

Members

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



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Thursday, February 14, 2008
9 a.m. to 1 p.m.
Room B
Labor and Industries Building
350 Winter Street NE
Salem, Oregon

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's December 13, 2007 Meeting
<i>(Attachment 1)</i> | Barnes Ellis |
| 2. Delivery of Services in Post Conviction Relief Cases
<i>(Attachment 2)</i> | |
| <ul style="list-style-type: none"> • An overview of post conviction relief in Oregon • The challenge of representing clients in post conviction cases – the view from the bench • The prosecution perspective • The appellate perspective • The Federal Defender perspective • The ethical perspective • OPDS perspective | <p>Mark Sussman
Noel Grefenson</p> <p>James R. Hargreaves</p> <p>Lynn Larsen</p> <p>Ingrid MacFarlane</p> <p>Steven Wax</p> <p>Chris Mullmann</p> <p>Kathryn Aylward
Paul Levy</p> |
| 3. Action Item: Contract Approval
<i>(Handout)</i> | Kathryn Aylward |
| 4. Action Item: OPDS Compensation Plan
<i>(Handout)</i> | Kathryn Aylward |

5. **Action Item:** Approval of Service Delivery Plan for Judicial District 15 (Coos and Curry Counties) (*Attachment 3*) Ingrid Swenson
6. Executive Director's Work Plan for 2008 (*Attachment 4*) Ingrid Swenson
7. OPDS's Monthly Report (Including Discussion of Meeting/Retreat Regarding Role and Responsibilities of PDSC) OPDS's Management team

Lunch will be provided at the end of the meeting for Commission members.

The next meeting of the Commission will be on March 13, 2008 in Salem at a location to be announced.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Thursday, December 13, 2007
9:00 a.m. to 1:00 p.m.
Labor and Industries Building, Room 260
350 Winter Street NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Mike Greenfield
Chip Lazenby
John Potter
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Becky Duncan

[The meeting was called to order]

Agenda Item No. 1 Approval of Minutes of PDSC's November 7, 2007 Meeting

MOTION: Mike Greenfield moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE: 5-0**

Agenda Item No. 2 Discussion of Testimony from invited Guests at November Meeting in Judicial Districts 6 and 10; Initial Discussion of Service Delivery Plans

Ingrid Swenson summarized the testimony presented to the Commission at its November 7, 2007 meeting in Pendleton regarding delivery of services in Umatilla and Morrow Counties. Commissioners discussed the low trial rate for juvenile delinquency cases in Umatilla County, the structure of the Blue Mountain Defender consortium and its proposed board of directors, the distribution of cases within the consortium, and OPDS's recommendation that the current contract be extended for a period of time in order to permit questions about the structure and membership to be resolved. Commissioner Welch suggested that the Commission have a discussion at a future meeting about the degree of oversight PDSC can exercise over the structure and operation of independent contractors. It was agreed that a discussion would be scheduled. The Commission also discussed the operation of the Intermountain Public Defender board.

With respect to Union and Wallowa Counties Ingrid Swenson again summarized the testimony provided in November, noting the significance of the distances public defense attorneys must travel in that district, the lack of services available, and the inability to maintain good contact with some clients. It was reported that the two existing consortia had decided to reorganize as a single consortium and had submitted a joint proposal.

Agenda Item No. 3

Contract Review and Approval

Kathryn Aylward then summarized for the Commission the process by which she and her staff had considered the needs of each contractor in light of the priorities established by the Commission, had negotiated with each of them, and arrived at agreement. She noted that the principal goal had been to maintain the system to make sure that the caseload would be covered for the next two years and that the providers would survive that period in a viable condition. They also tried to avoid agreeing to excessive caseloads as a way for contractors to increase their incomes. She described some of the changes that were made in an effort to standardize base rates and eliminate special provisions that make it hard to compare one contract to another. She talked about differentials that were developed for public defender offices, for in-house investigators, and for maintaining contract offices in Eastern Oregon. She also described the limited time available for negotiating contracts between the Commission's meeting in August and the expiration date for existing contracts. She suggested that in the next contract cycle some of the planning be done prior to completion of the state's budget process. The Commission could meet and decide on its priorities for the next biennium without assigning particular dollar amounts. She explained how she had applied the Commission's contract priorities to achieve the long-term goals established by the commission. She then reviewed all of the contracts that were proposed for Commission approval and explained the reasons some contractors received greater increases than others and responded to questions from Commissioners about particular contracts.

Commissioners then heard testimony from Tom Crabtree, Crabtree and Rahmsdorff, who suggested that contract expiration dates be staggered over the course of the biennium so that not all of them would have to be negotiated simultaneously and so that the commission could conduct a more in depth review of specific contracts. Mr. Crabtree also testified that he did not believe the Commission's priorities had been properly applied in Deschutes County and pointed to the terms of the various contracts.

Chair Ellis said that within the next year the Commission would begin planning for the next contract cycle. He asked the Commission to proceed on the contracts before it for approval.

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Commissioner Lazenby identified a conflict of interest with respect to one contract and asked that it be voted on separately.

MOTION: John Potter moved to approve the contracts; Shaun McCrea seconded the motion

Commissioner Welch noted that as a new commissioner she did not feel comfortable proceeding on the Crabtree and Rahmsdorff contract proposal since Tom Crabtree appeared to have raised legitimate issues about the rates differentials in Deschutes County.

Commissioner Lazenby discussed the policy reasons why the Commission would not be the appropriate entity to compare the details of each contract.

Chair Ellis noted that in light of its statutory obligations and what is realistic for the Commission to do and what is appropriately a staff function, it would not be possible for the Commission itself to micromanage each contract, that the Commission had done a reasonable job of establishing priorities and setting policy objectives. While it would be desirable in future cycles to review the office's proposed plan before contracts were finalized, this year the time frame made that unrealistic. He suggested that in future years new contracts might expire in March rather than December.

Commissioner McCrea requested clarification regarding the process that was used in Deschutes County. Kathryn Aylward explained the considerations that led to the terms she negotiated with each of the providers.

Chair Ellis called for a vote on all of the contracts except No. 56 on the list, MDI.

VOTE 5-1 with Commissioner Welch opposing.

Commissioner Mike Greenfield moved approval of No. 56, MDI. Commissioner Lazenby did not participate in the vote. The contract was approved. **VOTE 5-0.**

Agenda Item No. 4 Review of the Executive Director’s Biennial Report to the Legislature and Annual Report

Ingrid Swenson summarized the agency’s biennial report to the legislature and her annual report to the commission

Agenda Item No. 5 PDSC Key Performance Measure Progress Report

Kathryn Aylward provided the agency’s progress report to the Commission and noted that new key performance measures were being drafted.

Agenda Item No. 6 Approval of PDSC Public Record Procedure

Paul Levy discussed the proposed new agency policy for handling public records requests.

MOTION: Hon. Elizabeth Welch moved to approve the written procedure; C. Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 7 2008 PDSC Agenda

Ingrid Swenson discussed the proposed Commission agenda for 2008. Commissioner Welch requested that the agenda include an opportunity for members to discuss the role of the commission and some of the questions that arose at the meeting in Pendleton such as what the Commission should do with concerning information it receives about other agencies.

Agenda Item No. 8 OPDS Monthly Report

Becky Duncan reported on recent developments in the Legal Services Division.

Executive Session

The Commission then recessed the meeting to conduct a scheduled executive session.

The meeting was reconvened and a motion for adjournment made.

MOTION: John Potter moved to adjourn the meeting; S. McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting was adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, December 13, 2007
9:00 a.m. to 1:00 p.m.
Labor and Industries Building, Room 260
350 Winter Street NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Mike Greenfield
Chip Lazenby
John Potter
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Becky Duncan

TAPE 1, SIDE A

[The meeting was called to order]

Agenda Item No. 1 Approval of Minutes of PDSC's November 7, 2007 Meeting

002 Chair Ellis The first item is the approval of minutes from the November 7 meeting. Are there any additions or corrections to the summary minutes?
MOTION: Mike Greenfield moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE: 5-0**

Any additions to the unofficial transcript?

009 I. Swenson Mr. Chair, may I say that I myself found a number of typographical errors that I would propose to correct and not bother the Commission with today if that is satisfactory.

012 Chair Ellis That is fine.

Agenda Item No. 2 Discussion of Testimony from invited Guests at November Meeting in Judicial Districts 6 and 10; Initial Discussion of Service Delivery Plans

014 Chair Ellis The next item is Attachments 2 and 3 and this is the testimony from Judicial District 6 and 10. Ingrid, if you want to kind of summarize where we are on that.

018 I. Swenson I would be happy to Mr. Chair. Judicial District 6 is Umatilla and Morrow Counties. As you will recall there are two county seats and three courthouses in that judicial district, one in Hermiston and one in Pendleton in Umatilla County and those courts are currently handling approximately half of the caseload each. Each has a drug court. Then there is the court in

Morrow County which is in Heppner. The distances are significant for the judges, the prosecutors, and of course the defense lawyers. It is a 45 mile trip from Hermiston to Heppner and a 30 mile trip between Pendleton and Hermiston, so if you have hearings in more than one of those courts travel is going to take good portion of your time. In addition to the travel issue, you will recall that there was some controversy with respect to the drug court in Umatilla County. One of our contractors there is not making good use of that court and has explained that the conditions for admission to the program are such that he very often cannot recommend it to his clients because the risks are too great. Fifty percent of the people who are admitted to the court ultimately fail, and when they fail they have already entered a plea of guilty to every single charge in the information. There is no negotiation ahead of time on the charges, so they end up with convictions on all of the allegations. So there are some legitimate concerns. In addition to raising those in the report, I am suggesting when we talk about our 2008 agenda that the Commission take a look at drug courts statewide and get a picture of what the differences are. This is not a standard ...

045 Chair Ellis

I was going to ask.

045 I. Swenson

No. It is very unusual. I am not familiar with many of the programs but the ones I am familiar with involve negotiation ahead of time as to what counts will be admitted, if a plea is required, or, in some jurisdictions there is a stipulation of facts rather than a guilty plea. You stipulate to certain facts that would make it very difficult for you to have much of a trial if you failed the drug court. So they are all different and it would be worthwhile, I think, for the Commission to consider whether to create some guidelines as you did for early disposition programs. Another issue encountered there related to juvenile representation. There, as in many locations, attorneys are not having contact with their child clients in dependency cases. As the Commission noted at the time, the role of counsel is changing in that regard and it wasn't unusual in the past for lawyers to think they had no obligation to visit with those kids. That is clearly not the case under current rules of professional conduct and under the Commission's expectations, but the change is taking some time. We also heard about an instance, at least a set of circumstances, which appear to involve some kind of intimidation by a parent's lawyer of a child's lawyer, prohibiting the child's lawyer from presenting the position of the child in a litigation because of intimidation by the parent's lawyer. So that needs to be explored. It turns out that only half of the youth in delinquency cases are represented by counsel. That is half of the kids who actually get to the courtroom. Lots of them don't get there because they are dealt with informally before the proceedings begin. The court indicated to us, Judge Pahl indicated, that that is because they waive counsel, often in consultation with their parents. But national standards in that regard are pretty clear. The U.S. Department of Justice has recommended, and other agencies as well, that before an unrepresented youth in those kinds of proceedings waives counsel they have the ability to confer with counsel about whether they need to be represented or not. That is something the Commission could consider recommending in this district. Other concerns about delinquency cases involved the fact that very little is happening in terms of contested proceedings in those cases. I reported to you that our database indicated that there were only three requests for non-routine expenses, which would be for investigators or experts or something of that nature, for the entire year for all of the juvenile delinquency cases in the county. The judge estimated that there are five trials a year, probably no more, and that motion practice is extremely rare in these cases, so again some real questions arise as to whether that can amount to proper representation.

092 J. Potter

Ingrid, can you refresh me as to how many delinquency cases there were in that county?

093 I. Swenson

That is a very good question, Commission Potter, and I do not have the number. Maybe Kathryn can help us figure that out. There are approximately 5,000 cases overall for the two-year period that go to the Public Defender's Office and 2,600 that go to the Blue Mountain Defenders. That is a lot of cases and I assume that the delinquency cases are a reasonable proportion.

101 K. Aylward About 120 cases a year go to the PD's office and that is just delinquency that you are talking about?

103 I. Swenson Yes. I'll just proceed while Kathryn reviews those numbers. Other issues that arose here ...

108 K. Aylward And about 50.

109 I. Swenson So 170 total.

109 J. Potter So 170 total delinquency cases and did you say five of them have requested extraordinary expense?

110 I. Swenson Three.

110 J. Potter Three.

111 I. Swenson Five went to trial, reportedly.

112 J. Potter Once again, Kathryn, and this may be unfair as well, but in relation to other counties do we have any sense at all if three out of 175 is going to be the norm, below the norm?

117 K. Aylward I would say it is below the norm. It surprises me but with juvenile delinquencies we don't get the same ratio of requests for expenses as we do for criminal case – by far. There are fewer requests in general, but three seems low.

120 I. Swenson Mr. Chair, Commissioner Potter, the statistics I do have are statewide court statistics on the number of delinquency cases tried, so that data I can provide to you. I haven't got population figures for some of these counties. For this six-month period they showed zero trials in Umatilla County. In some counties there were 15; 28 in Benton. It seems remarkably low.

127 J. Potter I am just trying to get a perspective.

128 I. Swenson Yes. I understand and I will try to bring you some more information in the final report. Another issue we looked at was the structure of these organizations and of the system as a whole. It appears that it is probably the right combination of provider types for this area. We have a public defender office that is well established. They opened in 1994. People told us that they do all of the training for criminal lawyers in the area and generally do a pretty good job of that. Representation, other than in the juvenile area, is considered to be good. The other provider here currently is a consortium. It is new. It was formed just two years ago. This was their first contract and a consortium or some kind of managed list is probably the appropriate structure to add to the public defender's office considering the size of the county and the frequent conflicts that occur, especially with juvenile cases. You need some kind of provider like a consortium.

143 Chair Ellis It did seem to me that the consortium there was different than other consortia that I think I have become familiar with. It is much more dominated by a single person and it is more like a one or two person law firm with satellites than a consortium on the model of say Clackamas. What was your thought?

149 I. Swenson That is certainly my impression as well, Mr. Chair - very unusual in that regard and Mr. Childress basically acknowledged that that is the way it was set up and the way it would continue to operate under his plan. He gave us proposed bylaws of the organization which would basically make him unremoveable as the head of the organization.

- 156 I. Swenson Then he has sort of designated the attorney who shares space in his law office as his successor if at sometime he would leave. One thing we did hear from judges and from some of the attorneys is that there are very capable criminal lawyers in the county who would like to participate in public defense cases, but for whatever reason, do not wish to do so as part of the consortium. Now Mr. Childress advised us that people who he has admitted to the consortium have basically decided how many cases they want and of what type. I was not able to confirm with them whether that is correct. I didn't feel like I should be going inside the organization at this point and looking for that information, but he and Mr. Stevens essentially get full caseloads and the other's caseloads range from 20 to 50 percent, except for the attorney who handles the Morrow County portion of the caseload. She seems to be working approximately 80 percent of the time.
- 172 Chair Ellis Let me just stay on this topic for a minute. My impression is that Craig is probably a very able lawyer and my impression is he has probably got very strong opinions on a number of subjects, which is not a bad thing. My question is, given his style, is this really a model that is going to fill the role that we normally look for in consortium as a compliment to a PD to do or not?
- 181 I. Swenson Kathryn can speak to this if she wishes to, but that certainly is a concern that we would have. One reason that we are recommending that the Commission consider approving a very short term contract is to allow us to look a little more closely at what the needs of the other attorneys are and if there is some alternate organization or group of lawyers who could bring in more of that talent. We heard in the juvenile area, for example, that the best lawyers aren't involved in the work anymore for whatever reason. We need to explore what that reason is.
- 192 Chair Ellis It struck me that it may be a situation where you have got a very strong personality, which I think he and his partner probably – I didn't meet the partner but Craig certainly is - and that they probably do very aggressive and effective representation on the cases they take. I didn't hear anything that told me that that wasn't so, but it may be an unattractive relationship for some other providers to be part of. I could see us trying to keep the best of both by migrating to a third provider option with he and Mr. Stevens operating really as a two-person firm. I think that is where they are comfortable and how they relate to each other and maybe not as a manager of a broader consortium. I am not sure I felt that is a good fit.
- 207 I. Swenson Of course, Mr. Chair, the dilemma is how closely does this Commission want to manage the delivery of services in an area, or do we simply open the process a little more and try and feel out the rest of the community and see if there are other proposals.
- 212 Chair Ellis I came away kind of wanting us to stay in better touch with the broader community and get a sense, maybe the community is very happy with him and maybe I am wrong and his strength of personality is not making it difficult for other providers to come in, but if I am right in my impression I want to keep the strength that he brings but I don't want to continue something that I think might be driving other resources away.
- 221 I. Swenson I believe the system people find it difficult to deal with the consortium. As we heard, there are good reasons why you might not wish to participate in the drug court and yet those kinds of things should have been discussed and negotiated before the drug court was set up. The same with the mediation program in dependency cases. The consortium essentially does not participate in mediation in those cases. They probably disagree with some portion of the process, but again the community would say that this particular group isn't interested in participating in the development of policy and simply reacts to those policies once they are in place. So there is that concern as well.

- 235 Hon. Elizabeth Welch In support of the Chairman's comment, isn't he the same person who when he addressed the issue of representation, of lawyers having contact with their child clients - there were some concerns - and he just basically said that the complaint was totally without merit and groundless and kind of went on and on about that. Am I remembering that right?
- 243 I. Swenson Mr. Chair, Commissioner Welch, I think you are thinking of some comments that were made about contact with children, about representation of children in cases where an associate is representing another party to the case. There were those concerns and I believe Mr. Childress indicated that they were nonsense.
- 249 J. Potter Am I remembering correctly that in this next cycle he plans to have a Board of Directors established?
- 250 I. Swenson Yes. That is correct and he did provide us the proposed bylaws. It is an unusual kind of board arrangement. As I say, it would assure him of a position - I think he meant for three years, but the bylaws actually say five. Even though board terms are only three years his particular position is listed in the bylaws as established for five years, except that he can be removed for cause. The bylaws don't contain much process in terms of how the group would deal with underperforming members and that kind of thing. He might acknowledge that those are not yet complete and ready to go. I think he drafted them for the Commission to review because he was aware that the Commission liked to see these groups have boards.
- 265 Chair Ellis There is probably a foggy line between what I see as our role in regional planning and what I see as sort of the site review process. Some of what we are seeing may tend more to be appropriately handled in a site review, but I did think there was a structural issue here potentially. I guess where I come out is now that we have seen it and I have tried to articulate what I sense about it, I think we ought to revisit this about six months from now and see how we are doing and see if others in the community are really saying this is either working or maybe not working. It is a different model and even with the board, I think his personality is such that it is likely to be one of these director-dominated boards rather than the other way around relationships. I am not trying to say he shouldn't be a significant provider in the area. From what I can tell he is qualified, cares about it and wants to do it, but I am just not sure he is a consortium administrator as opposed to a dominant personality, for what it is worth.
- 268 I. Swenson We can certainly do that.
- 269 Hon. Elizabeth Welch I hate to linger over this any further but I am kind of hoping that someday soon we can talk about the issue of where that line is, sort of in the abstract and not necessarily in connection with any particular location. Maybe it is because I am new, but I think that is a tremendously complicated issue and I would like to have had an opportunity to hear what other people think about where the line is and where it ought to be.
- 295 Chair Ellis I think that is a very good question.
- 296 J. Potter Maybe a board retreat question?
- 297 S. McCrea That is what I was thinking because I think the lines move depending on the circumstances and we change our minds from time to time given the context.
- 299 I. Swenson A good discussion and we could do some preparation.
- 300 Chair Ellis I thought the same thing on the other, the PD. I didn't get the sense that they have a board that is functioning the way the most effective PD boards that we know of function. It seems like it was a counting kind of a concept and not a broader involvement, so I am not saying that we

not contract with them. I think they do provide a good service. I think that comment ought to get communicated to them. I think they are not getting the full benefit of a board.

312 I. Swenson I think that is true, Mr. Chair. I think they formed their board for a very specific reason and it served that purpose and they haven't expanded its function perhaps as they should.

315 Chair Ellis Any other thoughts, Ingrid, either that you have or other Commissioners have?

317 I. Swenson No. Not in that district, Mr. Chair. Shall we talk about District 10?

321 Chair Ellis Yes.

322 I. Swenson Again, similar issues in some ways in Union and Wallowa counties because of the significant distances there. The travel is even worse. It is 144 miles round trip between the county seats and apparently a frequent trip for everybody involved - the judges and the lawyers. In terms of distances, the thing that we heard about that was not in the initial report I prepared for you was the lack of services in the counties. Investigative services, for example, are very difficult to come by. Interpreters - there is one person who can interpret into English from Spanish and she is obviously kept very busy. Mental health experts - there are so few available that it is hard to find somebody who doesn't have a conflict. At the meeting we certainly encouraged the providers to talk with Paul and our office about these things because there are things we can do to assist. The suggestion was that we recruit investigators and there may be some need to do that to try to help them find people who would be willing to spend a significant amount of time out there. In terms of mental health evaluators it is a matter of making them available. There are evaluators from the valley who travel out there periodically and handle a number of evaluations while they are there, so those arrangements can be made somewhat more easily. Interpreters - that is another tough issue for the court as well as for our folks, to make sure that there are certified interpreters available, so recruitment may be their issue as well. One of the other things the juvenile lawyers mentioned was that their clients, of course, end up in placement facilities distant from the county because there simply aren't any there. They can be located in Klamath Falls and then the issue becomes how do you adequately represent young people who are placed so distantly and who have so many of their issues being dealt with in that vicinity rather than in the courthouse which is where the lawyer is located. Ms. Moffett was suggesting that like DHS and other agencies, we assign a "courtesy worker" in the county in which the youth is located. That doesn't seem feasible to me, but there may certainly come a point at which it makes sense to transfer a case to an attorney in another area if the youth is placed there for a long time and there are frequent treatment reviews. You can send an investigator, a well trained investigator, to participate and that can be an option in some cases. We will need to explore with these lawyers on a case-by-case basis what would be the best thing for the client under the circumstances. We certainly pay travel expenses for lawyers and it may be that you have to take a week and visit all of your clients in distant places on a long trip. Telephone, video, some of those things are available so we can certainly work with them on that. We heard about the rocket docket in La Grande and there was a great deal of discussion about it but what it appears like is a program that does not necessarily meet the Commission's standards for participation by defense attorneys in early disposition programs and that is because there is no representation, and I can confirm this with Mr. Dahl after the meeting, there is no representation provided to these clients. They are permitted to confer very briefly with an attorney before making the decision about whether they will accept the plea offer and waive counsel or not, but that is what it amounts to. I didn't provide you this time, but in connection with the materials last time, I gave you copy of the Commission's standards on early disposition programs. They clearly require representation, under the circumstances, allowing the client to proceed with counsel even if they are going to accept the state's offer and proceed on the early disposition. I would like to include that discussion in the report. I sent Mr. Dahl and the judges in the county, at the judges' request, a copy of the Commission's standards so they are aware of what it is that you had recommended for these kinds of programs. In terms of structure, we have the two

consortia that will be one very soon here beginning the first part of the year. They all appear ...

401 Chair Ellis The unisex consortium.

401 I. Swenson That is right. No more men's and women's, but all one. That seems to be the appropriate model for this small, remote county. The caseload in Union County is 1,470 cases every two years and 384 in Wallowa, so there isn't a lot. You have got five lawyers. This makes it very flexible. They can all be appointed to parties in a single case if necessary. Probably a public defender couldn't function very efficiently in that area. The particular providers that we have are all very experienced lawyers and, by all the accounts we received, very competent. In fact, the district attorney advised you to do everything you could to keep these people around. He says they are very skilled, knowledgeable and we need to make it feasible for them to continue their practice. Kathryn, as you will see in the statistics that we will be talking about later, has signed a preliminary understanding which would involve a 22 percent increase for these folks, so that may help with some of the travel expenses and maintaining offices and so forth. That is my summary.

424 Chair Ellis Any questions or comments on Judicial District 10? Okay.

Agenda Item No. 3 Contract Review and Approval

428 Chair Ellis The next item is contract review and approval. Kathryn you have been busy.

430 K. Aylward The whole office has been busy. In case Commissioner Potter had any detailed questions I have asked the analysts in our office to come and I would like to introduce them. Some of you know them already. We have Amy Jackson, Billy Strehlow, Caroline Meyer and Shelley Dillon and I have to start out by saying I am so lucky to have those four analysts. They have been hard working. They have a sense of humor. They are supportive, intelligent and they are supportive of each other. It has been a lifesaver to have them. We took a slightly different approach to contracting this time than we have in the past. We see our first priority as essentially maintaining the system. We have to make sure that we have the caseload covered for the next two years and not just through the two years but we want entities not to be on their last breath at the end of two years. We want to have a business arrangement with an organization that is viable. We see those two things as our absolute essentials. One of the other things that we tried to do is avoid assigning excessive caseloads. When you are trying to reach agreement one way to get more money is to take more cases. It is sort of a two-way street whether it is our office saying, "If you want more money you take these cases." It is often the contractor saying, "Um, I do want more money so please give me more cases." We have to try to resist that. We also want to make decisions based on the Commission's priorities, not a contractor's unique perspective. The four analysts and myself are probably the only people in the state who hear regularly from every single contractor. We have a pretty good picture of where the needs are, who is on the edge of not continuing to contract, and that is something that the other contractors don't hear and wouldn't hear. We have to resist "bending," I think, is the right word, to people's demands, requests, where they don't actually see what the big picture is. We had some other things that we wanted to accomplish this time that I hadn't listed as actual goals. They are more housekeeping things that we have been working on for a long time. One of them is to remove special clauses from contracts. All the contracts have the same general terms, but throughout the years when you are trying to negotiate, and you don't have any money, and there is nothing to give, and you have to reach agreement, a contractor will say, "Well, I can't do a Measure 11 for the rate you have because sometimes they take 30 hours." So the contractor will say, "How about this? If I get a Measure 11 that takes more than eight hours then I can start billing for those hours" and we will say, "Okay, fine" because we have to reach agreement. So, over the years, different contracts have had little exceptions to the general terms which - in my view it gives them a little bit of an unfair advantage over other contractors but it also makes it very difficult to

compare contract to contract. Most people when they do compare the matrix will say, "That is what he gets, that is what I get, and okay that is fair." Well, except that he actually gets something better because he had negotiated some exception to the general term. We wanted to remove those clauses as much as we could. We also wanted to remove some special items in the matrix. In our contracts there is what we call the "matrix", the number of cases times the dollar value. Then there will be a line item that lists "investigation, \$40,000 a year." The problem with having those kinds of line items that go through the contractor is it puts them in a difficult position. If they have been given \$40,000 a year in order to purchase investigative services, and they don't purchase \$40,000 worth, then that money stays in their pocket and you don't want an attorney to have to decide between buying the services that are needed for a case and doing without his own lunch money. We want to take those kinds of things out, separate them. Now it means additional work for the contractor because now when they need investigation they have to submit a request to our office, individually, and get the request approved. It is more work. In the past when we haven't had any funding you couldn't say to someone, "Do another year with no increase and by the way could you do a little more work?" They are just never going to say yes. Another thing we have always wanted to change and now have in done most of them - we used to have contracts that had a single rate, so whether it was a Measure 11, or a PV, you got \$320. The problem with those types of contracts is that over time it can work either way. Let's say a DA runs short of funding, doesn't prosecute misdemeanors, and ends up only doing felonies. Well, that contractor is now locked into doing all these felonies at \$320 and he has no misdemeanors. It can also go the other way. Juvenile reviews might happen more frequently and maybe they would be less valued case types and then we are the ones not quite getting the deal we thought we were. We wanted to move people toward individual case rates for different case types. Another thing we wanted to do is to convert hourly paid contractors to case rates. Part of the problem with the hourly paid contractors is that it was difficult for our office in terms of providing consistent data when the legislature would ask, "How many cases are there in this county?" Well, when someone is reporting hourly they might get a client with two or three cases. They will just write their hours down and submit a bill for payment on those hours and it will just list one case and we don't know that they actually had three. It is difficult to count the cases and it is unpredictable. You don't know from month to month whether it is going to be a big number or a low number. It is difficult for budgeting. We were hopeful that we could get rid of that. The last thing that we have wanted to change for a long time is the way MPDs contract is structured and I will talk a little bit more about that. They use a crime seriousness level as a yardstick for the work that they do. That creates similar problems to the hourly rate. It is very difficult for us to compare what MPD is paid and what their actual workload is compared to other contracts. It was just problematic for us. That was our list of things, our wish list. What we did to start with is we reviewed all the rates in the all the counties. We have a giant spreadsheet, every single case type for all 80 or 90 contracts. We put up all their rates, put everything up, and stood back and looked at it. We were able to establish a kind of base rate. If this is the work you are doing, here is a bunch of rates that should cover you. Now who is doing something more? Well, they have investigation, a staff investigator, not somebody they would spend their \$40,000 on. So those rates need to be higher because you have investigation. What else? You are a public defender office, you are a not-for-profit public defender office, who not only provides investigation but also provides training, a presence, stability, continuity, a lot of things, so then more for the PD offices. We also looked at areas that had particular difficulty with recruitment and retention issues. Now a lot of these things overlap. Recruitment and retention is tied partly to cost of living. It is partly tied to remoteness. It is partly tied to PD/DA salary differentials. The reason the DAs pay more is that it is expensive to live in Bend. The differential between a PD in Bend and the DA in Bend, sure it is a PD/DA differential, but it is also a cost of living differential. That is why the rates are higher. We also looked at the kinds of cases people were getting - a large Spanish speaking population, a large number of ICWA cases. Indian Child Welfare Act cases are much more complicated, with a higher burden of proof, more parties at the table, more difficult issues and geographic variations. The physical size of your county - Do you drive two hours and find you haven't crossed the county line yet? - the remoteness of a

location is huge and we heard Gordon Mallon, I think, testify, "Sure, a house might be cheaper in Burns but gas is \$3.50 a gallon. We don't have a Costco. We don't have an Office Depot and it is a remote place to live." We took all those things into account. We looked at the actual caseload that contractors had been receiving. That was our basis. Not their quota, because their quota was what two years ago we and they got talked into, or thought was going to be there, but instead what they were actually doing. Some contractors are running above quota and some are running below quota. We started by saying that let's assume that what you have been getting is what you are going to get, that you don't need some kind of change. Then we dropped in the case rates that we developed that were applicable to each contractor in each location. Then we looked at their proposals and said, "If we think that this is the number of cases and these rates are appropriate, where does that leave you?" Let's look at their bid and see what they need. It was essentially broken down into two primary questions and then additional information. The first question was, "What do you need to do to continue to provide services for two years without reducing quality?" Then the next part is, "What else would you like? What else would be good to help you improve quality?" It is almost like the way the state agencies are budgeted with an essential budget level and then policy packages. We took a look at what everyone had in their bid and said, "You know, this person really needs, this contractor needs to add another attorney. Does this provide enough funding for them to do that? Yes, I think it does." You go through all the bids and you make sure you are addressing those essential needs. Some bidders naturally would feel that absolutely everything was essential and others really bid and thought in terms of what is the least I can get by with. Since we were unable to fund every contractor at the total amount that they said they required for two years, we did our best. We took a look and thought, "Is this at least something that this contractor can agree to?" The first time it was, "No. He is not going to say yes to that so let's go back to the drawing board." We went through it again and thought maybe we needed a greater differential for eastern Oregon. Maybe we needed a greater differential for PDs. We thought about the unique problems in Coos and Curry County. We tinkered and looked. We had this up on the wall and each analyst looked at their group of contractors and said, "From my experience, I know that won't work for him," or "This will work for this contractor." We looked at it. All agreed that it looked fair. It was the best we could do. It addressed everybody's needs and we were pretty sure that it was going to work. The next step was to look at contractors who were way under quota, who basically owed us money. We looked at their quotas and said maybe they need to be a little bit conservative so that they can make up the difference. In my view, you set a quota and then you are up down, up down, up down, and if you arbitrarily draw a line when you happen to be down or happen to be up.... I see this in the long view. If you end up short on this contract you just work it off in the next one. It is not a huge issue. Most contractors kind of work those things out in the long run. We also looked at some shifting around. There were some contractors who said their workloads were too high. They wanted to reduce their quotas. Others said, "If I had a bit more caseload I could actually add an attorney. I have just enough now for a third of an attorney which means the rest of us are overworking ourselves. If I could get a bit more caseload, I could add the attorney, solve the workload problem and my problem would be fixed." We did that. That process took a long time. It took all of October. It was October 30 before we were actually ready to test the waters to see if it would fly. We prepared specific terms for each contractor. We gave them a call, conference call, talked to them and told them here was our process. Here was our rationale. If they were a sole provider in a county, we told them, "By all means, if you have better information about where the caseload is going and what is happening, let's talk about that and shift things around, but as far as the rates that were set this is what works, we believe, for everyone statewide." If someone came back and wanted \$10 more on a case, then up went the spreadsheet all over the state again. We had to find that \$10 from somebody else. We were not flexible on rates. We were flexible on caseload to the extent that we believed caseload was there. Well, so that was it. We spent most of November and unfortunately there tend to be a couple of holidays in there and people aren't available, but we stacked up these nearly 100 contracts on the 20 business days that we had left. We scheduled like five a day and the analysts were vying for time with me. So it was a little bit of a mad house. I would like to go through some of the details. So what would

we do differently if we were going to do it again? I think the procedure and the process is sound. I think, you know, it is a tough one but if the Commission wants to move toward a more administrative model, if you want to be fair, if you want to meet all of the needs, if you want to be consistent, it has to come from a central location. The central location, which is the Commission and me and the analysts and Ingrid - our office, we are the only ones in a position to sort of say what is fair. You could get a committee together. You could get a contractor advisory group to decide what is fair, but I don't think the 90 that aren't in that group of 10 are going to be real comfortable with someone else deciding. I guess the shortcoming is that it is extremely administrative. You could have contractors who say, "Well, this isn't negotiation. This is take it or leave it." You'd get that, but I don't know how else you would do it. Otherwise, it is a free-for-all. They like to negotiate. You will never reach agreement unless you have some kind of plan in place. What would I do differently? I think we need greater differentials for eastern Oregon.

740 Chair Ellis Differentials between who and who?

741 K. Aylward From our base rates. So essentially we have our base rates and if we say, "Well, you get 10 percent more than that because you are a PD and you get eight percent more because...." I think it needs to be a significantly higher increase for eastern Oregon.

745 Chair Ellis That is because of the travel time?

746 K. Aylward A lot of it is the travel time. A lot of it is the remoteness. A lot of it is the lack of alternatives. We cannot afford to lose some of those people. If they are on the edge or they have an alternative to make money doing something different, I don't want to lose them. There are free market forces at work here. That is just my guess. They did agree. It works for them, at least for two years, but I think that is something to think about in the future. I think we need greater differentials for contractors who include investigation. We had to take a stab at some of these things. For example, PDs should get more than non-PDs. Okay, how much more? I took a look at their budgets and we looked at the cost in their budget for things like staff investigators, a social worker. We looked at some of the infrastructure things like a personnel officer, a trainer. We tried to get a sense of what additional costs a PD office has simply because it is a PD. We thought it was about 20 percent. They should probably be 20 percent higher than non-PDs. Is that figure accurate? Is there a way to determine accuracy? I have no idea. It made sense. It looked good, so we said, "Sure." Then we have that category of contractor who isn't a PD but includes investigation, so how much of that 20 percent higher for PDs is investigation? It is half? Is it two-thirds? I don't know. We picked a figure somewhere in between. So if you have a case rate of \$100 as the base rate and \$120 is the PD rate, what should you pay somebody who includes investigation? I don't know \$110? You try it and see. Did they accept it? Yes. I suspect that probably that is not enough. If you actually took \$10 per case and added it all up you would get would be \$7,000 and you are paying your investigator \$40,000, so, no. I think we have added enough differentials, but everybody is getting squeezed at the top. When there is not enough for everybody you can't fill that gap. The other thing a lot of contractors said was, "How come I don't get paid more because I am better than that guy?" I said, "Well, you don't; you should." And this is something that I would urge the Commission in the coming two-year period to look at. That is what we want to do. That is the whole point of getting out the giant spreadsheet and leveling the playing field. When you have someone who is paid a whole lot less than somebody else and you go to them and say, "Well, we would like you to improve your quality." They say, "You know we are just barely hanging on here. We are lucky we are still standing. What are you talking about, improve quality?" I buy that argument. That makes sense to me with this round of contracts since we have said we will level the playing field. Not everybody gets the same rates. Of course not, because some have different situations, but everybody gets this kind of base rate. Then in the coming two years if we go back to them and say, "You know, you don't do as good of a job as he does." There is no excuse that they are unable to. At that point - and if we can do this and I don't know how you do it - do you

do it with surveys, site reviews, some combination of them, client interviews? But if there is a way to determine that one entity is providing better service than another, then next time that is the differential. That is pretty much the only differential that you need. Everybody is now sort of set where they should be except for eastern Oregon. If you have got people blocked out on different rates then it is very easy to say, "The only thing we are looking at this time is who are we going to reward." I think you do have to reward quality or you are going to lose it. So next we could do that. What else would be better? More time? I don't know why we think we can do this. Every time we think we can and it is like 11:00 at night on day seven of a seven day week and I am thinking this is impossible. We need to start sooner. Obviously, we are waiting to hear what our budget is, but so much of this figuring out stuff could have happened in advance. Someone could have said, "Your budget is \$1.00. Now do all the figuring to make it \$1.00 and then when you actually figure out it is \$100 million or \$200 million, then you just push a button and the numbers go higher." We should have started that quite a bit sooner. One other thing, which maybe I could discuss with Executive Director Potter, is the possibility of not having the management conference plunked in the middle of October - sorry, traditionally scheduled for October - because it is like the bids come in and you don't have that momentum. You are prepping for the conference and a lot of times at the conference I have people say, after I spoke at the last one I had someone say, "I wish I had heard that before I submitted my bid." You want them to know this. You want them to know what the approach and the goals and all that kind of stuff is. [end of tape]

TAPE 1; SIDE B

- 056 J. Potter because we don't have a lot of folks that are beating the drum or potentially going to beat the drum. So congratulations on that if that assumption is correct. The Commission at the retreat in Coos Bay had a list of priorities! the first one being everybody was to get an across-the-board 3.1 percent increase and then we went down, and I forgot to bring my list with me.
- 062 K. Aylward I have it memorized.
- 064 J. Potter Good. How far down on that list do you think you were able to address the priorities of the Commission?
- 064 K. Aylward Okay. Interesting question. Let's say you have the top ten things you want to accomplish. Does that mean that you do 100 percent of thing number one before you go to thing number two at all? If the Commission says things like "subsidize" or "improve" or "close the gap" that means it is important that you close the gap. Do you close the gap a 100 percent before you do anything else? That was not my understanding of what the Commission was saying. If you are supposed to mitigate, if you are supposed to close the gap where the PD and DA salaries have the greatest differential, does that mean that I do 100 percent of that before I address any of the other Commission's priorities? I don't think so especially given that the legislature was unwilling to go there. What we did was to say ...
- 077 J. Potter Let me speak to that from my personal point of view just for a second. I agree in general theory except if the ratios get out of bounds so much that you have decided that the first two or three priorities in the list were addressed by 30 percent, you made a 30 percent positive achievement of that, but then down at number 10 you achieved it 100 percent, that would be a reordering of the priorities in my mind.
- 083 K. Aylward Excuse me. What do you have as number 10 on your list?
- 086 J. Potter I was using a hypothetical and the Chair just reminded that me that we really only believed that we were going to get through one through five of the priority list. My assertion, just in response to your approach of partial achievement of a priority and then moving to another, was that you didn't have to do them all in order. Were you not saying that you might not achieve 100 percent of what a goal would be before you would look at another one. I was just

saying that that is true, I think, except if you drop down and say, “Well, we only achieved a little bit of one of these, but we achieved 100 percent of goal five and only a little bit of goal three.”

- 098 K. Aylward Two comments. Two years ago, four years ago, the Commission said, “We want you to address rate differentials.” There was a lot of testimony from Washington County about addressing rate differentials and we know that you won’t to be able to do it in one biennium. It might take two. It might take three, but do that. In my view that was almost a standing order. Of course that is what we are doing. Now, the by the time you fix one-third of that and you say to the Commission, “Well, is that so important now?” That is not so important anymore because now it is better. That was an instruction from two years ago to continue. When you went to a contractor two years ago and you offered them nothing and they said, “I can’t do this.” I said, “Please just stay two more years. Please don’t give up now. It can only get better.” If I went to them at the end of that time and said, “You know that there is money this time, but I want to do this, this and this,” I would have lost those people. Some people we can afford to lose because there are alternative providers. There are other people we cannot. I know that people will say, “Well, why did you give eastern Oregon some money for traveling when I still don’t have DA parity. Well, I had to. I had to. The other thing is that if someone puts in their bid, “I need \$100,000 for DA salary parity and \$100,000 to reduce workload.” Well, if I had \$200,000, I would assume that they would completely do both of those things. If I have \$50,000, I don’t know what they are going to do. Each individual contractor is going to have to balance it out. If I have employees, do I give them a \$5,000 a year raise and take away some workload or do I give them a \$10,000 a year raise and say, “Sorry you are stuck with that workload.” I don’t know where that is going to fall. But if I look at something and say, “Look, here is \$100,000,” I am thinking, “I got you to parity.” They are thinking, “You didn’t get me to parity. I need that other \$100,000 for workload. I am losing people because of workload. What about recruitment and retention? You are not following the Commission’s instructions.” It is a very complicated task and we did our best.
- 134 Chair Ellis Were there any new contractors?
- 135 K. Aylward Can I go through my list? Do we have time?
- 136 Chair Ellis Yes.
- 136 K. Aylward I like the yellow list. It is sorted by county. It makes a little more sense to go through what happened in the counties. I didn’t put comments on some of the ones where there is nothing newsworthy. In the Baker County Consortium - we actually have four providers in Baker County but one is from another county who takes Baker County cases, well two of them are. The three providers each submitted bids and we worked up all their bids and at the 11th hour when we contacted one of them he said, “You know, we really think we should be a consortium.” It was great, wonderful. They worked it out. One of the people, Dan Cronin, for various reasons it wasn’t really going to work for him to be part of the consortium but he wanted to keep his juvenile caseload, which he has done and two of his associates then joined the consortium. For us it is great. We now have one less contract but we also have a consortium that has a lot of players in it, especially some good, young ones. I don’t want to name names because the rest will feel bad. But Krischele Hampton - people say she is great and up and coming and we have preserved her now. Number four, David Carlson, was one of those people who we did manage to change from a single case rate to different rates for different case types. Eight and nine – Clatsop - the Commission heard a lot of testimony about workload and low rates. Mary Ann Murk lost an associate, or reduced the time an associate who was working under her contract on criminal cases and she said, “Well I am happy to have the consortium take it.” They were happy to take it and they added a new attorney.
- 159 J. Potter So how many attorneys in Clatsop County how?

- 161 K. Aylward Six. Let's skip down to some more interesting ones. Twenty-three and 24, Grant and Harney, you know they have a single case rate and you try to but you can't get as high as their single rate is. We discussed this with them and they said, "I have to keep my office open. I have got to be here, whether it is one pv coming in the door or 10 Measure 11s, I have got to be here even if nothing comes in the door." For both of those contractors we did keep them at a single case rate because of the smallness of the caseload. It just doesn't work well to have varying rates. We left those and we are happy to leave those and it was appropriate. Brian Aaron, No. 25, Aaron & Associates, again, he had been a single flat rate which we changed to individual rates. Lincoln Defense Consortium, No. 34, again, they were changed to different case rates. Number 40, Harris Matarazzo, he does the Psychiatric Security Review Board hearings and does a good job, but is far too busy and is overworked. We increased his contract. He is going to add about 1.5 FTE attorneys to handle that workload.
- 183 Chair Ellis Where is Jack Morris on this? I see Hood River.
- 183 K. Aylward Actually, he is under Wasco, because he is Wasco/Sherman/Hood River/Gilliam/Wheeler. Actually, before I started going through this yellow sheet because I know what questions are coming next, I should have said, "Look at the white sheet." I have no secrets. The white sheet is sorted by rate increase. Did everybody get a 3.1? Yes that request was accomplished, but let me explain to you what that rate is and what that means. I know it is simplistic but if you have a guy who has gets \$100 a case and you put him up 3.1 percent, say five percent, he is up to 105 percent. You have another guy at \$50 for that same case and you put him up 100 percent. Who has the better deal? Every single person I know will look at this and say, and contractors, too, after some bids went out would call up and say, "You offered him 10 percent. How come I am getting eight percent?" and I would say, "Well, your rates are still higher than his and do you know what that means? That means that he has had a worse deal longer than you have. If we are closing gaps and you only go up a little bit, that means you were closer before. So, congratulations." We went through all this with people. In addition, the way this number was calculated was to take the caseload, and now imagine we don't change the rates at all. Here are your existing rates and you look at the bottom line, \$500,000. Imagine we take that same caseload and these new proposed rates, and the bottom line is \$600,000. Well, that is 20 percent more. We have to look behind that a little at other changes that were made. If we said to a contractor, "Remember that line item you used to have, or that special clause that said after eight hours you can charge for your time on a Measure 11, or whatever you had in there, that is gone." So even though we are saying, "Your Measure 11 went from \$1,200 to \$1,400, there is your increase," for that guy, that is not that much of an increase because we are taking away his ability to bill for things elsewhere. Because that is too hard to calculate and it doesn't really matter because it is one on one. "Does this deal work for you?" "Yes it does." We are done, move on. There is no way to avoid the sibling rivalry. It is out there but at least if you can have answers for it, - what is the word - "short circuit," "reroute," whatever, it halts the discussion because it is wasted effort. If you look at the white one and you go down to the bottom you see Washington County - Ridehalgh & Associates - 39.34 percent and you think they hit the jackpot. But what happened in Washington County was early case resolution, which basically means certain categories of C felonies, misdemeanors and pvs are identified up front and diverted for essentially EDP, Early Disposition Program. What happens then is the cases that are left are the cases that are not the slam dunks and the quick and easy ones. You go to trial. They are harder, so the rates for misdemeanors, C felonies and pvs in Washington County went up considerably. For example, a misdemeanor that had been \$275 went to \$375. Okay, that is \$100 more. Is that profit? Is that an increase? Not if it took a \$100 more worth of work. If it took another \$110 more worth of work I am losing money. Again, we thought, "What is a reasonable increase?"
- 243 Chair Ellis MPD is a big player in Washington County and not listed under Washington County.

- 245 K. Aylward They are listed under Multnomah. It is difficult when they cover both. When a contractor covers both counties they will be up in Multnomah. The yellow pages are alphabetical by county. The white is numerical by rate increase. I had to pick or choose where they fell. When you see those rate increases it is not the whole picture. I don't know whether the cases are \$100 harder. They might be. They might be \$10 harder. Maybe these guys lucked out but we reached agreement.
- 253 Chair Ellis Were there any who applied who did not receive a contract?
- 255 K. Aylward Yes.
- 255 Chair Ellis Do you want to tell us about that?
- 256 K. Aylward I can. Some of them don't know yet that they have not received a contract, so I would really rather not have them hear it on the airwaves. Are you talking about new applicants?
- 260 Chair Ellis That is part of it. Where there are new providers who we haven't dealt with before that did get contracts? Are there old providers we have dealt with before who did not get contracts?
- 263 K. Aylward That is actually – if I can jump back to my yellow list. I am going through and then I have got the ones we didn't agree with, who we got rid of, it is in there. I just wanted, before people started freaking out about percentage number ...
- 266 Chair Ellis The other area I kind of want to hear is in multi-provider areas, how did you address the caseload issue?
- 269 M. Greenfield Mr. Chair, are the amounts under 2007 payments, are those the amounts that were contracted for or the actual payments?
- 271 K. Aylward Contracted for.
- 271 M. Greenfield It could be in some cases there is more or less based on additional cases.
- 273 K. Aylward Absolutely. Okay, I should finish going through because we will hit some of the new contractors and some of my comments in here talk about how caseload was shifted between, for example, Mary Ann Murk and CCDA. I can talk specifically about Multnomah and Washington separately. Okay, MCAD, No. 42 on the yellow sheet, was where I was. We offered them a proposal that would change them from hourly to case rates. They decided that that was something they were interested in doing. It simplifies things for our office. The percentage increase is there. It says, "NA." I have no idea. I am not even sure Mr. Gorham has a clear idea. They just had a sense that this was direction ...
- 286 Chair Ellis His board chair is shaking his head.
- 287 K. Aylward You can't. We may have underestimated the caseload on that contract and as a provision of that contract we have said that at six-month intervals we will look at the actual caseload and increase them as needed. While we are on that county, with the PD's office in Marion County, we did increase their caseload to add the number of attorneys that they wanted to add. I think the Commission heard testimony at the June meeting that the PD's office wanted to get up to eight. They wanted to add two or three attorneys. They wanted to get up to eight FTE at some point.
- 297 Chair Ellis Right now they are at about four, I think.
- 297 K. Aylward Five. There was some jostling. There is a little competition between those two entities, but I think it was successfully brokered. I think both entities will have a successful two years to

come. If things need to shift further, that is the future, but at least for now I think MCAD got what they wanted and the PD's office got what they wanted. I have MPD here, No. 49, listed in the Multnomah section. Their contract covers both Multnomah and Washington. Multnomah's criminal caseload is flat. Washington County's caseload, due to the early case resolution program, is decimated. It is probably 49 percent of the misdemeanors, 38 percent of the – anyway, huge, huge, cuts to those caseloads. As you can see with MPD, the annual increase for them is \$41,000 a year and one might wonder what can you possibly do with \$41,000. Well, the caseload is significantly reduced. If you look at their rate increase - I have got it there as 8.99 - again, we have the same problem we have with MCAD. When you are switching from their crime seriousness level count to case counts, I don't know. I don't have the data and even if I did I wouldn't even attempt it. Jim Hennings, I know, spent many long hours attempting it himself. We can only think that is an approximation, but again that doesn't take into account a lot of special clauses that MPD had that they no longer have. In fact, I don't think it is that high because we have disallowed a bunch of stuff we didn't want them to do anymore. They are currently running, I don't know, maybe half a million under quota on their current contract. Even though this contract is the same amount of money, it is less work for the same amount of money. It is not less work than you are currently doing, it is less work than the quota, but it is kind of what you have actually been doing for the same amount of money as your current contract. I am hoping that through attrition, turnover, that this will work for them and they think it will work for them too. In Washington County they will be handling – what we did in Washington County with the early case resolution, because it started mid-contract cycle and everybody was worried they would suddenly have their C felonies and misdemeanors disappear, they said, "Okay, how about this? We will let everybody participate, everybody who wants to participate." But a better model for an early case resolution program is where you have two big providers that share it, so you have coverage and it is a big commitment. It is a couple of attorneys all day, every day of the week from 8:00 in the morning till 5:00 at night, whatever, and it is a lot of work. MPD offered to do 50 percent of the ECR and Rob Harris, the Washington County Consortium, said he would do 50 percent, but if we needed him to do 100 percent he could do that. It was nice that he was willing to step up to the plate - plan B. That has changed for them and circumstances have changed entirely and the caseload isn't there. In Multnomah County, the next thing on the list is MDI. They have been pushing for a long time to increase their felony quota, a long time. We did increase their felony quota this time.

364 Chair Ellis

Is that beyond felonies for clients who they already do misdemeanor work for?

365 K. Aylward

Yes. Part of the problem with that is just the mechanics. Jim Hennings – MPD - was trying to do the appropriate assignment of felonies and they were saying, "You know, if they are going to get this many cases but we have to find them out of this pile, just put them on the rotation, just give them a morning. It is more work to pick out individual cases of clients. If they are going to get the caseload, let's just make life simple." MPD felt that that would be easier. This was sometime ago, long ago, and not part of negotiations. MDI's argument, interestingly, was the recruitment and retention issue. If you are principally a misdemeanor provider, which they have been, misdemeanor and juvenile, what you have got is a ton of attorneys at, I don't want to say entry level, but with less experience required to do the job. Then you have got the executive director. So if I am an attorney and I am thinking, "Well I could work here for two, three, four years, then where do I go? I have to wait for Paul Petterson to get hit by a bus before I have chance. I am going to go to MPD or I am going to start my own firm." MDI now currently has enough caseload so that they could have one senior attorney who handles the felonies and then at least that crop can look up and say, "Well, it is going to be a long time until a bus gets that person too." What Paul wants to do is to have enough of a felony caseload so that he can have another position that is felony qualified and does felonies, and enough caseload that some of that crop of people, even if they are not going to move into that position, get an opportunity to get trained and get some experience. It is a more desirable prospect to go to work for MDI when you know you are going to learn some felonies, maybe get promoted, and if not get promoted at least you have

learned something. Those are the kinds of arguments I buy. They make sense. Fear not. We took it away from Portland Defense Consortium. We increased MDI by 150 felonies a year and removed about 300 felonies from Portland Defense Consortium's contract. Everybody is happy so it is okay. I don't know if MDI is happy but they were happy to get that extra felony caseload. They also wanted a delinquency caseload and we had to say no because everybody else wanted it. Number 51 and 52, Multnomah Juvenile Consortium, this is interesting. The Commission has encountered this situation before, where you have employees of a contractor who submit their own bid. Now we have been through this and it has been good and it has been bad and the Commission's policy decision was that our office would encourage that soon to be ex-employee to speak to their employer, that it was not our role to announce to somebody, "Guess what, we awarded a contract to one of your subordinates and by the way they are quitting and leaving you holding the bag." We had this situation - Multnomah Juvenile Defense Consortium, Bertoni and Todd, they are Bertoni and something else. Essentially Gary Bertoni's firm had two employees and Ronnie Kliewer's firm, which is also a member of the Multnomah Juvenile Defense Consortium, had one employee. And those two here and this one here wanted to go into practice together and submitted a proposal for a contract. Those three attorneys are very highly regarded. In discussions the feeling was that we were going to lose them. They would not continue forever. But if they had their own firm, had their own contract, we've got them. I think I have to say publicly that Gary Bertoni was amazingly gracious through this process once we had made the decision to award a contract to TRW - Jamie Troy, Judith Rosenberg and Robin Wolfe - Troy, Rosenberg and Wolfe. After that decision was made there was some discussion about why would they have to leave the consortium. It could be a firm in the consortium. I kept thinking "I don't know how that is going to work, but they met and discussed it and it was a possibility that could have worked out, but I think it is better to have a little bit of separation at this point. Gary Bertoni was very cooperative in terms of which cases they would be able to take with them and continue to do. There is a little bit of a conflict issue because if you are an attorney in the firm that represented mom, and these other two people were in the firm that represented dad, you can't all take all your cases with you. We worked with Gary Bertoni to make sure that he wasn't going to be losing two people, and also be left with 300 some cases and no one to cover them. We reached an agreement that is workable for him. I am pleased and we will see how it goes. That is listed at number 55, a new contract, Troy, Rosenberg and Wolfe. Number 59, as Ingrid mentioned, this is the unisex consortium and they are now called the Grande Ronde Defenders. I think it is fabulous. This was their idea, they wanted to do it, and that is the way consortia work when you get two quality groups that agree on how they are going to run an organization. I forgot something that we were going to do. We were going to separate contracts. Let's say you have a death penalty contractor who has a mitigator under their contract. We have a couple of those where a death penalty lawyer has a mitigator. The problem with that, and we discussed this with the death penalty peer panel, is that first of all you don't always want the same mitigator. You would like to use someone different for a different type of case. You don't necessarily need exactly as many hours for the attorney as the mitigator. Those were resources we wanted to be able to share. We had also run into a technical problem where if the mitigator's hourly rate is lower and the attorney's hourly rate is higher and the mitigator worked extra hours and the attorney didn't, then for us it is a wash and we have to say, "Sorry. We don't owe you any money." But then there is the mitigator saying, "What about my extra 200 hours?" We wanted to do that. We did that with Rieke. Rieke had a co-counsel component. Chris Clayhold was co-counsel. We separated them. Chris Clayhold now has his own death penalty contract and Mr. Rieke's contract was reduced to reflect that. We have a new contract with Gordon Mallon. He had been doing a lot of death penalty work on a hourly basis and had reached the point at which it really was appropriate to do it under contract. Likewise, Jenny Cooke in Multnomah had been doing a lot of death penalty representation. She is even doing death penalty post conviction relief where we have so much trouble finding people. We propose awarding a contract to her. Number 77, Ken Hadley, kind of links up with 91, Lisa Harmening. She was his mitigation specialist and we have now separated those contracts. Some we haven't done yet and some don't appear on this list. One of them is Kathleen Correll, a death penalty contractor who also

has a mitigator, Ellen Rogers, under her contract. We want to do the same thing. We have had preliminary discussions with them but they are both on vacation this month. What we don't want to do is make something worse. We don't want a worse situation for one or our precious mitigators because they are precious. We only have a handful and we need many more and they are not paid enough. If splitting them hurts her financially in any way it is not going to work. The Commission, in the future, can talk about mitigation. Where do you draw the line between what is mitigation and what is investigation? Are we going to pay more for mitigation because it is specialized? Some investigators would say they are doing investigation. It is a big issue but I think we need to be able to pay more for mitigators. Yamhill County Defenders, YCD, bills hourly using the MCAD system. Yamhill County Defenders' hourly rate was lower than MCAD's. Since MCAD decided that case rates were better for them than sticking with their hourly rate, I was really surprised that Yamhill County Defenders decided to stay with the hourly rate. What I am proposing, and what we have offered them and they have agreed to is that we'll just do a six-month extension - so a six-month extension at the hourly rate they are getting now and they'll keep track of what it would be if they were case counting. Case counting is a little trickier because you have to know what counts and what doesn't, so on all of the cases that are assigned they are saying, "Under Kathryn's proposal this would have been three hundred dollars," and then they are going to keep track of their hours and see if they would end up better. I didn't put extensions on here. Traditionally we have used extensions to buy time for negotiations and we haven't asked the Commission to approve those extensions. We have only asked them to approve actual contracts. The other one you don't see on here is Blue Mountain Defenders, Umatilla/Morrow. What we had proposed to Mr. Childress was a three-month extension for the purpose of allowing the Commission to deliberate. I wasn't going to enter into a contract an hour before the Commission was to make a decision, so we decided to let the service delivery process finish. We can do a three-month extension, whatever we end up doing, and if we do reach agreement, we would backdate it to January 1. After the discussion earlier this morning perhaps a six-month extension would be more appropriate to give our office and the Commission more time. We then have the question, well maybe I can just think about it myself. In the office when we are preparing an extension is it a three-month extension at the same rates or is it 3.1 percent more? Or is it the eastern Oregon base rate? What do you do? If it is a three-month extension in order to negotiate then when you reach agreement you just backdate it to January 1 and no one cares. But if it is a three-month extension or a six-month extension and then there is no subsequent contract awarded, then how should you handle it? I can think about that unless the Commission would like to give me guidance.

- 556 Chair Ellis I would think the 3.1 at least ought to be embedded in the extension.
- 567 K. Aylward Good. Thank you. Marc Friedman has a personal service contract for administering the Lane County panel. Again, because it is not a legal services contract but a different form of contract, rather than draw up a the new contract we just extended it. I haven't put it on this list for approval. He requested some increases and those increases were reasonable and were provided and he has agreed and signed. I think I am done. Do you have questions or what did I forget to talk about?
- 572 S. McCrea Could you talk about No. 62?
- 575 K. Aylward On the yellow or the white?
- 576 S. McCrea On the yellow.
- 576 K. Aylward Yes. Brindle, McCaslin & Lee have a caseload in both Multnomah and Washington. What is different about their situation in Multnomah is that they handle a sort of specialty support docket. This 25 percent increase is again.... Here is what we used to do. We said, "Here is how much you get for a support case." And people would say, "But we have to keep going back again, and again, and again, and it involves so many appearances." We would say,

“Okay, fine. If you go back one time per case we will give you \$100 or something that was different.” What we have done is determine that that is a condition or a term that is an exception to the general terms. We don’t want to do that, so we said, “Look. Instead of giving you a small amount and a little bit more, this is the rate and you are not going to get to count those times you go back again, and again, and again.” Part of that value increase is the support docket and changing how we pay for those cases. Another big part of it is the Washington County representation. As I said before about C felonies, misdemeanors and PVs, the dollar value for a case went up, but so did the work on the case because they are not getting any of the easy ones. Again, I can’t really say exactly how much of an increase it is for them, but they are getting the same rates as everybody else who doesn’t provide something different or qualify for a differential. [To Shelley Dillon:] Did no one else bid to take the support docket?

610 S. Dillon

I think another factor is juvenile.

611 K. Aylward

That was another thing and I just decided this on my own, except I asked Ingrid, and I asked Robin La Monte, and they both thought it was a good idea. In distributing the funds there are a lot of places you can put it. If the Commission says, “Give so and so a 3.1 percent increase.” Okay and I said this at the management conference too. We are not going to take every single case and put it up 3.1 and have funny little numbers. What we are going to do is the same process. Here is your caseload at old numbers. What is the bottom at new numbers? What is the bottom line and isn’t it 3.1 higher? Yes. Then we are there. Where shall we put those bits of dollars? We decided it would be appropriate to put them into the juvenile. To load them a little more heavily into the juvenile dependency case types. This is good for three reasons. One of them is the nature of the case has changed significantly. Whatever you were paid for a misdemeanor three or four or six years ago, misdemeanor practice hasn’t probably changed all that much but dependency practice over the last six years has changed tremendously. The family decision meetings, the family team meetings, the family safety meetings, whatever you want to call it it is additional work. It is additional expectations, the Interstate Compact, all that stuff you have to know. With the money that we had instead of saying \$10 on each case type, we said “Let’s put \$20 on this case type, this juvenile dependency case type and a bunch more on this one. Not only does it reflect the fact that those case types have become more difficult, it also sends a very important signal. These are case types that this office values. These are not just the low end cases. These cases are important.” The third thing it does is make contractors pay attention to not losing that component of their contract. We thought “Great. If it works to put the money somewhere let’s put it there.” If we have a contractor who only does juvenile then they will have seen bigger increases than someone who only does misdemeanors. For example, another one that somebody might ask about is No. 66, on the yellow page, an overall 20 percent drop in their contract. That is a huge hit. A contract at \$636,000 a year dropping to \$504,000, that is huge, in my view. The problem with their contract is they only do criminal. They don’t have a juvenile component so there is no offsetting factor that would have been provided to a contractor who lost a bunch of caseload because of ECR. He is not participating in ECR because it is just MPD and the consortium. Okay, he is getting \$100 more on his misdemeanors because they are really hard now, but that is nothing, so at least you would want to have your juvenile rates going up more significantly. This contract, and it shows the value of diversification, pretty much only took misdemeanors, PVs and C felonies and misdemeanors, C felonies and PVs are gone. We did as much as we could to minimize the damage or to reflect the fact that now what you are getting is harder, but gone is gone. You said you had a question about 62 and I don’t know if I let you ask it.

690 S. McCrea

Yes. You answered it. You went way beyond. It was good.

693 Chair Ellis

I believe there are some contractors that want to comment before we review these and before we do that let’s take about a five minute recess.

[recess]

- 704 Chair Ellis Tom, I do understand that you wanted to speak to us. I don't know if there are others but I know about you. We have been given two letters, one dated in December from Tom and one dated December 11, from Don Thompson who is on the Board of Directors of Crabtree and Rahmsdorff Defense Services, Inc. Why don't you go ahead. You might want to summarize for the slow readers here.
- 716 T. Crabtree Well, I apologize that my homework wasn't in on time, Mr. Chairman. I was counting on fog in the pass but not the pea soup that I ran into on the way over. Let me start by saying that I don't want my comments taken in any way as being critical of Kathryn or her office. I think they did a remarkable job with the amount of time that they have for this task, an impossibly short amount of time, to prepare all the contracts statewide in the period of a month and then negotiate with everyone to try to reach an agreement in 20 days, as she said. That is an impossible job. Before the Commission took over, contracts used to be spread out over a two-year period.
- 734 Chair Ellis I have a distinct memory that contracts didn't get signed for months, sometimes years after the contract period.
- 740 T. Crabtree Yes. I think that is true for at least one office. Others of us signed eventually. I think a lot of the difficulty that exists now is just because of the short period of time. I know Kathryn spent an excruciating amount of extra hours preparing this spreadsheet of the whole state that she talked about and then tried to make some sense of that. In the comments she made earlier she talked about their office being the only one in a position to decide what is fair in the state and doing the best that they could. I believe that they sincerely believe that it is the best they can do.
- 764 Chair Ellis Let me try to get a handle on the time compression issue that you're talking about. Obviously, until the legislature adjourns you don't know what your resources are.
- 765 T. Crabtree Right.
- 765 Chair Ellis Then I think this year we very much wanted that Commission retreat in August to try and sort our own priorities out.
- 773 T. Crabtree Right.
- 773 Chair Ellis You gave a much shorter time period than I had thought.
- 776 T. Crabtree Here is what I view the timeline as being and please correct me if I am mistaken. After the Commission sets its priorities, Kathryn sent out the RFPs. Our proposals were due back at PDSC October 1. They had from October 1 to October 31, essentially, to prepare the work, prepare the spreadsheet and come up with the rates that they thought were appropriate for everybody in the state and then from November 1 through November 30, essentially, to reach agreement with all the contractors in the state. I think that is the time period we are dealing with. In the past, what had been done instead of everybody being due on December 31 you would have a third of the people due December 31. You would have another due the next June 30 and then the last third due December 31 the following year. The fourth six-month period is when the legislature is in session and you don't want to be negotiating contracts then. We were only dealing with a third of the state at one time rather than the whole state.
- 808 Chair Ellis I have a memory that we heard there were a lot of problems doing it on a staggered basis because within any market area you would have only a portion of the market being addressed at the contract period, and so the ability to really do a comparative was impaired. The ability to do case allocation with all providers in the area was a problem.

821 T. Crabtree Right. There were problems.

823 Chair Ellis I remember when we went to what we are doing now it was deliberate.

823 T. Crabtree I understand that and it is for the Commission to decide which works best. I am just saying that I think Kathryn and her office and - over the last decade I have had the opportunity to work with both Billy Strehlow and Shelley Dillon and have nothing but good feelings for the relationship that we have been able to build up over that period of time. I think their office needs to be complimented for what they have done in that short period of time. I am not here to advocate for any particular model. I think if we went back to something like we did before I have full confidence in Kathryn that she would iron out the kinks and get it functioning on time and a lot better than it was before.

843 Chair Ellis One statement that I read in your letter that I thought was interesting was where you say you had asked the Commission to consider altering the contracting process in the future so that before the first contract is ever negotiated the head of the Contract and Business Services Division would present her plan to the Commission, or a select group of the Commission, to see whether the service plan carries out the priorities of the Commission.

852 T. Crabtree Right. That gets into more of the substance of what I wanted to talk about.

857 Chair Ellis Go ahead. That is where I want you to go.

858 T. Crabtree In my letter I reminded the Commission of what the priorities were that the Commission voted on and the order that they were voted on at that time. How the process works now is that Kathryn is present as the head of CBS there and then she goes and develops the spreadsheet for everybody in the state. [end of tape]

TAPE 2; SIDE 1

001 T. Crabtree ... other seven full-time defender offices get greater rate increases. Almost half of the state gets greater increases and in terms of the recruitment and retention issues there probably wasn't another contractor in the state that had the problems that we did. Since the last contract ten attorneys left primarily for money reasons, some for workload reasons that are related to other people leaving and having to assume larger caseloads for periods of time. In some periods we got zero experienced attorneys applying for positions. If the Commission is aware of certain problems and aware of priorities they have you might have some input on this.

013 Chair Ellis Tom, let me make sure I have got my bearings on where we are. Have you agreed to the contract? There is a process by which a contractor who feels aggrieved can request the Commission to review the particular contract. It is sort of like discretionary appellate review. We have to agree that we want to. Or are you talking to us about the process going forward as opposed to asking us to look at your particular contract?

023 T. Crabtree I wasn't aware that the Commission had the ability to do that, so I came asking to develop this for the future.

026 Chair Ellis That is what I had understood.

026 T. Crabtree Right. I wasn't aware of the other. If, once the big plan is put into place and CBS says, "Okay, these are the priorities we had. First of all, we wanted to get everybody on an even playing field and mitigate the rates around the state." If the Commission felt "Well, wait a minute. That wasn't one of our top priorities. These were our priorities; these are the areas we think you should look at to fine tune what is done." Then I think we would have a better

process. What we are left with as contractors now is, once they decide within their office that these are fair rates, we are told they are not changing those rates. “We aren’t flexible on rates. We will give you more work.” She was very flexible on taking on more work in various types, mixes, whatever, to get more money, but that is taking on more work and the No. 6 priority that we had all talked about was reducing caseloads. In my belief, and I could be totally all wet about this, some priorities that were at the top of the list, such as the one the Commission selected as No. 9, mitigating rate disparities within the same markets, took priority over other considerations. In my county we have one consortium that got a 17 percent increase. They were lower. I will concede that. This is a group that has never had any problems recruiting and retaining. They have the opposite problem. They have a couple of people that they need to get rid of that they can’t. We have another contractor who gets approximately the same rate as I do. Again it is a three-person office, no problems recruiting or retaining and other problems related with that. There didn’t appear to be much attention paid, or in my opinion, enough attention paid to what the Commission clearly had identified at the retreat as the primary things to look at. Rate disparity between PD and DA salaries - there isn’t one that is greater in the state. Cost of living increase - we are the most expensive area in the state. Retention, recruitment problems - we are the poster child for that. We were left with no alternative, no way to have that reviewed by anybody. As Kathryn said, her office is in the best position to decide what is fair, so we are assigned a rate that is in the middle of the pack of the state. There are five other full-time PD offices that got greater increases than we did and there is no processes to have anybody review what is fair. What are the priorities and what should be going into this mix? That was the point that I wanted to make and if there is a way that the Commission can do that prior to any contracts being made, that is what needs to happen because once they decide the rates if I went to Kathryn and said, as I did, “Hey, your rate in this area is too low for these reasons” her response was “I can’t raise it for you because then I would have to raise it for the whole.” That puts us in a position where essentially there is no flexibility there. The only flexibility is more money for more work.

- 083 Chair Ellis Questions for Tom? Thank you and we appreciate the two letters. I did not understand this to be an appeal.
- 086 T. Crabtree Well, as I said, I didn’t know that there was an appeal. I certainly would not be offended if the Commission decided to look at the rates and determine that we should, in fact, get a higher rate increase because of the unique circumstances of our office.
- 091 Chair Ellis I think the sentence I read did present a possible improvement in the process that I think we should consider. Thank you.
- 093 K. Aylward Can I say something?
- 093 Chair Ellis You may.
- 093 K. Aylward I agree with Tom. I would love to have given you the whole spiel, the whole giant spreadsheet and John Potter would have found an item with one funny number. I would have loved the time to do that and absolutely part of my recommendation for next time is we need more time to do this. I think it would be great because then my job is easy. I pick up the phone and say, “Here is your contract. Commission already said that is what you are doing” and I don’t have to argue with anybody.
- 100 Chair Ellis I did think meeting in August was pretty quick after the legislative session. August is not a great time to hold meetings and I was delighted with the degree of participation we got both from Commissioners and contractors. How do you see we could tinker with the timing?
- 101 K. Aylward As I was saying we could do this prep work and just use one dollar as the figure in our budget and then make some of the decisions that were made at the retreat in terms of what is most

important. You could even say DA/PP salary is important. We want a 100 percent, but if you can't get there 30 percent is pretty good – that could have been planned out with more specificity without even knowing what the budget is. Then we get our budget and here are my marching orders, here is my sack of cash, make the giant spreadsheet and then go to you in August and say “Okay, here is how it looks for everybody and here is why I couldn't do this, and I was hitting my head on this ceiling and you look at it.” I would love seven more brains looking at this and saying, “Yeah, you know, you are right. There is nothing else that you can do.” That would be great.

- 112 Chair Ellis This probably isn't the day to try to schedule the next time we do this, but sometime within the next year let's try to plan ahead. I know at least one other large contractor had stress over the timing and if we can avoid that that would be good. Thanks. Anything else? I think we are at a point that you are hopeful that we will move to approve the contracts listed on both the white and yellow sheets.
- 126 K. Aylward Yes please.
- 126 C. Lazenby I spoke with counsel during the break. As you know my wife is an investigator at Multnomah Defenders. My reading of ORS 244 is that I have an actual conflict of interest in approving that contract or acting on that contract. I would ask that any motion to approve these contracts segregate out the MDI contract for a separate vote of the Commission so that I will not participate in that decision.
- 132 Chair Ellis That is fine. I would first entertain a.... Are you able to represent to us that each of the contractors that has been listed has agreed to the contracts that we are looking at?
- 136 K. Aylward I have signed agreements from each of the entities with the exception of MPD unless it is in Jim's briefcase. I would suggest that the Commission could approve this as Jim and I think it will end up being there. Then we are covered. So you can approve it as is and if it needs to be different then I will come back and ask again. I think we are there.
- 143 Chair Ellis Is there a motion to approve all the contracts other than MDI.
MOTION: John Potter moved to approve the contracts; Shaun McCrea seconded the motion
Is there discussion?
- 146 Hon. Elizabeth Welch Well, I am afraid there is. I am very uncomfortable with what I am about to say. As I told Ingrid, I am absolutely blown away at the quality of the presentation here this morning by Kathryn. She is an amazing person and she has obviously done, with her colleagues, a great job. It seems to me Mr. Crabtree's issue is not just for the future. One of my questions as a new member of this Commission is, what role does the Commission actually play in contracting? I understand there were priorities set at the meeting when I was not yet on the Commission, so I didn't participate there and a lot of hard work was done in coming up with priorities. Mr. Crabtree's point about the Commission's priorities not being followed, I think is a legitimate issue that needs to be talked about. If we say that they did a good job, they did what we asked them to do in these time frames. I am not being critical when I say this. I am not comfortable saying that it is too late to do anything about it, and maybe it is too late and maybe I need to be told that, but I am not willing to sit here and approve these contracts after hearing what I consider to be a very reasonable objection without regard to the merits of it because I don't know, because it is such a mish-mash of formula and other considerations. I don't know if other people agree with me or not but that is my view. Otherwise, I don't feel like I am doing my job, whatever it is.
- 170 Chair Ellis Is that a motion to have the Commission review specifically the Crabtree contract?
- 172 Hon. Elizabeth

- Welch Well I don't know.
- 172 Chair Ellis Because there is a procedure for that. It does take three Commissioners to agree to do want to do that.
- 175 Hon. Elizabeth Welch I guess I want to know what more experienced Commissioners feel about what Mr. Crabtree had to say, not so much in terms at this point of his immediate interest, but of the integrity of the process.
- 180 C. Lazenby I think that what Tom had to say deserves a lot more consideration from the Commission with our staff and we need to walk around it. First of all, we are a volunteer board. Every so often we have others things to do in what people call "the real world" that take up a lot more of our time. There is the other side of Tom's proposal, just to play a little bit of a devil's advocate here. Kathryn has to go through all the 91 business units that we have, come up with a projected or proposed contract amount, and then propose that to us. I am willing to bet that we will have at least half of our 91 business units coming in here sharp shooting at her spreadsheet for money at one point or another. Then we become the arbiters of that dispute not having the hands on, day to day, experience of dealing with the entire system. I think that can ultimately be very, very time consuming and lead to further inequities that are laid at the Commission's door if we do it. The other piece that happens under that changed arrangement is sort of an acceleration of the process that Mr. Crabtree is complaining about now, which is Kathryn goes and does that work and presents us with that spreadsheet and there is a lot of discussion about it, but we basically end up blessing it and then there is very little room for negotiation on behalf of the contractors at that point. We have basically concluded the negotiations and they are left with, I won't call it a contract of adhesion, but somebody might. That is what I mean. I am saying that off the top of my head in listening to him and listening to the way the process has gone, and I think that the timing pieces are very valid. I think we need to take a much more in depth view and walk around the process and see if there is a way that we can get better data, earlier, longer time periods for people to engage in those kinds of negotiations. Because of those kinds of uncertainties, and I agree with what you are saying, Judge, I think that Tom raises some good points as well, but we need to sort of think carefully about what that means for us logistically as well as what it means in terms of fairness for the contractors. Hindsight is always 20/20 and I wasn't at the Coos Bay meeting in August. I think the Commission may have made a mistake in prioritizing, ranking these aspects, because I can look at the 14 priorities of the Commission and see that some of them are more important in some areas of the state than in other areas of the state. A different governing model might have the executive director and her staff doing the best they can, implement that and report back on an annual or continuous basis on how they are doing with those things and then allow the Commission to re-juggle those priorities on a statewide basis and say, "Okay, focus more on this next time. Focus more on that next time," rather than have an exercise where we saying, "Gee, if you had given more priority to the top priorities of the Commission, we would have gotten more money or it would have turned out differently," or something of that nature. We put ourselves in an impossible position of sorting out those local intricates is we go down that road. Without saying that I am opposed to what Tom Crabtree is saying, I think that all this says we need to step back and think about it for next time as opposed to trying to go in now because once we go start going in, I don't see how we stop reexamining maybe half of the 91 contracts that are out there right now. That is just a practical consideration.
- 229 Chair Ellis I may be saying somewhat the same thing.
- 230 C. Lazenby But better and more concise.
- 230 Chair Ellis I think the question is to define what are both our statutory obligations and what is realistic for a Commission role as opposed to full time executive staff role. I don't think it is a good idea

for the Commission itself to micromanage each contract. I don't think we are able to do it. I think it is going to be a very divisive process, but I do think it is a good idea, and I think we gave it a really good effort this year, for the Commission to set policy objectives, set priorities within that, and to give direction. I thought we did a reasonable job of that at the August session. The piece that I guess I share some level of discomfort with, but not enough to cause me to not want to go ahead, the piece that I think is not in place is between the time we set what we think are priorities and before OPDS goes back to the contractors with proposals, is for Kathryn to review with us her plan to make sure we have correctly communicated with Kathryn on the policy level what our priorities are. I don't really fault Kathryn this year for not having that step in there because she worked extremely hard and her group worked extremely hard from August on to try to faithfully carry out as best they could what they understood we wanted. There is always some flex in there as she indicated in her opening comments. I also am sensitive that there were some contractors, and maybe a lot more than I have heard from directly, who felt that the time compression was so great there wasn't a lot of ability to work through issues. Maybe we should consider a schedule that would add another quarter before we renew contracts so that instead of feeling under the pressure we are under now for a December 31 completion, make it a March 31 completion. I know that is a little late but there is probably a way we could do that. So what I would suggest we do is I am personally prepared to vote yes on the agreements that are subject to the motion because I understand that the contractors, maybe they are not entirely happy, but they have accepted them and I think staff has made a good faith effort and I think it is a very reasonable thing to proceed for this contract period. But I think we ought to think through the process because I think we all feel a little bit like we get very little before we come in, very little time to get a sense as to how the process really works, but I think given where we are and where we have been, I think everybody has worked extremely hard to get to this point and I think it is a reasonable step to say, "Yes, but let's improve the process as we go forward."

287 J. Potter

I made the motion and I am a little uncomfortable as well, not as uncomfortable as the judge on this. I would have said to Tom that he has signed a contract, he agreed to it. After the meeting I would have said to him "What you may want to do is talk to Kathryn about snagging some of this money for the student loan repayment program and I would think you could make a very good case for getting some of that money." It is a foggy line. We talked about it earlier when we were talking about management and the role of the Commission in setting up management of contracts. It is a little bit of a foggy line on the role of the Commission in being involved in the quasi negotiating aspects of the contract. I am not very comfortable with the timelines either. This is very quick. The Chair's idea may fly in the face of what is normally done fiscally with fiscal year contracts or biennium contracts, but it may be an approach that we should consider. I will vote for the motion.

302 Chair Ellis

Any other discussion?

305 S. McCrea

I guess the question that hasn't been asked, and this is not to malign Kathryn or her group at all because I think she sort of likened herself to Sisyphous rolling the rock up the hill and I said, "No" because Sisyphous knew what was going to happen. I think this is more like Hercules having to clean out the stables as one of his labors. I guess the question that comes to my mind is what was the rationale for the increase that Crabtree and Rahmsdorff got and I guess that part of that, as compared to somebody like Mallon and Lamborn is that, okay, there is all this stuff in Bend but Burns is a totally different – I don't even think they have an espresso place out in Burns the last time I was there. I agree with everything that the other Commissioners have said, but I have this sort of concern because of all that we did here at the retreat. If you could just give me the benefit of your thinking?

321 K. Aylward

I think I am missing the connection between Burns and Bend.

322 S. McCrea

Well, Mallon and Lamborn, No. 24 got a percentage increase of 8.3 percent, but it was a rate increase of 29.34 and these guys got a 17.15 percent but a rate increase of 11.14 percent.

How did you decide where they were going to be in the pack, Kathryn? That is what I am asking.

328 K. Aylward

We didn't. That is why I said these numbers are pretty much meaningless. What we looked at - for example, in Crabtree's proposal the request in response to No. 1 was a dollar figure that represented full parity with the DAs. "Cannot enter into another contract without full parity with the DAs plus a bunch of other stuff, but full parity." I began to wonder why does Crabtree's office have a recruitment and retention problem. Well, their salaries are too low. Then I looked at Jacques Dekalb's proposal and his salaries were low too but he doesn't seem to have had a recruitment and retention problem. The attorneys that leave the Crabtree firm actually go to Dekalb and I am thinking "But the salaries are the same." So money is not entirely the issue. Then I spoke with both Tom Crabtree and Jacques Dekalb about this and the notion that a private firm can supplement their employees' salaries with retained work. Those employees are at 99.9 percent, which basically means 100 percent time but if a buck ever comes in the door and I can hand it to them I am okay with my contract. That is all that they do. Well maybe somebody was promised a partnership track. Maybe somebody likes the office environment a little better. Maybe somebody wants to work side by side with their spouse. There are lots of reasons, but they are never entirely money. It is not all about money. I questioned first of all whether the recruitment and retention problems that the Commission heard about from Crabtree and Rahmsdorff can be entirely solved with money. I am sure money will help a great deal. The other issue is a request for them to go to full parity. I believe this is sufficient funding for them to go two-thirds of the way toward parity and really we only have enough money in aggregate to get one-sixth of the way there. So if Tom is getting two-thirds then somebody else is getting nothing to address that issue. That is what the rationale is. I don't know if it is 17 percent or 4 percent. The question is "Is this a viable proposal? Is this the most I can defend to the other 90 guys?" Why does Tom Crabtree get two-thirds of the way toward DA/PD parity? He needs it. He has a recruitment and retention issue. It wasn't a question of how much we give this guy and how much we give another guy. It really was a different approach and these numbers are just a way to give some indication. Unless we go through the whole approach again with everyone, it is hard to get you there. Burns is easy. If you actually believe that someone will stop doing something and close their office, it makes you a little more agreeable to the rates that are there, whereas, in Deschutes we have three other providers who are paid less and eager to have more caseload. So we are supporting the PD but the fewer cases I give them and give to somebody else, who is cheaper, the more money I have to make everybody's rates go up. I have that balance too.

384 S. McCrea

I appreciate that. That is what I wanted is the benefit of your thinking, thank you.

385 Chair Ellis

Any other questions or comments?

387 C. Lazenby

I think that dialogue highlights what I was saying earlier. We can do that 91 times. We can do that 91 times every year around each and every one of these things. Actually, if you think about it we will do it 182 times at least because we will look at each one of them two ways. It is just an example for the Commission to think about. What role do we play and how detailed do we need to be given our statutory responsibility?

396 Chair Ellis

There is a motion and a second. All those in favor of the motion raise your right hand. The minutes should reflect the motion passed **VOTE 5-1** with Judge Welch opposing. Thank you and I do want to say that I think everybody who has spoken has acknowledged really the incredibly hard work, and good work, that you and your analysts have done. It is not an easy task. We can improve the process as we go forward but in my observation - I have been observing this on one side of the process for 25 or 30 years and on this side of the process for eight or nine years - I think this was magnitudes better than we have been before. That doesn't mean that we don't have a ways to go but I really think even with the comments that have been made, this was a remarkable achievement to get to where we are, so thank you.

- 416 M. Greenfield Mr. Chair, I move approval of the No. 56, Chris Lillegard –
- 417 Chair Ellis No, MDI.
- 418 M. Greenfield Alright, MDI.
- 420 Chair Ellis Let the record show that Mr. Lazenby has recused himself. Is there a second to this motion. Shaun McCrea seconded the motion. Is there discussion on this motion? All those in favor of this motion raise your right hand. **VOTE 5-0.** No opposition. I think that does Item 3. Ingrid, do you want to talk about your wonderful written submissions. One to the legislature and one to us, which I really did enjoy reading.

Agenda Item No. 4 Review of the Executive Director’s Biennial Report to the Legislature and Annual Report

- 431 I. Swenson Thank you, Mr. Chair. I can do a brief discussion if the Commissioners have had a chance to look at them. Basically they serve two different purposes. One is a mandatory report to the legislature on a biennial basis, so that covers July of 2005 through June 30 of 2007. The annual report, which is also statutorily required, covers this calendar year. The biennial report looks a little different because I am assuming that many of the legislators who look at it will not necessarily be familiar with the role and function of public defense, so it starts out with that kind of discussion - what the mission of the agency is, etc. It describes the right to counsel and those kinds of things, but then, like the annual report, talks about the organization, the components of the organization, the things we are charged with doing and how we get there. In the biennial report we talk about the strategic plan which the Commission approved in August for the current biennium and where that will take us if we can complete all of those goals, and then discusses the quality and cost of contract services and our appellate function, and some general funding issues. The Annual Report is, of course, a discussion of what this body and the Office of Public Defense Services have done in the last year. It struck me as I was preparing the report that we have undergone some significant changes this year. I mentioned some of those and talked about the challenges we faced. The budget is always No. 1 for us and I spent a lot of time talking about what happened there. As I mentioned to the Chair earlier, that was an effort to memorialize the process because there is really no place where it is memorialized except that you could listen to all the tapes if you chose to of the hearings. I realized as I was preparing this report what tremendous achievements our two divisions have had over the last year and certainly beyond that period. I talked about the Contract and Business Services Division, and of course the execution of all these contracts is fresh in your minds and you know the labor that is involved in that. In addition, lots of other things have been going on. I suppose the only one I would highlight at this point is the integration of the two divisions and Kathryn’s staff or former staff who have been engaged in that and are now performing functions that really cross over between the two divisions. I think that has all worked well. Our contractors and others provided good reports about the quality of service that they are receiving from our staff at CBS - courteous, prompt and efficient. With regard to the Legal Services Division we talked about the backlog and ways that that has been addressed legislatively as well as administratively, and we are certainly hopeful that we will eliminate that backlog in a timely way. Major reorganization has been occurring there. Becky Duncan can talk a little bit about that later if we have time for a staff update today. Then the report just sets forth some of the other achievements of the agency - the Commission’s structural reviews and the quality improvement initiatives. Paul Levy continues to conduct regular site reviews. We are approaching a significant percentage of contractors who will have been directly reviewed under one of those processes by the end of the current year. We also undertook a statewide quality survey for the first time this year. We told the legislature we would be doing that as another way of measuring not only the quality of representation but potential changes that we observe in the quality of representation as a result of funding and related decisions. Finally, we talked a little bit about the collaboration and consultation that goes on on a regular basis. We rely on our providers to

give us good advice and counsel about directions that we take. They have been generous with their time and it has been very helpful. We also do a lot of internal collaboration and discussion. Our management team meets regularly. We look at all issues as a group and hear from each other. We recently completed our annual - we think they will be annual - management team member evaluations. We were experimenting with a new process. I think it worked really well. It had basically three components. One was a staff survey and, for its own purposes, that was extremely valuable - to talk about employee job satisfaction as well as their reflection on performance of the members of the management team. That was very useful. The second component of the evaluation was a peer support meeting. Each of our management team members identified their goals for 2008 and during the peer meetings the team would talk about how they could support each member in the accomplishment of their individual goals over the next year. Then there was a self-evaluation component, which included the goals for the next year and also talked about things that went well this year, things that didn't go well and what could be done about it. At this point we haven't had a chance to get together and talk about how it all worked but those are all complete. I think that is my summary.

536 Chair Ellis

Any other questions or comments?

536 J. Potter

Ingrid, as you know, Jim Arneson has made a couple of presentations at management conferences about client evaluations and he does them in his office and meets with considerable resistance when he mentions this to other people. I don't know if anybody else in the state is doing, on a regular basis, client evaluations, but does Jim provide the client evaluation information, that overall client information, to you? Do we get any information from clients from Jim's office or anybody else's office for that matter.

542 I. Swenson

He has not - we have not asked for them. We have a list of best practices which we have developed through the course of our site visits and one of the best practices is certainly some kind of regular feedback from clients. There are some contractors who are either implementing such a policy or have started that process. During the site visit in Lincoln County, for example, we learned that one of our contractors there does it for every single client. We tried, in the site visit process, to do it directly. That has been unsuccessful. We can identify, say 70 clients. We take the information from the Oregon Judicial Information Network about the case and to whom it was assigned and try to get a representative sample for the contractors in the area. It is very difficult to contact those folks with the contact information that we have. I think we are going to have to have contractors do it using their own databases and allowing us to make some kind of random selection among those folks. We are probably not going to be successful attempting it as an outside agency. It is something we need to continue working on. I know it is extremely valuable information. It may not be scientific, but it is important.

571 J. Potter

Thank you.

Agenda Item No. 5

PDSC Key Performance Measure Progress Report

571 Chair Ellis

Given some time constraints, would it be problem to skip Item No. 5 for today? The Key Performance Measure?

575 K. Aylward

You could do Item No. 5 in two words. Just say "Thank you. Thank you for the submission." You have seen it before. It doesn't need discussing. We are going to throw them all out anyway and make new ones, so this is just providing it to you as we are required to do.

580 Chair Ellis

Thank you.

Agenda Item No. 6

Approval of PDSC Public Record Procedure

- 580 Chair Ellis Let's go to the Action Item No. 6 - Paul.
- 582 P. Levy Mr. Chair, there are a number of laws, new laws or changes to laws, that affect our agency. Some make requirements of us that are effective January 1. One of those is a change to the public records law which really made new two changes. One was to require agencies to promptly acknowledge requests and prescribe the form in which that acknowledgement would take place. We already did that but we now have a format for doing it that also ensures that we do it promptly. What we are asking the Commission to review relates to the second change in public records law which requires agencies to make available to the public a written procedure for making a public record request; to provide the name of the person those requests should be sent to, and the amount and manner of calculating fees. We are asking the Commission to approve this policy. We will then add this to the policies and procedures on the web site. The name of Lorrie Railey will be prominently ...
- 605 Chair Ellis No other volunteers?
- 606 P. Levy We would really rather not have to name a particular person because every time that changes we don't want to change the policy, but the law seems to ask for the name of a person. This is modeled on what DAS has now and a draft of what the Judicial Department is working on.
- 613 Chair Ellis Any other questions or comments about the proposed written procedure? Is there a motion to approve it?
MOTION: Hon. Elizabeth Welch moved to approve the written procedure; C. Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**
- Agenda Item No. 7 2008 PDSC Agenda**
- 620 Chair Ellis Ingrid, I think we already looked at the 2008 agenda.
- 621 I. Swenson You have, Mr. Chair. I am not sure that the whole Commission has.
- 625 Chair Ellis Knowing that all Commissioners read carefully everything that is sent to them before the meeting, are there any comments or questions on the proposed agenda?
- 626 Hon. Elizabeth Welch Yes. It is not really a question about the agenda, it is a question about what is not on the agenda and that is kind of that point that I raised which was some discussion about the role of the Commission, and again I got the sense when I made that particular point before that people thought this would be a good idea. There are so many things in the short time I have been on. There are so many questions that have come up that I have and I don't know how to constructively raise them. I can talk to Ingrid about them and maybe I should write you a letter, something like that and say ...
- 642 Chair Ellis Why don't you write it to everyone on the Commission and I think it is already evident we need to talk through our own process more than we have. Send your letter and we will find a way on here.
- 650 Hon. Elizabeth Welch Can I give a really brief example? This issue about the eastern Oregon differential is something that I have received such an education on in the last few months, reading the Coos/Curry County report and going to Pendleton. I didn't blink the whole time during that meeting in Pendleton. The conditions under which those people practice law are just mind boggling for us big city types. Just the whole issue of how does this get addressed. What does the minimum system look like? What is our role in articulating what that minimum system is? At what point do we pass our concerns on to some other body in the government? What is that whole role? The interpreter thing would be a wonderful example. My god, the

idea of practicing law – none of the defense lawyers here were at that particular meeting, but the idea of having one interpreter available for all purposes in that court system, whether you were a lawyer trying to find witnesses or talk to your client, or be in court. And I guess it is the same one the DA uses. I am not sure about that but that was the sense I got. It was the only person in town, period. What is our responsibility when we become aware of that? If we can solve it, of course, that is great. But in those situations where we can't solve it, what is our role? Who else is looking at this stuff other than us? Shouldn't we be making some noise about it?

- 681 S. McCrea I am so glad we have you on the Commission.
- 682 Hon. Elizabeth Welch Anyway, that is just an example. The list isn't gigantic because it is a role question, a series of role questions, rather than what we should do about X.
- 685 Chair Ellis To be honest we are all glad you are here.
- 687 S. McCrea I hope that the record was clear I wasn't in Pendleton because I had jury duty.
- 688 Hon. Elizabeth Welch No. No, because you could relate to it more. I was never a defense lawyer. Just the concept of trying to do your job.
- 690 J. Potter Is this the kind of thing, Mr. Chair, that the Baker City retreat might include?
- 693 Chair Ellis I think it is.
- 693 I. Swenson We could address it sooner.
- 695 S. McCrea Maybe we are going to have to have a winter retreat and a summer retreat.
- 696 J. Potter Just as long as the winter retreat is in a sunny climate.
- 697 S. McCrea Maybe at your house, John.

Agenda Item No. 8 OPDS Monthly Report

- 700 Chair Ellis Hi Becky. I understand Pete is on vacation.
- 703 B. Duncan Becky Duncan for the Legal Services Appellate Division of the office. Just to provide a very brief update about what we are doing. Following on the annual report that Ingrid has submitted we have had some restructuring. The good news from my position is that we have added two other chief defenders, which is the same position that I have. The previous management was just Peter Gartlan and myself, and so we have added two other attorneys who have been with us for sometime and who bring a lot of energy and organizational talents to our management team. We met at the end of November to have a retreat. We are doing strategic planning for our organization, setting priorities for how we want to improve the infrastructure of the office and then grow our services both in terms of our in-house training and our outreach to defender organizations and providers throughout the state. A lot of our energy is spent right there now and we are looking forward to the improvements we are going to be making in the immediate future. We are thinking long term about what our vision is and how we are going to implement that. On the legal front we have some exciting news. We litigated a lot of Oregon Supreme Court cases in September. We are getting opinions out in those cases. We got one successful one last week and we had three more that came out today. I haven't really heard about them. Paul did tell me that of the three that came out today, one of them was successful. I haven't had a chance to read them but will update you on those next meeting. We are also preparing for arguments in January. We have had a very, very active Supreme Court practice in the last couple of years. We have two more cases going to

the Oregon Supreme Court in January. We are presently holding the moot courts for those. On the U.S. Supreme Court front we have a case that we won in the Oregon Supreme Court. It is *State v. Ice*. It has to do with consecutive sentences and whether imposing a consecutive sentence based on facts found by the judge and not by the jury violates the Sixth Amendment. The Oregon Supreme Court did not decide the case on Oregon Constitutional grounds. They said there was not an Oregon Constitutional violation. They squarely decided it on federal constitutional grounds and so the case is ripe for review.

- 751 Chair Ellis Decided which way?
- 751 B. Duncan That there was a constitutional ...
- 752 Chair Ellis So the state may be seeking ...
- 752 B. Duncan The state has indicated that they will be filing a petition for cert. We will be filing a response if they file the petition for cert. In anticipation of that and because we want to develop attorneys in our office who are comfortable, and capable, and effective U.S. Supreme Court litigators, we have formed a team of attorneys who are already working on the response to the anticipated cert petition in the *Ice* case. The timeline we are looking at there is that the state is expected to file in early January and in early February we will be filing our response. We are also making a concerted effort to anticipate issues that might be attractive to the U.S. Supreme Court and setting up teams to research the issues, develop legal theories, and in appropriate cases, offer up the legal theories to trial counsel so we get these issues litigated the way we want them litigated from the get go. We can build the record and the arguments that we want from the trial level. One of the things that we think is really valuable to other offices and what we offer to the people that come to work for us is the opportunity to litigate criminal and constitutional law issues at the highest level.
- 780 Chair Ellis I am sure it is a delicate balance putting resources into that versus reducing backlog.
- 783 B. Duncan Right. Because of the Commission's support, with the budget that Kathryn and Ingrid were able to secure for us, we are actually at a point where we are reducing the backlog. As you know backlog has been cases that are over 210 days. We want the backlog to be down to 180 by the beginning of '08. Our goal is for our attorneys not to be filing cases after 180.
- 792 Chair Ellis One eighty is measured from transcript to brief?
- 793 B. Duncan Yes, from the settlement of the transcripts to when we file our opening briefs. Further, in the spring, we want that down to 150 days. I know for people who are new to appellate accounting that seems like a long time. It is a long time for somebody to sit and wait for the opening brief for five months, but it is a significant reduction in the time that it will take our office to file the opening brief. We are now in a position where we will be improving the quality, improving the training, improving the outreach, and reducing the backlog. We are in a spot that we are very pleased to be in.
- 809 Chair Ellis The positions that were created are they all filled now?
- 811 B. Duncan We have filled them. We have someone on leave.
- 815 Chair Ellis How did you feel about the quality of applicants and interest?
- 816 B. Duncan We had a really good pool of applicants. For example we had one attorney who has come to us who clerked for the Chief Judge of the Supreme Court in Wisconsin and then clerked for the Court of Appeals in Seattle, Washington. He has two clerkship experiences. We have one attorney who was at the International Criminal Court at The Hague before coming to our office. We have been really pleased with the applicant pool. We are also thinking about how

we recruit. We have, in the past, filled positions when they became available. Sometimes the quality of the pool depends on the time of year you are recruiting. We are considering moving to a model where we are hiring on the same schedule as the large firms and as the judicial clerkships because, in my experience, we have hired later. We often do our hiring while people are waiting for their bar results. I think there are some people when you are graduating from law school and you have a very large loan, if someone can offer you a position and say, "We are willing to extend an offer now. Take the bar and you can come and start for us in September or October," they would be more likely to come to us. They would feel less pressure to take a job earlier. They feel less pressure to take a position.

- 851 Chair Ellis Even if they have trouble with the bar you are still able to use them. They just can't appear and sign.
- 854 B. Duncan We like to avoid that. When someone else has to sign it is almost like they have to do all of the work. We would like to be recruiting on the same schedule as the larger firms and the clerkships because I think it will further increase the pool of applicants.
- 861 Chair Ellis I am interested in the mix between recent graduates versus laterals.
- 863 B. Duncan Most of the people we take on are less than three years out of law school which puts significant demands on our training. We have a group of four people right now who are in the very intensive training period. We would like to stagger the hiring a little bit more so we take in people one or two at a time, but we filled the positions that we had available so we have a big class of new hires now. In the future, because we do like to put very one-on-one concentrated effort into training people, we will be staggering the hiring.
- 881 Chair Ellis Are you having very much attrition on the other end? Either retirement or it is not working out or choose to go elsewhere?
- 886 B. Duncan We have had two people leave in the last six months or so. One, her husband had been out here for school and he got a teaching position at a university in another state. She had been out here while he was in school and then the family was moved there. Another one left for personal, family, medical reasons.
- 897 Chair Ellis Thanks. Any other questions for Becky? [end of tape]

Executive Session

TAPE 3: SIDE A

- 507 Chair Ellis We need to reopen the meeting and there is an important item of business to achieve.
- 511 S. McCrea Shall I go look in the hallway to see if anyone wants to come in.
- 512 Chair Ellis Yes. See if the non-press wants to come in. It is a sign of an organization that is really on its game that I got a map quest from my home to here from Laura. Alright, we are on the last item of the agenda which has been completed. We are now back in open session. Does anyone have a motion they want to make?
- MOTION:** John Potter moved to adjourn the meeting; S. McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting was adjourned.

Attachment 2

**OPDS's Initial Draft Report to the Public Defense Services
Commission
on Service Delivery in Post Conviction Relief Cases**

(January 4, 2008)

Introduction

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

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

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into service delivery in post conviction relief cases in preparation for the PDSC's public meeting in Salem on Thursday, February 14, 2008. The final version of this report will contain PDSC's service delivery plan for post conviction relief cases.

PDSC's Service Delivery Planning Process

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

Second, starting with preliminary investigations by OPDS and the preliminary draft of a report such as this, the Commission reviews the

condition and operation of local public defense delivery systems and services in each county or region or in a particular area of practice by holding one or more public meetings to provide opportunities for interested parties to present their perspectives and concerns to the Commission.

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

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

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

Background and Context to the Service Delivery Planning Process

The 2001 legislation establishing PDSC was based upon an approach to public defense management widely supported by the state's judges and public defense attorneys, which separates Oregon's public defense function from the state's judicial function. Considered by most

commentators and authorities across the country as a “best practice,” this approach avoids the inherent conflict in roles when judges serve as neutral arbiters of legal disputes and also select and evaluate the advocates in those disputes. As a result, while judges remain responsible for appointing attorneys to represent eligible clients, the Commission is now responsible for the provision of competent public defense attorneys.

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

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

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

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

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

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

In 2007 PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in these cases was approved by the Commission in June of 2007.

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

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

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

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

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

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

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

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

The Commission also has no interest in developing a one-size-fits-all model or template for organizing the delivery of public defense services in

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

the state. The Commission recognizes that the local organizations currently delivering services in Oregon's counties have emerged out of a unique set of local conditions, resources, policies and practices, and that a viable balance has frequently been achieved among the available options for delivering public defense services.

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

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

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

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

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

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

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

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

through the expertise on the boards and (c) ensure the professional quality and cost-efficiency of the services provided by their offices.

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

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

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

In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the consortium is reasonably well-organized and managed, PDSC has fewer contractors or attorneys to deal with and, therefore, OPDS can more efficiently administer the many tasks associated with negotiating and administering contracts.

³ Id.

Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar's "firm unit" rule, conflict cases can be cost-efficiently distributed internally among consortium members by the consortium's administrator. Otherwise, OPDS is required to conduct a search for individual attorneys to handle such cases and, frequently, to pay both the original attorney with the conflict and the subsequent attorney for duplicative work on the same case. Finally, if a consortium has a board of directors, particularly with members who possess the same degree of independence and expertise as directors of not-for-profit public defenders, then PDSC can benefit from the same opportunities to communicate with local communities and gain access to additional management expertise.

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

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

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

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

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

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

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

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

OPDS's Preliminary Investigation into Delivery of Services in Post Conviction Relief Cases

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

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

On February 14, 2008 from 9:00 a.m. to 1:00 p.m., PDSC will hold a public meeting in Salem at a location to be announced. The purpose of that meeting will be to (a) consider the results of OPDS's investigation into post conviction relief as reported in the preliminary draft report, (b) receive testimony and comments from interested officials and other individuals regarding the quality of the service delivery, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Post Conviction Relief Cases.

The initial draft of this report is intended to provide a framework to guide the Commission's discussions about the condition of service delivery in this area of practice and the range of policy options available to the Commission – from concluding that no changes are needed to significantly restructuring the delivery system. The initial draft is also intended to offer guidance to PDSC's guests at its February 14, 2008 meeting, as well as the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving public defense delivery in post conviction relief cases.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the justice system is the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan

A. Description of Post Conviction Relief

What is post conviction relief?

Post conviction relief (PCR) is the principal means by which a convicted person may challenge the lawfulness of a criminal conviction or the proceedings which resulted in the conviction. It is often the only avenue for seeking redress for fundamental miscarriages of justice that may not appear on the record. Consequently, it is an important component of Oregon's public defense system even though it represents only a small portion of the public defense caseload.⁴

PCR is a remedy reserved for situations in which other remedies are not available. A petition for post conviction relief may not be filed when a motion for new trial, a motion in arrest of judgment or direct appellate review remain available.⁵ A criminal judgment must be final before a petition for post conviction relief may be filed. All formerly available common law post-conviction remedies except habeas corpus were abolished upon enactment of Oregon's post conviction relief act. ORS 138.540.

What are the grounds for relief?

ORS 138.530 requires the court to grant post conviction relief if one or more of the following grounds is established by the petitioner:

- A substantial denial of the petitioner's federal or state constitutional rights in the trial or appellate court proceedings that rendered the conviction void
- Lack of jurisdiction by the court to impose the judgment
- A sentence in excess of that authorized by law or an unconstitutional sentence
- The unconstitutionality of the statute under which the petitioner was convicted

The most frequent circumstance in which relief is sought is upon the petitioner's claim of ineffective assistance of counsel. Among the other circumstances in

⁴ There were 672 post conviction cases in Oregon in FYE 2006 out of a total of 179,058 trial-level non-death penalty public defense cases.

⁵ A petitioner is not required to pursue an appeal before filing a petition for post-conviction relief but when an appeal has been taken, no ground for relief may be asserted in the PCR petition unless it was not and could not reasonably have been asserted in the appellate proceeding (except where the appellant was indigent and was denied counsel and the ground for relief was not actually decided by the appellate court). ORS 138.550.

which relief has been granted are cases alleging faulty guilty pleas, governmental misconduct, denial of adequate defense resources, and the mental incompetence of the defendant.

What forms of relief are available in PCR?

The post conviction court is authorized to provide a variety of forms of relief including release from custody or supervision, a new trial, modification of the sentence, or “other proper and just relief.” ORS 138.520.

What is the appropriate venue for PCR proceedings?

ORS 138.560 provides that proceedings must be commenced in the circuit court of the county in which the petitioner is imprisoned. If the court finds that the hearing can be more expeditiously conducted in the county of conviction, the court may order the case transferred to that county. SB 45 (2003) amended the venue statute to provide that the court may deny a motion for change of venue when a petitioner in a PCR proceeding is transferred to a state institution in another county.

How are proceedings initiated?

PCR is a civil proceeding in which the petitioner carries the burden of proof by a preponderance of the evidence. The proceeding must be initiated by the convicted person, except that in some death penalty cases they may also be initiated by a person with a significant relationship to the convicted person. The petitioner may request appointment of counsel by filing an affidavit stating inability to pay. Once appointed, counsel may move to amend the petition as filed by the petitioner within 15 days following appointment or as otherwise allowed by the court. ORS 138.590.

What is the deadline for initiating proceedings?

There is a two-year statute of limitations for post conviction relief actions that begins to run when the conviction has become final for purposes of appeal. ORS 138.510. The time frame for relief under 28 USC 2241(d)(1) of the federal Antiterrorism and Effective Death Penalty Act, however, is only one year and while the statute is tolled once the petition for post-conviction relief is filed, if an Oregon petitioner does not file the state petition until after the federal statute has run, the petitioner (except under rare circumstances) is barred from relief under the federal act.

What are some of the other pitfalls to be avoided in state proceedings which may limit or defeat federal claims? (These will be described in more detail in the oral presentation.)

- Exhaustion of state remedies (Requires a petition for review in the Oregon Supreme Court if the Court of Appeals upheld the denial of the PCR request)
- Procedural default rule and the doctrine of independent and adequate state grounds
- Presentation of facts and proper statement of federal claim

How are PCR hearings conducted?

ORS 138.620(1) requires that the petitioner be present at any hearing on the petition (other than a hearing on a defense demurrer or other legal issue) but the court may order that such appearance be by telephone or other communication device and this is the most common means of appearance. ORS 138.622 permits the court to approve the appearance of any of the parties, counsel for the parties or witnesses by telephone or other communication device approved by the court. The statute prohibits this alternative form of appearance for petitioner or petitioner's counsel, however, unless the facilities used enable the petitioner to consult privately with counsel during the proceedings. Evidence at the hearing may be in the form of affidavits, depositions, oral testimony or other competent evidence. ORS 138.620(2).

What is the appropriate role of the client in PCR proceedings?

In state post conviction cases the client is ultimately responsible for raising all appropriate issues, *McClure v. Maass*, 110 Or App 119 (1991), *rev. denied*, 313 Or. 74 (1992). ("A petitioner's failure to bring counsel's refusal to raise an issue to the trial court's attention in the first post-conviction proceeding bars subsequent post-conviction litigation on that issue.")

How should an attorney prepare for a post conviction proceeding?

The following outline is derived from materials prepared by Wendy Willis, a former Assistant Federal Defender, as part of her presentation in March, 2002 at an Oregon Criminal Defense Lawyers Association seminar on post conviction relief. This outline is provided only as a very basic summary of the components of representation in PCR cases. As noted below, an Oregon State Bar work group has been formed to create performance standards for attorneys practicing in this area and that group is expected to prepare a detailed outline and discussion of recommended practices in PCR cases.

- Preparation by counsel:
 - Meeting with client
 - Review of written materials (including transcript; court file, state's file, trial and appellate attorneys' files, bar files on attorneys, jail records (including medical records)
 - Investigation (trial team, client, client's family, witnesses, law

enforcement personnel, jurors, DNA evidence, appellate counsel)

Consultation with appropriate experts (forensic experts, mental status experts, legal experts, statisticians or social scientists)

- Discovery – Oregon Rules of Civil Procedure govern in PCR cases
- Pleading – framing the issues, preserving claims, exhaustion and default
- Preparation of client for deposition and hearing
- Post conviction hearing: evidence and methods of proof
- Findings of fact and conclusions of law
- Appeal and petition for review - role of appellate attorney

B. Quality Concerns

Concern about the overall quality of representation in post conviction relief cases is not a new issue for PDSC. Since the early days of the Commission the problem has been discussed and a number of possible solutions offered. There are, of course, some attorneys who provide the highest quality of representation in these cases and who have won relief for their clients from a variety of sentences. Unfortunately, however, the quality of performance is very uneven and it is therefore appropriate for the Commission to consider what steps can be taken to improve quality statewide.

Indigent Defense Task Force III Report

In May, 2000 the Oregon State Bar's Indigent Defense Task Force III Report expressed significant concerns were about the quality of representation being provided in post conviction relief cases. The Task Force noted that its members were especially concerned about inadequacies in representation in post conviction cases since post conviction relief is supposed to provide a forum for monitoring the adequacy of representation in other types of cases. It found that PCR cases were handled almost exclusively in a relatively few judicial districts where state prisons are located and that small firm contractors in these areas handle a disproportionate amount of the work and that, as a result relatively few judges and practitioners have firsthand experience with these cases. Judges in these areas and the state Indigent Defense Services Division reported significant difficulty finding competent attorneys willing to accept the cases at the rates offered. Funding for these cases was considered grossly inadequate. The Task Force reported on its interview of Steven Wax, the Federal Defender for the District of Oregon. Mr. Wax's perspective is a uniquely broad one since his office represents persons convicted in state courts who seek relief in federal habeas corpus. He noted that post conviction cases are even more under-funded than trial level representation since trial level cases are often negotiated by way of plea so that providers assume that a certain percentage of cases will be resolved without trial. But this assumption does not apply to post conviction cases, virtually all of which go to trial since there is no procedural mechanism for negotiated resolutions. Every post conviction case, therefore, requires thorough

investigation, preparation, and litigation. The Federal Defender's Office had found, however, that few post conviction cases in state court were investigated. That office has investigated cases five or ten years later, discovered new evidence and, in some cases, successfully obtained a new trial for the client. Mr. Wax noted that the problem is exacerbated by attorneys' reliance on the *McClure v. Maass, supra*, standard, which allows post conviction practitioners to shift the burden to their clients to identify errors that occurred at trial. Of course few indigent clients have the legal sophistication, technical knowledge or investigative resources to adequately identify the manner in which their trial level representation may have been legally inadequate. He also noted that issues not raised in the state court proceedings were becoming increasingly difficult to raise during later federal review. Constitutional violations not alleged by the state post conviction attorney often are deemed waived by federal courts. It was recommended to the task force that increased funding, additional investigative resources, additional education and greater oversight be provided in post conviction relief cases.

C. Possible Solutions

In a status report on April 19, 2002 the Task Force reported that no remedy other than the creation of a statewide entity would be able to provide competent and economical representation in post conviction cases. It noted the advantages of a single specialized office where lawyers could develop the expertise to handle PCR cases in an efficient manner, like the Oregon Department of Justice has done in the defense of these cases.

The PDSC created its own workgroup in June of 2002, chaired by the Vice-Chair of the Commission, Shaun McCrea, to explore solutions to the problem. Among the proposals explored were the drafting of performance standards, and the consolidation of representation at both the appellate level and the trial level. No formal request was apparently made to the bar to create a work group on performance standards until 2005. At that time a bar group was already working on updating performance standards in juvenile and criminal cases and the bar suggested that the post conviction relief project be postponed until the completion of the earlier project. In March of 2007 a formal request was made to the bar to create a task force to develop performance standards for post conviction relief practitioners. The proposal was approved and task force members have now been appointed.⁶ An initial meeting of the task force was held on January 18, 2007.

Consolidation of representation has also been pursued. Post-conviction relief appeals (in other than death penalty cases) are now being directed almost exclusively to the Oregon Appellate Consortium, a group of highly experienced

⁶ Task Force members are: Dennis Balske, Tony Bornstein, Noel Grefenson, Lynn Larsen, Harrison Latto, Paul Levy, Ingrid MacFarlane, Mark Olive, Rita Radostitz, Matt Rubenstein, Marc Sussman, Hon. Youlee You.

appellate attorneys. PDSC has proposed in several legislative sessions a budget policy package that would create four full time-equivalent positions at OPDS that would be devoted to PCR trial level representation.⁷ These packages have not been approved. As an alternative, OPDS has attempted to identify a group of well-qualified private providers to concentrate on PCR representation at the trial level. Currently two Salem practitioners are devoting a significant amount of their professional time to these cases.⁸

Other efforts at improving representation have come from the Oregon Criminal Defense Lawyers Association which continues to sponsor a post-conviction relief seminar every two years, and from the Federal Defender's office which offers advice and assistance to attorneys working on these cases and provides speakers and program materials for OCDLA's seminars. The Bar's Criminal Law CLE volume includes a chapter summarizing the post conviction relief statutes and caselaw co-authored by Chief Justice Paul J. De Muniz, Federal Defender Steven Wax, Assistant Attorney General Lynn Larsen, and PCR attorney Douglas Park and Andy Simrin.

Unfortunately, despite the efforts that have been made, OPDS continues to receive reports about quality concerns from a variety of sources including the Federal Defender, PCR trial judges, Department of Justice attorneys, Appellate Consortium attorneys, the Client Assistance Office at the bar, clients, and at least one correctional officer.

OPDS is also advised that some of the judges who hear post conviction cases on a regular basis exacerbate the problem by discouraging or attempting to prevent full review of the issues raised in these proceedings. It is hoped that improved representation might result in effective challenges to these practices.

After receiving testimony from invited guests and others at its February 14, 2007 meeting, PDSC should consider what additional steps can be taken to address quality concerns. Among the measures it might consider are enhanced compensation, a continued effort to centralize services either at OPDS or through contract providers, and additional training opportunities for attorneys.

Although neither the federal nor the state constitution require appointment of counsel at public expense in post conviction cases, in the past when the

⁷ In the 2007 session, PDSC's Policy Package No. 102 sought an increased allocation for the Legal Services Division of \$835,293 to add three Deputy Public Defender 1 positions and one Senior Deputy Public Defender 2 position. A reduction in the allocation to the Public Defense Services Account of \$531,840 would have meant a net impact of \$303,453 to fund the package.

⁸ In addition, the Marion County Association of Defenders continues to represent a significant number of clients in PCR cases.

legislature has considered the elimination of the right to representation, the Department of Justice, among others, has advised against such action.⁹

Summary of Testimony at February 14, 2008 Meeting

[This portion of the report will be completed at the conclusion of the February 14, 2008 meeting.]

Service Delivery Plan for Post Conviction Relief Cases

[This portion of the report will be completed at the conclusion of the Commission's discussions and deliberation.]

⁹ In 2003, for example, the Department of Justice testified in opposition to HB 2092 which would have eliminated the right to counsel in post conviction cases. The bill was referred out of the House Judiciary Committee without recommendation and was sent by prior referral to the Ways and Means Committee where it remained upon adjournment. In March of 2003 appointment of counsel in all PCR cases was suspended as part of the Oregon Judicial Department's Indigent Defense Budget Reduction Plan and was not resumed until July 1, 2003.

Attachment 3

**OPDS's Draft Report to the Public Defense Services
Commission on Service Delivery in Judicial District No. 15
(February 2008)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004, 2005 and 2006, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense systems in Coos and Curry Counties, a summary of the testimony presented to PDSC at its August 9, 2007 meeting in Coos Bay and recommendations regarding a service delivery plan for these counties.

PDSC's Service Delivery Planning Process

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

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

Third, after considering OPDS's preliminary draft report and public comments

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

Commission has undertaken a range of strategies to accomplish this mission.

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

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

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

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

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

In 2007 PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in those cases was approved by the Commission in June of 2007.

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

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

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

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

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

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their

organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

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

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

offices tend to have more office “infrastructure” than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

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

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

³ Id.

law firms, but in which they no longer wish to practice law.

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

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

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

3. Law firms. Law firms also handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defender offices and consortia, PDSC may be foreclosed from influencing the internal structure and organization of a law firm, since firms are usually well-established, ongoing operations at the time they submit their proposals in response to RFPs. Furthermore, law firms generally lack features of accountability like a board of directors or the more arms-length relationships that exist among independent consortium members. Thus,

PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

OPDS's Preliminary Investigation in Judicial District 15

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

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

On July 18 – 20 Commissioner John Potter, OPDS public defense analyst Billy Strehlow and Executive Director Ingrid Swenson visited with stakeholders in both Coos and Curry Counties. In addition to talking to PDSC's contractors in the district, they also met with the judges, the trial court administrator, district attorneys, juvenile department directors, the DHS Child Welfare Program Manager and members of her staff and representatives of the Sheriff's Office in both counties. Written responses to questionnaires were also received from the three contractors in the district. Copies of these responses are attached as Exhibits A, B and C.

As summarized below, at its meeting in Coos Bay on August 9th, PDSC heard directly from invited guests and others about the delivery of public defense services in the district and some of the challenges facing the public safety systems in Coos and Curry Counties.

The preliminary draft of this report is intended to provide a framework to guide the Commission's discussions about the condition of Coos and Curry Counties' public defense systems and services, and the range of policy options available to the Commission – from concluding that no changes are needed in these counties to significantly restructuring their delivery systems.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Judicial District 15's justice systems could turn out to be the single most important factor contributing to the quality of the final version of

OPDS's report to the Commission and its Service Delivery Plan for Coos and Curry Counties.

OPDS's Preliminary Findings in Judicial District 15

A. Overview of Funding Crisis in Coos and Curry Counties

While the funding crisis in Oregon's "timber counties" has been well documented, the extent of the impact on county services in Coos and Curry Counties can hardly be overstated. OPDS staff was advised that 68% of the general fund in Curry County and 50% in Coos County had come from the federal government. When the Congress eventually approved a one- year extension of funding under the Secure Rural Schools and Community Self Determination Act, both counties had already determined that they would need to make significant cuts in public safety spending. When funding for the additional year was ultimately provided, the counties took different approaches to use of the funds. Curry County rehired some of its public safety personnel. The Coos County Commission decided against restoring positions, however. Among the impacts in Coos County that were described to OPDS staff were the laying off of 85 county employees, the closing of nearly half of the jail beds, and the loss of half of the Sheriff's patrol deputies. Cuts in these and other county programs are discussed below in connection with particular agencies and functions.

B. The Court

There are six judges in Judicial District 15 who preside over proceedings in three separate court facilities – the Coos County Courthouse in Coquille, the Coos County Courthouse annex in North Bend and the Curry County Courthouse in Gold Beach. Judge Richard Barron is the presiding judge and Ed Jones is the Trial Court Administrator. The two newest circuit court judges - Jesse Margolis and Cynthia Beaman - have been assigned to the Curry County Courthouse. Judges Barron, Michael Gillespie and Martin Stone are located in Coquille and Judge Paula Bechtold is assigned to the North Bend Annex. The courts in both counties are working toward using the same model for processing cases. Some hearings have different names in the two counties and some court related functions are performed by different agencies in each county.

C. Coos County

(a) Judicial Assignments

Presiding Judge Barron handles juvenile cases, domestic relations cases that include children, and criminal cases that are tied to the family court process. Judge Bechtold handles non-jury cases, violations, small claims matters, FEDs, probate, domestic relations cases not involving children, mental health court and

civil commitment hearings. Judges Stone and Gillespie are the principle trial judges for civil and criminal cases.

(b) Special Courts

Drug Court - Coos County initiated its drug court program in February of 2005. It has processed approximately 300 Possession of Controlled Substance cases to date. The court meets once a month. Challenges to the ultimate success of the court include the lack of adequate funding for community corrections and the lack of a sufficient number of qualified treatment providers at low or no cost to participants.

Mental Health Court – This court was initiated a year ago. It is a post plea program that currently has six to eight persons enrolled. It meets once a month.

Family Court - The county is in the process of creating a court for families with 0-3 year olds in protective custody. Mental health, drug and alcohol, and parenting services will be included. The court will start with five families. On August 24, 2007 there was to have been a meeting with the attorneys to discuss the potential benefits of the program to their clients. One of the goals of the court is to limit the number of times children in care are moved. Representatives of a number of different agencies including mental health, DHS, the trial court administrator, juvenile and adult probation staff all contributed a significant amount of time to planning the new court.

Coos County also has a deferred sentencing program for domestic violence cases which was started in approximately 2000. It is available to both male and female offenders. It requires completion of a one-year education program. The county also offers a voluntary twelve-week education program for victims of domestic violence.

Both the drug court and the domestic violence deferred sentencing program are early disposition programs which defendants must elect within seven days of arraignment.

(c) The District Attorney

Paul Burgett is the Coos County District Attorney. He will retire in December of 2007. His chief deputy, Paul Frasier, is expected to be appointed to fill the vacancy. The office recently lost one deputy district attorney position and will not fill the vacancy created by Mr. Burgett's retirement. After his retirement there will be one district attorney and five deputies. This loss of personnel will affect the volume and seriousness level of cases filed in the county. Mr. Frasier believes that each deputy can handle an annual caseload of 725 cases including all of the cases reviewed and not filed. This means that some categories of cases will have to be treated as violations. At this point the plan is to treat as violations all

Class B misdemeanors and below, all non-person A misdemeanors and some Assault 4 cases if there is no injury. DUIs, Reckless Driving cases, and Driving While Suspended felony cases will be treated as crimes. One deputy DA is assigned to juvenile court but this deputy is currently out on family leave. The office currently handles juvenile dependency cases only through disposition. In the past they were able to appear at post-dispositional review hearings as well.

(d) Public Safety Agencies

Prior to the budget cuts the sheriff's office initiated approximately twenty-five percent of the criminal cases in the county according to the district attorney. Now there are very few cases initiated by the six deputies assigned to patrol duty. In terms of other law enforcement agencies, there is an Oregon State Police Area Command office in Coos Bay. There are also seven small police departments in the county that are reportedly in good financial condition.

(e) Criminal Case Processing

Initially, all criminal cases are docketed centrally. Once set for trial, however, they remain on the assigned judge's docket. Up to six trials may be set for trial on a single day.

The docket moves quickly in Coos County. It is described as a county-wide "rocket docket." In 2006 cases going to trial in Coos County were about half the age of the average case statewide. Once a plea offer is declined a case may be reset if the request is made within two weeks of the initial setting or thereafter, only for good cause shown. The state, of course, has the option of dismissing⁴ and refilling the case but the defendant who is denied a continuance must either plead to all counts or proceed to trial. There are no judicial settlement conferences in Coos County.⁵ Trial rates, particularly jury trial rates, are significantly higher for felony cases in Coos County than for cases in rest of the state⁶. Whether or not the relatively high trial rate is related to the fast pace of the docket is unknown. The system works well in the opinion of the Chief Deputy District Attorney. His office has been able to provide deputies to try the cases and except on very rare occasions there have always been judges and courtrooms to accommodate all of the trials set on a particular day. One key player in the local court system said that the court is not very understanding of the parties' struggle to keep up. This individual feels that disregard for the interest of the litigants has led to a less than cordial relationship among the

⁴ Statistics provided by the court indicate that the District Attorney's office dismisses about 32% of felonies and 37% of misdemeanors that are set for trial.

⁵ Judge Barron reports that in a discussion that occurred several years ago both the prosecution and the defense advised the court that judicial settlement conferences would not be helpful.

⁶ The average trial rate for felonies in Oregon in calendar year 2006 was 5% with approximately 8 court trials for every 10 jury trials. In Coos County 7.8 percent of felony cases went to trial and there were roughly six times as many jury trials as court trials.

members of the local criminal bar. Another member of the local bar expressed general approval of the speed with which cases are resolved in the county but noted that in individual cases some defendants are disadvantaged, especially when busy prosecutors do not have adequate time to thoroughly review the evidence prior to making a plea offer.

Presiding Judge Richard Barron testified that prior to implementation of the current system in the late 1980s, virtually all of the cases were set for trial even though the great majority of them were eventually settled, often on the eve of trial. He also noted that continuances are granted in approximately nine percent of the cases, which is within the range recommended for efficient court management.

Despite the loss of public safety personnel, the criminal caseload in Coos County showed an increase during the first six months of 2007. In January through June of 2006 there were 375 felonies and 536 misdemeanors filed. In January through June of 2007 there were 394 felonies and 800 misdemeanors. It is expected that a significant decline in cases will occur in the second half of 2007. OPDS staff would describe the caseload as essentially flat.

(f) Juvenile Dependency System

Initial juvenile court appearances occur every morning at 8:15. These cases are then heard the following judicial day at 8:15 with counsel present. Appearances in response to summonses in juvenile cases are scheduled for 9:00 a.m. every Monday with a further proceedings date two weeks later. Most cases settle within the two-week period but may be set over if more time is needed. Dispositions are scheduled for 3:00 p.m. on Mondays and trials are scheduled for two Thursdays of the month beginning at 9:00 a.m. Termination trials are set on the regular court docket.

Judge Barron has been the juvenile court judge for many years. He is described as the driving force in juvenile matters in the county. In addition to hearing the juvenile court docket, he is also the trial judge in most dependency and termination cases.⁷ DHS staff say he is knowledgeable, concerned and caring. He has initiated a number of innovative programs and approaches to handling cases. He organized the family support team which accelerates access to services for parents and he initiated the Coos County Infant and Toddler Court Team which will start in September. Because so many of the children in care are under the age of five he has generally preferred to appoint CASAs for these

⁷ In many counties, the judge who monitors the progress of the dependency case is not assigned to hear the termination of parental rights case. Attorneys who object to the termination case being heard by the same judge who has, in most cases, already approved the change of plan from return to parent to adoption, move for a change of judge. This practice appears to be rare in Coos County. It may be that in each termination case that is assigned to the judge who heard the dependency case the attorney has determined that it is in the clients' interest to have the case heard by the that judge instead of another judge.

children, rather than attorneys. About half of the children in care have court-appointed CASA's. A CASA volunteer said that CASAs are never appointed until after jurisdiction, however, so that children have no one, other than the other parties to the case, to advocate for their interests prior to jurisdiction. Recently the court has reportedly been appointing attorneys for children more frequently, however, especially for older children.⁸

The DA participates in dependency cases only until the initial disposition hearing. The Attorney General's office represents DHS in termination cases and usually gets involved as soon as the agency has decided to seek termination.

DHS has a staff of 50 in the county and as of mid-July there were 170 children in foster care. Half of these children are under the age of five. According to DHS, in the 2001-03 biennium Coos County had the highest child abuse rate in the state. It is now 14th.

The Citizen Review Board in Coos County is very active in the review of dependency cases, convening hearings every six months. Attorneys generally attend these hearings as well as family decision meetings, youth decision meetings, and the like.

Dependency cases, like criminal cases in Coos County, move fairly quickly with jurisdiction often being established within 45 days.

DHS anticipates that there will be fewer dependency cases in the County as long as the Sheriff's Office is operating at its current level. The Sheriff's Office had previously been involved in approximately 60% of the dependency referrals.

(g) The Juvenile Delinquency System

The Coos County Juvenile Department lost one third of its staff in the recent budget cuts. Rather than leaving the decision about which positions to cut to the Juvenile Department, the County Commissioners made the decision. The fewest cuts were made to detention center staff. The facility holds twelve youth and includes a treatment center. Two beds are rented to Curry County. Most of the cuts were made to the probation staff, which declined from six to two and three/fifths FTEs. The Juvenile Department Director reported that youth are now exhausting local options sooner and more youth are being committed to the training school. The county routinely exceeds its cap at the training school and consequently pushes for adjudication on Class A felonies⁹ since commitments on

⁸ Judge Barron said that with only six law offices taking appointments in juvenile cases, appointing attorneys for children in all cases would probably lead to more conflicts and the need for additional out-of-county attorneys. These attorneys often appear for court hearings by telephone, which is satisfactory, but it appears that they may also be meeting with their clients only by telephone.

⁹ Youth committed on these offenses occupy Public Safety Reserve beds that do not count against the county's cap.

these offenses do not count against its cap. Although youth may initially receive probation on Class A felony offenses, with few community resources available they are less likely to succeed and more likely to be committed on probation violations.

The juvenile department director would like to see fewer cases reduced from felonies to misdemeanors because she believes many of the youth who need felony level services are not receiving them.

She said that alternative treatment in juvenile sex offense cases is not available in the county.¹⁰

(h) Coos County Public Defense Providers

There are two contract providers in Coos County, Southwestern Oregon Public Defender Services, Inc. and the Coos County Indigent Defense Consortium. The consortium handles only conflict cases¹¹.

Southwestern Oregon Public Defender Services, Inc.

This non-profit public defender office currently provides services only in Coos County although it previously served both Coos and Curry Counties¹². The firm has a Board of Directors comprised of three outside members, one selected by the president of the county bar association, one appointed by the presiding judge and one selected by the other two members.

There are currently six full time attorneys at SWOPDS. There had been seven until one attorney resigned in February of 2007. Carole Hamilton, the administrator of the office, believes that the appropriate caseload for each full time attorney is approximately 25 to 27 new cases per month. To maintain that

¹⁰ Alternative treatment in sex offense cases generally involves an amendment or postponement of proceedings on the delinquency petition to allow a youth to engage in treatment services. If such services are successful the petition may be dismissed or treated as a dependency petition preventing the youth from having a non-expungible record or having to register as a sex offender. There is a significant disparity between counties as to whether juvenile departments, prosecutors and judges are willing to consider supporting such treatment. Attorneys for youth have been successful in a number of counties at persuading the court, sometimes over the objection of the juvenile department and the district attorney's office, to grant alternative treatment. While appellate case law has limited the circumstances under which the court may grant relief, the appellate courts have not determined that alternative treatment is beyond the discretion of the juvenile court to allow. Efforts in two legislative sessions to prohibit the practice were rejected. The effort of defense attorneys in all of the contract offices which have been evaluated by site visit teams of OPDS's Quality Assurance Task Force, to advocate for clients in a variety of circumstances, including representation of youth in delinquency cases involving allegations of sexual abuse, is an important component of every quality assessment. It is, therefore, one of the issues generally covered in OPDS's preliminary investigation.

¹¹ A spreadsheet setting forth the caseloads of both Coos County providers and the Curry County consortium is attached as Exhibit D.

¹² The office ceased providing services in Curry County in 2001.

ratio the office will probably need one more attorney but Ms. Hamilton has decided not to fill the vacancy until she has more information about caseload trends in the county. Recruiting and retaining attorneys is difficult. New attorneys in the DA's office receive \$3577 per month. Starting pay at SWOPDS is \$3087. Ms. Hamilton would like to increase the compensation paid to attorneys in her office.

SWOPDS has a written personnel policy manual and performs written evaluations of its employees. New attorneys are assigned experienced mentors. The administrator meets regularly with the judges in the county to inquire about attorney performance and sometimes listens to audio tapes of their trials. Financial support is provided for attendance at CLE sessions but additional funding would be needed to allow attorneys to take advantage of national training seminars, which Ms. Hamilton believes her attorneys should attend.

Coos County Indigent Defense Consortium

This consortium is comprised of five attorneys who devote varying percentages of their professional time to public defense representation. Sharon Mitchell is the administrator of the consortium. Each member of the consortium receives an equal share of contract funds (except that the administrator receives an additional amount for performing her administrative duties.)

The consortium does not have a board and does not include any quality assurance processes.

As noted above, the consortium is appointed only to those cases in which the public defender's office has a conflict preventing representation. The court assigns cases to individual consortium attorneys on a random basis. Separate appointment lists for Measure 11 and termination of parental rights cases prevent individual attorneys from receiving a disproportionate number of these cases.

Hourly rate providers

There are several attorneys from the Eugene and Roseburg area who appear regularly in Coos County cases. OPDS records indicate that there are only 1.2 cases per month that are assigned to the private bar.

(i) Comments regarding the quality of representation

SWOPDS

The following comments were provided regarding the quality of representation provided by SWOPDS attorneys.

Complaints about public defenders not seeing their in-custody clients are “rare.” Attorneys seem to have a lot of clients but appear to be prepared. One SWOPDS attorney in particular is seen by the sheriff’s office as going the extra mile for his clients and really caring about inmates.

Most attorneys work cooperatively with DHS in dependency cases. Some parents complain that the attorneys who represent them in dependency cases see them only outside the courtroom for five minutes prior to court hearings¹³. One CASA volunteer said that some attorneys don’t read the file until they get to court and don’t seem to know where their clients are. Some attorneys do excellent work. All of them seem overworked. Two public defenders were identified as being particularly good at getting things done for their dependency clients between hearings.

With respect to delinquency cases it was reported that Coos County defense attorneys are doing good work. They are looking for the best outcome for kids¹⁴. They see their juvenile delinquency in-custody clients regularly. The two attorneys who handle these cases spend a lot of time with their in-custody clients. Over time, representation in juvenile delinquency cases has improved in Coos County. There used to be an attorney who just didn’t care, but the new lawyers are doing very good work.

The chief deputy district attorney and others indicated that if they observed a problem with the conduct of an attorney with the public defender’s office they would bring it to the attention of Ms. Hamilton who would deal with it.

Another deputy district attorney indicated that there is an institutional rivalry between the DA’s office and the public defender’s office. Attorneys there sometimes decline reasonable offers. Some of the motions they file are not well founded.

Ms. Hamilton is described by opposing counsel as always willing to “work outside the box” when it comes to creating specialty courts and other non-routine approaches to handling cases. She is also felt to be a good spokesperson for the defense.

Ms. Hamilton has served on several OPDS site teams. During site visits she not only provided valuable advice to the contractors being evaluated but also used the opportunity to identify best practices that she could use in her own office. Ms. Hamilton is a member of the Local Public Safety Coordinating Council. Two

¹³ DHS staff and others noted that clients can be hard to reach and the lack of an adequate public transportation system is a major problem in the county.

¹⁴ Of course attorneys for youth in delinquency cases are required to advocate for the client’s expressed wishes, not for what the attorney may believe to be in the client’s best interest. Nevertheless, in support of the client’s expressed wishes it is important for the attorney to help identify outcomes and services that will serve their clients well.

attorneys in her office are also actively engaged in community organizations supporting young people.

Coos County Indigent Defense Consortium

Comments about the quality of representation provided by the consortium included the following.

One prosecutor indicated that if a relative of the prosecutor were charged with a crime the prosecutor would recommend that the relative seek representation by a consortium attorney.

When the sheriff was able to retain more defendants in custody there were complaints about consortium attorneys not seeing their clients regularly.

Most attorneys work cooperatively with DHS in dependency cases¹⁵. Some parents complain that the attorneys who represent them in dependency cases see them only outside the courtroom for five minutes prior to court hearings. A CASA volunteer said that some attorneys don't read the file until they get to court and don't seem to know where their clients are. Some attorneys do excellent work. All of them seem overworked. Consortium attorneys sometimes fail to request discovery in dependency cases as required by a standing local court order. If they do not request it, it is not provided and attorneys have to appear in court without having reviewed the case developments. Three consortium attorneys were identified as being particularly good at getting things done for their clients between hearings.

With respect to delinquency cases it was reported that Coos County defense attorneys are doing good work. They are looking for the best outcome for kids. They see their custody clients regularly. Over time, representation in juvenile delinquency cases has improved in Coos County. Most of the consortium attorneys are good. Some are temperamental.

Consortium attorneys are always ready to work outside the box.

Hourly attorneys

These attorneys were generally described as providing good representation. Some concern was voiced about the cost to public defense of having attorneys come from outside the county.

¹⁵ Some of the comments made with respect to consortium attorneys were also made regarding attorneys with the public defender's office and therefore appear twice in this report.

(k) Issues for Consideration

At its August 9, 2007 meeting in Coos Bay it was recommended to the Commission that it consider how best to address the following needs articulated by members of the criminal and juvenile justice systems in the county:

- (1) A number of those interviewed indicated that there is a need for at least one additional attorney to handle the public defense caseload in the county. DHS believes that more attorneys would help to reduce caseloads and this would allow attorneys to spend more time with their clients and do more preparation for hearings. They could also have more direct contact with service providers¹⁶
- (2) The Trial Court Administrator noted that one obstacle to recruiting attorneys to Coos and Curry Counties is that spouses and partners of attorneys have difficulty finding employment in the area. Mr. Jones thought that a loan forgiveness program might be a very positive incentive for attorneys to relocate to the area.
- (3) Since the volume of some case types is relatively small, attorneys may not develop expertise in all areas of practice. Attorneys with expertise in specific areas of practice could be made available as “resource attorneys” on complex sentencing guidelines issues and Indian Child Welfare Act cases, for example.
- (4) Recruitment and retention: One of the judges recommended that public defenders, who seem to have heavier caseloads and receive less compensation than consortium attorneys, be paid the same amount as the DAs.
- (5) One judge recommended that all of the attorneys obtain additional training on the rules of evidence.

D. Curry County

(a) Judicial Assignments

Jesse Margolis, a former attorney with the SWOPDS office and Cynthia Beaman a former member of the Curry County Consortium, are the two Circuit Court Judges assigned to Curry County Courthouse in Gold Beach. Judge Beaman had only recently been appointed to the bench at the time of the OPDS visit to the county and Judge Margolis had been there for only a few months.

¹⁶ Public defender offices and some consortia, such as Klamath Defender Services use paralegals to assist their attorneys in performing some of the functions that can be performed by non-attorneys, such as visiting with child clients and contacting service providers.

(b) The District Attorney

Everett Dial is the District Attorney for Curry County. When initial budget cuts were made he lost both of his deputies. One deputy position was added back after funds were restored. When eliminating one deputy position, the County Commission decided that the office could no longer prosecute support enforcement cases, and these prosecutions were returned to the Department of Justice for prosecution. The District Attorney's office will also have less involvement in juvenile cases than it has had in the past.

(c) The Sheriff's Office

In addition to the financial crisis faced by the Sheriff's Office, the former Sheriff was recalled from office on June 13, 2007 after being indicted for sexual harassment and other misdemeanor charges. He has since been convicted of all the charges. Allen Boice was named the new sheriff.

(d) Criminal Caseload

Although the proportion of cases charged as felonies in Curry County decreased in the first six months of 2007 as compared with the first six months of 2006, the total number of criminal cases filed in Curry County has actually exceeded the number of cases filed in the first six months of 2006¹⁷.

Some of the position cuts did not take effect until July 1 of 2007 so the full impact will not be known for at least several months.

(e) Juvenile Dependency System

There are 8 DHS staff persons in Curry County and forty children in foster care. All services within the county are located in Gold Beach which means that parties from other parts of the county must find transportation to the county seat for all required services¹⁸ or travel to Coos Bay or Crescent City, California for services. District Attorneys appear only for contested hearings in dependency cases so DHS must prepare its own petitions and represent itself at all other hearings. The Attorney General's office has counsel present for permanency hearings, however. The Citizen Review Board conducts reviews every six months and attorneys are reported to be present for these hearings most of the time. Attorneys are rarely appointed for children in dependency cases and currently, due to an upheaval in the Curry County CASA program, there are only three

¹⁷ According to the Trial Court Administrator in the first six months of 2006 there were 108 felonies, 282 misdemeanors and 1636 violations filed. In the first six months of 2007 there were 98 felonies, 326 misdemeanors and 1833 violations filed. OPDS would describe this caseload, as well as the caseload in Coos County, as flat.

¹⁸ There is a "bus loop" on Mondays, Wednesdays and Fridays.

available CASAs. New CASA volunteers have been recruited, however, and should be available soon.

(f) Juvenile Delinquency System

There are currently 74 youth on probation in Curry County, 26 of whom are on formal probation.

The Curry County Juvenile Department has laid off 9 staff members since February of 2007. Consequently, minor cases are not filed and are closed with a warning or a letter to a parent.

(g) Defense Providers

Curry County Consortium

This small consortium has undergone a number of recent changes. John Spicer remains the contract administrator but the other two members of the consortium have left – one to fill a vacancy on the circuit court bench. Two new attorneys have recently been added - Jim Gardner, who has been practicing criminal and juvenile defense in Curry County for a number of years and Rick Inokuchi who is also a member of the Coos County Indigent Defense Consortium. Both Mr. Spicer and Mr. Gardner are considering adding associates to their firms but need a third consortium member to handle conflicts.

The consortium does not have a board of directors and operates under the terms of a written Operating Agreement among consortium members. There are no evaluations of consortium members but input is sought from the judiciary and the consortium is one of the few contractors in the state that provides clients with the opportunity to evaluate the representation they receive.

Hourly Rate Attorneys

Two Coos County attorneys are often appointed in public defense cases in Curry County. These appointments have generally been on an hourly basis although it appears that Mr. Inokuchi is currently receiving cases directly from the consortium. OPDS records indicate that only .7 cases per month are assigned to the private bar.

(h) Quality of Representation

OPDS staff received the following comments regarding the quality of representation provide by the Curry County Consortium.

The Sheriff's Office noted that there aren't as many complaints from inmates as there used to be. John Spicer must be overwhelmed with the number of clients

he has but he does a good job. He seems to assess cases well, files motions and goes to trial.

Mr. Spicer handles most of the delinquency cases. He is described as being very good with kids. He sees them often. He is reasonable and doesn't ask for "outlandish" things. Jim Gardner is said to definitely be an advocate for his kids. Both attorneys file motions on behalf of their clients and try a lot of the delinquency cases.

In dependency cases it was reported that one attorney is only sometimes prepared for hearings and must sometimes be called and reminded to come to court. There have been no termination of parental rights trials in a number of years. Attorneys do appear for CRB hearings and attend family meetings. The attorneys here don't handle a high volume of juvenile dependency cases so they lack experience. In juvenile cases there are areas of practice in which attorneys do not seem well versed.

(i) Issues for Consideration

At its August 9, 2007 meeting in Coos Bay it was recommended to the Commission that it consider how best to address the following needs articulated by members of the criminal and juvenile justice systems in the county:

- (1) Both Curry County judges, the trial court administrator and a representative of DHS indicated that there is a need for more attorneys in the county, although OPDS records indicate that only .7 cases per month are being assigned to the private bar. Although Mr. Inokuchi is apparently a third attorney handling cases assigned to the consortium It is not clear that he is able to handle a sufficient number of cases because his office is located in Coos County and he has a large caseload there. In addition, both of the principle attorneys in the consortium are approaching retirement age and need to have succession plans in place.
- (2) Judge Margolis indicated that he believes that a public defender office would be the preferred model for service delivery in the county but understands that the conflict problem may not make that feasible¹⁹.
- (3) Although the caseload may decline due to shrinking public safety resources, consortium attorneys will need to be compensated sufficiently to make their practice in the county viable. Current rates for appointed counsel are simply not adequate to attract participation by private attorneys in the county. The billing rates for these attorneys is in the \$200-250/hour range. The district attorney's higher salary range has also been insufficient to retain experienced lawyers.

¹⁹ As noted above, SWOPDS previously had an office in the county but ceased providing services there in 2001.

- (4) The Trial Court Administrator noted that one obstacle to recruiting attorneys to the county is that spouses and partners of attorneys have difficulty finding employment in the area. Mr. Jones thought that a loan forgiveness program might be a very positive incentive for attorneys to relocate.

Since the volume of some case types is relatively small, attorneys may not develop expertise in all areas of practice. Attorneys with expertise in specific areas of practice could be made available as “resource attorneys” on complex sentencing guidelines issues and Indian Child Welfare Act

PDSC’s August 9, 2007 Meeting in Coos County

Judge Michael Gillespie was invited to make the initial presentation since Presiding Judge Richard Barron was unable to appear until later in the morning. Judge Gillespie said that although the district was a desirable place to live and work, recruiting new attorneys to come to the area and remain there had been difficult. He indicated that SWOPDS would need more financial support in order to compete for attorneys. Attorneys in the office are paid significantly less than attorneys in the private sector but are also paid less than attorneys in other parts of the public sector. SWOPDS is a critical resource. That office does a great job of training new lawyers and provides support for other public defense lawyers in the area. In order to perform these functions the office incurs overhead costs beyond those incurred by other contractors. Once attorneys are trained by SWOPDS and gain experience they either fill vacancies in the consortium or go elsewhere. New deputy district attorneys are not well paid but, at minimum, SWOPDS needs to be able to match DA starting salaries in order to be competitive locally.

Judge Gillespie said that SWOPDS appears to be handling conflicts appropriately. Some attorneys in the area have been relieved from representation for incompatibility with the client. This has not been necessary with any of SWOPDS’s attorneys.

There are two attorneys from other areas who often accept public defense cases in the county when local attorneys have conflicts or are unavailable. Both of them have been very cooperative and handle the cases adequately.

The Chair then welcomed Judge Barron. He told the commission that lawyers from other parts of the state have been asked to handle cases in Coos and Curry County, especially juvenile cases. This practice is likely to increase if the number of consortium attorneys gets smaller. When attorneys leave the consortium for private practice there is not usually anyone ready to take the departing attorney’s place. The consortium decides who can become a member and they do not appear ready to add any new attorneys. In Curry County there is

even more of a problem. There needs to be a system for getting people to come to Coos and Curry Counties and to stay. Judge Barron came to Coos County in 1971 to accept a position in the district attorney's office. It is a great community, a great place to live and raise children.

Before the current case management system was put in place in Coos County, almost every case was assigned a trial date at arraignment. Cases went away late but they went away and that did not seem like the most productive way to run the system. After obtaining input from both the prosecution and the defense, the court decided to implement its current system. Under that system, a plea date is set three, five, or seven weeks after arraignment depending on whether the defendant is in custody and whether it is a felony or a misdemeanor. The average age of cases going to trial in Coos County is half of the statewide average. Although the preliminary report indicated that resets were rarely granted, in approximately nine to eleven percent of the cases over the years, postponements have been approved. The public's interest in speedy resolution of cases has to be balanced against the interests of the litigants in the particular case. If a request for postponement is made within fourteen days of receiving notice of the trial date, the request is automatically granted. The thirty-five percent dismissal rate includes cases that are permanently dismissed and some that are refilled. In a few of the cases that are refilled a request to postpone has been denied.

Carole Hamilton at SWOPDS is an effective administrator. Her office previously provided representation in Curry County and should consider doing so again. Curry County is fairly isolated and it can be difficult to get there at night or in bad weather. It was hard to keep people down there.

Funding cuts in Coos and Curry Counties may well affect how cases are negotiated and may increase the number of trials. A drop in cases may mean that lawyers actually have appropriate caseloads. They have had heavy caseloads at times in the past. Other times they have dropped off. The caseload has fluctuated. Instead of reducing payments if caseloads decline, people may be able to do a better job.

If a public defense attorney fails to perform adequately, both Judge Barron talks with the attorney and, sometime, if the attorney is a public defender, with Ms. Hamilton.

Despite a natural rivalry between the DA's office and the public defender's office and occasional personality clashes, the system works well. There is communication among the members of the criminal justice community. SWOPDS has been cooperative in the mental health court, the drug court, and the domestic violence deferred sentencing program. SWOPDS also agreed to have attorneys present for initial hearings in juvenile cases. The consortium also participated at first but no longer sends attorneys to these hearings. SWOPDS

handles about seventy-five percent of the caseload and has been extremely cooperative with the court.

The juvenile system used to be the poor stepchild of the system but it involves serious issues and the providers take it seriously. The law is complicated but SWOPDS and the consortium attorneys have learned how to handle these cases.

Chief Deputy District Attorney Paul Frasier testified that his office has had difficulty attracting and retaining attorneys. After new deputies are trained they go elsewhere. The Coos County District Attorney's starting salary for new attorneys is \$3,575 per month. It is not competitive with Clackamas, Clatsop or Deschutes Counties. The majority of deputies who leave go to work at other prosecutor's offices. Currently the Coos County District Attorney's office includes the elected DA, the chief Deputy and five other deputies. When the elected DA retires at the end of the year his position will not be filled. Mr. Frasier is not sure what is going to happen to the caseload. Decisions will need to be made when the seventh position is lost in December. In the short term one deputy recently resigned and needs to be replaced and one deputy is on long term medical leave. One effect of having fewer deputies is that more cases will be treated as violations. He said he hoped that trial rates would go down. If they went up, further adjustments would have to be made.

The docket in Coos County moves quickly and that means that if cases are not settled and are set for trial subpoenas need to be issued only once. For the most part defense attorneys are going to trial in the cases they should, although, of course, some clients may decide to go to trial when they shouldn't.

There is good communication between the prosecution and the defense in Coos County.

Nancy Lee Stewart, the Child Welfare Manager for Coos and Curry Counties thanked the commission for coming. She said that DHS has good working relationships with attorneys in both counties. They participate regularly at citizen review board hearings, family meetings and with child and family mental health teams. The attorneys seem to have to work very hard to keep up. The more support they have the more effective they can be for their clients. Juvenile dependency cases have gotten more complex over time. Interagency team meetings have been helpful, so have the Juvenile Court Improvement Project legislative updates. Clients often lack telephone service and transportation.

Nick Nylander, a member of the Board of Directors of SWOPDS and Carole Hamilton testified next. Mr. Nylander said that the three-member board meets once every couple of months. They have an "open door policy" with Carole Hamilton. The office has operated efficiently and smoothly since the fiscal crisis of 2002-03 ended.

Mr. Nylander said that SWOPDS is an indispensable service provider to PDSC and needs more funding in order to attract and retain an adequate supply of attorneys. The board's goal has been to match the DA's salary scale. It would also like to reach parity with other public defender offices. The entry level salary at SWOPDS is \$3,087 compared to \$3,575 for district attorneys. Salary increases would also help with retention. Experienced lawyers provide better representation and develop long term relationships with district attorneys. Currently there are six attorneys at SWOPDS, including Carole Hamilton who maintains half a caseload in addition to her administrative duties. Three of the attorneys have significant experience and three are in the one to two-and-a-half year range. Carole Hamilton said that two of the newer attorneys are the kind of lawyers they would like to retain but they have children, large student loans, mortgages and SWOPDS's salaries are not competitive. In addition there are not a lot of health care options and health care is expensive in the area. Ms. Hamilton said that her contract with OPDS currently limits the amount she can expend for each employee for health care to \$500 per month.²⁰ The office's internal reimbursement rate for mileage is only \$.30 per mile, well below the state and federal rates.

Carole Hamilton said that SWOPDS had ceased providing services in Curry County in December of 2001. Mr. Nylander said that the office had been asked to provide services there and did so but it was hard to recruit people to go there and difficult to train and mentor them. The lawyers down there were isolated and when the consortium offered to provide services at a lower cost, SWOPDS did not feel it could match the consortium's offer. There were other issues including conflict between the bar and some members of the bench who are no longer there. Carole said that since Gold Beach is not within commuting distance lawyers who do not live in Gold Beach must go down for weeks or months at a time.

Ms. Hamilton described some of the activities in which she and some of the other attorneys at SWOPDS have participated such as the special courts, OPDS's site evaluation teams, the Contractor Advisory Group, and various community projects to benefit clients.

The District Attorney's office is prosecuting fewer offenses as crimes so the caseload is declining. Ms. Hamilton does not believe that her office can handle a greater percentage of the cases than it now does because it is already assigned all cases other than those in which it has a conflict. She described the conflict identification system used by her office.

Matt Muenchrath and Megan Jacquot from the Coos County Indigent Defense Consortium testified next. Mr. Muenchrath grew up in the area and returned to Coos County in 2001 to fill a vacancy on the consortium. Ms. Jacquot initially

²⁰ The OPDS model contract for 2008-2009 deleted the cap on health care payments.

worked at SWOPDS but had a large family and needed more income than SWOPDS was able to provide. They talked about the advantages of being in the consortium. Mr. Muenchrath said that the per unit contract seemed to work well except in juvenile dependency cases where there has been a significant increase in the types of meetings and proceeding in which the lawyer needs to be involved.

Mr. Muenchrath said that young attorneys could be recruited to practice in Curry County assuming the position was well publicized and the pay was attractive.

John Spicer, the administrator of the Curry County Consortium, said that very few Coos County attorneys practice regularly in Curry County. Curry County is isolated and even if an attorney can find work there, there is generally no suitable employment available for the attorney's spouse. In addition, housing is very expensive in the area. The district attorney's office has had difficulty keeping people there. Currently, Mr. Spicer and another attorney, Jim Gardner, are the active members of the consortium. It is easier for them to survive in the area because their homes and offices are paid for. They are trying to add a third member. It is difficult to predict what will happen with the caseload since there have been significant cutbacks in law enforcement funding. Operating a public defender office in Curry County would be difficult to do. Gold Beach is eighty miles from Coquille.

Judge Paula Bechtold testified that attorneys with both of the Coos County public defense providers work many hours for which they are not compensated. If the caseloads decline they would have time to do better work for their clients and could have some time for their personal lives. As with the schools, in small communities there are economies of scale. The system must be maintained even though the number of people served may be small.

Judge Bechtold is the mental health court judge. The court has been operating for over a year and is staffed by SWOPDS. It is not unusual for an attorney in these cases to have to appear thirteen times or more throughout the course of the proceedings. Attorneys can't be compensated at the regular case rate for these cases.

In order to find lawyers to practice in Curry County there need to be bonuses such as a loan repayment program. The same problem must exist in eastern Oregon.

Updated Information regarding Contractors

Since the Commission meeting in Coos Bay, all three of the Judicial District 15 contractors have signed contracts with PDSC for the two-year period beginning January 1, 2008.²¹

SWOPDS. Although one of the recommendations received from justice system officials in Coos County was that another attorney was needed in the county, the public defender office there takes all of the cases it can and only conflict cases go to the consortium. For this reason another attorney would be added to SWOPDS's staff only if the caseload justified it. Carole Hamilton is taking a "wait and see" attitude on the possible addition of another attorney. Attorneys have not reported that their current caseloads are excessive. The office currently has 5.5 FTE attorneys each of whom receive approximately 25-27 new cases per month. The caseload in the county is largely dependent on resources available to law enforcement, including the district attorney's office. With the uncertainty of county funding for these functions, SWOPDS and OPDS will be closely monitoring any changes in the caseload. The district attorney's office recently added a new deputy and a deputy who had been on family leave has now returned so that the caseload may well increase.

SWOPDS's new contract provides for fewer cases (approximately 6%) and greater compensation (a 15.20% rate increase) than the former contract. Consistent with the priorities established by the Commission in August 2007, OPDS was able to arrive at an agreement with this valuable public defender office that made it possible for it to continue to be the principal provider in the area and to assist it to retain and recruit attorneys as needed. Although the office lost one attorney to the consortium, with the increased compensation it was able to offer, it was able to persuade a very experienced attorney who had been with the office in the past, to return.

The Coos County Indigent Defense Consortium (CCIDC). CCIDC's caseload will increase under their new contract. They exceeded their quota in the previous biennium. The consortium has added another attorney, as recommended by the local justice system representatives and is currently at six. CCIDC received a 6.52% rate increase, which was significantly less than the increase received by SWOPDS. In attempting to meet the needs of each of its providers, OPDS did not find significant unmet needs in this consortium. Recruitment and retention had not been an issue. Although the caseload has increased under the new contract, the number of cases per attorney has not. The consortium has reorganized and has now entered into detailed agreements between member attorneys setting forth procedures for addressing performance issues. OPDS has recently received a complaint about a member attorney and, if the complaint is substantiated may be able to test the effectiveness of the new membership structure.

²¹ These contracts were approved by the Commission at its December 13, 2007.

Curry County Consortium. The Curry County Consortium reports that it has added another attorney and that both of the senior members of the consortium will be adding associates, assuming that the caseload stabilizes in the near future. The consortium also plans to create a board of directors during this contract period. The consortium was over its quota under the last contract and its caseload has been increased for the next biennium. It received an 8.32% increase in rates.

A Service Delivery Plan for Judicial District 15

Based on the decisions already made by the Commission at its August retreat regarding funding priorities and in view of the information received from Coos and Curry Counties, OPDS respectfully recommends that the Commission make the following findings in Judicial District 15.

Coos County

The structure of the public defense system in Coos County appears to be appropriate. The public defender's office handles approximately 75% of the caseload (all of the cases that it can handle without conflicts). It does a good job of training new attorneys, when necessary, and is a well-managed office that has adopted a number of best practices, including an active board of directors. Quality concerns raised during the Commission's review may be addressed in part by the increase in compensation and reduction in caseload. In the juvenile arena, SWOPDS has responded to the concerns expressed in the draft report and OPDS will be working with this office and others to promote a more pro-active style of representation in juvenile cases.²²

Among the other recommendations made to the Commission regarding the provision of public defense services in the county were that it consider a student loan repayment assistance program to serve as an incentive to attorneys to relocate to the area. Unfortunately, for a number of reasons, the Commission may decide that it cannot pursue the creation of such a program at this time. Fortunately, there are an increasing number of programs potentially available to lawyers with significant law school debts that are sponsored by the federal government, the state bar and local law schools.

It was also recommended to the commission that since the volume of some case types is relatively small in Coos County, attorneys might not be able to develop

²² For example, best practices and performance standards for juvenile dependency lawyers recommend that contact with parent and child clients be initiated on a regular basis by the attorney. Some contractors take the position that they are only required to respond to contacts initiated by clients whose cases are in review status. This model of representation can result in significant delay in getting parents engaged in appropriate services and can seriously prejudice their ability to have their children returned to their care.

expertise in all areas of practice. Attorneys with expertise in specific areas of practice could be made available as “resource attorneys” on complex sentencing guidelines issues and Indian Child Welfare Act cases, for example. At its August retreat, the Commission determined that the use of resource attorneys was not among the priorities to be funded in this contract cycle.

The recommendation of one judge that all of the attorneys obtain additional training on the rules of evidence has been communicated to all of the contractors.

Curry County

Although the Commission discussed the possibility of a public defender office in Curry County and reviewed the history of SWOPDS’s effort to provide services in that county, no proposals were received for the creation of such an office. In a county with a caseload of only 976 cases per year, it would be difficult to sustain an office that was attempting to perform all of the functions of a public defender office. And, assuming a relatively stable population within the county, a public defender office would also be unable to handle many cases because of conflicts. In juvenile cases with multiple parties, a public defender office can represent only one client while a consortium can represent as many parties as needed (assuming a sufficient number of members).

The discussion above regarding juvenile representation, loan repayment assistance and the creation of resource attorney positions in Coos County are equally applicable to Curry County.

Attachment 4

MEMO

To: The Public Defense Services Commission

From: Ingrid Swenson

Re: Work plan for Ingrid Swenson for 2008

Date: February 1, 2008

At the request of PDSC Chair Barnes Ellis, I am summarizing below my work plan for 2008, incorporating the goals and strategies currently assigned to me under the Commission's Strategic Plan for 2007-2009 and a number of projects and efforts that I think will help to achieve some of the broader goals and strategies of the Commission and of OPDS.

Goal I: Secure a Budget Sufficient to Accomplish PDSC's Mission.

PDSC may be asked to make an appearance before the Joint Ways and Means Committee during the course of the 2008 special session or before the E-Board before the beginning of the 2009 session to provide a progress report on its use of funds allocated for the current biennium.

My efforts will be primarily focused, however, on building support for an adequate budget for 2009-2011. There are currently two major initiatives under way. The Judicial Department, the Oregon District Attorneys Association, and the Criminal Defense Lawyers Association are coordinating an effort to give key legislators an opportunity to observe the criminal and juvenile justice systems in action. Legislators are invited to spend a day in a county courthouse in their districts, observing court proceedings, meeting with the judges, defense lawyers and the district attorney. I am participating in the planning group and in some of the visits. It is hoped that through this project, legislators will become more familiar with both the importance and the interrelatedness of the work of these three justice system components.

A group of four legislators is interested in promoting a measure in the 2009 legislature, similar to SB 411 in the 2007 session, which would allocate funds to PDSC for the specific purpose of improving representation in juvenile dependency cases. It is anticipated that the group will seek funding for a pilot project in a small number of counties rather than seeking funding for a statewide initiative as it did in 2007. A meeting with members of this legislative group is being scheduled. The Department of Human Services is working with OPDS to identify possible pilot sites.

In addition to these two efforts, I will be meeting with legislators as the opportunity arises during the 2008 session and thereafter to talk about public defense funding and any issues of interest to particular legislators.

I will also be working with Kathryn Aylward to develop a budget proposal for 2009-2011. As part of that process the agency's key performance measures will be revised to better reflect progress towards the agency's mission and goals. We have already met with one of the Department of Administrative Services' key performance measure specialist and will be updating you about recommended new measures at the March PDSC meeting.

Goal II: Assure the Quality of Public Defense Services.

I will continue to work with Paul Levy and the Quality Assurance Task Force to address issues regarding the quality of services provided by PDSC's contractors. Three additional site visits are planned for 2008, along with a more concentrated effort to follow up on earlier visits. After discussing PDSC's key performance measures with DAS staff, OPDS will be working with the task force to identify a consistent set of criteria for measuring quality which would allow OPDS to track changes in the quality of services provided by individual contractors and to compare quality levels across the state and between individual contractors.

We are currently reviewing the results of a statewide quality assurance and workload survey and will be distributing the results to the contractors and seeking ways to address issues identified in the survey responses. A report on the survey results and actions taken by OPDS will be presented to the commission in March or April.

I will continue to be involved in a number of initiatives aimed at improving representation in juvenile cases. I currently serve on a number of committees which include quality representation as one of their goals. The Juvenile Court Improvement Project provides training for judges, lawyers and others involved in juvenile dependency cases. It is creating new training tools for use by all of these groups. The Project also makes a significant contribution to the annual CLE sponsored by the Juvenile Law Training Academy. I currently chair this group which includes representatives from the University of Oregon Law School, the Juvenile Rights Project, the Oregon State Bar, the Juvenile Court Improvement Project, the Oregon Department of Justice and the Oregon Criminal Defense Lawyers Association. This group will be planning the fourth annual CLE event for October of 2008.

I also serve on the Executive Committee of the Juvenile Law Section of the Bar and chair the CLE subcommittee. This group sponsors an annual CLE event for juvenile lawyers and judges.

Finally, I serve on the Education Committee of the Oregon Criminal Defense Lawyers Association and on its Juvenile Law subcommittee, both of which plan CLE events for juvenile attorneys.

One of PDSC's strategies for improving the quality and cost-efficiency of local public defense services is its service delivery planning process. The Commission's 2008 agenda includes service delivery reviews in three geographic regions of the state and two areas of substantive law. I will continue to plan each of these reviews, prepare the preliminary and final reports and ensure the involvement of as many of the local stakeholders as possible. When the commission reviews delivery in a specific geographic area, I visit each region and hold meetings with these stakeholders.¹ Based on the information obtained I prepare a preliminary report for the commission. The preliminary report is also provided to local stakeholders who are asked to submit comments either directly to the commission in the form of testimony or to me for inclusion in the final report. As commissioners are aware, after the public hearing a draft final report is prepared, which generally includes recommendations for commission action; the commission then makes findings and policy decisions regarding actions to be taken.

Goal IV: Strengthen Working Relationships with Public Defense Contractors.

I will continue to seek the advice and assistance of the Contractor Advisory Group on matters of policy affecting public defense. This group of 14 Contract administrators served as an invaluable resource to Peter Ozanne and to me in the planning and carrying out of the functions of the executive director of OPDS. Currently one subcommittee is reviewing a large number of workload studies that have been performed in various parts of the country for the purpose of outlining what kind of workload study, if any, should be recommended to the commission for use in Oregon. Another subcommittee has been examining various proposals for a loan repayment assistance program for public defense attorneys. I will continue to work with the Contractor Advisory Group and any subcommittees that may be formed to assess particular needs or policy options.

Goal V: Continue to Strengthen the Management of OPDS

As the Commission is aware, OPDS has a group of highly skilled, hardworking, dedicated managers. In order to receive the maximum benefit from their considerable skills, the management team needs to work effectively and

¹ Commissioner John Potter has made the extraordinary effort to participate in each of these visits. It is extremely valuable to have the benefit of his input during interviews and in making preliminary assessments about the issues identified. It has also been possible for OPDS's analyst for the region to participate in many of the interviews.

efficiently. I will continue to work with the team and those advisors whom we have relied on in the past to improve the structure and functioning of our team.²

In 2007, each member of the management team participated in an evaluation of their work as managers. All OPDS staff members were surveyed about the performance of each member of the management team in terms of office leadership and related skills. Each manager was asked to perform a self-evaluation which included a discussion of the individual's goals for the coming year. The team then met to discuss ways in which other members of the team could support the individual in the accomplishment of those goals. I prepared a final evaluation incorporating the results of the survey, the self-evaluation and my own comments on the performance of the individual. I believe the team found the experience useful and we will plan to repeat it on an annual basis with such changes as we believe will enhance the usefulness of the process.

The employee survey also included questions about employee job satisfaction. It was clear from the responses that there was a desire for better communication within the office. As a result we will be having all staff meetings at least quarterly, LSD staff will meet on a regular basis for updates on developments within the section as CBS staff have done for some time. I will be providing email updates periodically on developments in the legislature, the issues before the commission, activities of groups and agencies affecting public defense, and the like.

Goal VII: Promote the Diversity and Cultural Competence of Oregon's Public Defense Workforce

All management team members are participating in efforts to achieve this goal. I have assigned many of the individual strategies to myself for implementation. Among the recommendations made to OPDS by the Diversity Task Force were that a recruiting brochure be developed, that a statewide directory of job openings in public defense offices be developed, that OPDS support federal loan forgiveness legislation and consider the commitment of PDSC funds to the creation of such a fund, that OPDS administer a baseline survey of providers to determine the current level of diversity among Oregon providers, and that a training/mentoring program for new attorneys be developed. A recruiting brochure has been developed and was first distributed at the Public Interest Law Career Fair at Lewis and Clark on February 2nd. Both Chair Ellis and I contacted key legislators regarding the John R. Justice Prosecutors and Defenders Initiative Act of 2007. I will continue to work through the American Association of Chief Defenders and through direct contact with legislators to promote passage of this act, which would provide loan repayment assistance to both prosecutors

² Geoff Guilfoy provided very valuable assistance and advice at an all-day retreat in June of 2007. Commissioner Mike Greenfield recently met with our management team and our two new chief defenders to share some of his experiences as a manager of a number of Oregon public agencies, some principles of good management and to problem solve with respect to particular management challenges.]

and defenders. Although the commission approved exploration of a loan repayment assistance plan with PDSC funds, as I will report at the February 14, 2007 Commission meeting, the workgroup is not recommending that such a plan be pursued at this time. The Oregon Criminal Defense Lawyers Association agreed to post job openings for all public defense providers on its website. OPDS directs persons interested in employment with one of the public defense offices to this website for further information. I plan to convene an advisory group to review a draft survey instrument regarding the current level of diversity among Oregon providers. No progress has been made on the development of a training/mentoring program for new lawyers. At the next Contractor Advisory Group meeting, I will seek input from providers about how such a program could be created.

I will continue to appear at job fairs and recruiting events around the state, and elsewhere as appropriate, to identify and recruit law students of color to become part of Oregon's public defense system. I have been invited, along with three other Oregon attorneys, to present a panel discussion about legal career opportunities in the northwest to the Black Law Students Association Western Region Convention on March 1, 2008 in Pasadena, California.

Other Activities for 2008

The Chief Justice has a Chief Justice's Criminal Justice Advisory Committee which meets quarterly to discuss issues of statewide significance to the courts and the criminal justice system. To date I have been able to attend only one of these meetings but have asked Pete Gartlan and Rebecca Duncan to attend others on OPDS's behalf.

At the invitation of the Governor's Public Safety Coordinator, I participate in monthly meetings with the heads of other public safety agencies³ to learn about developments affecting public safety in the state and to exchange information about the activities of each of our agencies.

As a representative of OPDS, I participate in a number of work and study groups relating to the functioning of the criminal and juvenile justice systems in the state. I attended a meeting in Grants Pass the last week in January that was convened by the Governor to discuss steps that the state's public safety agencies could take to assist counties significantly affected by the loss of timber funds. As the Commission is aware from its recent visit to Coos and Curry Counties, local public safety systems in those and other counties have been decimated by the loss of these funds. The Public Safety Subcommittee on which I served learned from the affected counties about the extent of the losses and discussed some

³ The group includes the Department of Corrections, the Board of Parole and Post Prison Supervision, the Oregon Military Department, the Oregon State Police, the Oregon Judicial Department, the Oregon Youth Authority and the Department of Public Safety Standards and Training.

possible systemic solutions, including, for example, the wider use of early case resolution programs such as the one the Commission heard about in Washington County.

I have also agreed to serve on the Critical Incident Response Team (CIRT) Review Group at the request of the governor's staff. This group will be reviewing the Department of Human Services' efforts at implementing the critical incident response protocol developed in 2004 to help the agency better address sensitive child welfare incidents, and making recommendations to strengthen the agency's ability to review and respond to these incidents and report on the results. I will be expected to bring to the group input received from the public defense attorneys who represent children and parents in juvenile dependency proceedings.

Periodically, I am invited to make presentations on public defense services or specific areas of representation to interested groups. In 2007 I talked about PDSC's efforts to improve juvenile representation: at a statewide meeting of juvenile court judges, at a quarterly meeting of Citizen Review Board (CRB) coordinators, and at an annual training session for CRB members from around the state.

In early January I made a presentation on Oregon's public defense system to the Mary Leonard Law Society in Salem. There were a number of Willamette University Law School students and law clerks in attendance, whom I of course urged to consider a career in public defense.

I participate in periodic telephone conference meetings of The Public Voice Committee of the American Council of Chief Defenders (ACCD), which is exploring avenues for effectively conveying the importance of high quality public defense to the general public. I also attended the national ACCD conference in San Francisco in August of 2007.

As time allows I plan to attend other events throughout the year that present opportunities for increasing understanding of and support for public defense in Oregon.