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PUBLIC DEFENSE SERVICES COMMISSION

**Meeting of the Public Defense Services Commission
Thursday, February 12, 2004
11:00 a.m. to 4:00 p.m.**

Lane County Courthouse
Courtroom 307
125 East 8th Avenue
Eugene, Oregon

(Please note the new time and location)

Agenda

1. Action Item

Approval of Minutes (*Attachment 1*) Barnes Ellis

2. Announcements and Updates

A. OPDS's Status Report OPDS Staff
(*Meeting Handouts*)

B. Review of Today's Meeting Peter Ozanne

3. Action Item

Review and Approval of Preliminary Kathryn Aylward
Agreements (*Attachment 2*)

4. Introduction to Review of Public Defense Barnes Ellis
Service Delivery in Lane County Peter Ozanne
(*Attachment 3*)

A. Discussions with the
Defense Bar

B. Discussions with the
District Attorney's Office

C. Discussions with the

Circuit Court

D. Discussion by the Commission

Next Meeting: Thursday, March 11, 2004 in Corvallis, Oregon. Location to be announced.

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES
January 15, 2004
Justice Building, Fifth Floor, Conference Room 2

Tapes 1 and 2

MEMBERS PRESENT: Barnes Ellis
Jim Brown
Jon Yunker
Chip Lazenby (by phone)
Janet Stevens (by phone)
Chief Justice Wallace P. Carson, Jr.

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Rebecca Duncan
Lorrie Railey
Ingrid Swenson
Angelique Bowers

OTHERS STAFF PRESENT: Ann Christian

TAPE 1, SIDE A

001 Chair Ellis Called meeting to order 9:05 a.m.

We will start with Action Item 4. Ingrid, I think you are the presenter on Item 4 which is Proposed Changes in the Payment Policies and Procedures relating to substitution of appointed counsel.

Agenda Item No. 4: Proposed Change in CBS's Payment Policies and Procedures

009 I. Swenson Thank you Mr. Chair and members of the Commission. I think some of the folks here today may be here because this issue is of interest to the defense bar. House Bill 2074 from last legislative session included a number of provisions regarding the policies and procedures that the Office of Public Defense Services and the Commission were to enact. As of January 1 of this year the bill provided that the courts no longer had the authority to substitute one counsel for another except pursuant to the policies of this body. For that reason it was with some urgency that we decided we needed to present the Commission with some policy proposals in that area. Prior to the enactment of House Bill 2074, the court operated under its inherent authority for the most part in this area. There was statutory authority with respect to criminal cases and appeals in criminal cases that governed the use of the substitution power of the court. In the criminal area the standard was the interests of justice. With respect to juvenile cases there was no provision

whatsoever for substitution, although there was for appointment. So in that area and in civil commitment cases, for example, a court was able to substitute counsel based on its inherent appointment power. Of course, the constitution is implicated because people have the right to counsel, and that assumes the right to appropriate and capable counsel. I think whether or not anything was enacted in terms of a Commission policy, the court would retain that inherent authority. However, it is my understanding that the legislature enacted these provisions after hearing about specific cases in the Portland area involving the substitution of counsel in two cases, one of which involved seven attorneys on one case and one of which involved eight attorneys in a single case. So the legislature was concerned for a couple of reasons, principally I think because they thought there would be a fiscal impact resulting from the appointment of multiple attorneys in a single case. As it turns out, that is not necessarily the case. If a case is reassigned within a consortium, there is no additional payment beyond the original payment to that consortium, even though the case is reassigned within that group. If the consortium is working on an hourly rate, of course there is some additional cost because the new attorney has to repeat some of the work that has been done before. The legislature's other concern was apparently that multiple substitutions would involve delay in a case. If you have a series of seven or eight lawyers appointed, it takes longer to adjudicate the case than if you have one or two. So we understood that the legislature wanted the Commission involved for those reasons.

You have two versions of a proposed substitution policy in front of you. One is the Revised Attachment 4 to today's agenda and the other is the Second Revised Attachment 4. The approach which we took with respect to this proposed policy was to not affect the power of the court as it is and as it remains, but simply to require pursuant to our policies that the court consult with the Office of Public Defense Services. Regarding some specific concerns that we heard from defense lawyers, we articulated very specifically the things that OPDS would be discussing with the court to assure the defense bar that we weren't going to talk about the substance of the issue. We weren't going to talk about things related to the basis for the substitution. OPDS would confer with courts about four things. First, we need to obtain information regarding the reason for the substitution. We felt it was imperative that OPDS knows why the court was making substitutions. We were informed by some judges, for example, that a substitution would be made if counsel simply failed to appear twice in a row with no explanation in a case. In such a case, those judges would remove that lawyer and appoint another. We need to be aware that this is happening and make further inquiry. It might be appropriate to take some action with respect to that attorney from our point of view if in fact they are not fulfilling the obligations which they have as appointed counsel. Secondly, we thought it appropriate that we learn about the patterns of substitutions that are taking place for purposes of future contracting. For example, in some counties where there are drug courts the process is to initially appoint an attorney at arraignment and then, if that case is appropriate for drug court, to substitute the counsel who is under contract to provide services to drug court clients. So for our purposes, it is useful to know when this sort of thing is happening that OPDS understands the initial attorney isn't going to be representing the client in the long term if it is a drug case. Thirdly, we believe it is appropriate that the court understands the impact of its decisions in substitution cases on the public defense costs. For the most part, judges have been very concerned about that and interested in knowing. One of the exceptions to the consultation rule in this proposed policy has to

do with reassignments within public defender offices, within consortia and within law firms. Those reassignments can be routine for a lot of reasons and we don't think it is necessary to confer about those because, for the most part, we incur no additional fee. Finally, we thought it might be appropriate when the court was making substitutions under certain circumstances for OPDS to be available as a source of information to the court regarding who among available attorneys would be appropriate to assume the role of counsel. For example, there have been cases where particularly difficult clients have been through several attorneys and our office has been able to suggest an attorney under contract with PDSC who has specific skills dealing with people with mental illness, mental retardation or other issues which may make the attorney/client relationship a fairly difficult one.

Because we didn't contemplate significant substantive changes with this proposed policy we weren't aware that the public defense lawyers would be as interested. As it turns out, they are. We did circulate the proposed policy to the presiding judges, heard back from three judges and tried to address their concerns. But the defense lawyers really did not see this policy until Tuesday of this week. I have had communications with a number of them since then and I would like to summarize some of their concerns. I think the major one was that they see this as an opportunity to address major concerns that they have about the existing process. They would like notice and opportunity to be heard—a formal motion hearing in all of these cases. They had some concern that there would be a substantive discussion going on between the judge and OPDS which they should know about or be provided information about. Some lawyers were concerned that they would no longer be able to get off cases when it wasn't an ethical conflict, but some other reason for substitution. I think that our draft policy certainly permits that. It may not have been obvious that substitutions other than for ethical reasons will continue to be necessary for many reasons. The draft simply says that in those cases the judges still need to confer with our office regarding the need for substitution and who the new attorney would be. One attorney expressed a concern that our office is basically a “bean counting” function and this should not weigh into the decision that a court is making in this important area. Courts shouldn't be concerned about cost and bargain attorneys.

As I reviewed all of these comments from people and the legislation again and talked to Ann Christian, who is always very helpful with history, suggestions and information, I prepared this revised proposed policy. I'd like to just briefly discuss what that does.

127 Chair Ellis

This is the second revised policy?

128 I. Swenson

Yes. That is the one on which I would recommend the Commission decide either to take action or to not take action today. What the policy basically says is that, because the legislature indicated that it was removing the power of the court to make substitutions except pursuant to OPDS policies, there may indeed be some need to acknowledge that the court continues to have that power. If we don't do that I suppose it could be argued in non-constitutional cases of substitution that the court simply doesn't have substitution authority. In any case, this draft attempts to address those issues. So what it says is that a court may substitute one appointed counsel for another only when the first situation involves conflict of interest cases, other ethical conflict problem areas. In those cases, the Office of Public

Defense Services, certainly does not wish to interfere with the court's exercise of discretion in determining whether or not in fact that ethical conflict exists for the lawyer, which is what court's have been doing all along. However, the concern we heard that maybe judges on their own, without a motion by counsel to be relieved, would just relieve them based on a decision that counsel could not ethically continue. So I think to make the language conform to the intent we added this phrase: "who is seeking to withdraw." That would mean that in the category of cases where lawyers seek to withdraw from representation based on what they believe is a conflict within the professional rules, then the court would exercise its discretion as it always has. However, the court is required to consult with our office regarding who the substituted attorney will be.

For other circumstances, we added the phrase "when the interests of justice so require" to make sure that there is some standard in place for the court to use in deciding when to grant or deny a substitution. There wasn't one previously, except in the criminal area and in the appellate area. In the juvenile law area, in the post-conviction area and in the mental health cases, courts were not given any instructions about the standard to use and so evidently relied on their inherent authority. "The interests of justice" standard in this context would apply to all of those circumstances. So in the category of other cases, other than ethical conflict situations, the court would apply an "interest of justice" standard.

- 168 Chair Ellis Does that include, for example, client dissatisfaction?
- 169 I. Swenson Yes. Exactly. Where it doesn't amount to a situation, where the lawyer can no longer ethically represent that client, it would be covered in this category. So it would be "the interests of justice" and then consultation with the Office of Public Defense Services.
- 173 Chair Ellis And Section B of the policy would also cover a court's dissatisfaction with a lawyer's performance?
- 174 I. Swenson Yes it would. And the proposed policy is basically saying that if the substitution is within a consortium or public defender office that no consultation is required. It also sets forth the purposes of consulting with OPDS, with the intent to limit those cases requiring consultation so the parties need not be concerned that OPDS is having some kind of inappropriate influence on how the courts make their decisions.
- 183 Chair Ellis The logic of 1.7.2 is a cost-saving logic. If an appointment is within a Public Defender's Office or a consortium under contract, then there is no impact on costs and we don't need to be involved?
- 187 I. Swenson That is correct with respect to the ethical problem cases. So we have said with respect to those cases that no consultation needs to occur, since the court is exercising its discretion in determining if there is a conflict that prohibits the lawyer from continuing representation. When the case is being reassigned within one of those kinds of offices, then we have no interest because we are not going to say to the judge, "we think you are wrong about the ethical conflict." As long as the assignment is within a contracting entity, the financial concern is not important.
- 198 Chair Ellis So does 1.7.2 apply to both sections a and b of 1.7.1?

199 I. Swenson It does. But 1.7.1(b) requires consultation regarding both the need for substitution and counsel to whom the case will be assigned. So 1.7.2 provides an exception to the provision required consultation regarding counsel to whom the case will be assigned, but not to the provision requiring consultation regarding the need for substitution.

203 Chair Ellis You are probably not getting very far because most of those ethical issues, which we are going to talk about later today, we have a vicarious ethical issue for others in the same group.

206 I. Swenson Yes. But in a consortium, other members of the consortium will not have the same conflict.

207 Chair Ellis So you are probably not going to have a whole lot of times when 1.7.2 will apply.

208 I. Swenson However, we also have to be aware that there are routine substitutions that occur. For example, at arraignment some courts require the identification of an individual lawyer as counsel for the accused. Whoever the lawyer is who shows up for arraignment is therefore identified as counsel and a substitution is required in order for that case to be reassigned in the normal course within the office. So we wanted to make sure that could happen without requiring undue consultation. So 1.7.3 then sets forth these four grounds. 1.7.4 clarifies that it isn't a situation where the judge needs to call OPDS in every single case. For example, in the category of cases I just described, where the assignment occurs within the same office because of the fact that that attorney did not appear at the arraignment, those kinds of things can be dealt with as categories, so that in any judicial district a discussion can occur with the presiding judge about a whole category of cases. Under such a process, it may not be necessary to talk about every single substitution. In fact, we are certain that it will not be necessary to do that.

227 Chair Ellis The second page of the document talks about preauthorization of non-routine expenses. I take it that is part of the same topic, or is that separate?

229 I. Swenson Thank you. Yes. I need to advise the Commission that the legislature also passed a prohibition, which basically is set forth here in the underlined language. We are not permitted to authorize out-of-state witnesses unless in-state witnesses are not available or more expensive than out-of-state witnesses.

238 I. Swenson So we have basically adopted verbatim the statutory language as our policy.

241 Chair Ellis Are there questions from Commission members? We are going to open it up to guests but we will start with Commission members.

243 Chief Justice Carson You mentioned you sent this to presiding judges and you heard from three of them?

245 I. Swenson Yes, that is correct.

246 Chief Justice Carson When did it go out?

- 247 I. Swenson To the presiding judges, approximately two weeks ago. And it also went to the State Court Administrator.
- 249 Chair Ellis Let me ask you a question about experts. There is nothing in the proposed policy about quality. So if you have a situation where the lawyer believes there is an important expert witness and feels very strongly about the quality, even though it costs a little more, would the intent be that OPDS would be prohibited from agreeing to that, if the cost was a little bit more for the out-of-state expert?
- 257 I. Swenson I think that it would be handled as all requests for variations from our guidelines. Which is basically to say, is there some reason why in this particular case the skills only possessed by the out-of-state person are necessary and, if they are, there isn't comparable expertise available within the state. We could then approve the expense for the out-of-state expert.
- 263 Chair Ellis This is a sensitive issue, I'm sure. But let's say there is a forensic analyst who is from out-of-state but is extraordinarily good. And there is some okay but not very great forensic analyst in the state. Who decides whether, with regard to the quality issue, the expense is justified?
- 266 I. Swenson Well, the initial decision is made in our office as an administrative one. It's based on the information that is provided by the attorney who is seeking those funds in what we call a letter of justification. The attorney needs to set out why some variation from our guideline amount is necessary. Of course, the attorney can have that decision reviewed by the court. However, I think the legislature fully intended that OPDS not approve the more expensive option unless there was a valid reason for doing so. So just because a person has better credentials or is more persuasive, if the in-state expert is adequate, we are probably required to use the in-state expert. The attorney would have the burden of showing that for whatever reason the in-state expert is not adequate under the circumstances of the case and that the special expertise of this out-of-state witness is necessary.
- 286 C. Lazenby How do we end up with a comparison? Say, for instance, I've identified an expert who is down in Sacramento. How does the Commission or the Commission staff end up saying, "Well, there are three people inside the state that could do an adequate job"? Who comes up with those comparisons? Is the lawyer who is proposing the out-of-state expert to come up with the comparators or are we going to do that?
- 294 I. Swenson It has been the obligation of the attorney to make that presentation. When you ask OPDS to utilize someone above our guideline rate, someone who for some reason pursuant to a policy like this is not otherwise eligible for compensation, we have considered it the burden of the attorney to claim: "I have contacted three experts to whom I was referred by other members of the criminal bar. I have talked with them about this issue. They are not sufficiently aware of some particular issue and, therefore, I need to use the services of this out-of-state expert." That is basically what has been happening.
- We do of course have some sense based on the experience of this office in terms of how much the cost for experts.
- 307 Chair Ellis I thought we were going to have a peer review panel involved on this issue? Is that not happening?

- 308 I. Swenson It is. The legislature directed peer panels on Measure 11 expenses and on death penalty expenses. So we are developing both of those processes. And I think it will be extremely helpful to have input from peers in making these kinds of decision. But the OPDS payment policy will still govern what those peers can recommend in a given case.
- 315 Chair Ellis Would it violate what you believe the legislature has done if you added word “comparable” before the words “in-state expert witness”? So it would read: “OPDS will authorize the use of out-of-state expert witness only if a comparable in-state expert witness is not available.”
- I am frankly worried about this. I can see a lot of mediocre in-state people and just across the border is a really terrific individual. The incremental expense is not much less than the incremental value and it would bother me to be constrained like that.
- 327 I. Swenson Well, of course, if it is less expensive we are fully authorized to do it.
- 329 Chair Ellis One of our statutory mandates has the word “quality” in it and I keep coming back to that. I am concerned about that.
- 331 A. Christian Mr. Chair, the only concern I would have with “comparable” is an example of the premiere individual, say in New York State, on a particular issue. It usually comes up with clients who are facing death penalty or Measure 11 cases where there is the person in the country on a particular issue, Dr. So-and-so in New York.
- 338 Chair Ellis At \$1,000 an hour.
- 339 A. Christian If you use “comparable” there is no one in Oregon who is comparable to that individual in New York. So if it is more a matter, as you pointed out, of the peer review, I know that most of these requests come up in Measure 11 and aggravated murder cases. And I think there is a hope that OCDLA, which has maintained an expert witness library, can somehow merge that library with OPDS, so that OPDS is better able than in the past to have a sense of who is good within the State of Oregon and who might be marginal or inadequate. That would benefit the office with regard to in-state experts. Because it can be a waste of money to be out there authorizing a psychologist who the majority of the defense attorneys think is not adequate. So I have a bit of a hesitation about inserting the word “comparable.”
- 360 Chair Ellis I thought I heard from Ingrid that “comparable” is implied in the sense that if you really can’t get “the service” in-state, you can go out-of-state. That leaves a whole lot of room for maneuver. Is it a category of experts or is it an incremental quality that is such that you can’t get in-state? I think the legislature would be satisfied if we had peer panel evaluating this so you don’t end up with defense counsel seeking someone really remarkably expensive. It is really their testimonial skills that their experts have that they are after? Or you end up with some situations with very unusual expertise where the peer panel really says that is beyond the line.
- 376 A. Christian I think the legislature’s intent, if I can maybe use an example, was it heard of one or two incidences during those hearings in February about out-of-state witnesses. When I think about this and in reviewing requests for non-

routine expenses, I use this as a barometer with attorneys: “If you were retained in this case, what would you tell your retained client to justify the fact that that you are requesting \$10,000 for the New York expert, as opposed to Dr. So-and-so in Portland for \$5,000?” That is what I think of, and what the legislature was maybe thinking of—that an indigent defendant might wind up with an expert from New York State, where a person who is able to retain counsel would not.

- 397 I. Swenson I am wondering if the use of the word “qualified” would get at the same issue.
- 398 A. Christian I like that.
- 399 Chair Ellis I think I could go with that because that gives a little bit more room for the issue I am worried about.
- 400 C. Lazenby I’m sorry I didn’t hear the suggestion. What was it?
- 401 Chair Ellis The suggestion was instead of the word “comparable,” which I was proposing” insert the word “qualified.” So it would read: “OPDS will authorize the use of an out-of-state expert witness only if a qualified in-state expert witness is not available.”
- 407 Chair Ellis Any other questions or comments from Commission members?
- 409 J. Brown I am just trying to process this. Am I correct in thinking that what we are talking about is a presumption, or something like that, that we would be using in-state experts? And we want to build in the need for exception? Is it useful to think about describing the kinds of considerations that would overcome the presumption? I’m thinking you could have a national expert in identifying a tool mark, but a second year crime lab person could look at the dual field microscope, if they still use those. And a tool mark is a tool mark. Not matter what the qualifications of the expert, it is a very basic issue. I somehow would like to be thinking now and in the future about the resources available to prosecution. And so to me, it would be a valid consideration to take into account the degree of expertise anticipated to be available on behalf of the state. Again, I’m wondering if it is useful to think about trying to develop some criteria, not necessarily to slow down implementation of this at this point, but a future consideration.
- 438 Chair Ellis If you are using a peer panel all that will happen, I would think.
- 441 A. Christian I found that helpful when an attorney would be asking for an out of the ordinary expertise—if they included the fact that the state has retained an expert from Los Angeles. That plays into the equation.
- 445 I. Swenson But we are talking about using state expertise in some cases, is that what you would like us to consider?
- 447 J. Brown I wasn’t intending to say anything different, other than the presumption would be if the state were using an in-state expert. I realize these are judgment calls. As long as there is a peer process, it makes great sense.
- 455 Chair Ellis Any other questions from Commission members?

- 457 J. Brown Under the 1.7.1, substitution of appointed counsel, subsection B, what is the standard? This is more of a rhetorical question. Do you have any thoughts about what the standard is of “interest of justice”? Is that the same thing as “sound discretion”?
- 466 I. Swenson I think it is a little different. I have to say that it’s more clearly applicable to criminal cases, although it certainly can be deemed applicable to more than just criminal cases. And we would be using it in some non-criminal areas. So it is the statutory standard that was in place in criminal cases, and it is a common standard in criminal law. For example, the court has the power to dismiss a criminal prosecution “in the interest of justice.” So it’s a standard with which the courts are familiar. Can I define it for you? Not well.
- 480 Chair Ellis Ingrid, what is the present situation when you have a difficult criminal defendant who seeks to fire counsel because he or she doesn’t like them? I thought there was a limit on that: maybe once but not twice.
- 486 I. Swenson Well, I think that is the impetus for the legislation in some ways. The legislature was concerned that there is no limit and in every case the court is considering the same issues. Can this lawyer work with this client effectively and provide this client with his constitutional right to counsel? It is a difficult situation.
- 493 Chair Ellis Is there anything other than what we are looking at here that addresses this situation?
- 495 I. Swenson No.
- 496 Chair Ellis So in answer to Jim Brown’s point, I assume in the context of the cantankerous defendant, whether in good faith, seeking delay or whatever else one might think, once the defendant keeps firing appointed counsel, the court will have to make a judgment whether “justice” really requires agreement to that.
- 501 I. Swenson Which is exactly what they are doing now. But, in addition, we have added this consultation requirement in the hope that we can talk with the court about potential lawyers who may be able to work effectively with that client. Maybe nobody will be able to. And the client isn’t entitled to a lawyer of his or her choice, obviously. But the client is entitled to a lawyer who is competent and a lawyer with whom that client can work effectively. But there is no absolute limit.
- 512 Chair Ellis The trouble with setting a limit is that it almost invites you to get there.
- 513 I. Swenson It does, and some clients are gifted at poisoning the relationship with their lawyer to the point that that lawyer truly cannot continue. So there isn’t an easy answer.
- 517 A. Christian I would not suggest any number, like three or seven. This issue came up again in February 2003 hearings before the House Judiciary Committee. Two prominent DA’s raised the issue of multiple appointments of counsel. One of the questions is not always knowing that a client is up to attorney number eight or nine, and I often found that, if consulted, we could try to figure something out, like an attorney who is excellent in dealing with difficult clients or providing the judge with a little bit of case law saying

there is no right to counsel of choice. And suggesting that, when the third attorney is appointed, the court make sure on the record that there is a discussion about the third attorney being perfectly capable and well respected, and make a record with the client that, barring some totally unusual situation, the third lawyer will be your lawyer. There will be no substitution. So what I have suggested to Ingrid with regard to this multiple appointment issue is adding to the items that OPDS can consult with the court about. The fact that OPDS could discuss with the court other options to substitution, including but not limited to the appointment of a legal advisor.

- 548 Chair Ellis Doesn't Section B give enough flexibility for that?
- 553 A. Christian It would cover it but, maybe to get to the point about multiple appointments, maybe OPDS should discuss more options with the court. So that when a case is up to its eighth attorney at least OPDS, a year before, will have been contacted, and at least have some ability to try to come up with the lawyer who will stick.
- 564 Chair Ellis I really read this as addressing the point.
- 565 I. Swenson It was intended to. My only concern about being more specific is that I would like to avoid any discussions on the substance of the representation, since the lawyer isn't there, the client isn't there. So if, for example, we would say to the judge. "Oh, just make this person a legal advisor." That might be something that shouldn't take place in an ex parte communication.
- 571 A. Christian I agree.
- 572 Chief Justice Carson So effectively, you make 164 judges who are out in the field consult with you on every substitution, even if it is with the same office? Stop whatever they are doing and get on the phone?
- 575 Chair Ellis No. Because, if it is within the same office, they don't. And, if it is in a category of cases that have been agreed to, they don't.
- 577 I. Swenson So the way we tried to avoid that onerous obligation was by recognizing that, if it is a reassignment within a contracting entity, we don't need to talk about that. But also we would like to confer with the judges on whole categories of cases. There will be large categories of substitutions where we don't need to talk directly with courts, but we would have to have some understanding of what those categories were. And it should be fairly easy to do that.
- 586 Chief Justice Carson I have only heard from one trial court administrator, in particular, who referred to this as an unfunded mandate. And you only heard from three. So I guess I won't worry about it.
- 588 Chair Ellis Let me ask this. I am sensitive that the defense community only saw this Tuesday and they may not have seen the second revised version. If the trial court administrators and presiding judges might need a little more time to gear up, I suppose one possibility would be to adopt this as an interim basis, but making clear we are willing to revisit this after the full vetting process has had a chance to run a reasonable time.

- 590 I. Swenson That sounds like a very appropriate way to handle it. I am little concerned about having no authority out there now for attorney substitutions but, absolutely, a policy is always subject to revision by the Commission and that would probably be appropriate in this case.
- 602 C. Lazenby Are you or Peter contemplating what appears to be a suggestion hanging here that perhaps what staff ought to do is pursue consensus among the presiding judges on categories of cases, or is that to gargantuan a task to take on? Because otherwise I think you wind up with the concern that the Chief Justice expressed, which is that all the judges have to consult you on every single case. Is it likely that we can reach broad consensus over a variety of cases?
- 614 I. Swenson Yes, I certainly think so. I think that is a good suggestion. Lorrie Railey is here, and Kathryn Aylward. We can certainly sit down and talk about the major categories we are aware of, send them to the courts, ask the courts for additional comment, and then maybe propose a series of categories with a standard way of handling them.
- 620 C. Lazenby Yes, because as it is right now, I think as many eyes as there are in that room right now, each eye is going to come up with a different circumstance, a different application of this that we haven't contemplated. That is the nature of being lawyers, I guess. But until we do that, we won't really be able to define it and make people feel more comfortable with the process that is outlined. I don't know if it is appropriate, Mr. Chair, to suggest that my vote in favor of adopting this policy on a temporary basis is premised on staff pursuing the consensus among the presiding judges.
- 633 Chair Ellis I think that is entirely appropriate. Are there others who would like to ask questions?
- 636 Jim Hennings I am the Metropolitan Public Defender. Commissioners, I have a process issue and it is: how do you adopt rules and how do you get input? Everybody ought to be involved and, as Chip just said, you need to consult with the judges, but you need to consult with field as well. There was a comment that maybe attorneys ought to be turned into legal advisors and I have a major problem with legal advisors. I am not sure that you should put any attorney in that situation. There needs to be a discussion of that. The question is how do you adopt rules. There is no question there is an emergency that needs to be addressed, but we should not adopt a rule and say we can come back and address it later if it has not been fully vetted. I suggest, if you have to adopt an emergency rule, that you adopt it with a sunset provision, and that the emergency rule cannot last longer than six months. I have major questions. When I first read the proposed substitution policy, I saw procedurally what they were trying to do. I didn't see some of the nuances until I started hearing from some of the other defense attorneys. And listening to the discussion, I think there are major, major issues that we have to be very careful not to have a very mushy standard that could be read two different ways by two different people. We need a little better direction than that. You were suggesting that certain standards would be made for the out-of-state witnesses and questioning how we would compare those. That is not what is in your rules, and your rules could be used against you and against your intent, unless you really want to discuss those individual issues. I'm not sure in the rule, for instance, what it means by "qualified" or "comparable," or what the burden is going to be.

There isn't anything in the rules that says anything; even that it is a presumption. It just says that on an out-of-state witness if they are not available. Does not "available" imply that we don't have somebody who meets the right standards? For instance, we have been faced for years with the issue of using state crime labs, and I would submit legally that the state crime lab cannot be used by criminal defense attorneys, even though it is available under the statute because the crime lab itself, if you ask the director, will say if they discover a crime, since they are sworn police officers, they have to report that to the authorities and they are no longer our expert. They are no longer our witness. They are no longer working as part of the defense team. That is an issue that I think would take a great deal of discussion. But I can see someone saying well you got the State Crime Lab, you can use that. There is nothing in the rules that says they are not available even though the statute says they are available. Are they not available because constitutionally we can't use them?

- 696 Chair Ellis Does the use of a peer panel ameliorate that?
- 697 Jim Hennings Not unless you want to set standards, and that is what this group is going to have to do. You can't simply take the statute which was supposed to be broad. You have to flesh out the statute and what the considerations are going to be used to do that. So what I am suggesting is I understand in both cases why you need the emergency rule. And I'm suggesting as a practice, not only in this case but in all cases, if you have to adopt an emergency rule, it is for a limited period of time and sunsets so that it can be fully vetted. We can't provide you the input from the field unless we see it, unless we have time to think about it, unless we have time to work it. I know Chip said you should circulate the rule and see what the judges have to say about it. I think you also have to see what the field has to say about it, and I think we have to be seen as part of that process. I understand why it went out to the presiding judges. I think there are people other than presiding judges in some areas who actually deal with this much more. They need to see it and they need to have an opportunity to comment. I would be more than happy to talk about the specifics on each of these two issues, but I think it may be premature because I think you are going to have to adopt something now, hope that we can work with it, and plan that you are going to get a lot of input from a lot of different people before you adopt it as a permanent rule.
- 728 Chair Ellis Okay.
- 729 Paul Petterson I have the same sort of a initial thought about the process that Mr. Hennings mentioned, although I would suggest that, as with all other administrative rules, you publish it and have a date or deadline for comments and after that date it would sunset or disappear. The date that it will be in effect, in emergency it is in effect now, but a later date that is your last chance to provide any input to the public, to everyone who might have an interest in it.
- 741 Chair Ellis Any other comments? I thought both of those suggestions sounded reasonable and the six-month period does seem reasonable.
- 744 P. Ozanne Longer than we anticipated –
- 745 Chair Ellis Say a month before that as the end date for comments on this?
- 748 I. Swenson Sounds very good.

749 Chair Ellis Is there a Commission members who wants to make a motion that would include inserting the word “qualified” on the second page and include the six-month sunset, the five month date for comments submission, and a directive to staff to seek input from all appropriate interested parties.
MOTION: C. Lazenby: So moved; J. Stevens: 2d.

749 Chair Ellis Thank you Mr. Lazenby. Is there further discussion on that motion?
VOTE: 5-0, hearing no objection, the motion **CARRIES**.

Agenda Item 1: Approval of minutes

766 Chair Ellis On the minutes, I have submitted to staff a few typographical points that appear on page 7, line 56, delete “see” and “would work” instead of “working.” Name spelling that was going to be checked on page 12. And on page 18, I think the word “conversion” ought to be the word “conversation.” With those proposed changes, any other amendments or corrections to the minutes?
MOTION: J. Brown: so moved; J. Yunker: 2nd
VOTE: 5-0, hearing no objection, the motion **CARRIES**.

789 Chair Ellis Okay, we are now where we would normally start, with your report, Peter.

Agenda Item 2A: OPDS’s Monthly Status Report

790 P. Ozanne As you can see Mr. Chair, I have changed this item to refer to an OPDS monthly status report, rather than an Executive Director’s report, because I expect other people on the OPDS management team will be also presenting information to the Commission. I certainly would entertain comments from Pete Gartlan, Kathryn Aylward or Ingrid. The idea is to use this item on the agenda to update you on OPDS’s progress in implementing your Strategic Plan, which amounts to management’s marching orders. So, I would expect this item of the agenda to include monthly updates on our progress in implementing the Plan’s strategies and goals. The rest of today’s agenda, particularly Item 5 with regard to discussions of our plans for service delivery planning and to the extent you want to hear from me on the follow-up to my annual performance evaluation, will serve as this kind of status report. So I don’t have anything else to add to this item on the agenda. Again, my colleagues may want to add some comments at this point.

816 Chair Ellis Peter, Kathryn, Ingrid, Becky?

817 K. Aylward Mr. Chair, I have distributed a handout entitled “Non-Routine Expense Requests.” I just found it interesting to run the numbers from 2003 to know how the jump in the number of requests starting July 1. And the amounts of money that has been approved for your information. Also, to indicate how much work we have taken on since July. It is quite startling to see the increases in requests.

832 Chair Ellis What do you attribute the jump to?

833 K. Aylward Well, on July 1, our office became responsible for reviewing all the non-routine expense requests. Before that, we just did the Measure 11 and the aggravated murder requests.

838 Chair Ellis Ann do you want to report on the Application/Contribution Program?

Agenda Item 2B:

Application/Contribution Program

840 A. Christian

Yes, I would. The last time I gave you an update was October 24, so I have quite a bit to report. First is the November 7, 2003 Emergency Board action. We (the Oregon Judicial Department and the Commission) were required by a budget note to implement statewide what is called the Application/Contribution Program (ACP) that exists in 16 counties. The budget note required the Judicial Department and the Commission to submit a report to the November 2003 Emergency Board with regard to a plan to implement ACP in all counties during this biennium. The budget note also allowed the Judicial Department to request approval of additional positions to assist with the implementation of ACP in all counties. We advised you of that at your October meeting. I must, as always, thank Robin LaMonte, our Legislative Fiscal Analyst, for her assistance with the November E-Board. The E-Board approved the Judicial Department's request for an additional four positions. One of those positions is a verification/application contribution program state coordinator. That individual will be employed within the Office of the State Court Administrator. The E-Board also approved three new verification specialists. These are court staff in the local courts who assist the verification and the application contribution process. The E-Board acknowledged receipt of our joint report.

Finally, the November Emergency Board directed both the Commission and the Judicial Department to return to the April Emergency Board, that would be April 8 and 9, to report on the following four areas. Program implementation and revenue estimates, both with regard to increases in application contribution monies. These are other funds that can be used for administrative costs of public defense, and that contribute to the General Fund and the Criminal Fines and Assessments Account, which also are the recipient of recoupment money. Recoupment money is ordered at the end of the case. There is a concern that full statewide ACP implementation and getting more money up front may have an adverse impact on General Fund money. The third area that we are to report on is the General Fund savings for existing Judicial Department verification staff. A part of the budget note adopted by the last Legislative Assembly provided that the Oregon Judicial Department will shift General Funded verifier employees to other funds as ACP revenues increase.

TAPE, SIDE B

007 A. Christian

The fourth area is to report on additional staff and expenditure limitation that the Judicial Department and the Commission may feel are necessary in the local courts in order to ensure a functioning statewide program. So, based on some other actions by the November Emergency Board, I would say we were very successful.

It is difficult these days to obtain positions, even if they are other funded. The status with regard to the four new positions: recruitment for the statewide coordinator closes today and we are going to conduct interviews this Tuesday afternoon. We are hoping to make a decision soon thereafter. At least two of the three verification positions were allocated to counties back in November immediately after the Emergency Board approved them. They were three counties who were in pretty desperate need, and I am not certain where that third position went. Lane County and Washington

County were given the two new positions back in November. In October, November and December, I made personal visits to Jackson County. Jackson County has implemented ACP, but they had a complete turnover in their verification staff. I took the opportunity, along with Jane Burke, who until recently was employed by the Judicial Department, to go down there because they have a very successful ACP. Also, I have visited Josephine County and this is all in preparation for implementation in Josephine, Lane, Clackamas and Washington Counties. In the first part of December, I appeared before the trial court administrators and gave a presentation with a question and answer period regarding the statewide rollout of ACP. I can report that the courts understand the necessity of getting this program implemented. There were 16 trial court administrators at that meeting who have actually implemented ACP. I asked them to describe the difficulties and the successes, and I think that that was pretty effective. An ACP training session for the majority of counties where ACP does not yet exist is scheduled for a week from today, and we are holding ongoing joint meetings. The Judicial Department and I are aware of the legal and logistically issues involved. The plan remains to begin implementation and expansion of ACP in February (expansion meaning some of the current 16 counties who have the program are not using the program in every type of public defense case and are focusing primarily on the criminal cases which are the most easily done). So we also intend to have the 16 existing ACP counties expand the Application/Contribution Program and, therefore, hopefully raise additional revenue.

- 053 Chair Ellis Thanks Ann. Any questions?
- 054 Ross Shepard May I ask a question? These positions that have been created and perhaps filled or attempting to be filled, Chief, maybe I am speaking to you. Is this the sort of position that will then be unfilled again after the tax vote?
- 058 Chief Justice Carson
It might be. In the Judicial Department we do plan primarily to use vacancies and unfilled positions to address our projected \$13 million budget cut if Measure 30 fails. It may be a local matter. We just haven't decided yet, and it will probably be decided at the local level.
- 061 A. Christian I would just add that I think there was some concern during the last legislative session, because the session was during budget crises, that verification staff, being at a level within the Judicial Department where they are the second lowest paid employees and tending to be the ones who have the greatest turnover rate most recently, may be the positions that courts decide aren't as critical. I understand the pressure. So part of the idea behind the General Fund shift of verification staff was to try to better ensure that the verification program, which is very important to the legislature, and ACP would have greater stability because of other funds paying for them, as opposed to general funds. There are no guarantees in these budget times.
- 084 Chair Ellis Peter, let's talk a little bit about your suggested amendments to your annual performance evaluation. I thought your document was really right on. I want to be sure we are not biting off more than we can realistically accomplish.

Agenda Item 2C: Follow-up re the Executive Director's Annual Performance Evaluation

- 090 P. Ozanne Well, I can't say that I don't worry about that too. And I am most concerned, not about my burnout, but burning out my colleagues on the management team. I appreciated the fact that, in some ways, the Commission's feedback to me looks like a reprioritization of the strategies in your Strategic Plan and we may want to change the plan accordingly. I think what may have been an assumption on the Commission's part or perhaps an oversight, in addition to the five priorities which you proposed to me for 2003 and which are in the a memo, I have proposed a sixth priority. My sixth priority would be legislative advocacy, particularly in the first six months of this year. I think one of my primary goals should be to get out there and inform legislators of the impending crisis in public defense and advocate for adequate funding.
- 106 Chair Ellis Any thoughts or comments from Commission members? This is an ambitious agenda, but I think that is good as long as it is not overkill. I think our whole approach is try to give you as specific and as objectively verifiable a program as we could, so that we really make ourselves push for those milestones. I am very happy with this.
- 115 P. Ozanne Thank you.
- 116 Chair Ellis Kathryn, do you want to talk about Action Item 3?

Agenda Item 3: Review and Approval of Preliminary Agreement

- 117 K. Aylward Yes, it is Attachment 3 in the materials. As you may recall from the last meeting, there was one preliminary agreement that we were asked to bring back again at this meeting. In rereading the meeting minutes, the reason for postponing it a month was so that interested parties would have an opportunity to discuss the proposed changes. I have spoken to Lane Juvenile Lawyers Association and did leave a message for Ross Shepard, but we didn't actually connect. So I don't know whether that is still an issue. I would still recommend approval. Actually, I think the confusion may have come from the way that the percentage change in the preliminary agreement was referenced. We talked about at your last meeting. Actually, in the Juvenile Lawyers Association's previous contract we found that they ended up 18% over their contract caseload quota. Therefore, the caseload in this new contract is 18% more simply to match the caseload they actually have been getting. Perhaps if that clarifies that this isn't a structural change, I would ask for approval.
- 135 Chair Ellis I am seeing our good friend Ross to your left shaking his head, so I will recognize him.
- 133 Ross Shepard I am saddened to weigh in on this issue once again. The minutes do accurately reflect I think what my concerns were and I thank Kathryn for trying to call me, and I accept that she did. I don't remember that happening. The issue that I was concerned with last month really hasn't been discussed at all, except for difficult conversations that I have had with my colleagues in Lane County. This has created a great deal of acrimony, which is uncharacteristic of Lane County. And I still suggest that, if there is going to be a coordination of the provision of services within a county or within a region, there should be an effort to bring all of the players together to see if a solution can be achieved that all agree upon. We really haven't taken the first step in that process since I made these comments to you last month.

- 147 Chair Ellis Help me understand the problem. Is this a case allocation issue?
- 148 Ross Shepard Yes. There is a formula in Lane County that determines which juvenile cases go to which contractor. So that in the allocation process on a day-to-day basis, if there are what one might characterize as additional or extra juvenile cases, the public defender certainly stands ready to do those, has not been asked to provide those services or told why we are not going to be involved in those cases. So I suspect that, rather than objecting to the substance of this, I would urge the Commission to direct that there be some process for looking at entire counties' needs.
- 158 Chair Ellis Can we fold this into our Region 4 planning process? Our next meeting is in Eugene.
- 161 Ross Shepard It makes sense to me. There will be a presentation to you I think by the criminal attorneys in Lane County for a solution to a minor problem we have. And one would hope that a similar presentation could be made by attorneys who are providing juvenile services.
- 164 Chair Ellis Kathryn what practical problem does that create if we try and make this part of that process?
- 166 K. Aylward Well, I know that we have representatives from Lane Juvenile Lawyers Association in attendance, and they would like the opportunity to comment on this.
- 169 P. Ozanne Before we do that, I would ask Ross to articulate, preferably in writing, what exactly it is you have in mind regarding a process. I think we have tried to improve our contracting process, but I thought this issue was a specific one regarding memorializing what was already the actual allocation of caseloads. What I hear you saying is about the general contracting process. And I personally have trouble conceiving of what that might look like in terms of participation by all potential contractors, but welcome any ideas. For example would we have a contracting process in each county where we talked about everybody's contract in an open meeting with everybody there, or publish preliminary agreements so everybody could comment on it? So, for the purposes of our next meeting in Eugene, so we can structure the discussion, could you give us your ideas about what you would like to see in terms of a general process? We have a specific issue here, which I think Kathryn is right to have our guests address, but I also think you are raising a more general issue of process, which I am having trouble envisioning a solution for.
- 185 Ross Shepard Well, I suppose that providing the facts and statistics of the cases available during the next biennium to prospective contractors would be a start, and then maybe urging those contractors to get together and see if their isn't an amicable solution. Really, the only conversation that we have had so far on this issue was caused by my speaking up last time and raising the ire of my colleagues. So I think there could be a simple process, Peter, that would just be a matter of notice I suppose of the question to be answered and the facts that will be relied upon. And maybe give the contractors another chance to try and figure it out themselves.
- 196 Mark Spence I represent the juvenile consortium out of Lane County. There are really two issues. Regarding this specific issue, we have made every opportunity

to open up our books and open up a dialogue with Ross. And, quite frankly, we don't think he has taken advantage of it. We have said: "Let's look at the numbers, you can look at our numbers and look at our contract. We would like to look at your numbers and your contract." To a certain extent, we feel we are being held hostage because the Lane County Public Defender's Office hasn't signed a contract and we are being dragged along in the process. For years, and it is in your materials, we have provided services above our contract, not because we were seeking it out but because that is what happened. We would be faced with a deficiency basically at the end of the contract period, where we provided more services than we had contracted for because we were asked to do it. We would get the compensation then at the end of the contract period, so we would basically be carrying a debt for the state. It is not something we were trying to do; it was the reality of the situation. This proposed contract recognizes that reality and brings our numbers up to what we have been doing for three or four years. So, it is no big mystery and there is no big grab here. We have offered to communicate with Ross and tell him why that happened, what our numbers are, what our caseload is. And the fact of the matter is, I don't think the PD's office in Lane County could take any more cases anyway because their conflict situation is a lot different than the consortium's, where we don't have the conflicts issue and we are able to take those additional cases. They have an internal conflict situation that doesn't allow them to take those cases. So we are not asking for anything that we haven't already gotten and we are in no way harming the Public Defender's Office because they couldn't take those cases anyway. And we have offered to sit down with the management of the Public Defender's Office and show them that. So I am pretty concerned about why this is happening.

The second issue is I know that there is a policy issue eventually. Ross's justification for making his comments to us is that he has been urged by Commission or the Director to be sort of a regional commentator on what happens in Lane County. Well, if this is what is going to happen, we are very uncomfortable with that. And I know that there is going to be a potential criminal consortium that is going to be submitting a bid at the beginning of next year. If I were them, I would be uncomfortable with that because Ross is, unfortunately, I don't think intentionally, seeking it out and has two conflicting responsibilities: being a commentator to this agency and looking out for the business bottom line of his own agency. So we are pretty concerned about how this has gone.

- 232 Chair Ellis I am disappointed in the sense that we delayed this last time in light of your comments, Ross, and then I get the feeling that you just waited for everybody to come to you. I really think you took the initiative last time to raise objections and I am not hearing that you followed up on it.
- 237 Ross Shepard I'm not sure that is a fair comment, Mr. Chair. I had several difficult conversations with these two fine lawyers and a couple of others, and I haven't really had much discussion on finalizing the public defender's contract. It seems to me that those two should go hand in hand if we are trying to coordinate the services in a given county.
- 244 K. Aylward I only want to comment that I prepared a proposal for the Public Defender's office, which included a large increase in caseload. When they first looked at it their informal response was, "we think that is too much caseload." As this year ran out, we decided to go with a one month extension in order to have more time to discuss these issues. That was my understanding. Even

though I tried to give them more caseload, they said that was pushing the limits of what they could do with current staff.

- 251 Chair Ellis What about the comment, Ross? That you probably couldn't take these cases anyway because of combination of limited resources and conflicts?
- 254 Ross Shepard The Public Defender's office does have a different conflict situation than the consortium does. I suspect that the lawyers that I have assigned to juvenile court are in a position to take more cases should they be available. Out of that 18% there might be 3% that would be available. I have no way of knowing that. I guess what I am just trying to express, a larger issue I am trying to express to the Commission, is the provision within a county or within a region of a process of coordination so that everybody is looking at the same target. And there shouldn't be a deal made over here without consultation with the other player in the county over here.
- 266 Chair Ellis Well, we are going to have this same issue in Multnomah raised in a few minutes. Kathryn or Peter, do you have a recommendation on how we ought to proceed on this?
- 267 P. Ozanne I will certainly let Kathryn speak to the particular substantive issue regarding the pending contract. As to the process issue that Ross raises, I think it is worthy of discussion in any forum. And, if it is a particular concern in Lane County, we can apply insights from that county to enlighten the policy issue. So I would support discussing it at the February meeting in Eugene. But I can't yet comprehend what that process would look like or how it would work. I would urge not only Ross, but anyone else who has a concern, to help us articulate the policy options. Openness, transparency, people have said many times, are our goals; but I don't quite understand how to incorporate these goals in the contract negotiation setting. I can see it in a planning setting, bringing everybody in to talk about the structure of a delivery system. But how do we proceed with contract negotiations as long as we have independent contractors and a competitive contracting system? I would like more help understanding how we would make that process more open and collaborative among our contractors. If we can get there, and have sensible discussion in February, I am certainly happy to do that. As to the merits of this issue, I will defer to Kathryn.
- 286 K. Aylward I thought that perhaps the work product that I produced for the last meeting had misled Ross into thinking something had changed. And with the little bit of discussion at the last meeting, I thought it became apparent that it wasn't a change and therefore I thought he no longer had a concern.
- 290 Chair Ellis The change is in case flow?
- 291 Mark Spence This contract is bringing things into compliance with the reality of the last three or four years.
- 292 Chair Ellis It is not a change in the actual allocation of cases; it just reflects what is already there.
- 294 K. Aylward Frankly, my real concern is the precedent. I don't think we have ever entertained one contractor telling us how to negotiate a contract with another contractor. We fit the pieces of the puzzle together so that caseload is covered, but I also am very uncomfortable with feeling that I need to

discuss with Lane Public Defender Services the caseload that we plan to give to their competition.

- 301 Chair Ellis What is wrong with the process that is open in the sense that all contractors in a region know what we are contemplating, have the chance to give us input on it, but then they don't get to tell us what to do? We go ahead and do what we think is appropriate, bearing in mind the comments they have made, which does I think allow for the openness that we have talked about, but maintains the independent that also is there.
- 310 K. Aylward I think, as a practical matter, that happens when you have multiple contractors and you are discussing a quota and rates. You do end up saying, "You know, I'm sorry you can't have the caseload you want because I am giving it to this provider," and that discussion goes on. But once the decision has been made, it has been incorporated into preliminary agreements. In this case, there wasn't anything which I felt needed to be discussed with others because it wasn't a change. I don't see a problem if there is a change anticipated. Certainly, we would give a heads up to the other providers in the county. But when there is no change, I just didn't feel the need to discuss it with other providers.
- 321 Ross Shepard Perhaps I can obviate the need to carry on with this inquiry. I think that, what I hoped would be perceived at least as a partially valid objection to this, I should withdraw because it is creating too much acrimony within my own jurisdiction. It isn't worth it. So if we have learned anything maybe from the process, points that I have tried to raise, then so be it. But as a practical matter, I don't want to fight about this anymore.
- 328 Chair Ellis What I think I am getting from the discussion is, let's move toward a system or process where we do give information to everybody about what we are considering and everybody in a region gets a chance to give their input, which I think was a piece that may not have fully happened here. But I am also hearing that the only thing that is happening here is reflecting the reality that exists. And the change is really helping the provider get paid on a regular basis, instead of at the end of a contract period, which is only fair to them.
- 338 K. Aylward That is correct.
- 339 Chair Ellis With all those comments is there a motion to now approve the Lane Juvenile preliminary agreement.
MOTION: J. Brown moved; J. Yunker 2nd
VOTE: 5-0, Hearing no objection, the motion **CARRIES**
- 343 Chair Ellis Any other of issues with this list of preliminary agreements?
- 344 K. Aylward No, they are very straightforward. In Douglas County, the cases have dropped off and so new contracts are for a smaller number of cases than the last period. We tried to spread the cut evenly. No. 3 on the list had a little less of a cut. And likewise in Klamath and Lake, there is less caseload than we had anticipated in the last period.
- 351 Chair Ellis Is there a motion to approve Items 2-5 on Attachment 3?
MOTION: J. Yunker moved; J. Brown 2nd
VOTE: 5-0, Hearing no objection, the motion **CARRIES**

358 Chair Ellis

Let's go to our review of Region 4. Tell us what you have been doing. I know you have done quite a lot

Agenda Item 5:

Discussion of Plans for Service Delivery Review in Region 4

360 P. Ozanne

As have Kathryn and Ingrid, who joined me. And John Potter was kind enough to serve as the host and convener for the defense bar community meetings. We have met with people in all four of the counties that we are calling "Region 4," which includes Benton, Lane, Lincoln and Linn Counties. We have been to each county once or twice and, so far, we have spoken at least to the presiding judge and the chief criminal and juvenile judges. I will be going back to follow up with others. After widely publicizing our meetings in each of the four counties, we have met with our public defense contractors and other interested members of the defense bar to discuss the state of public defense in their counties. We have also spoken with district attorneys and their staff in each of the counties. We are probably two-thirds of the way through this process because we put on a "full-court press" last month. But we will also be following up with further interviews and meetings.

I would like to give you a preliminary sense of what we have observed. You will be receiving a report before your next meeting in February, which will include the final results of our investigations and our preliminary recommendations. After I have given you this overview, I would like to discuss the logistics of our meetings in the region. I will be proposing that we meet in Eugene in February and probably in Corvallis in March.

First, a couple of general observations that became obvious during our travels to all of the counties, and that are probably already obvious to you. I should back up and say, for the benefit of our audience, that this process is a key part of our strategic plan. We are proceeding in Region 4 with a review of the counties' service delivery systems. We are not coming there saying, "we are rolling up our sleeves, and we are going to change everything." We are simply making an assessment of opportunities for improvement, of challenges the counties and the defense bar are facing, to see if we can help. As you will see when I get to the specifics of our investigations, we may simply leave well enough alone, or leave the good things alone. Once we are finished with the Commission's review and planning process in Region 4, we will hopefully complete another service delivery review and planning process this year. And the next region will be Multnomah County, the logistics of which we will be discussing here in just a few minutes.

In any event, some general observations from our visits to the four counties in Region 4: Defense attorneys, not surprisingly, and not just during the "BRAC crisis," report increasingly "heavier" caseloads over recent years. The whole balance between the lighter cases, like misdemeanor cases, and the heavier cases, like Ballot Measure 11 and other serious felony cases, has shifted. As a practical financial matter, this makes maintaining a public defense practice increasingly more difficult. That was a constant theme throughout our visits. Another observation that won't surprise you, but was a stark reality as we talked to individual prosecutors: how much policy and practice at the county level is driven by independently elected prosecutors and how much those policies and practices vary widely and drive our public defense budget. Another variable in managing our budget that we noticed is the nature and extent of variations in court docket management from county to county. So, we have counties in which the way the courts manage their

dockets place obvious burdens on lawyers. When dockets and schedules vary among judges in the same court, we see lawyers having difficulties with scheduling, having to appear multiple times during a day or over a week; rather than, in counties with centralized docket management, being able to block or concentrate their time for initial or routine court appearances. Finally, everyone was really surprised to see us and appreciated it. They called us “Salem”—“Really nice to see Salem coming to town and listening to us.”

449 Chief Justice
Carson

The “suits” from Salem.

450 P. Ozanne

I think I did take my tie off. So I think this process was worthwhile, and it was gratifying to go out there, if for no other reason than to make contact.

Let me briefly review some of our preliminary findings in particular counties in Region 4. All of these comments will be subject to reconsideration and revision in a written report after further investigation and reflection. Let’s start alphabetically with Benton County. Benton County is a relatively prosperous county, with low unemployment rates, relatively low crime rates and, as a university town, high education levels. Therefore, I was personally surprised to see what I’ll call a “cultural” issue in the county, which is relatively longstanding and which has adversely affected the quality of law practice there. Many of us have practiced law in areas where relations among lawyers are tense or strained. However, relationships between the District Attorney, his deputies and members of the defense consortium in Benton County seem to be strained to the breaking point, sometimes resulting in emotional exchanges and outbursts in the courtroom. Defense lawyers from outside the county who practice in Benton County, know the prosecutors and disagree with many of their policies and practices, don’t seem to have the same problems working with them on behalf of their clients. Several judges have actively searched for solutions, including efforts at mediation; but they seem to have been unable to exert control over the problem. These observations offer a picture of what criminal law practice in Benton County must be like. I am not suggesting that the Commission or OPDS can solve this problem, but I suppose artfully bringing it to light in our final staff report to the Commission may help generate some momentum for improvement.

As for the defense consortium itself, we have talked with the members of the consortium at length. For present purposes, I will simply say that there have been some issues of administration in the past involving complaints that have been made about the performance of lawyers in the consortium, but which apparently have not been addressed or resolved by the consortium. We will be talking to the consortium about this issue. There also appear to be what I’ll call quality assurance issues that I will address in our final report to the Commission next month, or in March before we meet in Benton County. Suffice it to say for now that we expect any solutions will probably not directly involve the Commission. We may instead be asking for authority from the Commission to send OPDS staff to Benton County to work directly with the consortium and the other parties in Benton County to try and address these issues. As we collect more information and talk to more people in Benton County, we may be more specific in our final report.

With regard to Lane County, we've met with even more people because it's a bigger county. We had 30 or 40 people attend our meeting of defense attorneys to discuss their issues and concerns. We have talked on numerous occasions with members of the court. We have talked with the prosecutor and five or six of his senior deputies. I think we will be able to identify the issues and policy choices for you in Lane County. There is some consensus and there is some disagreement over the key issue, which is the need to improve the process of handling the overflow of cases that can't be handled by the public defender's office. Criminal cases, in particular, but we may discuss in our final report some aspects of the juvenile practice as well. The appointment list in the county has existed literally for decades. The list may now number about 50 or 60 lawyers. The lawyers who attended our meeting, many of whom are on the appointment list, generally argued for its retention. But as we discussed the administration of the list further, I think there was consensus that, if we kept an appointment list, it has to be improved in a number of ways. The process has to be more transparent. There apparently are several lists used by the courts and the custody referees. We probably would want to tighten qualifications to be on the appointment list. It would probably be the kind of process for certifying and periodically recertifying lawyers that OPDS has talked about implementing statewide. So, improvements would be directed at tightening up the appointment process. Retaining an improved list will probably be one of the options presented to you next month. As I've said, the defense lawyers seem to support that general direction. They did not support what will be another option: the formation of a consortium, which has been done in other counties. You will have an opportunity to discuss the pros and cons of a consortium. It obviously makes administration easier. I think there are less quality control or quality assurance issues with a consortium but, as the lawyers who we met with said, it also forecloses the opportunity for more lawyers to practice criminal law. It potentially jeopardizes the entry of new lawyers into the practice. These are some of the things the Commission will need to discuss. And I think there will be a third option, which is doing both: form a consortium and a smaller appointment list and, over time, see which method of service delivery is most effective. That is probably going to be the major issue before you next month in Lane County. In general, and Ross should be gratified to hear this, I think the feeling among those we talked to is that the Public Defender's Office and its attorneys provide consistently outstanding services and, in the main, provide more effective representation than lawyers on the appointment list. There was a concern expressed that some lawyers on the appointment list charge more or report more hours on routine motions than is justified. At least that is a perspective of the judges and prosecutors we spoke with. Yes, Ingrid reminds me that we visited with the juvenile judge and he spoke highly about the quality of representation by the lawyers who appear in his court, both from the consortium and the Public Defender's Office. Certainly, the courts in Lane County are satisfied with defense representation in the juvenile area.

Lincoln County thinks it has a consortium and, in some ways, our contractors there operate that way. But they really are independent contractors who bid separately and then work out arrangements among themselves after their contracts are awarded. This is a county which is a unique and wonderful place to observe, and probably a place we ought to leave alone for the time being. I think there is an issue about the opportunities for new lawyers to come into Lincoln County and practice criminal law. As in any locale, and particularly where caseloads are small,

if we add contractors to the pool, we reduce the caseload and the revenue for existing contractors. So there is a tension there. I think we may at least offer a recommendation to you to direct OPDS to monitor and keep raising over time the issue of “succession” and access to new legal talent with our current contractors. The contractors told us in response, “Look, we will bring these new folks into the county through our law firms,” but the process right now sounds pretty vague. As I say, this is not an issue unique to Lincoln County, but it is an issue that we might want to address there, and in other counties going forward. Generally, the quality of defense work in the county is quite good. Again, the judges said they were satisfied, and so did the prosecutor. There are also good relationships among the players in the county. Certainly, lots of vigorous advocacy going on, but the parties seem to be working well together.

Linn County: again a county where there is a consortium in the criminal area, and a consortium also does juvenile work. There seems to be general satisfaction with the quality of the consortium’s legal work, based on our conversations with the judges and the District Attorney. Despite all the challenges I’ve already mentioned that our defense contractors face, the lawyers in Linn County’s consortium appear to be satisfied with the work. They report heavier caseloads over time and the stress of making a living, but they generally feel very committed to their public defense practice. I think there’s a unique attitude there about going the extra mile and really taking pleasure and pride in the work they do. So, I certainly wouldn’t anticipate that we will be recommending many changes in Linn County. The one area that did puzzle us, and of course you get different and sometimes contradictory perspectives on any subject depending on who you talk to: the county apparently can’t get an Early Disposition Program going and people can’t figure out why. Some people observed that it was due to judicial policy; others blamed prosecutorial policy. But one of things we found was that, when they tried to design these programs, nobody ever included the defense bar. Not just in the design process, but even in the program itself. I can understand the reticence of disposing of criminal cases through an EDP without defense representation. So that may be the reason for the county’s lack of success. We are probably going to be recommending to you that OPDS take some initiative in proposing to the interested parties that our office and the defense bar participate in the development and operation of an Early Disposition Program. I won’t go into it now, but it does raise an interesting policy question or philosophical question for the Commission. What is our role of promoting or facilitating the development of Early Disposition Programs? I have certainly heard from you and, therefore, taken the position that since EDP is a statutory mandate, we should cooperate and facilitate the development of such programs. We are certainly committed to working with the Chief Justice and others to take advantage of these programs in order to help us through our budget crises and because the programs are effective. But should we take a “proactive” stance with regard to establishing these programs? Should we go in and develop or promote such a program? Is that something that the defense bar ought to do? We will raise these questions with you in our report. That is really the only issue we’ve identified thus far in Linn County. So that is a general outline of what we saw and what issues we may be bringing to you in your meetings over the next two months.

655 Chair Ellis

How do you envision the meeting in Eugene? How can we use our being there to the most advantage?

657 P. Ozanne Well, first of all, I will talk about when we ought to have the meeting, presumably on February 12, which would be our regular Thursday meeting date. I would propose that it not be held from 9:00 a.m. to 12:00 noon. If we hold a public meeting and we want to hear from people in the county, we need to give some thought about when we should schedule it and how long it should be. We will probably have some regular business to take up with the Commission, so it may have to be a longer meeting than four hours. I would propose that we conduct our regular business for an hour or two and probably do that up front. My thought is that we either start late morning and go over the lunch hour, and invite some people who want to speak to us to come over the lunch hour; or we start later in the afternoon and straddle for at least an hour the end of the work day, ending, say, at 6:00 p.m. I know all of these arrangements will be an imposition on people, particularly you. What the structure of the meeting would be is one or two hours of regular meeting topics, and then essentially a public hearing. We will want to hear from the courts. I think we will hear from at least three judges who are willing to come and talk about their views on the issues. I am going to invite the District Attorney and his senior deputies. And I am going to be working with those 40 or so defense lawyers who met with us last month to organize their presentations. We can't have a meeting in which we allow everybody in the county's defense bar to talk. We will never have time to deliberate and to ask questions. The meeting has to be flexible enough to hear from people, but somewhat structured. So I am going back to the defense bar and urge them to select some of their number to represent their various viewpoints. I will try to come up with some suggestions for time limits, perhaps 10 or 15 minutes a person. I will also do so with the court and I'm sure they will be happy to limit themselves to half an hour or so. So we would structure the presentation in a way that there would be a chunk of time to hear from everybody and then a chunk of time for you to respond or ask questions and deliberate.

709 Chair Ellis Do you envision when you say deliberate, I would not have thought decision making would occur minutes after presentation.

712 P. Ozanne I would expect, like many good judges, you would take it under advisement.

713 Chair Ellis That is what I was thinking.

715 P. Ozanne When I said deliberate you might want to think out loud or discuss the issues among yourselves, but not reach decision. No, I don't expect that you will reach a decision. We won't know until we get there and hear what the issues are and what the problems are, so it may not be something we can wrap up by next month. When I say "wrap up," I mean a design of marching orders for us to implement. We could announce that plan in March, after we have staffed the result of the meeting in Eugene, identified the issues, given you a research memo, or a memo that recommends options, and then you'd come back in March to deliberate. Just to finish the picture, the March meeting, again, because –

730 Chair Ellis This would be the one in Corvallis?

732 P. Ozanne Yes, this would be the meeting I propose in Corvallis. For awhile I thought, "Wait a minute, the big issue is in Lane County with the appointment list/consortium issue. Let's just have that one meeting and get back to deliberating." But we are already committed, number one, to meet in other parts of the state and, number two, we went out to the other counties and

told people we wanted to listen to them. We are giving people in Lane County the opportunity to be heard, so I'm convinced, after talking with my colleagues, that we ought to hold a meeting in Corvallis to give people in the other counties the same opportunity. I will have to give the logistics more thought. I don't know what we will do after I have figured out the contents of our final report. Probably Ingrid and I will be writing a letter to everybody we met with in the other three counties, and we will be saying, "We really encourage your written comments because the Commission is interested, and then please let us know if you would like to come and testify at the Commission's March meeting." We may find in March that we'll simply be having a regular meeting in Corvallis if no one is interested in personally appearing before the Commission. Again, this may be a meeting where people want to come and get things off their chest, which may not even relate to the issues that staff has identified for your consideration. Thus, I recommend that you hold a meeting in Corvallis in March. And, of course, you may be announcing what you decided in Lane County at that March meeting.

- 763 Chair Ellis I think that sounds good.
- 764 P. Ozanne I just need your guidance about the amount of time and the schedule for the Eugene meeting.
- 765 Chair Ellis The whole point of going there is to be able to hear from and meet with some of the people in the system, so it sounds to me like a late morning start with the whole noon hour as a working session. Most people would be accessible then and also a place where people can find something to eat.
- 776 P. Ozanne I know the judges would prefer to do it during normal hours. We might want to use the noon hour for defense attorneys. I think the judges like the idea of coming in during the late afternoon.
- 781 Chair Ellis Depends on how the other Commission members feel.
- 782 P. Ozanne The noon hour I was thinking could be a time when the practicing bar could come in. At least give them an opportunity.
- 791 Chair Ellis Any thoughts by anyone else? I think it is important if we are going to a community that we get pretty good attendance of Commissioners.
- 802 J. Yunker Maybe I am just behind the curve here. I always want to know exactly what we want to get out of a public hearing or discussions with all of the participants. Are we zeroing in on our findings and recommendations and are the participants going to address whether they agree with the findings or recommendations? I don't really feel comfortable about visiting with people for four hours, and then we go someplace else and that's the end of that. If they are going to take their time to come in and talk to us, what are we going to provide them? What is the payoff for them?
- 817 Chair Ellis The way I would envision it is that we want to hear from them as to their views on how the present system is working; any thoughts they have as to changes that they think might be a good idea or not. I think we are going to interact with them. I know personally I have real concerns about a system that is so dependent on a long list because it does have problems with it. Many on that list are only part-time criminal lawyers and I think that has issues of its own. I think there may be issues relating to qualifications to be

on that list. There may be issues as to how that is playing out. Obviously, administratively it is not nearly as good for us as a consortium would be. And then I would envision after the session that staff will make their suggestions to us as to what might be a good direction to go. We are going to deliberate after that. Ultimately, the way that would play out is what type of contracts we enter into going forward.

848 P. Ozanne

Jon, I would add that you will get a report from us prior to the February meeting, which will contain findings and preliminary recommendations. "Preliminary" because we don't want to foreclose influence from direct testimony at the meeting. And everybody who comes to testify at the meeting will have seen that report. I anticipate that the report will present three options. Strengthening the current appointment process, tightening it up with the ways I mention; recommending a consortium; or some combination of the two.

TAPE 2, SIDE A

003 Jim Hennings

I agree there are process issues here. Speaking from someone whose area is going to be looked at, how do we respond? How do we come in and know what it is we are going to talk about? There are really two things the Commission has to do. They have to start narrowing down the issues you want to look at so that we can respond. Then ultimately you have to decide what the plan is and what happens in between. I mean, if you want it to be very open-ended and I'm sure it will happen in Eugene, people will come in with half a dozen different ideas. Or maybe if there is enough direction from the Commission, from the staff, then those will be the main things that will be looked at. But I don't think you will have narrowed the issues until after that first meeting. What is really going to be important is between that first meeting and when you decide on a plan, what is the process going to be? Are you going to say, "Okay, here are the five issues we are going to look at. Here are the facts that we are assuming are in place." You may be able to do that after the first meeting, but then you better have a process to not only hear from the staff, but also from the field. And get feedback back and forth between the staff and field about what the argument is going to be so you have some stuff in writing. And I think you almost have to plan that there will have to be a second presentation, either in writing or in writing with some sort of oral argument. You have to start limiting what you look at, just as you can't ask your staff to handle everything because you will burn them up. You are also going to burn the Commission out and the field out, if we have to dream up what things you are really concerned about. So, I really urge that you think about the tightness of what your process is going to be.

025 P. Ozanne

Well were my comments germane?

026 Jim Hennings

They were germane.

027 P. Ozanne

Okay, so I plan on making a report to the Commission, which everybody will see, and which will narrow the issues of likely interest or concern to the Commission before it meets in the county. Again, people may disagree with what those issues should be or how staff addresses them, but we will certainly provide all interested parties an opportunity to comment and give their input to the Commission. I just want to be sure we are on the same track here.

- 029 Jim Hennings I just wanted it to be real clear. I don't think it's going to be a simple one meeting sort of the process nor should it be. And I think what Peter has proposed is appropriate. What is going to be real important is not just the first report that is going to come out within the next month that people will respond to, but then are you right after that meeting going to say, "Okay, we are going to limit our review to these two areas" and then whatever the staff comes up with, and whatever the field comes up, will be distributed back and forth before it comes back before the Commission. So you will be able to decide what your plan is going to be in that particular area.
- 039 Chair Ellis I am not as fearful of this process as maybe I should be. But it does seem to me that in Lane County there are specific issues and we all know pretty much what they are. I am really looking forward to hearing how people respond to both the concerns and the opportunities. And I don't have any problem at all, once they have done that and staff makes their proposals as to what service plan in that area should be. We debate it, hopefully, we reach a conclusion as to what we would like to see and we give everyone another month's opportunity to comment on that.
- 048 Jim Hennings I would ask for field input prior to your making that decision. In other words, after you have had the meeting, after you have narrowed the issues, ask both the field and the staff to give you recommendations.
- 050 Chair Ellis I have no problem with that. I think the whole reason that staff is out there now, having these preliminary meetings, and that doesn't stop, is to try and get input from people in the community.
- 054 Jim Hennings What I'm saying is don't just adopt or modify the staff recommendations. Make it a true deliberation with input from both the staff and the field.
- 055 Chair Ellis That is absolutely the intent. How well we do that we will find out, but that has been the concept of this regional planning process. Let me suggest we take a ten minute recess.
- [Recess at 11:10. Meeting resumed at 11:20. Chip Lazenby signs off at 11:21.]
- 059 Chair Ellis The second piece of Agenda Item 5, which is the contract cycles relative to the 2004 service delivery review in Multnomah County. Kathryn do you want to lead off with that?

Agenda Item 6: Authorization for OPDS to coordinate Contract Cycles

- 064 K. Aylward Well, it became apparent in early December when I began negotiations with some of the Multnomah contractors that they were aware that the Commission was probably going to be looking at their service delivery system soon, and they rightly pointed out, "Well, why would I be comfortable entering into a two-year contract at this point if in four to six or eight months' time the Commission is going to come in and have a look and if we have issues like we want more caseload?" For example, MDI has requested a felony caseload and that is something that they probably don't want to wait two years to have addressed. Some people have said they want comparable rates. MDI has made a point before that they should get the same rates as MPD. We have other providers in the county who say, "I don't get paid enough to continue doing Measure 11 cases at the rates you are offering me, when I know you are offering much higher rates to other

people.” We actually have a number of contracts that we might want to look at. Do we really want this small contract, or should we coordinate the groups that provide conflict coverage? Those are the kinds of issues you will face. Some people have said, “I really don’t want to have an extension of status quo; even six months is pushing it because we are losing money.” Other people say “Well, I want the security of being locked into two years.” But the point is if you lock any of the pieces of the puzzle in for a two-year period, then if the Commission comes in six months and says, “Gee, we do think MDI should have a felony caseload” who are we going to take it from if you have already locked in the other players? So I had to agree with that logic. What we have done is we have provided everyone with a one-month extension, basically for the purposes of negotiating, with the thought that I would bring to the Commission for its discussion and input. Then you would make some kind of decision about whether all contracts will be extended, or only new contracts issue but for a shorter term, to allow the Commission to look at this. We have a large representation of some of the affected parties here. I would just like an idea of how realistic it is that some of these issues will be addressed by the Commission within four to nine months, when you do your review of the Multnomah County service delivery area.

101 Chair Ellis I had occasion to talk with Jim Hennings at the recess and he made a suggestion and I would like to get your reaction to. Which is go ahead with the extensions but include a 90-day clause, a termination clause, giving contractors at least the appearance of security going forward. They can plan, but if we conclude after the review of the area that we really want to make some changes, we have that flexibility.

108 K. Aylward Well, I think there will be some people who will say, “I am not willing to sign a two-year agreement for what I get now” because then they are stuck. If there is no decision, there is no obligation on our part to go back to the people. It’s like there are “haves” and the “have-nots,” and the have-nots are saying, “I want this looked at quickly. I don’t want to continue for two year” And the haves are saying, “Let’s leave it as is.” It may not be something that the Commission will decide to address—for example, the rate differential. We do have some people that I think should have their rates increased. But with this round of negotiations and in this biennium, we are absolutely stuck to no increases for anyone. But if the Commission were comfortable and chose to make this kind of decision, I think it is reasonable to say, “Within a county, two providers: the same dollar amount is still going to the county. This person’s rate went down and this person’s rate went up.” Now, okay, there is one contract where rates were increased. I think that is defensible if it is some kind of zero sum adjustment is made. The Commission may think that that isn’t something that you wish to address this biennium at all. It is difficult to say to one person, “I am going to be paying you less for the work you are doing now to compensate someone else.” I don’t know, maybe we can ask some of the people in group negotiations whether that is something that they would consider.

139 Chair Ellis I think I see two or three parts to this puzzle, or as you say, “Changing the tires on the moving truck.” We want to keep the system going while we have a chance to get input and think about it. There are some contractors who don’t want to lock themselves in at the current rates for too long because they feel the economic system is unfair. There are others who would be willing to continue the status quo, but if we lock them in for two-years then that limits our flexibility. So that is why the exit clause sounds

good from our point of view. But it may not be enough for those in that first category, who are not satisfied with the economics of their present arrangement. Have I got that right? What we are trying to find is a way to keep things going and keep the flexibility on both sides. Then we can see how we come out in the Multnomah service delivery review. It does seem to me that there has to be some way we can maintain the status quo going forward, but keep the flexibility both on the side of those who may not want to lock in for a longer period and on our side, if we want to pull things back and make some changes. Lots of people are here and we appreciate that.

163 Ken Walker

From the Portland Defense Consortium. There are some critical issues that we talked about among our Board members and we have probably three or four Board members here. We wanted to come and talk to you about this. None of this is personal and I want to make sure everyone knows that I am bringing this up on a professional level to discuss the issues. There are some serious equity issues about who is paid what in Multnomah County for what kind of case. There are some firms that I think are paid three times what the consortium is paid for a very similar case. I don't want to mention that we are probably more experienced and more relied on by the judges to do the most difficult cases. One of us will end up with these cases because we are the ones who can handle it. The judges call us because those are problem cases and they know we are experienced enough to do it, yet we get paid maybe a third of what others get for that same amount of work. What has happened in the last year is that we agreed with the Public Defense Services Commission to take on a lot of serious Measure 11 felony cases and a lot of other cases because we knew everyone was suffering. The money was cut back and we agreed to take them at an amount that we knew we could not sustain. But we did it to work with the Commission in the hopes that in the next year or so of this biennium that we would be able to increase the amount we got for these cases. So now here we are in 2004 and that has not come about, and now you are talking about extending it another six or nine months. Our firms, the five firms in the consortium, maybe 20 attorneys, are inundated now with Measure 11 cases. We are all in trial all the time. We are spending 50 to 100 hours on these cases. We get \$1,200 for them. I am in one now. I started trial Monday morning. The judge let me out of it today so I could come to this meeting because I told him how important I thought it was. I'm going to finish it up at 1:30 this afternoon. That is just an example of what all of us have been doing. I think it is time for us to talk about some equity in the amount per case for serious Measure 11 cases, so that we can maintain our firms. My staff is burning out from all of the work. All the clients are in jail. They are bitching and moaning about being in custody and wanting trials. These are very difficult cases. That is my concern. We have talked with Kathryn and Peter. I have told them the price on the other cases we can handle; but the Measure 11 cases have become extremely difficult. The Multnomah County D.A.s are not negotiating these cases like they used to. They are setting them all for trial. These cases are starting to inundate our firm.

202 Ron Fishback

I finished a one-day court trial yesterday and the comment of the judge was, "You know, when you walk in the door for a trial we know what is coming." It is a client who is almost out of control, usually been through two or three attorneys. And that is true for all of the members of the consortium. He says, "How can you keep doing this. I admire the way you talk to your client and got him through the trial." I must say we entered into this consortium to play ball. And we agreed to take a lesser rate for these cases because of the budget crises. But it has shifted our workload.

212 Angel Lopez

One of the other things that is happening, even on a collateral basis, is that we find that today we have a \$120,000 surplus. We are taking cases, we are not getting paid for them at the time that we are taking those cases. But on the other hand, we are taking Ballot Measure 11 cases at a rate that makes it extremely difficult to service these cases. But we are servicing these cases because we are hopeful it is a short-term problem, and any one can live through a short-term problem. But what we would like, at least if we are going to do an extension of our contract, is to crank up our monthly check to reflect the work we are doing. We would like to be able to talk about Ballot Measure 11 funding, right here right now. Not literally, but figuratively, so that we can staff our offices to avoid attorney burnout. The private firms that were doing Ballot Measure 11 cases in the past were the firms that had rotating attorneys because you can only take that kind of stress at that kind of pay with that number of attorneys for so long. We don't want to duplicate that experience. All the same factors appear to be in place in the same way and I can't see if we are going to be able to come to a different conclusion unless we have a rate of pay to staff these cases properly. We are dealing with the worst of the worst clients and the most desperate, with incredible consequences if something goes wrong.

237 Geoffrey Silver

Chairman Ellis, if I could address some of those same issues. Multnomah County Indigent Defense Consortium. We were primarily formed to handle felony conflicts when the substitution problem was out of control with some of the prior contractors who are no longer working. We were a group of between six and nine attorneys and for the past seven years were taking felony conflicts. We were at the end of the road because, if we got a felony appointment on a substitution, if one individual member had a conflict, it would go to other members in the consortium. I want to let you know that there is a historical basis to be paid more on Ballot Measure 11 and other cases, a higher rate than the other contractors in recognition that, on a felony conflict, you are dealing with more difficult clients and therefore it justified a higher pay rate. We also ran a consistent overage for six years, and our monthly payment was much lower than the actual workload. One of the things we did is we just had to cut back because we were getting a small monthly payment and a lot of those cases started going to this other group. Now, when this other consortium was formed, we were no longer the only game in town. All of sudden no longer would we get a lot of substitutions because when the other consortium would take cases they could keep them because if they had a conflict it would go to the other members. We had one of the members of our consortium file for bankruptcy, even though she was probably owed \$30,000 for work she had previously performed. But because she was getting such a small monthly payment she couldn't cut it. So, there is a problem if we go forward with what our monthly payment was before. We were told we would be increased to reflect the amount of work we were doing. But then, in face of the BRAC cutbacks last year, we were told to hold off. Then probably in September, if things came back, we would be increased back up to that point. Now, I don't think it probably makes sense to have two separate consortiums doing this work. I spoke informally to Mr. Walker about joining his group. Mr. Lopez's position was that they didn't want to take us in as an equal consortium. Rather, they wanted to take our workload and hire us as individual attorneys. We are concerned that, if we still get the monthly payment that we are getting that doesn't reflect the workload which we have done for six years, we can't cut it. We have six attorneys and our monthly payment is, on the felony part of the work, perhaps enough

to fund two full-time attorneys. I also do post-conviction work, so there is income that comes in. But I talked with Ms. Aylward and she suggested that we address that before this Commission today. My concern is that I am raising another issue, and I don't want to start the acrimony that happened in Lane County. But if we're not getting a fair payment for the work that we perform and if we don't speak up now and cases and monies are allocated, then the caseload that we once had will be significantly reduced. And we have experienced attorneys with fifteen years of experience who are doing the work.

- 295 K. Aylward Mr. Chair, just before this goes too far, just to clarify. What I am imagining would happen if we entered into agreements that just lasted for nine months, that doesn't mean that your existing quota and existing payment would stay the same. Then you come to a decision like the one with the Portland Defense Consortium. If they have consistently run over quota, then I would say, "Let's pay you for the next nine months at what you have been actually getting." But then the issue is, if the Commission takes a look at the issue and nine months later says, "Boy, we think MDI needs a felony caseload and we are taking felony cases from Portland Defense Consortium," you may then have set yourself up because the consortium will have hired new staff to take this extra workload and it might not be there in nine months' time. But as long as it is clear that anything could happen at the end of the nine months, then I would certainly adjust quotas upward—just not values unless the Commission finds a way to do it.
- 310 Chair Ellis Sounds to me there were two questions: the rate of pay and the timing of pay. And the timing of pay is something we may be able to do something about in the next nine months.
- 314 K. Aylward Yes. Actually though, think of it as how big your slice of the pie is.
- 315 Chair Ellis Right. But if you acknowledge the higher quota, which is reality, doesn't that mean –
- 317 K. Aylward Yes, their monthly payments would then meet the work they are doing. That was a big issue for a lot of them, and it was always our plan to do that, except that some people are saying, "Well, I want my quota even higher, I want it back to what it was a long time ago." Some people are saying, "Look at all the Measure 11 cases I get and I'm not paid enough." Yet I have somebody else who says, "I will take those Measure 11 cases and I will do them for less money." So then there is the issue of having one group that is excellent and they are expensive, and you have another group that cost you less money and maybe isn't so good. I'm not implying that about anyone. But, as a model, if that is what you are looking at, then if I make an administrative decision now to choose what saves money, and the Commission comes in in four months' time and says, "You know, this is worth spending the money" and shifts it back again, I just feel a little bit like I don't want to lock any of us into something that I personally haven't become familiar enough with Multnomah. The analyst that handled half of these contracts isn't with us anymore. It is complicated and I want the Commission to have time, and the people to have time, to have input on how it should be structured.
- 337 Chair Ellis Ken, if we were able to work out a change in the quota, so that you get paid more up front for the work you are actually doing, would that, at least on an interim basis, solve some of problems?

- 340 Ken Walker That will help in the short run.
- 341 Chair Ellis That is really what we are talking about: how to get from here to a point that we have enough time to try and sort out some of these issues.
- 343 Ken Walker It will help in the short run because I think we have been running over \$20,000 or \$30,000 a month. I am concerned about what Kathryn says, that we go out and we start getting paid for what we actually doing. And we go out and hire staff and then in six months or nine months you decide. "Well, we don't want do that." Now we have to lay off a couple of people in every office. I think that the Commission has to deal with the issue of equity sooner or later, hopefully sooner rather than later.
- 350 Chair Ellis The whole concept here is Multnomah is in the second slot on the runway ready for takeoff. We have committed ourselves to a review of Region 4 first, but Multnomah is second. That doesn't mean that the problems are easy, and will immediately be worked out. I think you need to have some confidence that we are not in the business of doing stupid things, such as abruptly cutting people off. I can't tell you now where things are going to come out because I don't know. But I think I can tell you that the whole demeanor of this Commission is trying to be a good partner with the providers.
- 365 Ken Walker I think initially paying us now for what we are doing would help. It will allow us to alleviate some of the strain on our office, but it won't fix the problem. I talked with our Board and they have allowed me to agree to some extensions for a certain amount of time. I would have to go back to them, if you want an extension for more than that. If we agree, I want to be able to go back and tell my 20 attorneys that, if we agree to an extension, that the Commission has promised to deal with these other issues, so that we don't come back in six months and say come back in six months. So it is not on and on and on. That we get some finality to the issue of equity and that, in the next six months, it is going to get resolved one way or the other. So we can determine if we want to have a law firm that is overwhelmed with Measure 11 cases, or that we want to back out of them and send them elsewhere. I think that maybe people are moving toward that, if there is not going to be some pay equity arrangements.
- 383 Jim Hennings I agree on the pay equity issue. But I think you have to look at what is the appropriate pay. I have presented to this Commission twice reports on what the comparison is between our pay at the Metropolitan Public Defender's Office and the District Attorney's Office. We get paid a 1/3 less. In fact, it is interesting that in 10 years of work in my office, we get paid about as much less as our attorneys are carrying in debt load from having gone through law school. About \$100,000. So if you are talking about equity, let's not take it away from someone. If you are not willing to talk about quality and paying for quality, we aren't ever going to get there. As you heard Peter say, we are in a zero sum situation in this particular biennium. This is what the Commission is going to have to address. If you want people to provide the services, you are going to have to pay for it appropriately. You cannot say, "Okay, this attorney or this group is going to do these cases for less," unless you are willing to go back and say, "Are they going to provide the quality on those services?" Our office also is over quota. In the last six months since the BRAC, we have been running 6% above our quota. And we won't get paid for that until sometime in the

future. We can't continue that forever. In Washington County, we are 20% over quota. I cannot continue that in Washington County. The reality is, although the legislature said caseload is not going to increase, the caseload is increasing. Even in Multnomah County where you have one of the few district attorneys who is actually looking at how not to issue a large number of cases, he can't do that. The low-end cases, with the BRAC hit, the level 1 to 5 cases. Right now, we are 12% up in the last six months, since the BRAC, on those cases. And it's not just because of "the bulge." The cases that were deferred, and there weren't that many cases deferred, most of those came through by August. That was offset by the fact that the District Attorney's Office has not been able to issue cases for the last seven weeks because their computer system doesn't work. So, even though in a six-month period of time at least six weeks of that was depressed on the low-end cases especially, we are still 12% up on those cases. So if you are talking about equity you will take it away from somebody and give it somebody else. I don't think you are going to be able to get there, unless you are willing to talk about the quality that will be provided. I don't think it can be done. I support what you heard from the consortium people. You have to pay for those cases appropriately. Whether you get the money or not is going to be another issue. Regarding an extension for nine months, I offered in October an extension for two years. And I suggested to Peter that I would even be willing to go further than that. If the Commission decides to go in a different direction upon 90-day notice, fine. You can terminate or modify the contract, relating to the difference in the direction you want to go to. A nine-month extension hits right about the time you are going to be having discussion in Multnomah County about where you want to go. Peter's own report says it will be August or September before he even gets to Multnomah County.

450 P. Ozanne

I do? Where do I say that? I thought I said the review of Multnomah County would begin in April.

451 Jim Hennings

In your report you said July or August, and then you are going to have to have discussions and decide where to go. And if you decide to make a change, Peter is going to have to come up with a process to implement that change. You are going to have to negotiate those changes. But a 90-day extension means that we stop being able to depend on the contract. There is at least a continuation of the contract. In my case, it means when I had my annual audit done, I would get a negative annual fiscal audit because we're no longer an ongoing concern. If we don't have a contract into the future, that has some impact on our business operations. I am willing to take a 90-day delay. I don't think you are going to want to pull that trigger because in September you are going to be preparing for the next legislative session. And in the legislative session, you are going to be devoting a lot of time to that. I am offering a way that gives you the opportunity to pull that trigger and say, "We want to go in a different direction" or "We are satisfied." Peter can then implement it. The only limitation that I would put on it is you've got 90 days to make that change. I think that is the more appropriate way, rather than saying, "Okay, everything ends in 90 days" because you know it is not going to end in 90 days. The field has to continue to do the work. Those cases have to continue to be handled. There is no way, other than another extension at that time, to continue operating this truck that is rolling down the road. So, I want the Commission to decide what the direction is going to be and do that kind of planning, I want the Commission to have the ability, consistent with my own administrative needs—which is 90-day notice, to decide that there is going to be a change, with active

negotiations during that 90 days as to whatever the change is going to be. That makes sense to me, if you are going to put a limit of a minimum of a year because you can't get there from here in less than a year. I think you ought to do it at least through the biennium because you are not going to have the money to make the adjustments that are necessary, at least until the end of this biennium. That is how I read the tea leaves.

- 497 Chair Ellis This is a piece of agenda that I was told was probably not controversial. Let me see if there is a way to reconcile the interests that have been presented, because everybody is here in good faith and I appreciate that. What if, with regard to those contractors who wanted longer extensions for the reasons Jim said, we do that 90-day call-back clause. For those contractors who are chronically taking overages, we adjust their quotas, so they get paid up-front and don't carry a cash flow burden. Their extensions can be either the nine months that OPDS is suggesting, or longer if they want to. If it is longer, we have the fall-back clause. Does that approach seem sound? I'm looking at you, Kathryn.
- 520 K. Aylward Yes. It does. Just a technical point. These wouldn't be extensions. They would be new contracts with a term of nine months or 12 months or longer. That sounds reasonable. In fact, there are a couple of contracts that the Commission approved through preliminary agreements last month for Napols, we call them. (They handle the Indian Child Welfare Act cases), and also L & L. I don't think there is a lot of competition for their piece of the pie. But I think those two contracts certainly could go ahead and have two-year contracts put into place, and if that also had the 90-day clause.
- 538 Chair Ellis Those are specialty areas and probably aren't going to be all that controversial.
- 540 K. Aylward Currently, the contract says if we need to modify it because the caseload has changed, then we will open negotiations and discuss it. That is always the case.
- 542 Chair Ellis To be consistent, let's try to have the 90-day clause in all the agreements.
- 546 J. Yunker I'll weigh in on this, Mr. Chair. I realize how important this issue is, and how complex. I don't know if people know my background but, among other things, I was a state payroll administrator for several years, and there is nothing more serious than a person's pay. There are a lot of issues here. The part that is bothering me, and getting back to "raising the level of all boats," we have a lot of issues here and every one of them needs to be addressed. And every one of them, frankly, costs more money. We don't have more money. And I'm sure we all realize that we may not have more money the next biennium. So you have four issues, stability, which is very important with staff. You have equity. And you have increased workloads and cash flow. So you have four issues. You can't solve that today. My premise would be one that we should extend those contracts, or have a new contract for as long of a period as we provide, which gets you to about July 1, 2005. I don't see why you have nine-month contracts, which just provide more instability and more uncertainty as to where we are, when we know we have more work than we have money for. We should try to go for a contract that gets us to the end of this biennium for everybody. If it doesn't work people then –
- 579 Chair Ellis You have the 90-day call-back clause –

- 580 J. Yunker Exactly. That's what I'm saying. There are maybe better answers here from other people, but then have the clause that provides that things can change. For example, I don't know exactly how it works if the Emergency Board gives us \$7 million to deal with issues here. I don't know if that all goes to workload, or whether that can go for inequities or cash flow issues. There's some information coming down the road this summer that might help us with some of these things. But I'd like to see our staff come back with some strategies on where we would go on these four issues. I'm with you. I think maybe we can do something on cash flow. Maybe we can do something on stability. But I don't know where we can go on increased workloads and pay equity issues with the limited dollars we have. My personal experience is when you give somebody a raise, you don't make a friend. You just finally gave them what they had coming a long time ago. But if you reduce their pay one penny, you've got an enemy for life.
- 605 A. Christian I really like what Jon has said. I'm just wondering, based on the discussions, whether—you know, the equity issue can't be fixed right away, so everyone's gotten a little bit more stability, and we can't deal necessarily with increased caseload right now—we can work on the cash flow problem so people who are running overages can get some relief. I'm not advocating, I'm just pointing out that we have another consortium in Multnomah County that really is looking, if I understand what Geoff Silver was saying, at a reduced amount of pay until July, 2005. We have the other consortium with too many Measure 11 cases for what the state can afford the pay. So is that something that maybe the parties should be talking about? Getting cash flow more built up for the Portland Defense Consortium so they have more stability? But also talk about having fewer Measure 11 cases going to the consortium on a short-term basis to help out attorneys now in trial every day. Is the attorney out there having to file bankruptcy still wanting to do cases?
- 643 K. Aylward That is what I was alluding to when I was saying, "If this group has too much work to do, I can solve that problem using this group who will charge less." Those things can be fixed. Then there is the question, do you really want to shift the caseload to someone else just because they are cheaper?
- 649 A. Lopez You have to consider this though. Last April, we were very hungry and would have taken a 100 Ballot Measure 11 cases a month. But when reality sets in, and when these cases are building up for trial, that is when the pressure sets in. And if you are taking this caseload and giving it to another firm, all you are doing is shifting the problem. Yes, it is short-term logic. But four months down the road, you are going to be getting complaints from the other consortia saying, "You are burning us out" and they are stressing out. What do we do? There has to be a different solution than shifting the ball.
- 663 A. Christian It is a real short-term bandage.
- 667 Chair Ellis Do you feel that you have enough direction from the Commission, which supports what Jon and I said, to work with contractors to complete these agreements with the cash flow improvement?

TAPE 2, SIDE B

- 023 K. Aylward You have the 90-day clause. That gives the Commission time. And then the Commission can take even longer if someone says, "I'm only going to sign a six-month agreement." "Fine, but in six months time nothing will have changed and you will be offered the same agreement again."
- 027 Alex Hamalian I guess I'm concerned. I'm looking at that 1910 bar examination that is posted on the wall out there in the hall, and the first question on it was, what is a contract? It seems to me, for a contract to be valid, you have to be able to lock folks into terms. Allowing you guys an unmitigated ability to just withdraw from it, giving us 90 days' notice, isn't really a contract. The form contracts that are available online currently have a clause for modification that can address caseloads, that can address shifting caseloads and shifting amounts of cases. But the problem that I see is that we are all trying to come to some agreement that can keep the system rolling along. When the BRAC hit and we all had to agree to modify our contracts, I think everybody in this room did. We took smaller caseloads because that is what was available. We took smaller amounts of money. And I can tell everybody what I did. Because I didn't want to lay people off, I didn't take any funds out of the contract and I reduced some hours. But we kept all our employees on. At this juncture, my consortium is running over its quota as well. I need to hire another lawyer. But it is hard to hire another lawyer. And you are not really addressing a security interest if you give us a one-year contract or a two-year contract or a four-year contract, but you still have the ability to cut us off with 90 days' notice.
- 045 Chair Ellis I assume this clause is not going to say 90-day arbitrarily. It is going to say 90-days, based on the development of a service delivery plan for the region.
- 047 Alex Hamalian But the problem is, we have to sign leases and I don't think they are going to give me a 90-day termination clause in my lease. We have to hire attorneys or bring attorneys into the consortium who are going to rely on a certain amount of money to feed their families.
- 050 Chair Ellis In a perfect world, I would agree with everything you are saying. But we don't have a perfect world.
- 052 Alex Hamalian But it is not really a contract.
- 053 Chair Ellis Yes it is. I'm certainly willing to debate you on practical contracts.
- 054 Alex Hamalian It seems to me that it is difficult to give an attorney you are bringing into a consortium any kind of security.
- 056 Chair Ellis It is difficult. We know that and we acknowledge that. But so is what we are trying to do. Everybody has to work with the risks inherent in public defense.
- 059 Andrew Kohlmetz I'm with the Portland Defense Consortium. As a member of a small firm in the consortium, the consortium is being asked to sign an extension of a year, or until July. And, Alex, perhaps this goes to your concerns. It concerns me that the Commission is entertaining new contractors coming into Multnomah County. There are a lot of players out there. Are there some reasonable assurances or is there any language we could use to at least provide some assurance to the current contractors who are signing these extensions that they will be given some preference?

- 069 Chair Ellis You know, it goes back to what I said before. We are not in the business of doing stupid things on purpose. I think you have to have a little confidence that we know the consequences that would follow if we behaved in a way that was erratic, unpredictable and unfair. Pretty soon, we wouldn't get anywhere with anybody and we know that. But to try and have this Commission agree now to some kind of a clause that would lock us in six months from now is a very hard thing to accomplish, and I feel uncomfortable with it. We are trying to do the right thing.
- 075 Ronnie Kliever I am from Multnomah County and have a small firm. I practice in juvenile court. I don't think anyone has really talked about what has happened in juvenile court. Last January, my firm and two other small firms all had contracts for routine regular pick-up weeks. But we were prevented from picking up any cases for six months in order to shore up MDI's and MPD's caseloads because they were running at a deficit at that time. That, of course, threw us into a major shortage. Now we have been flooded with cases. I can't hire anybody else, and I am wondering what guarantee there is if I sign an extension that, in fact, we will be allowed to pick up cases as we are supposed to and as we have contracted for? It puts us in a very difficult position when we can't make money. We are willing to do the work. We are ready to do the work, but we are prevented, intentionally prevented, from doing the work. So what kind of guarantee is there or that in the process?
- 095 K. Aylward That is actually a good point. And that is why we are tending to be very conservative when we set quotas. Because if we overestimate the caseload, everybody is hurt and we spend a lot of time shuffling cases around. That is why we had staggered contract lengths, so that we could get one group to the end on target, and the other group would have 12, 16, 18 months to catch up. It is very difficult for us, and the only assurance I can give you is that we are going to contract so conservatively that everybody should be able to make their quota, unless some sort of BRAC situation comes again. Then all bets are off. That is a priority for our office: to not put ourselves and our contractors in that situation again. If people complain that they are running over and not getting paid, well it's worse if you are short. It is worse for the system. So we try to balance that as much as we can.
- 106 Ronnie Kliever We are now caught up. But the problem is, I agreed voluntarily in good faith to take a six-month cut to make up that shortage. That really was not our fault. And now what I am hearing is I am expected to continue to operate at that lower level, despite the fact that my caseload and my associates' caseloads have essentially doubled since September. My staff is at their wits end and we are running around like crazy people.
- 112 K. Aylward As I said, we will look at adjusting quotas to match what actually is needed for the next nine months or a year or the duration.
- 114 Ken Walker Can I just make a quick comment because have to get back. I was sitting here thinking that last February and March, when we got this contract, the Portland Defense Consortium knew in January 2004 there would be some relief, or so we thought. There would be some relief, in terms of being able to hire new staff, do new contracts, and the price for cases would increase. Basically, I understand, Kathryn in hearing from you and Peter, that there is going to be no increase. There is no relief coming. If we are all at our wits end now, this is going to last for at least another year, or year and half. What I thought and I mentioned to Peter a month or so ago: "I just don't

know how long I can hang on.” I have had staff threaten to quit because of the stress and no one knows what having 50 Measure 11 cases in your office, with 99% of these people in jail calling 15 times a day. But what concerns me, if there is no relief in sight and the Portland Defense Consortium comes to me and says, “We just can’t do these 500 Measure 11 cases” and we tell Kathryn, “I’m sorry, we can’t do them.” MDI can’t do them. The Public Defender’s Office can’t do them, the Defense Consortium can’t do them. There are 500 people with Measure 11 cases out there and we can’t do them. The system will fall apart. Something bad may happen.

- 131 Chair Ellis Under that scenario, we have a real problem.
- 132 Ken Walker Maybe that would make the legislature say, “Oh, we have to start paying for people’s constitutional rights—to have an attorney paid at a reasonable rate.”
- 135 Chair Ellis I will respond by saying, you are right. And at the last legislative session, we did better, even though it doesn’t feel like it right this minute. We did do better because the legislature saw for the first time that, without defense system funding, the public safety system couldn’t function. But I would really hope that we wouldn’t have to contemplate a self-destruct mode.
- 141 P. Ozanne Ken, I don’t know where this notion comes from that contract rates would be changed or equalized by the first of this year, or in the short-run. I want to address that before you have to leave, just to complete the record. You said we will enter into this extension if the Commission deals with equity in the future. Right now, going back to Jon Yunker’s thought, and I have said this repeatedly since October of 2002 when I arrived. And I said it in a meeting with your consortium that you were unable to attend, and I have said it everywhere I have gone. We can address this equity issue if we get more money from the legislature. But if we get what we are getting now, or something less, we can’t raise the level of all boats. Without more resources, it’s a zero sum game. The money is going to have to come from somebody else, if we raise a contractor’s rates. So when we say, and when the Commission says, we will come to Portland and address the issue, I for one am not sure that we will deal with it in the way you want because we would have to take money from some of your colleagues in this room. And when I presented that reality to your consortium in our first meeting, nobody in attendance seemed to like the idea of pitting our contractors against each other in this fashion. We will look at it, but the other dimension of this issue is, if you want the Commission to take money from somebody, we may have to get into your business. We may have to look at who is spending too much money inside their business in order to decide who to take money from. And you know we are dealing with independent contractors. So all I’m saying is, to actually impose equity, that is, to take money from somebody and give it to somebody else, is an enormously difficult problem. And right now, I don’t know how to do it. So if somebody has heard me say since I have arrived that I was going to be able or thought the Commission was going to be able to address equity with the money we have now and are likely to get in the next biennium, and probably two biennia, I didn’t say it, because I can’t figure out how to do it. So please tell me in direct conversation, by letter or phone how we can do this without getting into your businesses and without, as Jon Yunker said, making permanent enemies by taking money away from people.

- 168 Ron Fishback I would like to echo Jim Hennings. I consider everyone in this room a friend, and I don't plan on that changing. But there is a perception that the private firms are less dependent upon indigent defense funds than public defense firms. For a lot of us, that is just not true. For my firm, at least 95% if not more, we are dependent upon you. I do a 100% of my work, as indigent work. I had one retained client last year, I think for \$1,500. My salary is what his senior deputies salaries are. And, indeed, compared to Mr. Schrunk's office, I make a third less, and that doesn't count PERS benefits. So there you have it.
- 180 Ken Walker The only way that I see that you can do it, I think this Commission can adopt a policy right now and say: "We are going to pay this much for a Class A felony to everybody everywhere. You want a contract for that amount this is what we can pay for it. You submit a bid based on that and you can add in investigation or whatever else that you think is necessary for that case." But pay for that case that same amount to everyone.
- 186 P. Ozanne That is equity, but some are going to win and some are going to lose. And as Jon Yunker said, you are going to make permanent enemies. We may have to do that. I'm just saying is, don't entertain a lot of expectations that when we come to Multnomah County we may have the perfect solution to achieving equity for everyone. I don't see it now.
- 190 Ken Walker You have been upfront about that. I don't think we are under any illusions that there is going to be magical money coming.
- 193 P. Ozanne If it comes, it is going to come from the legislature.
- 194 Paul Petterson Multnomah Defenders. I have been here many times over the last year and a half with the same issues for MDI. We got a whole bunch of felony cases last winter and then they mostly stopped. The Commission voted unanimously that I could negotiate with Mr. Ozanne. That didn't work out. Instead, last July the new consortium got the additional felony cases. Within three weeks of that. two of my bright young lawyers quit and joined the consortium. That is one of the reasons I want to have felonies, so that there is a career development component to my office. You start out doing shoplifting.
- 204 Chair Ellis This is a good topic to discuss when we come to Portland.
- 205 Paul Petterson I know. So Peter's response was, "Not in July, let's do it in December for 04-05 because then we will have figured out how to deal with Multnomah County." I submitted my proposal and drastically dumb-downed my felony caseload proposal. Primarily, five or six cases a month of existing clients. On January 30, I was appointed to represent a guy on a felony charge because I already represented him. It's not in the contract. It is a felony driving while suspended probation violation, but I made a few phone calls, got all of the cases consolidated and went into court and resolved it all. It was good for the client. So the proposal in December was that we'll extend our contract for nine months. That nine months was put off until today to see what we are going to do as a unit. I have also signed a one-month extension so that you have a one-month and a nine-month extension that I have signed. I would rather have the nine-month extension and I think, based on what you said earlier, that it is okay with the Commission. As far as equity, parity with the existing contract that I have, and the existing case values and the existing case types over a two-year period compared to

MPD, I get a third of a million dollars less. I don't have a solution. Well, there are unpleasant solutions. But if we are going to continue the status quo for a month or nine months, I certainly will bring this up again. What I believe I have heard is there are plenty of felony cases and that you are going to lock in the overages now with payments now, which is certainly equitable. But when we get to six months or nine months from now, and you finally get around to looking at the small modest minor felony caseload I am asking for, I want that to be available.

235 Chair Ellis So the noncontroversial part of the program is over. Next item is new business.

Agenda Item 7 New Business

237 Chair Ellis There is a reference in this item to Attachment 5, which is a bar opinion that Jim Hennings wanted to discuss with us.

241 Jim Hennings Metro Public Defender. I think I should advise this Commission that I became a major-

244 Chair Ellis I believe your exact words were I am "in such bad odor" with the Oregon State Bar.

245 Jim Hennings I have always wanted to use that phrase, which is why I put it in there. In fact, I was not going to run for the Board of Governors again. I have decided now that I am having so much fun that I am going to run again. I was very, very pleased with the way the court referred back to the Bar the proposed changes. This is part and parcel of an ongoing problem I have with how the Bar deals with ethics and how it fails to look at the reality of the world. To my knowledge, public defenders are either exempt from former client issues or the Bar associations have advised public defenders that there will be no issue taken because of their public defender work with former client issues. This is different than present client issues.

259 Chair Ellis But jumping a little ahead. DR101(C) is the problem.

262 Jim Hennings The problem is the Oregon State Bar has taken the position that there is a duty to stop everything when you get appointed; to ransack all of your files to see whether or not there is a problem. To give you an example of how far this goes, our office had an ethics complaint that ended in a stipulation, primarily because the woman attorney was pregnant and could no longer take the stress of that particular action. The Bar also filed against the supervisor, that we did contest and that ended up in a dismissal. I would argue with the Bar that the whole analysis on former clients is a mistake.

275 Chair Ellis In just the PD context or in general?

276 Jim Hennings Because it assumes facts as an irrebuttable presumption that are not necessarily true. I have no argument with a present client nor with actual conflict. But I do have a question about the Bar's position that you have to search for a conflict and you have to stop working on your present case, what you are being assigned to right now, until you have done that or if you don't you take the risk that this is going to come back as an ethics charge. So I suggest to this group that you can consult with the Oregon State Bar concerning an exemption for the former client rule. The firm unit rules apply to the former client, so two different rules. The firm unit rule, where

it assumes that everybody in the firm knows everything that any attorney ever did.

- 292 Ann Christian So long as the file is still there. Because I think a lot of people haven't had a chance to read the opinion.
- 293 Jim Hennings Not limiting it to the file. It also says if the attorney is there, and I have issues with the Bar saying, you can destroy the file because we have had cases in which the fact that we had a file in existence in a locked area that no one had access to, the fact that we had that allowed us to correct records because of the court's destruction.
- 300 Chair Ellis What is your file retention policy?
- 301 Jim Hennings We were told by OSB in 1974 unless you knew your client was dead we had to maintain the file because the client has a right to be able to go back to the same location to find out what exactly happened. Every single year we have clients who find what happened is different than what remains in the court record and the underlying files.
- 308 Chair Ellis In your view, is the lawyer for the client an individual or the entity?
- 309 Jim Hennings It is the individual. The assigned individual's responsibility and that is the position the Bar takes in terms of whether they hold someone ethically responsible or not.
- 311 Chair Ellis The way I read this, I would say is as a lawyer in a large civil firm. I am quite aware of that. I do see a significant analytic difference between a private firm and a PD or consortium. That is, in a private firm, you have common economic interests. In the PD setting, the individual lawyer has no economic interest. I can see some good arguments to distinguish, but then as I read this, it looked to me like the problem was in the DR, which defines "law firms" to include a public defender organization. But what I don't know, but somebody in this room may, what is the process to change the DR? It is not just the Bar. You have to go all the way up to the Supreme Court.
- 327 Jim Hennings It has to be initiated by the Bar, either by the Board of Governors or the House of Delegates. It has to be voted on and passed.
- 330 Chair Ellis That is what I thought. So the notion that your unhappiness with this opinion will lead to a quick meeting, there is a long and difficult process involved.
- 332 Jim Hennings Well, there is one other solution, and it is what happened with Gatti. That is, because the Bar is a creature of the legislature, the only one in the United States. The legislature can change the rules, as they did in Gatti, and the Bar subsequently in the third special session adopted those changes.
- 341 Chair Ellis Here is where I thought we might want to go. I'm not particularly happy to have the legislature decide legal ethics. I think it is a random connection. What I would like to suggest is an appropriate committee of defense lawyers, and I don't know how that gets formed. They would review the issue of the propriety of the definition of "law firm" under this DR 101(C) and write a proposal. If they conclude that it really isn't right, and a good

lawyer likes documents explaining why, then they would work through that process to try and change the DR, if that is where it all comes out.

356 Jim Hennings I am in the process of doing that, and I am also requesting that the Bar withdraw the formal opinion.

358 Chair Ellis That doesn't help you though. The DR is there. The opinion –

359 Jim Hennings Except Oregon is the only state that isn't –

361 Chair Ellis I know, but in footnote 2, it is very clear that the reason Oregon's opinion comes out differently is that Oregon's DR came out differently. If you can't change the DR you are stuck.

364 Jim Hennings It is the same DR. They have the same firm unit rule for former clients in all the other states. It has never been applied in the criminal area, in the public defender area. What has been applied, fortunately, and there was a major battle when I started the office over this issue, is actual conflict. When I first started the office, the major ethical issue was the judges wanted us to represent all co-defendants and we took an absolute stance: under no circumstances could we represent co-defendants. It simply cannot be done. I agree with that.

376 Chair Ellis Which means there is some entity representation going on, as well as individual representation.

378 Jim Hennings Because of the passage of communication. If it is an open case, there is no question about it. We are talking about a very, very limited number of cases, and we are talking about a presumption that I think flies in the face of reality and unfortunately is one that the legislature has to deal with. It may be if this exists, that we have to get out of drug courts, we have to forget about early disposition courts, we have to forget about all of those because we then are creating so many conflicts. We have the idiocy of a client who wants to plead guilty, who has been offered a "walk case:" plead guilty today and you can walk. But we have to say, "Hold it, we can't do that. We have to go back and find out whether or not we have a conflict."

395 Chair Ellis I have another question. What role should the Commission take?

398 Jim Hennings I think the Commission should weigh in because the legislature has instructed the Commission to look at Early Disposition Programs. I believe that in any kind of evaluation you are going to see the drug courts, programs and all the other specialty courts that have been set up, are not only necessary, but on a policy basis are good things in order to stretch the money as far as possible; in order to come up with a rational and just system.

405 Chair Ellis You indicated that you are in the process of forming a committee.

406 Jim Hennings I am in the process of requesting this from the Bar. Angel, I am glad that you are here. One of the things intend to put in, but I need to talk to you and Julie Franz: I think the Bar needs a group, apart from the group that did this report, which is the ethics group. And I think it ought to be co-chairs who are two former presidents of the Bar, which is the reason I need to talk to Angel and Julie.

- 415 Chair Ellis Can you get the Criminal Section of the Bar take this on as a topic?
- 416 Jim Hennings I can ask.
- 417 Chair Ellis I would invite you to come back as that process unfolds. I don't think we are the ones to spearhead this.
- 420 Jim Hennings It may be that it requires legislation, but I'll tell you right now, I am very reluctant –
- 422 Paul Petterson I think it would be an excellent idea to work with the Bar because it includes the DA's. There are a number of jurisdictions that make an exception to the firm rule for DA's office and public defender's offices. Oregon arguably should move in that direction through the normal process. The conclusion of this opinion is, if the lawyer is gone and the lawyer's file is no longer at the firm either, there's no conflict. Now we put our files in outside storage, so the lawyer is gone and the file is gone. So I e-mailed Sylvia Stevens for clarification: does this mean we don't have a conflict? No, she said, if you have the file in storage and you have access to it, then it will still be in your office. But what you might want to do is see if the State Court Administrator will store all of your files. So, according to Sylvia Stevens, one solution might be for our office to send all of closed files –
- 443 Chair Ellis It is a perfect world. We can rent that basement after all.
- 445 Paul Petterson I'll certainly pay you what we are paying now. Then I won't have access to the files and, if the lawyer is gone, there is no conflict.
- 447 Chair Ellis Okay. Any other comments on this very easy subject?
- 448 Bill Taylor It has been awhile since I looked at this particular issue as it relates to lawyers, the legislature and the court. But the last time I did, I think there was an old case out there that said, as far as qualifications of the bar goes, it is up to the courts, not the legislature. I think anytime you get into this area with the legislature it is constitutionally "iffy" because of separation of powers. But to take this to the legislature first off is different from Gatti in the sense that you are not going to have the district attorneys in there helping you on the issue. It is not going to potentially bring the system to a halt. Frankly, for the legislature, you are going to have to wait until next January anyway.
- 464 Chair Ellis Those are at least two very powerful reasons not to do what Jim Hennings said he didn't want to do anyway. Any other new business? I will entertain a motion to adjourn.
MOTION: J. Yunker moved; J. Brown 2nd
VOTE: 4-0, hearing no objection the motion **CARRIES**

Meeting adjourned at 12:35 p.m.

Presenter: Kathryn Aylward

Public Defense Services Commission
Meeting Action Item
 February 12, 2004

Issue

PDSC approval of Preliminary Agreements (PAs) for contracts that begin January 1, 2004.

Discussion

All PAs have been reviewed in detail and approved by the Director of Contract and Business Services Division. Actual contract documents will be signed pending approval from the PDSC.

Recommendation

Approve all preliminary agreements listed below.

Required Commission Action

Vote to approve all preliminary agreements listed below.

	Contractor	County	Caseload %-age change	Comments
1	Umpqua Valley Public Defender	Douglas	-4%	Fully executed two-year PA
2	Public Defender Services of Lane County	Lane	3%	Fully executed two-year PA
3	David R. Carlson	Malheur Baker	-32%	Fully executed two-year PA; removed PCR caseload

**OPDS's Report to the Public Defense Services Commission:
The Results of OPDS's Investigations in Service Delivery Region 4
(Benton, Lane, Lincoln & Linn Counties)**

**Part I: Lane County
(February 2004)**

Introduction

Since the completion of its Strategic Plan for 2003-05 late last year, the Public Defense Services Commission (PDSC) has focused on strategies and initiatives to accomplish its primary mission of ensuring the delivery of quality public defense services in the most cost-efficient manner possible. Recognizing that quality legal services promote cost-efficiency by reducing legal error and the resulting delays, appeals and other costly remedies, the Commission has concentrated on strategies that will improve the quality of the state's public defense delivery system and the legal services it delivers.

Foremost among those strategies is what the Commission refers to as its "service delivery planning process." This report represents an initial step in that process. It is the first part of a two-part report on the condition of the local public defense delivery systems in Service Delivery Region 4 of the state, which includes Benton, Lane, Lincoln and Linn Counties.

The Commission's next monthly meeting will be held in Eugene on February 12, 2004 for the purpose of hearing from all interested parties regarding the state of the public defense delivery system in Lane County. Therefore, this part of OPDS's report on Region 4 focuses on OPDS's findings and preliminary recommendations regarding Lane County. Part II of this report will be released in early March and will focus on the service delivery systems in Benton, Lincoln and Linn Counties, in preparation for a meeting in Corvallis that is tentatively scheduled for March 11, 2004.¹

PDSC's service delivery planning process has four steps. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they deliver in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services. Second, starting with preliminary investigations by its staff at the Office of Public Defense Services (OPDS) and a report like this, which will be provided to public defense attorneys, contractors and other interested members of the criminal justice system in the region under review, the Commission will review the condition and operation of local public defense delivery systems and services in a region, including holding public meetings in the region to provide opportunities for all interested parties to present their perspectives and concerns to the Commission. Third, after considering OPDS's report, any responses to the report and input from its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may simply confirm the quality and cost-efficiency of the

¹ This introductory section of Part I of OPDS's report on Region 4, along with the next two sections in Part I, will apply equally to Part II of this report.

public defense delivery system and services in that region. It may also take advantage of opportunities for change or for confronting specific challenges in the region in order to improve the quality and cost-efficiency of the region's public defense services. In any event, the Commission's Service Delivery Plans will (a) take into account local conditions, practices and resources unique to a 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, revise relevant terms and conditions in public defense form contracts. Finally, at the direction of PDSC, OPDS will implement the strategies or changes proposed in a plan on a specific timetable that will depend on the content of that plan.

Because critical steps in PDSC's service delivery planning process have yet to be completed, this report's findings and preliminary recommendations may be reconsidered or revised, depending upon new information presented to the Commission at its February meeting in Eugene or over the coming months, deliberations and decisions of PDSC following its meetings in Region 4, and any additional research and investigation that may be ordered by the Commission. Furthermore, any Service Delivery Plan that PDSC develops over the coming months in Region 4 will not be the "last word" on the service delivery systems in that region or on the quality and cost-efficiency of the region's public defense services. The state's current fiscal crisis and resulting limitations on PDSC's current budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and public defense contractors, and the wisdom of not trying "to do everything at once," all place constraints on the scope of this first round of the planning process in Region 4, or in any other region of the state. Indeed, PDSC's planning process is an ongoing and dynamic one, calling for the Commission to return to each region of the state over time in order to develop new Service Delivery Plans or revise old ones. The Commission may also return to some regions of the state on an expedited basis in order to take advantage of unique opportunities or address acute problems in the region.

Background

The 2001 legislation creating the Commission was premised on a policy, supported by most judges and the defense community, that the public defense function should be separated from the judicial function. This approach, considered by most commentators and authorities across the country as a "best practice," is intended to avoid the inherent conflict in roles when a judge, who serves as the neutral arbiter of legal disputes, also selects and evaluates one side in an adversarial proceeding. Thus, under the 2001 legislation, the Commission, not the courts, has the primary responsibility for the provision of competent public defense counsel. As a result, the Commission is committed to undertaking strategies and initiatives to ensure the competency of legal counsel.

However, in the Commission's view, minimum competency of public defense counsel is not enough. As it declared in its mission statement, PDSC is 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.

PDSC's range of strategies to promote quality and cost-efficiency. Service delivery planning is one of the most important strategies that PDSC has undertaken in recent months to promote quality and cost-efficiency in the delivery of public defense services. However, it is by no means the only strategy.

In December 2003, the Commission directed OPDS to form a Contractors Advisory Group, made up of the heads of public defense contractors from across the state. The group is advising OPDS on the development of standards and evaluation methods to ensure the ongoing quality and cost-efficiency of the services and operations of public defense contractors, and to improve those services and operations through peer review and technical assistance processes. The Contractors Advisory Group is also participating in the development of a new process for qualifying individual attorneys throughout the state who wish to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations, management practices and legal services of those offices.

Indigent defense task forces of the Oregon State Bar have repeatedly highlighted unacceptable variations across the state in the quality of public defense services in juvenile cases. As a result, PDSC has commenced a statewide initiative to improve juvenile law practice, in collaboration with the state courts. The Commission recruited an experienced juvenile defense attorney to serve as OPDS's General Counsel and to take the lead in this initiative.

OPDS, in accordance with PDSC's Strategic Plan, is examining options for a systematic process to address complaints about the performance of contractors and the legal representation of attorneys, as well as for a new organizational structure to deliver legal services in Post-Conviction Relief cases.

The Commission is also concerned about the "graying" of the public defense bar in Oregon. Due to the commitment of those engaged in this work and an increasingly competitive legal market over the past several decades, more and more lawyers are spending their entire careers in public defense law practice and in the private practice of criminal, juvenile and family law. In some areas of the state, most members of the defense bar are approaching retirement, with no process in place for finding replacements. As a result, PDSC is seeking ways throughout the state to attract and train younger lawyers in public defense practice.

"Structure" versus "performance" in the delivery of public defense services. OPDS submits that PDSC's service delivery planning process is aimed primarily at reviewing and improving the "structure" for delivering public defense services by selecting the most effective combination of organizations in a county to provide those services. On the other hand, most of the Commission's other quality assurance strategies and processes,

described above, focus primarily on “performance” in the delivery of legal services in order to ensure that lawyers and managers in public defense organizations are delivering those services efficiently and effectively. This distinction is not always easy to make, since the concepts obviously overlap and influence each other. For example, nearly everyone agrees that the quality and cost-efficiency of public defense services depend primarily on the skills and commitment of the attorneys and staff who perform those services, as well as on the provision of sufficient public resources to attract such talent. However, experienced public defense managers and practitioners and the research literature on “best practices” recognize that attention to the structure of service delivery systems contributes significantly to the quality and effectiveness of public defense services.²

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles and responsibilities of PDSC, OPDS and public defense service providers in this planning process—and in the overall management and operation of Oregon’s public defense system. A collegial, volunteer “board of directors” like PDSC, whose members are chosen for the variety and depth of their experience and sound judgment, and who conduct their business in public meetings with the support of professional staff, is best able to address systemic, “macro” policy issues, like the proper structure of state and local service delivery systems. OPDS, on the other hand, is frequently in the best position to address performance issues, under the direction of the Commission. Performance issues usually involve individual lawyers and contractors, specific management practices and unique circumstances that raise operational and management questions, rather than policy issues. Public defense providers have committed themselves to assisting OPDS and the Commission in the development and implementation of credible standards and processes to ensure performance. As independent contractors, they are in the best position to manage their offices’ specific methods of service delivery and ensure the quality of the legal services they provide.

Because of the significance of the distinction between structure and performance, and the differing capacities of PDSC, OPDS and contractors to resolve questions involving the two concepts, this report will usually recommend assigning PDSC the task of addressing structural issues with policy implications and assigning OPDS the task of addressing performance issues with operational implications. The report will also identify the issues that call for the input and assistance of contractors and practitioners.

The organizations operating within the structure of local 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 emphasized that it has no interest in joining this debate. Instead, it wishes to concentrate on finding the most effective combination of organizations for each region of the state from among those types of organizations already established and tested in Oregon.

² Indeed, debates over the relative effectiveness of public defender offices and “private appointment” systems have gone on for years. See, e.g., Spangenberg and Beeman, “Indigent Defense Systems in the United States,” 58 Law and Contemporary Problems 31-49 (1995).

The Commission is also not interested in developing a “one size fits all” model for organizing the delivery of public defense services in Oregon. Instead, 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 often been struck locally among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of scarce taxpayer dollars for public defense services. Therefore, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to proposals. As one of the largest purchasers and administrators of legal services in the state, the Commission is committed to ensuring that both PDSC and the taxpayer are getting competent legal services at a fair price. The Commission does not see its role as simply continuing to invest public funds in whatever local delivery system happens to exist.

Therefore, PDSC intends, first, to review the service delivery system in each county and develop its Service Delivery Plans with local conditions, resources, history and practices in mind. Second, in conducting these reviews and developing plans that might change local delivery systems, the Commission is prepared to recognize the efficacy of the local organizations that have 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 may be. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in a county or region is necessary to advance the mission of Oregon public defense, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering potential changes in a local service delivery system.

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of the relative advantages and disadvantages. This discussion of the relative features of these organizations is by no means exhaustive. It is simply intended to highlight the kinds of factors that the Commission is likely to take into account in reviewing the structure of any local service delivery system.³

³ Although OPDS solicited input regarding these descriptions of public defense organizations from our Contractors Advisory Group, we did not receive that input in time to include it in this report prior to the release of Part I of the report. OPDS expects that members of the Advisory Group and others in the defense community will have additions or amendments to these descriptions to propose, which can be included before the release of Part II of this report.

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 or the offices in which they work are independent contractors operating under contracts with PDSC, including the following types of public defense organizations:

- 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 its public defense services. The offices share many of the attributes one normally thinks of as a "Public Defender Office," especially the "defining characteristic" of a public defender office: an employment relationship between the attorneys and the office.⁴ The attorneys in these offices in Oregon are full-time specialists in public defense, who are dependent on this work and not allowed to engage in any other form of law practice. However, the state's public defender offices are not government agencies staffed by public employees. They are not-for-profit corporations overseen by boards of directors and managed by administrators who serve at the pleasure of their boards.

While some of Oregon's public defender offices operate in populous counties of the state, others are located in less populous counties. In either case, OPDS expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, and to administer specialized internal training and supervision programs for attorneys and staff and provide effective defense representation in each forum in which they practice, including specialized court programs such as Drug Courts and Early Disposition Programs. As a result of these 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 in their counties, including paralegals, investigators, automated office systems or personnel hiring and management processes.

Because of the professional management structure and specialized management staff in most public defender offices, PDSC looks to the administrators of the offices as well as to others 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, offer PDSC another effective means to (a) communicate with local communities, (b) enhance the Commission's policy development and administrative processes through access to the expertise on the boards and (c) ensure the 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 resulting from cases with multiple defendants, involving former clients or for other reasons, no county can operate with a public defender office alone.⁵ As

⁴ Spangenberg and Beeman, *supra* note 2, at 36.

⁵ *Id.*

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 providers who must operate effectively in their counties.

- Consortia. A “consortium” refers to a group of attorneys or law firms who agree to submit a proposal to OPDS in response to an RFP and to handle a public defense caseload together if they are awarded a contract with PDSC. The size of consortia in the state varies from a few lawyers or law firms to 30 lawyers or more. The organizational structure of these consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with group practice, without the interdependence and conflicts of interest that arise from membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for membership, (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 provisional membership and apprenticeship programs for new attorneys.

Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and wish to continue practicing criminal law under contract with PDSC. Many of them received their training and gained their experience in public defender or district attorney offices and larger law firms.

In addition to this access to experienced public defense lawyers, consortia offer OPDS and PDSC several administrative advantages. If the consortium is reasonably well-organized and managed, OPDS has fewer contractors or attorneys to deal with and, therefore, 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 efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys in the county who can handle the cases. Finally, if a consortium has a board of directors, particularly with members who possess the independence and expertise of directors on public defender boards, then PDSC can realize the same benefits described above, including more opportunities to communicate with local communities and access to additional management expertise and quality assurance processes.

The participation of law firms in a consortium may make it more difficult for an administrator or members of a consortium to monitor and manage cases and the performance of lawyers in the consortium. This potential difficulty stems from the

fact that internal assignments of a portion of a consortium's workload among attorneys in a law firm may not be evident to the consortium or within its ability to influence. Finally, to the extent that a consortium lacks 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 a consortium delivers, such as (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) PDSC's certification process to qualify for court appointments.

- Law firms. In addition to participation in consortia, law firms handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defenders offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals to OPDS in response to an RFP. Furthermore, law firms generally lack features of public accountability, like a public defender office's board of directors or the more arms-length relationships between independent consortium members. Thus, PDSC may have to rely solely on its own assessments of the skills and experience of individual law firm members, along with the external methods of training, standards and certification mentioned above, because the management structures, organization and operations of law firms are relatively inaccessible to public scrutiny.

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. The observations simply suggest that PDSC may have less influence on the organization and structure of this type of provider for the purposes of ensuring quality and cost-efficiency as easily as with public defender offices and well-organized consortia.

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

- Individual attorneys under contract. Individual attorneys efficiently provide a variety of quality public defense services under contract with PDSC, including in specialty areas of practice like aggravated murder cases and in geographic areas of the state with limited supplies of qualified attorneys. Given the potential influence stemming from the power to evaluate and select attorneys individually, and the one-on-one relationship and direct lines of communications between the attorney and OPDS inherent in this contractual arrangement, the Commission can ensure meaningful administrative oversight and quality control over individual attorneys under contract. Those advantages obviously diminish as the number of attorneys under contract with PDSC increases.

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

- Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as “overflow” from other types of providers. However, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, closely monitored and administered qualification process for court appointments, which is capable of verifying the attorneys’ satisfaction of requirements for relevant training and experience.

OPDS’s General Observations in Region 4

During December 2003 and January and February 2004, OPDS visited all of the counties in Region 4 at least twice, Benton County three times and Lane County five times. Members of OPDS’s staff met with virtually all of the public defense contractors and other interested public defense attorneys in each county of the region. Since PDSC’s foremost obligation is to ensure the cost-efficient delivery of competent legal services to public defense clients, OPDS also sought relevant information in each county from as many credible sources as possible, including judges of the Circuit Court, attorneys in District Attorney’s Offices, staff of local probation or community corrections offices and representatives of Citizens’ Review Boards.

As a result of those visits, OPDS is able to offer the following general, though not particularly surprising, observations:

- Public defense caseloads, with increasing numbers of more serious felony cases, have become more demanding and complex over the past several years,⁶ making public defense practice an increasingly difficult way to support a law practice.
- Prosecutors’ charging and negotiation policies and practices vary widely from county to county, making the level and variations in public defense expenditures dependent on these policies and practices, as well as on crime and arrest rates.
- The nature and extent of the courts’ docket management practices vary from county to county, affecting the time and expense involved in handling public defense cases.
- Everyone we interviewed in the four counties of Region 4 expressed appreciation for the visits by OPDS and the special attention from the Commission that those visits represented, making this effort worthwhile for its own sake.

⁶ This trend, reported by most public defense attorneys in the region, is independent of a similar development caused by cuts to the 2001-03 indigent defense budget and the resulting actions by the Chief Justice and his Budget Reduction Advisory Committee during the last four months of the 2001-03 biennium.

A Demographic Snapshot of Lane County

With a 2001 population of approximately 326,000, Lane County is the fourth largest county among Oregon's 36 counties.⁷ As the home of the University of Oregon, the county's residents are relatively well-educated, with 16 percent of its adults over 25 years old possessing a Bachelor's Degree, 10 percent with post-graduate degrees and 46 percent of its high school graduates enrolling in college. As a result, Lane County has had a relatively low unemployment rate over recent years, comparable to Multnomah County's and the state average in 2000, and below the unemployment rates of 26 other Oregon counties. It also has a relatively high proportion of professional, scientific and management workers in its workforce (8.7 percent, compared to Washington and Multnomah Counties with 11.9 and 11.4 percent, respectively) and the seventh highest per capita income in Oregon (at \$19,681, compared to Washington County at \$25,973 and Multnomah at \$22,606).

Lane County's population is not particularly diverse, with non-white and Hispanic residents making up 11.4 percent of its population, compared to 16.5 percent for Oregon and 23.5 percent for Multnomah County. However, the county has a relatively high percentage of individual residents living in poverty (14.4 percent, compared to 11.6 percent in all of Oregon and 12.4 percent in the United States).

With 23 percent of its population 18 years or younger (compared to 24.7 percent for the state as a whole), Lane County's "at risk" population, which tends to commit more criminal and juvenile offenses, is not particularly large. On the other hand, the county had the third highest index crime rate in the state in 2000 (with 57.9 index crimes per 1,000 residents, compared to Multnomah County at 74.8, Marion County at 58.5 and the state at 49.2 per 1,000).⁸

The public defense caseload in Lane County is approximately 10% of the statewide total.

OPDS's Findings in Lane County

The Public Defender's Office. Public Defender Services of Lane County, Inc. is recognized across the state and by the Commission as one of the outstanding public defense contractors in Oregon. During OPDS's investigations for this report, nearly everyone we spoke with had positive things to say about the office, the competence of its attorneys and the quality of its legal services. The Public Defender's Office's reputation for providing

⁷ This demographic information was compiled by Southern Oregon University's Southern Oregon Regional Services Institute and appears in its Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

⁸ For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122.

high quality legal services was recently confirmed by a positive evaluation from the National Legal Aid and Defenders' Association.

While there is always room for improvement in any law office, OPDS has no reason to recommend a review of, or any changes in, the organization or operation of the Public Defender's Office during this planning cycle. Moreover, any room for improvement in the office will be addressed during the assessment and technical assistance process currently under development by OPDS's Quality Assurance Task Force. The Director of the Public Defender's Office is a member of that task force and has volunteered to be among the first offices to participate in the task force's assessment and technical assistance process.

Juvenile law practice in Lane County. PDSC contracts with two public defense providers in juvenile proceedings in Lane County, the Public Defender's Office and the Lane Juvenile Lawyers Association. The Association is a consortium of 12 lawyers. Members of the private bar are occasionally appointed by the court from a list of qualified attorneys when the need arises.

The consortium and the Public Defender's Office received high praise from both the Juvenile Court Judge and attorneys in the District Attorney's Office. Attorneys in both providers' offices were described as highly skilled, result-oriented and not unduly adversarial. From the reports that OPDS gathered, it appears that the consortium is made up of qualified, experienced lawyers who monitor each other's work effectively.

OPDS concludes that the delivery system for public defense services in juvenile cases in Lane County is currently operating cost-efficiently and providing quality legal services. Therefore, no structural changes to this system are recommended during this planning cycle.

Public defense representation by the private bar. Most of OPDS's discussions with the criminal defense bar, judges, prosecutors and other interested parties in Lane County centered on the organization, operation and effectiveness of the process for appointing public defense attorneys in cases that the Public Defender's Office cannot handle, and the quality of the legal services that court-appointed attorneys provide. Apparently, those attorneys are ordinarily appointed from a list administered by court staff to whom the Circuit Court has delegated its authority to appoint public defense attorneys, as well as its authority to determine the terms and conditions of release from custody. However, it is not uncommon for lawyers to be appointed directly by judges as well.

During our first meeting with the defense bar in Lane County, with over 30 defense attorneys who are or have been on the court-appointment list in attendance, OPDS was informed that (1) the principal court-appointment list contains the names of anywhere from 30 to 60 lawyers, some of whom no longer practice criminal law in the county, (2) apparently, there is more than one list, (3) lawyers are uncertain about whether they are on a list, and which ones, (4) appointments from the list or lists appear to be neither random nor systematic, causing suspicion that some lawyers on the list are favored or ignored in the process, and (5) the list worked better in the past when the release officer appointed

attorneys from the list. The county's Trial Court Administrator, who was also in attendance at this meeting, voiced skepticism about some of the lawyer's observations and disagreement with others. He indicated that he would conduct his own investigation of the county's court-appointment process and report the results to the Commission. By its February 12th meeting in Eugene, the Commission should have a clearer picture of how Lane County's court-appointment process currently operates.

In any event, most of the defense attorneys we met in Lane County support the continuation of the county's court-appointment list or lists and the accompanying process. They also oppose the formation of consortia to handle some or all of the same caseload. Those attorneys did acknowledge the need for improvements in the current appointment process, including a more systematic, consistent and transparent selection process and more rigorous and verifiable qualification requirements to receive court appointments. They opposed consortia on the grounds that (a) opportunities for attorneys in the county to practice criminal defense law would be unfairly reduced, (b) the process of establishing and maintaining consortia would breed unnecessary competition among the county's criminal defense lawyers, pitting them against each other and destroying the unique "culture of collaboration" in Lane County, (c) the opportunity for fewer attorneys to practice criminal law would block the state's access to new legal talent and reduce the depth of legal talent currently available in the county, and (d) the current system has worked well for years, if not decades.

On the other hand, the judges and prosecutors we spoke to, without exception, supported the elimination of the current court-appointment process, along with the establishment of a consortium made up of a smaller, more qualified group of attorneys to handle the cases. The two groups' observations and reasons in support of their positions were nearly identical: The Public Defender's Office, in general, provides high-quality legal services efficiently. By comparison, a substantial number of the attorneys on the appointment list are ineffective and appear to spend too much time and energy on routine or inconsequential matters. From the perspective of these two groups, a few attorneys who currently receive court appointments in the county do not possess the necessary experience or legal skills to practice criminal law.

Years ago in Lane County, an attorney apparently prosecuted a successful lawsuit, claiming he was unlawfully removed from the court's appointment list. As a result, the Circuit Court is reluctant to remove any attorney from the list, even for incompetence, unless an attorney has failed to establish his or her qualifications in accordance with Oregon's "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense" (January 15, 2003).

During the fourth quarter of 2003, OPDS received proposals from Lane County attorneys to establish consortia in response to OPDS's standard RFP. However, consideration of those proposals was postponed until the Commission completed this review and developed a Service Delivery Plan for Lane County.

OPDS's contract negotiation process. During PDSC's December 2003 and January 2004 meetings, the Director of Public Defender Services of Lane County, Inc. expressed concern over his office's lack of access to information concerning OPDS's ongoing contract negotiations with another contractor in Lane County who was apparently competing with the Public Defender's Office for part of the same caseload. His point was that, in light of PDSC's commitment to a fair, open and consistent public defense contracting system, all contractors in the county should have access to the status of each other's ongoing contract negotiations with OPDS in order to ensure an equitable allocation of the county's public defense caseload. In response, the Commission's Chair and OPDS's staff confirmed that this current planning process would result in a Service Delivery Plan for Lane County that identifies the roles and responsibilities of the county's public defense contractors and the general nature and extent of their anticipated caseloads. However, they also expressed uncertainty about how individual contract negotiations could be conducted and managed, while providing other contractors access to the substance of those negotiations and the opportunity for input. OPDS asked the Lane County Public Defender's Office to present its concerns and recommendations in writing to OPDS in time for the Commission to consider them at its February 12th meeting in Eugene.

The delivery of public defense services in aggravated murder and murder cases. In years past, public defense attorneys in Lane County were appointed in aggravated murder and murder cases by the presiding judge from a list of uncertain length and content, and paid by the state on an hourly rate. More recently, OPDS's predecessor agency, the Indigent Defense Services Division (IDSD) of the State Court Administrator's Office, entered into a contract for aggravated murder and murder cases with a qualified and experienced defense attorney in Lane County. IDSD concluded that handling aggravated murder cases compromised an attorney's ability to maintain any other kind of law practice. As a result, IDSD decided that supporting specialized aggravated murder and murder caseloads under contract would permit qualified attorneys to deliver these services effectively without the distraction of maintaining a collateral or supplemental law practice.

During OPDS's meeting with Lane County's defense bar, several attorneys voiced objections to PDSC's contracting process for aggravated murder and murder cases, for reasons similar to the ones expressed in support of the county's current court-appointment list. While no one criticized the qualifications or abilities of IDSD's or OPDS's contractors in the county, the attorneys who voiced objections to murder contracts expressed a preference for the old court-appointment list administered by the presiding judge. They stated their belief that the aggravated murder contract in Lane County blocked access to exceptionally qualified local legal talent and promoted rivalry and hard feelings within the county's defense bar. OPDS has also heard rumors and complaints that IDSD or OPDS had to recruit defense attorneys from other counties to handle Lane County murder cases due to the limited capacity of their local contractors, and in spite of the depth of available local talent in the county.

OPDS's Preliminary Recommendations

1. A court-appointment list, a consortium or both? The primary opportunity to improve the quality and cost-efficiency of public defense services in Lane County arises from the county's current court-appointment process for handling cases that the Public Defender's Office is unable to because of conflicts of interest or limitations on its capacity and resources. As the Oregon State Bar and the American Bar Association have recognized, participation by the private bar in public defense representation results in significant benefits for any jurisdiction, including a deeper pool of talent to draw upon and wider support within the legal community for the mission of public defense. However, the Commission must balance the benefits of widespread participation by the private bar with its interests in quality and cost-efficiency that may be served by narrower and more tightly managed participation by the bar.

With those considerations in mind, OPDS believes that the Commission has three options to address this issue: (1) replace the current appointment system with one or more well-organized, tightly managed consortia, made up of the most qualified criminal defense attorneys available, and overseen by an administrator who can effectively manage the consortium's quality assurance, training and business operations; (2) establish a court-appointment list or panel that is predictable, consistent and transparent, with a rigorous and verifiable certification process to qualify for participation; or (3) a combination of the foregoing options, with a plan to evaluate their relative effectiveness and revisit the options in future biennia.

2. Reconsider OPDS's contract negotiation process with contractors? OPDS anticipates that the Commission will receive written comments from the Lane County Public Defender's Office at its February 12th meeting regarding that office's concerns over access to information about ongoing contract negotiations with other contractors in the county. OPDS is committed to the Commission's goal of providing as much relevant information as possible to all contractors in every county about their respective roles, responsibilities, methods of compensation and caseloads through PDSC's service delivery planning process. However, we do not currently understand how OPDS's contract negotiations with competing contractors in a county can be conducted fairly and efficiently if those contractors are granted ongoing access to each other's negotiations and encouraged to give input during the course of those negotiations. Nevertheless, OPDS recommends that the Commission consider any feasible proposal by the Public Defender's Office that is likely to advance PDSC's commitment to fair, open and consistent business dealings between OPDS and its contractors.

3. Reexamine the contracting process for death penalty cases in Lane County? Based on the limited input received on this subject, it is difficult for OPDS to determine whether this is a "structural" issue (such as the choice between a court-appointment list and a consortium), which is appropriate for the Commission to address; or an "operational" issue, which should be left to the sound discretion of OPDS in the course of administering the state contracting process (such as taking into account the size of the county's death

penalty caseload, the availability of qualified counsel, and the cost-efficiencies involved in administering contracts as opposed to appointment lists).

In response to its inquiries into the reasons other qualified (and complaining) attorneys in the county had not submitted proposals in response to previous RFPs for a death penalty contract, OPDS was told that the RFPs weren't publicized, or that the contracts were an "inside deal." Whether or not there is any substance to these claims, the point for present purposes is that OPDS can avoid such claims in the future by administering the state's contracting process openly and consistently.

However, in the interest of confirming the Commission's commitment to maintaining open channels of communication with the criminal defense community, OPDS recommends that the Commission receive testimony from those Lane County attorneys who support changes in the process of delivering public defense services in death penalty cases. To the extent that this testimony presents persuasive and feasible alternatives, PDSC can reexamine the contracting process in Lane County and direct OPDS to identify available options for the Commission's consideration in the future.