Some attorneys reported that notice of appointment may not arrive until two weeks after the shelter hearing. This delays first contact as well as creates confusion if the client was notified of the appointment before the attorney receiving the order. Some court staff reported that some attorneys appeared to wait until the day of a scheduled court appearance to notify the court of a conflict of interest requiring withdrawal from representation.

Lack of discovery was also noted as a factor in delaying initial contact. In most counties, attorneys receive the petition, court dates and discovery presented at the shelter hearing from the court or juvenile department - whichever is responsible for completing appointment of counsel. Attorneys then usually must formally request discovery from DHS. Attorneys expressed a reluctance to schedule first appointments with clients until all discovery was available. Some attorneys also expressed a reluctance to "track clients down" and waited until clients made contact with their offices.

Attorney contact with child clients was also concerning. The OSB Standards (OSB Standard 3.5) and PDSC model contract (7.1.4.2) hold attorneys for children to the same standard for client contact within 72 hours of appointment. The OSB Standards advise that children should be observed or visited in their home environment (OSB Standard 3.5.4).

The reassessment team surveyed foster parents statewide about contact by attorneys for children in their care. About half of those responding indicated that court-appointed counsel rarely (less than 5% of the time) called within one week of appointment and only 9% indicated that counsel usually (more than 75% of the time) made contact within the first week after appointment. Similarly, about half of those responding indicated that court-appointed counsel rarely met the children in the home of the foster parent before they went to court for the first time, while 13% reported that the attorneys usually meet the children in the home prior the first court appearance. 37% of court participants statewide reported that they believed that attorneys for children visited their clients in their homes rarely or occasionally.

"Often we never know who the attorney or CASA workers are until we see them in court. It would be good if there was a way to get information to the judge about the children without having to speak in front of parents. Sometimes these kids tell us things that should be known, and we're never sure if the case workers pass information along."

Foster Parent

CASA programs reported that they frequently act as liaisons between children and their attorneys because there is so little contact from children's lawyers.

There is a debate in some county's juvenile bars about the role of attorney for children. Some contractors question whether client contact is necessary at all to represent children. Others were unaware that client contact was a contractual requirement or that standards existed that required in-home contact with dependent child clients. Attorneys expressed concerns about the work load involved in monitoring children's care by visiting children in their placements.

Given the fairly widespread acknowledgment that some juvenile practitioners do not meet basic standards for client contact, it is worthwhile to consider what quality control mechanisms exist for public defense contractors.

"The only communication I have received is through the case worker. Never an attorney or judge or other advocate. Sometimes I feel left in the dark concerning my granddaughter's case and pending adoption. Not even my caseworker can answer vital questions about this case! 'I'm not sure' is not a good answer. I have had a child in my care for 6 months now. His attorney has never talked to me regarding the child or seen the child outside of court."

Foster Parent

PDSC's Qualification Standard 4.1E outlines the process for suspending an attorney from receiving public defense appointments. The process allows for either a presiding judge or the State Court Administrator²¹ to suspend an attorney when they become aware of "facts that call into question an attorney's ability to provide adequate assistance of counsel."

Juvenile court participants expressed concern about placing much of the responsibility for monitoring attorney performance and seeking suspension with the local courts. In general, juvenile court participants interviewed perceived that giving local courts responsibility for oversight of the quality of representation was inconsistent with their roles as judicial officers. Participants believe that monitoring attorney performance (at least of public defense attorneys) is more appropriately the role of the contracting agent for the state, PDSC. The views of participants notwithstanding and even though the Judicial Department no longer has responsibility for the provision of public defense services, the court remains the appointing authority and has an important role to play in monitoring the quality of representation and reporting concerns about quality to the attorney or contractor and PDSC.

PDSC is aware through reports from the Oregon State Bar and others about concerns regarding the quality of representation being provided in juvenile dependency cases. Through its contract process it continues to seek the highest quality legal services available. In addition, PDSC, in conjunction with JCIP, juvenile practitioners, and other interested groups, is working to create a "Juvenile Training Academy" curriculum that may become mandatory for all juvenile practitioners. In addition, PDSC has started a public review process for each county's public defense providers. It completed its first review, which involved Linn, Lane, Benton

²¹This standard was written when the State Court Administrator was the contracting authority for indigent defense. PDSC has the same authority to suspend contractors for poor performance.

and Lincoln Counties and will perform a review in Multnomah County in the fall of 2004. The review process allows for public comment about quality of representation as well as an opportunity for self-assessment of individual providers. PDSC has also made efforts to evaluate the quality of representation provided by individual public defender offices and consortia. It has completed the evaluation of one large public defender office to date and has scheduled the evaluation of two others before the end of the year. In counties with fewer public defense providers, the PDSC may perform county-wide quality evaluations rather than evaluations of each individual attorney or office. PDSC has also initiated a formal complaint process which will provide an established procedure for handling complaints from judges, other court participants, and the general public regarding both the quality and the cost of public defense services.

Appendix C

Presenter: Kathryn Aylward

Public Defense Services Commission
Meeting Discussion Item
June 15, 2006

Issue

Provision of counsel in juvenile dependency appeals.

Discussion

Chief Judge Brewer has formed a juvenile appeals work group to develop strategies for shortening the timelines and improving the quality of representation in juvenile dependency appeals.

The work group agreed at its meeting on June 1st that it would be beneficial to have counsel appointed and transcript production initiated as soon as possible after a notice of appeal is filed. The procedure that Legal Services Division uses works so efficiently for criminal appeals that it was suggested that a similar procedure could be developed for juvenile appeals.

An online intake form could be designed for trial-level attorneys to complete and thus more quickly discharge their obligation to perfect an appeal. OPDS would then file the notice of appeal and an order appointing counsel who would be selected from an appointment list of private attorneys. A fee statement for the production of the transcript would be emailed directly to the county transcript coordinator.

This approach has several advantages:

- 1) It eliminates the need for trial-level attorneys to prepare the notice of appeal (which is filed in the Court of Appeals) and the order appointing counsel and request for production of transcript (which is filed in the trial court).
- 2) It eliminates the need for the trial-level court to find appellate counsel.
- 3) It reduces the miscommunication that sometimes occurs when an attorney has prepared an order that requests more copies of transcripts than OPDS is authorized to provide.

In order to accomplish this, OPDS would need to hire a paralegal to administer the intake and distribution of cases (there is currently a vacant paralegal position). Some modifications to the online form would need to be made and procedures would need to be established, but this is an improvement OPDS could effectuate in a reasonably short time frame.

The work group also discussed the possibility of shifting a portion of the juvenile appellate work to OPDS employees. We estimate that approximately 75% of the dependency appeals (representing parents) could be handled without conflict by 4 FTE attorneys. The remainder would then be assigned to attorneys on the private bar list. The table below shows the additional cost of using FTEs, offset by the reduction in the amount currently being paid to private bar attorneys.

Net Cost of Adding 4.0 FTE to the Office of Public Defense Services

	Annual Cost	Biennial cost
4.0 FTE Deputy Defender 2 at Step 2 (\$4,669)	\$224,112	\$448,224
OPE at 42%	\$94,127	\$188,254
Total personal services	\$318,239	\$636,478
Services & supplies at 16%	\$50,918	\$101,836
Total cost	\$369,157	\$738,315
Less 75% reduction in non-employee attorney expenditures	\$216,190	\$432,380
Net cost of adding FTEs	\$152,967	\$305,935

This model assumes that the caseload is set at 25 appeals per attorney per year (in accordance with the standard adopted by many states), which would be about 70-80 hours spent on each appeal. Private bar attorneys currently bill an average of 47 hours per appeal. So either private attorneys do not spend enough time on a case (which may account for some of the quality issues) or FTE attorneys could handle more than 25 appeals per year.

There were discussions that doubling the private bar hourly rate would be necessary in order to improve the quality of representation to an acceptable level. The private bar hourly rate of \$40 per hour is approximately \$80,000 per year. OPDS employees, plus services and supplies, would cost \$92,289 per year. Therefore the additional cost of using state employees would range between a 15% increase and a 50% increase, depending on the appropriate number of hours per appeal. Although this approach would only provide improved representation in three-quarters of the cases, it is still a more economical approach than doubling the hourly rate for all dependency appeals.

Because OPDS will have the ability to regulate workload by adjusting the number of appeals that are sent to private bar attorneys, the FTE attorneys will be better able to meet the tight timelines required in dependency appeals. In addition, the supervisory infrastructure and the support of colleagues will improve the quality of representation.

Recommendation

OPDS recommends that PDSC include a policy package in the 2007-09 budget to provide for the addition of 4 FTE attorneys to handle juvenile dependency appeals.

Attachment 3

American Council of Chief Defenders National Juvenile Defender Center

TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS

Preamble¹

A. Goal of These Principles

The Ten Core Principles for Providing Quality Delinquency Representation through Indigent Defense Delivery Systems are developed to provide criteria by which an indigent defense system may fully implement the holding of *In Re: Gault*.² Counsel's paramount responsibilities to children charged with delinquency offenses are to zealously defend them from the charges leveled against them and to protect their due process rights. The Principles also serve to offer greater guidance to the leadership of indigent defense providers as to the role of public defenders, contract attorneys or assigned counsel in delivering zealous, comprehensive and quality legal representation on behalf of children in delinquency proceedings as well as those prosecuted in adult court.³

While the goal of the juvenile court has shifted in the past decade toward a more punitive model of client accountability and public safety, juvenile defender organizations should reaffirm the fundamental purposes of juvenile court: (1) to provide a fair and reliable forum for adjudication; and (2) to provide appropriate support, resources, opportunities and treatment to assure the rehabilitation and development of competencies of children found delinquent. Delinquency cases are complex, and their consequences have significant implications for children and their families. Therefore, it is of paramount importance that children have ready access to highly qualified, well-resourced defense counsel.

Defender organizations should further reject attempts by courts or by state legislatures to criminalize juvenile behavior in order to obtain necessary services for children. Indigent defense counsel should play a strong role in determining this and other juvenile justice related policies.

In 1995, the American Bar Association's Juvenile Justice Center published *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national study that revealed major failings in juvenile defense across the nation. The report spurred the creation of the National Juvenile Defender Center and nine regional defender centers around the country. The National Juvenile Defender Center conducts state and county assessments of juvenile indigent defense systems that focus on access to counsel and measure the quality of representation.⁴

B. The Representation of Children and Adolescents is a Specialty

The Indigent Defense Delivery System must recognize that children and adolescents are at a crucial stage of development and that skilled juvenile delinquency defense advocacy will positively impact the course of clients' lives through holistic and zealous representation.

The Indigent Defense Delivery System must provide training regarding the stages of child and adolescent development and the advances in brain research that confirm that children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults. Expectations, at any stage of the court process, of children accused of crimes must be individually defined according to scientific, evidence-based practice.

The Indigent Defense Delivery System must emphasize that it is the obligation of juvenile defense counsel to maximize each client's participation in his or her own case in order to ensure that the client understands the court process and to facilitate the most informed decision making by the client. The client's minority status does not negate counsel's obligation to appropriately litigate factual and legal issues that require judicial determination and to obtain the necessary trial skills to present these issues in the courtroom.

C. Indigent Defense Delivery Systems Must Pay Particular Attention to the Most Vulnerable and Over-Represented Groups of Children in the Delinquency System

Nationally, children of color are severely over-represented at every stage of the juvenile justice process. Research has demonstrated that involvement in the juvenile court system increases the likelihood that a child will subsequently be convicted and incarcerated as an adult. Defenders must work to increase awareness of issues such as disparities in race and class, and they must zealously advocate for the elimination of the disproportionate representation of minority youth in juvenile courts and detention facilities.

Children with mental health and developmental disabilities are also over-represented in the juvenile justice system. Defenders must recognize mental illness and developmental impairments, legally address these needs and secure appropriate assistance for these clients as an essential component of quality legal representation.

Drug- and alcohol-dependent juveniles and those dually diagnosed with addiction and mental health disorders are more likely to become involved with the juvenile justice system. Defenders must recognize, understand and advocate for appropriate treatment services for these clients.

Research shows that the population of girls in the delinquency system is increasing, and juvenile justice system personnel are now beginning to acknowledge that girls' issues are distinct from boys'. Gender-based interventions and the programmatic needs of girls, who have frequently suffered from abuse and neglect, must be assessed and appropriate gender-based services developed and funded.

In addition, awareness and unique advocacy are needed for the special issues presented by lesbian, gay, bisexual and transgender youth.

The **American Council of Chief Defenders** (ACCD), a section of the National Legal Aid & Defender Association, is dedicated to promoting fair justice systems by advocating sound public policies and ensuring quality legal representation to people who are facing a loss of liberty or accused of a crime who cannot afford an attorney. For more information, see www.nlada.org or call (202) 452-0620.

The **National Juvenile Defender Center** (NJDC) is committed to ensuring excellence in juvenile defense and promoting justice for all children. For more information, see www.njdc.info or call (202) 452-0010.

Ten Principles

1 The Indigent Defense Delivery System Upholds Juveniles' Right to Counsel Throughout the Delinquency Process and Recognizes The Need For Zealous Representation to Protect Children

A. The indigent defense delivery system should ensure that children do not waive appointment of counsel. The indigent defense delivery system should ensure that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.⁵

B. The indigent defense delivery system recognizes that the delinquency process is adversarial and should provide children with continuous legal representation throughout the delinquency process including, but not limited to, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal, expungement and sealing of records.

C. The indigent defense delivery system should include the active participation of the private bar or conflict office whenever a conflict of interest arises for the primary defender service provider.⁶

2 The Indigent Defense Delivery System Recognizes that Legal Representation of Children is a Specialized Area of the Law

A. The indigent defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law and that it is different from, but equally as important as, the legal representation of adults. The indigent defense delivery system further acknowledges the specialized nature of representing juveniles processed as adults in transfer/waiver proceedings.⁷

B. The indigent defense delivery system leadership demonstrates that it respects its juvenile defense team members and that it values the provision of quality, zealous and comprehensive delinquency representation services.

C. The indigent defense delivery system leadership recognizes that delinquency representation is not a training assignment for new attorneys or future adult court advocates, and it encourages experienced attorneys to provide delinquency representation.

3 The Indigent Defense Delivery System Supports Quality Juvenile Delinquency Representation Through Personnel and Resource Parity⁸

A. The indigent defense delivery system encourages juvenile representation specialization without limiting attorney and support staff's access to promotional progression, financial advancement or personnel benefits.

B. The indigent defense delivery system provides a professional work environment and adequate operational resources such as office space, furnishings, technology, confidential client interview areas⁹ and current legal research tools. The system includes juvenile representation resources in budgetary planning to ensure parity in the allocation of equipment and resources.

4 The Indigent Defense Delivery System Utilizes Expert and Ancillary Services to Provide Quality Juvenile Defense Services

A. The indigent defense delivery system supports requests for essential expert services throughout the delinquency process and whenever individual juvenile case representation requires these services for effective and quality representation. These services include, but are not limited to, evaluation by and testimony of mental health professionals, education specialists, forensic evidence examiners, DNA experts, ballistics analysis and accident reconstruction experts.

B. The indigent defense delivery system ensures the provision of all litigation support services necessary for the delivery of quality services, including, but not limited to, interpreters, court reporters, social workers, investigators, paralegals and other support staff.

5 The Indigent Defense Delivery System Supervises Attorneys and Staff and Monitors Work and Caseloads

A. The leadership of the indigent defense delivery system monitors defense counsel's caseload to permit the rendering of quality representation. The workload of indigent defenders, including appointed and other work, should never be so large as to interfere with the rendering of zealous advocacy or continuing client contact nor should it lead to the breach of ethical obligations.¹⁰ The concept of workload may be adjusted by factors such as case complexity and available support services.

B. Whenever it is deemed appropriate, the leadership of the indigent defense delivery system, in consultation with staff, may adjust attorney case assignments and resources to guarantee the continued delivery of quality juvenile defense services.

6 The Indigent Defense Delivery System Supervises and Systematically Reviews Juvenile Defense Team Staff for Quality According to National, State and/or Local Performance Guidelines or Standards

A. The indigent defense delivery system provides supervision and management direction for attorneys and all team members who provide defense representation services to children.¹¹

B. The leadership of the indigent defense delivery system adopts guidelines and clearly defines the organization's vision as well as expectations for the delivery of quality legal representation. These guidelines should be consistent with national, state and/or local performance standards, measures or rules.¹²

C. The indigent defense delivery system provides administrative monitoring, coaching and systematic reviews for all attorneys and staff representing juveniles, whether contract defenders, assigned counsel or employees of defender offices.

7 The Indigent Defense System Provides and Supports Comprehensive, Ongoing Training and Education for All Attorneys and Support Staff Involved in the Representation of Children

A. The indigent defense delivery system supports and encourages juvenile defense team members through internal and external comprehensive training¹³ on topics including, but not limited to, detention advocacy, litigation and trial skills, dispositional planning, post-dispositional practice, educational rights, appellate advocacy and administrative hearing representation.

B. The indigent defense delivery system recognizes juvenile delinquency defense as a specialty that requires continuous training in unique areas of the law.¹⁴ In addition to understanding the juvenile court process and systems, juvenile team members should be competent in juvenile law, the collateral consequences of adjudication and conviction, and other disciplines that uniquely impact juvenile cases, such as, but not limited to:

1. Administrative appeals
2. Child welfare and entitlements
3. Child and adolescent development
4. Communicating and building attorney-client relationships with children and adolescents
5. Community-based treatment resources and programs
6. Competency and capacity
7. Counsel's role in treatment and problem solving courts¹⁵
8. Dependency court/abuse and neglect court process
9. Diversionary programs
10. Drug addiction and substance abuse
11. Ethical issues and considerations
12. Gender-specific programming
13. Immigration
14. Mental health, physical health and treatment

15. Racial, ethnic and cultural understanding
16. Role of parents/guardians
17. Sexual orientation and gender identity awareness
18. Special education
19. Transfer to adult court and waiver hearings
20. Zero tolerance, school suspension and expulsion policies

8 The Indigent Defense Delivery System Has an Obligation to Present Independent Treatment and Disposition Alternatives to the Court

A. Indigent defense delivery system counsel have an obligation to consult with clients and, independent from court or probation staff, to actively seek out and advocate for treatment and placement alternatives that best serve the unique needs and dispositional requests of each child.

B. The leadership and staff of the indigent defense delivery system work in partnership with other juvenile justice agencies and community leaders to minimize custodial detention and the incarceration of children and to support the creation of a continuum of community-based, culturally sensitive and gender-specific treatment alternatives.

C. The indigent defense delivery system provides independent post-conviction monitoring of each child's treatment, placement or program to ensure that rehabilitative needs are met. If clients' expressed needs are not effectively addressed, attorneys are responsible for intervention and advocacy before the appropriate authority.

9 The Indigent Defense Delivery System Advocates for the Educational Needs of Clients

A. The indigent defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition.

B. The indigent defense delivery system advocates, either through direct representation or through collaborations with community-based partners, for the appropriate provision of the individualized educational needs of clients.

C. The leadership and staff of the indigent defense delivery system work with community leaders and relevant agencies to advocate for and support an educational system that recognizes the behavioral manifestations and unique needs of special education students.

D. The leadership and staff of the indigent defense delivery system work with juvenile court personnel, school officials and others to find alternatives to prosecutions based on zero tolerance or school-related incidents.

10 The Indigent Defense Delivery System Must Promote Fairness and Equity For Children

A. The indigent defense delivery system should demonstrate strong support for the right to counsel and due process in delinquency courts to safeguard a juvenile justice system that is fair, non-discriminatory and rehabilitative.

B. The leadership of the indigent defense delivery system should advocate for positive change through legal advocacy, legislative improvements and systems reform on behalf of the children whom they serve.

C. The leadership and staff of the indigent defense delivery system are active participants in the community to improve school, mental health and other treatment services and opportunities available to children and families involved in the juvenile justice system.

Notes

¹ These principles were developed over a one-year period through a joint collaboration between the National Juvenile Defender Center and the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association (NLADA), which officially adopted them on December 4, 2004.

² 387 U.S. 1 (1967). According to the IJA/ABA Juvenile Justice Standard Relating to Counsel for Private Parties 3.1 (1996), "the lawyer's principal duty is the representation of the client's legitimate interests" as distinct and different from the best interest standard applied in neglect and abuse cases. The Commentary goes on to state that "counsel's principal responsibility lies in full and conscientious representation" and that "no lesser obligation exists when youthful clients or juvenile court proceedings are involved."

³ For purposes of these Principles, the term "delinquency proceeding" denotes all proceedings in juvenile court as well as any proceeding lodged against an alleged status offender, such as for truancy, running away, incorrigibility, etc.

⁴ Common findings among these assessments include, among other barriers to adequate representation, a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile court culture that encourages pleas to move cases quickly, a lack of pretrial and dispositional advocacy and an over-reliance on probation. For more information, see *Selling Justice Short: Juvenile Indigent Defense in Texas* (2000); *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (2001); *Georgia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2001); *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2002); *An Assessment of Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (2003); *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003).

⁵ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

⁶ A conflict of interest includes both codefendants and intra-family conflicts, among other potential conflicts that may arise. See also *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 2.

⁷ For purposes of this Principle, the term "transfer/waiver proceedings" refers to any proceedings related to prosecuting youth in adult court, including those known in some jurisdictions as certification, bind-over, decline, remand, direct file, or youthful offenders.

⁸ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 8.

⁹ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 4.

¹⁰ See National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), 5.1, 5.3; American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992), 5-5.3; American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993), 4-1.3(e); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts, Chapter 13, "The Defense"* (1973), 13.12; National Legal Aid and Defender Association and American Bar Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985), III-6, III-12; National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989), 4.1.4.1.2; ABA Model Code of Professional Responsibility DR 6-101; *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 5.

¹¹ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principles 6 and 10.

¹² For example, Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards* (1979); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts, Chapter 13, "The Defense"* (1973); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995).

¹³ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 9; National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standards 1 to 9.

¹⁴ National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standard 7.2, footnote 2.

¹⁵ American Council of Chief Defenders, *Ten Tenets of Fair and Effective Problem Solving Courts* (2002).

Attachment 4

Members

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

**Ex-Officio Member**

Chief Justice Paul J. DeMuniz.

Executive Director

Peter A. Ozanne

PUBLIC DEFENSE SERVICES COMMISSION

August 1, 2006

DRAFT

The Honorable Peter Courtney, Co-Chair
The Honorable Karen Minnis, Co-Chair
State Emergency Board
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Dear Co-Chairpersons:

Nature of the Request

The Public Defense Services Commission (PDSC) requests that the Emergency Board accept the attached report and allocate \$7,853,000 from the general purpose Emergency Fund to the 2005-2007 Public Defense Services Account in order to meet constitutionally and statutorily mandated caseloads through the end of the biennium.

Agency Action

During the 2005 Regular Session, the PDSC was allocated \$166,543,539 for "public defense contract services" during the 2005-07 biennium.

The allocation was based on a projected non-capital trial-level caseload of 353,404 cases during the 2005-07 biennium. Although the PDSC is not at present projecting an increase beyond that caseload figure, the overall projected expenditures, including appellate and capital cases, will exceed the original allocation.

The PDSC reported to the Legislative Fiscal Office in May 2006 that projected expenditures would exceed the allocation by approximately \$7.6 million. Current data indicates that the shortfall is over \$7.8 million.

The attached report details the results of PDSC research into the factors contributing to the increase in expenditures and establishes a methodology for more accurate forecasting in the future.

Action Requested

The PDSC respectfully requests that the Emergency Board allocate \$7,853,000 from the general purpose Emergency Fund appropriation to pay the cost of public defense services through June 30, 2007.

PDSC Report to Emergency Board
Page 2
August 1, 2006

Legislation Affected

Allocate \$7,853,000 from the general purpose appropriation to the Emergency Board established in chapter 794, section 1, Oregon Laws 2005 to supplement the General Fund appropriation made to public defense contract services by chapter 552, section 1(2), Oregon Laws 2005.

Thank you for your consideration.

Sincerely,

Peter A. Ozanne, Executive Director
Public Defense Services Commission
Office of Public Defense Services

Attachment

cc/att: Chief Justice Paul J. DeMuniz
Barnes Ellis, Chair, PDSC
Robin LaMonte, Senior Legislative Budget Analyst
Erica Kleiner, Assistant Budget Analyst, Budget and Management

**Public Defense Services Commission
Attachment to Emergency Board Letter
August 1, 2006**

Overview

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

The Account funds all court-appointed representation at the trial level and a portion of the appellate-level representation. The majority of criminal appeals are handled by state employees in the Legal Services Division of the Office of Public Defense Services (OPDS). The Account funds all non-criminal appeals and the criminal appeals which the Division cannot accept either due to ethical conflicts or as a result of limited capacity.

In order to estimate the funds that will be required each biennium, OPDS projects the number of non-death penalty, trial-level cases in which court-appointed representation will be required. This model assumes that the number of death penalty cases and the number of appeals will remain proportional to the trial-level caseload. It also assumes no cost increases beyond any cost-of-living adjustment provided by the Legislature.

OPDS has been able to project caseload with a high degree of accuracy. The projection for the 2003-05 biennium was 343,036 cases; the actual figure was 342,759, a difference of 0.08%. For the 2005-07 biennium, OPDS projected 353,404 non-death penalty, trial-level cases. Current data indicates that the caseload will be within 0.1% of that projection.

Given that the caseload projection appears to be accurate, the Account should theoretically have sufficient funds to cover expenditures. However, based on actual expenditures during the first 12 months of the 2005-07 biennium, projected expenditures will exceed the funds in the Account by \$7.8 million.

OPDS has determined that there are three principal reasons that the caseload model for projecting expenditures has underestimated the funding required: 1) the number of appeals funded from the Account has not remained proportional to trial-level caseload; 2) death penalty cases from previous biennia continue to require funding from the current biennium; and, 3) some categories of costs have increased beyond the 2.4% inflationary adjustment.

Disproportionate Increase in Appeals

Between fiscal years 2001 and 2005, the trial-level caseload increased 3%. The appellate caseload funded from the Account increased by 111% during the same period. In part, this is a result of the fact that the Legal Services Division is limited in its ability to increase its appellate caseload without a corresponding increase in FTEs. Any growth in appellate caseload must therefore be funded from the Account.

But this accounts for only a small part of the increase. The majority of the appellate increase comes from post-conviction relief appeals and juvenile appeals. In fiscal year 2001, there were 189 post-conviction relief appeals; in fiscal year 2005, there were 429; and fiscal year 2006 is projected to have 587. This increase is a direct result of a US Supreme Court decision (*Blakely v. Washington*) issued in June, 2004, which raised serious questions about the lawfulness of Oregon's felony sentencing guidelines system.¹

In fiscal year 2001, there were 105 juvenile appeals; in fiscal year 2005, there were 174; and fiscal year 2006 is projected to have 216. This disproportionate increase is likely due to the Federal Adoption and Safe Families Act which, in addition to setting stricter timelines for resolving juvenile dependency cases, requires that courts hold a permanency hearing to establish a plan for reuniting a family or placement of a child in alternate care. Parents and children may appeal the outcome of permanency hearings.

Death Penalty Expenditures

Although the annual number of new death penalty cases filed has been fairly stable in recent years, the cumulative cost of these cases increasingly impacts each subsequent biennium. After the initial trial-level case, which often spans a year or more, there is an appeal, then post-conviction relief, then an appeal of the post-conviction relief case. So every year, in addition to expending funds for representation on new cases filed, OPDS continues to have expenditures for cases filed in previous years. Death sentence post-conviction relief appeals currently pending are the result of cases originally filed as far back as 1986.

In addition to this cumulative effect not reflected by trial-level caseload budgeting, there have been a number of death penalty cases that have been remanded on appeal for a new trial or sentencing, and cases that required representation at the US Supreme Court during this biennium.

Costs Exceeding the Inflation Rate

1. Attorney hourly rate

Since 1991, OPDS's guideline rate for hourly paid attorneys has been \$40 per hour in non-death penalty cases. Not surprisingly, it has become increasingly difficult to find qualified attorneys willing to take cases at \$40 per hour. OPDS's policies allow exceptions to be made to the guideline rate when either a case is unusually complex or when suitable counsel could not otherwise be found. In counties where there are a limited number of qualified attorneys, OPDS has approved rates in excess of the guideline amount for Measure 11 and murder cases. Without agreeing to an increase in the rate, OPDS would not have been able to provide qualified counsel and these cases could not have been prosecuted.

2. Mileage reimbursement

Effective July 1, 2005, OPDS increased the mileage reimbursement rate from 32.5 cents per mile to 40.5 cents per mile. Although still below the federal reimbursement rate, this 25% increase will impact current biennial costs by over \$250,000.

¹ Justice Antonin Scalia, writing for the majority of the Court, held that certain facts relating to a defendant's sentence must be determined by a jury rather than a judge.

3. Interpreter usage

During the 2003-05 biennium, the average expenditure for interpreter services was \$21,700 per month; expenditures for the 2005-07 biennium are averaging \$40,270 per month. As there has been no increase in the hourly rate for these services, this biennial impact of \$445,680 is solely a reflection of the increase in the proportion of non-English speaking clients.

4. Death penalty attorneys

The guideline rate for death penalty attorneys is \$55 per hour. Generally, attorneys may be able to afford to earn \$55 per hour for a limited portion of their time because the remainder of their billable hours are charged to private clients at \$150 to \$200 per hour. Due to the limited number of death-penalty qualified attorneys and the cumulative effect of ongoing cases, OPDS has asked a number of attorneys to increase their death penalty work to full time under a contract. Contract rates for death penalty attorneys currently range between \$75 per hour and \$92 per hour.

5. Non-attorney providers

The majority of non-attorney costs of representation are for investigation. The guideline hourly rate for investigators in non-death penalty cases is \$25 per hour. Although that rate has not increased in at least the last seventeen years, there are still enough licensed investigators willing to work for \$25 per hour.

However, other providers such as forensic experts and medical experts are in shorter supply. OPDS's guideline rate for forensic services is \$90 per hour. Most forensic experts in Oregon have raised their rates to \$125-\$150 per hour. The guideline rate for medical experts is \$110 per hour. Many medical experts now charge \$150-\$300 per hour. Because the federal defender pays higher rates than OPDS for such services, these providers have a sufficiency of work available to them and do not need to accept public defense work at the state level at reduced rates.

Possible Further Expenditures Due to Changes in Legislation

During the 2006 Special Session, the Legislature passed House Bill 3511 ("Jessica's Law") which increases the mandatory minimum sentence from 100 months to 300 months (the equivalent of a murder sentence) for adult offenders sentenced for certain sex and kidnapping offenses involving a victim under the age of 12.

OPDS submitted a fiscal impact statement indicating that the cost of representation for such cases would likely fall between the cost of murder cases and three times the cost of other Measure 11 cases.

The Public Defense Services Commission heard testimony at its public meetings in May and June 2006 that Jessica's Law cases are much more complex than murder cases due to the fact that these cases often include allegations of multiple incidents or multiple victims; that defendants are more likely to go to trial; that there will be a greater reliance on psychological evidence; and that they are more difficult to settle before trial even when settlement may be the most appropriate option for a defendant under the circumstances of the case. In addition, only the most-experienced attorneys would have the skills and be able to accept cases that carry such a high degree of responsibility.

Although current expenditures have not yet been impacted by HB3511, OPDS will need to seek additional funding when data becomes available as those costs were not provided for in the 2005-07 budget.

Effect of insufficient funding for 2005-07 biennium

Without the funds requested, the Public Defense Services Account will be exhausted by the end of May 2007. OPDS would be unable to pay for either new appointments after that date or for work already performed but not yet billed. All contractual agreements would be suspended.

New cases could not be prosecuted without the constitutionally and statutorily mandated provision of legal representation. Pending cases would have to be set over by the courts or dismissed.

Conclusion

Many of the factors discussed above have been gradually adding pressure to the public defense system for several biennia. Some factors, such as court decisions that have increased the number of appeals, would have been difficult to anticipate. The table below summarizes the impact of these unbudgeted costs.

Category	Estimated Impact
Disproportionate increase in appeals	\$1,108,049
Death penalty expenditures	\$3,308,391
Costs exceeding inflation rate	
1. Attorney hourly rate	\$444,600
2. Mileage reimbursement	\$245,431
3. Interpreter use	\$445,680
4. Death penalty attorneys	\$268,137
5. Non-attorney providers	\$2,032,955
Total	\$7,853,243

OPDS has now developed a more sophisticated budgeting model that is better able to predict future costs. OPDS analyzes a variety of additional indicators such as the growth in the non-English speaking population, the length of time a capital case is pending, the rising costs of medical service providers, and appellate caseload growth.

How the 2007-09 Public Defense Services Commission Budget is Built

		Amount
1.	Start with 2005-07 LAB (General Fund only)	\$175,292,811
2.	Add base budget adjustments: amount needed for state employee salary increases	\$1,022,582
3.	Add Essential Packages	
	010 Vacancy factor (state employees)	(\$47,351)
	020 Phase-in/Phase-out (not applicable to OPDS budget)	\$0
	030 Inflation and Price List Adjustment (rates set by DAS)	\$696,399
	040 Mandated Caseload	\$24,887,196
4.	Total is Essential Budget Level	\$201,851,637
5.	Add Policy Packages	
	100 Juvenile Dependency Appellate FTEs	\$958,926
	101 Employee Compensation	\$350,569
	102 Post-Conviction Relief Trial-level FTEs	\$835,293
	103 Parity*	\$20,000,000
6.	Total is Agency Requested Budget (GF only)	\$223,996,425

* Placeholder figure entered pending outcome of Commission instructions

How the 2007-09 Public Defense Services Account Budget is Built

		Amount
1.	Start with 2005-07 LAB	\$166,543,539
2.	Add base budget adjustments: amount needed for state employee salary increases	\$0
3.	Add Essential Packages	
	010 Vacancy factor (state employees)	\$0
	020 Phase-in/Phase-out (not applicable to OPDS budget)	\$0
	030 Inflation and Price List Adjustment (rates set by DAS)	\$0
	040 Mandated Caseload	\$24,887,196
4.	Total is Essential Budget Level	\$191,430,735
5.	Add Policy Packages	
	103 Parity*	\$20,000,000
6.	Total is Requested Budget	\$211,430,735

* Placeholder figure entered pending outcome of Commission instructions

Policy Package Details

100 Juvenile Dependency Appellate FTEs

This package adds one Senior Deputy Defender and three Deputy Defender 2 positions to handle juvenile dependency appeals. The personnel costs are generated by the payroll system and then 16.8% of that figure is added for services and supplies.

101 Employee Compensation

This package would adjust LSD attorneys salaries to match those of Department of Justice Appellate Division salaries. The figure is generated by the payroll system.

102 Post-Conviction Relief Trial-level FTEs

This package adds one Senior Deputy Defender, one Deputy Defender 2, and two Deputy Defender 1 positions to handle trial-level post-conviction relief cases. The personnel costs are generated by the payroll system and then 16.8% of that figure is added for services and supplies.

103 Parity

This package is comprised of three elements:

1.	Funding to increase full-time public defender salaries to corresponding deputy district attorney salaries in their counties.	\$6,211,003
2.	Funding to provide an increase in the hourly rate paid to attorneys.	TBD
3.	Funding to provide an increase in the hourly rate paid to investigators.	TBD
Approximate Total (placeholder)		\$20,000,000

Salary Comparison
Deputy DAs & Deputy PDs
(2006 Average Salaries)

Public Defender	County(s)	Deputy DA Annual Salary	Deputy PD Annual Salary	Difference	PD FTEs	Total
Public Defender Servs. of Lane Co.	Lane	\$77,535	\$69,580	\$7,955	23	\$182,972
Southern Oregon Public Defender	Jackson/Josephine	\$65,162	\$51,478	\$13,684	23	\$314,727
Southwestern Ore. Public Defenders	Coos	\$54,967	\$54,905	\$62	7	\$435
Umpqua Valley Defender Services	Douglas	\$58,704	\$50,667	\$8,037	8	\$64,295
Crabtree & Rahmsdorff	Deschutes/Crook	\$65,762	\$54,409	\$11,353	15	\$170,290
Intermountain Public Defender	Umatilla/Morrow	\$49,942	\$48,125	\$1,817	8	\$14,532
MDI	Multnomah	\$78,691	\$54,286	\$24,405	21	\$512,501
MPD	Multnomah/Washington	\$78,979	\$56,365	\$22,614	58.6	\$1,325,178
JRP	Multnomah	\$78,691	\$47,635	\$31,055	13.4	\$416,138
NAPOLS	Multnomah	\$78,691	\$41,393	\$37,298	2.8	\$104,433
					Annual total	\$3,105,502
					Biennial total	\$6,211,003

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Public Defense Attorney Hourly Rates Adjusted for Inflation

	CPI*	Non-Death Penalty	Death Penalty
1991		\$40.00	\$55.00
1992	4.4	\$41.76	\$57.42
1993	3.5	\$43.22	\$59.43
1994	2.9	\$44.48	\$61.15
1995	2.9	\$45.76	\$62.93
1996	3.5	\$47.37	\$65.13
1997	3.4	\$48.98	\$67.34
1998	1.9	\$49.91	\$68.62
1999	3.3	\$51.55	\$70.89
2000	3.1	\$53.15	\$73.09
2001	2.5	\$54.48	\$74.91
2002	0.8	\$54.92	\$75.51
2003	1.4	\$55.69	\$76.57
2004	2.6	\$57.13	\$78.56
2005	2.6	\$58.62	\$80.60
2006**	2.6	\$60.14	\$82.70
2007**	2.6	\$61.71	\$84.85
2008**	2.6	\$63.31	\$87.05

* Consumer Price Index, Urban Workers, Portland-Salem OR

** Projected

PUBLIC DEFENSE ATTORNEY FEES
ADDITIONAL BIENNIAL COST WITH DIFFERENT COMBINATIONS OF HOURLY RATES

<i>Non-DP</i>	<i>DP</i>	<i>Biennial</i>
\$45	\$60	\$2,477,076
\$45	\$65	\$2,753,656
\$45	\$75	\$3,306,816
\$45	\$85	\$3,859,976
\$45	\$95	\$4,413,136
\$45	\$105	\$4,966,296
\$45	\$115	\$5,519,456
\$50	\$65	\$4,954,156
\$50	\$75	\$5,507,316
\$50	\$85	\$6,060,476
\$50	\$95	\$6,613,636
\$50	\$105	\$7,166,796
\$50	\$115	\$7,719,956
\$60	\$75	\$9,355,156
\$60	\$80	\$9,908,316
\$60	\$85	\$10,461,476
\$60	\$95	\$11,014,636
\$60	\$105	\$11,567,796
\$60	\$115	\$12,120,956

<i>Non-DP</i>	<i>DP</i>	<i>Biennial</i>
\$70	\$85	\$14,862,476
\$70	\$95	\$15,415,636
\$70	\$105	\$15,968,796
\$70	\$115	\$16,521,956
\$80	\$95	\$19,816,636
\$80	\$105	\$20,369,796
\$80	\$115	\$20,922,956
\$90	\$105	\$24,770,796
\$90	\$115	\$25,323,956
\$100	\$115	\$29,724,956

Public Defense Investigator Hourly Rate Adjusted for Inflation

	CPI*	Non-Death Penalty
1991		\$25.00
1992	4.4	\$26.10
1993	3.5	\$27.01
1994	2.9	\$27.80
1995	2.9	\$28.60
1996	3.5	\$29.60
1997	3.4	\$30.61
1998	1.9	\$31.19
1999	3.3	\$32.22
2000	3.1	\$33.22
2001	2.5	\$34.05
2002	0.8	\$34.32
2003	1.4	\$34.80
2004	2.6	\$35.71
2005	2.6	\$36.64
2006**	2.6	\$37.59
2007**	2.6	\$38.57
2008**	2.6	\$39.57

* Consumer Price Index, Urban Workers, Portland-Salem OR

** Projected

**PUBLIC DEFENSE INVESTIGATOR FEES
ADDITIONAL COSTS IF HOURLY RATE IS INCREASED**

	<i>CY 2005 Cost at \$25/Hr.</i>	<i>Increased to \$35</i>
Non-Death Penalty	\$2,698,277	\$1,079,311
Biennial (x 2)	\$5,396,554	\$2,158,622
	<i>CY 2005 Cost at \$34/Hr.</i>	<i>Increased to \$45</i>
Death Penalty	\$707,590	\$228,926
Biennial (x 2)	\$1,415,180	\$457,852
<i>Biennial Total</i>	<i>\$6,811,734</i>	<i>\$2,616,474</i>

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