

Members

Barnes H. Ellis, Chair
Shaun S. McCrea, Vice-Chair
Michael Greenfield
Henry H. Lazenby, Jr.
John R. Potter
Janet C. Stevens
Honorable Elizabeth Welch



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Wednesday, November 7, 2007

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

Room 316

Umatilla County Courthouse

216 SE Fourth St.

Pendleton, Oregon 97801

AGENDA

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| 1. Action Item: Approval of Minutes of PDSC's October 12, 2007 Meeting, <i>(Attachment 1)</i> | Barnes Ellis |
| 2. Action Item: Approval of the Minutes of PDSC's August 10, 2007 Retreat <i>(Attachment 2)</i> | Barnes Ellis |
| 3. Presentations on Public Defense Delivery in Judicial Districts 6 and 10 <i>(Attachments 3 and 4)</i> | Invited guests and audience members |
| 4. PDSC Key Performance Measure Progress Report <i>(Attachment 5)</i> | Kathryn Aylward |
| 5. OPDS Monthly Report (Management Team Evaluations, Staff Survey, Juvenile Appellate Section, Petitions For Cert., Contract Process) | OPDS's Management Team |

Please note: *Box lunches will be provided for Commission members at noon in the meeting room.*

Next meeting: *Please note that the Commission's next meeting will be in Salem at a location to be announced on Thursday, December 13 from 9:00 a.m. to 1:00 p.m. Proposed Contracts for 2008-2009 will be presented to the Commission for Approval.*

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Friday, October 12, 2007
12:30 p.m. to 4 p.m.

Riverview Room
Hood River Inn
Hood River, Oregon

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
John Potter
Janet Stevens
Hon. Elizabeth Welch
Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Peter Gartlan
Amy Jackson

Chair Barnes Ellis called the meeting to order.

Agenda Item No. 1 Introduction of New Commissioner, Hon. Elizabeth Welch

The Chair introduced the Honorable Elizabeth Welch who was appointed by the Chief Justice to complete the unexpired term of former Commissioner James Brown.

Agenda Item No. 2 Approval of the Minutes of PDSC's August 9, 2007 Meeting

MOTION: Shaun McCrea moved to approve the minutes as amended; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE: 6-0.**

Agenda Item No. 3 Review and Possible Approval of Proposed Service Delivery Plan for Washington County

Following Ingrid Swenson's summary of the report and testimony previously presented to the Commission on the delivery of public defense services in Washington County, Commissioners discussed the role of private bar attorneys in Washington County, possible methods of ensuring adequate training for new lawyers, and the appropriate role of counsel representing children in juvenile dependency cases. After approving several amendments the Commission approved the report.

MOTION: John Potter moved to approve the report; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE: 6-0.**

Agenda Item No. 4 Review and Discussion of Coos/Curry Testimony and OPDS Draft Report

Ingrid Swenson summarized the information provided in the draft report on the delivery of public defense services in the Fifteenth Judicial District and the testimony provided in Coos Bay. She noted that many of the issues that arose are being addressed in the current contract negotiations with the public defense providers in the area and recommended that the Commission postpone final action on the report until the conclusion of those discussions. The Commission discussed whether it would be possible for the public defender's office to extend its operations to Curry County, and discussed the changes which had occurred in Curry County since the Commission meeting and the fact that many of the Commission's priorities as established at its retreat in August would guide contract discussions with the contractors in this district. Final action on the report was postponed.

Agenda Item No. 5 Update on Service Delivery in Marion County

128 Chair Ellis The Commission heard testimony from Tom Sermak regarding the founding and operation of the Public Defender of Marion County office, and from Steve Gorham and Olcott Thompson about recent developments with the Marion County Association of Defenders.

Agenda Item No. 7 OPDS's Monthly Report

Peter Gartlan reported on the hiring of four new attorneys in the Legal Services Division and introduced two attorneys who had recently been promoted to Chief Deputy positions. Kathryn Aylward summarized developments in the contract negotiation process. Paul Levy reported on the creation of a work group to create performance standards for post conviction relief cases and the development of a survey that will be sent to criminal and juvenile justice system stakeholders statewide regarding the quality of public defense services. Ingrid Swenson discussed developments regarding loan repayment assistance legislation.

Agenda Item No. 6 Public Testimony Regarding Service Delivery in Judicial District No. 7 and PDSC Complaint Process

Chief Justice Paul DeMuniz excused himself from the meeting in order to allow Mr. Robert Larry to address the Commission about the representation he received from public defense attorneys in a recent criminal case that is currently on appeal. Mr. Larry discussed the developments in his case and his concerns about how the process had worked for him. He recommended that the Commission require attorneys under contract to seek the opinions of their clients regarding the quality of representation they receive and talked about other steps he was taking to address the problems he experienced and to help defendants in other cases.

MOTION: Chip Lazenby moved to adjourn the meeting; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

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Riverview Room
Hood River Inn
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MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
John Potter
Janet Stevens
Hon. Elizabeth Welch
Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Peter Gartlan
Amy Jackson

TAPE 1, SIDE A

[The meeting was called to order]

Agenda Item No. 1 Introduction of New Commissioner, Hon. Elizabeth Welch

001 Chair Ellis The first item on the agenda is an easy one. I think most of you know Judge Welch is now our newest Commissioner. We will have to stop calling you "Your Honor" and start calling you "Commissioner." Welcome. Those of you who attended our meeting a year plus ago focused on juvenile issues, will recall how really helpful Judge Welch was on a whole range of issues there. We are particularly glad to have her on the Commission, so thank you and welcome.

011 Hon.
Elizabeth Welch Thank you.

Agenda Item No. 2 Approval of the Minutes of PDSC's August 9, 2007 Meeting

011 Chair Ellis Item No. 2 is approval of the minutes from August 9 to 10. This was the meeting, as distinguished from the retreat, in Coos Bay. Are there any additions or corrections to the official minutes? I had one typo on page 3, the first line, "change" should be "charge" but other than that I didn't see anything. Is there a motion to approve those minutes?

MOTION: Shaun McCrea moved to approve the minutes; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE: 6-0.**

On the unofficial I don't think we need to have an approval of that, but again I read that transcript and that is a great way to remind oneself of the testimony that we heard.

Agenda Item No. 3

Review and Possible Approval of Proposed Service Delivery Plan for Washington County

- 027 Chair Ellis Item No. 3 is the Washington County plan. This is at the stage that if we are prepared to do so approval could be called for. This was a plan that was originally presented in draft form before our meeting in Washington County. We have had subsequent meetings where it has been discussed. Let me ask does any Commissioner have aspects of it that they wanted to raise here?
- 034 J. Potter I would only ask if the staff has taken into consideration Mr. Moran's letter, and if that impacts this report at all? Is there anything that his letter added?
- 038 I. Swenson Well, Mr. Chair and Commissioner Potter, yes, I would like if possible to spend a little bit of time talking about that and following up on one other thing the Commission raised last time we talked about this, and that was training issue. So, once Commissioners have had a chance to raise other issues, I would like to talk about those.
- 043 Chair Ellis Okay. I had a topic I wanted us to address on page 13, just because it is a kind of a policy level issue. This is the second full paragraph and it relates to how our contract should deal with early disposition cases, which obviously save money and attorney time and the issue is whether in a county where you have a lot of early disposition cases, should we be reducing compensation in those cases. The contrary argument is that those that don't go into early disposition tend to be the more difficult cases and the argument is that they should balance out. One point that I would make is, assuming within a particular county we are satisfied with the due process part, I think early disposition is something that we ought to encourage, so I don't want to go the other way and start saying if you have early disposition there is a financial penalty. At the same time, if we find ourselves with a lot of cases going that way, I think our rate structures have to reflect that to end up fairly. I wanted to get any input that anyone on the Commission wanted to make on that subject.
- 066 C. Lazenby It seems to me that it something like squeezing water in a watermelon at one end to try to even think about reducing rates. We have been wrestling with fair compensation in the whole system and we recognize that this is just a feature of it. I don't see it as a real cost savings because we end up looking at these cases that go longer and never really consider the expense of doing those cases.
- 073 Chair Ellis I don't disagree with that. I had a question on page 17, the paragraph that carries over to the top of the page. This is the issue that apparently a number of attorneys for children in Washington County decline to take a position on behalf of their clients at all and then kind of put themselves in the position of parties and tell you later where we are. The report certainly questions whether that is representation as contemplated in our contract. I would be interested in any thoughts anybody has as to whether we should be communicating to those lawyers some concern we have about that approach? It has always been a question for me "From whom does a lawyer for a child take direction?" That is a difficult question all on its own, but for the lawyer to refuse to take any position until hearing evidence by the other parties strikes me as odd. Any comments or observations on that?
- 091 I. Swenson I have some if none of the other Commissioners do, Mr. Chair. Well, first of all, let me just say that the State Bar through the Performance Standards and through the Rules of Professional Conduct have really nicely addressed what the rule for lawyers is in these cases and how you determine whether you will advocate for best interests versus expressed wishes. The mystery that surrounded that question at one time is not there anymore and so in every educational forum where we have a chance to talk about these standards we do so. We are trying to educate our lawyers so that they are familiar with them. This was a surprise to me to

encounter this particular attitude - that you might be liable if you made a wrong decision on behalf of a child, and therefore as a precaution you don't take any position. It makes one wonder why you are there. What possible purpose are you serving in the courtroom? If you are not serving as an advocate then you are not doing what we contracted with you to do. There was one particular attorney about whom this statement was, for the most part, applicable. I certainly did talk with this attorney's employer on more than one occasion and I believe that that issue is being addressed with that attorney. There may still be other attorneys in the county who are under a similar impression and I think it remains more common to not have direct information about a child and to attempt to rely on information from other sources - the Department of Human Services or the CASA if there is one in the case, and so forth. I suggest at the end of this report that - and it is not a problem peculiar to Washington County - that we ask the providers to once again review all of the applicable standards and just let them know that in approximately six months time we will be asking our Quality Assurance Task Force to talk again with the judges and all of the local representatives of the juvenile system and see if some progress has been made. We are happy to work directly with them on this issue in this county. It remains a problem in the state and it is a tough one. I know Kathryn and her staff are trying to address some of these quality issues in the contracting process and eventually we will get there, but among our providers there are lots of people who don't think it is necessary to have any contact with a client at any time during the course of the proceeding in which they are appointed to represent the client. It is a problem.

- 131 Chair Ellis Page 20, the paragraph that starts with "MPD's contract" I'm quite sure MPD does not do capital cases.
- 136 I. Swenson That is correct.
- 137 J. Hennings We do; but it says we don't do Non-Support.
- 138 I. Swenson Thank you.
- 138 Chair Ellis So delete "capital" and insert "Non-Support" from the exceptions.
- 139 K. Aylward They have done representation as co-counsel in capital cases.
- 140 I. Swenson Occasionally they have, that is true.
- 141 J. Hennings Only as co-counsel.
- 142 Chair Ellis Page 27, the paragraph before the new topic is - this is a little more substantive regarding the report - we heard when we were there and I think we have had at least two letters since we were there, private bar attorneys expressing concern that they want to continue to be included. They don't wish to join a consortium. Here is my question. I understand how it is working in Washington County, the private bar lawyers that we were talking about; they don't have a contract with. They tend to get their cases through a court-appointment and I would be a lot more comfortable - I think if we can draw the contracts in a pretty open-ended way - but I think we ought to have a direct link to those lawyers. I am very uncomfortable with that still being left as an ad hoc appointment by the local court and we don't have anything like the relationship that we have with all the other providers. Am I wrong as to how it is being done?
- 164 I. Swenson No you are not Mr. Chair and Kathryn can comment too if she wants, but it is not unusual to have private bar providers in a number of counties because sometimes we run out of contractors eligible to take cases. It seems to me that in Washington County what has developed is the use of particular attorneys in certain categories of cases - the court is well aware of the special qualifications of these particular attorneys - and a practice has developed of saying "This is a case involving someone in federal custody and I know an attorney who will accept this case on an hourly basis so instead of appointing one of the contractors who

will have to start from ground zero, this attorney has already figured it out.” Maybe there is a role for that and the hourly connection with them is they have to qualify under the qualification standards. They have to be approved for appointment. They are not contractors but they have to meet those criteria. I think the major issue for our office would be if there are not enough cases to meet the contractual requirements of our contractors, then they don’t like to see cases being sent to private providers because that doesn’t allow us to anticipate the costs and to cover them appropriately and to make sure that our contractors are receiving an adequate number of cases. I suppose there are two aspects that would need to be considered. One is in the contracting process if it is appropriate that these attorneys be able to participate in the way they have then maybe we need to leave cases in the system, understanding that they won’t all be going to contractors, that there will be some cases for hourly rate attorneys. The quality component is another thing and maybe we need to make sure we work closely with the court to understand the criteria under which they are appointing these particular attorneys. In this case, in the case of Washington County, at least the attorneys with whom I am familiar that the court is appointing on a fairly regular basis, are all highly qualified and ...

- 198 Chair Ellis One of them testified and I was pretty impressed.
- 199 I. Swenson Yes, and Judge Thompson also testified that these people are just critical, in the judge’s view, to handling the special cases. I don’t know, Kathryn do you want to talk anymore about that.
- 203 K. Aylward I think you have covered it.
- 204 I. Swenson Kathryn would probably appreciate some direction from you as to whether you see that as an appropriate thing to do in a given county, to say let’s recognize that in some counties the hourly rate providers do fill a critical function and we don’t want to necessarily look to contract for 100 percent of the cases in those situations.
- 210 Chair Ellis Are you comfortable how it is being done now?
- 211 K. Aylward I think the first thing that we look at is if we have an existing contractor with whom we are going to enter into a subsequent contract, that there is a sort of economy of scale factor that once they have geared up and they have employees they need to be able to count on a certain number of cases coming in so that their monthly payment can cover their overhead. That would be the first thing - I would be reluctant if I have a good contractor that is established to cut back their caseloads so that they had to lay people off or couldn’t cover their overhead just to be able to provide cases to private bar people. Assuming that I can provide a sufficient quota to the good, existing contractors, then I don’t have a problem and could go either way if there is any additional caseload whether it is covered under contract or left available for private bar attorneys. I don’t think it makes too much of a difference either way as far as contracting goes.
- 225 G. Hazarabedian Thank you Mr. Chair. As the Commission knows I am former aggravated murder provider and I can tell you that even if a contractor has a full caseload and would not want a case that comes into a county, there is some sensitivity to the contractors not being asked about whether or not they have the capacity to take that case before it goes to the private bar member. There is some concern among some of the contractors, in certain areas more particularly than others - I don’t know about the Washington County situation specifically - but the view among the contractors is largely that we should be given first crack at cases that come in and then they should go to private bar after that. I am pretty confident that I speak for the majority of those who do the work.
- 238 C. Lazenby That is the general practice though, right? We give the contractors first crack?

- 240 G. Hazarabedian It is the general practice and deviations from that general practice are very noted in the community.
- 242 C. Lazenby Systemically then, my next question is how wide spread is the use of private, hourly attorneys throughout the state?
- 244 K. Aylward In terms of number of cases it is probably four percent or less go to hourly paid private bar attorneys. It is actually the Commission's policy, written policy, that contractors have priority over non-contractors for cases, so that in situations where we have established a quota and an entity has geared up and staffed for a certain number of cases, that the priority is to make sure, to the extent possible they can meet their quota before cases go to private bar. We work with the courts. The courts generally understand that we are trying to meet, at least meet, there is no guarantee. No one is entitled to exceed their quota. The court's know this and there are situations and we are not in a position to second guess where a court will say "I know this contractor is down and needs this case but I would like it to go to this attorney because they have special skills." We are fine with that.
- 258 Chair Ellis That is a different issue than where I think we see private bar most of the time which is in family court where the contractor is really either conflicted or can't take it and then you go to private bar. Here it is kind of a specialized private bar which I think is different.
- 265 K. Aylward Mr. Chair, I think that is correct. There also is the conflict issue. Cases go to private bar because of conflict, but I think the numbers are really quite small now. I think we are talking about a handful of individuals that clearly are concerned about their livelihood but in terms of the impact on the contractors, I think it is almost negligible. It is not hurting them now - the cases that are going to private bar. If that continues to be the case, I think everybody would be happy.
- 275 J. Hennings I think you may have a special case in Washington County. You have small number of attorneys, most of them are sole practitioners and have no desire to be involved in a consortium, have no desire to be associated with some of the full-time firms, but they are very, very concerned because they are called in in very specialized cases in an area of family law where there is a case that transcends a number of areas, some of which are not necessarily appointed. The expectation is that their representation will carry over into some of these other areas. Right now they are very concerned because they want to do this. They are doing it basically on a pro bono basis. They are doing it at a loss. They want to remain as sole practitioners and they have been in the business some up to 20, 25 years. I think the judges are very, very cautious because it is very limited resource. There are very few people with that kind of training and that kind of background. I don't know how you create a situation, very much like you did in Eugene, in which you hire an administrator...
- 294 Chair Ellis But Lane County is really different because there it is 30 percent of the caseload. You can afford to justify the kind of management structure we put in place.
- 298 J. Hennings You don't want to lose these people and you may even force them into a consortium. Keith Rogers who runs the Washington County office is here may have even more information than I do. Basically, you have some people who are very, very valuable to the court. The question is how do you keep them available.
- 302 Chair Ellis Keith that was a segue to you, I think.
- 303 K. Rogers Mr. Chair, I came in the middle of this conversation so I am not sure where the direction was heading. I would say that the group that does the hourly basis cases in juvenile court are very good and very experienced. I think they are a big part of the system. I think it depends on those individuals and it is a small enough group that we would hate to see them go. I don't

think it is systemically a major issue. Many of them are older and are not going to be in the system forever.

- 314 Chair Ellis Would it make more sense for us to have contracts with them for fairly small caseloads but recognizing they are like some other contractors we have that are specialists and contract that way.
- 319 K. Rogers I am not sure if that is the case. I think that the flexibility is probably pretty important to the court.
- 324 I. Swenson I think their expressed preference is to continue to work on an hourly basis rather than a unit basis. That does not preclude a contract but it makes it less desirable for lots of reasons. I think they are filling a niche in Washington County. One other aspect of that is that I think they enrich the practice there for all the attorneys because they are good solid lawyers who have skills that are very important in juvenile court even though they are not part of what happens there, related to domestic relations and other areas of law. It is kind of an unusual situation.
- 334 J. Potter It strikes me we had this conversation on a much broader basis years ago when we began contracting more and more. The private lawyers were saying you are going to drive us all out of business. Some were saying we are going to drive out those who have experience that don't want to do contract work. We are going to drive them all out of there. We are going to reduce the numbers of lawyers that are qualified to do criminal law because we contract with a smaller group. These folks in Washington County it appears are sort of the last of the Mohicans. It is a very small group. I think we have gone way past the arguments that were originally raised. I don't have any problem if the system in Washington County is saying they don't have a problem keeping this last vestige of the court-appointed or the hourly rate people.
- 350 C. Lazenby So we have driven them to extinction except for this small group.
- 351 S. McCrea I don't think there is a problem.
- 354 Chair Ellis Okay. You have two subjects you wanted to raise.
- 355 I. Swenson That was certainly one of them, Mr. Chair. The other was training. We had reported to the Commission at an earlier meeting that we would be meeting with all the contractors and we did. Commissioner Potter and Paul Levy, Kathryn and Caroline Meyer and I were all there.
- 362 Chair Ellis This was the July 24th meeting?
- 362 I. Swenson Yes. We attended this meeting and talked with people. We took an inventory of the training available to Washington County contractors. We came away from the meeting without any solid new plans in terms of how to get at those younger lawyers and make sure that when they get into the courtroom they know how to protect their client's interests adequately, even the first time they appear. What Kathryn is doing during this contract cycle is working with each of them individually asking them what their plan is for training new attorneys. Some are seeking additional funding and that is a fair response. I think we will resolve that on a case by case basis and if we come out of that with any good systemic answers we will certainly let you know what they are and look to apply them elsewhere. This was the first place we encountered lack of training as such a major issue for the judges, that lawyers were just not comfortable in the courtroom, weren't ready to be there and weren't being adequately mentored.
- 383 Chair Ellis For the younger lawyers in the consortium?

- 384 I. Swenson That is right. We talked about the Metropolitan Public Defender trial skills training and how that works effectively for those lawyers, and although they have certainly opened that up, when possible, to lawyers from other firms, they can't be continually offering that course. Something like that would be very desirable but we certainly haven't identified, statewide, how we could do that. In the meantime, I am assuming that Kathryn will be working pretty closely with them.
- 395 J. Stevens Can I ask a question, Ingrid? You mentioned in your footnote about training that it would be better handled as a policy or a requirement in the qualification standards. If that were to happen, what would you see that saying?
- 400 I. Swenson Instead of the suggestion that our contracts require somebody to have a particular type of training, it seemed to me that if that were a direction that you wanted to go it would be more appropriate to put it in the general qualifications standards, to say "In order to accept a public defense case you have to be able to show us that you have received this kind of training before you do it." Those standards do require certain things in terms of knowledge and at least observation of cases and participation if possible, but they don't require the kind of training that appears to be necessary (inaudible).
- 415 J. Stevens I think it would be one thing to find that and make it available in Portland and Washington County, Salem, Bend, so on and so forth, but what happens when you get to Gilliam County or Wasco County or Sherman County?
- 420 I. Swenson That is part of the problem and I know John has worked over the years to create a new lawyer seminar. They do it annually. It is not a hands-on sort of thing but at least it is an effort to convey some of these things to new lawyers on a periodic basis. Maybe that is why we need to be more flexible and ask the providers to create a plan. Maybe it is mentoring in some counties instead of a classroom sort of situation. An experienced lawyer follows the new lawyer for the first week or so of practice if that is possible and just works directly with the attorney on a one-on-one basis. I think there might be different models and some people are doing that.
- 434 Chair Ellis One other item I had was, on page 30, talking about non English-speaking clients, which I believe is a significant piece of the work in Washington County if not also Marion County, I am not aware of other counties that have nearly that concentration. The statement was made that "OPDS should provide a stipend to contractors who employ bi-lingual attorneys and staff." I don't know if I would phrase it quite that way. I have no objection in the contracting process if it takes more money to attract bi-lingual staff and lawyers. I think that is a legitimate factor for us to consider. Maybe that is all that is intended with that stipend language.
- 452 K. Aylward It is just that MPD, under that contract, they actually separate Spanish-speaking clients from English-speaking clients. The case rates for the Spanish-speaking clients are about 20 percent more than the non Spanish-speaking clients. I think that is a little bit of an accounting nightmare. It is almost easier to say that it is a client and because we know that X percent of your clients are Spanish-speaking and you have Spanish-speaking staff attorneys, therefore your case rate for these cases is higher. I think maybe this was addressed because other contractors either don't have, or didn't ask for additional compensation for having a clientele that is Spanish-speaking or have a Spanish-speaking staff. That is something I do want to address statewide. It is always a surprise when you are talking about a contract when someone says "I have to spend a lot of money because it is crucial that I have bi-lingual staff." I'm thinking elsewhere in the state somebody is getting more because of that and I didn't know that you did that. I think that this go round with the way the RFP is structured, those are exactly the kinds of things that we are looking at providing additional compensation for.
- 477 Chair Ellis Any other comments or questions?

- 477 S. McCrea Can we go back to page 14, the paragraph on Systems Issues in Criminal Cases. There were a number of things and a number of concerns that were brought to our attention. The last sentence says that “Judge Kohl indicated that he is willing to meet with anybody who has a suggestion for improving the system.” I am just interested in whether there has been any movement or any meetings or do you have any knowledge of that Ingrid?
- 484 I. Swenson No. I will have to ask Keith if he knows if there has been a follow up.
- 486 K. Rogers I think that any experienced attorney knows that the court indicating a willingness to consider the changes in the system is different then actually getting those changes. There is a Benchmark Committee in Washington County and I am a member of that. As a practical matter there is the situation that you find in any county where they have done things a certain way and it seems to work most of the time and it is glacial to try and change it. The short answer I guess is there has not been.
- 497 I. Swenson That is unfortunate. As with many counties when we come and start talking to people, people raise issues with us that they really should have raised with either the bar of the bench in their own counties. We often ask them “Well, have you talked about this with the judge?” “Well, no.” Or with the judges who have concerns about the way the lawyers have been practicing you ask the same question. So, the idea of making the suggestion was the hope that they would get together but maybe when they do it doesn’t work and they just don’t make any progress. It was just our hope that they would talk to each other directly on these issues.
- 511 Chair Ellis Any other comments or questions on the report? I did come away with the feeling that this is one of five large population counties and on the whole I felt pretty good about it. I think MPD ought to feel very good about what is said about them in this report. I think it also interesting to see that the PD with multiple offices model is working as well as I think MPD is working there. I came away generally pretty encouraged. It is a large population county and I felt that the problems were not horrific.
- 528 S. McCrea You sounded so positive until the last part.
- 528 Chair Ellis Is there a motion to approve the report.
- MOTION:** John Potter moved to approve the report; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE: 6-0.**
- Agenda Item No. 4 Review and Discussion of Coos/Curry Testimony and OPDS Draft Report**
- 537 Chair Ellis The next item is the Coos/Curry attachment report, Attachment 3. Ingrid, do you want to outline that?
- 540 I. Swenson Yes, thank you Mr. Chair. Four of you were able to attend the meeting in Coos Bay and in the draft report we identified some of the issues in these two counties and witnesses at the hearing identified some additional ones. After the Commission hearing today, I am hoping we can put together a final report but if you decide we need to gather more information that is just fine. We are, of course, engaged in contract negotiations currently with these providers as well as all of the other providers in the state and some of the issues we encountered there are really contract issues. The main issues that we looked at in Coos County are county funding, obviously - it is one of the timber counties suffering dramatically from the loss of county revenue - then the geography of the district, Judicial District 13. They have three courthouses in two counties. There is a good 90 minute drive from the county seat in one county to the county seat in the other, so that it makes it difficult for our providers to provide services in both of those areas. In Coos County, you will recall, Judge Gillespie spoke at some length about his sense that the public defender in that county filled a critical role and

needed some additional compensation to continue to do that. The PD has not been able to retain their lawyers in the long-term because they aren't competitive even with the local providers like the district attorney. That was a major concern on the judge's part. They have four special courts that they have to cover in addition to doing just the regular criminal or juvenile matters. We talked about the speed of the docket, which is well known in this county. I had received some additional comments from Judge Barron which I have incorporated into the revised draft. He certainly had a different perspective on some of those issues than others did. Then, if you recall, in Curry County there are two brand new judges, one of whom has been there less than a year.

593 Chair Ellis

Both alumni of a PD.

594 I. Swenson

Yes, of the public defense system. Some changes there. In terms of quality issues we heard in both counties about client contact being an issue, principally in the dependency area, not just with children but with parents as well, attorneys coming to court having not met with their clients. As Judge Welch knows, sometimes that is the client's fault, but not every time. It is the lawyers not making an adequate effort to meet with them. In Curry we heard about one attorney that was routinely unprepared and then in general about a need for more lawyers in both counties, even though the caseload is expected to decline if there aren't sheriffs deputies and juvenile department people to be prosecuting these cases. For conflict purposes they still need a large number of providers and it has to be possible for those lawyers to make a living in this rather isolated legal community, so more attorneys rather than fewer were reported to be needed in both areas. At the retreat which followed this meeting, I think the Commission looked at a lot of the same issues that arose statewide and I think with Coos/Curry counties freshly in mind, the Commission was able to address some of the issues in terms of funding and I think the tools we have with the new budget and the priorities which you have established will help us address some of those. Kathryn, I am sure, took them as directions to her and her staff as to strategies to use for helping necessary providers maintain the attorneys and the staff needed to do the job. So, for example, when you are talking about parity with the DAs, it would be wonderful if we could accomplish that statewide, but that is not likely with the funding we have, and yet if there is a county where maybe it is achievable and maybe it is the only critical piece that needs to be addressed in order to help her retain her folks, that might be something we could look at. The Commission asked us to come back with a plan for loan repayment assistance plan and that was something that Carole Hamilton suggested would be very useful to her younger attorneys. In Curry County, you will recall, there were essentially two providers, two members of the consortium with a third attorney traveling back and forth between the two counties to fill the need. They have since added a third attorney which is a good thing. She is a former prosecutor and I think she will work out well and actually be located in Curry County, so that would be a good piece.

662 Chair Ellis

That happened after our meeting?

663 I. Swenson

Yes it did. I talked to John Spicer yesterday, actually, and he said that they had been successful and retained this person to participate. We talked a little bit about using resource attorneys down there, for example, in Indian Child Welfare Act cases because what DHS and other providers indicated to us was that there are so few of these cases in the county that nobody has really developed the necessary expertise and you kind of can't expect that they are going to be able to do it immediately if they get one of those cases. The idea was if we have a resource attorney somewhere in the state who would be available for consultation not only to them but to attorneys in other parts of the state as well, that might help to fill that need. At the retreat that was one of the proposals that the Commission considered, and although it was not adopted, I have not given up hope that we can look at going in that direction if necessary, when it turns out to be an economically feasible thing to do rather than finding some other solution that may end up costing us more. I think it would be an economical way to provide expertise to lawyers who are part of isolated legal communities. We heard the same thing from John Spicer about complex sentencing issues - wishing that there was available to him

somebody like Jess Barton to help him figure out, in a really complicated sentencing, how the law applies, and what the arguments are, and so forth. That is just another thing that we will be looking at and maybe bringing back to you at some point if we need to pursue it. [end of tape].

TAPE A; SIDE B

- 036 I. Swenson ... what we see happening in the contracts with these providers right now, but would like to possibly come back to you after the contract negotiation process is completed and report to you then where we ended up and see if you are satisfied with the direction that we are going.
- 041 Chair Ellis You mentioned this new lawyer and maybe that is going to be enough to address the problem. I thought the big problem that we heard from the testimony was that Curry County, which is remote from the rest of the state, is even remote from Coos County, and they had two fairly senior people and no prospect in sight of someone else and you could tell from the questions I was asking, I was kind of hoping there was a way that SWOPDS, if I have the acronym right, could play in a role. They did up until '01 and then as I understand the history, the two resident lawyers underbid them and they backed out. Do you think this new lawyer, if she is a resident of Curry, is going to be there pretty much full-time. Do you think that is going to solve the coverage issue?
- 056 I. Swenson Mr. Chair, well, I don't know her, I don't much about her other than she came from practice in a DA's office and that ...
- 059 Chair Ellis From outside?
- 059 I. Swenson Yes, and she is residing there, but I don't know more than that. Both of the older providers, however, had said that they were looking for associates to join each of them at their firms so that they could look toward retirement and begin training new attorneys, so that may provide some resolution to that. Kathryn, do you want to talk a little bit about the public defender approach, I know that was discussed.
- 066 K. Aylward There is always more to these stories. Our office initially asked the Coos PD office to set up a Curry branch because we had trouble getting coverage and that worked for a while but there were difficulties administrating a remote office. It wasn't a question of their being underbid. The principle and well-respected attorney in the remote office decided that she didn't want to work there anymore and wanted to have a contract instead. Basically, it was a two attorney PD office and both of them said "Why are we part of the PD? We are little lost stepchild. Let's get out from under and have our own contract." They didn't really underbid the PD, they sort of said they are going to quit anyway. We dealt with the courts on this and the courts basically said "We like that attorney and that attorney is good and we don't care whether she is part of a new consortium or whether she is part of a PD's office, we just don't want to lose her. She is going to quit anyway and we are going to lose her if we don't give her a contract." So that is more of the history. It was extremely expensive. Shutting down a public defender office was time consuming; it was not pleasant; it took months of wind down; there were issues with what do you do with the space you have rented and the furniture, computers; and it was a difficult process that I would not wish to go through again. Maybe now with different administration in the PD's office perhaps this satellite office could be administered. We tried it and it didn't work and it was hard to undo. I would be really reluctant to try it again.
- 092 Chair Ellis Okay. I am just looking at it from the outside. That did seem to be the hardest kind of structural problem. How do you serve Curry County given its location?
- 097 I. Swenson It is a difficult one but I think they are addressing it. We will check back with them and see if that is working.

- 099 Chair Ellis On page 25 that last full paragraph, you might want to rewrite that. Maybe put the word “both” after Judge Barron instead of before it would be a little better.
- 104 I. Swenson Thank you.
- 104 Chair Ellis Any other comments on the draft of Coos/Curry? So you will work up the last section which has been discussed?
- 106 J. Potter One comment, Mr. Chair, on page 27, the first paragraph, last two sentences, the footnote after \$500 per month. This may be a contract issue that you don’t want to talk about but she was complaining about the \$500 per month health care limit. The footnote says that that has been deleted. The next paragraph said the internal rate for mileage is \$.30 cents a mile. We have raised our mileage reimbursement rate for investigators and others. Does that automatically go into a contract or do they have to negotiate a rate regardless of what we have done?
- 118 K. Aylward Commissioner Potter, whatever an employer negotiates with their employees for work related travel time is up to them, because it is not a reimbursement that our office provides. They would be free to set whatever rate they felt was appropriate. We don’t compensate them at all. It is basically “Here is your case rate, if you need to travel,” I would imagine some firms don’t reimburse their employees at all.
- 125 J. Potter So it is one of the things that they could put in their case rate if they so desire and they put in whatever rate they want?
- 127 K. Aylward Absolutely.
- 127 J. Potter Thank you.
- 127 Chair Ellis Okay.
- Agenda Item No. 5 Update on Service Delivery in Marion County**
- 128 Chair Ellis The next item is Marion County. I know we have at least three people here that we want to hear from. I wonder if we ought to just bring the chairs forward. Welcome to all of you. Why don’t we start with you Tom, if you could kind of bring us up to speed on the Marion PD office that is now up and running.
- 143 T. Sermak The office opened, I was the first employee of the public defender of Marion and I started work on April 2.
- 146 Chair Ellis Didn’t want to do it on April 1?
- 147 T. Sermak That was a Sunday and I was kind of fortunate it was that day. At that point we had a preliminary agreement with the state for money. We subsequently leased property in the Oregon Building which is just kitty-corner across the Marion County Courthouse.
- 153 Chair Ellis And the Chief gave you some furniture?
- 153 T. Sermak That is true, yes. I was thinking about it this morning. With everything that the Chief was talking about having done, it surprised me that at some point or another he just ended up in my office and walked through it. He was walking through my office and I was pointing things out to him and showed him a room that was kind of empty and he whipped out a notepad and started taking notes. The next thing I knew I was getting a call from his staff to come and look at some furniture that they didn’t need and we might be able to use. That is

actually kind of emblematic of both the support that the Chief Justice has given to our office and also the kind of cooperation and support that we have enjoyed throughout his prior tenure in Marion County. We did start taking cases in July. We at that point had two lawyers and no cases. We rapidly got cases. The system there is a little different than what I was used to in Lane County and I think different than many other counties as to how the cases are handled. We had some understanding of how that worked but there were of course going to be some bumps along the way. Internally, the office has a very good and capable computer system that we anticipate will meet our needs. The server will meet our needs probably for the next ten years and certainly for the life of the server. The more electronic the judicial system gets the more we will be able to accommodate them in that fashion. We are designing our system and our objective is to be as paperless as the judicial system will permit as time goes by. I went there with certain preconceptions as to how we would be able to do things on a paper flow basis. That met with some resistance within the judicial system, the Marion County court system. We had no resistance out of the staff other than "This is going to be very time consuming for us. We have never done it that way and we don't want to do it that way now" – those sorts of things. Presently we are in a shake down period. By agreement we took a large variety of cases. We do not take murder cases because MCAD had a contract through the end of this year that gave them exclusive right to murder cases, but we take anything under that - attempted murder on down to probation violations and we have that mix within our office now. I would say - I don't have these figures - that is part of the problem with having to try and make a presentation like this after only three months of operation, because there just is not enough raw data to get some sense of what the cases are going to be like. I believe that at present about 40 percent of our cases involve people with bi-lingual needs. Some of them are able to speak English but I would say probably 40 percent of our clients need to have an interpreter when they go to court. The way that we take cases is every Thursday we are the attorney of the day, as it were, and take all of the cases that come in except for Spanish-speaking misdemeanors, which MCAD takes. We just get the Spanish-speaking felonies by and large, but it turns out that in Marion County they schedule interpreters on Tuesdays and Thursdays so there is an inordinate percentage of Spanish-speaking clients. I think that explains the disparity between what the demographic of the county is versus my perception of what our caseload is. We do have a bi-lingual office person right now; our secretary/receptionist is bi-lingual. We hired a legal assistant who is conversant in Spanish and almost immediately asked that we help her pay for a Spanish course at Chemeketa and we did that. She is now getting more proficient in that language. We have hired three more lawyers for a total of four now. Two of us are Measure 11 qualified. One of us is on the verge of being Measure 11 qualified and I am using a co-counseling method and training method to bring Ms. Schmidt along. I think she will be Measure 11 qualified by the end of the year. We also have a new hire who is a new graduate, newly admitted to the bar, who is somewhat conversant in Russian.

229 Chair Ellis

That is a language that is ...

229 T. Sermak

... is useful in Marion County because of the Russian population in the Woodburn area, by and large. I think we are well situated to deal with those sorts of issues. I am pleased, and I would say blessed, to have a very good Board of Trustees. I keep finding the fingerprints of the Chief Justice over my Board of Trustees as well. Most of them will say that they were volunteered by the Chief Justice. We have a bi-lingual attorney to help us liaison with the Spanish community. We have four lawyers and three non lawyers on the board. They are very active. They have met monthly ever since I have been on board. They take a great deal of interest in what we are doing. I have prepared for their perusal and editorial comments a fairly detailed employee manual and that has been the topic of conversation for the last two or three board meetings. We are on the verge of getting that in place. We have implemented, right from the get go, an attorney survey for client feedback and we are getting the bugs out of that system. That seems to be working fairly well. The paper flow in the office, I am trying very hard to maintain interoffice procedures from the bottom on up. I don't want to have a problem if I have to replace anybody, especially suddenly. The difficulty and of course there

is the problem of succession which is another one we are trying to address by having good procedures in place and good job descriptions in place internally. Somehow or another, and this is a major problem, is how the office will succeed over the next few years. I don't want to wait until two years before I retire, or get fired, to have something in place that will enable someone to take over my place. Those are extremely difficult questions particularly with an office as small as ours. We do intend to expand both physically and numerically. I negotiated a lease with the Oregon building for two different sections of the fourth floor. We have one now that we are using and we will have that filled up by the end of the year. We have a right of first refusal and an obligation to lease some additional office space on the same floor when we expand to our full compliment of lawyers, which I anticipate will be seven lawyers plus myself. After negotiating the preliminary agreement that got the office started, I negotiated with OPDS for a contract for the period between July 2 and December 31. I took a deep breath and then had to start responding immediately to the RFP for the next two years, but that is done and in place. We will be negotiating that in the immediate future. I am in the process of putting together a formal training and mentoring program within the office to ensure quality control of the services that are being rendered by our staff. We also are implementing an annual attorney review and office staff review. My board, of course, has implemented a review process for me.

289 Chair Ellis

Apparently that is monthly.

289 T. Sermak

Well, I have to go up there and do a lot of explaining monthly. There is going to be a formal evaluation, I believe this month, and then I will be evaluated annually after that. The goal is to have an office as soon as possible, but I think as soon as possible reasonably would be within the next two years that is a model in the sense that it reflects the best practices as nearly as we can and also the goals that indigent defense or public defense has for the future, and that would include making an electronic legal process. We are going to try and be as paperless as we can be. We want to archive all our files digitally rather than physically. There is a lot being done and we are in the process of doing that now. We are at the point where things have gotten started; we are working the bugs out slowly and deliberately. We are not doing anything that would have to be undone to implement the best practices as we see them, although there are bugs that you don't anticipate. I did not think there would be the problem with paper flow to the court outside my office that there is. They seem to be rather behind the times. They are kind of 20th century and we want to get into the 21st century. That has been somewhat difficult. I have had nothing but cooperation with the system starting with the district attorney, Walter Beglau, and the presiding judge, Judge Lipscomb and Judge Leggett who is running criminal court there. I think I have a good relationship with all of them and I would hope that I would get feedback from them. I do solicit information from them on a fairly regular, although not very formal, basis. This Commission may know more than I do about it, but I think we are integrating well into a system that is designed to accept public defense. Dealing with the jail was a joy. When I needed something or I had a question about something I got complete cooperation, from the transport deputies to deputies inside the jail to the jail staff itself, the administrative staff. That has been true with the court system. MCAD helped us with a number of different aspects and helped us understand how the systems works, giving us advice as to how to take cases and what cases to take. I fully expect that that cooperation with continue. That is about all I can think of at this point. We are making all deliberate progress at this point.

338 Chair Ellis

Let me suggest that we hold off on questions until we have heard from MCAD too so we can take Marion County as a whole. Olcott or Steve, which of you wants to start?

341 O. Thompson

I'll start first. I am glad to hear they perceive us as helping them. We are trying and it seems to have worked and hopefully we will continue that and I am not just talking about me as the Chair or Steve as the Executive Director but the MCAD members as whole. I know I always will and I hope that all or our members will continue to do that. I have talked to Tom a couple of times checking on his numbers because I think he could hit his contract numbers

perfectly the way Marion County works. They need one more of this case and they take one more of that case and we'll take all of the rest of them, just because he has a smaller piece of the pie than MCAD does. One thing that MCAD has done since we last talked, probably about six months ago, is we have created a judicial liaison position - one of our board members, actually one of your board members too now, John, who actively solicits information issues from the judges about our members. It has been wonderful. She reports that since June none of the judges have had any issues with any of our members. We think it is great and also quite frankly we think maybe some of their issues weren't really issues.

364 Chair Ellis

There were real issues when we ..

364 O. Thompson

There were some, absolutely. I heard from Steve, I heard from Ingrid, and this is true that Judge Leggert reported that she had refused to allow two people to continue to take appointments. One of those people was one of our great trial attorneys, but we already knew, and her work group already knew, and we already working with her. She had problems getting to court on time and she had problems meeting with her clients. For some reason she did great in the courtroom without ever talking to her clients. All those issues were coming to a head when Judge Leggert said "I'm not appointing you in anything else anymore." Then we were fortunate and she resigned. We didn't have to do anything more. Like Paul said yesterday, that is the best way. They resign and you don't have any personnel type issues if they resign. The other attorney, interestingly, is a former MCAD member who is now the judge of Salem Municipal Court, and I didn't know this until this happened with the other attorney, was that you show up for a 10:30 appearance and you may be there until 3:30. He was there until 3:30. Meanwhile he had a 1:30 appearance at the court annex for circuit court. He called. Unfortunately what happened was the court staff hadn't listened to their messages. He immediately went and apologized to Judge Leggert, told her what happened and Judge Leggert at that point knew of this delay issue because we investigated it immediately and found all this out, and she was fine with it. One other important thing that has happened and I think it shows our responsiveness: unfortunately one of our members got arrested for selling cocaine. That happened at night. The next day, actually it was the same day because it was early in the morning, the court gave us a list of all his cases. By the end of that day he was off every single one of those cases. The only delays on any of those cases were for clients whose court appearances were so soon that we didn't have a chance to talk with those clients before their court appearances. We had to reset. It is unfortunate what happened to him but that is what we are doing now. Hopefully we can continue to do that. Then, sort of to toot our own horn, *State v. Ice* which we talked about yesterday, came out of Marion County. It was an MCAD attorney that raised the objection.

415 S. Gorham

I just have a few things to add. We continue to work on our quality of representation and our responsiveness to the issues. I think that is what the Commission wanted us to do and I think we have done that. We had some major changes. We provided you with all of the changes that we did. We established an education plan and a communication plan. We reorganized into work groups to help train and deal with the concerns of whomever, including the courts, or especially the courts. The work groups are mandatory meetings for the people who are taking appointments. They meet every two weeks. Work group leaders from each work group meet every month. Olcott and I go to those meetings and issues get dealt with at least on a monthly basis that come out of the work groups. One of the things that surprised me when Ingrid called me about the concerns of Judge Leggert and these two attorneys, those concerns came up in April. The concerns were expressed to me probably the same day that Judge Leggert had the problem.

436 Chair Ellis

April of '06?

437 S. Gorham

April of '07, this year. Within a day I had communicated with the work group leaders of those particular individuals and communicated with those individuals about Judge Leggert's concerns. Since then there only has been one concern expressed and the same thing

happened. I got a call and immediately got in touch with the attorney and the work group leader and that situation was really a workload issue, if anything, and that is being resolved. It was a little surprise to me when Judge Leggert kind of mentioned these concerns because they were in April and literally since this one in May, we have not heard any concerns. As Olcott has explained, we just don't sit around waiting for these concerns. We have this new position of the judicial liaison that affirmatively goes and talks to all of the judges who are dealing with our members and asks if they have any concerns. I think the important thing is so that not only did the judiciary and the components of the system know who to contact, either me or the judicial liaison or Olcott, they also communicate with almost all of our attorneys as to whatever the concerns are. But they do focus on communicating with me, the judicial liaison, and Olcott. We deal with these concerns immediately and try to deal with them especially through the work groups, which I think has helped us quite a bit. A couple of other important things is we represent all of the specialty groups in Marion County. EDP is sort of a specialty court. It is done at the arraignments but we are the attorneys who are representing the individuals at EDP. We have drug court. We have mental health court and I call it a specialty court because we have a special section and it is done kind of separately, the SEC, the Support Enforcement Court. It is really not so much of a specialty court, but we have specialists, a few attorneys, who do that and it is at a special time and things like that, so MCAD is integrated into the whole criminal justice system in Marion County. I would say, and I think it is positive, if somebody in Marion County, especially someone in the system, is looking for information or concerns about the criminal justice system, they call MCAD. They have annex meetings which are basically the criminal justice meetings. We have all issues that come up and we are involved intimately in that. We are on the DV council. We are on the Court Security Committee. We are on the video arraignment - we don't have video arraignments yet - but we are about to start a Video Arraignment Committee. The judges call us when there are organizational issues both within the court, maybe a little bit with us, but within the whole system, so we really are integrated into the criminal justice system in Marion County and the courts know whom to call. They call us. One of things also is that OPDS knows whom to call when they have problems not only in Marion County but elsewhere. I think that one of the things that is really important with our structure and the way we do things is that if say Lincoln County has a case in which they need an attorney and for whatever reason they can't find one or there are problems with one of their attorneys that they can't do it, we get the call and within usually hours we can find one of our attorneys willing to go over to Lincoln County and represent the individual. A good example of that happened last week. I think it is important that you all recognize our flexibility in being able to serve, not only in Marion County but wherever the statewide system may need one of our experienced attorneys to work, we are there and we are there to do the work. I hope, and I think, that our work is quality work. Yes, you have some underperformance and I think as Olcott explained, we had one underperforming attorney that was a really, really good trial attorney, but who had these organizational problems and the organizational problems just never seemed to improve. It was better that this person resigned to do something else rather than us having to suspend them or fire them.

530 Chair Ellis

Is the litigation fully resolved?

532 S. Gorham

Yes, except. The person that I had partially suspended, sued us and that settled. He has reintegrated into our system and is doing, as far as I can tell, well. The person who I fully suspended, part of the settlement was that she would resign and she has. We have a few little weird kind of issues in regard to her that were a result of, we had an insurance attorney who helped us in that, and we didn't perceive one potential problem. This particular attorney ended up being the subject of a post conviction from years back - the post conviction was filed in the beginning of this year. And because of the intricacies of the settlement agreement, she sought to have the post conviction dismissed because an MCAD attorney was representing the client on the post conviction petition. That didn't happen. There may be those kind of little issues.

- 558 Chair Ellis Where does the experience of the litigation that you have been talking about leave you from this point of view, do you feel comfortable that you can exercise authority on a quality control issue and eliminate from MCAD those that really are under qualified and underperforming, or do you feel intimidated given the experience.
- 568 S. Gorham I feel comfortable. I don't think I would say I feel intimidated. Not much, fortunately or unfortunately, intimidates me, but I am cautious. I would say that I am definitely cautious but I don't think it intimidates us. I think we are prepared, as I think is revealed by the examples I have given you, to handle underperforming members. Hopefully we are training them to become performing and over performing members, rather than seeking the dire consequences of suspension or things like that. I feel comfortable we are able to deal with our underperforming members.
- 581 O. Thompson From a volunteer board member's perspective my answer to your question was "yes." I am leery of doing that but I am more than willing to do it. What we have really been able to do because of the litigation is see where our problems were, not only identifying somebody who really wasn't doing the job, but then taking the steps necessary in an appropriate manner to either get them to be able to do the job or say we are sorry you have to leave. As much as litigation can be against somebody personally, it has been very positive because we have learned a lot about what we really hadn't done right.
- 597 Chair Ellis The Commission, obviously, two years ago adopted a strategy in Marion County of building a PD to be a balance with MCAD. You guys have moved from a monopoly role to more like consortia in some of the other large counties. How do you feel about it? Are we making that transition in a way that seems to be working?
- 608 S. Gorham I think so. I think one of the keys will be how big the PD becomes. We clearly wish to continue to be the largest indigent defense provider in Marion County, but I think it has certainly been a positive that the public defender is here. It has been a positive that Tom was hired. We are trying to cooperate as much as we can to see that they are successful. We want the PD to succeed. We don't want them to become an 80 percent share of Marion County, but a 20 or 30 percent share we are absolutely comfortable with that and hope that that succeeds and we think it will.
- 626 Chair Ellis From our point of view, there is a critical mass level that doesn't make sense to have a PD if you don't get to that level. Speaking for myself, where it goes after that depends on their performance and your performance. That is not a bad thing.
- 632 S. Gorham No, I agree. I think that is a good thing. What my hope is is that both bodies, if you will, both organizations, get a fair shake. In other words, get evaluated on what they are doing, also the integration between them, and what they are doing in the system. I think it that happens we will come out very well. I think we are a good, flexible indigent defense provider. After all, I have said it over and over again, what our goal should be is giving good service to our clients. That is our goal and it doesn't much matter whether it is giving the good service or Tom's group giving the good service, the good service to the clients is what is important.
- 651 Chair Ellis I will say that we naturally have - I think I sense some very positive things happening and I think on one end I have obviously supported having a PD in what is the second largest county in the state. I think we needed that, but I also felt your reports over the last year and half and what we hear indicate real progress at MCAD. You guys are doing some positive things. It is no longer just the loose - I'll say it in a way that you will probably disagree ...
- 667 O. Thompson I agree.

- 667 Chair Ellis The loose private appointment system which is what was there a few years ago. I think it has made real progress. Any questions or comments from Commissioners?
- 673 J. Potter We listened today to Helen Russom from BOLI, I don't know if you were in the room for that discussion?
- 674 S. Gorham I was not.
- 675 J. Potter Some of the discussion focused on personnel manuals and the importance of having rules, a personnel manual in your situation is going to be different, and it will have a different look to it than a personnel manual in Tom's situation as a public defender. Do you have a personnel manual or a procedures manual for members of you consortium?
- 685 S. Gorham Yes. It is a document in transition as we have transitioned, but we do. Almost all of procedures and I say almost because we could probably find one that isn't written down and distributed. Certainly the work group plan that we have - you have that - it is a working document. We also have an employee manual that in draft form right now but it is going to be finalized. We have both types of documents.
- 698 O. Thompson The organization also has a contract with each of our individual attorneys that we spent as a board probably six months on revising, sending it back to our corporate attorney, "What about this and what about that?" We got the one that Clackamas County had. We had one that was ten years old. Some of the stuff wasn't right.
- 710 J. Potter Is the process, taking off on Barnes' question about the litigation, is the process that you would have to remove somebody or fire or suspend somebody, is that different than it was two years ago and how is that different?
- 718 S. Gorham Absolutely. The work groups I think are the biggest difference. The work groups are aware that we take things first to help improve the performance of the attorney. I would say absolutely it has changed. What we have learned from the litigation is that we are all attorneys that are doing this, or mostly attorneys who are doing this, and attorneys are prone to litigation. There is nothing that we, or any group, is ever going to be able to say absolutely 100 percent we are going to be able to prevent that. We are trying our best to get our procedures down so that if it happens again, we won't be in litigation.
- 739 O. Thompson The ultimate decision maker is the board of directors, but they don't get to make that decision on a first call. It is supposed to be made by the work group and passed up to the work group leaders who basically work on the issue and decide to try something else if they need to or impose something. Then it goes to the executive director. Only then, if the executive director thinks something needs to happen to this person that is not positive. Part of the work group is trying to get somebody better. It is a different focus. Then that person can appeal to the board of directors. The board of director has the last word but they don't get the first word.
- 760 J. Potter That helps me. I am just thinking of a scenario... [end of tape]

TAPE 2; SIDE A

- 001 J. Potter ... it comes back to you and you either concur or don't, then you take that to the board of directors and it is a suspend or fire kind of thing.
- 003 S. Gorham I think in general that is the procedure that we have established. I think a good example of us being able to be flexible and use our best judgment is this unfortunate occurrence where one of our members was arrested for a drug offense. We took immediate action. He was more than willing to voluntarily not take any more cases and give up his cases, but we were prepared to act if that didn't happen.

009 J. Potter I assume you didn't represent him within the consortium?

010 S. Gorham No.

010 O. Thompson He retained, but there was a co-defendant and I believe Steve was on the phone to me before they got to the jail to see if our office would be able to represent him and we have done that.

013 Chair Ellis My understanding is that the lawyers Tom has hired to this point are from outside Marion County ..

015 S. Gorham Except one.

015 O. Thompson One starts November 1.

016 T. Sermak My newest hire is an MCAD lawyer.

017 Chair Ellis Okay, that is news to me and that may make this next question a little easier. Both because caseloads generally are in a somewhat declining mode and obviously we can all do the math. If they grow to the level Tom indicated there are going to be fewer cases for MCAD. How are you approaching the downsizing?

022 S. Gorham I have to tell you Marion County, like in a lot of things, is unusual. I think our caseload has not gone down but in fact has trended up. I doubt that it is going to trend up to the 20 or 30 percent that Tom's organization might take, but it has not gone down it has gone up. To maybe our advantage if you will, we are not going to have to see that type of problem at least yet. That is not to say that tomorrow it might not change, but it is not going down in Marion County it is going up.

031 O. Thompson At this point the last three or four lawyers that joined MCAD were specifically told about the PD's office and we don't know what is going to happen. We don't know what percentage of the cases we will have. We don't know whether there is going to be enough for you and all the lawyers specifically in their contract now, we are not guaranteeing you a single case at all. In a sense it was fortunate that a PD's office came in, we were having problems getting lawyers on some cases because there were too many cases for the lawyers we had. I think, at this point, natural attrition out of our organization that we are losing another lawyer the end of this year that is moving to Arizona. She just found out earlier this week she passed the Arizona bar so she is going to move to Arizona the end of this year. Well, there is another lawyer we are "losing." We are just really careful in replacing them to make sure we are not going to have somebody learn all this and three months later find out there is no work for them at all.

045 S. Gorham I think we are dynamic enough to be able to do this and we have been lucky – unlucky for society - that caseloads have gone up. That has helped our organization a little bit, but as Olcott said "We know that this might be happening so our contracts with our new attorneys tell them, if the caseload isn't there you are the person who is not going to get those cases" and they agree to that.

049 Chair Ellis You are certainly the largest consortium that is hourly and I think there is only one other that I am aware of, Benton I think...

051 S. Gorham Yamhill.

051 Chair Ellis Yamhill is hourly. Any thinking on your mind whether you want to stay there or reconsider that?

- 054 S. Gorham I can tell you it is a dynamic situation. We are looking at it right now. I think to be fair it is going to depend on what the rates are. How much money is there? We have a tradition of doing the hourly rate. Several times in our contract negotiations we have said because we have felt we would make more money, if you will, that we were willing to case count and when we have said that we have not gotten positive feedback. We are getting positive feedback now but at discriminate rates we may not be interested in. At equal rates we may be interested in it. We have been talking about that in the consortium at least since July and we have an annual meeting that is mandatory for our members and we are going to be taking a vote as to whether we want to propose a case count contract or keep on the hourly rate. We hope to meet with Kathryn and our analyst before that so that the members have as much information as possible to make that determination and we will see where it goes. I think it is a possibility. Maybe it is 50/50 now and maybe it used to be 20/70 that we wouldn't do it. Probably 50/50 now and a lot depends on the rates.
- 072 O. Olcott If the rate is, and I'm just throwing this out, is half the amount that Tom makes, it is an easy answer. If we are going to get paid half just on the numbers we are going to lose money. It depends what that rate is on the case count more than anything.
- 076 Chair Ellis Other questions?
- 076 Hon. Elizabeth Welch I have a informational question. Do either of your organizations represent juveniles?
- 077 S. Gorham No. There is a juvenile consortium in Marion County that does all of the juvenile work.
- 079 Chair Ellis Thanks. I like the fact the three of you are here and you are talking to each other and you are cooperating with each other. We all could see it could have gone a different direction. I just want to say I appreciate particularly how the MCAD folks are responding.
- 083 S. Gorham Thank you.
- 083 O. Olcott Thank you.
- 083 Chair Ellis Did I get kick in shins?
- 084 S. McCrea Yes you did.
- 084 Chair Ellis We'll take a 10 minute recess.
- Agenda Item No. 6 Public Testimony Regarding Service Delivery in Judicial District No. 7 and PDSC Complaint Process**
- 085 Chair Ellis Item No. 6, Public Testimony Regarding Service Delivery in Judicial District No. 7 and PDSC Complaint Process. Why don't we start, Ingrid, with the Attachment 4 which is the service delivery plan.
- 090 I. Swenson Thank you Mr. Chair. I included that just so the Commission could recall some of the discussions in Hood River, Wasco, Gilliam, Sherman and Wheeler Counties and the issues that arose there and the service delivery plan that was approved there. There isn't anything that I am aware of in Mr. Larry's proposed presentation that is directly related to the findings that you made, except that he would have some concerns about the adequacy of representation, certainly in his case, and more generally as well.
- 100 Chair Ellis Let me see if I understand what Mr. Larry wants to discuss.
- 103 I. Swenson Sure

103 Chair Ellis Can you outline for us where we are going here?

103 R. Larry Sure. I attended your February 8, 2007 meeting and at that time you basically said if I could put something on paper and submit it to you and then if my case was done then you would hear me. I have sent you an outline. I distributed a handout. I know I won't talk about all of these issues on that handout, but I think these are issues that need to be brought to your attention.

111 Chair Ellis We are not talking about a specific case that is pending?

111 R. Larry I am sure I will talk about my case some. My case is finished now.

113 Chair Ellis So, finished, it is not in the appellate process or anything like that?

114 R. Larry Actually, I have a misdemeanor conviction that I am appealing. So you don't want to talk about anything in that case?

116 Chair Ellis Let me make clear; one of our members is obviously the Chief Justice. It would awkward to be discussing a pending case in his presence.

120 R. Larry Okay.

120 Chair Ellis I am going to ask you not to do that at all.

121 R. Larry Let me suggest that the Chief Justice who I really would like to hear what I have to say, but I think the message I want to get across to you needs to be delivered today, so I would ask if the Chief Justice would excuse himself.

125 Chief Justice De Muniz I will. We just to make sure that there are no problems. So I'll excuse myself.

125 Chair Ellis Here is what I am going to do. We are going to reverse the order of the remaining two items so we can take Item No. 7 now while the Chief is here and then he will excuse, recuse, whatever, himself.

130 Chief Justice De Muniz Go away.

131 C. Lazenby While we are on this Mr. Chair, for the record I think I have a potential conflict of interest because I see that Mr. Hamalian is listed down here as one of the attorneys that Mr. Larry is going to discuss. For the record I want to indicate that Mr. Hamalian has done work for me and I have done some work for him in my private capacity, in fact I am presently working with him on a matter, so it is a potential conflict of interest just because I don't know whether we are going to be asked just to take information and use it for system improvement or whether it has something to do specifically with him. I am putting this on the record. As you go along Mr. Larry, as I listen to that, it may develop into an actual conflict of interest for me in which case I will step out and not participate. At this point I anticipate it is only a potential conflict of interest. I am putting that out on the table to identify what my relationship is with Mr. Hamalian. We are close personal and professional friends.

142 R. Larry I appreciate that. I don't see anything that will be a conflict for you, but of course I am not an attorney.

143 C. Lazenby I have to judge that myself.

144 Chair Ellis We will get back to you.

Agenda Item No. 7 OPDS's Monthly Report

145 I. Swenson Mr. Chair, we would like to update you on some of things that have been happening with us and maybe a good place to start would be to ask Peter Gartlan to talk a little bit about our new positions in the office, how we are doing with respect to recruitment and, for the sake of the other Commissioners who weren't present earlier, to introduce his new chief deputies.

150 Chair Ellis This is the most popular man in Oregon. He has eight jobs to fill.

151 P. Gartlan Mr. Chair and members of the Commission, my name are Peter Gartlan, Chief Defender with the Office of Public Defense Services, Legal Services Division. I am pleased to report that we have completed our hiring. We are expecting at least four new Deputy I attorneys to start this month. The first one started last Monday, Carolyn Bys. Carolyn has an interesting background. She actually worked at the Hague for about six months. As we know, questions of international law keep popping up in criminal cases recently. We thought we would get some expertise. So Carolyn started. She is a 2007 graduate of Lewis & Clark. The next person we have starting is next Monday. Laura Frikert. Laura was with our office for three years. She left in 2003 after the birth of her second child. She got a degree in teaching. She has decided that she is more of an advocate than she is a teacher so she is returning to us. The Monday after that another 2007 graduate from Lewis & Clark will be starting. His name is Erik Blumenthal. He has worked at Metro PD and the Ninth Circuit and he also was an intern for Justice Thomas Balmer a couple of years, so the Chief Justice might know him. The last person is Dan Bennett and he is starting the week after that. He is also a graduate of Lewis & Clark. He worked at MDI for a while as a certified law student. We are really excited about the people who are starting. We had an excellent crop of applicants and we were able to pick and choose the people that we wanted. We actually turned down people who were top in their class. We certainly had a great group of applicants and went through a very smooth process. We think we have four really strong people to start and teach them appellate law.

180 Chair Ellis Good.

181 I. Swenson What about your senior deputies.

181 P. Gartlan I would like to introduce Bronson James. I think I reported last time that we have two new chief deputies and one of them is Bronson. Bronson has been with us about two and a half or three years and he has interesting background because he has some corporate law experience. We thought that would be an interesting mix and would improve the structure of the management team. We are really happy to have Bronson. Shawn Wiley has been with the office for about six or seven years. He has an excellent interpersonal abilities. He gets along well with everybody and we are really happy to have him. I think we have a very strong management team.

191 Chair Ellis So what is your total number of FTE lawyers now?

192 P. Gartlan It is 34 and that is excluding, at some point we will be adding juvenile appellate lawyers, but we don't have any of those yet. We are at 34.

195 Chair Ellis I forget is it four juvenile positions?

195 P. Gartlan Yes. One senior deputy and then three deputy one or deputy two attorneys.

198 Chair Ellis There was enough space in the building for all this?

- 199 P. Gartlan Kathryn has worked her magic and there is enough space in the building and everything is set up and we are just awaiting personnel.
- 200 Chair Ellis That is good.
- 204 I. Swenson Kathryn, do you want to just tell folks where we are with the contracting process. I know we are in the middle of it but maybe you can give them a sense of what the schedule is.
- 205 K. Aylward We did end up granting some one week extensions to people for unusual circumstances to get their proposals in so that put us behind a week and then getting ready for the conference. Generally we don't start diving in until after the management conference but because it is fun and exciting and interesting I can't wait to dive in. I have read all of the proposals and number crunched maybe 25 or 30 percent of them now. As you know the last round of contract negotiations was the first time that all contracts were in place prior to December 31. That is the first time that has ever happened as far as I know, at least the first time in 12 years. We felt good about that. To be able to do the same again and actually pull the schedule forward would be great and I am optimistic that we can do it. Some things will be difficult to negotiate as you know. Washington County is complicated. Multnomah is complicated. Anytime you have multiple providers in a county that makes it very difficult to do that. We want to take this opportunity to make some changes in contracts that we had hoped to make but it always required additional funding to be able to make those changes. As Steve Gorham mentioned, some of the hourly paid contracts, figuring out what the alternative would be if they weren't hourly paid, that is complicated as well. We are going to try to achieve some things this time that we haven't had the funds or time to tackle. I am optimistic. I think it is going to go quite well.
- 229 I. Swenson I know at the management conference you described some of the ways you are going to apply the priorities that the Commission established at its retreat. Do you want to talk a little bit about that?
- 231 K. Aylward Certainly. We restructured the RPF this time, actually when I thought about it it actually mimics how state agencies budget. The first question is what do you need for your essential budget level. What do you need just to keep going without any changes in what you do? The second question correlates to policy option packages where if you had the funding what would you like to be able to do? In my view, we absolutely are required to fund the essential budget level. We have to be able to provide this service, so those requirements that are outlined in question one in the RFP, I think we have an obligation to make sure that those levels are met and then beyond that for improvements that people would like to be able to make. The example I gave at the management conference was we think it is very important to have attorneys at shelter care hearings. If there is some reason that they are unable to do it and money fixes - money fixes a lot of things - if we can do that then that kind of thing would be a high priority and likewise a bi-lingual staff. These people know their businesses. They know what they would like to have to be able to do the kind of job they know they should be doing. It has been very frustrating for me personally and for anyone in the system when you talk to someone and they say "Yeah, I know. I just don't have time to do it. I just don't have the funding to do it." This time at least it is going to be a huge relief to be able to say to people "Yes you will in this small measure be able to do some of these things that you couldn't afford to do before." We are trying to target some of the increases into certain case types. If a contractor has a mix of cases they will have felonies, misdemeanor and juvenile cases, a general mix. And an increase, if there is going to be an increase, we are going to use to target primarily juvenile dependency cases. I think in part this reflects the fact that those cases have changed in nature whereas a misdemeanor now is probably not a whole lot different than a misdemeanor five or 10 years ago, juvenile dependency cases have become much more complex and time consuming. They have always been, in my view, much more important than misdemeanor cases. So not only will we be increasing the rates for those case types and address the fact that they actually are more work, but I also hope that it sends a

signal to contractors that this is valuable component of your contract. Basically, “Don’t screw this up. We want this to be the plum bit of your contract so that you will pay attention, know that we give it importance.” A lot of things that we hear about, as Ingrid was saying, where attorneys in dependencies have child clients, they maybe are not devoting as much to that case simply because they are representing a child instead of a parent. We want to make sure we give them an incentive. We send the signal. For contractors who don’t take juvenile cases I imagine we would be putting any increases into Measure 11 cases, the more serious cases.

- 281 I. Swenson Thank you. I would ask Paul to update us on a couple of things next. He has been working on a statewide survey, quality survey for providers and a post conviction relief group to create performance standards.
- 285 P. Levy Thanks, Ingrid. First of all, the site visit process is proceeding on pace. We are on schedule to complete four this year with one to be done yet this year. A very exciting development that I think you have been told about is the formation of a State Bar Task Force to identify performance standards for counsel in post conviction cases. The bar approved the formation of that task force in April and I think today a subcommittee of the Board of Governors is considering a list of 10 really outstanding candidates for the task force that we have assembled including the top post conviction and habeas practitioners in Oregon. Probably nationally the best post conviction and habeas litigator in the country has agreed to participate on the task force, the attorney in charge of the AG’s unit that handles these cases, a judge with experience across the spectrum with these cases, so hopefully the bar will approve our list and we will get to work as quickly as we can on that. I think we were not necessarily asked but we “promised” if that is the right term, the Legislature, the Ways & Means Committee, that we would look at statewide performance of our providers somewhere in there and we have been working on a survey that will be sent to stakeholders, system people throughout the state, to get a baseline measure of performance. We have vetted that survey and have gotten some good input this morning from the Contractor Advisory Group. We will be further refining it and getting it out soon, I hope. Also, on the agenda it says here of course “proposed ethics opinion on workload” and that opinion is no longer proposed, the Board of Governors has adopted that. I talked at some length yesterday at the conference about this and I would be happy to talk about it a little bit more here if you wish, or we could have that discussion some other time.
- 324 Chair Ellis I think it would actually be helpful to circulate the opinion and then maybe at the November meeting if we have questions because otherwise we are just going to spend all day getting you to remember what is in it.
- 327 P. Levy Really and I think the best way to understand this is a careful reading of the opinion. It is nuanced in some respects and I think overall it is very helpful, too. What I have been circulating is a draft. The bar has technical editors who will put the final touches on this and it should be published soon, but I will circulate the draft and will get that to you right away.
- 336 Chair Ellis You can just tell them that nothing in the opinion reaches the Commission as a potential subject of concern.
- 338 P. Levy Yes. The Legal Ethics Committee, in a brief wrong-headed moment, did address OPDS and Commission exposure but we were persuaded, wisely, to limit our discussion to what we really knew about. The Board of Governors on their second examination of this issue I think voted 13-2 to adopt the opinion. That is about all for my report.
- 345 Chief Justice De Muniz Just a question. Is that proposed ethics opinion, well it isn’t proposed anymore, an outgrowth of the ABA opinion?

- 348 P. Levy It is modeled on it. It sites and relies upon the same rules of professional conduct. It is very similar although it is rewritten to address the scenarios in which we provide public defense in Oregon. A PD's office, a consortium and an hourly court appointed lawyer.
- 354 Chief Justice De Muniz I asked the conference of chief justices in late July and early August to take a position on that and the vote went against that, but I thought on very reasonable grounds the chief justices concluded that there were just too many variations in too many states to have a uniform position on it but they were praiseworthy for bringing it to the floor and at least having a discussion about it.
- 362 P. Levy We certainly took that model ABA opinion and molded it a little bit to Oregon's unique circumstances.
- 364 I. Swenson Mr. Chair, the only thing I thought I might update you on unless you have questions is the loan repayment issue. The Commission has followed the federal legislation with some interest and we talked about it this morning at the Contractor Advisory Group. Where we are basically is that Congress has passed, and the President signed, one act and that is the College Cost Reduction Act, which has some potential benefits for public defenders in it. It has to do with deferring payments in the early years of professional employment and then, ultimately - the act used to provide after 25 years of public service they would forgive the balance of your debt. They reduced that to 10 years under this act so it has some potential. It is a very positive development and will help many of these people. It allows them to consolidate their loans so that they can take advantage of these rates under the federal act. An act called the "John R. Justice Prosecutors and Defenders Incentive Act" which, as you know, you and the District Attorney's Association have persuaded all of our Oregon Congressman to sign onto and support, is moving along well. It has passed the Senate and, I would say somewhat optimistically, that people are looking toward possible confirmation in the House by the end of this year. If that happens it is also expected that the President would sign that. It is very possible by the end of this year that that piece will also be in place. The advantage to that is that it focuses on providing loan assistance in the early years of the loan and writing off permanently some part of that debt. Then, of course, we have the Oregon State Bar program in effect and some public defenders are currently benefiting from that repayment plan. As our contractor advisory group discussed this morning, we are going to form a small workgroup of contractors to look at whether or not PDSC funds can be used in some way at this point to supplement what is now or may soon become available under these other acts. There was a very excellent law review article on the College Cost Reduction Act and one piece of it doesn't take effect until January of '09, but the recommendation was that if you are locally looking at some similar plan you might want to postpone any action in doing that because you may prevent people from qualifying for these more comprehensive loan repayment programs. We have a group of four or five contractors who are going to sit down and review all this and look at whether or not the funds which the Commission tentatively looked at approving could be used in some way at this point without undermining the goals of these other acts. We will get back to you on that.
- 416 Chair Ellis I know yesterday you handed out to the OCDLA group the summary of the retreat. I am not sure that has ever been formally approved by this body.
- 420 I. Swenson Mr. Chair, it has not and I wasn't sure necessarily what the appropriate process was. I did send it to each of the four Commissioners who participated to make sure that it accurately recorded their recollection of what happened since we were not tape-recording it, and then put it on the website, but if you would like some formal action by the full Commission we can certainly do that.
- 427 Chair Ellis I think it has some real significance going forward so what I would suggest is why don't you include it in the materials for the next meeting and make sure everybody has it. As far I know

it is accurate. I have reviewed it and I thought it was. It is a curious document and has more interest than 99 percent of what we generate but has not been approved. Anything else?

434 I. Swenson

No not unless there are questions that is where we are.

435 Chair Ellis

Thank you. Thank you Chief. You are excused. Mr. Larry do you want to come forward? If you want to bring the chair up so we can hear you better or if you want to stay back that is alright too.

440 R. Larry

I'm fine. I'm comfortable. Again, I am Robert Larry. I had a case in the Dalles in Wasco County that started back in 2005. It was a Measure 11 which, to be a defendant, facing close to 30 years was a death penalty case, this was something I tried to get across to, I had four public defenders. It was a bogus case with the district attorney in Wasco County. I had done a lot of work in defendant advocacy in Portland. I am past President of the NAACP. I have done work on police brutality and housing issues. Chip, Mr. Lazenby, knows me from some of the issues I have brought to PDC when he was the general counsel at PDC. Just to give you that background I am very focused on what I do when I put the spotlight on something. I had some serious issues with the type of counsel, public defenders, that were assigned to my case. I think the first appointment was through Morris & Olsen, Jack's firm, and that attorney, Lonnie Smith, let me know that he would be taking the whole month of November off. We had a trial date set for December 22. Lonnie wanted to get off the case. Judge Smith and Eric Nisley really pressured him to stay on the case to a point where I told him if he stayed on the case I would file a bar complaint. I have not filed a bar complaint against Lonnie Smith. I don't have any intentions of filing any bar complaint against Lonnie Smith. The second appointment was through, well the attorney was Kevin Hashizume, I filed a complaint with PDSC with regards to Mr. Hashizume, and it was a pretty extensive complaint, well documented. I filed that complaint in March of 2006 and it wasn't until March of this year that I got a response back as far as a decision from PDSC. The complaint was initially written to Ingrid when she was the general counsel and I believe in November or December of 2006 it was transferred to Mr. Levy when Ingrid went to the executive director position. Like I say, the complaint was well documented. When I attended your February 8, 2007 meeting, I had a brief conversation with Mr. Levy about getting the complaint through the system. At that time I was kind of taken aback by a comment from Mr. Levy. He told me that sometimes no decision is the best decision. I told him that he had enough documentation that he was going to make a decision in this particular case. In March of this year he got me a written decision and he acknowledges that Mr. Hashizume had some issues and he made some recommendations, but the tone of Mr. Levy's letter to me, I have not addressed it at this time, but I am going to address Mr. Levy's letter. I think even some of the cases that he cited didn't support what he was saying - that I wanted to run my case. That was not the case. I think there is enough documentation to show that I did everything I could do to get Mr. Hashizume to do something and he just wouldn't move. I know it's a problem doing a *pro se* case. I don't think the state wanted me to do a *pro se* case because I would have embarrassed Eric miserably and anyway, through the OSB complaint process which I will talk about later. I think there are some issues as to how PDSC is looking at complaints from defendants. I think there are issues with the overall commission as to who you think your clients are. When I was talking to Ingrid a little bit earlier she talked about the attorneys as being clients. From a defendant's standpoint, these attorneys are not your clients. Defendants are. They are a byproduct of defendants that are in the system. When I read through these reports and I listened to what is going on in these meetings. You talk about a lot of administrative stuff but you are not really delivering services to the defendants in the State of Oregon. I am just blown away, and I confirmed it again today, when I requested to address the Commission that Ingrid told me that I am the first defendant in the state to ask to be heard by the Commissioners. That just blows me away but tells me something about how business is understood by the Commissioners, also these attorneys. I am a businessman. I understand that I could not do any business if I weren't delivering services to my clients, surveying and doing outreach to these clients. It is not happening here. I understand that you don't want to have

defendants come and rant and rave. That is not my intentions. That is not why I am here. I think you need to hear this. I hate that the Chief Justice had to excuse himself, but I think it is more important that he excuse himself and you have an opportunity to hear what I have to say to you. I could speak on all these attorneys. I won't do that. I will say with all of these attorneys - I had four attorneys - I never gave up any of my rights although these attorneys withdrew. They should have withdrawn. I wasn't going to give up my rights. I understood that. I did a lot of research and that was one of the things that hit home. Giving up your rights and also getting the record clear for appeal, which a lot of attorneys in my opinion - I had four attorneys so I would say 80 percent of them - probably didn't understand that. At some point, in October of 2006, I filed a judicial fitness complaint against Judge Smith and that whole process. I know you don't have anything to do with that, but that is one of the discussions that I want to have with the Chief Justice. There is no transparency there. He recused himself, rightly so, and the state brought in Judge Robert Huckleberry from Lincoln County. I have to say that we went to a trial, a week long trial, and I have to say that Judge Huckleberry is probably the brightest mind that I have had the pleasure spending eight hours a day, five days around, since I have been in the State of Oregon - a very, very smart guy. I am not taking anything from Mr. Gokey but he was probably smarter than Mr. Gokey. Also, I will say that it was not a jury trial. Because I was in the Dalles, when your attorney Mr. Hashizume told me that sometimes they have to go out on the court steps and ask the local bar to get folks to come in and I understand the order of being in Wasco County with the history of bigots and racists, superior minded individuals and groups, so that wasn't going to happen. I had a bench trial. At the end of the state's case in chief, my understanding from Mr. Gokey is Judge Huckleberry called Mr. Nisley and Mr. Gokey into chambers and asked Mr. Nisley "have you ever tried to settle the case." I went to two settlement conferences. One was a complete joke which Mr. Hamalian was involved in and I did everything I could to get the case settled, but in the end I think that one of the things that Judge Huckleberry said to Mr. Nisley and also the complainant in this case, he basically said this complainant was the "biggest liar" - he didn't say "biggest liar" he said "the most non credible witness" he had ever seen in 25 years sitting on the bench. He told Mr. Nisley that in 30 years of being in the profession he had never seen a case like this. This is why it was so bogus. I am going through the complaint process with the Oregon State Bar. I am writing a blueprint for individuals on how to get rid of rogue attorneys and district attorneys. I have filed five complaints against Mr. Nisley so far. When I first talked to the bar they asked me if I would send them a complete packet so they could take a look at it. I basically told them that I wouldn't do that because I understood if they found one thing they could throw the complaint out. What I am doing is going through my case and I'm filing individual complaints for all violations. That is the blueprint that I am talking about. As far as the Public Defense Services Commission, I think there are some issues, there is a lot of stuff here and I put it in this outline just that you understand. I will probably be coming back. I'll probably contact Ingrid and try to work on some of these issues, but there are some things here that I think you should consider. Client outreach, and I am not talking about attorneys, I am talking about defendants in this state. I was treated criminally throughout this whole process until Mr. Gokey came onto my case, and defense attorneys to not understand what happens to a defendant's life while going through this process, and I know all of the attorneys very well. I don't think you do. When I heard the death penalty attorneys back in February do their presentation it was an eye opener for me because I do believe those guys, and I saw it in Mr. Gokey. My case hinged on the investigation and the attorneys, the three attorneys I had before Mr. Gokey, they just weren't getting it. Since Mr. Hamalian is here, I will say that when he took my case I think Judge Smith kind of broadsided him in allowing the time that he needed to prepare, but I also believe that Mr. Hamalian should have recognized the type of case he had and withdrawn.

692 Chair Ellis

What was the charge?

693 R. Larry

Attempted murder, kidnapping, it was like nine charges and all of them were thrown out by Judge Huckleberry. I have a reckless endangerment misdemeanor charge because my six-

year-old son at the time was with me and I took him out of the vehicle when the police were there. But I had a dog, we had just gotten a family dog, his first dog, which was a six-month old Doberman and he was going nuts in the vehicle. I understand what happened. Basically, Judge Huckleberry threw the state a bone in the fact that I was convicted on the misdemeanor. I don't have a problem with that. Moving forward here there are some things that I have done and I will be doing in the future to bring awareness to issues with defendants in this state. One of the things is I think is that the bar rules need to be tightened up as far as, you know, one of the issues I had with Mr. Gokey, and I think Mr. Gokey when you ask him he will probably tell you that I was the best client that he has had. These other attorneys they just weren't getting it because they didn't understand the case. They didn't want to hear the fact that I, as a defendant, understood the situation better than they did. I understand that Mr. Levy doesn't believe that defendants have that right, but in my experience I think if I were doing it again, in fact Judge Huckleberry said, he told my attorney, Mr. Gokey, that I did everything right in my case, to be able to sit here and talk to you today. I do think one of the issues with Measure 11 is that the district attorneys are overcharging. These defense attorneys when they recognize that there are some bogus, malicious prosecutions going on, overcharging, I think they should file bar complaints. One issue I had with Mr. Gokey was he failed to bring Mr. Nisley to have him testify in the case. He said basically I don't want to ruin a guy's career. I don't believe that. If you have a rogue attorney, district attorney, they need to be brought down and if a defense attorney won't file a complaint you are going to have these problems going on forever. I am sure no one in this room can give you any ideas on what to do about Measure 11. Everybody I talked to has the same story. District attorneys have carte blanc to do whatever. I think the situation can be handled and defense attorneys need to look at doing some of these things. I met with the President of Portland Community College Monday and he has agreed to – Portland Community College, Cascade campus, has a law library that just opened up last November and he has agreed to put together a community law class that will teach individuals how to do legal research. That was one of the problems I had even before my case came up, I would get complaints from defendants that were in the prison system, in jail and they had these issues where attorneys would give them copies of paperwork and they basically didn't know what was going on. That happened with me until I educated myself on what I needed to do. That community law class should be coming on line in the winter term. I am also putting together a group to teach individuals about. I understand the thin line of legal practice by someone who is not a bar member, but I do believe that there are enough individuals out there who do not understand the American due process system. I think that defendants really need to understand that, so I am working on putting a group together to do that. Also, I'm working on a cable access show to have defendants come in and talk about issues they are having past and present. I think the state needs to do more. That is pretty much all that I have. There are a lot of items that I didn't talk about. If you have any questions I feel like you can address me as Dr. Larry. With the amount of time that I had to spend doing research I feel like I probably know more than most people in this room having gone through that experience. I say that jokingly but in some respects I know it is a serious joke. If you have any questions or anything feel free to ask.

835 Chair Ellis

Let me just say, I don't know if you have had a chance to review the statute that created this Commission.

836 R. Larry

I have.

836 Chair Ellis

Then you probably saw the provision that says we are prohibited from access to files on individual cases, so we are not able to get into your individual case. I respect your appearance here and I appreciate your coming to us. We will take this into account in terms of our overall work that we do, but we can't get into an individual case.

853 R. Larry

No. I don't think there is anything you can do for me. I think the message is that you should probably be doing some type of outreach or surveying defendants, again as I have sat here and listened to and I know you don't want to hear defendants talk about they have not had any

contact with their attorney or they have only talked to their attorney one time in six months, they are getting ready to go to trial and they are being offered plea bargains that doesn't make any sense.

- 868 Chair Ellis You may be interested to know some of our contractors have a program where they try to get feedback from the defendants they represented on a pretty systematic basis to help them do their job better. I am thinking about a provider in the Roseburg area that I know does that and you have heard Mr. Sermak talk about doing that in the new public defender group that he is heading in Marion, so there is an effort to try to get feedback from those who are the clients of defense lawyers.
- 888 G. Harazabedian I would just add Mr. Chair that not only is there an effort among some contractors but that is in fact one of the best practices that the Qualify Assurance Task, and indirectly this Commission, has put out to contractors in Oregon and that is that one of the best practices is that we should all find ways of surveying clients to see how we are doing just to further emphasize what Chair Ellis is saying.
- 898 R. Larry To that I would say that I think when you say that the contractors should do something, I think it should be directed from the Commission that all contractors have to do something to survey clients. If the Commission is not going to do it then the attorneys who are being contracted should have to do it. If they are not forced to do it they are not going to do it.
- 914 Chair Ellis A lot of them are doing it is what I am saying. Okay.
- 915 R. Larry Okay.
- 918 Chair Ellis Any other questions or comments to Mr. Larry?
- 923 R. Larry Dr. Larry. Thank you.
- 923 Chair Ellis Any other business? If not, I would entertain a motion to adjourn.

MOTION: Chip Lazenby moved to adjourn the meeting; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Attachment 2

Minutes of Public Defense Services Commission Retreat

August 9 – 10, 2007

Coos Bay Oregon

Attending: Barnes Ellis, Shaun McCrea, John Potter, Janet Stevens

Staff: Ingrid Swenson, Kathryn Aylward, Peter Gartlan, Rebecca Duncan, Paul Levy

Barnes Ellis convened the PDSC retreat. The first topic of discussion was the 2007-09 budget.

Ingrid Swenson described the final actions taken by the Legislature on the PDSC budget and expressed appreciation to the governor and the legislators, the chief justice, commissioners, contractors, representatives of law enforcement, the Oregon Criminal Defense Lawyers Association, the Oregon State Bar and others who supported increased funding for public defense in the 2007 session.

Kathryn Aylward reviewed the final budget allocations to OPDS's Contract and Business Services Division, its Legal Services Division and to the Public Defense Services Account. She explained the major components of the budget and identified funds that could be used to increase compensation for providers.

Barnes Ellis then invited the contractors who were present to supplement the materials that had been provided prior to the commission retreat regarding funding priorities. He then summarized all of the submissions and identified fourteen proposed priorities:

1. Increase the hourly rate
2. Provide an across-the-board inflationary adjustment
3. Mitigate rate disparities within the same markets
4. Reduce caseloads
5. Subsidize providers in areas unable to attract/retain needed attorneys
6. Subsidize providers in counties where the difference between public defender and district attorney compensation is the greatest
7. Fund a student loan repayment program
8. Increase investigator compensation
9. Increase death penalty mitigator compensation
10. Fund a pilot project for juvenile dependency cases
11. Increase funding for non-profit public defender offices
12. Allocate resources to improving representation in PCR cases
13. Allocate resources to improving representation in death penalty cases
14. Allocate resource to improving representation in juvenile cases

Commissioners then discussed these proposals and their implications.

Hourly rate: Overall, the hourly rate service delivery model has become limited compared with service delivery on a unit basis by public defenders or consortia. Thus, while some groups would receive the benefit of an increase in the hourly rate, the impact would be limited and uneven. However, since the Legislature supported the hourly rate increase it is important for the Commission to follow through with it. Experience is tending to show that the unit based service delivery model is more desirable than the hourly rate model, both for OPDS for whom the expense per case is more predictable and for contractors whose income is more reliable. In the next biennium it is expected that the number of attorneys working on an hourly rate basis will decline.

Inflationary Adjustment: An across-the-board inflationary adjustment was proposed by OCDLA and supported by a number of the contractors.

Mitigation of Rate Disparities: The Commission discussed the history of rate disparities and its effort last session to begin to mitigate them despite very limited resources. As to disparities between public defender offices and other contractors, public defender offices generally cost more but they perform essential training, provide leadership in the community and can't supplement their income with retained work. Nevertheless, the case has been made that some consortia have been undervalued. Since the commission wants to retain consortia which provide good quality representation, their needs must be addressed. Each prospective contractor should seek contract terms that meet its individual needs and not expect rates to be uniform statewide or even within a single region.

Reduced Caseloads: If case rates were increased and case numbers remained the same, some consortia might eliminate attorneys in order to increase compensation per attorney rather than reduce the caseloads of its attorneys. It is not PDSC's role to try to maintain a particular number of attorneys if the caseload declines. If the number of cases declines, however, it could well be appropriate for contractors to maintain their current staff with lower caseloads or reduce staff and increase compensation. With early disposition programs resolving many of the less complicated cases in some jurisdictions, the cases that remain for adjudication are more complex and difficult and the rates for these cases may need to be increased. In the past public defense providers have been told that they needed to take more cases if they wanted more money. That will not be the case in this contract cycle. There may not be additional cases to be taken and the commission needs to establish case rates that accurately reflect the cost of doing business. If either caseloads or compensation rates increase beyond the levels budgeted for them by the Legislature the commission may have to seek supplemental funding to meet its obligations.

Attracting and Retaining Attorneys: A variety of strategies are needed to assist public defense providers in attracting attorneys to their areas and retaining

them once they have been trained and become experienced in criminal or juvenile law.

Addressing Salary Differential between Public Defenders and District Attorneys: Reducing salary differentials is one strategy that could be used in some areas to attract and retain attorneys. In other areas parity with the district attorney's office will be less critical.

Loan Repayment Assistance Plan: In October of 2006 the Diversity Task Force proposed that the Commission create a loan repayment assistance plan that would provide assistance of \$5,000 per year to lawyers at the lower end of the pay scale who have significant loan repayment obligations. Such a program could help attract and retain younger lawyers and lawyers with various cultural competencies such as fluency in Spanish or ties to minority communities, and could be used as an incentive to attract lawyers to geographically remote areas of the state as well. For attorneys who work less than full time on public defense cases, the amount of the grant could be made proportional to the portion of the attorney's time devoted to public defense. A limited program could be initiated by the Commission and, if it were found to be successful, grants and other funds could be sought to expand the program.

Increases for Investigators: Investigators who work on privately retained cases are paid significantly more than investigators on public defense cases. Rates for public defense investigators have not been raised in many years, and there are insufficient numbers of some types of investigators, such as mitigators in death penalty cases, to handle the caseload.

Pilot Projects: A pilot project in two or more counties that included reduced caseloads and increased compensation for juvenile dependency lawyers could help OPDS establish that implementing these changes statewide would result in improved representation which could in turn result in significantly better outcomes for clients and possible savings for both the child welfare system and the courts.

Increased Funding for Post Conviction Relief: High quality representation in post conviction relief cases is critical to preserving clients' access to the federal courts but there have long been concerns about the quality of representation in this area. It is anticipated that it will be at least two years before the Legal Services Division will be in a position to undertake a new category of representation such as trial level post conviction relief. In the meantime OPDS has been able to obtain the services of some highly skilled lawyers to handle part of the caseload and will be seeking the services of others.

Increased Funding for Death Penalty Representation: OPDS may need to extend contract offers to more providers, since many death penalty attorneys will probably be unwilling to work for the \$60 per hour rate proposed for adoption by

the Commission. In addition, current death penalty contractors have not had a rate increase for a significant period of time and may seek increases in this contract cycle.

Improved Representation for Juveniles: In addition to the possible pilot project discussed above the commission was asked to consider the creation of a certification program for juvenile lawyers that would provide enhanced compensation for attorneys who received certification as juvenile law specialists.

At the conclusion of the discussion about recommended budget priorities, individual commissioners were asked to assign a numeric value from 1 to 10 to each of the proposed priorities. At the conclusion of this process the commission endorsed the following as its principle priorities for expenditure of funds from the Public Defense Services Account in the 2007-2009 biennium.

1. Increase in the Hourly Rate for Attorneys and Investigators/Mitigators. The rate for attorneys in non-death penalty cases will be increased from \$40 to \$45 per hour and the rate in death penalty cases will be increased from \$55 to \$60 per hour. The hourly rate for investigators will be increased from \$25 to \$28 per hour in non-death penalty cases and from \$34 to \$39 per hour for investigators/mitigators in death penalty cases. Increased attorney rates will apply to work performed on or after August 10, 2007. Increased investigator rates will apply to authorizations approved on or after August 10, 2007. (The Commission reconvened its regular meeting which had been recessed on August 9th and approved implementation of the hourly rate increases with all four commissioners present voting in favor of the proposal.)
2. Inflationary Adjustment. All contractors, including the Marion County Association of Defenders, but excluding the Yamhill Defense Consortium, will receive at least a 3.1% increase this biennium in contracts executed after January 1, 2008¹.
3. Mitigation of Rate Disparities. The Commission directed the Office of Public Defense Services to work towards mitigating rate disparities in any markets in which the disparity would jeopardize OPDS's ability to retain desired contractors. Non-profit public defender offices provide services that consortia do not and rate disparities between public defender offices and other types of contractors may, therefore, remain. Rate disparities between public defender offices within the same market providing similar services should be mitigated.

¹Yamhill Defense Consortium attorney are compensated on an hourly basis and will realize an increase exceeding 3.1% effective August 10, 2007.

4. Reduction in Caseloads. The Commission disapproves of the concept that contractors must take more cases in order to receive increased compensation. This practice had led to contractors handling caseloads higher than those recommended by national standards. If funds are available to do so, when OPDS is satisfied that increasing the unit value would result in an actual caseload reduction for the attorneys it may increase that value. OPDS should not agree to caseloads that jeopardize the contractor's ability to provide quality representation. In the spring of 2008, the Commission will conduct a review of public defense caseloads in Oregon.
5. Subsidize providers to help attract and retain qualified attorneys.
 - (a) OPDS staff is to prepare a proposal for creating a loan repayment program that will help providers attract and retain attorneys in underserved areas of the state and assist in serving other recruitment needs such as attracting culturally competent attorneys. The proposal should address how a fund of approximately \$100,000 could be used to create a loan repayment assistance plan, what the annual amount of the award per attorney would be, whether it would be available only to full time defenders, what the financial eligibility requirements would be, whether there should be a limit on the number of years for which an attorney would be eligible to receive the award, how the program might be designed to avoid conflict with other loan repayment assistance plans that are in place or may become available.
 - (b) In those areas where it is difficult to attract and retain qualified attorneys, it is appropriate for OPDS to increase compensation rates.
 - (c) If public defender offices have difficulty attracting and retaining qualified attorneys because of a pay differential with the local district attorney's office, OPDS may work to minimize that differential.

The Commission reviewed and discussed new Key Performance Measure Nos. 8 and 9. OPDS will review the agency's existing performance measures and recommend changes to the measures in order to make certain that they address the key functions of the agency, including maintaining the capacity of the public defense system and improving the quality of the services provided.

The Commission reviewed and approved the proposed amendments to the PDSC Strategic Plan for 2007-2009.

Attachment 3

**OPDS's Draft Report to the Public Defense Services Commission
on Service Delivery in Judicial District No. 6
Umatilla and Morrow Counties
(November 7, 2007)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004 to 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Washington, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of Umatilla and Morrow Counties' public defense system undertaken in preparation for the PDSC's public meeting in Pendleton on Wednesday, November 7, 2007. The final version of this report will contain PDSC's service delivery plan for Judicial District No. 6.

PDSC's Service Delivery Planning Process

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and the criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams have visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole criminal and juvenile contractor in Benton County. Another site visit is planned for Columbia County in December of 2007.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and developed a statewide Service Delivery Plan for juvenile representation.

In 2007 PDSC undertook to review the delivery of public defense services in

death penalty cases. A final plan for providing services in these cases was approved by the Commission in June of 2007.

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

“Structure” versus “Performance” in the Delivery of Public Defense Services

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service delivery planning process. That process is aimed primarily at reviewing and improving the “structure” for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into “best practices,” recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.¹ A public agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

Most of PDSC’s other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the “performance” of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time to time in the course of the Commission’s service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission’s deliberative processes. OPDS, with advice and

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

assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

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

Organizations Currently Operating within the Structure of Oregon's Public Defense Delivery Systems

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense

services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated regions. In either case, PDSC expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, administer specialized internal training and supervision programs for attorneys and staff, and ensure the delivery of

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

effective legal representation, including representation in specialized justice programs such as Drug Courts and Early Disposition Programs. As a result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

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

Consortia offer the advantage of access to experienced attorneys who

³ Id.

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

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

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

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

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually

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

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

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

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

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

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

for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation in Judicial District No. 6

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

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

On November 7, 2007 from 9:00 a.m. to 1:00 p.m., PDSC will hold a public meeting in Room 316 of the Umatilla County Courthouse in Pendleton, Oregon. The purpose of that meeting will be to (a) consider the results of OPDS's investigation in the district as reported in the preliminary draft report, (b) receive testimony and comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the county's public defense system and services, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Judicial District No. 6.

The initial draft of this report is intended to provide a framework to guide the Commission's discussions about the condition of the public defense system and services in the district, and the range of policy options available to the Commission – from concluding that no changes are needed to significantly restructuring the district's delivery system. The initial draft is also intended to offer guidance to PDSC's invited guests at its November 7, 2007 meeting, as well as the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving Judicial District No. 6's public defense delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the justice systems in these two counties is the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Judicial District No. 6.

OPDS's Findings in Judicial District No. 6

Judicial District No. 6 is comprised of Umatilla and Morrow Counties. There are three courthouses in the district, two in Umatilla County (Pendleton and Hermiston) and one in Morrow County (Heppner).

There are five judicial positions in the district, increased from four in 2006.⁴ Judge Garry Reynolds is the presiding Judge. He and Judge Jeffrey Wallace are assigned to the courthouse in Hermiston.

Judge Daniel Hill and former District Attorney and now Judge Christopher Brauer are assigned to Pendleton, as is the family court judge, Judge Ronald Pahl, who also serves as the drug court judge in Pendleton. (Judge Reynolds serves as the drug court judge in Hermiston.)

The judges are assigned to cover the court in Heppner on a rotating basis.

Hermiston is approximately thirty miles from Pendleton and Heppner is approximately seventy. A map of the region is included as Exhibit A.

The Umatilla County Jail houses prisoners from both counties.

Umatilla County

The population of Umatilla County in 2006 was 72,190. Funding for county services has been relatively stable in recent years. The county is served by twelve separate law enforcement agencies.

Since the completion of a new courthouse in Hermiston all categories of cases, including murder cases, are being assigned to the Hermiston court if they arise in the western area of the county. Because this is the area in which most of the growth in the county is occurring it is expected that the caseload handled by the Hermiston court will continue to grow.

⁴ In an effort to describe the workload in the district, it was reported by the Judicial Department that there were 1,516.8 cases of all types including violations filed per each judicial position during the period of January 1 to June 30, 2007. There were 697.8 cases per judicial position if violations are excluded. The statewide average without violations for this period was 1,008. During the same period one felony and 4 misdemeanors were tried in Morrow County and 27 felonies and 41 misdemeanors in Umatilla.)

Procedure in criminal cases

In criminal cases, each judge maintains his own docket and whichever judge presides over the arraignment schedules all future appearances for his own courtroom. Attorneys are present for arraignments. (Both the attorney and the defendant are at the jail during in-custody arraignments, while the judge and the district attorney are in the courtroom; all are in the courtroom for out-of-custody arraignments.)

A pretrial conference is scheduled in every case for approximately six to eight weeks after arraignment in order to track progress in the case, determine whether discovery has been provided, schedule motions, etc. Except for custody cases, a trial date is set only if the attorneys indicate that the case will be going to trial. A trial readiness appearance is calendared three to five days before trial.

With respect to the quality of representation being provided in criminal matters by PDSC's two contractors in the area Judge Reynolds said that the attorneys for both contractors work hard at what they are doing and, despite having to cover cases in multiple courts, they are providing good services.

The District Attorney

Dean Gushwa is the District Attorney of Umatilla County. He currently has five deputies but is recruiting for several more. His office must staff both the Hermiston and Pendleton Courts five days a week. Despite short staffing, this office continues to prosecute some types of offenses, such as failures to appear and drug residue cases, which some district attorneys have chosen not to pursue when resources are scarce. In addition, Mr. Gushwa said that his office pursues the death penalty in every case in which the grounds for charging aggravated murder are present and does not decide whether it will actually seek a death sentence until all the evidence has been presented in court.⁵ As of October 30, 2007, there were 7 aggravated murder cases pending in Umatilla County (out of a total of 48 statewide).

Drug court

Umatilla County operates a drug court in both Hermiston and Pendleton. Each meets once a week. The first graduation ceremony occurred in the late summer of 2007. As of September, 2007, the program had 44 participants, half of whom were women. The program has a maximum capacity of sixty. The program works with medium and high risk offenders, including those charged as repeat property offenders, and provides extensive support for participants, including

⁵ This approach can be very costly for PDSC since every client must be provided full ABA-compliant representation throughout the pretrial and trial proceedings even though the state may ultimately determine that it will not be asking for a death sentence.

anger management counseling and job skills training, as well as drug treatment. The drug court reportedly has very few Hispanic clients. Staff believes this is because many of the Hispanic defendants are one-time offenders and conditional discharge is often a better option for them.⁶

The program just received a Bureau of Justice Assistance grant to expand coverage to clients in the Milton Freewater area, to add an on site GED program and a mental health treatment component, and to fund research to assess the impact of the program.

The District Attorney believes the drug court is working and attributes the declining number of misdemeanor offenses to the intervention of the drug court.

Doug Fischer, the administrator of the Intermountain Public Defender Office, has been an active participant in the development and operation of the court and sits on its steering committee. One attorney is assigned to staff the court and represent all of the clients who participate.

Attached as Exhibit B is a document describing the court and its operation.

Some attorneys with the Blue Mountain Defender consortium are reported to discourage clients from participating in drug court. The consortium administrator, Craig Childress, explained that, although the program might be appropriate for some clients it is not appropriate for clients who are likely to fail since applicants are required to plead guilty to all outstanding charges as a condition for admission to the program,⁷ and may not withdraw their pleas even if found ineligible for the program.

While program rules require applicants to waive indictment and stipulate to laboratory reports, clients are not required to plead guilty to any charges until they are accepted into the program. They are then required to plead to all counts in the information. Other pending charges may be brought into drug court, but if the client wants them included, he or she must also plead guilty to all charges in those cases. If the client successfully completes drug court, all of the charges are dismissed. If the client does not successfully complete the program, the court proceeds to sentencing on all counts. If an applicant is not accepted for drug court, he or she is still entitled to a trial on the charges alleged in the

⁶ For non-citizen clients, even a conditional discharge may be treated as a “conviction” of a drug offense by the federal government, which can lead to exclusion and/or deportation from the United States. District attorney diversions, on the other hand, may not be considered convictions for this purpose.

⁷ The Umatilla County drug court model may be unusual in this regard. Attorneys in other counties report that plea discussion and negotiation is often part of the process of admission to drug court. If a guilty plea is required, in some counties it may be to a single charge. In counties that do not require guilty pleas, the defendant is instead generally required to stipulate to the admission of certain evidence.

information but is bound by the stipulation relating to the laboratory findings.⁸ Program representatives say that they work hard to keep clients in the program, that relapses are understood to be a part of treatment and that if clients are honest with them, they will do everything they can to help them succeed.

Juvenile cases

Judge Ronald Pahl is the family court judge. All juvenile proceedings in the county are held in the Pendleton courthouse.

The district attorney's office assigns a deputy full time to the juvenile department; this deputy files all the petitions in dependency cases and represents the state in delinquency proceedings as well. A secretary in the juvenile department prepares subpoenas, summonses, and other documents in dependency cases.

Procedure in dependency cases

Initial appearances in juvenile matters occur in the afternoon, as needed, which is approximately one to two days per week. About a year ago, Judge Pahl, working with the contract firms and DHS, instituted the practice of having attorneys appear at shelter hearings.⁹ A mediation session is scheduled in every case approximately forty-five days after the initial shelter hearing. The county was able to fund this program when support from the Juvenile Court Improvement Project ended in 2005. Approximately half of all dependency cases were formerly being resolved at mediation. One representative of the state indicated recently, however, that the program may be in jeopardy because some attorneys decline to participate.¹⁰

Occasionally, attorneys do not become aware of conflicts until the mediation session. Substitution of new counsel at this stage can significantly delay the proceedings.

The court conducts reviews in dependency cases annually. The Citizen Review Board reviews cases every six months.

The CASA coordinator reported that as of September there were eighteen active CASAs working with eighty children in foster care. CASAs are not appointed until in Umatilla County until approximately thirty days after shelter hearing.

⁸ During 2008 the Commission will review drug court operations around the state, focusing on the role of counsel in each county and will consider whether it should issue guidelines for participation of public defense attorneys in this specific type of early disposition program.

⁹ This practice has largely resolved a problem brought to OPDS's attention in the past, of some attorneys not meeting with their clients prior to the mediation session.

¹⁰ Two attorneys associated with the Blue Mountain Defender consortium were identified as being unwilling to permit their clients to participate.

Comments on representation in juvenile dependency cases

One juvenile system participant said that she is concerned that many attorneys are not meeting with their child clients regularly, or sometimes at all. She could name only two attorneys who visit their child clients regularly, one at IPD and one at BMD. The attorney who represents children in most of the dependency cases does not appear to have contact with them, although it was reported that in the past month he has made efforts to do so.

One juvenile system representative said that although attorneys regularly attend CRB hearings or send representatives, most of them do not participate. They take notes but do not provide any information to the board. They appear not to have information about child clients, and, if they have it about parents, are not providing it. There are two attorneys, one from each contract provider, who are always prepared and make effective presentations on behalf of their clients. If they cannot attend they normally send detailed information in writing.

Judge Pahl said that in cases subject to the Indian Child Welfare Act it might be helpful to provide some training to the attorneys about how to use the act to their clients' advantage.

Additional comments regarding quality of representation are set forth below with respect to each of the contractors.

Procedure in delinquency cases

Attorneys are present for shelter hearings in delinquency cases. They are appointed in only about half of the cases, however, with the other half waiving counsel and generally resolving their cases proposed by the juvenile department at the initial hearing. The juvenile department reports that it diverts most first time offenders out of the court system.

The juvenile department in Umatilla County has six probation counselors, one assigned to intake and one to sex offender supervision. The other four are field officers. A representative of the department said that they maintain good working relationships with defense attorneys, although the district attorney's office does not permit them to talk directly to defense attorneys about their cases. There are few juvenile delinquency trials; the department representative indicated that only about five cases had been tried in the previous year.¹¹ Motions are filed only occasionally.

The local detention facility has 24 beds; only 15 are currently staffed and 11 or 12 of these are generally rented to other counties. The region recently received a Casey Foundation Juvenile Detention Alternative Initiative (JDAI) grant. Judge

¹¹ OPDS received only three requests for non-routine expense approvals in juvenile delinquency cases from Umatilla County in the one year period beginning October 1, 2006.

Pahl and Chuck Belford, the director of the juvenile department, attend national JDAI meetings. Members of the defense bar have also been active participants. Umatilla County is also seeking to become a model court site through the National College of Juvenile and Family Court Judges. Judge Pahl noted that there are few local resources available for adjudicated youth. They often use resources in Spokane, Yakima and Bend. There is a multi-treatment center in Umatilla County but it is not appropriate for all.

With respect to minority youth in the county, one juvenile system representative said that one of the local police agencies sites minority youth in disproportionate numbers. It is hoped that this practice can be addressed through the JDAI.

There is a significant population of non English-speaking Hispanic youth, especially in the West end of the county. The juvenile department has one Spanish speaking juvenile court counselor but treatment resources are scarce for this population.

Comments on representation in delinquency cases

The director of the juvenile department said that there might be a need for more attorneys to handle delinquency cases. Attorneys sometimes come from Union County to take cases that cannot be handled by the local attorneys but this can result in delay due to scheduling issues and travel time for these lawyers. He also said that caseloads may be too high or lawyers may be devoting too much of their time to other cases. Some attorneys are not meeting with their clients in a timely way¹² and don't appear to be able to give priority to their juvenile cases.

Judge Pahl said that he would like to see attorneys do more research on dispositional alternatives and present a plan in each case.

Public Defense Providers

Intermountain Public Defender¹³

Intermountain Public Defender (IPD) is a private non-profit corporation that contracts with PDSC for 100% of its legal services. The IPD office is located in downtown Pendleton, two blocks from the courthouse. The office was founded in 1994 and currently has eight full time attorneys, including its Executive Director, Doug Fischer. The office employs both clerical and investigative staff. It contracts to handle all case types except for aggravated murder and post-conviction relief cases. Under the current contract IPD has agreed to handle

¹² One local attorney said that the juvenile department needs to improve its communication with defense attorneys. Attorneys aren't always notified when their clients are taken into custody or when there are other important developments in the case.

¹³ A copy of IPD's response to OPDS's questionnaire for public defense offices is attached as Exhibit C.

4,944 cases over the two-year period ending December 31, 2007. IPD is paid \$1,000 per month for representing clients in drug court and also receives a stipend for travel expenses. In the past IPD was paid \$357 per case, regardless of case type. A change to a rate structure based on the value of different types of cases resulted in a revenue increase under the 2005-2007 contract. In the past IPD has reported that 89% of contract funds were expended for salaries and benefits, and only 11% for overhead. The office provides health insurance and funds a pension program (10%) for all employees and pays bar dues and NACDL and OCDLA membership for the attorneys.

The office has a four-member board of directors, two of whom are attorneys in private practice, one is a retired judge and one is an accountant. The board's primary function has been to insure financial accountability. An auditor reviews monthly bank statements and performs an annual audit. The Board meets annually to review the audit results and at such other times as needed.

IPD adopted a written personnel policy manual in 2005. It has no formal performance evaluation process, however. IPD reports that performance evaluation is an on-going process at IPD. Management receives input from judges, court staff, the district attorney and others. Concerns are evaluated and discussed with the individual in question. On rare occasions employees have been encouraged to seek other employment.

Despite having hired a number of new employees over the last several years, IPD does not appear to have a formal orientation, training or mentoring program, other than its "open door" policy under which new staff are encouraged and expected to seek advice from more experienced staff. IPD does fund fifteen hours of CLE credits for each attorney every year. IPD also maintains a library and provides access to online legal research tools to its attorneys.

IPD case management

IPD attorneys appear at criminal arraignments. Discovery is not always available at this time. In most cases, an investigator makes initial contact with in-custody clients within 24 hours of appointment. Upon receipt of discovery, clerical staff reviews the police reports and checks for potential conflicts. The attorney then receives the file. If no conflict is found, a letter, including both an appointment time and the next court date is then sent to the client. If withdrawal is appropriate, a motion is filed immediately. .

Cases are assigned on a case-weighted basis in order to balance the workload among the attorneys and give each of them cases consistent with their experience.

IPD covers drug court in Pendleton and shares coverage of the Hermiston drug court with Blue Mountain Defenders.

Comments on quality of representation by IPD

While many people interviewed for this report had very positive things to say about IPD's "turn around" and about the good work it does on many cases, about its training of new attorneys, about its preparation in criminal cases and aggressive representation of clients, and about the representation it provides in the special courts, it also appears that IPD may have some significant quality issues to address.

All of the following concerns were mentioned by one or more of the persons interviewed for this report: clients continue to complain that they are not able to reach their attorneys,¹⁴ especially juvenile court clients;¹⁵ juvenile system representatives say that most IPD attorneys appear but do not participate in Citizen Review Board hearings, and that some attorneys have no contact at all with child clients.¹⁶ Another juvenile system representative said that one IPD attorney, who is not a bad attorney, can be very difficult to reach, even on urgent matters affecting his clients, and failed to see one of his clients for six months following his appointment.

Some of these commentators believed that quality problems were probably related to workload and that the attorneys often appear to be "swamped."

Blue Mountain Defenders

The Blue Mountain Defender consortium (BMD) was founded in 2005, succeeding to a caseload previously assigned to the Umatilla/Morrow Defense Consortium. The administrator of the BMD consortium is Craig Childress. There are eight other attorneys identified in the 2005-2007 contract as being included in the consortium.

BMD contracted with PDSC for the two year period ending December 31, 2007 to handle a mixed caseload of 2600 cases. The consortium's case mix is similar to that of IPD, except that BMD does not receive appointments in murder cases.

BMD did not provide a description of its current operating structure other than to say that for the last two years it has operated as a small public defense firm with subcontracting lawyers taking a few selected case types according to individual

¹⁴ One former IPD attorneys said that the court requires clients to contact their attorneys regularly and, since IPD does not have voicemail, people may be trying to contact them after hours without success.

¹⁵ One juvenile system representative suggested that IPD attorneys meet with their clients immediately after the shelter hearing to schedule an appointment with them rather than trying to contact them later by phone or letter.

¹⁶ This has been a common concern in many parts of the state. OPDS recently sent to its contractors a statement outlining OPDS's expectation with respect to representation of children. A copy of this statement is attached as Exhibit D.

members' needs and limitations. It appears that Mr. Childress and another consortium member, Dan Stephens, devote almost 100% of their time to public defense cases and consider themselves to be sole members of BMD. Other attorneys associated with the consortium are considered "outside attorneys" and are reported to devote between 20 and 80% of their time to public defense cases. It is not clear whether this distribution is based on the preferences of all concerned. Mr. Childress has acted as the administrator of the consortium and OPDS's contact has been exclusively with him.

BMD has drafted a proposed set of bylaws that would become operational if it were awarded a contract beginning in 2008. Under the bylaws, there would be a board of three to seven directors, including five members of the consortium. A retired Oregon State Police officer and a community activist are being considered for appointment to the board as lay members. The consortium administrator would serve on the board for an initial three year term although the bylaws also indicate that his term as an officer would be for five years and would permit him to be removed only for cause.¹⁷ Other members would be subject to removal by a vote of two thirds of the directors then in office.

Currently, the consortium administrator and his staff person receive 5% of the total monthly payment to the consortium for their administrative duties.¹⁸

The administrator submitted written responses to questions regarding the structure and operation of the consortium. A copy of this document, along with the proposed bylaws is attached as Exhibit E.

OPDS received many positive comments about BMD. The judges praised the general level of representation provided by BMD attorneys and the level of experience they bring to their work. Court staff is appreciative of the consortium's management of its cases.

Two consortium attorneys were identified as being particularly skilled trial lawyers and two were noted to provide superior representation in juvenile court cases although neither of the latter appeared to be assigned many juvenile cases.

Concerns were expressed by a number of people about the practice of the consortium administrator the other attorney who works in the same office¹⁹

¹⁷ Mr. Childress explained that because he gave up other employment to plan and organize the consortium, his role as executive director is preserved under the proposed bylaws for at least three years.

¹⁸ It is not clear whether the 5% is in addition to or includes the \$7,500 line item for administration in the PDSC contract with BMD.

¹⁹ A number of the justice system representatives who were interviewed expressed concern about at least the appearance of impropriety when attorneys representing co-defendants or other parties to a single proceeding share office space, and in some cases, have common law office staff. It is undoubtedly a struggle in small communities for lawyers to find affordable office space and consortia members in a number of counties share space and often some office equipment.

appearing to take the same position on nearly all of the cases in which both are involved, even when their clients' interests appear to be very different.

Concern was also expressed by a number of juvenile system representatives about Mr. Childress assigning to himself most of the child clients in juvenile dependency cases. One child advocate said he did a "pretty good job," but others reported that he sometimes does not know the names or ages of the children he represents, generally sits through trials without making an opening or closing statement on behalf of his child client or asking any questions of the witnesses, and that until very recently failed to meet with child clients, including adolescents who were capable of considered judgment.

One observer said that Mr. Childress and the other attorney in the BMD office are extremely disrespectful to DHS representatives in the courtroom, at CRB reviews and during mediation sessions. This observer said that the behavior of these attorneys is not just unusually adversarial. In her opinion it is unprofessional and works to the detriment of some clients.

Hourly paid attorneys

Some attorneys in the area expressed an interest in handling public defense cases on an hourly basis but it is rare that there is a need to appoint a non-contract attorney. These attorneys do not want to participate in the current consortium, however. In addition, a court representative said that there are capable attorneys in the area who could do excellent work in public defense cases but they are not available to the court for appointment because they are not part of the consortium.

Morrow County

The population of Morrow County in 2006 was 12,125. Funding for county services has been less stable in recent years in Morrow County than in Umatilla. There are some economic development projects underway that may improve the economy. Ground will soon be broken on a speedway in Boardman and a new ethanol plant has recently been completed.

There are two law enforcement agencies in the county, the Morrow County Sheriff's Office and the Boardman Police Department.

The sharing of staff creates the greatest risk for jeopardizing the confidentiality and secrets of public defense clients among attorneys who represent parties with opposing interests in the same or related proceedings. Ethics Opinion 2005-50 indicates that staff in such circumstances should not open mail, receive telephone calls or review client information in any case in which two attorneys represent parties with opposing interests. Mr. Childress provided OPDS with a detailed description of the staffing at his office and the steps that he and Mr. Stephens have taken to protect client confidences. As of January of 2008 Mr. Stephens plans to relocate his office to Hermiston.

Elizabeth Ballard is the district attorney. She has been in office for approximately a year and served as a deputy district attorney for three years before becoming the district attorney. She currently has no deputies.

Criminal cases²⁰ are scheduled in Morrow County every Thursday and sometime on Friday although the court hears primarily civil matters when it is in session on Fridays. It can be difficult to conduct trials with so little court time available.

BMD attorneys handle almost all of the cases in Morrow County and have assigned a single attorney to cover most of these matters. This attorney appears in person for criminal arraignments and other matters on Thursdays. On other days she appears by video connections. The round trip distance between Pendleton and Heppner is 144 miles.

Both Judge Reynolds and District Attorney Ballard indicated that the BMD attorney who handles most of the cases in their county does a very competent job. She is generally prepared, is in good communication with the court and the state, and provides vigorous representation to her clients.

Juvenile matters are heard in the county court in Morrow County and, consequently, public defense providers are paid by the county, not OPDS.

OPDS's Recommendations for Further Inquiry at PDSC's November 7, 2007 Meeting in Pendleton

In light of the information which came to its attention during interviews with representatives of the juvenile and criminal justice systems in Judicial District No. 6, OPDS recommends that the Commission focus its inquiries and discussion at the November 7 meeting in Pendleton on the following topics.

Structural Issues

The number and types of providers in Judicial District No. 6 appear to be appropriate ones. The public defender's office is the principal provider and does much of the training of new defenders in the area. It offers leadership in other areas, including participating in the planning and operation of special courts such as the drug courts. Doug Fischer serves on the Local Public Safety Coordinating Council and meets regularly with judges and the district attorney to keep abreast of developments and to monitor the quality of the work IPD lawyers are doing.

A well managed consortium is often the best alternative provider in an area the size of Judicial District 6. It can add members as needed and provide members

²⁰ A total of 350 credits were claimed by BMD for the period of January 1, 2006 through September 30, 2007.

with flexibility in terms of the amount of time they are able to devote to public defense representation.

There may be structural issues within each of these particular providers, however, that need to be addressed. Both face significant challenges as they adjust to the increased proportion of the caseload that is now assigned to the Hermiston court. One of the judges said that both providers probably need additional attorneys to staff the two courthouses.

Within IPD, greater stability is needed so that the office does not have to devote significant amounts of time and resources to recruiting and training new attorneys. The budget priorities developed by the Commission at its August retreat can be used in the current contract negotiations to help IPD identify retention strategies. Other issues that need to be addressed include creating a more formal training process for new and experienced lawyers. While the current “open door” method of training attorneys may be working in criminal cases, there are significant issues regarding the quality of representation provided in juvenile cases. It may be that even experienced attorneys are not well trained in this area of the law. If additional resources are needed to provide such training this too could be discussed in contract negotiations. Please see the further discussion of this issue below.

BMD appears to be managing the consortium’s workload to the court’s satisfaction. It is just beginning, however, to work on internal structural issues. Fortunately, there are excellent models in the state for the effective organization of consortia. Among the major issues that need to be addressed are the roles of the consortium administrator and the other members in the design and operation of the consortium. If the administrator distributes the cases, do the members receive appropriate shares of the caseload and the opportunity to handle cases of interest to them? What should be the criteria for admission? How will the consortium monitor the quality of members’ work? How will it address underperformance? Are there qualified attorneys in the area who should be recruited to become members of the consortium? As OPDS applies the Commission’s budget priorities in this contract cycle, how can it best ensure the stability of the organizations it is funding? Can it assist BMD to address some of its structural issues? Is a two-year contract appropriate before essential structural issues are resolved or should the current contract be extended for period of time to allow for resolution of these issues ?

Comments about representation provided by BMD attorneys indicate that some of its lawyers excel in trial work, others in juvenile representation. How can these highly skilled consortium members share their expertise with others? What kinds of training, coaching, mentoring can the consortium provide to its members?

Representation in Juvenile Cases

In both delinquency and dependency cases, juvenile system representatives noted significant deficits in the representation provided by attorneys at both IPD and BDS, although as noted in the draft report there are attorneys in both groups who do excellent work. OPDS believes the training tools are available in Oregon for lawyers in all parts of the state who seek to provide high quality representation in juvenile cases. There are frequent CLE events, some offered without cost, that focus on juvenile representation. There are websites and list serves. There is bi-monthly newsletter sent to all OPDS contractors devoted to developments in juvenile law. OPDS's general counsel is available to work with providers to help them identify their particular training needs and available training options. OPDS will also be talking directly with contractors in current contract negotiations about how they plan to comply with client contact and representation standards outlined in the "Role of Counsel for Children."

Drug Courts

In Umatilla County it appears that at least some members of the defense bar believe that most clients eligible for the drug court would not be well served by participation in the program. In 2008 the Commission should review drug court models from around the state and the role of defense counsel in those courts. Based on its review, the Commission may wish to establish guidelines for counsel in these cases.

Exhibit A

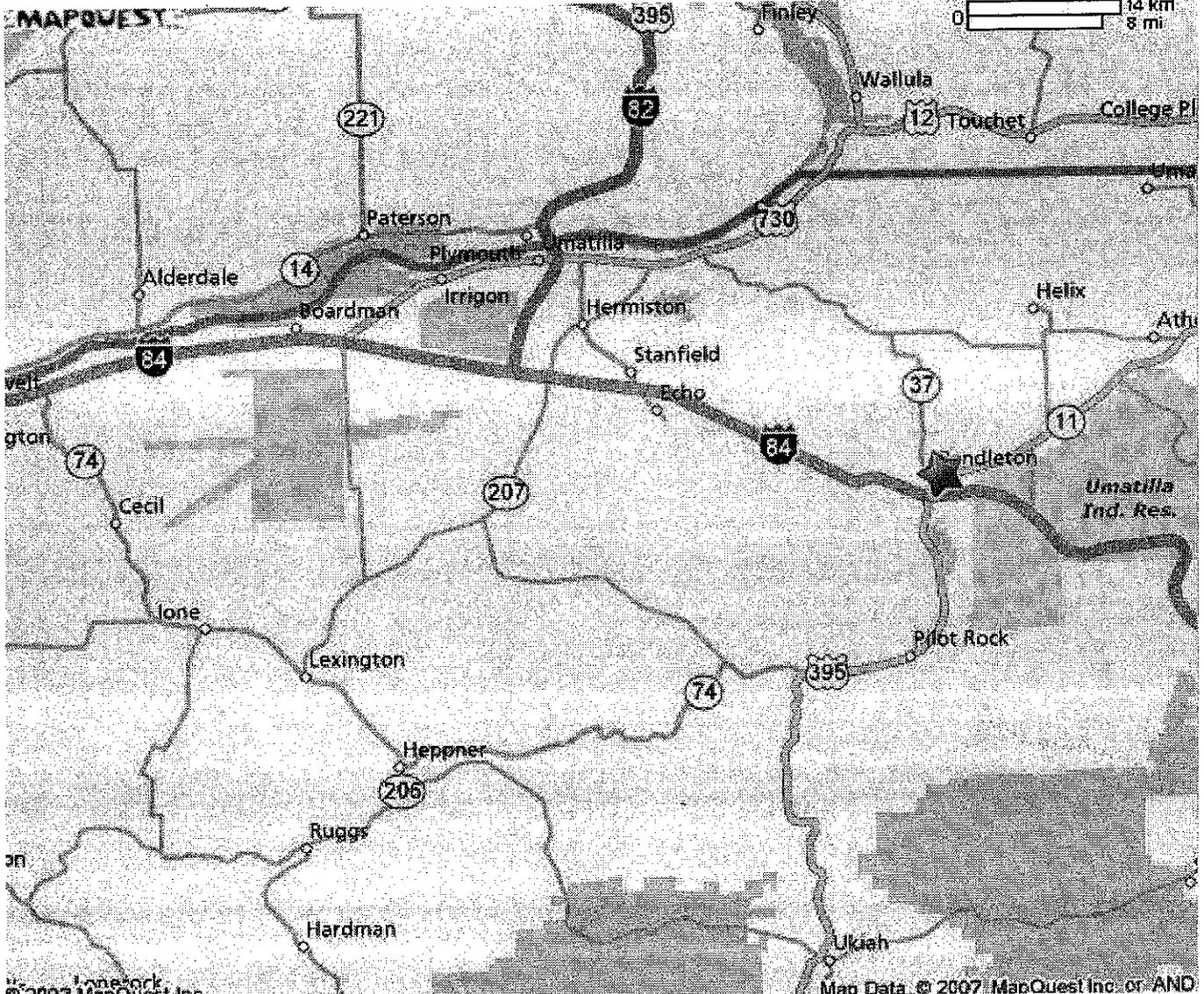


Exhibit B

QUALIFYING OFFENSES

A person charged with a qualifying offense may qualify for entry into the drug court program. Qualifying offenses may include the following:

- A. Possession of a Controlled Substance I, II, III, or IV other than possession of less than one ounce of marijuana. ORS475.840.
- B. Delivery or Manufacture of a controlled substance, upon a showing of good cause*.
- C. Tampering with Drug Records or forgery to obtain a prescription for controlled substance. ORS 167.212; ORS 165.007;013.
- D. Violation of Conditional Discharge Probation and the offender is in jeopardy of losing the conditional discharge status.
- E. Violation of Probation where the allegation involves use or possession of a controlled substance in a non-commercial quantity.
- F. The person is not a violent offender as defined by 42 U.S.C. 379ii.
- G. Other offenses motivated by drug abuse.
- H. The person has not been convicted of a sexual offense.

** "Good cause" means that the person's participation in Drug Court is likely to be more effective than standard criminal justice treatment in reducing the risk of the person's recidivism, thereby increasing public safety.*

ELIGIBILITY CRITERIA

The following criteria are set forth as a guide. A reasonable effort must be made to evaluate the individual circumstances of each individual desiring to enter into the drug court.

A. Voluntary Admission and Withdrawal, Generally:

1. Admission – Entry into drug court shall be voluntary. No person shall be forced to enter this program. The time to enter into the program is discussed below.
2. Withdrawal – No person shall be forced to remain in the drug court program. Any person wishing to withdraw must notify the drug court team.

B. General Requirements:

1. Entry into the program is at the discretion of the drug court team after having given due consideration to the eligibility criteria.
2. The defendant may be in violation of a current conditional discharge case and the probation officer recommends drug court.
3. The defendant should show a risk score of medium or high as defined by assessment utilizing the LSI-R:SV or the LS/CMI.
4. The defendant is a resident of Umatilla County.
5. The defendant is not a sexual offender or been convicted of a sexual offense.
6. The defendant is not a violent offender as defined by 42 U.S.C. 379ii. Under that law, for adult drug courts, the term “violent offender” means a person who-

(A) is charged with or convicted of an offense, during the course of which offense or conduct-

(1) the person carried, possessed, or used a firearm or dangerous weapon; there occurred the death of or serious bodily injury to any person; or

(2) there occurred the use of force against the person of another, without regard to whether any of the circumstances described in subparagraph (a) or (b) is an element of the offense or conduct of which or for which the person is charged or convicted; or

(a) has 1 or more prior convictions for a felony crime of violence involving the use or attempted use of force against person with the intent to cause death or serious bodily harm.

Note: If a defendant has a history of any domestic violence behaviors or previous misdemeanor or felony arrests or convictions for a domestic violence crime, the team may require that the defendant undergo further assessment to determine the likelihood of re-offending. The results of the assessment would determine whether the defendant would be eligible to enter the program.

7. In the same charging instrument, as that which charges the qualifying offense, there cannot be alleged:

(A) A person felony;

(B) A person misdemeanor involving domestic violence.

8. The defendant has no holds from any other jurisdiction unless the hold can be quickly resolved.
9. The defendant has no prior Drug Court unsuccessful terminations (Team has discretion on a case-by-case basis).
10. The program is not full as determined by the drug court team.
11. The defendant does not suffer from a mental illness or other mental impairment significant enough to prevent the defendant from adequately participating in drug court.
12. The defendant is able to pay the required fees and treatment costs, or is able to formulate a plan to make payments thereon. The court may waive fees based on the recommendation of the drug court team.
13. The defendant is subject to a drug package, an alcohol package, and a no gambling directive.
14. All applications require the initial and final approval of the Umatilla County District Attorney's Office. Such approval may be withheld without any showing of good cause.

PROCEDURE FOR ADMISSION

A. Screening Process:

Please refer to case processing flow charts (Appendix A). In cases involving new criminal charges, or allegation of probation violations, the Drug Court Manager or Community Corrections Probation Officer identifies eligible participants,

completes an LS/CMI assessment, and notifies the District Attorney prior to arraignment. The District Attorney identifies eligible participants at the time of the charge or motion is filed, or as soon thereafter as possible. The District Attorney shall advise the court and defense counsel when it appears that a defendant may be eligible for drug court. The District Attorney shall make a reasonable effort to provide discovery at arraignment. At the earliest possible court appearance, the court will advise appropriate defendants about drug court. In the event that a defendant declines the opportunity to enter into drug court, the appropriate paperwork will be filed. (Appendix B)

B. Plea Required Before Entry Allowed:

As a condition of entering into drug court, the defendant shall tender a plea of guilty. A Drug Court Petition, waiver and agreement to plead guilty, shall be submitted to the court (Appendix C). In the event of probation violation allegation the defendant shall admit to a violation prior to entry.

C. Time Period To Enter Program

The defendant must make application (Appendix D) to enter the drug court program by the date set for the first pre-trial. Should the defendant be accepted, the Judge will sign an Order Accepting the Application and Guilty Plea and Deferring Disposition For Entry Into the Program (Appendix E). Upon showing of good cause, a defendant may be allowed to apply for the program after the time

set in the preceding paragraph, but in no event shall a defendant be allowed to enter into the program beyond the date set for either sentencing or trial.

D. Number of Participants Allowed:

The drug court program will be designed to allow approximately 6 participants per month to enter the program. This would allow for up to 72 clients to be served within a year, with a maximum capacity of 60 at any one time.

E. Program Costs:

The costs to participate in the Umatilla County Drug Court Program include a one-time application fee of \$20 and \$5 per week, after entering Phase II. Failure to make scheduled payments will be considered a violation of Drug Court requirements. Unless otherwise determined by the team, all Drug Court fees must be current to advance to phase III and phase IV.

During Phases II, III, and IV, missed tests, adulterated tests, or tests revealing substance abuse will each result in a \$20 fee to the participants.

In addition, all lab tested urine specimen results are final. However, if a participant adamantly contests a positive urinalysis, he or she can request the test be sent to a lab for a third confirmation for a cost of \$25.00. This fee will be refunded if the results from the lab are negative for restricted or illegal

substances. Regarding instant tests, positive results can also be sent to the lab for confirmation at the client's request for a fee of \$25.00.

Regarding polygraph costs, the client will be responsible for the cost of the polygraph, which is \$150.00. The full amount will be due at the time of the test. Should the client attend the appointment, but fail to pay the fee, the polygraph will still be administered, however, the client will be suspended until the fine is paid. Should the client fail to attend the appointment, he or she will be placed in custody and the test may be administered while in custody. In this case, the fee will be due upon release from custody. The participant will be reimbursed for the cost of the test if the participant in fact has not violated the conditions of Drug Court and he/she is proven to be truthful to all questions posed. If the participant has not been truthful or the results are "inconclusive" the cost will remain the responsibility of the participant.

Exhibit C

BOARD OF DIRECTORS

Pursuant to our charter, IPD does have a Board of Directors. It is currently composed of two area private practice attorneys, a retired judge, and an accountant. IPD came into being in 1994 when the previous contractor encountered financial record-keeping difficulties that had escaped their board's oversight. It has, therefore, always been the primary function of IPD's Board to insure financial accountability. At the direction of the Board, we undergo an annual audit with the results published to the Board members. We also have our auditor review monthly bank statements and checks against a list of known vendors and monthly payments. The Board meets annually to review the audit results, and at such other times as issues arise or interest warrants. Beyond the directives of our Articles of Incorporation, there are no written policies or procedures, and the Board is generally not involved in individual personnel matters or the day-to-day operation of IPD.

PERSONNEL

Upon the recommendation of the Site Review committee, IPD adopted a written policy manual in 2005. The manual incorporated in concise form the principles and directives that had governed IPD since its inception. New employees are made aware of the Policy Manual's location, and encouraged to read and refer to it should questions arise. To date, there have been no overt instances of policy violations by our staff. The Manual outlines a staff evaluation process and management is putting together a procedure for implementing formal evaluations. We have weekly staff meetings to discuss both scheduling and case concerns.

Performance evaluation is an on-going process. Operating, as we do, in a limited universe, both within the office and our court system, performance concerns are quickly identified. Management constantly receives input from judges, court staff, the DA, and a myriad of other players about our attorneys. While much of the input is positive, concerns are evaluated and discussed with the individual. In most cases, an airing of the concerns and suggestions of alternative approaches resolve the matter. In rare instances, an attorney is encouraged to recognize that criminal defense is not proving to be their forte and another line of work should be sought. Similarly, our small size makes staff performance issues apparent, and they are addressed with the assistance of our office manager. Along with the rest of our attorneys, management's door is always open to the concerns of others within our office.

There are three basic types of employees; attorneys, clerical staff, and investigators. While the attorneys' job descriptions remain relatively self-explanatory and constant, there is overlap and flexibility within the support staff, and even between our two investigators. For example, our most experienced investigator has, over the years, become something of a computer geek, and now also maintains our system. The other investigator came from our clerical staff and is bi-lingual. She is able to step up in times of need as both a secretary and interpreter. This sort of willingness and ability to meet

needs when they arise is necessary to the success of an office as small as IPD, and characteristic of our recognition of that need.

Given the unusually frugal funding of Umatilla County, salary levels at IPD are currently roughly equivalent with those of the Deputy District Attorneys. If, however, the trend noted in the past several years continues, we will fall short of their salary structure. Our salaries are also generally in line with equivalent sized public defenders around the state, which makes competing for applicants with other PD's offices in less remote locations difficult.

COMPETENCE

From the moment prospective attorneys are interviewed, this office is described as one where new staff are encouraged and expected to seek advice and counsel of those more experienced. It is the manner in which everyone at IPD has developed their skills, and is recognized by all as vital to our operation. This "open door" method of mentoring further facilitates the attitude that our staff works best when working together. Since there are usually multiple IPD attorneys appearing in any one court for preliminary matters and hearings, help for unanticipated courtroom occurrences is readily available. This situation also provides for continual performance assessment and suggestions. IPD's relatively small size facilitates this constant assessment process. Attorneys in this office do not have the option of operating in isolation.

There have been no PCR petitions granted on cases emanating from IPD. While we have, over the years, had several attorneys disciplined by the Bar, the complaints arose from clients the attorneys represented prior to coming to IPD.

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TRAINING

While the orientation and educational process available to our attorneys was addressed above, formal education through attendance at defense-related CLE sessions is mandated. IPD fully funds for each attorney at least 15 hours per year of largely OCDLA sponsored conferences. Conferences and relevant training is also made available to our investigators. Additionally, IPD makes available relevant publications and Internet law resources to each attorney. Notwithstanding the above, the bulk of our new attorney's education comes from on-going interaction with those more experienced within the office.

CASE MANAGEMENT

Immediately upon arraignment, charging documents are returned to the office together with future court dates. While the DA's office strives to have discovery available at arraignment, this is very much a hit-and-miss prospect. It is often received several days after arraignment. In the case of in-custody clients, an investigator is notified so that initial contact is made within 24 hours of appointment whether or not discovery is available.

Case assignments are made on a case-weighted basis with consideration given to both balancing with workload among the attorneys and giving each attorney cases consistent with their experience. Rarely, an attorney with a special interest will request cases of a certain sort, but largely the emphasis of the appointment process is that every attorney will receive a large selection of case types. Active case numbers for each attorney are monitored, and appointments are adjusted accordingly.

Upon receipt of discovery, clerical staff reviews the police reports, and the names of co-defendants and witnesses are checked within our case management software for potential conflicts. The attorney is then presented with the file noting possible conflicts. If deemed appropriate, a motion to withdraw is immediately generated. Due to the length of time it can take to get discovery, IPD may occasionally have an open case for weeks before conflicts are identified.

Assuming no conflicts are noted, an appointment with a client is set and the client is notified by mail of both the appointment time and reminded of their next court date. The client contacting the office, or the attorney's need to consult with a client may also generate client appointments.

Investigation is initiated by the attorney discussing the case with one of our two investigators. Given their experience, the investigators can be especially helpful to our newer attorneys in developing an investigation plan, and acquainting them to some of the idiosyncrasies of our area and clients.

Given the size of our office and the manner with which cases are discussed among the attorneys and investigators, case relief very rarely an issue. Should an attorney come to believe that they are “in over their head” with a case, there are always more experienced staff available to help and/or take over the case if necessary. IPD operates with an overarching premise that we are all in this together.

AVAILABILITY

Consistent with the terms of our contract and the provisions of our NLADA-sponsored professional liability coverage, IPD attorneys may not offer legal advice to non-court appointed clients. We do, however, provide general descriptions of the process to individuals as they appear in our office.

An IPD attorney appears at all scheduled arraignment times, and we are usually able to accommodate the court at such other times as it may find necessary.

APPEAL

In the majority of cases, i.e., those involving negotiated change of pleas, appeal rights are discussed with clients before entry of a guilty plea. Plea Petitions contain a description of appeal rights and are discussed with clients as part of the petition completion process.

In other cases the availability and advisability of appeal is discussed with clients as potential issues arise, e.g., at the conclusion of hearings or trials. In all cases, if the client indicates a desire to initiate an appeal during or immediately after our representation, the attorney will contact OPDS with the relevant client information

COMMUNITY EDUCATION

While IPD attorneys have, in the past, appeared as guest lecturers in criminal justice at our local community college, and hosted student groups to our office, the size of our community does not provide many opportunities for direct educational outreach. All attorneys are members of the local bar association, several in the past having served as officers. Additionally, management is a member of our Local Public Safety Coordinating Council and Drug Court Team.

ZEAL

IPD strives to support its staff by creating and fostering an atmosphere of collegiality and unity – a place, in short, where everyone, despite the stressors of a fast-paced law office, can feel comfortable and rewarded. Seeking everyone’s input in decisions that impact all of us, in part, encourages a sense of ownership, which then extends to a commitment to excellence in our individual efforts. We all share the victories of our individual efforts.

CONCLUSIONS

In an overall sense, IPD performs well the time-honored role of a public defenders office. We bring in new lawyers with an interest in criminal defense and/or litigation and give them an opportunity to gain such experience in an educational and supportive environment. In so doing, we serve well our clients and the courts.

Our greatest challenge is in retaining a core of experienced attorneys and attracting new attorney applicants. IPD does not have the option of drawing from an attorney base already present in our area. While we can't change our location and the drawbacks that presents to many potential applicants, we can, and do strive to create an atmosphere of encouragement and support. That helps to bring people in, but ultimately offering them an adequate compensation package is necessary to encourage them to stay.

Exhibit D

ROLE OF COUNSEL FOR CHILDREN AND YOUTH

During the course of numerous site reviews over the last four years, OPDS has noticed significantly inconsistent practices regarding the role of appointed counsel for children in both dependency and delinquency cases.

For example, some attorneys believe that it is not necessary to meet and confer with child clients.

It is hoped that this statement will clarify what OPDS believes to be the role of counsel for children in dependency cases and youth in delinquency cases. The statement is being sent to all public defense providers. If you have questions about the role of counsel as outlined in this statement, please contact OPDS's General Counsel, Paul Levy at (503) 378-2478.

Role of Counsel in Dependency Cases

In juvenile dependency cases, the role of the attorney appointed to represent a child will depend on the age of the child and the child's capacity for considered judgment.

An attorney for a child capable of considered judgment must advocate for the child's expressed wishes. The role of an attorney for a child not capable of considered judgment must advocate for the child's best interest as determined by the attorney's independent investigation and exercise of sound judgment. Some children are capable of considered judgment with respect to some decisions that need to be made in the case but not with respect to others. Standard 3.4 of the Specific Standards for Representation in Juvenile Dependency Cases of the Oregon State Bar's Principles and Performance Standards¹ outlines the analysis to be used in deciding the appropriate advocacy in a given case.

Regardless of that ultimate determination, the child is a "client" and OPDS contracts require the contractor to speak to and conduct initial interviews, in person, with clients who are in custody within 24 hours of appointment whenever possible; and to arrange for contact, including notification of a scheduled interview time, within 72 hours of appointment for all clients who are not in custody. Children are not excepted from this rule.

In addition, Rule 1.14 of the Oregon Rules of Professional Conduct (ORCP) requires counsel for persons with diminished capacity (which includes children not capable of considered judgment) to maintain, as far as reasonably possible, a normal client-lawyer relationship with the client. The ORCP require attorneys to

¹ The full text of the 2005 version of the Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases can be found on the bar's website at http://www.osbar.org/surveys_research/performancestandard/index.html.

maintain contact with their clients, **to keep them reasonably informed** about the status of their cases (ORPC Rule 1.4), **to promptly comply** with reasonable requests for information (*Id*), **to explain** matters to the extent reasonably necessary to permit the client to make informed decisions about matters regarding which the client is capable of exercising considered judgment (*Id*), **to abide by** the decisions of a client who is capable of considered judgment concerning the objectives of representation (ORPC Rule 1.2), and **to consult** with the client regarding the means by which the objectives of representation are to be pursued (*Id*). These rules apply regardless of the client's age or capacity.²

Role of Counsel in Delinquency Cases

Attorneys for youth in juvenile delinquency proceedings are bound to advocate for the expressed wishes of the youth. While the attorney has a responsibility to advise the youth of legal options that the attorney believes to be in the youth's best interest and to identify potential outcomes of various options, the attorney must represent the express interests of the juvenile at every stage of the proceedings. The attorney owes the same duties to a juvenile under the Rules of Professional Conduct as an attorney owes to an adult criminal defendant.

If an attorney determines that a youth is not capable of aiding and assisting in the youth's defense, the attorney shall move the court to dismiss or amend the petition, as discussed in Standard 2.8(2) of the Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.

² For those attorneys who lack the information or skills to have an age appropriate discussion with a young or disabled client, an online training will be available beginning in November, 2007 at the following link: <http://www.cwpsalem.pdx.edu/teen/>.

Exhibit E

BY-LAWS
OF
BLUE MOUNTAIN DEFENDERS, LLC

ARTICLE I – NAME

Section 1.1 The name of this non-profit private organization shall be Blue Mountain Defenders, LLC.

ARTICLE II – PURPOSE

Section 2.1 The limited liability company shall be organized and operated for any lawful purpose, but primarily for the purpose of contracting with the State of Oregon for the conduct of indigent criminal defense. Subject to the limitations stated in the Operating Agreement of Blue Mountain Defenders, LLC, the purposes of this limited liability company shall be to engage in any lawful activities, none of which are for profit, for which limited liability companies may be organized under Chapter 63 of the Oregon Revised Statutes.

ARTICLE III – MEMBERSHIP

Section 3.1 This limited liability company shall have no members, except as provided for in the operating agreement and bylaws.

ARTICLE IV – BOARD OF DIRECTORS

Section 4.1 Duties. The affairs of the limited liability company shall be managed by the board of directors, including the authority to determine personnel, fiscal and program policies; manage and control the affairs, funds, records and property of the corporation; and approve contracts with the State of Oregon for indigent defense services.

Section 4.2 Number. The number of directors may vary between a minimum of three and a maximum of seven.

Section 4.3 Term of Directors – Except as provided below regarding initial terms for directors. The term of office for directors shall be two years. A director may be reelected without limitation on the number of terms he/she may serve. The board shall elect its own members, except that a director shall not vote on that member's own position. Terms shall be staggered. The initial Board Member Terms shall be for the following periods: Position 1 – 1 year; Position 2 – 2 years; Position 3 – 3 years; Position 4 – 4 years; Position 5 – 3 years. The initial Directors shall be: 1. Daniel E. Stephens; 2. Valerie Doherty; 3. JT Lieuallen; 4. Dale Breshears (layman); 5. Craig Childress; 6. Kittee Custer; 7. Dick Jones (layman). Position 5 shall also act as the Executive Director of the Consortium.

Section 4.4 Removal. Any director may be removed from the board, with or without cause, by a vote of two thirds of the directors then in office. Except that position 5 shall only be removed pursuant to Section 6.3 herein.

Section 4.5 Vacancies. Vacancies on the board of directors and newly created board positions will be filled by a majority vote of the directors then on the board.

Section 4.6 Composition of Board. To the extent practicable. The Board shall be made up of at least 3 indigent legal services providers and 2 outside Directors.

Section 4.7 Quorum and Action. A quorum at a board meeting shall be a majority of the number of directors in office immediately before the meeting begins. If a quorum is present, action is taken by a majority vote of the directors present, except as otherwise provided by these bylaws. Where the law requires a majority vote of the directors in office to establish committees to exercise board functions, to amend the By-Laws and Operating Agreement, to sell assets not in the regular course of business, to merge, or to dissolve, or for other matters, such action is taken by that majority as required by law.

Section 4.8 Annual Meeting. There shall be an annual meeting at a time and place to be set by the board of directors. The meeting is designated by the board for the purpose of electing directors, officers, committee chairpersons and members and for the transaction of such other business as may come before the board.

Section 4.9 Regular Meeting. Regular meetings of the board of directors shall be held at the time and place to be determined by the board of directors. No other notice of the date, time, place, or purpose of these meetings is required.

Section 4.10 Special Meetings. Special meetings of the board of directors shall be held at the time and place to be determined by the board of directors. The presiding officer of the board or 20 percent of the directors then in office may call and give notice of a meeting of the board. Notice of such meetings, describing the date, time, place and purpose of the meeting, shall be delivered to each director personally or by telephone or by mail not less than five days prior to the special meeting.

Section 4.11 Meeting by Telecommunication. Any regular or special meeting of the board of directors may be held by telephone or telecommunications in which all directors participating may hear each other.

Section 4.12 No Salary. Except for a Director also acting as the Executive Director, Directors shall not receive salaries for their board services, but may be reimbursed for expenses related to board service.

Section 4.13 Action by Consent. Any action required by law to be taken at a meeting of the board, or any action which may be taken at a board meeting, may be taken without a meeting if a consent in writing, setting forth the action to be taken or so taken, shall be signed by all the directors.

ARTICLE V – COMMITTEES

Section 5.1 Establishing Committees. The board of directors may establish such other committees as it deems necessary and desirable. Such committees may exercise functions of the board of directors or may be advisory committees.

Section 5.2 Composition of Committees Exercising Board Functions. Any committee that exercises any function of the board of directors shall include two or more directors in office.

Section 5.3 Quorum and Action. A quorum at a committee meeting exercising board functions shall be a majority of all committee members in office immediately before the meeting begins. If a quorum is present, action is taken by a majority vote of persons present.

Section 5.4 Limitations of the Powers of Committees. No committee may authorize payment of any part of the income or profit of the limited liability company to its directors or officers; may approve dissolution, merger, or the sale, pledge, or transfer of all or substantially all of the limited liability company's assets; may elect, appoint, or remove directors or fill vacancies on the board or on any of its committees; nor may adopt, amend, or repeal the operating agreement, bylaws, or any resolution by the board of directors.

ARTICLE VI – OFFICERS

Section 6.1 Titles. The officers of the limited liability company shall be an Executive Director and a secretary.

Section 6.2 Election and Term of Office. The board of directors shall elect the officers of the corporation to serve two year terms. Excepting that the initial term for the Executive Director shall be five (5) years, as provided in Article IV, an officer may be reelected without limitation on the number of terms the officer may serve. There is no limitation to the number of different offices a person may hold at different times.

Section 6.3 Removal. Any officer or member of the executive committee may be removed from office by a two-thirds majority vote of a quorum of the board, at any time, with or without cause. Except the initial Executive Director shall only be removed with cause.

Section 6.4 Vacancy. Any vacancy in any office shall be filled not later than the first regular meeting of the board of directors following the vacancy.

Section 6.5 Executive Director. Craig G. Childress is named as the initial Executive Director. The Executive Director shall be the chief officer of the limited liability company. The Executive Director may sign, with the secretary or any other designated person, contracts or other instruments which the board has authorized to be executed, except in cases where the signing and execution thereof shall be required by law to be otherwise signed or executed. The Executive Director shall perform such other duties as are customary for that office and as may be prescribed by the board from time to time.

Section 6.6 Secretary. The secretary shall keep the minutes of the meetings of the board and executive committee; see that all notices are duly given in accordance with the provisions of these bylaws or as required by law; be custodian of the limited liability company records; and in general perform all duties incident to the office of secretary and such other duties as may be prescribed by the board from time to time. The board may expressly delegate to some other officer, agent or employee of the limited liability company performance of any duties enumerated above, by the responsibility for proper performance shall remain with the secretary. The initial Secretary shall be Wendy Wohlford.

Section 6.7 Other Officers. The board of directors may elect or appoint other officers, agents and employees as it shall deem necessary and desirable. They shall hold their offices for such terms and have such authority and perform such duties as shall be determined by the board of directors.

ARTICLE VII – AMENDMENTS TO BYLAWS

The bylaws may be amended or repealed, and new bylaws adopted, by the board of directors by a two-thirds vote of the quorum present. Prior to the adoption of the amendment, each director shall be given at least two days notice of the date, time, and place of the meeting at which the proposed amendment is to be considered, and the notice shall state that one of the purposes of the meeting is to consider a proposed amendment of the bylaws and shall contain a copy of the amendment.

ARTICLE VIII – LIMITED LIABILITY COMPANY BUSINESS AND FINANCIAL RECORDS

Section 8.1 Records. The limited liability company shall maintain adequate and correct books, records and accounts of its business and properties. All books, records and accounts of the corporation shall be open to inspection by the directors for any proper purpose at a reasonable time.

Section 8.2 Contracts. The board may, except as otherwise provided in the bylaws and operating agreement, authorize any officer or agent, or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the limited liability company and such authority may be general or confined to specific instances.

Section 8.3 Fiscal Records.

1. Deposits. All funds of the limited liability company not otherwise employed shall be expediently deposited to the credit of the limited liability company in such banks, trust companies, or other depositories as the Board may select.

2. Checks, Drafts. All checks, drafts or orders for the payment of money, notes or other evidence of indebtedness issued in the name of the limited liability company shall be signed by such officer or officers, agent or agents of the limited liability company and in such manner as shall from time to time be determined by resolution of the Board.

3. Gifts. The board may accept on behalf of the limited liability company any contribution, gift, bequest or a devise for the general purpose or any special purpose of the limited liability company.

4. Loans. The limited liability company shall not make any loans to any member, officers or employers.

5. Fiscal Year. The fiscal year of the limited liability company shall end on December 31 of each year.

Section 8.4 Audit. An independent audit of the limited liability company books shall be made within 120 days after the end of each fiscal year by a certified public accounting firm selected by the board.

The chair of the board shall make the audit available to the members of the board, and shall submit a detailed financial statement based upon the audit at the first meeting of the board following receipt of the audit, but no later than 180 days following the close of the fiscal year.

ARTICLE IX – LIABILITY AND INDEMNIFICATION

Section 9.1 Liability. The civil liability of a member of the board for the performance or non-performance of the director's duties shall be limited to gross negligence or intentional misconduct.

Section 9.2 Indemnification. The limited liability company shall indemnify its officers and directors to the fullest extent allowed by Oregon Law.

ARTICLE X – DISSOLUTION

Upon the dissolution of the limited liability company, the board of directors and/or trustees shall, after paying or making provisions for the payment of all the liabilities of the limited liability company, dispose of all the assets of the limited liability company exclusively for the purpose of the limited liability company in such manner, or to such organizations or organizations organized and operated exclusively for charitable, educational, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501 (c)(3) of the Internal Revenue Code, or to an organization organized for similar purposes, as the board of directors and/or trustees shall determine. Any such assets not so disposed of shall be disposed of by the Circuit Court of Umatilla County.

Board Member

Board Member

Board Member

Board Member

Blue Mountain Defenders, LLC Response to Questionnaire for Administrator of Consortium

1. Does your consortium have formal by-laws and a set of written operating policies and procedures? If so, please provide.

Yes. Attached is our pending bylaws for Blue Mountain Defenders, LLC (BMD) to become operational if we are awarded a contract in 2008. For the last two years we have really operated as a small Public Defense Firm with subcontracting lawyers within the consortium taking a few selected case types according to individual members needs and limitations.

The following responses should always be noted in the context that Craig Childress, the Director of Blue Mountain Defenders, LLC. and Wendy Wohlford, the office manager, worked for Intermountain Public Defenders for a long period of time in management positions. Thus the organization, structure, software, forms, and systems to operate effectively with the justice system, clients, and courts are modeled from the same system of operation at Intermountain Public Defenders. Our prime software program is Time Matters 7.0 and is the prime source of our conflict checks and tracking of cases.

2. Does the consortium have a board of directors? If so describe the role that your board plays. Who are the members? How often does it meet? What kinds of issues are directed to the board? Are there limits on how long a board member can serve or how long one member can chair the board? Are there seats designated for "lay" or "community" board members?

We have authorized three to seven director seats. They have a two year term and are staggered.

The board consists of the executive director (Craig G. Childress), Daniel E. Stephens, Valerie B. Doherty, JT Lieuallen, Kittee Custer, Dale Breshears, and Dick Jones. We have tentatively decided that we would like to get up to seven directors. We have added a non provider attorney, and two non lawyers to the Board. At this early point in the consortium, the board and its providers are attempting to get the basic organizational flow in place and determine what type of additional members, with what type of backgrounds would be most useful and helpful.

We have tentatively concluded that someone with political or community activity background would be appropriate for the non lawyer position and have thus added Dick Jones (layman community activist) and Dale Breshears (retired OSP Officer) as our lay members.

Because our group is relatively small – eight members – at most meetings all of the member attorneys are expected to attend. We will have quarterly meetings. At those meetings we will update everyone on all changes at the courthouse, scheduling issues, case issues, contract issues, consortium issues, conflict issues and everyone is welcome to

bring up any issues they have encountered. Furthermore, the director has at least weekly contact with each individual attorney and formally meets with each individual attorney on a mandatory monthly basis. All member attorneys are encouraged to attend and participate at all board meetings since we are a very small organization.

3. How is the administrator of your consortium selected? Compensated? Evaluated? Are there formal qualifications to be the administrator? Does the consortium or its board of directors have a “plan for succession” to insure an orderly transition from one administrator to the next?

Board members receive no compensation. The executive director and his staff receives 5% of the total monthly payment to the consortium. For this payment the director provides staff to pick up cases, assign them to the provider attorneys, transmit all discovery and court orders to attorneys. Track assignments, reassign conflict cases, occasionally cover cases where the provider attorney cannot get coverage, pay expenses related to book-keeping, banking and tax matters, and attend meetings with the bench and other groups involved with the criminal justice system. Furthermore, the Blue Mountain Defenders staff must regularly communicate with the courts, clients and family, and District Attorneys office regarding attorneys and scheduling of cases. Lastly, staff must compile and comply with the significant statistical and administrative duties regarding OPDS, courts and consortium members regarding assigned cases.

Because this consortium was planned and instituted by Craig G. Childress, who gave up his employment from the Public Defender to start the consortium and the incurring of significant office and staff expenses, the consortium by laws were set up so that he would be the initial executive director for three years, except that he could resign, or be terminated for cause by a majority vote of the directors. After three years, assuming Craig G. Childress is still the executive director, the board can name an ED of its choice, but the “successor” is expected to be Daniel E. Stephens as the named successor as Executive Director of Blue Mountain Defenders, LLC.

Officers, including the executive director are appointed for two year terms, excepting as otherwise provided above.

4. What percentage of the administrator’s overall workload is related to consortium matters? Is there a formal limit to the percentage?

There is no formal limit. I would guess that approximately 20% of the administrators total time is devoted to consortium business, and 100% to consortium cases. In addition there is substantial staff time expended on consortium business. Approximately 100% of the directors assistants time is spent on consortium business and consortium cases.

5. How are administrative problems and demands met when the administrator is in trial or otherwise unavailable? Is there a formal or informal back-up administrator?

The ED's (executive director) staff, Wendy Wohlford, can cover the case assignments or any administrative problems and demands. Daniel E. Stephens, a lawyer in the ED's office has stepped in to make decisions that call for a legal analysis. In addition, the other directors are notified well in advance when the ED has been on vacation and the ED's staff, Wendy Wohlford, is in very good contact with all directors and member attorney's of the consortium, the courts and OPDS.

6. What are the requirements for membership in the consortium?

The initial panel of attorneys was selected by Craig G. Childress and based on his individual knowledge of their abilities and their expressed willingness and desire to be on the court appointed list of Blue Mountain Defenders, LLC.

7. What is the process for applying for membership?

This hasn't come up yet, but the members have discussed coming up with a standard form application then having the board vote on membership as additional caseloads may appear. Presently, if an attorney wants on the list, we have him fill out the appropriate OPDS qualifications forms and questions and submit it to OPDS and discuss his addition to the consortium.

8. How long has each of the attorneys been a part of the consortium?

Since January 2006 when we initially started. We've had one drop out and we've added one.

9. To what extent do consortium attorneys specialize in criminal and juvenile defense, representation of the allegedly mentally ill? In public defense? Is there a limit on the percentage of an attorney's practice that can be consortium related?

There is a difference between the attorneys who are at Blue Mountain Defenders Office and the other private practice attorneys (I'll refer to the non Blue Mountain Defenders Office attorneys as outside attorneys)

All of the Blue Mountain Defender attorneys are experts in criminal defense. Each attorney must also have a private practice. The list is as follows:

Craig G. Childress

OSB# 79023

-Practiced criminal law and juvenile law for over 28 years in District Attorney offices and at Intermountain Public Defenders.

Valerie B. Doherty OSB# 81210

-Practiced criminal law and juvenile law for 26 years in the Morrow County District Attorney's office and in private practice.

Stephens Law Office, Daniel E. Stephens OSB# 96435

-Former coworker and employee at Intermountain Public Defenders for over 9 years and currently in private practice specializing in family, juvenile and criminal law.

Custer Law Office, Kittee Custer OSB# 00035

-Former coworker and employee at Intermountain Public Defender for approximately 3 years and in private practice specializing in family, juvenile and criminal law.

Monahan, Grove & Tucker, Jon Lieuallen OSB# 00073

-Former coworker and employee at Intermountain Public Defender for over 3 years and currently in private practice specializing in family, juvenile and criminal law.

Robert G. Klahn OSB# 80068

-Former employee at the public defenders office and currently specializing in criminal defense.

L. Kent Fisher OSB# 91268

-Former Deputy District Attorney and employee at Intermountain Public Defender currently in private practice specializing in family, juvenile and criminal law.

Maurene McCormach OSB# 94545

-Currently the Municipal Court of Pendleton contracting attorney and in private practice specializing in criminal defense.

Cory, Byler, & Rew, J.T. Lieuallen OSB# 04083

-Junior associate who practices in a large civil firm and agrees to take some juvenile assignments.

While there is no rule on the percentage of ID cases that any provider can take, the essence of the consortium was as follows: Blue Mountain Defenders will take approximately 2-3 caseloads. It is responsible for bringing in new or inexperienced attorneys and training them in criminal defense. It would also be responsible for teaching these newer attorneys other skills that could be used in the private practice of law and financially support them be way of benefits, advertising and practice building. Blue Mountain Defenders provides for these attorneys opportunities to reduce their ID

caseload in increments as their privately retained practice picks up. Blue Mountain Defenders and its senior attorneys, Craig G. Childress and Daniel E. Stephens, also serve as mentors, advisors and resources for all attorneys within the consortium on a regular basis.

In general the outside attorneys are given 10%-50% caseload pending on the status, age, limitations and needs of their private practice.

The ED has also encouraged outside attorneys to take on attorneys as mentors and if there is caseload available, then those outside attorneys will be given additional cases that can be assigned to them in order to support their mentoring efforts.

10. How do you insure that new attorneys can become part of the consortium?

The plan is for new attorneys to be associated with either Blue Mountain Defenders or the outside attorneys who act as mentors. We have never refused so far anyone who has indicated a desire to be a member. However, the excessively low case rates/values make it improbable that many attorneys would be attracted to the consortium at these fixed rates that are in private practice with high overhead expenses and usually charge \$150 an hour. In order to justify \$5,000 for a DUII on a privately retained basis, you do not want to be appearing for \$280 for a DUII on the indigent defense cases!

11. What materials and orientation are provided to new consortium members?

This hasn't come up yet, however, for Blue Mountain Defenders the newer attorneys are mentored by the experienced attorneys and the newer attorneys have all CLE's paid for by Blue Mountain Defenders. Also all attorneys meet regularly with the senior attorney individually to ensure compliance with standards and expectations and to ensure prompt resolution of issues.

12. Is there a procedure for insuring that less experienced attorneys have access to more experienced attorneys when they need advice? Do you have a formal mentoring system? Please describe your system.

See above.

13. How are cases distributed among attorneys? Do you have a process for assigning cases based on the seriousness and complexity of the case? If so, how do attorneys progress from handling less serious and complex cases to handling more serious and complex cases?

Each of the subcontractors – lawyers (the outside attorneys and Blue Mountain Defenders) have an agreement to take a certain mix of cases. That mix is agreed on at the time of the subcontract. The ED and his staff meet daily to assign cases so that the cases assigned match, as close as possible the amount, type, and court location of cases each subcontractor has agreed to take. Each of the attorneys has a mix of serious and less

serious cases. Blue Mountain Defenders has more of the cases since it is training and mentoring attorneys and it is 100% of its operating revenue. The ED does his best in keeping returning clients with the same attorney, and packaging up cases as they come in so that the outside attorneys have multiple appearances in the same court in order to save time and in a desired geographical area or case type that the subcontractor desires. The case assignment system takes into account the qualifications, experience and workload of each attorney, a conflict identification system which identifies conflicts at the earliest opportunity, a case monitoring system which tracks the number and type of cases assigned to each attorney and a resource management plan for handling the assigned caseload.

14. How soon are attorneys notified of appointment to a case? Do attorneys routinely meet with clients within the timeframes set forth in the contract with PDSC?

The ED staff scans and emails the court appointment to the assigned attorney. She can also personally deliver the information. That occurs every morning at the time the cases are assigned. I believe the attorneys generally meet their in custody clients in a timely manner. We follow the recommended "Best Practices" approach as much as possible. The ED meets personally on at least a weekly basis with every attorney to discuss everything, including appointments and performance. Assignments and notifications to the individual attorneys are made within 36 hours of receiving an appointment from the Courts.

15. Does your system provide continuity of representation when possible? If a client has been represented by a consortium member in the past are future cases involving that client generally assigned to the same attorney?

Yes. See above.

16. Does your organization have a standardized procedure for identifying conflicts or does each attorney or law firm have its own procedure? When are conflict checks conducted? How soon is a case reassigned after a conflict is identified?

The ED staff checks for conflicts with our Time Matter system that we are able to identify before meeting with the ED to assign cases. Then it is up to the outside attorneys to do a second check for conflicts internally.

17. Do consortium members meet regularly as a group? If so, how frequently?

We meet approximately every month as a group and on a weekly basis have individual contact/communication. The Executive Director also has a mandatory face-to-face meeting with each individual consortium lawyer once a month.

18. Is there a mechanism for regular communication among consortium members such as a newsletter, e-mail list, website, regular mailing?

Yes. The ED has a list to communicate with outside attorneys. It is easier to send group emails, individual emails, and regular meetings. We also communicate very regularly by fax, telephone and office meetings.

19. Is there a mechanism for sharing research or forms?

Informal only. Blue Mountain Defenders has a large inventory of forms, motions, and memorandums it freely shares. It also shares its library conference rooms for meetings with clients – researching and preparing for court. Blue Mountain Defenders stocks all OCDLA publications. Also we have a large inventory of motions, forms and memorandum from our previous work experience over the last 20 years which we freely share when it assists attorneys in their cases.

20. What system do you use to monitor the volume of cases assigned to each attorney or law firm? How do you insure that attorneys are not handling too many cases?

The ED and staff update the assignments daily. The ED keeps all assigned cases in a binder with a running tally of total cases assigned per month. These cases are broken down by outside attorney and number and type of cases assigned. The ED also keeps a running tally of the total dollar value of the cases assigned and how that compares to the total contracted for so that he can see if any attorney starts to get behind.

21. How do you insure that attorneys are providing quality representation? Are there regular evaluations of attorneys? If so, how and by whom are they performed? Are there other mechanisms in place to insure that consortium attorneys are providing quality representation.

For outside attorneys, no formal evaluation, however they are required to report to the ED any contact by the OSB for bar complaints or disciplinary matters. The ED is also in contact with the presiding judge and judges and they have an agreement to contact us if any problems arise. The ED meets weekly, monthly and quarterly with each individual attorney. At these meetings we are consistently communicating with each other about cases, issues, performance and attempting to resolve concerns in a prompt, professional manner.

Within the Blue Mountain Defenders the ED has oversight capability and regularly communicates with all attorneys and keeps track of their trials and number of court appearances and ensures quality performance of Blue Mountain Defender attorneys as well as resolves concerns of clients or the courts with performance of all attorneys.

22. How do you address problems of underperformance by attorneys?

So far that hasn't been an issue. However, we did have one attorney receive reprimands and I asked the attorney to send a letter to me outlining the issues along with the corrective measures taken. Essentially, excessive and regular meetings and open communication have satisfactorily resolved all issues. One attorney had a problem with an out-of-county PCR Judge which resulted in a bar complaint against him. The Bar resolved the complaint in his favor and against the complaining Judge. However, as corrective action the particular attorney was removed from PCR cases and we notified OPDS of his removal and desire not to contract for PCR cases. Lastly, see above discussion concerning regular, frequent and open communications on a on going basis with all attorneys concerning all issues.

23. Do you provide training or access to training for consortium lawyers? Please describe. Do you require a minimum number of criminal, juvenile or civil commitment law or trial practice-related CLE credits per year?

Non other than what has already been stated.

24. Are attorneys required to report disciplinary action by the bar? How many consortium attorneys have been disciplined by the bar? What were the circumstances?

One attorney was reprimanded. The attorney notified me of the reprimand. I asked him to get me a letter outlining the issues and what corrective steps he took. The issues involved the attorney's failure to communicate with clients in PCR cases.

25. What is the consortium's process for handling complaints from judges? Clients? Others? Is there a designated contact person for complaints? Is that person's identity generally known in the criminal and juvenile justice community?

The ED is the designated contact person. I believe everyone in Umatilla County aware of the contact person. Clients receive a letter and/or business card from the consortium with the ED's name and phone number and that of his staff.

So far there have been no complaints from our local judges. The ED has received very, very few complaints from clients and has called these clients and in most cases, was able to satisfy the client that the attorney was doing an adequate job. In approximately three cases it was clear that there was little we could do to satisfy the client. In any case where a client complains to the ED, the ED will contact the assigned attorney to discuss the matter. Most complaints have to do with adequate communication and in general those complaints can be dealt with. The ED will, as a last resort, reassign a case if the communication breakdown is irremediable.

26. What steps have you taken to address issues related to cultural competence such as the need for interpreters, training regarding cultural biases, culturally appropriate staffing, awareness of immigration consequences?

Blue Mountain Defenders has materials in its library on immigration consequences of criminal convictions. Blue Mountain Defenders has one attorney who speaks Spanish. One of the outside attorneys' also speaks Spanish. We have interpreters who are readily available to assist us for a fee.

27. Do you have a system in place that allows clients to evaluate the quality of services received from consortium attorneys?

Yes, see above. It is premised on regular, consistent and open communication from all interested parties.

28. Are consortium attorneys and the administrator active participants in policy-making bodies of your criminal and juvenile justice systems?

Yes

29. What are some of the things your consortium does especially well? Please describe.

Organization and assignment of cases to increase efficiency. Our attorneys all subscribe to the highest performance standards and are committed to providing the most competent and effective assistance of counsel we can provide to our clients. We handle serious cases, hard to manage clients and mundane petty matters with the highest professionalism. We are and have been especially effective in rendering services in juvenile law and working together in a team approach to accomplish our mission.

The ED has a fair relationship with the DA's office and has actively sought out areas where we can agree so as to build the trust that can be lacking between defense bar and the prosecutor. However, it is an adversarial relationship and the newly appointed District Attorney has no executive or management experience and his office is staffed with very inexperienced prosecutors learning on the job with excessive meetings, staffings and micromanaging that interferes with effective and prompt resolution of cases in the system. In fact there has been a turnover of 6 attorneys including the District Attorney in the last year alone. The office only has 8 attorneys so it has been dysfunctional and chaotic to deal with on occasion.

30. Are there any areas in which you think improvement is needed? Please describe.

We attempt to use as our guide the “Best Practices” recommendations promoted by OPDS as well as the “Qualifications and Standards of Performance” in the practice of indigent defense promoted by OPDS, OCDLA, ABA and OSB. Since we strive to meet these high standards, it is safe to say we will always need to improve in one area or another on a continuing basis. We will continue to strive to be more efficient, effective and professional with all components of the criminal justice system. We will remain flexible to change and accommodate the needs of others as long as it is consistent with our ethical obligations and mission.

Respectfully submitted,

Craig G. Childress
Director of Blue Mountain Defenders, LLC.

Attachment 4

**OPDS's Draft Report to the Public Defense Services Commission
on Service Delivery in Judicial District No. 10
Union and Wallowa Counties
(November 7, 2007)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004 to 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Washington, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of Union and Wallowa Counties' public defense system undertaken in preparation for the PDSC's public meeting in Pendleton on Wednesday, November 7, 2007. The final version of this report will contain PDSC's service delivery plan for Judicial District No. 10.

PDSC's Service Delivery Planning Process

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and the criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams have visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole criminal and juvenile contractor in Benton County. Another site visit is planned for Columbia County in December of 2007.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and developed a statewide Service Delivery Plan for juvenile representation.

In 2007 PDSC undertook to review the delivery of public defense services in

death penalty cases. A final plan for providing services in these cases was approved by the Commission in June of 2007.

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

“Structure” versus “Performance” in the Delivery of Public Defense Services

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service delivery planning process. That process is aimed primarily at reviewing and improving the “structure” for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into “best practices,” recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.¹ A public agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

Most of PDSC’s other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the “performance” of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time to time in the course of the Commission’s service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission’s deliberative processes. OPDS, with advice and

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

assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

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

Organizations Currently Operating within the Structure of Oregon's Public Defense Delivery Systems

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense

services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated regions. In either case, PDSC expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, administer specialized internal training and supervision programs for attorneys and staff, and ensure the delivery of

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

effective legal representation, including representation in specialized justice programs such as Drug Courts and Early Disposition Programs. As a result of the Commission's expectations, as well as the fact that they usually handle the largest caseloads in their counties, public defender offices tend to have more office "infrastructure" than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

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

Consortia offer the advantage of access to experienced attorneys who

³ Id.

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

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

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

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

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually

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

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

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

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

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

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

for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation in Judicial District No. 10

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

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

On November 7, 2007 from 9:00 a.m. to 1:00 p.m., PDSC will hold a public meeting in Room 316 of the Umatilla County Courthouse in Pendleton, Oregon. The purpose of that meeting will be to (a) consider the results of OPDS's investigation in the district as reported in the preliminary draft report, (b) receive testimony and comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the county's public defense system and services, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Judicial District No. 10.

The initial draft of this report is intended to provide a framework to guide the Commission's discussions about the condition of the public defense system and services in the district, and the range of policy options available to the Commission – from concluding that no changes are needed to significantly restructuring the district's delivery system. The initial draft is also intended to offer guidance to PDSC's invited guests at its November 7, 2007 meeting, as well as the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving Judicial District No. 10's public defense delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the justice systems in these two counties is the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Judicial District No. 10.

OPDS's Findings in Judicial District No. 10

Circuit Court

Judicial District No. 10 is comprised of Union and Wallowa Counties. There are two courthouses in the district, one in La Grande and one in Enterprise. The distance between the two courts is 65 miles and the travel time, in good weather, is approximately 1½ hours.

There are two judges in the Tenth Judicial District,⁴ Presiding Judge Phillip Mendiguren and Judge Russell West. Both have courtrooms in the Union County Courthouse and both hear cases at the Wallowa County Courthouse as well.

Public Defense Providers

There are currently two consortia which provide representation in criminal and juvenile cases in the Tenth Judicial District – the Union/Wallowa Indigent Defense Consortium (UWIDC) - “the men’s consortium” - and the Union/Wallowa Women’s Consortium (UWWC). The men’s consortium includes five attorneys (two of whom are women) and handles all case types except murder and aggravated murder. It contracted to provide representation in a total of 1,470 cases over the two year period ending December 31, 2007. In addition it received \$1,000 per month to cover drug court and \$1,000 a month to cover the early disposition program.

The women’s consortium is comprised of three attorneys, one of whom is also a part of the men’s consortium. It contracted for a mixed caseload of 384 cases for the two-year period ending December 31, 2007.

All of the attorneys are experienced and handle all case types under the two contracts. They all practice in both counties and many of them also appear in cases in neighboring counties when needed. The court sometimes requests that

⁴ In an effort to describe the workload in the district, it was reported by the Judicial Department that there were 1,395 cases of all types including violations filed per each judicial position during the period of January 1 to June 30, 2007. There were 649 cases per judicial position if violations are excluded. The statewide average without violations for this period was 1,008. During the same period one felony and 3 misdemeanors were tried in Wallowa County, and 12 felonies and 20 misdemeanors in Union.)

a particular attorney be assigned to a case based on the attorney's special expertise.

For the next contract cycle, both groups have discussed publicly their intention to form a single consortium that includes all of the current members. Differences between consortium members in the past caused the attorneys to reorganize periodically. Those currently working under contract believe they can be more effective and efficient as a single consortium. Rick Dall has been the administrator of the men's consortium and is expected to be the administrator of the joint consortium if the contract proposal is approved by the Commission.

Union County

The population of Union County in 2006 was 25,110. La Grande is the county seat. Union County has not experienced the kind of dramatic shifts in general fund dollars available for county services that other rural counties in Oregon have.

Union County District Attorney Timothy Thompson was appointed to his position in October of 2006. Prior to that appointment he had worked as a deputy district attorney in Josephine County for a number of years and at the Department of Justice for eight years. He currently has two deputies although the office previously had three and may add a third in the future. The County just received a grant for a half-time prosecutor to specialize in domestic violence cases. The three-county region of Union, Baker and Wallowa received a five-year grant for \$250,000 per year.

Mr. Thompson said that criminal filings are down in Union County but he believes they will increase as soon as the cases currently in the system have been cleared and he recommends that the Commission not see this temporary reduction as a long-term development.

Mr. Thompson said that all of the members of both consortia are competent and experienced and he hopes that PDSC will take the necessary steps to allow these attorneys to continue handling public defense cases. He said that Rick Dall is well suited to the administrator role.

Criminal Cases

In criminal cases, attorneys are present for arraignments. Out of custody arraignments occur on Tuesdays. The district attorney selects some cases for early plea offers. Mr. Dall, the contract administrator meets with the defendants in these "rocket docket" cases and discusses the district attorney's offer with them. If a defendant decides to accept the offer he or she generally waives

counsel and proceeds to entry of plea and sentencing⁵. Those who are uncertain can have additional time to consider the offer. Offers are extended in approximately 95% of misdemeanor cases and only occasionally in felony cases.

Cases that don't settle at arraignment are set for pretrial conferences. Only those cases that are not resolved at the pretrial conference are set for trial.

The judges reported that there is an active motion practice in the county

Drug court

There has been a drug court in Union County for seven years. The court meets weekly. As of mid-September the drug court had graduated 35 clients, terminated 16, and was currently serving 19. The District Attorney would like to see the number increased to 40. The program is currently open to applicants charged with drug possession but not manufacture. It is also open to clients charged with property offenses. Mr. Dall is the attorney who represents defendants at drug court hearings. In Union County, (unlike Umatilla County, for example), applicants for drug court generally negotiate with the District Attorney over which charge or charges will be admitted and discharged upon successful completion of drug court.⁶ No plea or stipulation is required in order to apply for admission to the program.

Comments on the criminal system

The District Attorney has been meeting with the judges on a regular basis to discuss procedure in criminal cases. Last month the defense bar was included in the meeting. One of the issues that Mr. Thompson believes should be addressed at a future meeting is the number of many mandatory appearances in criminal cases. Written pleas are accepted in misdemeanor cases but parties are required to appear in person in felony cases and the District Attorney believes there may not need to be as many appearances as are currently scheduled.

⁵ A copy of PDSC's Guidelines for Participation of Public Defense Attorneys in Early Disposition Programs is attached as Exhibit A. The guidelines contemplate that counsel will establish an attorney/client relationship with the defendant in an early disposition proceeding and that the court will allow the attorney to continue the matter, if necessary, to perform an investigation before advising the defendant how to proceed. It is not clear whether the Union County EDP includes legal representation in this sense.

⁶ The PDSC will be reviewing the representation of drug court clients at one of its monthly meetings in 2008.

Comments on the quality of representation in criminal cases

It was reported that there was a period when attorneys were doing most of their own investigation. They now appear to be hiring investigators more often.⁷

One court representative said that defense attorneys don't always assess their cases early enough in the process.⁸ While the attorneys generally do a good job for their clients, one attorney is sometimes not prepared to proceed.

The court said it would be beneficial to their clients if attorneys were able to get them involved in treatment before sentencing or at least come to court with a plan for the client. These issues will also be discussed at the next monthly meeting of the court, the district attorney and the defense bar.

Juvenile Cases

Juvenile cases are heard by both of the Circuit Court judges. Court staff tries to ensure that each case is consistently assigned to the same judge.

Delinquency cases

The juvenile director estimated that attorneys are appointed in approximately 70% of the delinquency cases in Union County. In the remaining 30% the youth generally make an admission without requesting counsel. The court regularly schedules reviews in juvenile delinquency cases and appoints the same attorney who represented the youth in the original case upon request.

The county expects to open a juvenile drug court in the near future.

Comments on quality of representation in delinquency cases

The juvenile director said that the lawyers in Union County seem to be in good contact with their juvenile clients. He said it is unusual for delinquency cases to go to trial. Defense attorneys have not often challenged their client's competency but youth under twelve are rarely prosecuted in the county. He also said that private attorneys seem to obtain psychological evaluations of their clients in sex offense cases more often than public defense attorneys.

⁷ OPDS's records confirm that Union County attorneys are requesting approval for investigation expenses on a regular basis.

⁸ This representative also said that the district attorney's office doesn't always make offers in a timely manner.

Dependency cases

DHS files its own petitions in Union County with assistance from the district attorney's office, which appears in all dependency cases.

The court has recently begun appointing attorneys at the initial shelter hearing in dependency cases. Some attorneys are concerned about their ability to be prepared for these hearings since they generally receive less than complete discovery.

Comments on quality of representation in dependency cases

One local juvenile system representative said that the general quality of representation provided by consortia attorneys is good. They attend Citizen Review Board hearings as well as court reviews and present useful information. There is one attorney who does not appear to be meeting with her child clients, however. A second attorney is reported regularly raise issues involving legal technicalities that do not appear to be in his client's interest.

Wallowa County

Wallowa County had a population of 7,140 in 2006.

Both criminal court and juvenile court proceedings are held on Wednesdays in Enterprise, including drug courts for adults and juveniles. Pleas and pretrials in adult criminal cases are heard at 10:00 a.m. and juvenile cases at 2:00 p.m. In addition, one of the judges sits in Enterprise four to five days per month to hear trials. Each of the consortium attorneys appears in Enterprise at least once a month. Attorneys are required to be in court and are not permitted to participate from remote locations. Appearances in misdemeanor cases (in which clients are not required to be present), however, may be handled in writing.

Wallowa County prisoners are currently held in the Umatilla County Jail in Pendleton. As of November 15th, however, they will be held in the Union County Jail in La Grande, facilitating contact between consortia attorneys and their clients.

In-custody criminal arraignments are conducted via video connection with the judge in his chambers in La Grande, the District attorney at the courthouse in Enterprise, and the defendant at the jail. Defense attorneys are not present for arraignments because appointment of counsel does not occur until a request is made at arraignment. The attorney is notified promptly, by fax, of the appointment. A release hearing can be scheduled as soon as the following judicial day.

With respect to shelter hearings in dependency cases, because they generally have up to twenty-four hours notice the attorneys are generally able to be present in the courtroom with the parents, DHS and the District Attorney. The judge ordinarily appears by video connection from his chambers in La Grande. The District Attorney's office is appearing in all juvenile dependency cases at this time.

Mona Williams, the District Attorney for Union County, took office in January of 2007. She had no prosecutorial experience at the time. She said that the county budget is stretched tight. The sheriff's office is short-handed and her office could use another deputy or at least an investigator. The loss of timber revenue has had a big impact on the county. The last mill in the area closed recently and there was only a one-year extension of funding under the Secure Rural Schools and Community Self Determination Act.

Ms. Williams said that the number of criminal filings had increased somewhat in the past year, although the number of methamphetamine cases declined during the same period.

She indicated that both defense consortia appear to be good advocates for their clients and are willing to try cases. She had a lot of trials when she first took office; presumably because the defense attorneys were testing her. There is not a lot of motion practice in the county, however.

OPDS's Recommendations for Further Inquiry at PDSC's November 7, 2007 Meeting in Pendleton

In light of the information which came to its attention during interviews with representatives of the juvenile and criminal justice systems in the Tenth Judicial District, OPDS recommends that the Commission focus its inquiries and discussion at the November 7 meeting in Pendleton on the following topics.

Structural Issues

While the consortium model may work the best for attorneys practicing in Eastern Oregon Counties, it should be possible for the consortium to become a more stable organization, even if the membership may change from time to time.

Instead of restructuring periodically, the attorneys currently providing service in the area should be able to create an organizational structure that can meet their needs, the needs of their clients, and the needs of the court and OPDS over time. The Quality Assurance Task Force's list of best practices for public defense providers was given to Mr. Dall to consider when the new consortium is formed.⁹

⁹ A copy of the list is attached as Exhibit B.

Retention of Attorneys

Most of the persons interviewed expressed appreciation for the quality of representation being provided by the experienced attorneys currently handling cases in the Tenth Judicial District. They asked that sufficient support be given to these attorneys to permit them to continue to do the job. It would probably be very difficult to replace any of these attorneys with attorneys having similar levels of experience. In addition, the lawyers are required to travel relatively long distances, sometimes in severe weather conditions, to meet with their clients and attend court hearings. The Commission's funding priorities established at its August retreat¹⁰ should be applied by OPDS in its contract negotiations with this group of lawyers to make it possible for them to continue to represent public defense clients and attract additional attorneys as needed.

Quality of Representation Issues

While the quality of representation provided in the district is generally regarded as very good, there are certainly some issues that need to be addressed. If lawyers are not meeting with their child clients, plans need to be made for them to do so.¹¹ If attorneys are coming to court unprepared, this information needs to be provided to the consortium administrator, and the consortium needs to have in place procedures for addressing issues of attorney underperformance, as well as the other policies and procedures outlined in the list of best practices.

¹⁰ A copy of the minutes of the Commission retreat are attached as Exhibit C.

¹¹ All OPDS contractors recently received a statement from OPDS regarding its understanding of the role of counsel for children. The statement is attached as Exhibit D. OPDS is asking each contract applicant to describe its plan for meeting these expectations if it is not already doing so.

Exhibit A

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

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

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

Commentary

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

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

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

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

Commentary

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

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

STANDARD 1.1 – Prerequisites for Representation

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

STANDARD 1.2 – General Duties and Responsibilities of Counsel to Clients

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

STANDARD 1.3 – Role of Counsel

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

STANDARD 1.4 – Initial Client Interview

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

STANDARD 2.5 – Initial Court Appearances

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

STANDARD 2.6 – Independent Investigation

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

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

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

Commentary

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

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

STANDARD 2.8 – Pretrial Negotiations and Admission Agreements
Counsel should:

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

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

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

Commentary

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

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

Commentary

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

RULE 1.16 DECLINING OR TERMINATION REPRESENTATION

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

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

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

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

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

RULE 2.1 ADVISOR

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

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

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

Exhibit B

Components of a Successful Office -- Best Practices List
Revised April 5, 2006

- (1) Policy of zealous advocacy. A contractor should develop and maintain a client-focused practice. Zealous advocacy requires that the contractor have attorneys present at all court hearings including arraignments and shelter hearings. It also requires immediate and continuing contact with all clients, including child clients, and a plan for meeting the needs of non-English speaking clients.
- (2) Board or advisory group. For **consortia** and **public defender** offices, a regularly meeting board of directors or advisory group with at least some independent members who are not employed by the contractor.
- (3) A business or strategic plan developed and regularly updated by the contractor's managers and subject to review by its board of directors or advisory group. The plan should include a formal process for recruiting and training new attorneys, a succession plan for managers, and an affirmative action plan.
- (4) Evaluation of management. **Public defender** offices and **consortia** should have a management assessment process that includes an annual evaluation of the executive manager, an evaluation of office management processes, and a review of the operations by the board of directors or advisory group. **Law firms** should have a process for obtaining feedback on the performance of firm management.
- (5) Professionally acceptable law office management policies and procedures including an employee manual; an office procedure manual; a case file maintenance procedure for creating, maintaining and closing files, calendaring appearances, and retaining records and case notes; and a system for collecting and using management data¹.
- (6) Modern, professional-quality law office space, technology and equipment. In addition to maintaining a work environment that safeguards the health, safety and comfort of employees, instills pride and confidence in the work performed there, and promotes efficient and productive work among attorneys and support staff, attorneys should have access to current reference materials and manuals and online legal research services.
- (7) Case management: A case assignment system which takes into account the qualifications, experience and workload of each attorney, a conflict identification system which identifies conflicts at the earliest opportunity, a case monitoring system which tracks the number and type of cases assigned to each attorney and a resource management plan for handling the assigned caseload.

¹ At a minimum this data should include for each case: the date of intake, the name of the assigned attorney, current status and final outcome.

- (8) Compensation and Advancement: A fair and rational compensation system and a fair and rational system for advancement from minor cases to more serious and complex ones.
- (9) Training and evaluation. An orientation process for new employees; a training manual and mentoring plan for new attorneys; regular training for lawyers, investigators and legal assistants; regular and consistent written performance evaluations of the contractor's attorneys (at least every two years).
- (10) A method of obtaining client input regarding the quality and responsiveness of the contractor's legal services and a process for resolving complaints about the performance and conduct of the contractor's attorneys and staff.
- (11) Involvement in the legal system of the county and the community at large.

Exhibit C

Minutes of Public Defense Services Commission Retreat

August 9 – 10, 2007

Coos Bay Oregon

Attending: Barnes Ellis, Shaun McCrea, John Potter, Janet Stevens

Staff: Ingrid Swenson, Kathryn Aylward, Peter Gartlan, Rebecca Duncan, Paul Levy

Barnes Ellis convened the PDSC retreat. The first topic of discussion was the 2007-09 budget.

Ingrid Swenson described the final actions taken by the Legislature on the PDSC budget and expressed appreciation to the governor and the legislators, the chief justice, commissioners, contractors, representatives of law enforcement, the Oregon Criminal Defense Lawyers Association, the Oregon State Bar and others who supported increased funding for public defense in the 2007 session.

Kathryn Aylward reviewed the final budget allocations to OPDS's Contract and Business Services Division, its Legal Services Division and to the Public Defense Services Account. She explained the major components of the budget and identified funds that could be used to increase compensation for providers.

Barnes Ellis then invited the contractors who were present to supplement the materials that had been provided prior to the commission retreat regarding funding priorities. He then summarized all of the submissions and identified fourteen proposed priorities:

1. Increase the hourly rate
2. Provide an across-the-board inflationary adjustment
3. Mitigate rate disparities within the same markets
4. Reduce caseloads
5. Subsidize providers in areas unable to attract/retain needed attorneys
6. Subsidize providers in counties where the difference between public defender and district attorney compensation is the greatest
7. Fund a student loan repayment program
8. Increase investigator compensation
9. Increase death penalty mitigator compensation
10. Fund a pilot project for juvenile dependency cases
11. Increase funding for non-profit public defender offices
12. Allocate resources to improving representation in PCR cases
13. Allocate resources to improving representation in death penalty cases
14. Allocate resource to improving representation in juvenile cases

Commissioners then discussed these proposals and their implications.

Hourly rate: Overall, the hourly rate service delivery model has become limited compared with service delivery on a unit basis by public defenders or consortia. Thus, while some groups would receive the benefit of an increase in the hourly rate, the impact would be limited and uneven. However, since the Legislature supported the hourly rate increase it is important for the Commission to follow through with it. Experience is tending to show that the unit based service delivery model is more desirable than the hourly rate model, both for OPDS for whom the expense per case is more predictable and for contractors whose income is more reliable. In the next biennium it is expected that the number of attorneys working on an hourly rate basis will decline.

Inflationary Adjustment: An across-the-board inflationary adjustment was proposed by OCDLA and supported by a number of the contractors.

Mitigation of Rate Disparities: The Commission discussed the history of rate disparities and its effort last session to begin to mitigate them despite very limited resources. As to disparities between public defender offices and other contractors, public defender offices generally cost more but they perform essential training, provide leadership in the community and can't supplement their income with retained work. Nevertheless, the case has been made that some consortia have been undervalued. Since the commission wants to retain consortia which provide good quality representation, their needs must be addressed. Each prospective contractor should seek contract terms that meet its individual needs and not expect rates to be uniform statewide or even within a single region.

Reduced Caseloads: If case rates were increased and case numbers remained the same, some consortia might eliminate attorneys in order to increase compensation per attorney rather than reduce the caseloads of its attorneys. It is not PDSC's role to try to maintain a particular number of attorneys if the caseload declines. If the number of cases declines, however, it could well be appropriate for contractors to maintain their current staff with lower caseloads or reduce staff and increase compensation. With early disposition programs resolving many of the less complicated cases in some jurisdictions, the cases that remain for adjudication are more complex and difficult and the rates for these cases may need to be increased. In the past public defense providers have been told that they needed to take more cases if they wanted more money. That will not be the case in this contract cycle. There may not be additional cases to be taken and the commission needs to establish case rates that accurately reflect the cost of doing business. If either caseloads or compensation rates increase beyond the levels budgeted for them by the Legislature the commission may have to seek supplemental funding to meet its obligations.

Attracting and Retaining Attorneys: A variety of strategies are needed to assist public defense providers in attracting attorneys to their areas and retaining

them once they have been trained and become experienced in criminal or juvenile law.

Addressing Salary Differential between Public Defenders and District Attorneys: Reducing salary differentials is one strategy that could be used in some areas to attract and retain attorneys. In other areas parity with the district attorney's office will be less critical.

Loan Repayment Assistance Plan: In October of 2006 the Diversity Task Force proposed that the Commission create a loan repayment assistance plan that would provide assistance of \$5,000 per year to lawyers at the lower end of the pay scale who have significant loan repayment obligations. Such a program could help attract and retain younger lawyers and lawyers with various cultural competencies such as fluency in Spanish or ties to minority communities, and could be used as an incentive to attract lawyers to geographically remote areas of the state as well. For attorneys who work less than full time on public defense cases, the amount of the grant could be made proportional to the portion of the attorney's time devoted to public defense. A limited program could be initiated by the Commission and, if it were found to be successful, grants and other funds could be sought to expand the program.

Increases for Investigators: Investigators who work on privately retained cases are paid significantly more than investigators on public defense cases. Rates for public defense investigators have not been raised in many years, and there are insufficient numbers of some types of investigators, such as mitigators in death penalty cases, to handle the caseload.

Pilot Projects: A pilot project in two or more counties that included reduced caseloads and increased compensation for juvenile dependency lawyers could help OPDS establish that implementing these changes statewide would result in improved representation which could in turn result in significantly better outcomes for clients and possible savings for both the child welfare system and the courts.

Increased Funding for Post Conviction Relief: High quality representation in post conviction relief cases is critical to preserving clients' access to the federal courts but there have long been concerns about the quality of representation in this area. It is anticipated that it will be at least two years before the Legal Services Division will be in a position to undertake a new category of representation such as trial level post conviction relief. In the meantime OPDS has been able to obtain the services of some highly skilled lawyers to handle part of the caseload and will be seeking the services of others.

Increased Funding for Death Penalty Representation: OPDS may need to extend contract offers to more providers, since many death penalty attorneys will probably be unwilling to work for the \$60 per hour rate proposed for adoption by

the Commission. In addition, current death penalty contractors have not had a rate increase for a significant period of time and may seek increases in this contract cycle.

Improved Representation for Juveniles: In addition to the possible pilot project discussed above the commission was asked to consider the creation of a certification program for juvenile lawyers that would provide enhanced compensation for attorneys who received certification as juvenile law specialists.

At the conclusion of the discussion about recommended budget priorities, individual commissioners were asked to assign a numeric value from 1 to 10 to each of the proposed priorities. At the conclusion of this process the commission endorsed the following as its principle priorities for expenditure of funds from the Public Defense Services Account in the 2007-2009 biennium.

1. Increase in the Hourly Rate for Attorneys and Investigators/Mitigators. The rate for attorneys in non-death penalty cases will be increased from \$40 to \$45 per hour and the rate in death penalty cases will be increased from \$55 to \$60 per hour. The hourly rate for investigators will be increased from \$25 to \$28 per hour in non-death penalty cases and from \$34 to \$39 per hour for investigators/mitigators in death penalty cases. Increased attorney rates will apply to work performed on or after August 10, 2007. Increased investigator rates will apply to authorizations approved on or after August 10, 2007. (The Commission reconvened its regular meeting which had been recessed on August 9th and approved implementation of the hourly rate increases with all four commissioners present voting in favor of the proposal.)
2. Inflationary Adjustment. All contractors, including the Marion County Association of Defenders, but excluding the Yamhill Defense Consortium, will receive at least a 3.1% increase this biennium in contracts executed after January 1, 2008¹.
3. Mitigation of Rate Disparities. The Commission directed the Office of Public Defense Services to work towards mitigating rate disparities in any markets in which the disparity would jeopardize OPDS's ability to retain desired contractors. Non-profit public defender offices provide services that consortia do not and rate disparities between public defender offices and other types of contractors may, therefore, remain. Rate disparities between public defender offices within the same market providing similar services should be mitigated.

¹Yamhill Defense Consortium attorney are compensated on an hourly basis and will realize an increase exceeding 3.1% effective August 10, 2007.

4. Reduction in Caseloads. The Commission disapproves of the concept that contractors must take more cases in order to receive increased compensation. This practice had led to contractors handling caseloads higher than those recommended by national standards. If funds are available to do so, when OPDS is satisfied that increasing the unit value would result in an actual caseload reduction for the attorneys it may increase that value. OPDS should not agree to caseloads that jeopardize the contractor's ability to provide quality representation. In the spring of 2008, the Commission will conduct a review of public defense caseloads in Oregon.
5. Subsidize providers to help attract and retain qualified attorneys.
 - (a) OPDS staff is to prepare a proposal for creating a loan repayment program that will help providers attract and retain attorneys in underserved areas of the state and assist in serving other recruitment needs such as attracting culturally competent attorneys. The proposal should address how a fund of approximately \$100,000 could be used to create a loan repayment assistance plan, what the annual amount of the award per attorney would be, whether it would be available only to full time defenders, what the financial eligibility requirements would be, whether there should be a limit on the number of years for which an attorney would be eligible to receive the award, how the program might be designed to avoid conflict with other loan repayment assistance plans that are in place or may become available.
 - (b) In those areas where it is difficult to attract and retain qualified attorneys, it is appropriate for OPDS to increase compensation rates.
 - (c) If public defender offices have difficulty attracting and retaining qualified attorneys because of a pay differential with the local district attorney's office, OPDS may work to minimize that differential.

The Commission reviewed and discussed new Key Performance Measure Nos. 8 and 9. OPDS will review the agency's existing performance measures and recommend changes to the measures in order to make certain that they address the key functions of the agency, including maintaining the capacity of the public defense system and improving the quality of the services provided.

The Commission reviewed and approved the proposed amendments to the PDSC Strategic Plan for 2007-2009.

Exhibit D

ROLE OF COUNSEL FOR CHILDREN AND YOUTH

During the course of numerous site reviews over the last four years, OPDS has noticed significantly inconsistent practices regarding the role of appointed counsel for children in both dependency and delinquency cases.

For example, some attorneys believe that it is not necessary to meet and confer with child clients.

It is hoped that this statement will clarify what OPDS believes to be the role of counsel for children in dependency cases and youth in delinquency cases. The statement is being sent to all public defense providers. If you have questions about the role of counsel as outlined in this statement, please contact OPDS's General Counsel, Paul Levy at (503) 378-2478.

Role of Counsel in Dependency Cases

In juvenile dependency cases, the role of the attorney appointed to represent a child will depend on the age of the child and the child's capacity for considered judgment.

An attorney for a child capable of considered judgment must advocate for the child's expressed wishes. The role of an attorney for a child not capable of considered judgment must advocate for the child's best interest as determined by the attorney's independent investigation and exercise of sound judgment. Some children are capable of considered judgment with respect to some decisions that need to be made in the case but not with respect to others. Standard 3.4 of the Specific Standards for Representation in Juvenile Dependency Cases of the Oregon State Bar's Principles and Performance Standards¹ outlines the analysis to be used in deciding the appropriate advocacy in a given case.

Regardless of that ultimate determination, the child is a "client" and OPDS contracts require the contractor to speak to and conduct initial interviews, in person, with clients who are in custody within 24 hours of appointment whenever possible; and to arrange for contact, including notification of a scheduled interview time, within 72 hours of appointment for all clients who are not in custody. Children are not excepted from this rule.

In addition, Rule 1.14 of the Oregon Rules of Professional Conduct (ORCP) requires counsel for persons with diminished capacity (which includes children not capable of considered judgment) to maintain, as far as reasonably possible, a normal client-lawyer relationship with the client. The ORCP require attorneys to

¹ The full text of the 2005 version of the Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases can be found on the bar's website at http://www.osbar.org/surveys_research/performancestandard/index.html.

maintain contact with their clients, **to keep them reasonably informed** about the status of their cases (ORPC Rule 1.4), **to promptly comply** with reasonable requests for information (*Id*), **to explain** matters to the extent reasonably necessary to permit the client to make informed decisions about matters regarding which the client is capable of exercising considered judgment (*Id*), **to abide by** the decisions of a client who is capable of considered judgment concerning the objectives of representation (ORPC Rule 1.2), and **to consult** with the client regarding the means by which the objectives of representation are to be pursued (*Id*). These rules apply regardless of the client's age or capacity.²

Role of Counsel in Delinquency Cases

Attorneys for youth in juvenile delinquency proceedings are bound to advocate for the expressed wishes of the youth. While the attorney has a responsibility to advise the youth of legal options that the attorney believes to be in the youth's best interest and to identify potential outcomes of various options, the attorney must represent the express interests of the juvenile at every stage of the proceedings. The attorney owes the same duties to a juvenile under the Rules of Professional Conduct as an attorney owes to an adult criminal defendant.

If an attorney determines that a youth is not capable of aiding and assisting in the youth's defense, the attorney shall move the court to dismiss or amend the petition, as discussed in Standard 2.8(2) of the Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.

² For those attorneys who lack the information or skills to have an age appropriate discussion with a young or disabled client, an online training will be available beginning in November, 2007 at the following link: <http://www.cwpsalem.pdx.edu/teen/>.

Attachment 5

LFO Revised Budget Form #107BF04c

**Public Defense Services Commission
Annual Performance Progress Report (APPR)
for Fiscal Year 2006-07**

Original Submission Date: September 25, 2007

2005-07 KPM#	2005-07 Key Performance Measures (KPMs)	Page #
1	APPELLATE CASE BACKLOG - Number of cases in the Legal Services Division backlog	4
2	FEE STATEMENTS REDUCED - Percentage of fee statements reduced due to incorrect billing	6
3	PROCESSING FEE STATEMENTS - Percentage of fee statements processed within 10 business days	7
4	REVIEWING EXPENSE REQUESTS - Percentage of non-routine expense requests reviewed within 5 business days	8
5	EXPENSE COMPLAINTS – Percentage of complaints regarding payment of expenses determined to be founded	10
6	BEST PRACTICES - Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their services, which are identified by PDSC’s site visit process and the process’s “360 degree” evaluations	12
7	ATTORNEY PERFORMANCE COMPLAINTS - Percentage of complaints regarding attorney performance determined to be founded	14
8	CUSTOMER SERVICE – Percent of customers rating their satisfaction with the agency’s customer service as “good” or “excellent”: overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information	16
9	BEST PRACTICES FOR BOARDS AND COMMISSIONS – Percentage of total best practices met by Commission	17

PUBLIC DEFENSE SERVICES COMMISSION

I. EXECUTIVE SUMMARY

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

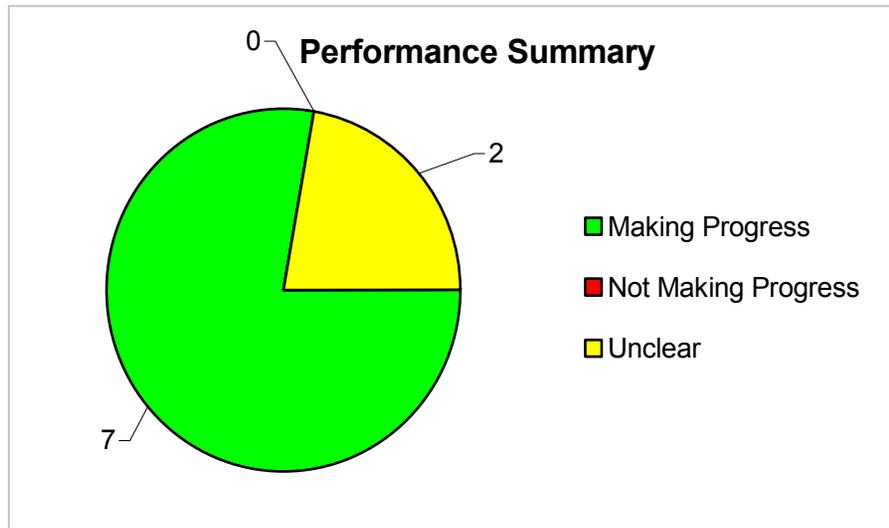
Contact: Kathryn Aylward	Phone: (503) 378-2481
Alternate: Peter Gartlan	Phone: (503) 378-2371

1. SCOPE OF REPORT

- Key performance measures address all agency programs.

2. THE OREGON CONTEXT

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



3. PERFORMANCE SUMMARY

The agency is making progress in seven of its nine Key Performance Measures. On KPM #8 and KPM #9 are new measures for which there is no data yet.

4. CHALLENGES

The primary challenge for the agency is that public defense in Oregon has been chronically underfunded. During fiscal year 2007, the hourly rate for an attorney appointed on a non-Aggravated Murder case was \$40 per hour (the rate established in 1991). Over time, the skills, abilities, and experience-level of the attorneys willing and able to work at that rate have steadily declined. Contractors who are paid a flat rate under a contract are assigning excessively high caseloads to their attorneys in order to cover operating expenses. This combination of being either over-worked or under-paid, and in most cases both, prevents attorneys in some cases from being able to provide an acceptable level of representation.

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

PUBLIC DEFENSE SERVICES COMMISSION

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

5. RESOURCES USED AND EFFICIENCY

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

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

PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

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

1. OUR STRATEGY

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

2. ABOUT THE TARGETS

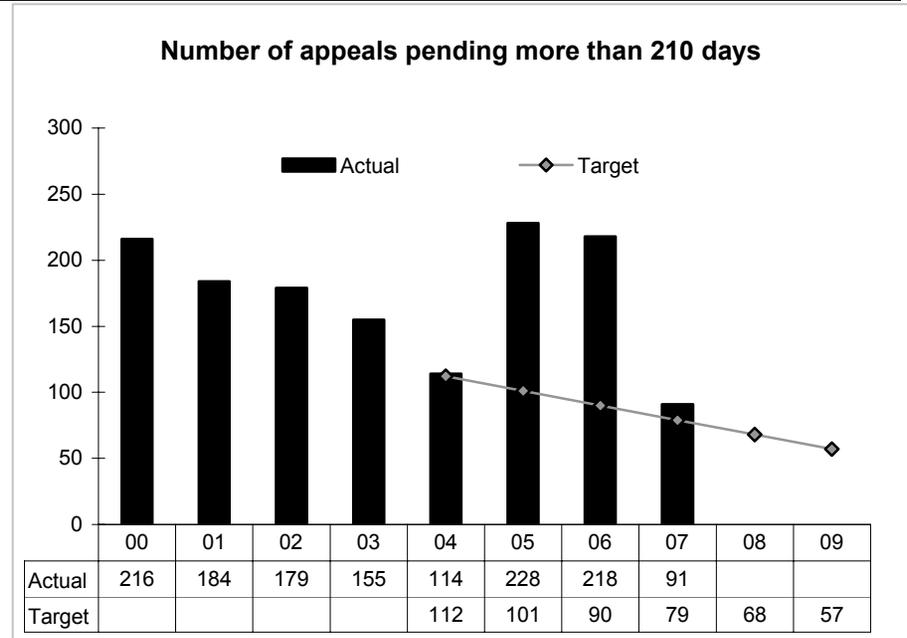
The Legal Services Division wants to file its opening brief in most cases within 210 days of record settlement. The 210-day target reflects several considerations. First, the agency considers it intolerable that an incarcerated individual must wait more than seven months before an appellate attorney is in a position to properly advise a client regarding the viability of an appellate challenge to his conviction and/or sentence. Second, past budget reductions in the Attorney General’s Office caused the Solicitor General to slow its briefing schedule in criminal cases. The Attorney General’s slowed pace meant additional delay in the appellate process, which means additional delay for the client. Third, federal courts have intervened in state appellate systems when the state system routinely takes two years to process criminal appeals. The 210-day target represents a reasonable attempt to meet the varying considerations.

3. HOW WE ARE DOING

The agency significantly reduced case backlog from June 2000 through June 2004, but the case backlog increased from June 2004 through June 2005, and remained high through June 2006. During fiscal year 2007, the agency reorganized its administration so that the Contract & Business Services Division would be responsible for all administrative functions of the agency. This allowed Legal Services Division managers and staff to concentrate their efforts on reducing the backlog. Although still not at target, fiscal year 2007 represents a significant improvement.

4. HOW WE COMPARE

The Legal Services Division compares extremely favorably with national standards for attorney productivity. In 2001, the US Department of Justice issued a report entitled “Keeping Defender Workloads Manageable” which contained national data indicating that an appellate attorney should be assigned a



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

maximum number of 25 appeals per year. By contrast, an agency attorney resolves an average of 37 cases per year, or approximately 50% more than the national average.

5. FACTORS AFFECTING RESULTS

In 2004, the United States Supreme Court issued two landmark decisions (*Crawford v. Washington* and *Blakely v. Washington*) that directly impacted agency caseload. The *Blakely* decision rendered virtually every sentence imposed by state judges subject to challenge and dramatically increased the number of appeals statewide. These two court decisions account for the backlog “spike” in fiscal years 2005 and 2006, and therefore the agency was unable to meet its target for 2007.

6. WHAT NEEDS TO BE DONE

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

The agency will continue to refine its evaluation system and performance measures to more closely measure attorney capacity and promote individual responsibility for case production.

For the 2007-09 biennium, the Legislature provided funding and position authority for eight additional attorneys to handle direct criminal appeals. After recruitment and training of these additional attorneys, the agency should be able to meet backlog reduction targets and keep up with the increasing caseload.

7. ABOUT THE DATA

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

PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

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

1. OUR STRATEGY

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

2. ABOUT THE TARGETS

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

3. HOW WE ARE DOING

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

4. HOW WE COMPARE

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

5. FACTORS AFFECTING RESULTS

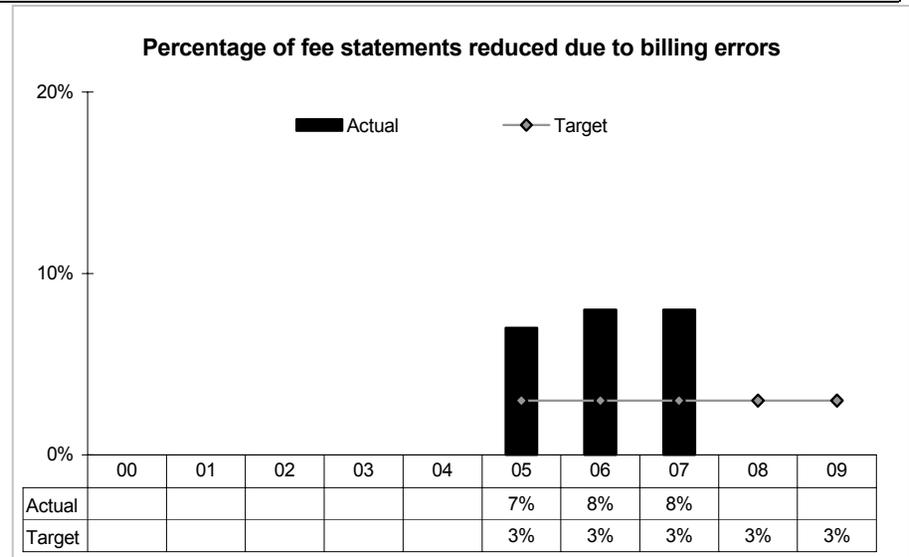
It appears that the initial targets are too low.

6. WHAT NEEDS TO BE DONE

The agency will work with the Progress Board and the Joint Legislative Audit Committee to determine whether this is a useful performance measure.

7. ABOUT THE DATA

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



PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

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

1. OUR STRATEGY

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

2. ABOUT THE TARGETS

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

3. HOW WE ARE DOING

The agency was at target for fiscal year 2004, and then far exceeded the targets for 2005, 2006 and 2007.

4. HOW WE COMPARE

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

5. FACTORS AFFECTING RESULTS

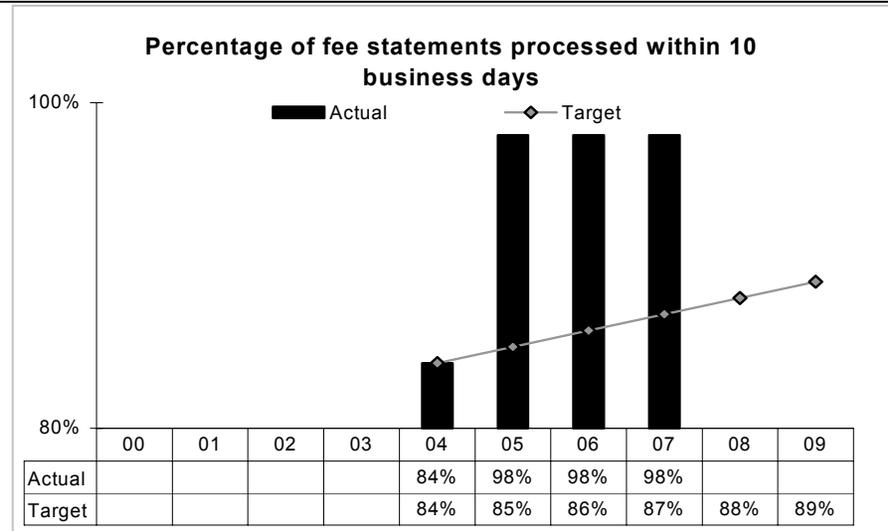
In late 2004, an agency employee developed a technological improvement that eliminated the need for duplicate data entry. Not only did this speed the processing of bills but it also eliminated the chance of error in the transfer of information between accounting systems. In 2007, the agency diverted staff time away from processing fee statements to assist the Legal Services Division in making better progress toward its performance measure (KPM #1). In spite of this reduction in staff time, the agency was still able to maintain the rate of fee statement processing.

6. WHAT NEEDS TO BE DONE

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

7. ABOUT THE DATA

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



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

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

1. OUR STRATEGY

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

2. ABOUT THE TARGETS

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

3. HOW WE ARE DOING

The agency was at target for fiscal year 2004, and then far exceeded the targets for 2005, 2006 and 2007.

4. HOW WE COMPARE

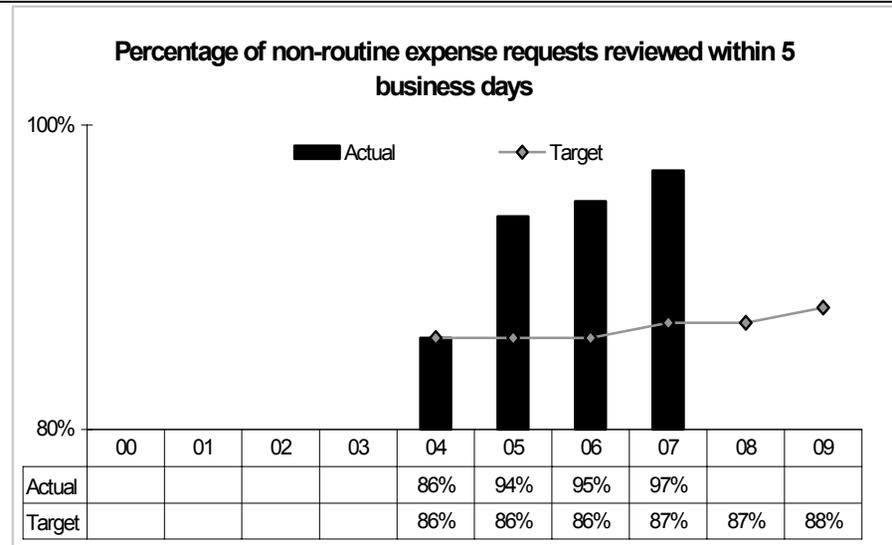
The agency is not aware of comparative data.

5. FACTORS AFFECTING RESULTS

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

6. WHAT NEEDS TO BE DONE

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



PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

7. **ABOUT THE DATA**

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

PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

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

1. OUR STRATEGY

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

2. ABOUT THE TARGETS

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

3. HOW WE ARE DOING

Out of approximately 40,000 payments processed per year, the agency received three complaints regarding payment of expenses in fiscal year 2007. All were determined to be unfounded.

4. HOW WE COMPARE

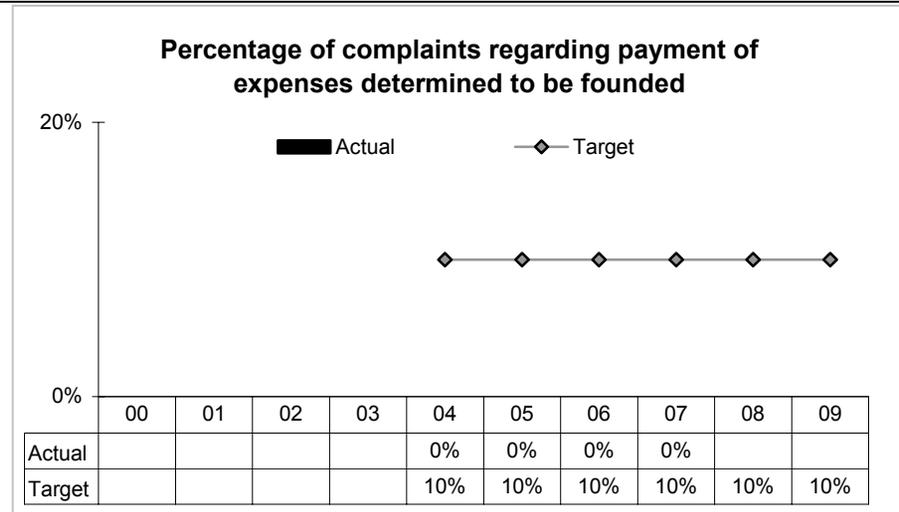
The agency is not aware of comparable data.

5. FACTORS AFFECTING RESULTS

Prior to July 1, 2003, expenditures were reviewed and processed by each circuit court. On July 1, 2003, the Public Defense Services Commission assumed responsibility for the entire public defense program. This centralization of expense approvals provides consistency and appropriate distribution of the agency’s limited resources, and likely accounts for the fact that so few complaints have been received.

6. WHAT NEEDS TO BE DONE

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



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

7. ABOUT THE DATA

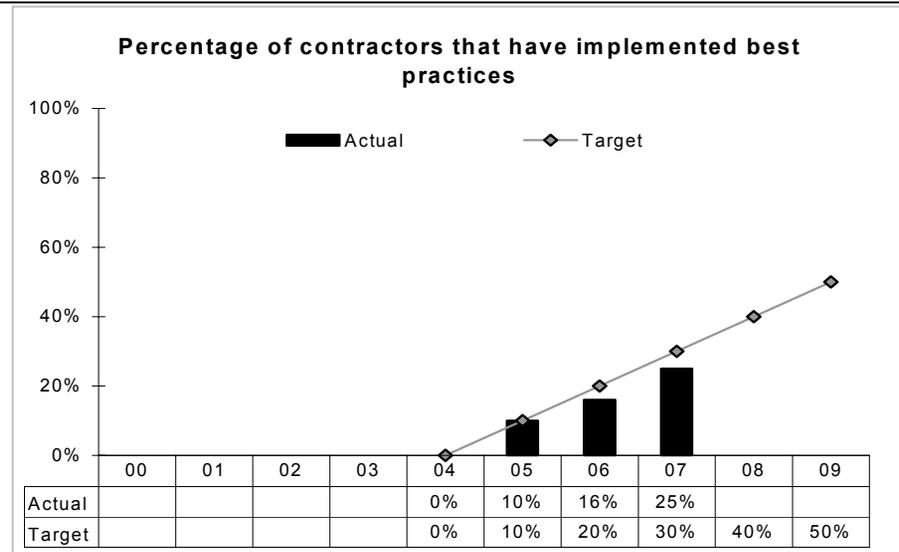
The data includes complaints received during the fiscal year (July 1 to June 30). The weakness of the data is that there will likely always be a very small number of complaints and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance.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

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

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

1. OUR STRATEGY

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



2. ABOUT THE TARGETS

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

3. HOW WE ARE DOING

Because the targets did not anticipate the time contractors would require for implementation, the straight-line projection over-simplifies what the agency would expect to see. Although we are not quite at target for 2007, the agency expects to meet or exceed targets in 2008 and 2009.

PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

4. HOW WE COMPARE

The agency is not aware of comparable data.

5. FACTORS AFFECTING RESULTS

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

6. WHAT NEEDS TO BE DONE

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

7. ABOUT THE DATA

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

PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

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

1. OUR STRATEGY

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

2. ABOUT THE TARGETS

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

3. HOW WE ARE DOING

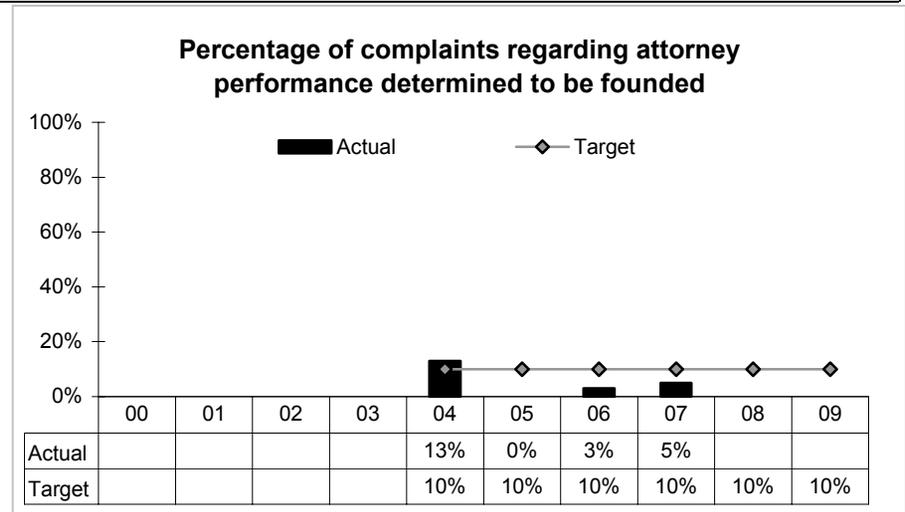
In fiscal year 2004 (the first year of operation for the agency), we did not meet the target; however, in 2005, 2006 and 2007, the agency exceeded expectations with fewer than 10% of the complaints received being founded.

4. HOW WE COMPARE

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

5. FACTORS AFFECTING RESULTS

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



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

6. WHAT NEEDS TO BE DONE

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

7. ABOUT THE DATA

The data includes complaints received during the fiscal year (July 1 to June 30). The weakness of the data is that the total number of complaints received is quite small (59 in 2007) and therefore the percentage of founded complaints may fluctuate dramatically without giving a true indication of performance. Furthermore, the absence of complaints should not necessarily be seen as an indication that there are not problems with the quality of representation. In 2000, the Oregon State Bar Task Force on Indigent Defense concluded that representation in juvenile cases and post-conviction relief cases was inadequate. In 2005, the Secretary of State's Audits Division rated the quality of representation in those case types as "risk areas" for the agency.

PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

KPM #8	CUSTOMER SERVICE Percent of customers rating their satisfaction with the agency’s customer service as “good” or “excellent”: overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information	Measure since: 2007
Goal	To provide greater accountability and results from government by delivering services that satisfy customers.	
Oregon Context	To maintain and improve the following category ratings of agency service: overall quality of services, timeliness, accuracy, helpfulness, expertise and availability of information.	
Data source	Customer Service Surveys	
Owner	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	

1. OUR STRATEGY

The general strategy is to utilize feedback to address cited problems and improve the general level of service provided by the agency.

2. ABOUT THE TARGETS

Targets were not set for 2007-09 as no baseline data was available upon which realistic targets could be based.

3. HOW WE ARE DOING

Data not yet obtained.

4. HOW WE COMPARE

No data for comparison.

5. FACTORS AFFECTING RESULTS

No results yet.

6. WHAT NEEDS TO BE DONE

Develop and administer survey.

7. ABOUT OUR CUSTOMER SERVICE SURVEY

Not yet developed.



PUBLIC DEFENSE SERVICES COMMISSION

II. KEY MEASURE ANALYSIS

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

KPM #9	BEST PRACTICES FOR BOARDS AND COMMISSIONS Percentage of total best practices met by Commission	Measure since: 2007
Goal	Best practices as a pathway to improved performance and accountability	
Oregon Context	Required KPM for all Oregon boards and commissions	
Data source	Commission agendas and minutes	
Owner	Contract and Business Services Division, Kathryn Aylward, (503) 378-2481	

1. OUR STRATEGY

The agency's commission currently follows most of the best practices and will implement the remainder during the next six months.

2. ABOUT THE TARGETS

The agency anticipates meeting all of the best practices for boards and commissions by 2008.

3. HOW WE ARE DOING

No data yet.

4. HOW WE COMPARE

No data for comparison.

5. FACTORS AFFECTING RESULTS

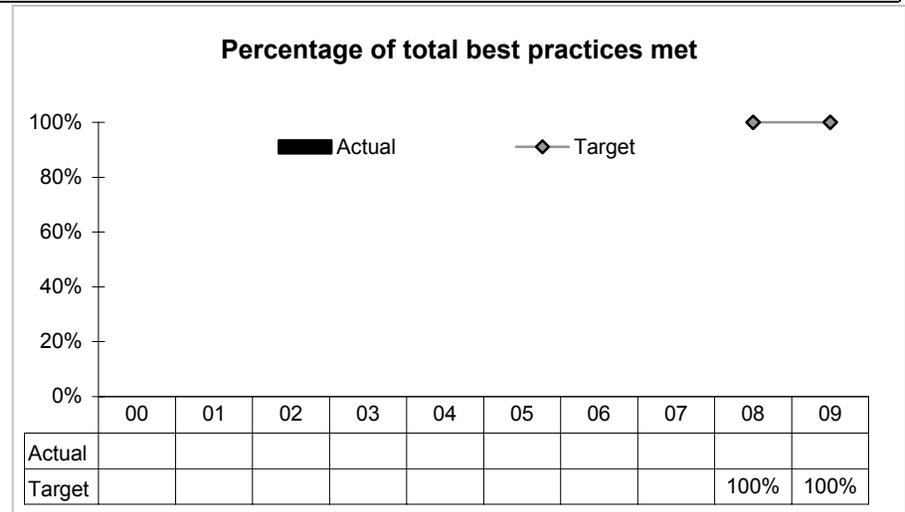
No results yet.

6. WHAT NEEDS TO BE DONE

No data yet.

7. ABOUT THE DATA

No data yet.



PUBLIC DEFENSE SERVICES COMMISSION

III. USING PERFORMANCE DATA

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

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

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