

Members

Barnes H. Ellis, Chair
Shaun S. McCrea, Vice-Chair
Henry H. Lazenby, Jr.
Peter A. Ozanne
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, March 10, 2011
9:00 a.m. – 2:00 p.m.
Room 302
Lincoln County Circuit Court
Newport, Oregon

AGENDA

1. **Action Item:** Approval of the Minutes of PDSC's October 22, 2010 Meeting; October 23, 2010 PDSC Retreat (*Attachment 1 and handout*) Barnes Ellis
2. Comments/discussion of Transcript of December 9, 2010 PDSC Meeting (*Attachment 2*) Barnes Ellis
3. Presentations on Public Defense Delivery in Lincoln County (*Attachment 3*) Invited Guests and Others
4. Update on Lane County Service Delivery Plan (*Attachment 4*) Ingrid Swenson
Brad Cascagnette
5. Preliminary Discussion of PDSC Policy and Procedure regarding Contracts for Personal Services (*Attachment 5*) Paul Levy
6. Executive Director's Annual Report (*Handout*) Ingrid Swenson
7. OPDS Monthly Report OPDS Staff
 - Budget report (KA/IS)
 - Legislative Discussions on Death Penalty/ Drug Cases (KA)
 - Annual Statewide Survey report (PL) (*Attachment 6*)
 - Report on Immigration law resource, Need for Domestic Relations Assistance (PL/IS)
 - Appellate Division Report (PG)

Notes

Please note: Lunch will be provided for Commission members at 12:00 p.m.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.

Next meeting: The next meeting of the commission is scheduled for April 28, 2011 from 10 am to 3 pm at the Office of Public Defense Services in Salem, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Friday, October 22, 2010

12:30 p.m. to 4:00 p.m.

Agate Beach Hotel

Cove Room

3019 N. Coast Hwy

Newport, Oregon 97365

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
John Potter
Janet Stevens
Chief Justice Paul De Muniz (provided testimony)

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Shawn Wiley
Paul Levy
Billy Strehlow
Amy Jackson

The meeting was called to order at 12:30 p.m.

Agenda Item No. 2 Looking Ahead: Crime Rates, DA Charging Practices, Judicial Resources and their impact on Public Defense Services in '11-'13 and Beyond

Multnomah County District Attorney Michael Schrunck described changes in district attorney charging practices that had been implemented in Multnomah County in July of 2010. A group of non-person misdemeanors are now being prosecuted as violations. It has been the practice for some time in Multnomah County to treat some misdemeanors as violations. When additional deputies were lost to budget cuts the office increased the number of misdemeanors handled as violations. There was no initial reaction by the public until a story was published in October. Costs are reduced for the district attorney's office whenever there is a reduction in the number of times a deputy needs to handle a file. With violations, the deputy usually sees a file only once; with misdemeanors the involvement is much greater. He recently attended a national conference on court innovation where the focus was on preserving the rule of law. Other district attorneys offices are dealing with similar issues to those in Multnomah County. Most DAs agree that they need to focus on violent crime, but even with behavioral and property crimes when someone breaks a law something probably ought to happen. At the current time, crime is going down, both violent crime and property crime.

Chair Ellis asked about the implications of the change in charging practices for public defense. Mr. Schrunck said he thinks a defense lawyer should be present to

provide at least some review for cases being handled as violations. Chair Ellis thanked Mr. Schrunk for his presentation and for his testimony to the legislature in 2003 in support of funding for public defense.

Jeffrey Ellis, Capital Resources Counsel for Oregon, described his legal background and experience in Oregon, Washington and Texas. He said there are significant differences in how death penalty cases are handled in Washington and Oregon. Washington has twice as many murders as Oregon but only seven men on death row compared to 34 in Oregon. Washington prosecutors seek the death penalty in only two to five cases per year compared to 20 – 30 cases in Oregon. The scope of the statutes in both states is similar. Washington invests prosecutors with discretion at the outset of a case to decide whether or not to seek the death penalty by requiring that they file a notice of the intent to do so. Such motions are filed in only approximately 20% of the cases. In the great majority of cases in which they do not seek the death penalty they do not ask for a guilty plea. Long time King County Prosecutor Norm Maleng said that he would never use the death penalty as a bargaining chip, believing it to be too coercive. Oregon prosecutors express the belief that the value of the death penalty in many cases is that it will produce a guilty plea. After Washington prosecutors make a decision not to seek the death penalty the case is treated as an ordinary murder case and the costs associated with it are significantly less than those in a death penalty case. In Oregon cases plea agreements that result in non capital sentences usually do not occur until just prior to the time set for trial, so that most of the costs of capital litigation have already been incurred. Washington prosecutors are required to file the notice of intent to seek the death penalty within thirty days, although the date is usually extended by agreement with the defense for six to 12 months. Prosecutors decide not to file such notices in the great majority of cases, filing it only in “the worst of the worst” cases. Mr. Ellis said the question in Oregon is whether our system is working in an effective way to identify the true death penalty cases early enough in the case to prevent wasted resources. Mr. Ellis said that he did not believe prosecutors make decisions about whether to seek the death penalty based on the costs of prosecution. If Oregon were to give prosecutors discretion to seek the death penalty, he believes there could be substantial savings. The Washington defense bar is under pressure to complete its mitigation investigation but the system is working for defense lawyers.

Chief Justice Paul De Muniz testified that the state is facing what has been described as a \$10 billion deficit in the next decade. The current projection is a \$3.2 billion deficit in the next biennium. The Judicial Department started the biennium with less funding than it had in the prior biennium and has recently been asked to reduce its current budget by an additional \$13.3 million. Despite these cuts the courts will remain open during business hours and will process all case types. Currently there is a 10 to 20% vacancy rate in judicial staff. He met with staff in all 27 judicial districts this year and explained that the department would need to undertake an aggressive reengineering of the courts to continue to operate on fewer resources while maintaining or improving services. The department will need to make more effective use of resources, leverage technology to become more efficient and accessible, and align resources with essential services. He provided examples of how staff functions had been realigned to cover vacancies and how technology was creating savings. An implementation committee is focusing on centralizing the administrative functions of the courts, while attempting to promote convenience for litigants, reduce the cost and complexity of the judicial process and maintain or improve access to justice. The Department maintains good relations with public defense, which is a critical part of the justice system, all of which should be funded in balance. E-court implementation in the appellate courts will be complete by the end of the biennium. There are pilot projects involving electronic content management in five trial courts and the Department is processing a request for proposals for a single source provider to complete the E-court transition. It is not yet clear whether funding will be available to go forward. Passage of time and rapid technology changes have made the total cost less than originally anticipated. Commissioner Lazenby inquired whether the courts were looking at alternative

means of resolving cases. Chief Justice De Muniz said that some states, such as California, are moving in that direction because their courts can no longer support the civil justice system. Unfortunately this creates a two tiered justice system, one for the wealthy and businesses and one for criminal cases and self-represented litigants. Commissioner Lazenby asked whether one way to reduce the demands of the criminal system would be to adopt limits on charging decisions. The Chief Justice responded that he could not comment on that approach but noted that the governor is creating a sentencing commission to review Oregon's sentencing scheme and its costs.

Marion County District Attorney Walter Beglau is the vice chair of the Oregon District Attorney's Association. He testified that Marion county has had a case reduction policy in place for two decades following the adoption of Measure 5, which he has adjusted over the course of the six years that he has been in office. His office, which lost five percent of its staff in 2009, assigns priority to cases involving violence, including domestic violence, and child abuse. It takes no action on another group of cases including Criminal Mischief III, Criminal Trespass II, Disorderly conduct, Failure to Appear II, Frequenting and Harrassment unless there are aggravating circumstances. The office uses an early disposition program for a third group of cases including Misdemeanor Driving While Suspended, False Information, No Insurance, Offensive Littering, 911 calls and Theft III. There were 1900 such cases that were treated as violations through the EDP program in 2009. Defendants who go through this program get a fine and restitution but no probation and no one is working with them to address mental health or substance abuse issues. The total number of cases in Marion County has decreased by several thousand over the last couple of years. Another category of cases that has been triaged is the offenses that occur in the institutions – the prison and the state hospital. There is a written policy that provides that no action will be taken regarding certain offenses. Finally, there are some felonies that are given misdemeanor treatment such as felony possession cases that go to drug court. If resources become even more stretched, the next step may be to treat some felony possession cases as violations. One area of concern in Marion County is that the District Attorney's office may not be able to continue to provide representation for the state in juvenile dependency cases.

Chair Ellis inquired whether Mr. Beglau had heard Jeffrey Eillis' testimony. He said that he had. He said that he would be willing to sit down with the defense on this issue and talk about ideas. The Oregon District Attorneys' Association had not been in favor of establishing a timeline for deciding whether to seek the death penalty and thirty days would clearly not be enough time. Commissioner Lazenby asked whether the potential expense of a capital prosecution ever affected the decision to seek the death penalty and Mr. Beglau said that it had never been a factor for him and is not one of the criteria used to make these decisions. Chair Ellis inquired whether Mr. Beglau had any comment on the public defense providers in Marion County. Mr. Beglau said that he worked well with both organizations and has seen improvements at MCAD in the areas of concern identified by the Commission. Both prosecutors and defense attorneys need adequate training.

Craig Prins, the Executive Director of the Oregon Criminal Justice Commission, made a video presentation on Oregon crime rates and discussed some of the factors affecting crime rates in Oregon and elsewhere. He said that much of the information he would present comes from *The Great American Crime Decline* by Franklin Zimring. Both violent and property crime have been declining for the past 15 years and dropped 40% in that time. Much of the information relied upon comes from Uniform Crime Reports but he said it is also reflected in victimization studies. In Oregon the violent crime rate dropped 2% to the lowest rate since 1969. Oregon's decrease is second only to New York's. Oregon's rate dropped while it increased the use of incarceration but New York's dropped while it decreased use of incarceration. In terms of longer term trends, the crime rate was flat in the 1950s and '60s, it increased in the 1970's and '80s and has been dropping since the early '90s. Portland drives Oregon's crime rate because it is our largest city. In Portland there

was a 71% drop in violent crime from 1985 to 2009. Portland used to account for more than half of the state's violent crime but by 2008 Portland accounted for only 35%. Crime rates vary from one part of the state to another because crime is a complex local problem. Oregon's property crime rate dropped 10% from 2008 to 2009. Oregon was in the top five highest states for property crimes but has now dropped to the middle, with the greatest decrease in the country in the last five years. Victimization surveys reveal similar trends.

The volume of cases being processed has not declined as rapidly as the crime rate because in the 1980's the system was really at capacity. Among the possible explanations for the falling crime rate are unemployment or poverty, incarceration and demographics. Most economists and criminologists don't think there is much of a link between unemployment and crime but there is between habitual poverty and crime. Incarceration is a part but only a small part of the reduction in crime. It has been estimated that a 10% increase in the incarceration rate would result in only a two to four percent drop in the crime rate. Only 13 to 15% of Oregon's 45% drop in the violent crime rate is attributable to increased incarceration. Many say that the one trend over time that is consistent with a decline in the crime rate is demographics – the percentage of Oregon's population that is male and between the ages of 15 and 39. Juvenile crime rates have also declined and this is a good indicator of future crime rates. These trends are national. Community policing, elimination of methamphetamine labs, use of risk based probation techniques, and other factors have also been important. Perception of crime prevalence by the public, however, is not based on actual crime rates but on media coverage of high profile crimes.

While crime rates have dropped significantly, Oregon's population has grown and therefore the total number of crimes has declined only 10% since 1991 and the arrest rate only 2%. Felony convictions are actually up since 1991. Prison population has more than doubled and prison intakes have doubled. Even if Oregon wanted to incarcerate more individuals than it does now, it will not be able to do so in the current budget environment. It is expected that expenditures will exceed revenue in the '11-'13 biennium by \$3.5 billion. We will probably be shrinking our public safety system since we have to have a balanced budget and the Department of Corrections accounts for 60% of the public safety money. Crime has declined, Oregonians are safer than they have been in decades. There is a diminishing return on incarceration and the great majority of offenders need alcohol and drug treatment. Oregon needs to consider moving to a modern sentencing guidelines system along the lines of the federal system, as well as adjusting some sentencing provisions like Measure 11 as recommended by the Governor's recent cabinet. To maintain our current 14,000 prison beds, the rest of the public safety system would have to shrink between 40 and 60% to afford those beds.

[Recess]

Agenda Item No. 1 Approval of the Minutes of August 5, 2010 Meeting

MOTION: John Potter moved to approve the minutes; J. Stevens seconded the motion; the motion carried without objection: **VOTE 4-0.**

Tom Crabtree advised the Commission that Commissioner Stevens had recently been inducted into the Bend High School Hall of Fame in recognition of her career in journalism and her dedication to advocating for persons with disabilities and the importance of voluntarism. Her service on the Commission was noted. Chair Ellis congratulated her and thanked her for her service.

Agenda Item No. 3 Contract Approval Jackie Page – Mitigation Contract

Kathryn Aylward described the proposed one year contract with death penalty mitigation specialist, Jackie Page.

MOTION: John Potter moved to approve the contract; Chip Lazenby seconded the motion; the motion carried without objection: **VOTE 4-0.**

Agenda Item No. 4

Approval of Service Delivery Plan for Clackamas County.

Chair Ellis reminded Commissioners that they had been presented with a proposed service delivery plan for Clackamas County at the previous meeting and had asked that the report and plan be amended to reflect their concerns and the likelihood that they would need to revisit the county in the next several years. An amended report was submitted to the Commission for approval.

MOTION: Shaun McCrea moved to approve the report; Janet Stevens seconded the motion; the motion carried without objection: **VOTE 4-0.**

Agenda Item No. 5

Adoption of Schedule of Compensation for Recoupment of Costs for Appointed Counsel

Paul Levy said that some judges had expressed concerns about the need for better guidance about the amount that public defense clients should be required to pay for recoupment of defense costs at the end of the case. Although there is some ambiguity in the current statutes, a statutory change is not required for PDSC to adopt a compensation schedule since Chapter 151 already authorizes it to adopt such a schedule. Many courts currently rely on the use of PDSC's hourly rate to establish a recoupment amount even though most attorneys are not paid by the hour. This approach has presented difficulties since most lawyers do not keep track of their hours, may not know the amount paid for the case under their contract with PDSC and are uncomfortable providing information that will be used to impose a recoupment obligation on their client. The proposed compensation schedule reflects the typical cost for each case type, including the average cost for non routine expenses. He noted that the Commission was being asked to approve an amendment to its policies and procedures establishing such a schedule. Since OPDS is awaiting further comment from the Judicial Department on the proposed schedule PDSC action was not being sought today. Kathryn Aylward explained that determining an average cost for each case type would have been very difficult so the mode was chosen since it reflects the most frequently encountered value in PDSC's contracts. Greg Hazarabedian expressed concern about imposing greater costs on indigent clients. Commissioner Lazenby said that the adoption of the schedule would not affect the court's discretion regarding the amount of recoupment to order in a particular case. Commissioners discussed the potential impact on both public defense clients and clients with retained lawyers of learning the actual costs of public defense representation. Chair Ellis proposed moving forward with approval of the schedule subject to change if objections are received from the Judicial Department.

MOTION: John Potter moved to approve the schedule; Janet Stevens seconded the motion; the motion carried without objection: **VOTE 5-0.**

Agenda Item No. 6

Amendment to Eligibility Standards

Kathryn Aylward said that verification specialists in five counties had agreed to track denials of counsel and provide their worksheets so she could determine what assets had been reported by the applicants who were denied. Ultimately verifiers from only three counties provided data. She received worksheets on 60 denials. She then reviewed the data to determine which of those who were recommended for denial would be eligible for appointment under two eligibility standard options. Option 1 had been presented to the Commission at an earlier meeting and the Commission found it too low. Option 2 represents a doubling of the amounts in Option 1. In 28 of the 60 examples, the court appointed counsel despite the recommendation of the verification specialist. These applicants may have had assets that could not be liquidated. In two of the examples the defendant failed to appear so no outcome was indicated. Twelve of the applicants decided to represent themselves. It cannot be

determined whether they had the money and chose to represent themselves or were simply not successful in retaining counsel. She said that the data indicates that it is only in the lower end cases that counsel is being denied. Commissioner McCrea said that the impact of conviction for even the lower level offenses can be significant. Kathryn Aylward estimated the annual fiscal impact of each proposed option. Chair Ellis said he preferred Option 2 because there is greater harm in denying someone counsel who can't afford it than occasionally appointing counsel for someone who can. Commissioner Potter said that Option 2 is closer to the actual cost of privately hired lawyers than Option 1. Kathryn Aylward said that it is sometimes very difficult for clients to liquidate assets and doing so might significantly delay a case. The court can always order recoupment of the costs at the end of the case.

MOTION: John Potter moved to adopt Option 2 of the privately hired attorney fee schedule; Janet Stevens seconded the motion; without objection the motion carried: **VOTE 5-0.**

Agenda Item No. 7

OPDS Monthly Report

Ingrid Swenson reported on the new office and the open house that was held in October. She noted that the new location is much more convenient for staff.

Peter Gartlan reported that the Appellate Division's regional contact project had been inaugurated at the management conference the preceding day. He summarized the recent Oregon Supreme Court holding in *State v. Partain*, which removed the ceiling on the sentence a successful appellant could receive upon remand from a successful appeal. The Division is now trying to assess the risk for each client of a harsher sentence on remand. Chair Ellis said that there would be additional system costs imposed on appellate lawyers as a result of the change. In addition the ruling creates an incentive for a defendant not to pursue a legitimate appeal. Commissioner Lazenby said that it is probably not a lot different from telling a client about the risk of going to trial. Peter Gartlan said that a legislative proposal had been submitted to restore the ceiling. The Appellate Division submitted two other legislative proposals, one of which would allow involuntarily confined defendants to have the mailing date of a document sent to the Court of Appeals be treated as the arrival date since they do not have access to certified mail like other litigants. The other legislative proposal would bring Oregon law into conformity with a recent United States Supreme Court ruling on forfeiture by wrongdoing of the right to confront a witness whom the defendant has intentionally prevented from testifying. Mr. Gartlan reported that the Appellate Division currently has several cases pending in the Oregon Supreme Court. He also discussed the new two judge appellate panels and the types of cases the Appellate Division believes are appropriate for the panel.

Ingrid Swenson and Karen Stenard described the legislative proposal being prepared by the Interbranch Workgroup that would increase resources available at the time of shelter hearings in juvenile dependency cases.

Chair Ellis said that he probably would not be able to attend the December 9 PDSC meeting but Commissioner McCrea said she would be available to chair the meeting.

MOTION: Chip Lazenby moved to adjourn the meeting; Shaun McCrea seconded the motion; the motion carried without objection: **VOTE 5-0.**

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION
UNOFFICIAL EDITED TRANSCRIPT

Friday, October 22, 2010
12:30 p.m. to 4:00 p.m.
Agate Beach Hotel
Cove Room
3019 N. Coast Hwy
Newport, Oregon 97365

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
John Potter
Janet Stevens
Chief Justice Paul De Muniz (provided testimony)

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

The meeting was called to order at 12:30 p.m.

Agenda Item No. 2 Looking Ahead: Crime Rates, DA Charging Practices, Judicial Resources and their impact on Public Defense Services in '11-'13 and Beyond

0:07 Chair Ellis I encountered Mike earlier today. He was totally lost, looking for a courthouse and I explained that it has been a problem for him to find the courthouse. Mike has been a good friend of the defense community and we welcome you here.

0:30 M. Schrunk Thank you. I have given you three handouts and we can talk about those. One is what is called the Violation Program, the second is a graph with three different colors, about what we have done and we can track...

0:49 Chair Ellis The Multnomah DA has gone high tech on us.

0:54 M. Schrunk No. I had to go to Kinko's for this one. We still haven't been able to talk them into funding us right. Let me tell you. It is my understanding that you wanted to hear some of the things and some of the trends we are doing. Let me first say that the one that is really heating up and there is a little bit of sadness but there is a little bit of humor in it. With the budget cuts we have lost lawyers like everyone else has. How do you cope with that? I believe that we should pay adherence to the rule of law as best we can, and in that regard I think there ought to be a consequence for violation of the law. That leads us into - we started a violation court, a violation procedure. I thought with some of the misdemeanors instead of filing them as misdemeanors we would file them as violations. We gradually expanded that. The bottom half of the pages are cases that would be filed as violations. The upper ones are ones, and we tried to take the most serious violations, that we will file as misdemeanor crimes, at least expose someone to a criminal sanction if they committed these. The interesting part of this is that we have gradually done this over a period of time. We have worked with the court and with the defense very successfully in creating what we

call a “community court” or “violation court” really where there is certainly no jail sanction. So with the last budget cuts with the stealth operation we said if we lose misdemeanor deputies we are going to have to increase this program and readjust the crimes we are doing. We had the public hearings and it went through. You hem and haw and you argue about these things and the budget cuts happen. We told people it was happening and we told them we would implement it the first week in July. Well we did. Business as usual. No one mentioned a thing. In October, Lars Larson’s favorite fish wrapper decided to write an article about the DA who is kissing off crimes. I couldn’t believe it. You get people saying, “The sky is falling. The sky is falling.” My answer is it didn’t change much on the street. If you take, and you have the list here, but if you take a look at the graph, the red is your misdemeanor crimes and the yellow is the violations. You will see that from the number when we started in July that we dropped down. It comes down and is plus or minus a few points, but you can see that we stopped issuing about 25% of the cases, misdemeanors, but we increased about 25% of the violations.

- 4:16 Chair Ellis The top line is (inaudible).
- 4:21 M. Schrunk The top line are the ones that are issued. Actually all three of them have a downward slant. That could bode well for us. I think it probably does. If you have questions...
- 4:42 Chair Ellis Walk me through how the violation process works.
- 4:52 M. Schrunk Alright. You, Barnes, commit something and the police get called. If it is a crime, which it probably is, a shop lift or something, they would arrest you, cite you, what they would do for a misdemeanor. Now the issuing deputies have this list and unless there are aggravated circumstances or multiple offenses, they stamp on the file “violation treatment” and it goes right to violation court.
- 5:31 Chair Ellis Which immediately means no risk of jail?
- 5:35 M. Schrunk Absolutely. It means we have not filed anything where there is exposure to jail. Then we try and put it in as fast as we can in court. We have a relatively rapid docket except on three day weekends. There is an arraignment.
- 5:56 Chair Ellis A violation charge gets appointed counsel, right?
- 6:03 M. Schrunk I think that is probably what you would want to talk about. But do you have appointed counsel at the same rate that you pay a felony case, a misdemeanor case, you would have consult. A long time ago when we started this, and I have learned – been beaten over the head by - I suspect some of the people who are sitting behind me. The first stop I make is with my public defender and defense bar and say, “Hey, I got this goofy idea and what do you think? Should we do it or should we not do it?” Jim Hennings was a great sounding board. He would scream at me frequently when I would try and do something.
- 6:50 Chair Ellis We have all had that experience.
- 6:53 M. Schrunk So it goes in. It is a plea court. There can be a court trial. The sentences are community service - Clean and Safe. We have a crew that cleans up downtown - the minimal amount of hours. Usually a very minimal or non-intrusive sentence. That is it. It is a violation. End of story. Now instead if you are one of the aggravated ones so that a misdemeanor was filed, you would be arraigned. You would go through and end up with a court appointed attorney. There would be a plea offer and normal discovery goes on.
- 7:52 Chair Ellis What do you do with a person who recidivates? They come back.
- 8:00 M. Schrunk In the criteria we have tried to provide for that person. If they continually get arrested for sleeping in the doorway or things like that – it has got to be a real

problem before they get the misdemeanor filed. The other thing we have learned is that violation court and community courts, as we have set them up, the population comes in there. Let me just give you a quick history. When we started a community court we started one in the King neighborhood, the King School, and then we put one out in the southeast and we did the west side downtown and one out in Gresham. We had four of them going but with budget cuts we had to consolidate. So we kept alive the community court dockets in Gresham and in the downtown area. We still try to use that as a violation court, a plea court. You still have that and it works, although it is not a true community court.

- 9:19 Chair Ellis How does this work from the standpoint of your saving the cost of deputies?
- 9:30 M. Schrunk As you certainly know from the practice of law, anytime you give a file to a lawyer and they touch it more than once it is costly. These are usually a one touch. They are a review and a deputy in court. But now the misdemeanor you got charged with you could be going through a lot of touches by the defense, by the prosecution, witness control, witness notification. Cases do not get assigned out on the first trial setting as people sadly learn. It's continual re-contacting, re-subpoenaing, which is an expense to the prosecution and then they go – as those who have practiced in the Metro area know – to pretrial Friday. If you walk in the Multnomah County Courthouse you will see the staircase filled with people. There are deputy prosecutors, defense counsel, and defendants and their families are queued up outside the assigned judge's courtroom to work out a plea and close the case.
- 10:54 Chair Ellis Are other DAs following this practice, or are you kind of doing your own?
- 11:02 M. Schrunk Walt is here and is going to talk to you. I think every DA is struggling with the same things that we do when you talk to people around the country. Some people shut the door completely on cases.
- 11:18 Chair Ellis Just do nothing.
- 11:19 M. Schrunk Yeah. Do nothing. I am still trying to limp along and I think there ought to be some sort of consequence. I truly believe that police many, many times, probably 90% of the time, solve the problem on the street, whether it be an arrest or a trip to a jail or a written citation, they remove them from that street corner or that store front where the problem is.
- 11:53 Chair Ellis Are you getting any push back from the police?
- 11:56 M. Schrunk There is certainly push back. There is push back from police. There is push back from the merchant community. Again, I guess I shake my head. In the last three months we filed a whole lot of those and hardly a peep until someone writes about it. I don't believe we should operate in a stealth operation and hide things. I have an obligation to be up front and tell people what we are doing. If you were my county commissioners I would tell you that this is what I am going to do. I am not recommending it to you. It is not the public safety plan or the prosecutorial plan that I would recommend to you, but if these are all the dollars that you have to fund my operation this is what you will get.
- 12:56 Chair Ellis What do you see as the implications for our task which is provision of defense at the lowest cost consistent with standards of quality?
- 13:10 M. Schrunk I think there needs to be a lawyer present. I know people will argue that there is no jail potential because you have removed that. I think someone that can sort and pull this out and look and see if you have an issue that this ought to go a different route and often bang heads with my deputy district attorneys if they should. I think there needs to be a presence, but does it need to be ...
- 13:44 Chair Ellis But Steve Houze doesn't have to do it.

- 13:48 M. Schrunk Although I'm sure given the appropriate case he would come in and stand beside you, Barnes, should you get cited into violation court.
- 13:58 Chair Ellis That is always comforting to know.
- 13:59 M. Schrunk I met with a number of people earlier this week from around the country in a meeting sponsored by the Center for Court Innovation in New York. They have been big pushers building on the mid-town Manhattan Community Court, of pushing that in. We in Portland became the second place to start the "Community Court," but we did it on a docket level, not the \$50 million building and service level that mid-town was able to do. I think you are seeing more and more of that around the country - trying to figure out how to preserve the rule of law. When you make a law something probably ought to happen. It is like when I got caught jaywalking, the shame factor will keep me from jaywalking certainly within a two block radius of the courthouse. I think you are seeing this and I would expect the people from this association that go to their national meetings, they are faced with a dilemma that you are because prosecutors are faced with the same dilemma. What are we going to do? How are we going to finance this? I can say thankfully we have not seen a big increase in crime going up. But you are going to have crime and it is pretty simple. I think most prosecutors are going to say "TCB" - take care of business and that means you have to do something with the violent crime and you are going to do that. The rest of the things we are grappling with. What do we do with the behavioral crimes? What do we do with the property crimes? I told my commissioners when I gave a talk about public safety down at the Benson not too long ago to a business group. Afterwards they were talking about the cost of prosecution, defense, and incarceration. I went through the same triage. Finally somebody said, "That is great. Spend all you want on violent crime. You do everything you can on your very serious crime, your Ballot Measure 11, your murders, and your aggravated murders, but just make the other people stop." This is the Q and A after the talk. It was actually a woman and she runs a business. I think she was jerking my chain a little bit. I said we are trying everything. I told them we do drug courts. We do diversion. We do this probation stuff. We do start court. I said, "but that is expensive too." She just said to make them stop. I said, "Do you have a solution how to do this?" She said, "Can't you just give them a pill?" If only it was so easy. You are going to get push back. We get push back. The police get push back when they don't respond. We get push back when we don't file something whether it is a commercial resident of the community or a residential person, someone who is actually living there whether it is business or not. That is the dilemma we are facing. We are really trying to telegraph what we are doing. You have got 36 different district attorneys around the state that your men and woman are dealing with. You have to ask them what they want to do. You might want to take a look at the last one. That is the stats. It gives you the behavioral, property, and the person crimes. You know they are not that much changed. Then I put your homicides down there. Homicides are down although I checked the cold case stack before - yesterday I checked and there are over 200 that are sitting in the cold case file. Are they all going to pop? Are any of them going to pop? Who knows. I don't know how you forecast budgeting for that. That is what I see coming. I see crime going down. You have had violent crime go down and you have had property crime go down. The solution is how do we keep the low end, the misdemeanors and the property and behavioral people from re-offending? It is policing, prosecution, court, the probation department and Max running his corrections and local sheriffs. We have gone from 2100 beds in the Portland area down to about 1300 right now. We are surviving. People are grumbling. It is a minor crime and everyone in here knows what a minor crime is. It is when Potter is the victim and not Barnes. Any questions? I am not thin skinned. If you have a better solution for God sakes say so.
- 20:17 J. Potter Did I miss hear you or I am misreading the chart here? It looks to me as though homicides have gone up.

20:25 M. Schrunk Overall they have gone down. They go in batches.

20:32 J. Potter But for the year you have 19?

20:33 M. Schrunk Yeah.

20:33 J. Potter And last year it was 11?

20:42 M. Schrunk Yeah. Now I started in the ancient past and I had a full head of hair, but I used to talk to people and we would talk about 60 and 70 in the Portland area yearly. Now you have fewer, which is good.

20:56 Chair Ellis Okay. Thanks Mike.

20:59 M. Schrunk Thank you.

21:02 Chair Ellis I think this is about the 10th time that you have appeared before us.

21:08 M. Schrunk You know I will come down there. I believe strongly in the defense.

21:10 Chair Ellis Your testimony in 2003 was really wonderful. We all have a strong memory of that.

21:19 M. Schrunk I think that was because I was sitting alongside your Chief Justice. People were saying, "What is the Chief Justice and the DA from Portland here for? Why are they doing that?" I think it is because we all believe in the system. Thank you and keep up the good work.

21:35 Chair Ellis We all have a fond memory.

21:37 M. Schrunk I apologize for leaving you. I am due back up at Portland.

21:40 Chair Ellis I think you can find the courthouse up there. Jeff? For the record this is Jeff Ellis. We met for the first time today. Unless there is something in our DNA that neither of us knows about, I don't know that we are related.

22:07 J. Ellis Thank you. I am Capital Resource Counsel for the State of Oregon. This marks a full circle return to the State of Oregon. I went to law school here. I worked in law school at the Department of Justice writing appeals in their division with now Justice, but then Solicitor General, Linder. After leaving the State of Oregon I skipped across the river to the State of Washington and skipped across the adversarial divide to defense where I did defense work and did capital work in the State of Washington for approximately 20 years. I also practiced in the State of Texas, the heart of the death penalty for a number of years, and have taught both at University of Texas Law School and Seattle Law School. I taught capital punishment. What I want to do today is talk initially about some differences between the Washington death penalty experience and the Oregon death penalty experience, then invite a conversation about why those differences exist and whether it makes sense to talk about changes. Washington has about twice the number of murders that Oregon does, but its death row currently has seven men and Oregon has 34 individuals on death row. In addition, the number of cases that are potential death cases, where the prosecutor in the State of Washington has sought death, tends to range from year to year of an average of about two to five, whereas in the State of Oregon we have about 20 to 30 pending death penalty cases every year. They are fairly stark differences especially given the murder rate. The question then becomes why? Is it because, for instance, the Oregon capital murder statute is broader, that it involves a greater scope of crimes? I think the answer to that is no. They are roughly the same in terms of the potential scope of murders that can fall into the capital murder group. So instead what I think you are seeing is you are seeing a system in Washington that invests the prosecutors with discretion at the front of the end of the case to decide whether to file a death penalty notice and decide whether

the case is going to be a death penalty case or not thereafter. In about 80% of the cases in Washington, and it will vary from county to county obviously, but overall in about 80% of the cases the prosecutors choose not to seek the death penalty and thereby eliminate the possibility of the death penalty very early in the case. They also do so in a large majority of cases without asking for a guilty plea in return. So while there are certainly cases in Washington State where a prosecutor would agree to take death off the table in return for a guilty plea, in many, many more situations the prosecutor is simply making a qualitative judgment that this is not a case that qualifies as the worst of the worst, that this is not a case, although it falls within the aggravated murder statute, where death ought to be sought. I think as a result of that, what you see in Oregon and Washington in terms of juries returning verdicts is that in both states juries, more often than not, don't vote for death when they have that option. The big difference, of course, is the number of times that the jurors are given that opportunity to make that decision. The other thing that happens when a prosecutor in Washington State takes death off the table is all of the resources that come with the prosecution and defense of a capital case fall away. The case becomes an ordinary murder. That doesn't mean it is not well defended or adequately funded, but I think anybody who has done any amount of death penalty work recognizes that the costs associated with the death penalty really are far more significant than any other case that we have in our system. Consequently you have decisions that are being made at the 60 or 90 or 120 day mark in a case that that no longer is a death penalty case and all of the resources that normally would accompany that fall away. One of the things that we have been looking at here in Oregon is the difference between the amount of time that it takes in capital murder cases to get to a plea versus the difference in the time it takes to get to a trial. Again, in Washington if you saw that graph there would be remarkable differences because the capital cases would take three, four, five times as long as the non-capital cases. Here there is very, very little difference between the two in part because the pleas are happening really on the eve of what would be the trial. So even in those cases where there is a guilty plea, the cost associating with getting that case to a guilty plea...

27:15 Chair Ellis

Are the same as if you went to trial.

27:16 J. Ellis

Are the same as if you went to trial. The only thing you are taking off, obviously, is the costs that would have been associated with the trial and perhaps with the review thereafter.

27:25 Chair Ellis

Now your predecessor, Matt, spoke to us about two years ago and my memory is that he explained that in Washington there is a period of time before the prosecutor decides whether to seek capital or not. In that period of time the defense has the opportunity to try to dissuade, present mitigation, whatever. It takes it out of the publicity limelight that often accompanies an arrest. He attributed a lot of this difference to that procedure. What is your thought?

28:15 J. Ellis

Well, what happens in Washington State is after an arrest, and when a capital murder charge is filed, every prosecutor will say, "I am not deciding today whether this is a death penalty case or not. I am going to listen and hear what the defense has to say. I am going to talk to the victims. I am going to talk to the police officers. We are going to evaluate all of the circumstances and then decide." There will be some date set out in the future at which the prosecutor will announce this decision. It has become very common in Washington State for prosecutors then at the end of that period to say, "I don't think this falls into the category of the worst of the worst. I am not going to seek death in this case." Again, in many, many cases, in a large majority of cases, it is not because the defendant is offering up a guilty plea or the prosecutor has asked for that in response. That happens from time to time, but there is a remarkably different culture that developed in Washington State over that issue. Norm Maleng, who was the King County prosecutor for about 30 years, the largest county ...

29:19 Chair Ellis

The Mike Schrunk of Seattle.

- 29:21 J. Ellis Exactly. He said that he would never use the death penalty as a bargaining chip. He felt it was far too coercive. He would make a decision about whether a case was a death penalty case or not. In fact, he famously refused offers to plead guilty in exchange for taking the death penalty off the table.
- 29:42 Chair Ellis So are you agreeing with the summary that I gave of what I recall Matt telling us?
- 29:48 J. Ellis I am agreeing completely. I think prosecutorial discretion is the main reason that there are seven individuals on death row in Washington State and 34 here. Because it is a formalized system, the statute is set up in a way that tells the prosecutor, "You don't have to make a decision at the beginning of the case whether this is a death penalty case or not. You have the discretion to do that." And there is an expectation that the prosecutor will then make that decision and in most cases choose not to seek death penalty, and in what the prosecutor views to be appropriate cases, choose to seek it.
- 30:26 Chair Ellis This data discrepancy, which is amazing to me, has to be apparent to people on both sides of the system. I assume you have had discussions with some of the DAs in Oregon. Is there any interest in shifting to this delayed announcement system to give a little more time? Or is that an article of religion that they don't want to touch?
- 31:00 J. Ellis So far I haven't heard an overwhelming response about the movement towards it. I think, again, it is in part because of the way the systems have developed according to the statutes. I think prosecutors here will tell you they do have the authority not to seek the death penalty even in a case where they have charged capital murder. The reality though is it doesn't happen all that often where a prosecutor will simply pull back. I have also heard there is a strong belief that the value of the death penalty in many cases is that it will produce a guilty plea and that will result in closure for the victims. It will result in an end to the litigation in the case. I certainly recognize that there are those cases where the prospect of a death sentence would produce a plea. But I think if you look at a much bigger system wide analysis, the ultimate cost savings, and I am now pulling very far back from an individual case, the ultimate cost savings happen if prosecutors use discretion not to seek the death penalty in the majority of cases even without asking for a plea in return.
- 32:18 J. Potter How many days does the Washington statute permit the DA to make the decision in?
- 32:21 J. Ellis The Washington statute works within Washington's speedy trial rule. For an individual who is in custody, he or she has a right to go to trial within 60 days. So the statute sets 30 days because you have to give notice before trial starts. But in reality it doesn't really happen that way. There is a good cause extension that happens in almost every single case. What you are dealing with, again there is some variance, but I would say probably that it is in the neighborhood of six to 12 months that the initial decision making process happens. In all candor there is some tension around that. I think there is some push by prosecutors to try to shorten that period of time. There is some push by defense attorneys to try to lengthen that period of time. I think that is a natural tension that always exists within the system. But at a minimum there is some decision at a much earlier date than what we see here in Oregon about whether the case is going to be a death penalty case or not.
- 33:27 Chair Ellis Other thoughts? To me it is just an amazing data variation. The Columbia River can't explain it.
- 33:44 J. Ellis Again, I lived in Washington and I have lived in Oregon. I don't see tremendous differences in the population. I think the statistics bear that out in terms of how often jurors return death. They don't return death all that often. Certainly not what I saw in Texas where you put any case in front of a jury and it is likely that it is going to be returned a death sentence. I think what we are talking about is how many cases are potentially in that pool. There are two things that I can say. Is our death row too

large comparably speaking, and is our system at the trial level working in an efficient way to figure out which was cases are truly death penalty cases and which cases are not, and doing it an earlier enough point that there could be substantial savings?

- 34:36 J. Potter Are there economic/political interests in Washington that are different than Oregon? In Washington they fund their public defense on a county by county basis, correct?
- 34:44 J. Ellis That is true.
- 34:44 J. Potter As they fund their prosecution function. We don't do it that way here. Do you see that there is pressure from county commissioners on DA offices to make decisions not to charge death because it is costing the county not only to fund the prosecution function but also the defense function?
- 35:05 J. Ellis I have never heard of a case where a prosecutor says we are going to spend millions of dollars to try to execute this person. If we talk about the number of executions Washington actually leads Oregon. They have executed five and we have executed two.
- 35:41 Chair Ellis Two that...
- 35:39 J. Ellis Two that volunteered. There are greater efficiencies at work in Washington State if the ultimate goal is to seek an execution. That is a goal that is abhorrent to me personally, but it is the goal that the system is attempting to achieve.
- 36:04 Chair Ellis Do you recommend that we move down the track of trying to change the procedure in Oregon to match this procedure in Washington?
- 36:13 J. Ellis I am a big believer that prosecutors, if given that formalized authority, will exercise discretion and will look at a case early on and ask that very difficult and multi-faceted question, is this truly a death case? Although there will be variance from county to county and I certainly respect the right of each county prosecutor to make that decision for herself, what we will see is that in many cases the death penalty goes away because it doesn't simply fit into that increasingly narrow category of the worst of the worst.
- 36:52 Chair Ellis I know it is a sensitive thing for us to be the ones to propose it. I would really like to see a dialogue with the DA community to see if there isn't some interest on at least some of their parts to work on this. So in terms of where we go, I know when Matt spoke we kind of got excited about it and then we were told it is too close to the legislative session. I would be very interested if you could prepare a draft of what you think – I don't think it is horribly complicated – what legislation would look like. Let me know and Ingrid and see if there isn't a way that we could try to get a dialogue going on this. I know for us to just try to push it is not the most politically savvy way to try to get there.
- 37:57 J. Ellis Right. Ultimately what we are talking about here is prosecutorial discretion. Investing prosecutors with the opportunity to make a choice in a very formalized way.
- 38:09 Chair Ellis Nobody is arguing that they don't have that discretion. The issue is it is just amazing that the culture would be that different in what otherwise seems like the same kind of people on both sides of the river.
- 38:25 J. Ellis I agree.
- 38:26 I. Swenson Jeff, if I could just ask you to talk a little bit about what the defense does during that period of time. Do they do the same things you are observing here in terms of mitigation investigation and that sort of thing?

38:42 J. Ellis Yeah. What happens during the initial period of time, when the prosecutor needs to make a death penalty decision, is the defense team puts together and does what we call a mitigation investigation. It is the same thing that happens here in Oregon. I think the difference is that the defense also recognizes that they are working under a bit of time pressure. Prosecutors are not going to agree to an unlimited amount of time to get it done. There is very much a focus in that initial period of time on what are the most important things for me to discover and to put together and let's get it done right away. Anybody who is a lawyer recognizes that working under time pressure forces you to get things done. I think the difference is that all of those things have to be done in a very compressed period of time.

39:34 Chair Ellis That is why merchants encourage Christmas shopping.

39:37 I. Swenson And does the defense generally consider that they are able to do the job the way they want to in that time frame, or is that not the case?

39:46 J. Ellis I have never heard a single complaint from the defense about the system working to their disadvantage. Again, the complaint is how much time do I need to get mitigation packages done. I have never heard a defense attorney or defense team say that I hate the system and it doesn't work. Nor do prosecutors complain and suggest that it needs to be fixed.

40:14 Chair Ellis Great. Thanks a lot.

40:14 J. Ellis Thank you very much.

40:17 Chair Ellis Chief, you occupy both a presenter role and a Commission role. Which one would you like to do?

40:21 Chief Justice
De Muniz I'll be the presenter. Do you want me to sit up there?

40:30 Chair Ellis No, no.

40:32 Chief Justice
De Muniz Good afternoon everyone. Ingrid asked me if I would come down and address all of you with regard to the judicial budget. I am pleased to do so. Let me start with just a little bit of background. In 2003, when Oregon became the poster child nationally for a state that inadequately funds its education and inadequately funds its courts, the cumulative state government budget deficit in this country was \$40 billion dollars. Today the cumulative state government budget deficit throughout this country exceeds \$150 billion and is expected to continue to grow. The governor's reset cabinet, which produced its report a few months ago, contains a projection that stated in two different ways that the state economists described it as a \$10 billion dollar budget deficit over the next decade. Another way to look at is that we experience \$2 billion dollar budget deficits each biennium through 2019. Right now the projected budget deficit in Oregon going into the 2011-13 biennium is projected at \$3.25 billion. We have had to balance this biennium to end the '09-'11 biennium at \$1.25 billion. The Oregon Judicial Branch in the 2009-11 biennium started at \$32 million less than the cost of services for the 2007-09 biennium. I received this morning from Senator Courtney and Speaker Hunt, a confirmation that I needed to reduce the judicial budget to balance it for this biennium by another \$13.3 million. I started reducing the judicial budget voluntarily many months ago starting with an \$8.3 million dollar reduction. I am pleased to say, however, that even with this \$13.3 million dollar reduction Oregon courts will remain open and accessible through this biennium. That means they will be open eight hours a day, five days a week. They will process all case types and we will not be entering into the case type prioritization process that occurred in 2003, when we refused to process any small claims or FEDs, adjudicated no misdemeanors or low level felonies and did only serious person felonies and child dependency matters. We continue to remain open

and accessible because we started over a year ago, in anticipation of this, holding vacancies open. Our courts are operating around the state right now many of them at 10 to 20 percent vacancy rate. However, we have undertaken ...

44:35 Chair Ellis

Vacancy is judicial vacancy?

44:41 Chief Justice
De Muniz

No. Staff vacancy, the people who operate the counters, the people who do all of the hard work that goes on in our branch of government. I concluded almost two years ago, particularly in consultation with the governor who repeatedly in many meetings told me, "Mr. Chief Justice, your problem isn't 2009-11, it is going to be 2011-13." That is proving to be true. This summer I visited all 27 judicial districts and spoke to over 1700 employees to explain to all of them the context in which I would make decisions about where we go with this branch of government. I explained to them I do not see furloughs, hiring freezes, freezes on cost of living, step increases, the variety of things that we have done in the past to balance our budgets as a solution to a long term or decade of deficits. I explained to all of our employees that we needed to undertake an aggressive reengineering of our courts so that we could find alternative efficiencies that would permit us to operate on fewer revenues yet maintain or improve our judicial services, that we needed to ask the hard questions - why do we do things and why do we do it this way? We needed to confront our culture and our traditions to operate and, 1) to actually make more effective use of the resources that we have; 2) to leverage our technology to make us more efficient and provide the public with greater access to the courts; and, 3) to question what are our essential functions and decide which things we should be doing and perform a legal triage to determine where our resources are more properly aligned with our essential resources. I called this re-engineering. There could be other more radical words for it. One of the reasons that we are able to operate at this 10 and 20 percent vacancy rate is because of this re-engineering program and this willingness to confront our tradition and culture. Let me just give you one example that I think you will find interesting. Probably for nearly 150 years the traditional unit of operation, or the judicial unit, has been one judge and one judicial assistant, supervised by the judge. Let me use the Oregon Supreme Court as an example. Traditionally there was one justice and one judicial assistant. So there were seven justices and seven judicial assistants. The job descriptions for those positions as judicial assistants were likely written when those judicial assistants were typing 50 page opinions on an Underwood typewriter with onion skin copies. The technology world has passed all of that by. We no longer operate that way in the Oregon Supreme Court. For seven justices we have three judicial assistants supervised by one appellate office manager. Those three continue to do all the work necessary for the seven justices. Ten months ago I transferred all of the operational data entry work, case management work that the records department did for the Supreme Court to those three JAs. They perform all of it. That was the equivalent of creating two and a half to three new FTE in the records department to devote themselves to the Court of Appeals work, which is our busiest appellate court. That is a small example of making more efficient use of our resources which we are duplicating throughout the state. I will use one more example. Multnomah County, our largest court, followed that and ended the tradition of the judicial assistant being supervised by one judge and a number of months ago, as part of the budget reduction process, transferred all 38 judicial assistants and the supervision of those judicial assistants to the trial court administrator, and mandated that each judicial assistant devote 25% of their day to operations. That is the equivalent of adding seven new FTE to operations. It is one of the reasons that Multnomah County remains current and operationally efficient in what they are doing. Those are small matters but they are being repeated throughout the state. We also are saving thousands and thousands of dollars. We did away with transferring the appellate record by paper from the trial court to the appellate court. If they are not already in an electronic form then we scan it and put it in a PDF and off it goes to the appellate records department. Frankly, I question whether we even need to send it anywhere because the data simply exists anyway, but we do create a file in the records department for it. When I was undertaking change, I received a

great deal of pushback that said, “You will be creating more work if you have to index these appellate records electronically.” Well, 75% of the Court of Appeals cases are affirmed without opinion, which means that no one looks at the record. They simply read the briefs and decide what to do. Only in 25% of those cases does anyone ever look at the records, so we no longer index the record. I have personally looked at the appellate records we are receiving now electronically. Without an index they are completely navigable and searchable anyway. We are saving thousands and thousands of dollars in paper and postage. Some people might call that tinkering around the edges but we have a very bold reengineering program that we are involved with now. I formed an implementation committee and they are doing the following things: 1) Centralization. Where can we reduce costs and trial court workload through central processing of our payables, collections, handling traffic citations, and other areas? We are going to centralize our functions. 2) Regionalization. How can we manage processes regionally or modify venue to expedite case processing or adjudication, including developing our specialized dockets to better utilize judicial resources. One of the things we are going to be doing is trying to make much more efficient use of our judicial resources statewide through video and a variety of state docketing efforts. 3) Leveraging our technology. We are going to go to online access to pay fees, fines, jury management, and access to documents, and, again, make more effective use of our judges statewide. Then I will be seeking legislation to permit me the authority to create administrative judicial districts. I believe that we can provide a more efficient use of our judicial resources through creating a larger administrative apparatus, not the smaller judicial districts that we are operating in now. I am going to seek legislation that allows me to create these administratively. I don’t have authority to change the county boundaries, but to create administrative districts in which we can manage this process a lot better. It will permit greater staffing and better delivery of trial court services. We are undertaking to restructure ourselves to permit us to operate on fewer revenues, which I think is the reality that we are going to have over the next decade and at the same time maintain or improve our judicial services. The committee that is charged with looking at these four areas and making recommendations, also is charged with the responsibility of looking at restructuring and transformation efforts through the lens of a litigant, asking ourselves each time, “Are we promoting convenience for litigants? Are we reducing the cost and complexity of the judicial process? Are we maintaining or improving access to justice, and are we improving case predictability?” So that is the bold course that we have set ourselves on to deal with this very difficult economic crisis.

55:48 Chair Ellis

Any suggestions how we can help or not hinder?

55:58 Chief Justice
De Muniz

I don’t know about answering your question directly. I can tell you this. We have a wonderful working relationship with Ingrid and your organization. Obviously, indigent defense is a crucial part of the system. My position is that the justice system must be funded in balance. We will have to continue those collaborative efforts. I think you have done a tremendous job. I think the legislature has been very sensitized to the defense function because of the good work that all of you have done over the last decade, honestly. I think if we ask Ingrid, PDSC is not suffering near the deficiencies and reductions that we are as a whole. That is to your credit.

57:00 Chair Ellis

I may have missed it but I didn’t hear you talk about electronic filing.

57:05 Chief Justice
De Muniz

We already have it in the Oregon Supreme Court and the Court of Appeals. We will complete the whole e-court for the Supreme Court and the Court of Appeals by the end of this biennium. We have five pilot projects in large, medium, and small courts operating right now on small claims and FEDs. They are not e-filed; they use what we call “electronic content management” that allows us to move the documents and the data in a certain way. We have an RFP in the process right now on the street asking for a single source provider. I cannot tell you right now, because I don’t have

it on the top of my head, when we will have statewide e-filing for all case types. I can tell you it won't be this biennium. Of course, the legislature has continued to reduce our e-court budget as we go forward. There is talk now that I have had with the legislative leadership, I am not sure that they are going to sell the bonds that we need to continue to debt finance this project as we go forward, so we are making contingency plans to get us through this biennium and part of the next. But the good news is because technology is changing so rapidly, a single source integrator or provider will be able to do what we need cheaper than we originally anticipated and faster than we originally anticipated. So all of our efforts are in trying to husband our resources to make sure that we can do that and that will result in e-filing.

58:58 C. Lazenby

Just out of personal curiosity as you are going through the reengineering process, Mr. Chief Justice, are you looking at – I know it is a judicial model - but are you looking at more enhanced alternatives to seek resolution to lessen the demand on the judicial resources that are out there, an expanded way to resolve a lot of these matters before they need to have a judicial person make that decision?

59:26 Chief Justice
De Muniz

Chip, I am going to answer that in two ways. The answer is yes. There is a certain triage that this has to do with, determining what our essential functions are and where these cases should go. If they should go to some form of alternative dispute resolution this triage mechanism would do that early on. I have another response to you. I think that the kind of severe budget cuts and destabilizing budget reductions that could be visited upon us if we don't do this reengineering, and what is happening in a number of other states right now, is that when you move, because you no longer can handle the civil justice system because of your lack of resources, when you move to the alternative dispute resolution idea you create two tiers of justice in a state. One is for rich people and companies and businesses who can afford to hire reference judges, who can afford to do ADR and all of these things. What you leave in the courts is you leave a ghettoized process in which you have criminal cases for which the judicial branch has no discretion whatsoever about anything, and self-represented litigants and people who cannot afford to get themselves into this other venue. That would be California today. You can't get a civil jury trial there for six years.

1:01:23 C. Lazenby

Can I follow up on that? I apologize for being late but I kind of came in on the tail end of the conversation about the death penalty and charging decisions and the disparities between Oregon and Washington. If we are truly reengineering the way we have done the judicial system, isn't it fair that one of the things that needs to be on the table is the statement that you just made, which is in the criminal area we don't seem to have any legal limits on the discretion of what gets charged and what doesn't get charged. If you are really going to reengineer a system to save billions of dollars shouldn't that be on the table too so maybe there is some objective criteria that applies statewide in terms of charging decisions and how that occurs. I am not being a Pollyanna about the legislative process. I am just saying that if we are really serious about reengineering the judicial system shouldn't that be on the table.

1:02:15 Chief Justice
De Muniz

Well, you are entitled to say what you think. I don't know that the – I am having a hard enough time managing my aspects of the public safety system. I will leave it to them to talk to you about that. I will tell you this. The governor is getting ready, by executive order, to create a sentencing commission or something like that. I will be one of the members of that commission that will try to make public what our sentencing scheme actually means in terms of dollars and cents and human lives. That is not an answer to your question but a response.

1:03:10 Chair Ellis

Other questions for the Chief?

1:03:09 J. Potter You have piqued my interest now since I am not aware of this sentencing commission. Can you tell me more about who is going to be on it and when they are going to start?

1:03:15 Chief Justice De Muniz I really can't. I have had some preliminary discussions with the governor but I should leave that to him. It is just something I am aware of.

1:03:29 Chair Ellis Thank you.

1:03:32 Chief Justice De Muniz You are welcome. Thank you for having me.

1:03:36 Chair Ellis Walter or Craig?

1:03:42 W. Beglau Thank you. Well, Mr. Chair, members of the Commission.

1:03:53 Chair Ellis We appreciate you coming.

1:03:51 W. Beglau This is my first time in front of the Commission. It was Mike Schrunk's 10th and my 1st. Hopefully I may get invited back depending on how I do today here in terms of my presentation, but thank you, thank you for having me here. My name is Walt Beglau. I am the Marion County District Attorney and vice-chair of the Oregon's District Attorney's Association as it stands right now. Ingrid asked me, and I think it kind of dovetails with what Mike was talking about relative to charging decisions and the local economy and the resources there, to talk about the Marion County experience. I did a little research. I have had a chance over the years to speak to this quite extensively because Marion County has had a significant case reduction policy in place for two decades. It really came with the onset of Ballot Measure 5. My predecessor, Mr. Penn, Dale Penn, actually coined what he worked through as "budget immunity" when he was speaking to our local commission in terms of not having the resources to get the job done and what was coming in the door and him asking for that local general fund and that was he who coined that phrase. I don't speak much that way. We clearly have a firmly rooted policy in place that has been adjusted over time, including during my six-year tenure of district attorney, and it is a blend of two things. Mike is not doing this in Multnomah County. It is a blend of no action in cases, good solid cases that are investigated and have evidence to charge them, just shutting them down at the door and then dispositionally handling them different. We have talked a little bit about those, treating them as violations or reducing them. I want to speak very clearly to the process in which we do that in Marion County and many other counties and that is early disposition, EDP, the process in which we fast track, so to speak, misdemeanor cases. Those are the two routes that we have in place in Marion County. I am going to kind to speak to them because we literally have 20 years doing that. The current landscape of financial reductions has not dramatically impacted our policies right now, but there is no doubt in my mind that in the next couple of fiscal years, as signaled by our local chief administrative officer and our board of commissioners as the state grapples with shared revenues and all of that totality of resources in public safety that we are going to be cutting prosecutors. We are going to be cutting more staff. In 2009, we lost five percent. I lost an attorney there and some support staff and cut back on materials and services. Last year we tried to hold ground. That was kind of the expectation and now they are signaling as we go into the next budget cycle through June 30, that there are going to be more cuts. So clearly there will be adjustments to these in place policies that I have and will talk a little bit about with you. The only respite, and Craig will talk to this, the only respite has been that the total numbers are down. I have looked over them every year and we had about 13,500 a couple of years ago. We are down to 10,799 cases ...

1:07:45 Chair Ellis That is felony and misdemeanor combined?

1:07:46 W. Beglau

Correct. That is the total number. You can see it edged down a couple thousand during that period of time. I have looked at this year's numbers and it seems to be kind of stable. You will see that in the way we are handling cases too. How did we make those decisions about how we were going to do early disposition or what cases am I just going to flat out shut down? It has been, as you know, a very predictable process, actually, just prioritization. We put a premium on violent crime, child abuse, domestic violence, and then there are three categories that we have taken our swings at. One of them is unique to Marion County that I will mention here. The first category is misdemeanors. What we do with those are two things. One is flat out don't file them. Those cases that we don't, by policy, file unless there are aggravating circumstances are Criminal Mischief III, Criminal Trespass II, Disorderly Conduct, Failure to Appear in the Second Degree, Frequenting and Harrasment -offensive physical contact that is non-sexual in nature. We did about 3,000 no actions in 2009.

1:09:20 Chair Ellis

You have gone the no action route as opposed to the violation route?

1:09:21 W. Beglau

We do all of them. We stage them and we have three categories. The first thing in our policy is the cases we have shut down and the ones I just mentioned, Mr. Chair, are the ones we don't file unless there are aggravating circumstances. That might be a substantial criminal history or a repeated problem, but that is no guarantee that we are actually going to do anything with that case. We have guys that are rearrested five or six times and we still no action under this policy. The second category is the EDP cases. Those are the misdemeanors. In 2009, we handled 1,900 cases through early disposition. The way we manage EDP is we work very closely with our defense bar on these. They come in the door. A citation is a charging instrument. We will reduce it to the misdemeanor and they will get discovery in advance and go into court the day of arraignment and resolve the case. It is a total package thing where there is representation and the Deputy DA in the court trying to resolve those cases. We did 1,900 of those in 2009. As of this morning, 2010, we are on the same track. We had 1,307 we have done through this morning in Marion County. Of those EDP cases we take a bunch of them and we treat them as violations. They are crimes coming in the door. They are violations at the time they go into the courtroom by interlineation. Those cases are driving while suspended, not felony, giving false information, failure to carry and display, no insurance, offensive littering, 911 calls, and most importantly, Theft III, which is a high volume misdemeanor crime. Those get violation treatment and go through this fast track process. What we do with EDP, and we can all argue about the value, it is kind of a double-edged sword when you are talking about fast track processes. They happen quickly and for the defense to get a chance to take an earnest look at them is often a challenge. I have heard that from our defense bar. I know Tom is here and he has probably handled some of these before. Also we don't do anything with them. We don't put them on probation. We don't treat the underlying issue. It is what I would call almost resume building. They just get a fine and restitution and a conviction and then we don't treat the underlying issue. We are getting efficiencies in a court system but we might see those folks back. I have a tough time. I go like this with EDP because we all know what is driving the criminal justice system and that is mental health concerns and substance abuse, particularly with these front end crimes that we are treating pretty much across the state through early disposition courts. There is a risk involved for the system with EDP, but that is what we are doing with them. The rest of the misdemeanors that I do in the normal course with supervision and treatment programs and that kind of thing is DUII, misdemeanor sex crimes, and misdemeanor domestic violence. Those do not go through that fast track process essentially in Marion County. So that is that first category and that is the lion's share of how Marion County for quite some time has done things, I guess, differently to resolve cases. It has almost been institutionalized in Marion County. I want everyone to know what we are doing. I go and talk to Rotary and say, "This is what I am doing." They come at me and I say it is the system. The second category is correctional cases. Marion County has a high percentage of those.

1:13:41 Chair Ellis

Is this what you referred to as unique?

1:13:47 W. Beglau

Yes, unique because we are one of just a few counties that have the institutions and we have the only maximum security facility, the state penitentiary, and as you know there are some significant concerns about safety issues, not only for the inmates but for the corrections officers as well. We reduce and have reduced to writing a policy around supplying contraband and weapons, again triaging the level of crimes that occur in there and treating them differently. We “no action” them and we have some criteria we have set up. Clearly those are kind of cemented in policy for Marion County to not file cases. We work closely with the Department of Corrections. One area that is very ripe for further discussion is the state hospital, which I can assure you is the number one driving investigative force for criminal activity for the state police by far. I am in this constant dialogue about how we manage criminal activity in that facility. Those are the unique parts. The third area is felonies. We do have a few felonies that we take out of felony land and do something different. Some of them get a misdemeanor through early disposition process. Then I take some felony possessions and I run them through our drug court and I give them misdemeanor treatment. We have created a theme for drug court around children and family. That is where I feel you get your biggest return on investment in terms of costs and, of course, the human side of it as well. I take some of these PCS cases where there is an endangering or some mistreatment involved and we put them into our drug court. We give them a misdemeanor and if they treat that then that case gets misdemeanor treatment. That is another category of felony that we are trying to do something different with in Marion County. Those are the main ways that we are doing things differently in Marion County. Some of the areas of concern that I thought might be interesting for your discussions or for you is juvenile court. We have extraordinary numbers of delinquencies. My biggest area of concern is the area of dependency. In terms of looking in my crystal ball in the future here, many of the counties have a contract to do juvenile dependency enhancement through the Department of Justice and our attorney general, to bring in prosecutors and staff to help manage those families and get deeper into the courtroom with those particular cases in representation of the Department of Human Services. I have done that in Marion County and it is a very valuable asset. It is going to be on the chopping block again through this next biennium. I am looking at now pulling back out of that process because I am not going to have the ability to maintain services when my commissioners are faced with cutting dollars at the general fund level, in other words back filling state money. I think you are going to see that paradigm kind of replicated in other counties. I can’t keep doing that if that funding isn’t retained. I think we ought to have our eyes on our juvenile departments about doing delinquency and doing dependency work. I think one of the biggest concerns is going to be preservation. I know the chief justice spoke of this. I don’t want to be an alarmist but that figure he gave us today is concerning. We all know the system doesn’t function without the court. That is the gatekeeper for all that we do. Of course the criminal bar eats up all the resources. I am worried about the court getting hit and then pulling back from some of the good programs in treatment that we have done. We have a mental health court in Marion County. We have parallels in our juvenile court. We have a drug court. We are doing some good work there, but with the court getting impacted and if we are pulling back there I am worried about us getting straight back to what are ultimately considered core services and not being able to move those things forward. We are going to have a disruption in that balance. I am concerned about that and I have heard that in my discussions locally about how can we sustain those programs that are working? In fact with the Criminal Justice Commission we have talked quite a bit about that particular issue. Next steps, if I get hit hard in Marion County, what else am I going to stop doing? I think I will have to start taking felony drug cases and treating them as violations or not doing anything with them. We all know that if you are not involved you are not going to address the substance abuse issues. We are going to be in trouble. Those are those areas of concern that I thought I would leave you with today. I am certainly glad to answer any questions that you have.

1:19:15 Chair Ellis Were you here when Jeff Ellis spoke?

1:19:15 W. Beglau I was.

1:19:22 Chair Ellis Any reactions? The disparity between Washington DP cases and Oregon cases is amazing. I am curious.

1:19:33 W. Beglau Mr. Chair, I knew that that was coming. I listened with great interest to that conversation. Is Steve Gorham still here? Let me just say this. We have a death penalty case pending in Marion County right now with Steve Gorham. The court has issued a gag order on all parties even to talk about general cases in our county. I need to be cautious and Steve would agree with that. The bottom line is that I am more than willing, to the extent that I can on behalf of the organization, to sit down and talk about ideas that are out there in the resource context. Bottom line is the association has not been, in the past, in favor of setting a timeline around that decision making process given that it is an extraordinary complex process, and a lengthy process to do a penalty phase investigation so that you have all of the assets and information in front of you. The thought of 30 days from the time that they are actually charged and in custody, having made 12 of these decisions myself, gives me great consternation. I guess I will leave it at that with the door open. I would be glad to sit down and discuss.

1:21:03 Chair Ellis Any other thoughts why the data would be so remarkable comparing Washington and Oregon. We are focusing on this one. Are there other factors that are going on here?

1:21:15 W. Beglau He mentioned that there is a 80% decision point up front for them to not go forward. It is obvious that Oregon prosecutors move forward in a greater percentage. Maybe the timeline is persuasive to just not go forward because of that. They don't have the necessary information or they are just choosing to not go that direction and resolve. I honestly don't know. Some of that information I learned about Washington was news to me as well today.

1:21:52 Chair Ellis We may well take you up on your offer to talk further about it. It is just amazing. You know that four years ago we started a public defender in Marion County. There have been significant, at least from our perspective, changes - we think improvements - in MCAD. I am very interested how you are reacting to those two organizations. Any comment?

1:22:24 W. Beglau I think we work tremendously well with both organizations. With MCAD I think the areas of concern that were identified by the Commission have had great improvement. I really could not speak to any specific concerns of communications and relationships. Probably the only area that we all work on is – not only for deputy district attorneys but for entry level defense attorneys is training and getting them adequate resources so that when they go into the courtroom they are really comfortable with the cases that they are getting. That process of triage and the training piece I think we can always push in that direction. I would encourage that for both organizations. I would encourage that for our organization and we are doing that. It is very, very important that the defense attorney and the deputy district attorney sitting in the courtroom know what they are doing and they are both equally competent and capable and getting the job done for their respective points of view. I really think things are going well.

1:23:42 Chair Ellis We are very glad to hear you say that.

1:23:42 W. Beglau Yeah. Paul Lipscomb and Tom Sermak - we work together on different issues and serve on joint community organizations. They call me when there is a concern or an issue. I can't complain today.

1:24:03 Chair Ellis Good. You get invited back if you say that. Other questions?

1:24:09 C. Lazenby I just want to ask one follow up question. I am not trying to be snide or anything. One of the things that Jeff said in his presentation was that one of the differences that may exist between Oregon and Washington is the way in which death penalty decisions are funded. You spoke pretty eloquently – by the way I am the new county counsel, so I am back doing that again so I am very sensitive to the way that the counties provide support services for things in the justice system. When you made those 12 decisions about the death penalty, to what extent did the expense of that decision go into your decision making about whether to go with the death penalty or not. Is it a little bit of a factor? Is it somewhat of a factor? Does it factor in at all or is it really just on the merits of the case and the aggravating factors in the case and the victims and all those other pieces?

1:25:05 W. Beglau When I took over in 2004, I set up some very, very specific criteria to make these decisions. I am thinking back and I know every single case by name that I have decided. I have never thought about money in that decision. The kind of central piece has always been an evidence based approach on the four questions. I guess that answers your question. I don't think about money when I make that decision. I have looked at the costs internally to doing these cases and it might surprise – maybe it won't – they don't cost the district attorney that much. It is all FTE. It just depends on who you put on the case.

1:26:04 C. Lazenby They are already there. You have some additional costs in terms of trial preparation, etc., right?

1:26:09 W. Beglau Right. I speak to my board of commissioners about that and I can tell you one death penalty years ago cost \$15,000 in our office. The current one is at \$7,887 and then my people. That is not where the cost is. Sure I have people doing the work and that draws down the capacity to do the other work, but that is what our job is - balancing that. I had a child abuse case last week that cost more than a death penalty. That is the tough part because justice can be expensive.

1:26:59 Chair Ellis I think on the defense side DP cases are considerably more expensive. Other questions? Thanks a lot. We appreciate your time.

1:27:11 W. Beglau Nice to see you all.

1:27:13 Chair Ellis Craig?

1:27:19 C. Prins Thank you. Am I the last speaker for the afternoon?

1:27:20 Chair Ellis Well, you are the last speaker in this segment.

1:27:24 C. Prins Okay. I am Craig Prins from the Criminal Justice Commission. Ingrid asked me to put together some of the things that Walt and Mike have talked about which are crime rates in Oregon. I also looked at some of the factors for that. I know a lot of folks in the room, so if you have questions please interject. It might make it more interesting. I don't know if this is going to work very well to have this setup like this with graphs. I don't think you will be able to see them from back there. If you find what is going on with crime interesting, you might want to move up or you are going to get a crick in your neck. Chair Ellis, this is kind of following what Mike and Walt were talking about. It is a little different because this is looking at crime trends. Not just filings but reported crime and victimization and trying to get an idea of prevalence of crime. Crime is complex and a lot of this I have taken out of a book by Franklin Zimring called The Great American Crime Decline. It is an excellent book. If you are interested in kind of an overview of somebody who looks at the – the big fact is if you look at the last 15 years we have had a long period of declining crime. It has been violent and property crime and it has been deep. It is a 40% drop. Franklin Zimring has written a good book on this, kind of the why and why not. This is kind of looking at that. Whenever we look at crime prevalence, and when I

am saying prevalence you are always looking at a rate. How many people have reported crime per thousand because obviously we have more Oregonians now than we did back in the 1980s or '90s. Whenever folks are talking about, in *The Oregonian* or whatever, is crime going up or down, they are talking about the Uniform Crime Reports. When a victim lets law enforcement know, makes a crime known to law enforcement, they categorize that and they give it to the state police who then give it to the feds. The FBI prints that as the Uniform Crime Reports. You can see the crimes that are in the crime measures. Aggravated assault is by far the most common violent offense. Larceny theft, which includes predominantly misdemeanors, is by far the most prevalent in the property crime index. We use this because it has been used since the '30s. Hoover started this with the FBI. It is the best way to get long-term comparisons of crime. It also has problems which would be like, well, what if reporting has changed, and I will talk about that. We use a couple of things to look at that. We look at the victimization survey that is national as well.

- 1:30:26 Chair Ellis Where do drug crimes fit in all this?
- 1:30:28 C. Prins Mr. Chair, the violent and property crimes do not include behavioral but I have got some data on there that I would be happy to look at. Behavioral crime is so different and I hope you have heard from Walt and Mike, it really depends on how it is enforced. You also don't have that many reported behavioral crimes. Usually the person trying to buy the drugs is seeking the person that is selling the drugs, and there is not a victim in the way there is for violent property offense. It is more of a drug market. Does anyone else have any questions? Just holler if you do. The latest we have got is 2009. The 2009 reports came out a little while ago. I have been watching the 2010, and Greg from Lane and those of you in each of your individual counties can look at those as well and probably tell me what is going on in your county, but from '08 to '09, violent crime dropped two percent. That is the lowest crime rate we have had with a violent crime rate since 1969, which is the year I was born, sorry. From '04 to '09 it has dropped 15%. That is the second largest drop behind the State of New York. What is interesting is New York and Oregon are a good comparison. Oregon has had reduced crime while increasing incarceration. New York has had reduced crime while reducing incarceration.
- 1:32:05 Chair Ellis Where does that lead us?
- 1:32:11 C. Prins We are going to talk about that, Mr. Chair. We are going to talk about the usual suspects of why crime drops. I just wanted to give you some of the long-term trends.
- 1:32:17 A. Hamalian Craig, you have said that you have taken a look at the 2010 numbers and what is the trend?
- 1:32:24 C. Prins Yeah, so, Lane is way down. Portland is up. Specifically it looks like a lot of burglaries, Alex. You still work in Portland, right?
- 1:32:31 A. Hamalian It seems to be up for burglaries, aggravated assaults and homicides.
- 1:32:38 C. Prins The homicides that Mike showed are predominantly domestic, I believe. The burglaries are way up in Portland, but Lane is way down on property crime which started at the end of '09. Marion is also down and Gresham is way down too. You all can tell me more about that then I can tell you. I get kind of a
- 1:33:07 A. Hamalian I will say what they have been pushing in Multnomah is that there is an increase in gang related violence. I doubt if that is reflective of the numbers.
- 1:33:21 C. Prins I just watch what is going on and you can see that you guys have had some high profile shootings in Portland, but the overall trend for the state I think 2010 will be about flat from '09. So, Mr. Chair, if you looked at this really long-term you would say from the '50s and '60s it was flat, '70s it began to go up and now since the early

'90s it has been dropping. That redline is the United States average and the black line is Oregon. Alex, this is probably going to be interesting to those of you who practice in Portland. Portland drives Oregon's crime rate because it is our largest city. What is interesting is like Mike was saying in the mid-'80s is when I looked at Portland's violent crime rate it was right with Detroit's in the '80s. When you look at where violent crime was in Portland in the '80s to where it is now, there was a 71% drop in violent crime from 1985 to 2009. The important thing in 2008 Portland was only about 35% of the violent crime. It used to be more than half of the state's violent crime. What has happened in Portland has really changed the violent crime rate in Oregon.

1:35:04 C. Lazenby

Just to take a little bit of the fun with numbers out of that is that because the rest of the state has become more urbanized and has more violent crime around the state so that the Portland share is smaller? Or does that mean overall there is just less violent crime happening?

1:35:19 C. Prins

This is Oregon's total. It has been pretty flat. I think Portland has changed pretty dramatically since the '80s. It is fun to talk to someone like Chuck French or someone who was doing gang cases in the '80s and it is just totally different.

1:35:38 A. Hamalian

I don't know if this has any input because I practice in Oregon and Washington and in a rural county and a urban county. Folks in Clark County Washington will tell you that their increase in violent crime is in direct relation to a certain income level of folks being priced out of the low income market in Portland who have ended up in southwest Washington. Does that figure in?

1:36:14 C. Prins

I will show you that. I think Gresham certainly felt that as well, but Gresham's crime has stabilized too. I think you can think for a short term, especially on enforcement changes. You know this one is a mess. So Oregon's crime dropped in the '80s. That doesn't mean crime in every city and every county has dropped. Gresham has bounced up and down quite a bit. Eugene's violent crime rate has gone down, but Greg can tell you that the property crime rate in Eugene is really high. Crime is a local, complex problem. If you are at U of O and you have a lot of bicycles that are not locked up you are going to have property offenses. If you have gang issues you are going to have violent crimes. You have to remember that this is a 30,000 foot view. We always check murder rates because murder is always reported, basically, and you can see the murder rate trends are almost exactly the same trend that we showed in the violent crime indexes. Property crime – I am going to go through this pretty quickly. I asked Ingrid, I do have kind of the budget look at public safety too which might be more interesting to you to kind of see what is going on with that. I am going to go through this fairly quickly. Mr. Chair, this is the property crime rates. The property crime dropped from '08 to '09 ten percent. We had some sizable drops in property crime. The big one that I remember was in 2000 - let's see when Kevin Mannix filed Measure 61 and then we filed Measure 57, when we were doing that, property crime dropped 16% and we will talk about that, but if you try to say that to the media or the citizens they will be like, "You are out of your mind buddy. Go back to your graphs because that can't be right. Go look at the 6:00 news." I have a couple of things we are going to get to perception of crimes as opposed to this, but property crime did drop very dramatically in Oregon. We were in the top five highest states for property crimes for years, and we now dropped down to right smack dab in the middle. We have had the biggest property crime rate drop in the country in the last five years. Here are different ones to look at in Oregon. The big cities drive property crime and that is the red one. This is preliminary data. This is victimization surveys. Really when we talk about this you can see the numbers that Mike gave you there is not a big difference. The concept is our response to crime is here. This is arrests. All of this reported crime is down just means that per arrest we are handling more of the actual offenses, but when you look at how many get arrested, charged, convicted, and I will show you some of that data. It is a much smaller number, which I think shows we don't have the capacity. We were way over capacity and we are less so now.

- 1:39:35 C. Lazenby Isn't there also this feature that there is a small group of folks within the crime demographic that are doing 60% of all the crimes, so that low arrest rate is because – you never really charge them.
- 1:39:53 C. Prins Yes there is a concentration of crime. Just like hot spot policing showed us, there is definitely a small group of people that do most of the crime. Reported crime can be way down but as we start to talk about how many cases are you going to have, it has not dropped 45%. I am going to show you that that is because our ability to actually handle crime was really at capacity or more than saturated in the '80s. So why is this? This is where it gets really interesting. This is where you realize that crime is so multifaceted that everyone has a theory about why crime dropped. You have heard some of the ones that are more colorful. I am going to hit the usual suspects of the three you hear a lot. One is unemployment or the economy or poverty, incarceration and then demographics. What do those things say in Oregon about this crime rate reduction? As you know we have had the highest unemployment, the pink line is unemployment. Bottom line is that none of the economists and criminologists think that there is much of a link between unemployment and crime. It is poverty. It is habitual poverty that is a place where crime happens. It is not like a welder gets unemployed or maybe a Criminal Justice Commission executive director in a few weeks. I will try to stay on the straight and narrow. This is an interesting one for you all when you are making your arguments about public safety and sentencing. Incarceration is the black. Here is the Measure 11 effect. From '95 to 2000, we really increased our incarceration rate. This is the number of Oregonians who are in prison per 10,000 Oregonians. We had a big incarceration here with Governor Goldschmidt when they started to do the matrix thing on parole. This would be right before the guidelines. Then we got into Measure 11 and then what is interesting here is since '05, from '05 to 2010, the incarceration rate has been flat. Now Director Williams is still building beds because people keep moving to Oregon even though there are no jobs, and that makes for us having very educated baristas, I guess, but what you see is crime has dropped just as much in these five years as it did in these five years. We did a report that was based upon work by William Spellman that a 10% increase in incarceration, statistically looks like you get a two to four percent crime drop. Most of that is property crime. That would be mostly larceny crime. That is that whole concept that we put together in our report in 2007. That is that law of diminishing marginal returns. To get a 10% increase in incarceration now, Director Williams has to build 1400 prison beds. It used to be 600 in '89. It costs a lot more and you are avoiding less crime because you are putting a more marginal offender in then you were in the '80s when crime was very high and mostly we were locking up really serious offenders.
- 1:43:43 Audience There was an article about that maybe a month and a half ago in *The Oregonian* that they anticipated in 15 years having to build, I think, two additional prisons.
- 1:43:52 C. Prins Correct.
- 1:43:52 Audience Is that solely to take care of the increase in per captia crimes?
- 1:43:57 C. Prins No. It is Measure 57 coming back that is the large part of that, about 1,000 beds of that, and then it is just the sentencing policies that we have in place now, just moving them forward. Incarceration does matter but it doesn't matter nearly as much as we politicize about it. Of the violent crime rate drop of 45%, our big incarceration increase would explain about 13 to 15% of that. It matters, but probably not as much as we tend to focus on it at the statewide level. I think we focus on incarceration because it is the most costly part of the criminal justice system. Incarceration doesn't completely explain it but it is part of it. Demographics is the one trend over this time that we would say is consistent with a drop in crime rate. This is the percentage of Oregon's population that are males between the ages of 15 to 39. From 1965 to 2009, as your population ages, as your male population ages, basically, that is a good indicator that your crime rate should drop. That is favorable unless

you are male and you feel like you are getting older. That would be consistent with crime continuing to drop. Juvenile arrests have dropped a lot. During all these years just looking at the crimes committed by juveniles, and we can only get those that we actually arrest for those, so this wouldn't be reported crime, but you can see that juvenile arrests are down which is another really good indicator that we can hope to see these kind of crime rates for the future. Why? Why? Why? The first thing you have to do is step back and say, "This is not an Oregon trend. This is trend that is national." It has been in place for 15 years. If you look at Canada it actually has a somewhat similar trend. Franklin Zimring points to that several times in his book. These are all things that we have done that have had some type of impact. I don't think any of these will necessarily surprise you. I think that what they have done in old town with some of the community policing, innovations in policing. If you look at Lawrence Sherman's work talking about what happened in New York, our crime rate drops are pretty consistent in Portland with what they saw in New York City that they get so much press about. I think community policing, focusing on the highest concentration neighborhoods, being proactive, has something to do with it. The second bullet – full disclosure – I was a big part of the pseudoephedrine legislation, so I think that is important. I think when we eliminated the labs in Oregon; my fear was that we were going to have more property crime because you would have to steal more to buy meth than actually to make your own meth with Drano and cold pills. I think it has been kind of the opposite. Kind of eliminating those little labs, you know, tweaker sell groups that hung out and did identity theft and were high for a couple days at a time. It seems to have kind of had the opposite effect. I think that is something that is part of this. I think that a lot of it is if you look at probation it is a lot more sophisticated than it was in the '80s. They really use what they call the "risk principle," again, concentrating on those who are highest risk. Realizing that the more they work with low risk offenders they are probably making it more likely that they recidivate because they are making it more difficult for them to keep a job. I think that has a lot to do with it. I also put in that I just think about how different some of the things we do like with child abuse is so different now than it was decades ago. These are some of the things in Oregon that I would point to, to say these are some of the things that we changed that I think have something to do with this. There are the meth lab seizures. Meth arrests are down 30%. The big thing now is the prescription drugs is the thing that we can see on the rise when my guys look at the data, but a 30% drop in meth is a lot more cases than a 20% increase in the prescription drugs. Perceptions of crime, however, for most citizens are that crime is increasing. If you ask, "Is there more crime in the United States than there was a year ago or less?" 74% say there is more crime in the United States every year. The more you get down to their neighborhood they will think there is less crime. I think that is very easy to understand. I have a video that I showed the legislature called The Mean World Syndrome. When you think about cable television and how much crime we watch everyday as we are channel surfing. The crime that makes it to Nancy Grace is the most violent, abhorrent crime. It might have happened in Kansas but it is your room. That is where we get our perception of crime a lot of the time. That perception tends to be out of sync, but I think it is totally rational when you look at where most people get their crime information. We have just done a victimization study with Portland State and a perceptions on crime study. You can see if asked, "Is crime on the increase in Oregon?" that 50% said yes. In the community 26% said yes. If you are interested in that I have a video about it. He does a good job of showing how media has really changed the perception on crime. These last ones I wanted to put something in here that was more about my caseload, right? This is not rates. I was showing you rates because that is how statisticians measure prevalence. When you want to know how many people get victimized by crime you look at a rate. This is just sheer numbers. If you look at all reported offenses, so this is every reported crime that makes it to the local police and state police, since 1991, and you factor in that we have a million more or so Oregonians, the reported crimes have only dropped 10% as a sheer number. The number of arrests has dropped 2% over that time. The misdemeanor charges have dropped 8%. This is what I wanted to ask you all about. The number of felonies charges has dropped 26% since 1991. I don't know why that is. It might be what

Walt and Mike were talking about that they just don't have enough deputies and they are doing more charging as misdemeanors. I know we did that a lot when I was a DA in Portland even in the mid-'90s.

- 1:52:34 A. Hamalian A lot of it is attributable to the drop in methamphetamine labs. Also, my recollection, and I don't know about all counties, but in many counties the pills are a misdemeanor.
- 1:52:51 C. Prins It is a Schedule III substance.
- 1:52:53 A. Hamalian With the lack of meth labs you have seen it switch to difference substances.
- 1:53:09 C. Prins What is interesting if you look at just felony convictions over that time, all felony convictions are up since '91. Prison population, of course, has more than doubled since '91, and intakes, just the sheer number of offenders has doubled. One of the main things that I tell the legislature is sentencing policy tells you how big your prison population is not your crime rate.
- 1:53:43 A. Hamalian Do those numbers include people serving a prison sentence in the county jail?
- 1:53:47 C. Prins Yeah. If the sentence was one where you serve nine months it would include that. It would not include a revocation of a local probation.
- 1:54:00 C. Lazenby Is there anything in the data that would debunk Mannix and Doell saying this is Measure 11 working?
- 1:54:07 C. Prins Yes.
- 1:54:07 C. Lazenby You lock up all the bad guys and that is why this is the way it is.
- 1:54:08 C. Prins I think the first thing that would debunk that is that there has no increase in incarceration rate since '05 and crime has dropped substantially. This is a national trend and if you look at New York they are seeing the same kind of crime drops we are. I think when I talked to Steve about it, incarceration is important and it has a part, but it is a small part, and as we are going forward – Chip, you are kind of segueing into the next part of this which is good timing. If you look at reported offenses by a rate and you factor in there are a lot more Oregonians, you can see all of these measures and not just reported, but arrests are down 22%, misdemeanors charges are down 29%, and felony charges are down 43%. I think what that means is that when Ingrid showed me your data, the numbers of your cases are going to change much more incrementally than what you see in prevalence of crime out there. I want to wrap this up and give you time for your next thing. I don't know how much time I have, Ingrid; I am going to go to the budget conversation. The budget conversation is kind of an easy one for me. Chip, when you say how do you respond to incarceration? If anyone looks at the data I don't think anyone can say it is all incarceration. They rely on our report, the Criminal Justice report, and I'm saying that explains about a 12 to 15% drop and not the whole thing. But you can kind of get out of your philosophical discussion when you start to look forward and realize where we are headed budget wise. It doesn't really matter if you want to build more prisons or not. I will kind of show the numbers on that. This is the general fund budget, the pie. Those of you who do policy work - Bill sees a lot of pie charts, so Bill, I am just getting you geared up for February. This is the state's school fund. This is your funding of K through 12. That is 40% of the general fund. Human services is 25%. Public safety and the judicial budget, which we count you in, is 16%. This is that thing we started talking about in the reset. Ninety three percent of the general fund money is either spent on education, and that is including higher ed, human services and public safety. If you look at where we have prioritized it and where we are going, you see that just reprioritizing is not enough. We are probably going to have to look at shrinking our system. This is what the legislature and new governor are going to face when they come in in February. The revenues

have declined \$3.5 billion dollars. When we got through the '09-'11 budget we had this stimulus money which was about \$1.2 billion. We used a lot of our state reserves. We had the two tax measures. We took money away from basically fees and they swept all the money out of other funds that, like, I would have.

1:58:04 W. Taylor

When you are showing the pie chart, particularly of human resources, my recollection is a lot of that is federal money.

1:58:11 C. Prins

This is the general fund part.

1:58:11 W. Taylor

So that is not even the federal funding?

1:58:13 C. Prins

No.

1:58:20 W. Taylor

But if we don't spend it we lose the federal money?

1:58:22 C. Prins

That is right. When you look at the general fund revenues, this is where we are, which is basically about the revenue we had when we were in 2003. This is why we called this kind of the lost decade. We have kind of a lost decade of revenue and we are really back to where we were right after September 11. I am just going to skip this one. We have all had to do allotment reductions, basically, to get through this biennium so that we can get to the big bloodletting in February. It has been kind of a demoralizing process. I was telling Bill on the drive here, I think the executive branch is already pretty burnt out on this because we have been doing pink slips and things for months. As you know the expenses are expected to grow. This is kind of the one that we show a lot of times. This is where we are going with revenues. These are our revenues and expenditures. This is what it looked like before. This is what it looks like now. Our expenditures are over our revenues to the tune of \$3.5 billion. That is a 10-year look. As you can see Tom is forecasting that we are going to have increases. Our economy is going to increase, but where we are with our expenditures we don't catch up. The other thing that you always have to remember and Ingrid I have to remind myself this about next session, this number is going to meet this number some way in about eight months. They are going to cut and whatever. It is not like we get to glide into this. They have to give us a balanced budget. I have to remember that because I can talk about the decades of deficits. But Chip, you know about that process too. It is going to meet somehow.

2:00:50 C. Lazenby

It is going to collide.

2:00:50 C. Prins

A big part of it is an expenditure problem. This is one of the conclusions from Governor Kulongoski's reset. This is a really scary one. This is showing what it would look like if we had our best four biennia, if our revenues increased like our very best biennia. The last best four we would be cool by 2017, but if it is like our worst then we are in worse shape. It is really a dire picture for next session. I am going to get to some of the reset recommendations. I think the Chief mentioned a little bit of that. Most of the public safety money, 60% of it is Max Williams' Department of Corrections budget. Max has got sentencing policy passed by the citizens. He has got the box with Article I, Section 44 in that he really can't release people like they would have done back in the day with parole. He has got labor costs and he has got reduced revenue. He is really in a box.

2:02:09 Audience

Plus the increased medical costs.

2:02:11 C. Prins

And the medical costs are really escalating. He has got more and more older offenders as we have tacked on time to the end of sentences. These are some of the findings we made in the public safety reset. Crime has declined. Oregonians are safer than have been in decades. There is a diminishing return on incarceration. Seventy percent of offenders need A and D treatment and we have had some successes. We recommended that we want to look at starting afresh and showing the legislature what it would like if we could move to a modern sentencing guidelines.

We have built 9000 prison beds since the sentencing guidelines went in place in 1989. They have not really been changed. Measure 11 is not really designed to allot resources. It is designed to force that the sentence imposed be served. We really think it is time to look at modernizing a sentencing guidelines system. We recommended looking at the federal system where everyone gets 15% earned time unless they are serving a life sentence. We also recommend looking at some adjusting if we can't get the bigger picture looked at, adjusting some Measure 11 sentences and we wrote that in. Continuing the Measure 57 suspension and there has been some interest looking at – as you know when you are talking about a budget and you have to get it right, you are really talking about letting people out early or diverting people from prison to impact the prison population. Because changing a seven year sentence to a five year sentence doesn't save you any money next biennium. It is kind of a two-part discussion. There is the short-term discussion and the long-term discussion. I was pleased that the Chief mentioned that. Here are some of the dollar amounts. We tried to do some do nothing options. This was before our last allotment reduction. We put this together in the public safety reset. You might be interested in it. But let's say that the legislature just says we cannot reduce the prison bed need. We cannot make the sentencing changes to do that. Right now there are 14,000 beds that are needed. If you could keep it at 14,000 and Max didn't have escalating medical costs, both of those things are kind of dubious assumptions. Let's say you had to reduce the other budgets in public safety to get to your 14% reduction. Are you following me? You had to just reduce every other budget in public safety. You would reduce community corrections by 50%. You would reduce state police by 60%. OYA by 70%. I am sure that the drug court grant model would be gone. I don't know what Ingrid's budget would look like. This is really why we have been recommending that we look at sentencing and incarceration policy changes. The current trajectory is to add 2000 beds in the next decade. Operation costs would increase \$407 million dollars over the next 10 years. You can see the debt service if we don't do something. That is in the governor's reset that Max Williams was the chair of. My office did a lot of the policy and fiscal analysis on that. We put that out and I am sure we will be asked by the legislature to look at all kinds of different options come February. I think that is it. Thank you very much for your time.

2:06:59 Chair Ellis

Thank you very much. We will take a 10 minute recess.

(recess)

Agenda Item No. 1

Approval of the Minutes of August 5, 2010 Meeting

2:08:07 Chair Ellis

We will resume the meeting. I am going to go back now to the minutes which we skipped over before. Are there any additions or corrections to the minutes?

If not, I would entertain a motion to approve the minutes.

MOTION: John Potter moved to approve the minutes; J. Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

2:08:36 Chair Ellis

We are going to interrupt these proceedings because Mr. Crabtree of Deschutes County has asked for the floor.

2:08:45 T. Crabtree

Thank you, Mr. Chairman. Since the Commission is in the process of reviewing Deschutes County there is some other information that I wanted the Commission to be aware of. In relation to Bend, as you might know, there are three high schools in Bend, Summit High School, which is well known for its track excellence and consecutive state championships; Mountain View High School, which is known for its football and basketball prowess; and Bend High School, which is the oldest and which last year created its own hall of fame. In the first year they had a number of folks that were admitted to the hall of fame. There were a couple of Olympic champions, somebody who invented a treatment for leukemia and some guy named Les Schwab whom you might have heard of. This October they initiated another seven people into the hall of fame including two women, one of whom is sitting at

the table with you there, Ms. Stevens. She was elected for her career in journalism and her dedication to helping and advocating for people with disabilities and the importance of voluntarism. It mentions her service on this commission as part of that. I just wanted the board to be aware of the illustrious person present at the table. Interestingly enough, this article from The Bulletin, which was not searchable, even to us subscribers, so you couldn't find this article with help from there, but somehow when you printed it up it printed everything except her picture.

2:10:58 Chair Ellis

Well, Janet, congratulations. We are very proud of you. If we haven't said it recently, thank you for your service, which goes all the way back to the study commission. You have been doing it, I think, 11 years. It has been great and thank you for that. Okay. Kathryn do you want to talk to us about contract approval - Jackie Page?

Agenda Item No. 3

Contract Approval Jackie Page – Mitigation Contract

2:11:37 K. Aylward

Jackie page has been – was a mitigator in Oregon and she was one of the people who was interested in and talked about for the Death Penalty Resource Center having a mitigation person to help provide training. But she had been working in Alabama and at the time we put out the requests for proposals, she contacted our office and said, "I am not going to be ready to start a contract the first of January, 2010, but may come back to Oregon so can I submit something but not necessarily commit a start date of January 1, 2010." We said that was fine. She is now back in Oregon. She is actually doing mitigation on a capital case right now. We would like, and she would like, to enter into a contract for mitigation starting January 1, 2011, just a one year contract so she will back on the same cycle with everyone else. It is a half-time contract at the same hourly rate as all the mitigators under contract.

2:12:46 Chair Ellis

Any questions?

2:12:46 J. Potter

Do we have a copy of it? What are the numbers involved?

2:12:50 K. Aylward

It is \$59 an hour times 900 hours a year or \$53,100.

2:13:07 Chair Ellis

Any other questions: Is there a motion?

MOTION: John Potter moved to approve the contract; Chip Lazenby seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

2:13:22 Chair Ellis

Next item is still you, Kathryn. You can't get away that quickly.

Agenda Item No. 4

Approval of Service Delivery Plan for Clackamas County.

2:13:38 Chair Ellis

We can do Clackamas. As I think the commissioners will all remember at our last meeting we were close to completing our work on Clackamas, but various commissioners wanted to inject some notes of caution about needing to revisit that county in the next three years or so and wanted that included in the report. Ingrid has revised the report. Are there any questions or comments about the revised report? If not, I would entertain a motion to approve the report on Clackamas.
MOTION: Shaun McCrea moved to approve the report; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Agenda Item No. 5

Adoption of Schedule of Compensation for Recoupment of Costs for Appointed Counsel

2:14:31 Chair Ellis

Now Kathryn and Paul are up on Adoption of Schedule of Compensation for Recoupment of Costs for Appointed Counsel.

2:14:42 P. Levy

I think I can start as Kathryn gets set up here. This is shown as an action item but we are not asking you today to take action. We want to inform you about the issue and I will explain in a moment why we are not asking for action. I am not sure of the

genesis and how long standing the concern has been about how courts go about ordering recoupment of costs for the cost of appointed counsel, but recently, certainly, there have been concerns among judges primarily that the statutes aren't very helpful. There were a few legislative concepts and suggestions about statutory changes. We looked at this and determined we could, and indeed probably should, take action in a way that could rationalize and simplify the process for courts. This memo that you have in your materials says that we don't think a statutory change is necessary to do that. After the memo was written and provided to the Judicial Department along with the suggested compensation schedule for their review, we actually learned of the possibility that the relevant statutes might be looked at in the coming session. Indeed there are ways in which the statutes can be improved to eliminate some unnecessary ambiguity. The scheme overall provides for courts to order recoupment, or some payment toward the cost of appointed counsel, at the beginning of the case through what is called or is commonly called the ACP, the Application Contribution Program, and then at the end of the case. There are no needed changes to the process at the beginning of the case.

2:16:45 Chair Ellis

This was the part that Ann Christian was doing a lot of work on?

2:16:51 P. Levy

The ACP program, yes, and developing that and the statutes describing that. There is a 305 page manual that actually reflects commission policies and procedures which is maintained and administered by the Judicial Department for ordering both contributions to the cost of determining eligibility and also up front contributions to the cost of counsel. The problem that most courts have is figuring out how and what to order as repayment at the end of the case. The statute says that the courts can order a reasonable amount for attorney fees and for other costs approved through the non-routine expense process. Then they go on to say, and there are a couple statutes that have this identical language, that a reasonable attorney fee is presumed to be a reasonable number of hours worked at the hourly rate established by the Commission. Having said that, both statutes that address this then say that in determining a reasonable attorney fee the court should look to a schedule of compensation established by the Public Defense Services Commission. The problem that courts have is that presumptive way of establishing repayment orders doesn't make sense to them for good reason. The only hourly rate that the Commission has set is the non-contract hourly rate for appointed work. It doesn't work both because attorneys generally don't keep track of their time because they are contractors and they just keep track of how many cases they handle, and the number that courts come up with don't usually correspond to what they think is the true cost under a contract. We are proposing the Commission actually adopt something that you have not adopted yet, called a schedule of compensation which the statute calls for. There is actually a history that I will not take your time with, with the idea that there be such a schedule. The idea now is that this schedule reflects the typical costs for cases, including the typical costs for expenses according to various case types. You have those proposed schedules in your materials. Even without a statutory change, the courts would be guided and could use this schedule to arrive at an amount to order as payment. We are not proposing that we dictate or describe to courts, in any more detail than the statutes provide how they go about arriving at a number. We wanted to make sure that they had the schedule that the statutes say they should have from the Commission. We have determined that they don't have that yet.

2:20:30 Chair Ellis

So are you going to present us with a proposal?

2:20:38 P. Levy

You have it in your materials. The reason you have both a proposed addition – it would go in the Commission's payment policies and procedures as an addition.

2:20:59 Chair Ellis

We have two schedules for the next item. I don't think we have any schedule for this item.

2:21:09 P. Levy

This is after the yellow sheet. After my short memo you have just a very short policy that we are suggesting the Commission adopt, although not today, and then a

proposed schedule of compensation. The policy is directed primarily to the Commission and us that we provide a schedule and an updated schedule is necessary. It describes what that schedule is and then you have a proposed schedule here. The reason we are not asking for action today is we are still waiting to hear from the Judicial Department and receive input from them about whether they think this will meet their needs and purposes.

2:22:03 Chair Ellis

So this isn't an hourly? This is a unit type of compensation.

2:22:11 P. Levy

Kathryn can explain this in more detail. This is the typical contract rate and that describes most of the court appointed work. Indeed, it would not be inappropriate, but this is up to a court, of course, to decide to use an hourly rate instead.

2:22:42 I. Swenson

Can I just mention a couple of anomalies and Paul knows these. A court will get to the end of a case and one of the providers will have been there as an hourly attorney and another will be under contract. Depending on the court, the judge will decide to handle these cases either the same, because these people are receiving the same representation, or they will be literal in some cases and say, "Oh, your lawyer was working under the hourly rate and yours was under the contract. How much was the contract rate?" They will give them a number and then the hourly guy will say, "Well, I spent a 100 hours." His client suddenly has huge bill compared to this other guy. Then, too, lawyers at the time do not have available to them, nor do we have available to us, the total costs of the case. So if the judge were to call us up and ask how much the case cost, we would have to say, "We don't know because we haven't been billed for all the services that are outstanding in this case." This would just be a tool to help judges. If they collected this in every case they would be collecting the cost of representation in essentially all of those cases. That is the idea.

2:24:04 K. Aylward

If you are interested in knowing how the numbers were derived, it is very difficult to do an average contract rate because with murder, for example, someone could have murders at \$16,000 and somebody else at \$20,000 in a new contract, but then you won't know until the end of the contract whether this person ended up getting any murders and this person may have gotten a hundred murders. Then the average is scaled down. What we decided to do is to use the mode, which is the most frequently encountered value in a contract. Expenses you can average because we say, "Show me all of the expenses on C felonies and how many C felonies were there in total, not just the ones that were billed on." Then you can get an average of costs for expenses. We rounded them, because I like nice round numbers, and that is our total cost.

2:25:06 Chair Ellis

Great.

2:25:06 G. Hazarabedian

There is a legislative work group that is now meeting in Salem and will meet again on Monday morning. I am on that group for OCDLA and that group is looking at the structure of criminal fines and fees for violations and crimes. It is going to be proposing some legislation through the committee, legislative committee, to revamp how fines and fees are collected and distributed in Oregon for violations and for criminal fees. It is going to be a major change from what has been current policy assuming the bill has the legs that I suppose it does. While I have looked at this schedule proposed to you by staff, and clearly the numbers look about right, I would at least ask this Commission to consider a statement going along with that schedule saying that while this is the actual cost of representation, we do not believe it is appropriate in many cases to impose that on the defendant. The legislative groups are looking for revenue wherever they can find it as you might imagine in this budgetary crisis. I am doing my best in that committee to see that the revenue to fund the court system is not raised on the back of the poorest Oregonians. Many of our clients are the poorest Oregonians. While I understand why the Commission might need to participate in this exercise, I think it would be appropriate for this Commission to take into account that we do work for very poor people. Funding the judicial system on the backs of those people is maybe not very good public policy.

2:26:57 C. Lazenby But the court still retains discretion under the statute. These are merely guidelines. How do you think this is going to work in practice? These are going to be ironclad and this will be the fee?

2:27:10 P. Levy No. This fits within the existing statutory structure which grants the court the discretion to arrive at what is called a reasonable attorney fee. That is meant to include whatever the defense attorney wants to provide to the court about the complexity of the case and the charges.

2:27:34 C. Lazenby Where do the funds go right now that are collected?

2:27:36 K. Aylward They go to the Criminal Fines and Assessment Account.

2:27:40 C. Lazenby So they go into the big pool. Gotcha.

2:27:45 J. Potter But you are telling us, and I appreciate Greg's comments about funding the court system on the backs of the poor is not something we are trying to do, but what the statute is requiring us to do is to come up with some schedule. Is that correct?

2:27:58 P. Levy Yes. We found another project for the Commission. We hadn't quite finished yet.

2:28:08 Chair Ellis You mean you read the bill.

2:28:10 P. Levy We are aware of the effort that Greg is describing.

2:28:19 C. Lazenby So is there a need for us to fulfill this obligation before this legislative process or should we wait?

2:28:24 P. Levy The statute has only been there since 2001.

2:28:31 C. Lazenby That doesn't answer the question about whether it is urgent or not. Do we need to urgently deal with this now, or do we anticipate that there are going to be changes?

2:28:43 P. Levy I think that we would like to make sure that what the Commission does is going to make sense to the Judicial Department. I don't think this is going to change the way courts go about assessing – it is just going to make it easier for them to do it but not the calculation and consideration that they use.

2:29:11 K. Aylward It is my understanding that many courts actually say, "Where is the contract matrix? I will use that as the schedule." For many courts this is just adding a little amount for expenses.

2:29:23 J. Potter It should be noted from the private bar perspective that they have clients in the courtroom when this schedule is being reviewed. There are going to be clients that are just going look at their lawyer and wonder why they were just bilked out of 10 times the number that we are charging.

2:29:43 S. McCrea Actually it is more the opposite. I missed what Greg had to say because I just arrived, but I was sitting in a sentencing yesterday and the Lane County judge asked the defense lawyer how much time he had in the case. He said he had two hours. I am sitting there thinking he must be just saying that so that it won't hurt the defendant but otherwise this is really painful. It was a complicated, multi-count case with a significant sentence and a number of parts. I am not sure what that message sends when the defense stands up and says, "I have two hours in the case," when either it is not true and that sends a message, or it is true and that is even a worse message.

2:30:33 J. Potter This would take away that question would it not? They wouldn't be asking that question anymore. They would be saying, "Let's go to the chart."

- 2:30:39 P. Levy Potentially yes. That question is a problem for the courts and for the defense attorney for precisely the reason that Commissioner McCrea is identifying. When I was practicing in Multnomah County I got that question a lot. I didn't know what our contract matrix was. I didn't know how many hours but I wanted to minimize the burden on my client and that wasn't necessarily the best dynamic.
- 2:31:10 Chair Ellis What if we adopted this today but if you do get input from judicial you can bring it back us to in December and we can amend.
- 2:31:19 P. Levy I would like to hear from our executive director on that.
- 2:31:21 I. Swenson A sort of a conditional approval. We could do that. That would be fine.
- 2:31:34 Chair Ellis It would be approval but with an invitation if they have input that they think is material then come back and modify it.
- 2:31:40 I. Swenson That might be a good way to go. In fact I may have gotten an answer this afternoon. They knew we were trying to deal with this today and I just haven't been able to determine whether that is true. That would be fine.
- 2:31:59 Chair Ellis This advice that we are nine years overdue bothers me.
- 2:32:04 J. Potter It works for me and the numbers are arrived at based on averages and these numbers are low. I think they are great numbers to have out there to show the legislators what it is costing to provide these services.
- 2:32:22 Chair Ellis I was struck by how low they were. Is there a motion to approve?
MOTION: John Potter moved to approve the schedule; Janet Stevens seconded the motion; hearing no objection; the motion carried: **VOTE 5-0.**

Agenda Item No. 6 Amendment to Eligibility Standards

- 2:32:55 Chair Ellis Now for the uncontroversial issue of eligibility standards.
- 2:33:02 K. Aylward I managed to get five different counties to agree to track their denials and provide me copies of the actual worksheets, so I could see exactly what the assets were of each of these people who were being denied. Of the five counties that agreed to do it only three after the time period were able to get me information. A couple of them said, "Oh, sorry, I couldn't do them," or, "My boss said I had to redact them before I sent them to you." I ended up with a small sample of 60 denials. These aren't really in good order. Option 1 is what I presented at the last Commission meeting that everybody said was too low, and Option 2 is pretty much just doubling those figures. After I looked at the data, I really hoped there would be some kind of clear break to sort of say you want to capture all the ones that are getting court appointed counsel anyway, you probably want to capture the ones that are proceeding *pro se* because they went out and weren't able to get an attorney. I sort of thought there would be a magic spot where that would happen and it didn't. After much effort I just said forget it and doubled it. That is what the Commission said, that it would be a good start to just double them. That is what Option 2 is. You have many other options but this chart is looking at the list of the 60 denials. Of the 60 that I saw, 60 are where the verifier recommended to the court that they be denied. The first 28 of them, off to the right the outcome, "CAC" – court appointed counsel, that means that in 28 of the 60 recommendations for denial, the court appointed counsel anyway. If we are looking at the pool of cases it is not going to make any difference. You could quadruple the privately hired rates, make them 10 times as much in some cases and the court is still going to appoint counsel in certain circumstances. The first column is the assets that the client had according to the worksheet. That could be cash in the bank. It could be equity in a home. It could be furniture and any number of things. Column B is the current privately hired attorney rate. You will see in one of these

cases the client had more in assets than the current private attorney rate lists and, therefore, the recommendation was to deny. Column C is the option that I provided at the last meeting. That would show that of that first bunch if you went with Option C, there would be 10 that the verifier would now say they now do recommend counsel and the court would have appointed counsel anyway. Those are kind of a wash. They don't make any difference. If you went with Option 2, you see many more where they would recommend court appointed counsel but they got court appointed counsel anyway. So basically the first 28 rows of this table where counsel was appointed anyway it doesn't matter what you do. The two failure-to-appears, rows 31 and 32, we don't know what the outcome of those cases is ultimately going to be. Then the *pro se* section, rows 33 to 45, there is a question of whether some of those people who chose to go *pro se* actually did have the money. The highest one, the person with \$57,000, who needed to get an attorney on a PV, they probably could have found the money to do that and probably chose not to. What I think you want to do is come up with figures where you are still putting some back pressure on the system, but making sure that little old row 33, who ended up going *pro se* because he has \$682 and couldn't find an attorney to help him, I think that is what we don't want is people proceeding without counsel because they didn't have the money to do it. As far as the retained cases go ...

- 2:37:31 Chair Ellis Go back to him. He would have qualified under both options.
- 2:37:39 K. Aylward That is correct. You can maybe see there is some highlighting in the assets column. I highlighted the ones that Option 2 would capture that Option 1 wouldn't. So if you went with doubling what I brought last week, those are the people you would be scooping up. They still don't have very much money. I look at those numbers and think row 35, 36, and 37, they have got between \$1,000 and \$1,200. That is the margin of error of whether you go out and find an attorney. They are in the pool. That seems reasonable to me.
- 2:38:26 S. McCrea What is "CONT" in your case type?
- 2:38:28 K. Aylward Contempt. What else is interesting in that case type column is you don't see any really serious cases. There are no Measure 11 cases. It is really the low end cases where there are denials.
- 2:38:58 S. McCrea That seems fine in isolation. The problem is that some of these people could get into the criminal justice system and accumulate convictions and then there is a cumulative affect on them down the line. I have a concern about making sure that people have representation at the very beginning even if it is not that important of a case.
- 2:39:24 K. Aylward The very last page sort of summarizes the annual fiscal impact. If you went from current privately hired attorney rates and chose Option 1, I am estimating the annual fiscal impact to be about \$100,000 to \$140,000, something like that. If you went with Option 2 it might be \$300,000 to \$400,000. Then I have listed the incremental costs of going from Option 1 to Option 2.
- 2:39:57 Chair Ellis Any discussion or comments?
- 2:40:00 J. Potter Row 30 where you have an exclamation there. Somebody appears to have some money and yet they qualified for court appointed counsel.
- 2:40:08 K. Aylward I have all of the details. I don't want to say that the court is just appointing where they shouldn't be. There is always more to the story. You can imagine the scenario where maybe there is cash in the bank but it is a joint banking account and the wife was the victim and she has frozen the bank account. He doesn't know this and writes down that he has \$10,000 in the bank. That may come out in court and those funds may not be available.

- 2:40:55 J. Potter You don't have to spend any time for me finding it, but as a legislator if you see that number it will raise a question. I fully understand there are extenuating circumstances that may well justify it. That is not your point. Your point is are we going to take Option 1 or Option 2, or some other option.
- 2:41:29 Chair Ellis I think my own instinct to do is Option 2. I think it is a much greater harm to deny someone counsel who really can't afford it, than to occasionally appoint counsel to somebody who can afford it. Of the two options I would go two.
- 2:42:00 J. Potter Based on what we have learned, certainly, the cost of privately hired lawyers is closer to Option 2 than Option 1.
- 2:42:14 K. Aylward I will tell you what gets most people is equity in real estate. Mr. 30, who apparently has \$109,000 in resources, \$101,000 of that is in real estate and \$8000 of that is in a vehicle. He is going to say, "Your Honor, I have been arrested. I have lost my job. Who is going to give me a home equity line of credit on my double wide?" The court figures, "I don't want to hold the case up while this guy goes and tries to get refinanced. I am going to appoint counsel but then I am going to recoup it at the end of the case. The state is whole again even though it goes from one pocket to another." That is often the rational - not to hold up a case because it is difficult to get funds for counsel. There were some in here where that is all they had was equity in their home.
- 2:43:21 Chair Ellis Their estimate of value may be up or down. Any other comments or questions? Is there a motion? You can see I am shy. I got shot down last time when I tried to make motion.
MOTION: John Potter moved to adopt Option 2 of the privately hired attorney fee schedule; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**
- Agenda Item No. 7 OPDS Monthly Report**
- 2:44:25 Chair Ellis Ingrid. I think I was the only one of the Commission that attended the house warming. You should tell them what a great building you have got. It is really terrific.
- 2:44:36 I. Swenson We do indeed. I think John has been there; Shaun not yet, and Commissioner Stevens I hope will come by sometime. It is indeed a very beautiful building as all of us who work there can tell you. So far it is just exceedingly comfortable for our staff and ourselves. It is a new building, and if we didn't tell you that, it was finished according to our specifications. The lawyers' offices line the building and we have conference rooms and a library and a reception area that are so far working very well. If I haven't told you before, I certainly need to tell you that the move went very well. I think we talked a little bit about that before. It was a pretty painless event for all of us except for those who were actually doing it, which was Kathryn and her staff. We went to work on Thursday in one building. We took Friday off and went to work on Monday in the other building. Everything was up and running. We had a nice open house. Barnes was there and lots of people came by. Not everybody could.
- 2:45:51 Chair Ellis Lots of judges.
- 2:45:53 I. Swenson Yeah. It felt like a real celebration and we heard good things from them too. We are very pleased.
- 2:46:04 Chair Ellis I think the location is really excellent and I think the balance between nice space but not opulent space is also just about right.
- 2:46:10 I. Swenson Yes. It seems to be a very good balance. We are right across from the Department of Justice, so conveniently located for our staff and attorneys and for the legislature.

We used to have to run up there on a moment's notice and that was sometimes hard to do. Now we can just cross the street and there we are.

2:46:32 Chair Ellis

Okay.

2:46:40 I. Swenson

On our monthly report we included a copy of our E-Board report and if anybody has questions we can talk about those. Pete Gartlan and Shawn Wiley are both here. Both of you can come up if you want, or either, and tell us about the legislative proposals that the division is making and maybe update us on the news from your division.

2:47:04 P. Gartlan

Good afternoon. We are the speakers you have been waiting for.

2:47:17 Chair Ellis

If you do say so yourself.

2:47:17 P. Gartlan

A couple of items. One is the attorney regional contact project, which I think I mentioned a couple of meetings ago. I think Shawn reported on it last meeting. Yesterday a group of attorneys from the Appellate Division came here and were seated at tables with the providers. We had our first contact in person. I am being facetious. From what I heard it was a nice get together, and we had discussions about what is happening in their counties and offices and the courts in their area. We are looking forward to a development of that. Hopefully we will have a nice dialogue going on with different parts of the state. There will be a kind of cross communication.

2:48:19 C. Lazenby

Pollination.

2:48:19 P. Gartlan

Thank you.

2:48:21 S. McCrea

I am assuming that the bandage does not mean someone took a swing at you during this process?

2:48:24 P. Gartlan

No. That bandage. There was a child playing in traffic and I ran out.

2:48:35 S. McCrea

Okay.

2:48:41 P. Gartlan

But, again, we are looking forward to that. We hope that this will develop into something really useful. That was Bronson James' idea. He approached us with that a few months ago. Shawn was the MC yesterday. The second item is there was an important case that came down about a month, a month and half ago that will affect our practice somewhat. That is *State v. Partain*. I am going to have to describe this for a minute, but the rule in this state had been that if a criminal defendant appeals successfully that if the case is remanded whatever the sentence had been is the ceiling on remand, so someone could not be punished by successfully appealing and going back and getting a harsher sentence. The Oregon Supreme Court decided to undo that doctrine. It decided that the case that announced that principle probably went too far, back in 1968. It said we are going to undo that doctrine. So now in Oregon if a criminal defendant successfully appeals, there is potential for getting a harsher sentence on remand. We are now in the business of trying to assess risk for clients with respect to counseling them about the risks of the successful appeal. We have also introduced a proposal to the legislature to try to restore what had been the rule, to put it back to what is called the Turner principle, to restore the Turner principle and we will see where that goes.

2:50:33 C. Lazenby

What was the vote in *Partain*?

2:50:35 P. Gartlan

I think it was six to one. I think Martha Walters was the only dissent. We have a couple of other proposals in the legislature. One is kind of a mailbox rule for people who are involuntarily confined. The Court of Appeals has a rule that if you don't use certified mail, when your pleading paper or initiating document arrives and is

stamped “filed” that is the date that it arrives. If you can go certified mail then whatever date is on the mail is the filing date. For people who are involuntarily confined in state institutions, they don’t have access to certified mail or anything like that. We have proposed an amendment that would say, consistent with an Oregon Rule of Appellate Procedure Rule, if somebody is involuntarily confined and they give their document to the person in that institution that is responsible for forwarding it, that is the date that it has been filed. It is kind of a housecleaning bill for people who have been involuntarily confined. Does that make sense?

2:52:04 Chair Ellis

Go back to *Partain*. I have been listening intently but thinking about that case at the same time. Does this now put your lawyers in the position that they have to really work with the potential appellant because I can just see it unfolding if you don’t do that and then the appeal and they get a higher sentence. They are going to blame the guy who filed the notice and took the case that, “You didn’t tell me any of these things.” I could see a pretty good argument for the legislature that that is not a position that lawyers in the Appellate Division ought to be put in.

2:52:52 P. Gartlan

That argument will be used. I can tell you that has affected our practice because we have changed our opening letter and we have a question on our attorney referral form asking the trial attorney if they know of any reasons why there could be a harsher punishment on remand if client is successful on appeal.

2:53:12 Chair Ellis

I am sure the argument the other way is going to be the way the system works now there is no risk for a defendant. They all appeal pretty much automatically. Maybe this will save system costs, but I think there is just as much additional system costs imposed on your lawyers as the arguable savings from appellants who decide not to take that chance.

2:53:44 P. Gartlan

There are more attorney resources used from our perspective just with gathering that information. There is going to be more litigation.

2:53:55 Chair Ellis

There are going to be a lot of post conviction claims. You are going to build a documented file of the advice that is given. It is probably not advice so much but raising the question and putting the burden on the defendant to decide, “Do I want to take this chance or not?”

2:54:19 P. Gartlan

Yep.

2:54:19 Chair Ellis

That is a very interesting subject.

2:54:24 C. Lazenby

I agree with you, Barnes, I am not disagreeing with you, but I think in practice it is not that much dissimilar from the advice that criminal defense lawyers give their clients when they are entering into a plea agreement where they have to say, “Look this a deal between us and the DA’s office, but the judge is free to go completely crazy and give you the maximum and not abide by this and you have to understand that.” Isn’t it very similar to that?

2:54:51 P. Gartlan

It is a lot like that. Essentially we are leaving the decision to go ahead with the appeal with the client. The client has that power in the first instance, but we have to remind the client of that. We are tracking how much it is going to affect the number of appeals that we have, or the number of appeals that are dismissed for this reason. This is a relatively new decision. I don’t have any numbers yet but we are tracking that.

2:55:22 Chair Ellis

It does bother me that a defendant would have an incentive to not take a legitimate appeal. These cases only have relevance if you win on the appeal. So by definition it is not a frivolous appeal. By definition it was a good appeal and it does seem very troublesome that this threat of a higher sentence might intimidate people from taking good appeals.

- 2:55:54 P. Gartlan I agree. There is a fairness factor in here, just basic fairness, and there is also an educational function or benefit to a successful appeal. To the bar and the bench when there is a written opinion there is more information about how a certain issue should be decided and what the relevant principles are. If people are dismissing their appeals, then potentially we would have courts who continue to make rulings using incorrect legal principles. There are a lot of downsides both to the individual and, I think, systemically.
- 2:56:33 C. Lazenby I am looking at Mr. Sermak and Mr. Hazarabedian out in the audience. It is pretty much well understood by everybody that going to trial has sort of an enhanced penalty for the criminal defendants doesn't it? That is just understood.
- 2:56:54 T. Sermak Oh yeah. We are practiced in telling them what the risks are of going to trial and making them understand that. Part of what I am nodding in agreement with is I see myself telling my client that, "I'm sorry you lost your case. I have real good reason to believe that the judge made a mistake. If we can convince other people that the judge made a mistake that same judge is going to be sentencing you, but he is going to be doing it in two years if he still on the bench and I don't know what his mood is going to be like that day. I wasn't sure what his mood was like this day." It just seems to open up the possibility of post conviction relief even if you put it back on the trial lawyer. The guy in prison is going to say that he is doing an extra two years, "Because my lawyer failed to tell me that such and such judge would be likely to punish me more harshly." I don't see an upside to this and I do see a lot more costs in terms of future litigation as a result.
- 2:58:10 Chair Ellis Giant costs to both levels. I would think the trial lawyers and the appellate lawyers would each have that ...
- 2:58:14 T. Sermak That can happen. We see that a lot already where, especially somebody with a long sentence, will bounce it back and forth. First he will PCR the trial lawyer. Then he will PCR the appellate lawyer. Then he will PCR the appellate lawyer on the PCR case. It just seems to me that they have opened up a Pandora's box that is going to prove way more expensive than they realize. I would hope the legislature would correct that.
- 2:58:44 G. Hazarabedian I was just going to say that people who become criminal defense lawyers, whether private or retained, do so to enhance and defend constitutional rights of clients not to have to be in a position where we are trying to chill those rights of clients. This new ruling puts us in that position. I think it is something that we definitely need to urge a change on.
- 2:59:06 J. Potter The two variables to enhance are whether or not at the trial level something is brought forward by the DA that wasn't known during the trial? Is that number one?
- 2:59:18 G. Hazarabedian That is correct.
- 2:59:18 J. Potter Then number two is something that may have taken place in the prison that may have caused an enhancement. Are you also not going to litigate whether or not the DA knew or didn't know at the time of trial? Why wouldn't a DA hold something back knowing that this might come back on appeal and he can use it as an enhancer?
- 2:59:50 I. Swenson It is the judge.
- 2:59:50 S. Wiley Under the decision, the strict words of the decision and the guidance that the Supreme Court has given us, it is simply whether or not the trial court was aware of the information at the time of the original proceeding. That can be new information that developed subsequently, or it could be information that wasn't presented at the original sentencing hearing. As written in *Partain*, it is not a new trial standard where it is known or reasonably could have been known.

3:00:19 C. Lazenby The prosecution gets a second chance at prosecuting.

3:00:19 S. Wiley Exactly.

3:00:25 Chair Ellis Okay. You have got all the free help we can give you.

3:00:35 P. Gartlan Would you like to testify with me, Mr. Chair? The third piece of legislation is a proposed amendment that affects an evidentiary rule. It is called a forfeiture by wrongdoing rule. There is a right to confrontation of witnesses against you. When the U.S. Supreme Court issued *Washington v. Crawford* in 2004, the Oregon legislature enacted what is called forfeiture by wrongdoing, specifically in the evidence code. It says you don't have that right to confront a witness if your conduct created that witness' absence at trial. Let's say there is a witness who does not appear at trial, that witness' statement can come in against a defendant if a defendant caused that witness' absence. That way if the defendant caused the absence the defendant has forfeited the right to confront the witness. We advised the legislature that if they crafted the rule a particular way then it would be constitutional, but the legislature enacted a rule that was a little bit broader than that. The U.S. Supreme Court about a year ago issued an opinion that said that rule is effective, if and only if, the defendant caused that witness' absence so that the witness would not testify against him. So, essentially, we are asking the legislature to limit the statute, the rule that passed a couple of sessions ago. I hope I haven't confused too many people, but we are trying to say, "Limit the statute to be consistent with the U.S. Supreme Court opinion that issued recently and by the by, we told you so a couple of sessions ago but you didn't listen."

3:02:43 Chair Ellis You might reconsider that last part.

3:02:50 C. Lazenby Is that as narrow as it sounds, Pete? The defendant caused it. She is buried in New Jersey and I did it. Is it that narrow? What kind of causes?

3:02:57 P. Gartlan You killed them or you have done something. You have beaten them up. You have threatened them. You have done something so that they are afraid or cannot appear and you did it so that they would not testify against you.

3:03:19 C. Lazenby So that would that extend in child abuse cases where an accused child abuser due to the child abuser's action has traumatized the child such that the child doesn't want to testify and therefore there is no right of confrontation in child abuse and sex abuse cases.

3:03:43 P. Gartlan The judge would have to make a determination was that abuse or terrorization for the purpose of keeping the child unavailable. It has to be intent.

3:03:56 J. Stevens In that specific case or just in general?

3:04:00 P. Gartlan In general. The rule is that the judge would make the preliminary determination of whether or not the defendant did this with the intent of making that witness unavailable.

3:04:13 J. Stevens So a guy, no offense, tells a kid, "If you tell you are going to get me in a lot of trouble and you will be really sorry." That is narrowing it?

3:04:22 P. Gartlan Fascinating. That is, "Don't tell other people." It may not be, "Don't come into court to tell others." That would be a fascinating question.

3:04:36 S. McCrea Yeah but it is not intimidation that is the intent. Intended intimidation is not the same as not testifying. That would be an interesting thing to be litigated.

3:04:57 Chair Ellis Okay. Anything else you want to add here?

3:04:59 P. Gartlan Sure. Another 30 minutes of material.

3:05:06 Chair Ellis I think your light is on.

3:05:06 P. Gartlan We have several cases in the Oregon Supreme Court coming up, including our first in the juvenile/appellate section unit. We are looking forward to that.

3:05:24 Chair Ellis It sounds like they are taking cases?

3:05:23 P. Gartlan Yes. We have five in the criminal section in November being argued. We have a regular diet of Supreme Court cases. The last one is fairly notable, I think. It has to do with the two judge panel. I think I have reported in the past about that. Chief Judge Brewer went to the legislature at the end of the last session and got authority, got statutory authority, to create a two judge panel instead of a three judge panel, which is the norm. The way that statute is written the judge can just create this two judge panel and say that these two judges are going to hear some cases. The judge did that because there is a significant backlog in the Court of Appeals. I think I reported on this a couple of meetings ago. It is taking from six to eight months after the briefing is complete for a case to be on the Court of Appeals docket. This is an attempt to kind of process more cases at the Court of Appeals level.

3:06:40 Chair Ellis So a 30% increase in available judges for this?

3:06:48 P. Gartlan I think there is only authority for one two judge panel. What is happening to us is that we are filing 60 merit briefs per month on average. The court is setting 40 cases per month. So every month there are 20 cases going into a backlog. We were concerned about the two judge panel because we were concerned about cases being processed and maybe not given due attention, perhaps just being rubberstamped and so we were concerned about that. We voiced our concerns to the court. I think the court was receptive to our concerns. The court has set a two judge panel for our cases in December. Chief Brewer and Justice Gillette will be sitting. We are trying to make the best of it. In the best of all possible worlds we get a three judge panel, but we look at the realities and our cases are just getting backlogged and backlogged.

3:08:13 Chair Ellis The chief said something like 60% of Court of Appeals cases are decided without opinion.

3:08:20 P. Gartlan Seventy-five. We are going to try and take advantage of this in our client's interest. I think we have come up with a plan to do that. We will identify for the court 30 cases for the two judge panel. We have identified categories of cases that we think will benefit our clients. It is not all of them. If we think that we have a clear winner under current law then we will put this case before the two judge panel. If we think there are mootness problems with a case. In a lot of misdemeanor cases if there are sentencing issues there are mootness issues. We think those cases would be appropriate for the two judge panel. If we have cases where our assessment of the direct appeal issue is that it is not that strong but the client does not want to waive direct appeal, the client wants to go to PCR and we think that would be a case for a two judge panel and similarly with cases where the client wants to exhaust state remedies before going to federal habeas. Finally, when we think we have a case where the controlling case law is against us at the Court of Appeals level but we think that it might be ripe for Supreme Court review. We are telling all our clients when we have identified cases that we think are appropriate for a two judge panel we are telling our clients, "Here is what is happening and here is why we are doing it."

3:10:07 Chair Ellis Here you know who the two judges are. You are not just sending these cases to the two judge panel, it is these two judges.

3:10:20 P. Gartlan Yep.

3:10:24 Chair Ellis And each of them gets veto power. They have got to agree or they can't decide.

3:10:30 P. Gartlan If they don't agree then a third judge is pulled in to cast the deciding vote. We don't like the idea of two judge panels, but we think we can actually benefit our clients if we are identifying the correct cases to be before the two judge panel. We think we are moving some cases along, at least that is our hope, the cases that would not be addressed for several months later if they remained on the regular docketing schedule.

3:11:05 Chair Ellis Any other questions or comments?

3:11:09 P. Gartlan I have five more items.

3:11:16 C. Lazenby Whatever they are we agree.

3:11:17 Chair Ellis Ingrid, anything else?

3:11:31 I. Swenson You have one more attachment. Last time I described briefly to you the work of this interbranch workgroup. The only reason I introduce it today is because I think Karen is here, Karen Stenard, from the Lane County Juvenile Consortium. She has been active in this group for some time. If we had more time I would give you more information about this. I have provided you the letter that I have given the interbranch workgroup about this proposal from representatives of the three branches of government. There are legislators on our group. Chief Judge Brewer and the Chief Justice and some trial judges are on this group. Then there are defense lawyers, and prosecutors. It is a collection of people interested in the juvenile dependency area. They were trying to agree on a proposal that they can all support before the legislature. They ultimately identified the initial proceeding in a juvenile dependency case as being a critical place where you could make a difference by increasing the resources available to all of the people involved in that part of the process. As you know, we have difficulty getting our lawyers to those first hearings in some counties. They are not there. The parents are unrepresented, the children are unrepresented and this is a critical part of the entire proceeding. The group is willing to support a minor fiscal increase for public defense for the purpose of obtaining more compliance with the requirement that lawyers be there for that initial hearing. So we provided an estimate and I think it was \$1.8 million total for accomplishing that piece financially. We will see where that goes. It has been good to see people try and come to agreement. Karen, anything you want to say?

3:13:41 K. Stenard No. It has been an effective workgroup and it is the proper identification of a really critical issue. The first hearings really dictate the rest of the way these juvenile cases will go. It is astounding to me that providers don't see the benefit of going to that first hearing. It is the culture in some counties and it is persistent. I think this would go a long ways towards addressing it. My thought is once you had compliance if the money was no longer there hopefully at that point people would have changed the culture. That would be my expectation.

3:14:26 Chair Ellis I notice the next meeting is December 9. There is a significant chance I won't be able to make that.

3:14:27 S. McCrea I will be there.

3:14:34 I. Swenson Very good. For those of you who are available we are having dinner at 7:00.

3:15:05 Chair Ellis I would entertain a motion to adjourn.
MOTION: Chip Lazenby moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting adjourned.

Minutes of October 23, 2010 Public Defense Services Commission Retreat

Chair Ellis – Are we in danger of becoming complacent? Presenters yesterday confirmed sense of collegial atmosphere in public safety community.

Comm. McCrea – Doesn't see complacency. Good structure in place for PDSC and providers. A lot of transparency and use of benchmarks to measure progress. There is a lot of cohesion and respectful expression of differences.

Comm. Stevens – Feeling good about where we are but next few budget cycles will be challenging. Will need to defend the agency more than ever before. Commission operating well.

Comm. Potter – There is a certain comfort level after years of being uncomfortable. Haven't been hammered on the budget but need to push in some areas like juvenile representation. As budgets tighten, old adversarial relations may be revived. May be time to survey our contractors about what commission should be doing.

Comm. Lazenby – Peter introduced transparency. Big challenges are coming. May need to focus on how cases come into the system. Since we are efficient we can say we have done our part and others must act now. Dimensions of budget shortfall are alarming and, if anything, are always low. No easy decisions left for legislature.

Chair Ellis – Won't legislature expect our expenses to decline with crime rate?

Ingrid Swenson – But prosecution rate remains the same.

Comm. Lazenby – Perception of high crime rate persists. Businesses concerned if don't prosecute shoplifting. Real question is where does the system go? Can't tax ourselves out of this situation. Public defense has to be reactive to what comes in; it has no control.

Comm. Potter – The cases being prosecuted may be more serious now. One difference from the past is that the size of the shortfall is so great, cutting public defense won't help much. The entire system has to be changed.

Chair Ellis – Two data questions. Cases filed now are more serious but misdemeanors will be prosecuted as violations. How will this affect our caseload?

Kathryn Aylward - Caseload: a third of the caseload is juvenile dependency; that will continue to increase; have seen small (4-5%) drop in felonies, 6-8% drop in

misdemeanors. So charges are proportionally more serious and more people are now qualifying for court appointed counsel.

Comm. Lazenby - The population of young males is an important factor in driving the crime rate. That data could help us to do long range planning. Could the Brown case be found applicable to this effort to treat crimes as violations?

Peter Gartlan - Not yet.

Chair Ellis - We should communicate these points to the legislature early in the process.

Comm. Stevens - We can't ask contractors to take cuts when they're already underpaid and don't have the benefits of public employment.

Chair Ellis - OJD has more FTEs so the impact on them is greater. What is the Sentencing Commission?

Ingrid Swenson - Gov. Kulongoski will be appointing this group to look at revising the sentencing guidelines.

Comm. Lazenby - Guidelines bring more consistency and predictability to sentencing and the costs of incarceration.

Chair Ellis - We need to be more proactive regarding participation in the sentencing commission?

Peter Gartlan - Would be interesting to know the actual number of prosecutions in the last year compared to earlier years. Rates can be misleading because of population increase.

Kathryn Aylward - If look at case filings, they have gone up even if crime rate has gone down.

Chair Ellis - Do we know what has happened with drug crimes?

Kathryn Aylward - We track our cases by OJIN case categories (crime seriousness), not by specific case types. We now have a new program that will allow us to collect data about specific charges and number of counts.

Chair Ellis - Would like to have four or five talking points to respond with when asked about declining crime rates.

Kathryn - Juvenile cases, death penalty, more people qualifying and drug cases.

Ingrid Swenson – Commission might want to provide information to the legislature about changes they could make to reduce our caseload.

Kathryn Aylward – (Provided handout about breakdown of public defense expenditures by case type. Another handout showed detailed breakdown by particular charges, number of cases and cost. Another handout related to the comparative cost of defending murder and aggravated murder cases.)

Comm. Potter – Important to know the cost of an average case - \$575 to 600 per case.

Kathryn Aylward – Last session there was a bill that would have reduced some drug charges involving small quantities. That would have saved us approximately \$500,000. Reducing Driving While Suspended, Theft III, Criminal Trespass II, Criminal Mischief III and Disorderly Conduct would save \$3.5 million per year. Maybe PDSC should say – here is the universe of things you could do – fully fund, decriminalize, or stop prosecuting. If want to decriminalize here are some options.

Comm. Potter – Legislature has never really wanted to decriminalize. But even if did, DAs might backfill with other types of cases and prosecution rates may remain the same. Unless DA's offices lose deputies probably won't reduce filings.

Comm. McCrea - In some counties DAs don't negotiate. Their office policies don't appear to be affected by cost.

Comm. Potter – Police will continue to pursue prosecution on their cases.

Comm. Lazenby – Is legislature interested in reducing any particular kinds of offenses?

Ingrid Swenson – Two legislators have invited PDSC to provide information about how money could be saved.

Kathryn Aylward – Another area where could save money is to narrow the scope of the aggravated murder statute.

Paul Levy - Washington's statute is similar in scope.

Chair Ellis - Sentencing options are different

Comm. Potter – Defense is already underfunded; hard to reduce cost.

OPDS will prepare information for the legislature about ways in which it could save money by decriminalizing some offenses and lowering the crime seriousness level.

Chair Ellis – Should PDSC take an active position on the Partain case? It will have a cost impact. In every single appeal will need to have trial counsel and appellate lawyers counsel clients about the risk. There is also an increased risk of PCR.

Comm. Potter – But will be savings if people decide not to appeal. If a person goes back for re-sentencing and gets a higher sentence will challenge whether the court knew about the enhancement facts.

Ingrid Swenson – There is a question of whether the defendant will be entitled to a jury decision on the additional aggravating factor.

Peter Gartlan – Explained the rationale used by the court in Partain.

Comm. Potter – Doesn't believe PDSC should take a position on Partain.

Chair Ellis – There won't be a lot of cases that will result in additional prison time, but there will be additional costs in connection with the appeal process.

Commissioners McCrea and Lazenby urged against PDSC taking a position on this issue. Commission could send a letter talking about potential impact on our costs.

Comm. Potter – Another issue the commission might want to consider taking a position on is the bail bond proposal since it could impact revenue to courts.

Chair Ellis – Isn't that an issue for the courts?

The Commission discussed and approved the list of possible topics for 2011 outlined in the materials provided to commissioners.

With regard to succession planning for OPDS managers, Ingrid Swenson said that Peter Gartlan and Kathryn Aylward are critical parts of OPDS. Theirs are the key positions to fill and we need to prepare for their departures. She built her own plans around theirs. Disruption not a good thing before a tough legislative session, so reluctant to make any changes before the session. Once legislature has adjourned, would be a good time to transition to a new executive director. Good time for agency to have a new director.

Peter Gartlan is approaching retirement age. After working hard for last several years he would like to take some time off. AD is in a position to absorb change. Happy with division. Have some people who have matured into great managers.

Kathryn Aylward said that she will reach retirement in less than four years. Ingrid Swenson said Kathryn is indispensable in many of her roles and we need to be developing capable assistants. It will take two budget cycles for someone else to get up to speed. Hard to identify such a person. Shawn Wiley said there are people in organization who can take on management roles. OPDS needs to continue to develop interest in the management role. Paul Levy is willing to continue serving the organization. Comm. Potter said if Peter Gartlan were to leave close in time to Ingrid's departure, it would be a challenge. Ingrid said that one option would be to ask Pete to work part time to continue to train new lawyers. With Kathryn's position, need to think about how to mentor a replacement for her. When do we start process of replacing Pete? Chair Ellis said he feels far more comfortable now than five years ago. Agency has reached maturity, stability. Turnover is inevitable. One of commission's jobs is to deal with transitions. Healthy to be able to talk about these issues. Kathryn said it would be good to have time to get a new executive director oriented before they actually had to take over. With regard to notifying people about the departure of the executive director, Comm. Stevens asked if it would be appropriate to wait for a time after the legislative session so that it does not appear to be a response to whatever happens in the legislature. Other commissioners felt that it would be best to make it public now. Ingrid said that as the legislative session proceeds, the date of adjournment should be predictable and she will attempt to identify an actual retirement date well in advance of her departure.

Attachment 2

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, December 9, 2010
9:00 a.m. to 2:00 p.m.
Office of Public Defense Services
1175 Court St., NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Honorable Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Paul Levy
Billy Strehlow

The meeting was called to order at 9:10

Agenda Item No. 3 Discussion and Possible Approval of Updated Strategic Plan

0:07 Chair Ellis We do not have a quorum until Commissioner Lazenby arrives. The first item then is the updated strategic plan. Ingrid, maybe you want to walk through the highlights?

0:22 I. Swenson I would be happy to do that, Mr. Chair. All of you have the draft revised plan in your documents this morning. If you will look at the first four pages, actually five pages, there are no changes there other than to change the date. That sets forth the vision, mission, values, etc., of the Commission. I did notice as I read through it that there are 11 different references to cost efficiency. That will certainly be a theme this biennium, as it has been in the past. On page six the changes begin and if you will look at the middle paragraph on page six, this is simply updating what Kathryn and I have been doing during the interim, which is to report to the E-Board when it meets and to Interim Ways & Means and to the Ways & Means at the 2010 legislative session. It talks about revenue projection under House Bill 2287, which was the court fee bill. Both the judicial department and PDSC report regularly. The judicial department estimates projected revenue under that bill and then the E-Board makes a decision as to how to proceed. In the 2010 session an additional \$3.5 million was identified for possible appropriation to PDSC should HB 2287 fall short of its projected revenue goal. It has fallen short as time has moved along. Our projections would indicate that we would not need the full \$3.5, but only \$1.4 million of that amount. Although it is not included here, we will be appearing before the E-Board next week. At that time the recommendation of legislative fiscal staff is that no action be taken with respect to appropriating any of that funding to PDSC, and that that decision be postponed until the 2011 legislature convenes in the expectation that we will have more information about our projected needs for that period of time. Strategy 2 includes some updated information about our discussions with the legislature in the next session. We will talk about this perhaps later. In the materials that I distributed this morning there is a draft document which outlines, just structurally, how the cost of public defense funding could be reduced if that is one of the goals that the legislature chooses to pursue since across the board cuts for other

agencies are certainly being considered. What it says, and you can take time to read it when you have an opportunity and can maybe discuss it further, but it essentially says there are two factors which we discussed at our December meeting which principally drive our caseload. That is the cost per case of contracting for trial level services and then the number of cases. Principally district attorneys and then the Department of Human Resources on the juvenile side drive those numbers by the choices that they make about cases that they will be pursuing. That leaves us in a position of having very little flexibility, very little ability to control the costs of public defense. It certainly becomes a legislative responsibility to decide how it can reduce that cost if that is what it chooses to do. As District Attorneys Schrunck and Beglau both indicated last time, in their jurisdictions they are charging differently because of their own cost challenges. They are charging more offenses as violations and in Marion County, choosing not to pursue certain non-person misdemeanors at all, not to prosecute them. The idea would be to advise the legislature of those decisions and choices and the fact that they can reclassify offenses. They can decriminalize behavior. They can change punishments, all of which affect our costs. What that document doesn't do is talk about the last time such reductions were made which was in 2003. In the budget narrative, which we submitted with our budget this time, there is a lengthy discussion as the Commission requested, about the impacts that were experienced by our contractors in 2003 and by the criminal justice system. That piece will get added in some summary form to remind people that that isn't an attractive way to reduce costs and ultimately doesn't save money and has an impact on public safety. On page seven, strategy 3, there is a discussion about the policy option packages that the Commission approved when we drafted this 2011-13 budget request. You had decided at that time that it was appropriate to talk about the needs even though the likelihood of obtaining policy option package funding was not very good. I think the Commission may want to think about how much we promote any of those policy option packages. For example, with the Appellate Division the parity piece is a relatively inexpensive one. I don't know the current number but I think it has been around \$300,000. But if we pursue that sort of energetically in the legislature, first of all I don't know if that would be successful, secondly, it might result in the need to make choices that we wouldn't want to make. They could say, "You can cut positions if you want to increase compensation." But we have that and then for the trial level people your policy option package includes parity for public defenders with local district attorney offices and other increases. We knew at the time that asking for those kinds of funds was not likely to be successful and yet, on the other hand, it is important to talk about them. We will certainly describe the needs to the budget writing committees of the legislature, but how much we want to promote and pursue those becomes a question. On page 9, just a correction - it says "Goal II" but it should say "Goal III." The next changes are on page 13. The last paragraph describes the events surrounding the March 2010 PDSC meeting where you heard from George Yeannakis and others about representation in juvenile delinquency cases and the extent of the problem here in Oregon. This is an update on that issue.

9:15 Chair Ellis

What is the status of that in the Court of Appeals case?

9:21 I. Swenson

We are hoping that we have identified, one of our trial lawyers has identified, a case that will be appropriate for an appellate review. No brief has yet been filed but it is under consideration. In fact, I think there are two cases. Two cases being considered, is that right? So two possible cases in which there could be some appellate review of that issue. I was going to report later but I can tell you now. After meeting with Commissioner Welch, I revised the draft colloquy that we had been working on. The attorneys from this office had prepared the initial draft. I sent it on to the Chief Justice last week. I am hoping he will either comment and make changes of his own, or send it on the trial judges for their consideration. On page 14, the only new material is in the third paragraph under item B. This biennium we did not submit another policy option package for post conviction relief cases, wanting instead, as you know, to take a look at how our providers are doing and evaluate that before looking to seek funding for a full time FTE PCR unit. On page 15, the only

change is Item C – Appellate Representation – PDSC reviewed the delivery of services this year. It is an update with respect to that. The final paragraph on the page is new information on what has occurred with respect to the Commission’s view of the need for boards of directors by contract providers. That just summarizes that decision. On page 16, the first paragraph under strategy 4 also talks about attorney evaluation procedures and the fact that the Commission had considered various approaches to that issue and then decided in connection with the requirement for boards, that contractors be required to have in place a management system and an evaluation and quality assurance system that meets the requirements of the Commission with respect to any new contract proposals in the next budget cycle. On page 20, under Goal IV - the integration of the functions of the Appellate Division and CBS - here we can essentially say that we have achieved this goal with the move. I think most of the issues that existed have been resolved. Kathryn and her staff continue to look for ways to coordinate the work of the two divisions and manage it more efficiently, but essentially that has been achieved. On page 21, when we are talking about the goal of promoting diversity and cultural competence, I mentioned the fact that we had attempted to do a baseline survey of our contract providers last year. Unfortunately our response rate was not adequate to permit us to actually assess what ...

13:26 Chair Ellis

That surprises me because we have had pretty good response rates on almost everything else.

13:37 I. Swenson

I think it is a little different because it is a kind of information that they are not accustomed to gathering from their staff. There were certainly questions about the categories of employees and how to use the terminology and a certain level of discomfort, I think, asking for information that otherwise they haven’t. Maybe gathering it from consortium members is a more difficult thing than it is from other kinds of contract providers. In any case, what I would propose is that we request that such a survey accompany responses to our next request for proposals. We can certainly clarify any terms if that is a concern that people have. I do feel like it is appropriate to get some information.

14:40 Chair Ellis

I think it is too. Hispanic, Black, and I am not sure Asian is that much of an issue for us. I think we want to know this because it is an area, particularly given what the likely ethnic mix of our client base is, we want to mirror that.

15:08 I. Swenson

Yes. We will look to pursue that. The other development is that Paul is currently working on a diversity training for our own staff to which we will invite the local legal community. It will be a full day event. It is tentatively planned for April 14, I believe, with multiple presenters. Paul attended the Department of Human Services event here earlier in the year and found that it was excellent. He got some great ideas for people that we could also ask to assist us. Those are really the changes. Then I attached all these materials on different public defense related issues so that Commissioners could take a look at those and consider whether there are other directions we should be exploring, not necessarily pursuing but exploring in terms of some of the issues that were raised in those papers if you decide to talk about this. One article has to do with voucher systems for clients in public defense. I know Jim Hennings spent a little time studying that report and has some concerns about the scholarship involved in that report that he might want to mention to you. It is here simply for your review and consideration if you find anything of interest there.

16:40 Chair Ellis

So the idea is that we just disband and shoot the vouchers out and let the individuals involved pick their lawyers?

16:55 I. Swenson

Well it sounds interesting that in Ontario, at least, that is the system that it is place and apparently in a lot of Common Law systems and at least when we discussed this at our Quality Assurance Task Force meeting, Karen Stenard was there from Lane County and she has an acquaintance who works in the Ontario system. At least according to her acquaintance it worked effectively. I think where it would work is

probably where you have a list of lawyers. They are there taking the occasional case, either declining it or accepting when the court calls them. It wouldn't be a huge change to let the client be empowered to make the appointment instead of the court. You are told there are four lawyers available. Pick which one you want and bring them this voucher. I think the idea is to give some level of control to the client. For better or for worse clients don't have any say except to complain that their appointed lawyer is not satisfactorily meeting their needs. It would create an incentive to meet the client's objectives. I think the other point is that public defense is so underfunded nationally that it may be an approach that ultimately would press the system to do better. These private lawyers wouldn't need the public defense income in the same way that our providers do who rely on that system. Maybe they wouldn't be available unless the market rewarded them appropriately for the work. I think those are the motivations.

- 18:53 Chair Ellis Of course markets are efficient only if there is adequate information for the market participant to make a decision. I can see that being a huge problem.
- 19:09 I. Swenson It could be, although the authors of this article say it is not. Now the court is gathering information about people and using it to make appointments. They could make information about qualifications available to clients if they were interested.
- 19:25 Chair Ellis They are matching it against court appointed systems, not what we are doing?
- 19:30 I. Swenson Yes, I think, for the most part that's right.
- 19:37 Chair Ellis What happens to the plan? Who gets it and where does it go?
- 19:43 I. Swenson It is our document. It is an internal document that we prepare for our own use to guide both the Commission and OPDS staff. We assign ourselves tasks in terms of following through on the goals and strategies. I do include it in the biennial report to the legislature so they see what it is. We just submitted that December of last year and we will do another one prior to the end of next year.
- 20:19 Chair Ellis Obviously we have a new Governor coming in or an old Governor coming back. Any sense what the climate is for the new administration? Any sense who the new Joe O'Leary would be?
- 20:40 I. Swenson Somebody may have a lot more information than I do. I have not been able to determine that and the old Joe O'Leary doesn't know either. He is my best source of information. Other people may have other impressions and I want to hear them, but my impression is that public safety is probably not the top of the new Governor's list of priorities. He has announced who his advisors are and what people will be in a number of areas, but not yet in public safety. Greg, did you have something?
- G. Harazabedian I just heard yesterday from Rob Raschio, OCDLA president, and OCDLA has been asked to recommend if we have any names as to who might be the next advisor on public safety issues. They are going out to the various constituencies looking for ideas. That is all I know.
- 21:36 Chair Ellis To this point we are not hearing where we might come out under the executive budget?
- 21:43 I. Swenson No, other than to expect that it will be what it usually is under any Governor, which is proportional treatment without specificity, an increase or decrease similar to whatever other agencies receive.
- 22:06 Chair Ellis Any sense on the legislature? Did we lose friends or gain friends? Too soon to tell?
- 22:16 I. Swenson I will be candid. I feel comfortable with the legislators who are there. Bruce Hanna was identified as the potential House co-speaker yesterday. He has been very open

and receptive to information about public defense and the needs of public defense. He served on the Public Safety Subcommittee of Ways & Means, which heard our budget. At least four years ago he was there. There is nobody that I am uncomfortable with, so it remains to be seen who will serve in what capacity. They haven't yet named a potential co-chair on the House side. I think we will be alright.

- 23:13 Chair Ellis Any thoughts or observations on the Strategic Plan?
- 23:19 Hon. Elizabeth Welch Yes. A couple. They are more questions than anything. The first one is I am curious if there is any impact on the way in which this office and the Commission will function given the change in the legislature, in other words, going to the annual sessions? Is there going to be any impact from that? It seems like there might be but I don't know. Where does that put our sort of biennial process?
- 23:55 I. Swenson That is a really good question and I don't have an answer for you. My assumption is that that second session is going to act a lot like the special sessions have the last two biennia, which is to have a very limited agenda. We will continue to have biennial budgets as far as I know. Is that right, John? No? We are not sure about that.
- 24:18 J. Borden The assumption is yes, but there is going to be a cautious approach.
- 24:25 I. Swenson If we have biennial budgets then the even year session is a lot more focused on other things, but probably adjusting the budget as needed. I suppose if the body went to annual budgets that would have a huge impact.
- 24:48 Chair Ellis There could be more of a tendency to not make hard choices, but push them to even year sessions, so we would live with more uncertainty. I could see that happening.
- 25:05 I. Swenson Could be. Could be. I would inquire, Mr. Borden, if there is any other information that is available at this point about how that second session will be used.
- 25:20 J. Borden I think they are just trying to get organized for this upcoming session at this point.
- 25:27 I. Swenson Everybody is waiting for things to settle, for leadership to be resolved and even the election isn't entirely resolved yet. We kind of have to wait for that.
- 25:44 Hon. Elizabeth Welch Okay. My other question has to do with the format on page 15, the position that the Commission took regarding boards of directors. We spent a lot of time on that subject and I continue to be a little skeptical about how effective this is all going to be. I guess I was a little disappointed that there isn't more emphasis, even though it is an internal document, on the issue of oversight of performance of lawyers. To me that is what this is about. I am sure it is about other things, but if it is not about that it is not very important - that would be the bluntest way of my putting it. It is not specifically mentioned as a reason for our requirement and I feel like it should be.
- 26:48 I. Swenson I can revise it. What I did was on page 16, I put that piece under Strategy IV, because that is the best practices regarding evaluation of attorneys, recruiting, monitoring, and so forth. I can connect it.
- 27:07 Hon. Elizabeth Welch That is just my opinion and I don't know how other people feel about it. The things that are mentioned as the reason for doing this don't include that. Although strength in the management of contractors could be intended to be included under that. I just think it is important for that to be kind of the big sign over the building.
- 27:27 I. Swenson I think it is certainly what the Commission intended. I would be happy to revise it to ensure that it reflects that.

27:39 Chair Ellis Shaun, any questions?

27:39 S. McCrea No. Thank you.

27:45 Chair Ellis I thought it was very well done. You read along and say, "Yeah, that is what we did." The only other comment that I had was I just don't want us to start getting complacent and just be in a maintenance mode. I am not sure we have really identified what we need to do to go to whatever the next level might be. But for this time, given the economic constraints, I think this is the right document. I think we want to continue to keep pushing ourselves and what could we do to make it really better. We probably aren't going to be able to do that the next year or two, but let's keep our eyes down the road.

28:48 I. Swenson I think, Mr. Chair, I will continue to include with Commission materials whatever articles we find that are potentially of interest and the idea would be to keep current on what is happening in other jurisdictions.

29:03 Chair Ellis I would welcome that. We used to get the Spangenberg report kind of regularly. I don't know whether that has sort of tapered off or we are just not seeing it. I do feel a little disconnected from the broader picture.

29:20 I. Swenson As far as I am aware there is no current Spangenberg report being issued on a regular basis. He is associated with a university. NLADA has a list serve which reports on what is happening in other states. I usually get an email about something in New Hampshire or something like that. I could consolidate that information and sort of update you periodically on developments in other states. There is a lot happening and none of it good.

30:16 Chair Ellis Meaning what?

30:17 I. Swenson Mostly it has to do with crises in those states regarding funding in public defense. Once in awhile there will be a positive article about some new approach to defense work, such as the ones that you see here. Most of the information that we get is about underfunding.

30:40 Chair Ellis Have many gone to a statewide or commission type group?

30:46 I. Swenson More. It is certainly viewed as a best practice. I would say if financial times were a little better that we would see more of that. I don't think there is much initiative for change in that direction right now. People are just scrambling to survive.

31:09 Chair Ellis Do you want to talk more more about this draft on how to reduce costs? I think that is going to be a big part of what we are asked.

31:19 I. Swenson That arises out of the presentations you received last time from the Criminal Justice Commission, the district attorneys, and the Chief Justice. It put everything in perspective in terms of the factors affecting the demand for public defense services. Every two years we try to identify, for the legislature, some of the things that we believe affect our caseload. There are many of them, but as Craig Prins explained to you, we can't always unravel changes in crime rates or caseloads or anything else by just looking at the changes that have occurred in the environment. Some of them affect it positively and others we don't know. That information was certainly enough, I think, for us to conclude that we can't look behind it so much as just to realize that while the crime rate is going down dramatically, and one would expect that the whole criminal justice system would be shrinking accordingly, that is not happening and as Craig explained the prosecution rate remained stable throughout that 15 year period of decline in the crime rate. His thought, which he expressed to you, was that that was probably due to the fact that they were working at capacity for much of that time. So when the caseload for them declines they have a whole series of things they have been wanting to do and haven't been able to do and now are able

to do. At least he thinks that has been the case. As we heard from Mike Schrunck and Walt Beglau, for them at least - not all DAs but for them - the loss of staff means that they have to address that by handling these cases less often. As Mike Schrunck said the more times a DA has to touch a file the more deputies you need to handle that file. A violation file you touch once, a misdemeanor at least multiple times before that case has worked its way through the system. For those reasons at least some DAs are looking differently at how they will prosecute cases. We can't look statewide and know what is going to happen. We can track it as it occurs but it is not something that we can predict unless we were able to say these offenses are going to be treated this way and DAs are not going to do something different that would increase our costs. Let's say they prosecute fewer misdemeanors then they may prosecute felonies in a different way. Maybe there are more Measure 11 cases that get their focus or whatever. Our costs are related to the seriousness of the offenses that they charge as well. We would have to assume that the prosecution rates would go down and that the cost per case for us would go down accordingly. That is a big assumption. We can follow it. But the legislature could make some of these decisions instead of leaving it up to individual district attorneys. For example, with respect to the treatment of violations the law has changed more than once on that topic. At one point in the past, the legislature had determined that all of the cases that could be filed as violations or misdemeanors would automatically be treated as violations unless the district attorney elected to elevate them to misdemeanors. That was then reversed and now the assumption is that they will be misdemeanors unless the district attorney elects in writing or at the initial appearance to treat them as violations. So the legislature could reverse itself on that again with the expectation that more would be filed as violations. They have got to think of all kinds of ramifications, however, and maybe - I don't know the answer to this question but violations may be more expensive for the court to process. I would be surprised because there are a lot of costs associated with misdemeanors. With no defense attorney to handle the case it may be that a significant increase in violations affects court capacity too. So there are lots of factors to think about. There is a blank in this document and we will include in there information that Kathryn developed in 2009 for the legislature when we were asked, with respect to a draft proposal, "What would be the fiscal impact for public defense if you made the following changes in the criminal law?" They included things like first time possession charges being treated as misdemeanors rather than felonies statewide and identifying other cases for reduction. C felony property offenses could be treated as A misdemeanors. I think on average it would probably save us about \$400 per case if a C felony were treated as a misdemeanor instead. The legislature could say that we are going to take these steps with the expectation that this will lower public defense costs. We can assume that it will unless charging practices change or some district attorneys begin filing things they haven't filed in the past. It is hard to be certain. But then as I say the point was to talk also about the cost drivers for us, which are the cost of doing business of our contractors and the fact that they are not well paid as it is. I think I mentioned in this document, if not I need to develop it a little bit more, the disruption that occurred the last time we lost providers. Some providers didn't return and some were harmed enormously by the termination of public defense funds prior to the end of the biennium. I want to develop that a little bit more. The idea is it is kind of an outline for us when we make a presentation.

38:39 Chair Ellis

Any other comments? I would invite anyone in the audience that has a comment on the strategic plan. We would be interested. We don't have a quorum so we hope Commissioner Lazenby gets here.

Agenda Item No. 4

PDSC Training Session – Update on Ethics Rules for Public Officials

39:07 Chair Ellis

Shall we go to Item No. 4 on Paul's presentation?

39:20 P. Levy

This is the item that we hoped Commissioner Lazenby would be here to assist with since he is quite an expert on the Oregon Government ethics law. There may be others here in the audience who are quite familiar with it as well. This is part of our

effort to help you fulfill the best practice for boards and commissions receiving training. We are also working to identify other opportunities for the Commission that relate more to the function of boards and commissions in the public defense system. This is a topic that we did present to the Commission in 2008, to update you on significant changes to the Oregon Government ethics law that occurred in the '07 legislature. There were again significant changes in '09 and we wanted to review those with you and take an opportunity to review the law and some of its more important features. I think it is interesting to remember that this law originated as an initiative in 1974, in the midst of or immediate aftermath of Watergate. I suspect there were many initiatives nationwide for good government.

41:00 Chair Ellis

Common Cause.

41:02 P. Levy

Common Cause. I worked in their DC office in 1974. They spurred the changes around the country. I was curious about this so last week I looked at the voter's pamphlet from 1974. Voter's pamphlets were quite different then. There was one argument for and one against each of the ballot measures.

41:30 Chair Ellis

Sounds refreshing.

41:30 P. Levy

It didn't really shed much light on what any specific concern was in 1974 with the way Oregon's legislature and other government public officials were operating. The statements pretty much said, "We have clean government. Let's make sure we keep it that way." There weren't specific instances of problems that the law was going to address. The law governs all public officials in Oregon, so paid and unpaid, commissioners, state employees, volunteers on local boards and commissions, local governments. It is quite sweeping and that is, in fact, what prompted the most recent changes. In 2007, the legislature really beefed up reporting requirements and also some of the gift provisions. Local and small governmental entities found it difficult to retain volunteers on their boards and commissions. They had to divulge everything about their own personal life, their own finances, and those of their relatives. That was corrected in the '09 reforms. One of the defining characteristics of the law is that every public official individually needs to figure out for him or herself how to behave. There is no immunity or indemnification from the agency or governmental unit for which you work as, for instance, under the tort claims act there would be. The law is administered and enforced by the Oregon Government Ethics Commission. That is what the entity was called in 1974. It then was changed to Standards and Practices and now it is back to its original name. They provide informal and formal opinions for any public official. My experience was, in the one time that I sought them out, that they were very prompt in responding to email inquiries. A public official is able to rely, in some degree, on their advice at least as far as consideration when it comes to the penalty that will be imposed for following it. It doesn't provide a safe harbor for violating the law. You can get their opinion on a problem you might face, an ethical challenge, but if they are wrong, or you don't follow it exactly, you may still be found in violation of the law. There may be no punishment imposed because of the reliance, but there is a still a record of a violation. The Oregon Government Ethics Commission's website is quite helpful. They have a guide for public officials that is useful. It is written in plain English. It is understandable and it has lots of examples and it is interesting. The examples are interesting. They are not particularly helpful for you.

45:22 Chair Ellis

Which is good news.

45:22 P. Levy

The local fire chief needs new ladders for his engines and orders a lot of ladders at a nice discount and then permits employees to buy ladders at those reduced costs. That is a violation of the government ethics law. For the reason that I have set out here on page two of my outline on this, it is sort of a cornerstone of the law and the part that is of really immediate concern, especially for public employees and that we have to think about all of the time, is that no public official can obtain a financial benefit by virtue of public service that is not available to other members of the

public, or at least a significant portion of other members of the public. It is as simple as that we can't use office equipment or office time to conduct personal business, but we also can't take advantage of bulk purchase agreements and the like. The Oregon Government Ethics Commission spent a lot of time going back and forth and issuing formal opinions on whether public employees could take advantage of discounted rates offered by cell phone providers. If you have ever gone in to buy an I-Phone from virtually any provider they will say if you are a state employee we have a special rate for you. That should raise a red flag for a state employee but what the Commission found is that they have so many special rates and so many deals that virtually everybody in the state can find themselves a special rate. It really wasn't the use of a public position to obtain a financial benefit that wasn't generally available.

47:31 Chair Ellis

So what do they do with frequent flyer miles?

47:33 P. Levy

That is a very interesting question. If we took the Commission out to dinner and we are going to be reimbursed through your portion of the per diem for dinner, we shouldn't be putting it on a credit card for which we individually would then get miles. That is a problem. Public officials who are in a position to do that ought to have two credit cards. There is an exception to that. There is a major exception to not benefiting from public service. That is that you are able to receive your salary. You are able to receive reimbursement from a government entity for your expenses in government service. If your employer, the entity that you serve, makes a part of your compensation plan your opportunity to receive miles, for instance, then you can receive them if it is part of the compensation plan. It can be addressed in a number of ways. Another cornerstone, and one that obviously concerns the Commission, is the conflict of interest provisions. This hasn't changed. Public employees, and everyone else, has to respond to potential and actual conflicts of interest. These are instances where the person might receive a financial benefit from a decision or vote. The responses are different depending on who you are and what kind of problem you are facing. Public employees for actual and potential conflicts need to provide written notice to their employer or appointing authority about the conflict and ask somebody else to deal with the matter. Commissioners, if it is a potential conflict of interest, before any official action or deliberation on the matter, need to announce the potential conflict and then can participate in the discussions and in votes on the matter. If it is an actual conflict then a commissioner should refrain from any participation, discussion, and voting, unless that vote is needed to meet some required threshold on the particular matter and then the commissioner can vote but not otherwise weigh in on the matter. This is not a provision to account for a lack of quorum except for that vote. It is for the super majority or other voting requirement. There are interesting exceptions to the conflict of interest law. One is, and this would affect some commissioners, if the conflict arises by virtue of a role that you play in your private life or practice, and it is because of that position that you serve on a board or commission. So if you are here as a criminal defense attorney member of the private bar who doesn't take public defense cases, and the Commission was somehow entertaining a matter that might benefit the private bar, because you are a member of that private bar would not be a conflict. That is why you are on the Commission.

51:39 S. McCrea

So that would not be a conflict?

51:51 P. Levy

That would not be a conflict. That is why you are here, to represent those interests in some sense. That might not exactly describe your situation but it certainly would on other boards and commissions. People are chosen because they represent various interests. If your interest coincides with a significant number of the rest of the community then that may be an exception as well from the conflict laws. The example that the guide for public officials gives is if you are a county commissioner and you are voting on paving the road and it happens to be the road that runs in front of your house. You will perhaps benefit from that financially, but so will a lot of other people and that may not be a conflict. Then there is another one. If the

conflict arises because of an unpaid position as an officer or member of a non-profit that would not be a matter that would require a commissioner or an employee to declare or respond to. The area of the law that really changed the most in 2009 concerned gifts. This is an area that our agency employees and the Commission needs to be concerned about. Public officials are prohibited from receiving more than \$50 a year from any single source that has a legislative or administrative interest in the decision or vote of that public official. Understanding how this works requires understanding what it means to have an administrative or legislative interest and what is a gift. The legislature changed the definition of legislative or administrative interest to narrow the number of cases where these gift provisions would arise. You can receive gifts, unlimited gifts, from somebody who doesn't have an administrative or legislative interest in your vote or decision. This, in fact, is something of an exception to the general rule of not benefiting from your public position. It used to be that a source was said to have this interest if it had an economic interest, distinct from the general public, in any official action of the official's governmental agency. It now focuses on the individual public officer and whether there is an interest in that individual person's decisions or votes. Now two people serving the same governmental entity, one might be able to receive a gift and one may have a \$50 limitation because the authority that individual has that may differ from others. It is a much more focused and narrow application. So that is a change in the administrative and legislative interest definition. Gifts have changed too in a number of ways. The basic definition of gift is unremarkable. It is what you would expect. It is something of economic value that you, your relatives, members of your household, people associated with your business receive, but what is kind of remarkable about the definition of gift are all of the things that are exempted from it. This hasn't changed but I put it here because you might get one of these. An unsolicited token or award of appreciation and they list it out here, in the form of a plaque, trophy, memento, or similar item with a resale value that is reasonably expected to be less than \$25. You might get one of those a month from somebody. But what has changed, and this is important, because we ran into this and a lot of this arises in the context of the interaction between Commission members or legislators or legislative staff and OCDLA. It used to be in order to receive free admission and free food at an OCDLA event or reception, the public official had to be a scheduled speaker and make a presentation. That latter part has been deleted from the requirements to be exempted from gifts. So you don't need to speak you just need to show up and schmooze and wheel, or as we say in my musical world shake and howdy.

57:47 Chair Ellis

So if they do it in Hawaii and it is a really elegant feast, it is still alright?

57:54 P. Levy

It is still alright. Now we will talk about whether you can receive reasonable travel and lodging expenses to arrive at that event. That has changed too. You may receive the cost of lodging and travel to appear at a convention, make a speech, appear on a panel, but you still have to part of the scheduled program to receive reasonable travel expenses as a representative of a public entity. Presumably if a commissioner were invited to speak at an event it is in your capacity as a commissioner. You could receive your expenses if they were paid for by a unit of state, federal, or local government, a recognized Indian tribe, a membership organization to which the public body pays membership dues or a non-profit corporation that is tax exempt under 501(c)(3). That is the law now. What it had said prior to the '09 changes is that that non-profit organization had to receive less than five percent of its funding from for profit entities. That excluded OCDLA because it receives more than five percent from its private bar members. Again, it would be legislators who are invited to speak and other public officials. Can we come to your conference and have you pay for it? Now OCDLA would be able to say much more confidently, "yes." In fact, we had, and this is the one instance where I asked the Commission, the Oregon Government Ethics Commission, for their opinion on this. Because our agency pays membership dues for the lawyers and staff in OCDLA, it is a membership organization to which a public body pays membership dues. For that reason, according to this opinion that we received, not

only could we receive travel expenses to make presentations, but so could members of the legislature or any other public official. I am much more comfortable now that the law has changed with receiving that payment. Another change is the exception from gifts, and I wish Chip were here for all sorts of reasons, but he might understand this one a little better. It is not a gift if you receive anything of economic value that is received as part of the usual and customary practice of the person's private business or employment or volunteering activities, and that bear no relation to your public position. I assume this is because, on many boards and commissions, people receive lots of things of value from all sorts of folks who might also have an interest in the activities of that board, but what they are receiving is part of their private business and doesn't affect their volunteer activity on the board or commission. It makes sense. Finally, another change here and not such a radical one, in '07 the legislature had prohibited entirely the receipt of any gift of entertainment by a public official. That was repealed and so now it depends. If the source of the gift has a legislative or administrative interest, you can receive \$50 worth of entertainment and no more in a calendar year. Finally, a big change that doesn't concern the Commission, but does concern our executive director, they changed the statements of economic interest that were really the thing that bothered local commissions and entities the most. These are intrusive filings about your personal finances and that of your family. They were required quarterly. There is now just an annual filing. What has to be provided has been significantly streamlined. Members of the Commission still are not required to make these filings. The legislature did add the executive director of OPDS to the list of officials.

1:03:52 Chair Ellis

They are on to you.

1:03:52 P. Levy

You can see quite low on the list because they ran through the entire alphabet and then had to get to the M's of the new alphabet. There is a long list that goes on after the executive director. So that is a brief overview of the law and significant changes that might interest the Commission.

1:04:24 Chair Ellis

Thank you. I know this may have sounded maybe more academic than directly bearing on our situation, but I do think it is important that we be reeducated periodically and I think the minutes need to reflect that you made a very excellent presentation on the range of issues. The last thing any of us needs is some kind of embarrassing episode. Fortunately, knock on wood, we have not had that in the 10 years that we have been at it.

1:05:07 P. Levy

And the embarrassment can be quite costly. The fines can be big and they can add up quickly.

1:05:19 Chair Ellis

Then all the process of the claim that gets made is a big expense. Any questions for the general counsel? Thank you.

1:05:35 S. McCrea

Thanks Paul.

1:05:36 Chair Ellis

We are at 10:10. Why don't we take about a 15 minute break.

(Break)

Agenda Item No. 5

Information for Legislators regarding Impact of Decriminalization/Charge Reduction on Costs of Public Defense

0:07 Chair Ellis

Do you feel you covered item 5?

0:12 I. Swenson

Yes, unless the Commission has additional input they want to provide.

0:19 Chair Ellis

Why don't we go ahead to item 6.

Agenda Item No. 6

OPDS Monthly Report

0:23 I. Swenson

One of the handouts you have is entitled OPDS Quality Assurance Task Force Site Visit Summary. You have seen a document similar to this usually in June when Paul or someone updates you about the site visit process. This is a summary that was prepared for the Quality Assurance Task Force which met last week to update them about what had been done, which contractors had been reviewed, in order for them to be able to give us recommendations about where site teams might go from there. The group recommended that we do a few things. The other thing we talked about was getting current information from the people who had previously received evaluations. Based on the group's recommendations, we will be sending a written request to each contractor that has already been the subject of a site visit, for an update on the issues that were addressed in the last site visit report. Another thing, and Jim Hennings noticed this one, is how many lawyers have actually participated in these site visits. We named them all for you here. You will see that some of them have served multiple times. I counted 78 different attorneys who have participated in one or more of these events. We are very lucky to have Jim Hennings still willing to participate either as the chair of a site visit team or as a member, and Bert Putney at his retirement event last week indicated to me that he would really enjoy participating in more of these. We have a good faculty of people to use. Part of the discussion we had with them is that the next step is for us internally to figure out, if these are the site visit follow ups we plan to do, then where should the Commission's attention be focused? We balance those processes and sometimes look at a county or a set of contractors and say that a site visit would be an appropriate way to evaluate what is occurring and other times if there are overlapping structural issues or things of that nature then we would prefer to do a PDSC visit. With respect to site visits, we decided that we would follow up immediately on Yamhill County. That was a site visit which occurred very recently and the site team had recommended an early follow up. That will be occurring in the near future. Clatsop County looked like an appropriate place for a site visit. The Commission had already been there and reviewed the structure of that system. There were some concerns expressed at the time about succession planning in particular. That might be a more appropriate topic for a site team to analyze and make recommendations regarding. The site team will be asked to review the work of the Juvenile Advocacy Consortium here in Marion County and that is partly at Commissioner Welch's recommendation. She had some very positive reflections on the work that she observed when she was sitting on the bench there. We figure that there are some things that we might learn and that might benefit others as well. That is on the list for a site team visit. Then post conviction relief. The follow up to the Commission's work on that issue is probably more appropriately performed by a small team - Paul Levy and we are looking for some assistance from the federal defender who often sees the work product of our PCR lawyers at the end of the line. So there will be a plan to follow up on that. Then for the Commission these are the thoughts that we had. As we were putting together the details of next year's Commission agendas, we wanted to incorporate as many of these structural reviews as was practical to do and that needed done. We will follow up in January on Lane County. That will not involve another visit by the Commission. I think it is just a matter of finding out from the local folks how the new consortium is working - how it works for them and any changes that are occurring there. We will report to you about that in January. Tillamook County, I think we mentioned at the time of the retreat, looked like a place that the Commission ought to go. You haven't been there before. As the chair is well aware, we used to have only a list there, but there are contractors there now. It would be a good time to go and review how that system is functioning. Lincoln County is another place that I think the Commission ought to go to. In 2004, when you did your first structural review it was actually a regional review and it included four counties including Lincoln. It was Lane, Lincoln, Benton, and Linn, but Lincoln may deserve your full attention for one or more meetings. There are a number of providers there and a number of long-term structural issues that we would like you to look at.

6:29 Chair Ellis

Do you see those two as a single event or as separate events?

- 6:34 I. Swenson I think separate. I don't think there is a great deal of overlap in the providers. I think we want the Commission to actually be in both of those places. I think it would be beneficial if you could. I am hoping to complete those two during my tenure. Then I think next, when there is time, you might want to look at Linn County too. We did a site visit in Linn County in 2006 or '07 with providers there. I think that might bear some scrutiny. You haven't been to Douglas County at all and it is a large county with a number of providers. One is a major public defender office. There are also private law firms so it is an interesting combination of contractors.
- 7:31 Chair Ellis It has always been held out as kind of a paragon of virtue.
- 7:35 I. Swenson In some regards, yes. I think that would be a good place for you to go. Then civil commitments and right now the focus is on quality improvement efforts that are under way. Training materials are being developed. Trainings are being planned that will occur in the very near future. Then there are some issues pending before the legislature relating to the Psychiatric Security Review Board and treatment of mentally ill prisoners. The recommendation from the task force and from us to you is that you postpone your review of civil commitments until these educational pieces have been put in place, and the legislature has reviewed and made any changes they are going to make in this system. That is the thought on where to go next. As I look at your schedule for next year we have got you scheduled for January 13. Now that is just a month away. Besides the Lane County update there are a few other minor items – oh, Deschutes County should be ready for some information too, maybe not everything you need to know to finalize your report there, but at least an update. Again, it is not a terribly full agenda. We could consider canceling that if ...
- 9:22 Chair Ellis I am pretty sure that I am not going to be available on the 13th.
- 9:24 S. McCrea I may not be available either. Maybe it would be good to cancel it.
- 9:31 I. Swenson I see no harm. March 3rd was your next meeting, so it is a little distant. We will be busy with the legislature and we will have more information for you. Let's plan on that. We will continue all of those things to the March meeting. We may want to do the March meeting in Lincoln County. I will see how far we get in terms of preliminary analysis. Then the next meeting scheduled after March was for April 28. If the Lincoln County piece can get wrapped up at that time that would be good. If not, we can use more than one meeting. I think we can almost start the Tillamook review in April just to get those both under way, but not necessarily concluded. Then June 16 is our meeting in Bend. We always want to hear from contractors at that point for input on the RFP and what the Commission should be looking at in terms of making future decisions about contracts.
- 10:44 Chair Ellis We will know more about funding.
- 10:45 I. Swenson We will know a lot more at that time. Then you are scheduled to meet July 28. We can summarize what happened in the legislature and get input on the RFP. Our tentative expectation is to issue that in August and that hasn't changed. We are going to issue the RFP in August so your final input for the RFP would be July 28. Then you would probably not meet until September 15. That would include an executive session for you to discuss a statewide contracting plan like you did in September of 2009. It is a tentative initial approach to what the plan would be. Then, as you requested, you will have a second opportunity for an executive session in October to discuss actual proposals before they are presented to you for approval.
- 12:01 Chair Ellis What was the October date?
- 12:02 I. Swenson I don't know why I don't have it with me. I am sorry. This is the one that is held in conjunction with the management conference. I don't think I have it on my calendar yet. I will let you know as soon as I can. I should have the date here but I don't. It

is usually on Friday in one of the middle weeks in October. It is going to be in Pendleton this year, so it is a change of venue. Then December 9th would be the meeting at which we would ask you to approve the contracts.

- 12:42 Chair Ellis That would be here?
- 12:42 I. Swenson That would probably be here. That is the plan. We can always amend it or add topics of interest.
- 13:03 Chair Ellis Comments?
- 13:01 S. McCrea Sounds good to me. I think at some point we are going to want to look at Linn County, especially with all of the changes that are going on with the bench. It may be early to do that.
- 13:13 I. Swenson It might be, but at least we can look at our providers and sort of figure out where they are and track whatever else is happening in the county.
- 13:22 G. Harazabedian Mr. Chair. I just saw on the OCDLA website that October 20 – 21 is the Pendleton management conference.
- 13:30 I. Swenson This meeting would then be on the 21st. I asked Paul to update you on some immigration issues just because they are important to our provider community and there was a recent US Supreme Court case which affected the obligation of the lawyers in criminal cases to advise their clients about immigration consequences.
- 14:05 P. Levy Are you ready for more CLE credit? The decision that Ingrid is referring to is well known now in the defense community. It is *Padilla v. Kentucky* decided by the US Supreme Court in March.. It held, really quite remarkably, in a majority opinion by Justice Stevens that a non-citizen defendant has a Sixth Amendment right to be informed by his or her attorney, to receive accurate information, about the immigration consequences of the criminal matter that is pending. It is really a watershed decision adding a significant responsibility for defense counsel and a whole area of entitlement to criminal defendants to receive information about what may happen and whether they might be deported or excluded from reentry as a result of the criminal matter. It is a welcome decision and one that has been sought for some time. The court based its decision, in large measure, on what it saw as national and state standards of justice.
- 15:42 Chair Ellis But it imposed the burden on defense counsel as opposed to the state or the court?
- 15:50 P. Levy As we have seen with the US Supreme Court, and nowhere more dramatically than with *Gideon v. Wainwright*, they created a right but didn't give much guidance or help on how to fulfill it. The context of this case is a post conviction appeal where the person was claiming that had he been given accurate information about his guilty plea and what was to happen to him in immigration land, he would not have plead guilty. I will explain the facts briefly in just a moment. The court did look at these national standards of justice and state standards of justice. In Oregon we have had a history of requests from the defense community for funding for experts to assist them in determining what the immigration consequences are. Those requests had been routinely denied for various reasons and then the Court of Appeals, some years ago, decided a case *State v. Gonzales* that found that it was ineffective assistance of counsel to tell a client that you may be deported, when, in fact, the law was that the person would most certainly be deported. In response to that we began providing assistance in that context. Concurrent with this there have been a number of efforts by this agency and its predecessor and OCDLA to examine establishing a resource center to help criminal defense attorneys, public defense attorneys, advise their clients about possible immigration consequences. The *Padilla* decision says that it is the lawyer's responsibility to do so and in language such as this which really makes it quite clear. "It is quintessentially the duty of counsel to provide her client with

available advice on an issue like deportation. The failure to do so clearly satisfies the first prong of the analysis for ineffective assistance of counsel and the Sixth Amendment.” The *Padilla* decision wasn’t terribly helpful in explaining how advice was to be provided. It was a simple case and that is probably why it was decided the way it was. The defendant, Mr. Padilla, is not unlike many defendants that we see in our cases. He had been in the country for 40 years. He was a decorated US Army veteran. He also was facing federal charges for delivery of marijuana. His lawyer told him confidently, when asked, “Might this affect my immigration status?” that, “You have nothing to worry about. Don’t give it a thought.” Of course, as the court says, that couldn’t have been more wrong. The court said the law was clear. Just a simple reading of the National Immigration Act would have disclosed that he had a lot to be worried about. Whether you are allowed to remain in the country with your family, or go to some place that you never really have known because you came here as a child, is probably the most important part of a criminal case.

- 20:24 Chair Ellis So what are we doing? I can see huge implications for us.
- 20:31 P. Levy Yes. That is exactly the question. What are we doing and what should we be doing?
- 20:41 I. Swenson You might mention that the Supreme Court in *Gonzales* reversed the Court of Appeals.
- 20:45 P. Levy Yes. I should bring that up-to-date too. The Supreme Court of Oregon reversed the Court of Appeals and said, “No, telling a client you may be deported is adequate.” We are doing a number of things now. After the Oregon Supreme Court reversed *Gonzales*, and before *Padilla*, we began routinely denying requests for immigration assistance. We urged lawyers to seek judicial review of those decisions. Most often we were reversed on those. I think it was a matter of practicality. Well the behavior of trial courts is interesting when they review our decisions. It is not their money is the first thought that occurs to them. In the cases that were reviewed they were thoughtful decisions. What we have done after *Padilla* is largely try to educate lawyers about what it really means and to push for OCDLA to help fulfill what the real import of the decision is. The decision says nothing about how lawyers are to get this information. It doesn’t directly endorse the use of experts. It says that in clear cases, and this is just paraphrasing the decision, in clear cases the defense counsel has to tell their client what is going to happen. In more complex cases the language is troubling and there is a lot of debate about this.
- 22:41 Chair Ellis This just seems horribly inefficient.
- 22:43 P. Levy It is.
- 22:43 Chair Ellis If we are asking our several hundred trial level lawyers, each of them individually, to become competent in an area that is hard.
- 22:56 P. Levy That is exactly the response of our trial bar.
- 23:00 Chair Ellis I sympathize.
- 23:01 P. Levy What we have said is you have to work with us on this. Just to complete this thought the decision says in complex cases you need to do nothing more than tell the client that there may be consequences. But what people have observed, and I think correctly and that Justice Alito demonstrates dramatically in his concurring opinion, is that that dichotomy doesn’t make any sense. It is all complicated and the so called clear cases are not clear at all. The decision has been welcomed by, more than anybody, the immigration bar. They have clients who are lawyers, in some instances, who have kind of screwed up by not thinking at all about these consequences, not being informed about them and then not informing the client about them. Then they have these very compelling cases that they can’t do anything about. The immigration rights organizations and immigration rights lawyers have

interpreted this opinion to essentially require three things. I think this is what is guiding us. Defense attorneys needs to become, as Justice Stevens says, educated now and knowledgeable in the basics of immigration law. That is a function that OCDLA has been performing. There have been many immigration law presentations before this opinion and they are doing it in a much more focused fashion now. I am hoping we will create the same kind of manuals and charts that they have done in other practice areas. Defender organizations are, in some instances, developing their own expertise within their organizations to help lawyers answer these questions. MPD, I think, has gone through a couple of lawyers who have received support from the firm to become knowledgeable about immigration matters. Unfortunately then what happens is those lawyers move on.

25:37 Chair Ellis

Why don't we contract with an appropriately competent immigration lawyer as a resource available for our defense lawyers to work with?

25:55 P. Levy

I think that is what we are ultimately looking at. Washington has a longstanding resource center for public defense attorneys to go to, a person who has come to Oregon to lecture about immigration law, a really effective organization and we need to find a cost effective way to make this advice available to our lawyers. What we are doing now and the approach that we are taking is lawyers are asking us for expert assistance. I wrote a piece in the OCDLA monthly publication to explain how we will view those. If a lawyer says, "I have a non-citizen client, so help, give me an expert," we are going to say, "Sorry, that is denied. You haven't given us enough information." What we are asking lawyers to do is what the immigrant rights organizations are saying they should do. Try to figure it out because some questions you can figure out. There are lots of manuals and resources available for free on line that will help lawyers understand the basics of this area of law. We are telling lawyers if you have consulted those resources and you still can't figure it out then, depending on the individual circumstances, we will consider approving a limited number of hours. It really doesn't end up costing that much to receive the advice of an immigration lawyer. It is complex and I don't want to start....

27:53 Chair Ellis

But that shouldn't be on an ad hoc, one at a time basis. This just cries out to have a centrally available resource and just to encourage them. That resource is not going to have to research anew. It is a five or 10 minute conversation. We have done it in an efficient way. In your mind does *Padilla* overrule *Gonzales*?

28:32 P. Levy

That is a good question. It does because --- it doesn't overrule it. *Gonzales* sort of bought out the dichotomy between collateral consequences of a conviction and direct consequences. Traditionally states have analyzed immigration questions in this fashion. Any other consequence -- "I lost my license as a result of this criminal conviction and nobody said I would. Set aside the conviction." And courts will say that that is a collateral consequence. It doesn't matter. Get lost. Immigration was thrown into that collateral consequence bag by most courts. That is sort of how Oregon has approached it. In any case, saying you may be deported is good enough. *Padilla* says saying you may be deported may be good enough in some contexts. What *Padilla* says is that this is a Sixth Amendment right to effective assistance of counsel that *Gonzales* didn't really satisfactorily resolve.

29:52 Chair Ellis

It seems to me we ought not to be just looking to do the minimum to pass constitutional muster. As I listen to this I think it is important to defendants who have an immigration issue that they understand enough to know what may happen.

30:18 P. Levy

Absolutely. I think we agree. I have long advocated that position. Ultimately the most cost effective way of handling this is the one you suggest and certainly one we are looking at.

30:35 Hon. Elizabeth
Welch

Reminiscent of an unrelated issue, what is the position -- if you don't know maybe Lane can tell us. When the court has asked for lawyers to help people get custody in

divorces, the answer was, “No, we don’t have malpractice coverage for that.” Do you have malpractice coverage to cover immigration?

- 31:12 L. Borg My reading, and this has been an interesting discussion within the office is, I think that there is a popular myth that the insurance limits you to just criminal issues. I don’t see that. The limitation limits us to poverty. We can only represent people who cannot afford counsel and we have relied on the court’s finding that they are eligible for court appointed counsel so they are appointed to us. In looking through ours we don’t get our insurance through the PLF, we get it independently, and looking at that I haven’t seen a limitation that says that you may not appear in some collateral things. One thing I wanted to relate. I think there are people who read *Padilla* to limit it to immigration consequences. I don’t think that is right. I was at a conference in D.C. in October. This young woman from the south had reported that - I think it was a state appellate court - had relied on *Padilla* to overturn a juvenile conviction that resulted in Adam Walsh lifetime registration, sex offender registration, and relied on that in saying, “This is such an onerous thing, this is so big a collateral consequence that it now comes over to that Sixth Amendment right.”
- 32:43 P. Levy It is not surprising that lawyers have tried to move things that states have said are collateral into the direct consequence category as a result of this opinion. These lawyers would not be practicing and representing their clients in immigration before immigration judges and in immigration proceedings. In order to fulfill their client’s rights in the criminal proceeding they need to give immigration advice. It is part of their function as defense attorneys now. It is terribly burdensome for lawyers, but so is fulfilling the right of a client to understand what the sentence will be. That is something that we are a little more familiar with. It is terribly complex but it is core to the criminal defense function. The court is adding something to those core functions. It is another area in which we have to become experts. We have to recognize that it is an area of practice that is so complex that it can’t be answered and satisfied without assistance.
- 34:23 Chair Ellis You have indicated that what I was suggesting is where we ultimately ought to go. What is holding us back? Why can’t we just go there?
- 34:40 I. Swenson One of the things we have discussed over time is that when the volume of requests for that kind of advice reaches a level where it becomes more efficient for us to create such a specialty center that’s when we would look at it. It has not yet. There are enough immigration lawyers available for reasonable rates on an occasional basis, which is essentially what we are approving, to handle the volume at this point.
- 35:12 Chair Ellis It sounds like we are making them jump over the hurdle that they must individually research what is available on websites and the like, and only the extraordinary case will get reimbursement and is treated like an extraordinary expense.
- 35:33 I. Swenson Exactly. It is.
- 35:33 P. Levy What we are trying to do at this point is be cost efficient in how we are responding. As Ingrid says, there is going to be a point where the scale is tipped and contracting for this service will be more cost efficient. But the other thing is that there is no question that what this means is that lawyers need to become familiar with the basics of immigration law. There are some questions that lawyers can and will be able to, with some familiarity with the basics of the law, answer for themselves with a fair degree of confidence without expert assistance.
- 36:25 Chair Ellis So are courts beginning to work this into their sentencing disclosure?
- 36:30 P. Levy They have been. This is interesting. They have been required by statute for years to address this in their plea colloquys with defendants. There is also a separate statute that governs plea bargaining that has directed defense counsel to address immigration issues with the client. It has been a part of the Oregon State Bar

Performance Standards that are termed there now collateral consequences, including immigration. It is not an entirely new area of concern. It has been elevated, though, as far as its importance

37:23 S. McCrea

Well, typically, when you have a plea colloquy, the court will say, “Do you understand that if you are not a US citizen there may be consequences which may include deportation?” That is really, at least in my experience, all they say. I have really, really mixed feelings about all this. I certainly agree that every defense attorney should be asking his or her client if they are a citizen. I remember a case that I had years and years ago. My client was what I will term a stealth Canadian. I just had no idea. One of the lessons it is the things that you do wrong that you always remember. Now I have it on my intake form and I am always asking people, “Are you a US citizen because I have to know?” This stuff is so complicated. There are some basics, Paul, because if it is a felony drug conviction well, yeah, that is probably going to be a problem. If it is a crime of violence but then how is a crime of violence defined, and how is *Ice* defining things this week because it is constantly changing? I have to tell you that it is an area that scares the hell out of me. Any chance I get I try to send somebody to talk to an immigration lawyer because I just don’t feel that I am an expert on it.

38:44 P. Levy

There are resources for referring their clients to immigration lawyers. They will likely have immigration proceedings that they need to negotiate and work their way through. It is the criminal defense attorney’s responsibility to tell the client what is likely to happen as a result of a contemplated plea or a conviction. The court in *Padilla* actually suggests that prosecutors should work with defense counsel to fashion resolutions in appropriate cases in order to avoid immigration consequences. The prosecutors don’t have a Sixth Amendment obligation, but it is not just, “This is what is likely to happen,” but to get information that you can use to work with the court and the prosecutor to, in some cases, mitigate

39:42 Chair Ellis

I have seen the case where the prosecutor used the threat of deportation to get cooperation.

39:51 P. Levy

That happens frequently. But what happens too and I have had this experience and I know others have because we are being told about that in requests is that the circumstances of these individuals are often compelling. They have lived in this country since they were children. They don’t speak the language of their country of origin. They don’t know anybody there. Prosecutors are willing to work with defense counsel, as the court suggested, to find ways to mitigate the adverse consequences. It is terribly complex, not only what is an aggravated felony which is grounds for deportation, but there are different grounds for deportation and for entry into the country. In fact, some people who are in the country illegally are better situated because of the rules governing reentry than people who are here legally. They can have the removal waived and they are still eligible to come back even with a crime that would result in the deportation of someone else. One of the other big areas is crimes of moral turpitude. There is no list and it is hard for anybody to gather or understand.

41:19 S. McCrea

We might be better served to always tell our client, “Yes, you are not a US citizen. Yes, if you take this deal you are probably going to be deported.”

41:28 P. Levy

Padilla actually says that is not going to be good enough. There was a tension on the Supreme Court as well, what if you just don’t say anything? Isn’t that the best thing? The problem in *Padilla* was this guy gave incorrect information. Why don’t we just say what is wrong is giving wrong information. The safe course would be not to say anything, which is essentially what you proposing.

42:00 S. McCrea

No. You are putting them on notice that there may be an issue. Then saying that you need to get expert advice about this because I am not an expert in this area.

- Even if you learn about, at least for me, I am not going to be in a position to be able to give definitive advice.
- 42:15 P. Levy "It is quintessentially the duty of counsel to provide her client with available advice."
- 42:25 S. McCrea So my available advice is that I think there is a problem and you need to go consult an immigration lawyer.
- 42:29 P. Levy I don't think that is what they had in mind here.
- 42:31 Chair Ellis Then I am guessing that part of the quandary is that nobody has argued that there is some right to counsel for an indigent person with immigration issues relating to the processing of the immigration issue. I am sort of listening for where that line gets drawn. It just seems from our point of view that there is a very powerful argument that it is far most cost efficient to have a true expert involved and accessible. The cost efficiency is to avoid PCR cases. We do that all the time.
- 43:26 P. Levy Yep.
- 43:26 Chair Ellis I could see us starting on this track of getting on contract a qualified person. Even though the volume may be low now that would just go to how much we have to compensate the qualified person, but to even ask the individuals at the defense level to figure out who is competent in the immigration law field, that is a very inefficient thing to have 600 people chase around doing that.
- 44:01 G. Hazarabeidan If I might point out, Mr. Chair, I think the low volume is cause for great concern in and of itself. That is a case of lawyers who are not even making the inquiry about the issue. The low volume scares me the worst out of what I have heard today.
- 44:13 P. Levy There are reasons to be afraid. Service to the client is one. A lawyer has been disciplined. Again, it was more like in Oregon for doing essentially what Mr. Padilla's lawyer did which is to say, "Nothing to worry about," without having done any research, without having informed himself about the issue, and it was one of many counts against this lawyer but it wasn't a basis for discipline.
- 44:51 Hon. Elizabeth Welch I have a question. Trying to illustrate from my perspective, which is not straight criminal stuff in terms of experience and that has to do with domestic violence. Probably in terms of volume that is where this would have the greatest implications. Daddy gets shipped off and is that in the interest of the community and family? It is my experience that prosecutors are not willing to look at that at all. One of the issues that I have, and this is the question part after giving that background, is that most larger courts have some kind of diversion program for domestic violence. Some of those programs require people to plead guilty in order to get into the diversion programs. What are the deportation implications?
- 45:52 P. Levy That is a major focus of the education component on this. You plead guilty and your plea is latter withdrawn. Most diversion programs now require a guilty plea. It is the same as if you were convicted.
- 46:09 I. Swenson I think it actually goes farther than that and if a judge participates in the process, no matter whether there is a plea at all, if you can impose restrictions and sanctions then that is a conviction for purposes of the immigration law. So DA pre-court diversions don't have that impact. At least that is my understanding where that line has been drawn in the past.
- 46:47 P. Levy It is complex. Just one more example. The country to where you would be removed makes a big difference. Some countries we don't have relations with and we won't send people back there. They will just sit in custody forever here. Or maybe those proceedings won't even be initiated. It really does require, in many areas, expert

assistance. Ironically the area where expert assistance is most clear and where we tend to approve requests most easily are with less serious offenses. With the more serious offenses you often know that they are what are called aggravated felonies. There aren't any choices but aggravated felonies as far as how that case is going to be resolved. A lawyer could pretty competently advise a client what is going to happen without help. Your input is very helpful. A resource center is what people really need. It is what will ultimately be most cost efficient.

- 48:09 Chair Ellis I think we ought to pursue that. It does seem to me that that is a very rational, cost effective way to deal with what I can see is not a simple problem. Okay. Thanks.
- 48:32 P. Levy Shaun knows the debates that are raging on this issue.
- 48:38 S. McCrea Yeah, indeed.
- 48:45 Chair Ellis Mr. Gartlan nice to see you.
- 48:45 P. Gartlan Thank you, Mr. Chair.
- 48:52 Chair Ellis Now you are going to give us exegesis on diplomatic law and the right to knowledge that you have...
- 49:02 P. Gartlan Yes. That will follow the meeting. Actually I only have a couple of items and they are a lot less weighty than Paul's presentation. They both concern a week from tomorrow. We are having our Holiday CLE in house. It is going to be in house this year because we want to have it in this office and this office is not big enough to accommodate attorneys from the outside. It is going to be a shortened agenda. We are going to have the CLE in the morning and then the festivities for the holiday party. Then ...
- 49:46 Chair Ellis I commend you on your sequencing.
- 49:47 P. Gartlan Thank you. After the party Justice Gillette is having his final argument in the Supreme Court in the afternoon. He is not invited to the party but he is going to have his final argument in the afternoon and this office is on the case, so we will be arguing at Justice Gillette's final argument, which should be interesting.
- 50:23 S. McCrea After the festivities.
- 50:23 P. Gartlan That is about it. A light agenda for you today. 'Tis the season.
- 50:38 S. McCrea Doesn't Kathryn have anything to report.
- 50:38 K. Aylward I've got nothing.
- 50:48 I. Swenson We have nothing further on our agenda. We have tours arranged for Commissioners to tour the office and meet staff. Whenever you are ready I asked them to come early.
- 50:56 Hon. Elizabeth Welch Can I be boring and bring up something else. I was going to do this before Paul's discussion. The issue of representation of parents in dependency cases and the ability to close cases that continue ad nauseum otherwise because domestic relation relief is obtained in the variety of ways that it is or isn't happening at this point around the state is something that is not an issue in other jurisdictions. I know that it is on the edge of arguably appropriate for this organization to deal with. I don't think it should be on the edge. I think it has some potential for saving a lot of money for OPDS. Cases go on and on and on simply waiting for someone to get their house in order and get custody of their children. I was hoping that we could take a look at the issue. I don't mean the Commission at this point. Do some information

gathering. Look into the issue. Maybe someone would be interested in taking that on. I am very interested in it. I know I am a little stale in terms of what is going on in the rest of the world. There were states I remember, Hawaii stands out specifically, as one where this was absolutely part of the job of a lawyer representing parents in dependency cases, to get whatever domestic relief would close the matter. Those of you who know how long these cases stay open can understand, we are talking years paying lawyers, paying prosecutors, paying judges to hear these cases.

53:06 Chair Ellis

We probably pay by the unit and it is a continuing burden on the provider.

53:16 I. Swenson

There may be additional review hearings scheduled because of the inability to close the case without a domestic relations order being in place. If that is true then we do incur additional expenses. You heard about this in Deschutes County when we were up there. Some of the providers were talking about the fact that there is no compensation to them for handling the domestic relations matter. It is correct, as Commissioner Welch indicated; a lot of practitioners do not feel competent, or in some cases, adequately covered in terms of liability to take action on behalf of a client in another court and another cause of action. But until that custody issue is resolved these dependency cases will often remain open indefinitely. I don't know what the solution is. We have always responded when there is a request for funding that we don't provide funding for activities outside of those required within the context of the appointment. Practice is real inconsistent. Some folks take it on voluntarily and routinely just to resolve the cases.

54:45 Hon. Elizabeth
Welch

The other thing that has happened, and I don't know where things stand right now, but I assume badly, is that some of the larger jurisdictions again have a facilitator program that helps people get divorces and so forth. In Portland we opened an actual branch office at the juvenile court to do that. My guess is those things have gone by the wayside with all the budget cuts. I have no idea.

55:12 I. Swenson

I would be happy to gather some information. I don't know that I have a solution to offer the Commission. I am not sure if it is available, but we can gather some data on what is happening in different counties.

55:33 Hon. Elizabeth
Welch

Marion is one that does a good job with this. At least some of the lawyers do it. I think Clackamas also. They just do it and get it done. This is not pension division or stock option division, this is very fundamental stuff and the idea that people lack expertise is frankly baloney. What they really need to do is help people fill out the forms that the state already prints, which by the way is hard to do, filling out those forms. I think this is a very worthwhile issue. If we can't do anything about it I don't know who can.

56:27 Chair Ellis

Any other comments or questions? If not, we will do the tour. Is there a motion?

56:36 S. McCrea

We don't have a quorum.

56:36 Chair Ellis

We can't even convene or adjourn.

Meeting adjourned at 11:35

Attachment 3

D R A F T

Public Defense Services Commission Service Delivery Plan for Lincoln County

(March 2010)

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.

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 the initial version of this document.

PDSC's investigations of local delivery systems in counties or judicial districts across the state serve another important function. 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.

From 2004 through 2010, the Commission completed investigations of the local public defense systems in thirty Oregon counties.

Lincoln County Reviews

PDSC's first service delivery plan was developed for a region that included Lane, Lincoln, Linn and Benton Counties in 2004. At that time although PDSC

contracted with a single entity – the Lincoln Defense Consortium – the consortium members regarded themselves as individual attorneys and law firms in competition for the caseload. Consortium members even submitted individual RFP responses as alternatives to the Lincoln Defense Consortium proposal. Prior to 2001, PDSC’s predecessor, the Indigent Defense Services Division, determined the percentage of caseload for each consortium member and incorporated those percentages into the contract. By 2001, IDSD convinced the Lincoln Defense Consortium that, as a consortium, they should be able to reach agreement among themselves as to how caseload should be distributed.

In 2004 the Lincoln County contractors expressed satisfaction with the operation of the system then in place. OPDS was concerned about the ability of this group to recruit and train new public defense attorneys but it was represented that the law firms in the group could bring in new attorneys as needed. Judges and the District Attorney expressed satisfaction with the work of the group and appreciation for the experience and skill of the attorneys. OPDS did not recommend that PDSC make any changes to the public defense delivery system in Lincoln County in 2004.

Since that time a Quality Assurance Task Force (QATF) site team, comprised of volunteer lawyers from around the state, conducted a thorough review of the quality of services provided by the Lincoln Defense Consortium. That evaluation occurred in September of 2006. A final report was presented to the consortium in January of 2007. Since QATF evaluations are confidential, with the final report being provided only to the contractor and OPDS, no conclusions from that evaluation are included in this report.

In 2010 PDSC identified Lincoln County as one of the counties it would visit in 2011 in order to update its earlier service delivery plan.

OPDS’s 2011 Preliminary Investigation in Lincoln County

To prepare for the March 10, 2011 Commission hearing in Newport, OPDS staff conducted a preliminary investigation into the current functioning of the public defense system in Lincoln County and submits this report.

On February 9 and 10, 2011 OPDS Executive Director Ingrid Swenson, Public Defense Services Commissioner John Potter and OPDS Contract Analyst Shelley Winn visited with stakeholders in Lincoln County, including Presiding Circuit Court Judge Charles P. Littlehales, Judge Thomas Branford, Judge Sheryl Bachart, Pro Tem Judge Paulette Sanders, former Pro Tem Judge Frederick Bennett, District Attorney Rob Bovett, Senior Juvenile Department Officer Larry Ballinger, CASA Executive Director Betsy Henderson, CASA Program Manager Carol James, consortium administrator Guy Greco, Jeff Pridgeon of Pridgeon, Bjornsen & McCrum LLC, and sole practitioner Daniel Taylor.

In addition Ingrid Swenson met or spoke by phone with the Trial Court Administrator, Bonnie Savage, and CRB coordinator Walt Gullett.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns 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 a particular area and OPDS is grateful to the stakeholders in Lincoln County for their much appreciated contributions to this report.

Lincoln County Criminal and Juvenile Court Systems

The Lincoln County Circuit Court is located in Newport. Many county offices and facilities are located in the general vicinity of the courthouse, including the juvenile department, community corrections, the sheriff's office, the jail and the detention facility.

The court has three elected Circuit Court Judges and one pro tem judge. Charles P. Littlehales is the presiding judge. The other two elected judges are Thomas O. Branford and Sheryl Bachart. Paulette Sanders is the pro tem judge. In addition to other duties, she handles most of the juvenile cases. Bonnie Savage is the trial court administrator. Five staff positions have been lost to the court over the course of the current biennium¹.

Rob Bovett is the elected District Attorney who replaced two term Lincoln County District Attorney Bernice Barnett. Mr. Bovett, who was previously with the Lincoln County Counsel's office, served as the chair of Oregon's Meth Task Force and is the primary author of the state's meth lab control laws. He has a chief deputy and eight deputy district attorneys. The office also has seven legal assistants and, like the courts, has lost five positions due to budget cuts in the last two years. Mr. Bovett has been skillful in obtaining grant funding to retain additional positions that otherwise would have been cut. Commentators note that relations between the District Attorney's office and the defense bar have improved significantly over the relations that existed under his predecessor.

Criminal Court System

The Lincoln County Circuit Court does not use a central docketing system. Individual judges manage their own dockets. Each criminal case is assigned to a particular judge at arraignment. All future hearings in the case are heard by the same judge unless that judge is unavailable on the assigned trial date due to a conflict. The case may then be assigned to another judge for trial if one is

¹ The state trial courts' report on judicial resources indicates that during the six month period ending June 30, 2010 there were 1,461 cases filed in the Lincoln County Circuit Court, 1500 cases terminated and 1,189 cases pending per Lincoln County Circuit Court Judge position. Statewide averages were 1,670, 1,663 and 1,374.

available. Measure 11 cases, however, are rotated in order that all of the judges have a similar number of Measure 11 cases. Hearings on motions must be scheduled with the individual judge's staff. Out-of-custody cases are assigned an Early Resolution Conference (ERC) hearing date approximately six weeks after arraignment. It is expected that discovery will have been provided by this date and that attorneys will be able to report whether the matter will be scheduled for a Final Resolution Conference (FRC) date or for trial. A Trial Report Hearing is held three weeks before trial to confirm whether the matter will remain on the trial docket.

For in-custody matters only an FRC date is scheduled and it is set approximately three weeks after arraignment.

Monday is the principal criminal court day. Trials are scheduled on Tuesdays through Fridays. In-custody arraignments occur daily at 1:15 pm. Out-of-custody arraignments are held on Mondays.

Court staff interviews in-custody clients prior to arraignment and makes a preliminary determination of financial eligibility for court-appointed counsel. Out-of-custody defendants who seek appointed counsel have counsel provisionally appointed until eligibility can be determined. The LDC administrator notifies the court in advance which attorneys are scheduled to pick up new cases. Court staff contacts the attorneys to advise them of the need to appear in court for arraignment.

An LDC attorney is present for all arraignments.

Currently there is no early disposition program in Lincoln County. Planning for such a program is underway, however. The district attorney is in the process of outlining eligibility criteria for "rocket docket" treatment.

There are four specialty courts in Lincoln County: a drug court, a domestic violence court, a mental health court and a "HOPE" court. The oldest of these is the drug court, which has been in place for approximately five years. Judge Branford serves as the drug court judge. The Lincoln County drug court has implemented the Ten Key Components of Drug Court recommended by the National Association of Drug Court Professionals. If a defendant in a criminal case is determined by the state to be eligible for drug court participation, the defendant discusses the program with the attorney who is initially appointed to represent him/her and makes a decision whether to participate in the court. Most participants are eligible for a conditional discharge upon successful completion but some defendants who are on probation volunteer to participate in order to achieve sobriety. In the past drug court participants were not represented once they were accepted into the program. For the last two years, however, representation has been provided by consortium attorney Dan Taylor. There are currently 18 to 20 people participating in the court. Initially they are required to

appear weekly, then bi-monthly and then monthly until graduation after participating for a year or more. The court continues to work with participants who are struggling with sobriety.

There is a Domestic Violence Court (DV Court), which emphasizes speedy resolution of the charges and regular compliance review hearings during the course of supervision. This court has been in place for approximately a year. In order for the court to function as intended the state needs to provide full discovery at arraignment, including police reports. Defense attorneys indicate that discovery is not always being provided at this stage. Most cases involve deferred sentencing agreements but, for those who contest the charges and are found guilty, participation can be part of a probationary sentence. Compliance reviews are scheduled after 60, 120 and 365 days. No contact is usually permitted between the defendant and the victim until after the first compliance hearing. There are approximately 100 people in the program. The rate of compliance with program requirements has been high. All of the criminal lawyers participate when they have clients in the program. The program is partially grant funded. Judge Bachart presides over DV Court cases.

Help and Opportunity through Probation with Enforcement (HOPE) Court is a prison diversion program funded by a Department of Corrections grant. It is directed at repeat property offenders who are facing presumptive prison sentences. It is modeled after the drug court but the focus is on victim restitution. Judge Branford presides over the HOPE court which has a total capacity of 10 persons.

A Mental Health Court was started very recently by Judge Littlehales working with the Mental Health Subcommittee of the Local Public Safety Coordinating Council. It is designed to divert offenders driven principally by mental health disorders from the criminal justice system into appropriate treatment, using regular court hearings to support compliance. This is designed to be a small program serving between four and six chronic offenders.

There has been some discussion about a possible veteran's court but the demands on court staff may be too great to permit the creation of another specialty court and there may not be sufficient demand, at least at this time.

Lincoln County currently has adequate jail space. There are 170 beds available which means that when the court imposes a local sentence, it is usually served in full.

The Juvenile Delinquency System

There are three juvenile court counselors and one supervisor in the Lincoln County Juvenile Department. Positions have recently been lost both in the detention facility and in the juvenile department. The department uses Formal

Accountability Agreements with many first-time offenders and in most misdemeanor cases. Under an agreement with the District Attorney's office the juvenile counselors prepare most of the petitions. The county has an 8-bed detention facility and a 12-bed shelter, which is used for both delinquent and dependent youth. Most other placement resources are through the Oregon Youth Authority. Measure 11 youth (16 and older) are held in the county jail. Alternative approaches to the handling of juvenile sexual offenses has permitted some youth to expunge their records and be relieved of the obligation to register as sexual offenders.

Delinquency preliminary hearings are held immediately after adult in-custody arraignments. Attorneys are appointed in virtually all cases. Most delinquency court hearings are on Friday. The court seeks to group juvenile cases by case type in order to minimize the amount of time attorneys, clients and caseworkers need to spend in court waiting for their hearings to begin. When cases get continued upon the request of either the state or the defense, however, the youth and his or her parents are often significantly inconvenienced. Some cases have been set over five or six times. Currently the youth is required to be present for these set-overs meaning that the youth will have to miss school and the parents may have to miss work.

The juvenile court schedules "compliance hearings" for some probationers in an effort to prevent violations. Once an attorney is appointed for a youth, the court does not terminate the appointment. In the past, however, when probation violations were filed, whichever attorney was next in the rotation system was appointed rather than the original attorney². That practice has now been changed and whenever possible the same attorney is appointed.

The Juvenile Dependency System

Attorneys are appointed for parents at shelter hearings. Court staff notifies attorneys several hours in advance that they will need to be present. They receive the petition and the DHS shelter summary and sometimes a police report before going to court and usually have a few minutes to meet with the client before the hearing. Attorneys are rarely appointed for children except at the request of another party to the action. CASAs are appointed in most cases however. (There are currently 38 CASA volunteers in the county.) Since Paulette Sanders became the pro tem judge, there have been more review hearings than in the past. She usually schedules reviews 90 days and six months after jurisdiction. A pre-permanency hearing is scheduled to determine what the agency's permanent plan will be so that parties can be prepared to litigate the issue at the permanency hearing if necessary.

² The consortiums' previous practice was not considered a best practice. Youth offenders benefit from having continuity of representation and being able to contact "their attorney" with questions and concerns during the probation period.

The Lincoln County District Attorney's office participates in dependency cases in the early stages. They appear at shelter hearings and remain until jurisdiction has been established. They do not appear at post-dispositional review hearings or permanency hearings.

The court currently has a family court specialist who assists clients with domestic relations actions. This position may be in jeopardy if there are further Judicial Department budget cuts.

Lincoln County has a Juvenile Court Improvement Project Model Court program with participants from all involved agencies, including LDC.

The Confederated Tribes of Siletz Indians of Oregon is the largest tribe in the area. No tribal representative participates in the Model Court team or other policy making bodies. Tribal experts are available to testify in Indian Child Welfare Act cases but the tribe rarely intervenes in these cases, never seeks transfer of cases to the tribal court and rarely has services to offer to native families involved in state juvenile court dependency matters although the tribe does have a social services department and a number of caseworkers.

Civil Commitment Hearings

Judge Bachart and Judge Littlehales hear most of these cases. Attorney appointments are on a rotational basis.

Public Defense Provider

PDSC contracts with a single provider for non-death penalty cases in Lincoln County, the Lincoln Defense Consortium. Guy Greco is the administrator of the consortium. The consortium contracts to handle 3,108 cases per year. The group includes five individual attorneys and two law firms. The law firms are Ouderkirk and Hollen and Pridgeon, Bjornsen and McCrum. Senior members of both firms handle some public defense cases and each firm currently has two associates who also handle public defense cases.

LDC has no formal by-laws or written operating policies or procedures. It has a board comprised of consortium members. There is no formal process for evaluating the work of the consortium administrator or the quality of services provided by members of the consortium. There are several consortium meetings held each year but attendance is not mandatory. The consortium does not offer any services to its members other than management of the OPDS contract.

There is no mechanism in place for regular communication between members. When contract or system issues arise, however, the administrator contacts members, usually by e-mail. If a judge has a problem with the performance of an attorney, the judge usually contacts the attorney directly or the consortium

administrator. Recently the consortium administrator sent a questionnaire to the judges regarding performance of the attorneys. At the time of OPDS's visit to the county, the results had not yet been reviewed.

New consortium attorneys are added either by being hired by one of the member firms or with approval from OPDS. The consortium provides no orientation or training to members. Each firm has very experienced senior members. The consortium administrator is a highly regarded criminal defense lawyer who is available to provide advice and assistance upon request. The consortium does not monitor the caseloads of individual attorneys. Such monitoring is deemed a function of the law firm rather than the consortium. Similarly, training and oversight of the work of these attorneys is not considered a consortium function in Lincoln County although the administrator has recently taken a more active role in identifying concerns about performance and seeking to resolve them.

Case distribution within the consortium

Each of the firms and each individual attorney member receives a specific percentage of the contract caseload. The administrator determines which office will pick up new cases each week in order to maintain the appropriate distribution of cases. Except for termination of parental rights cases for which the assigned office is paid \$2300 per case, the amount of compensation received by each office is based on the percentage of contract cases the office has agreed to handle. Cases are not weighted but are assigned at random on the assumption that the more time consuming cases will balance out over time. Each office receives a fixed amount per month based on their percentage of the total caseload. The consortium maintains a reserve in case the caseload falls short and they must reimburse OPDS.

Comments from Lincoln County Stakeholders regarding Provider

Delinquency Representation

For the most part court appointed defense attorneys are described as doing a good job, some are described as "outstanding." They are considered conscientious and professional. Lawyers sometimes attend school expulsion hearings with their juvenile clients and provide educational advocacy. Few motions are filed in delinquency cases³, however, and they rarely go to a contested adjudication hearing⁴. Competency hearings are also rare. One

³ OPDS non-routine expense request records reveal that during the final six months of 2010 no requests for non-routine expenses – for investigation, for expert or other services – were submitted in any juvenile delinquency case. The consortium's case reports for that period indicate that attorneys were appointed in 32 delinquency cases and 18 probation violation proceedings.

⁴ Delinquency statistics for the one-year period ending September 30, 2009 indicated that fewer than 2% of delinquency cases were tried in Lincoln County in that time period, compared to

attorney has been very creative in representing youth charged with sexual offenses and one of the local attorneys is challenging the county's practice of shackling youth in the courtroom.

Dependency Representation

Reports received from a number of sources indicated that the dependency system in Lincoln County is being significantly affected by the performance of DHS management and staff. Staffing levels are seen as insufficient making communication very difficult. Caseworkers keep changing. Two workers who just completed their training are already gone. One of the permanency workers is also leaving. When the agency has to use interim staff they are often not adequately trained. The agency cannot provide staff to accommodate family meetings, which can be very productive in some cases. Family resources are often not identified until late in the case. The agency is sometimes too slow to remove some children, causing additional damage. There are not enough foster homes in the county and only two visitation supervisors. Judge Sanders is working with charitable organizations to identify potential lay supervisors who could facilitate more family visits.

With respect to the work of the lawyers, several lawyers are said to provide very good to excellent (or on one case "stellar") representation in juvenile dependency cases. Several other attorneys were described as generally doing very good work but at times seeming overwhelmed. One of the newer attorneys was described as very eager and promising. It was noted that some children's attorneys do not have sufficient contact with their clients. A small group of attorneys fail to explain juvenile court jurisdiction and its implications to parent clients and none of the attorneys are very active in identifying family resources for placement, visit supervision and the like.⁵ There is a high level of competence in termination cases.

Representation in Criminal Cases

One attorney is described as providing "superb" representation and always being on top of the issues in his cases. Several other attorneys were described as very good and others as competent. Three of the senior public defense lawyers who could provide excellent representation in all case types, including Measure 11 cases, never appear in criminal court. Two of the experienced lawyers who do appear seem apathetic and one of them provides obviously better representation

approximately 4% statewide. The average length of trial in Lincoln County was 50 minutes compared to 99 minutes statewide.

⁵ Non-routine expense authorizations have been approved for requests from some attorneys to use investigators to assist in finding relatives who may not be responsive to inquiries from DHS.

to retained clients than to public defense clients. Neither of these latter two attorneys files motions or takes cases to trial⁶.

There are not enough experienced lawyers to handle the most challenging cases. The law firms tend to hire inexperienced lawyers and fail to provide them with training and mentoring. Even though some of the new lawyers are very promising and could become excellent advocates, they are overworked and underpaid⁷ and left completely on their own when they begin practice. There is no senior attorney present at their initial appearances or even at their first trials. The new lawyers don't know how to prepare a trial notebook, for example. Some come to trial with no plan for what questions they will ask on direct or cross examination and sometimes ramble ineffectively.

Commentators noted that the District Attorney's office faces similar challenges in the training of new lawyers. Some kind of mock trial training would be helpful for both the defense bar and district attorneys. Both appear to be in need of a training plan and a checklist of things new lawyers need to know.

One suggestion to PDSC was that it contract directly with the attorneys who do the work. It was said that PDSC could attract and retain well qualified attorneys if it used such an approach instead of the current "franchise" approach. Another commentator said that consortium members have gotten into the habit of believing they own a piece of the public defense contract pie and can do with it what they want.

As in Lane County, the judges said they would be happy to meet with individual lawyers after cases are closed and talk to them about their observations and suggestions for handling cases. They are rarely asked to do so.

Civil Commitment Cases

No detailed information about representation in these cases was requested in view of PDSC's intention to review service delivery in civil commitment cases on a statewide basis. More training was reported to be needed by both the state and the defense in these cases, however.

⁶ Felony trial rates in Lincoln County are below the statewide average but trial rates in misdemeanor cases are higher. The state trial courts' "Cases Tried Analysis" indicates that during the six month period ending June 30, 2010, 256 felonies and 806 misdemeanor cases were closed. Of those cases, 2.7% of felonies were tried (six to a jury and one to the court); and 6.6 percent of the misdemeanors were tried (23 to a jury and 30 to the court). Statewide for the same period 4.2% of felonies were tried and 3.6% of misdemeanors.

⁷ One law firm representative said that new lawyers make a "lean but adequate salary" and that health benefits are generous. He noted that it is expensive and risky for a new lawyer to locate in Lincoln County and start a practice, and that it is the firms that provide an avenue for entry into practice.

Issues for Possible Consideration by Commissioners at March 10, 2011 Public Hearing

Measure 11 cases, training and mentoring:

While the PDSC's structural review of a public defense delivery system is not intended to focus primarily on the quality of services being provided, in some cases quality issues may be directly related to the structure in place. That appears to be the case in Lincoln County. While the quality of representation in juvenile cases appears to be very good, significant concerns were expressed about the quality of representation in criminal cases, particularly the more serious categories of criminal cases. These problems were seen as primarily twofold: (1) there are an insufficient number of highly experienced lawyers willing to handle Measure 11 cases; and (2) new lawyers are not being provided adequate training and mentoring, are generally overburdened and underpaid and are therefore not likely to remain long enough to develop into highly skilled criminal defense attorneys.

Role of compensation:

Prior to 2008, the Lincoln Defense Consortium's contract established a single flat rate for all case types with the exception of TPR cases and included a provision for hourly billing on Measure 11 cases after a certain number of hours. During every contract negotiation prior to 2008, CBS tried to persuade the consortium to move to individual case rates. Finally in 2008, CBS insisted that cases be weighted according to seriousness. However it appears that while agreeing to a contract that valued cases appropriately, the consortium decided to continue the single rate model internally. Since under their internal model attorneys receive no more compensation for handling Measure 11 cases than they do for handling misdemeanors, it may not be surprising that some lawyers prefer not to handle the more serious cases and assign them instead to associates in their firms⁸. Attorneys handling termination of parental rights cases do receive a fixed amount for those cases and the quality of representation in those cases is considered to be very good⁹.

Weaknesses of the consortium model:

In earlier service delivery reports, OPDS has described the types of entities with which it contracts and noted the relative strengths and weaknesses of each type. That information is set forth in Appendix A to this report. As the Commission has found in other counties the organizational structure of consortia varies from one county to another. When a consortium is the sole provider in a county some of

⁸ Some of the law firm associates are described as offering excellent representation, others as needing more training.

⁹ Lawyers in these cases were described as "being on full alert."

the traditional weaknesses of loosely organized consortia may not be offset by the presence of other providers.

In Lincoln County there is no local public defender office that could perform the functions of recruiting new lawyers to the area, training them under the direction and supervision of more experienced lawyers, providing county-wide training and other services provided by some of the state's non-profit public defender offices.

Qualification standards:

The law firms clearly have senior members who are experienced and capable of doing all of the necessary training and monitoring but currently do not perform this function. The senior partner in one firm when informed about the comments regarding the lack of training and monitoring, noted that the firm never assigns lawyers to handle cases for which they are not qualified under PDSC's own qualification standards. While these standards are intended to express the minimum qualifications attorneys must have in order to be approved to handle particular case types, they are not meant to serve as a substitute for comprehensive quality assurance systems which contractors should have in place, and which they will be required to have in place for contracts beginning in January of 2012. Nevertheless, PDSC could expand the qualification standards to include specific categories of training and preparation that would have to be demonstrated before attorneys could appear at particular types of hearings without a supervisor or mentor.

Special contract terms:

Since the standards appear to be serving their intended function in most parts of the state, however, it would probably be more appropriate for PDSC to simply include specific requirements regarding the training and oversight function in its contract with LDC.

PDSC could also, as suggested by one commentator, consider contracting directly with individual attorneys rather than with law firms that then assign the cases within the firm. This approach would involve OPDS more directly in the selection and monitoring of attorneys, and in the assignment of cases.

Restoration of court appointed list:

Although, as noted in the Appendix below, the use of a court appointed list does not involve a contractual relationship or provide for any meaningful assurance of quality and cost-efficiency, neither the consortium's current quality assurance system nor its internal compensation system provide a sufficient incentive for attorneys to expend the time and skill required for adequate representation in the

most serious cases. Using a rigorous, carefully administered qualification process for a court appointment list in Lincoln County might result in improved representation in Measure 11 and other serious cases.

Outside training resources:

The Metropolitan Public Defender office has offered to provide its mock trial training to public defense attorneys from other parts of the state on an as needed basis and without cost. OCDLA provides an annual new lawyers' seminar and a trial skills training program. These resources are currently available and would address at least some of the concerns about new lawyers who lack basic courtroom skills. They would not substitute however, for ongoing mentoring, training and monitoring within the firm or contract entity.

Statewide mentor attorney program:

There are many areas of the state in which training for new attorneys is not as comprehensive as it should be. One approach to meeting the need for training statewide would be to use skilled attorneys who want to devote a portion of their time to the training of new lawyers as traveling mentors. At least one of these attorneys has indicated a willingness to provide such assistance. OPDS would need to either compensate these trainers for their time or provide adequate contract funds to allow providers to retain their services.

While the Oregon State Bar is in the process of implementing a new attorney mentoring program statewide beginning with new admittees in 2010, this program will focus more on professionalism and attorney ethics than on practice issues although each mentor and new attorney will be involved in the design of the mentoring plan for the new attorney.

A Service Delivery Plan for Lincoln County

[This portion of the report will be completed after the PDSC has developed its service delivery plan for Lincoln County.]

APPENDIX A

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.¹⁰ Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

¹⁰ Spangenberg and Beeman, *supra* note 2, at 36.

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.¹¹ 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 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

¹¹ Id.

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.

Attachment 4

LANE COUNTY SERVICE DELIVERY REVIEW

JANUARY 2011 UPDATE

Background:

On October 23, 2009 the Public Defense Services Commission met in Bend, Oregon and continued a review begun in September 2009 of the delivery of services by the Lane County Public Defense Panel, the conflict provider for criminal cases in Lane County.

In response to information received in written reports and the testimony of witnesses, Commissioners determined that the existing delivery structure was not working satisfactorily and that the “panel” approach to handling the conflict caseload would not be continued. OPDS staff was instructed to meet with Lane County Commissioners and other interested persons to discuss alternatives to the existing structure. PDSC had received a proposal from a small group of lawyers to provide representation for part of the conflict caseload. Ross Shepard agreed to convene a series of meetings and discussions in Lane County to explore other possible options. As a result of those meetings a proposal was received from a group of attorneys that included those who had submitted the earlier proposal, and at their December 10, 2009 meeting Commissioners unanimously approved a revision to the Lane County service delivery plan authorizing OPDS to negotiate a contract with the new group. OPDS entered into a preliminary agreement with the Lane County Defense Consortium on January 1, 2010. Commissioners approved the proposed contract on January 28, 2010 and the consortium began accepting cases on February 1, 2010.

Stakeholder reports:

The consortium has now been functioning for approximately one year. In order to assess the performance of the new group, OPDS’s executive director and its contract analyst for Lane County (1) met with a number of stakeholders in the Lane County criminal justice system, and (2) reviewed the results of the annual OPDS survey on performance completed in January 2011.

On the whole the comments received about the performance of the new consortium were excellent. One judge said there had been a “ten-fold improvement” in quality and that one doesn’t need to feel sorry for defendants any more. The lawyers have also responded to the court’s invitation to meet with attorneys and review their performance in particular cases. Even experienced lawyers are taking advantage of this opportunity. Contract administrator Brad Cascagnette is reported to be “the right guy for the job.” He checks in regularly with the judges and promptly resolves any issues that are brought to his attention. One judge reported that the management issues that existed with the

panel have been resolved. Peer review is now occurring. It was also noted that without a financial incentive to make multiple court appearances, lawyers are now more thoughtful about setting cases over to days when they will actually be available and setting appearances on multiple cases at the same time. This has relieved some overcrowding on the court's 35-day call docket.

Two commentators said that there were still one or two lawyers in the group who should not have been included. One survey respondent said that he/she questioned the preparation of some public defense attorneys who appeared not to have met with their clients (without indicating whether they were with the public defender's office or the consortium). Three survey respondents said that overall the quality of defense had not changed in the past year. Two respondents said that it had improved somewhat. One of the latter noted that, "The consortium is a huge improvement over the former system. A lot of the less competent lawyers got weeded out. I feel badly for them, but not for the folks who need their services."

Operation of the consortium:

Brad Cascagnette said that the consortium is functioning well. It has a board of directors with five current members (3 to 15 are authorized.) The initial board members were President Don Diment, Secretary Mike Buseman, Treasurer Kevin Merwin and members Dan Koenig and Rebecca Davis all of whom were appointed for one-year renewable terms. Future board members will be elected by the board. There is no outside appointing authority¹. The board appoints the executive director and is required to perform an annual evaluation of his work; the board also appoints members of a fiscal oversight committee which performs an annual audit of the organization.

Mr. Cascagnette tries to accommodate member lawyers' preferences for the portion of their professional time they wish to spend on public defense cases. The consortium now has its own website (<http://www.lanecountydefense.com>). It has already sponsored one CLE event and plans another in the near future. Consortium attorneys meet monthly to talk about cases. All of the attorneys are now Measure 11 qualified. Two who were not were gradually introduced to more serious cases. Mr. Cascagnette personally mentored them by reviewing the facts of cases with them, discussing the law and helping them prepare for court hearings.

System changes:

Defense attorneys are no longer routinely waiving grand jury indictments in Lane County. In a change supported by the new consortium, the District Attorney's office is now convening grand juries in most felony cases. Commentators had

¹ The group created its board before the Commission established the requirement, applicable to contracts beginning in January of 2012, that boards include outside directors.

different opinions about whether demanding indictments actually benefited clients.

Public Defender Services of Lane County:

The work of the Lane County public defender's office was also praised. One survey respondent said that the work of its lawyers was "truly outstanding." It was noted that the office had recently been able to hire some new attorneys, replacing one attorney who had been appointed to the bench and one who had moved out of the area. As Commissioners will recall the lawyer retention rate at the public defender's office has been very high over the years. The training of new lawyers would be a natural role for the public defender office but one of the reasons that the panel approach was approved in 2004 was that the local legal community wanted to maintain an avenue for new lawyers to enter the system and there were only rare openings in the public defender's office. With more public defenders nearing retirement age it may be possible for the office to hire and train more new attorneys and thus fulfill this important role in the Lane County legal community.

Civil commitment cases:

Several judges mentioned that there did not appear to be sufficient number of qualified attorneys to represent clients in civil commitment cases. These comments have been provided to the contract analyst for the county.

Juvenile cases:

It is not the purpose of this report to discuss service delivery in juvenile cases but it should be noted that in a recent spot survey regarding the caseloads of public defense attorneys who handle only juvenile cases, the Lane County providers had the highest number of current clients per attorney of any provider in the state, in some cases having twice as many clients as their counterparts in other jurisdictions. OPDS will be exploring the reasons for these high caseloads and their impact on the quality of representation being provided in Lane County.

Conclusion:

The current public defense delivery system for criminal cases in Lane County appears to be functioning well for clients, for the defense providers and for the system as a whole.

Attachment 5



Oregon

Public Defense Services Commission

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MEMORANDUM

To: Public Defense Services Commission

From: Paul Levy, General Counsel

Re: Proposed Policy and Procedure for Public Defense Contracting

Date: March 10, 2011

Introduction

The Public Defense Services Commission (PDSC) is directed by statute to adopt policies and procedures regarding many of its core functions, including “[t]he contracting of public defense services[.]” ORS 151.216(1)(f)(H). The agency’s Request for Proposals for Public Defense Legal Services Contracts (hereafter “RFP”), has been regarded as its statement of policies and procedures on the contracting process. The RFP includes all of the applicable procedures for the submission of public defense contract proposals and for the review, selection and award of those contracts, and the Commission has reviews and approves each RFP prior to release. OPDS recommends that the Commission explicitly identify the agency’s RFPs as policies and procedures of the Commission and that it add several new provisions to the next version of the RFP.

Proposed New RFP Provisions

At the PDSC meeting now scheduled for April 28, 2011, OPDS will present an RFP for Commission approval that will be released later this year to solicit proposals for public defense contracts for 2012 through 2013. In addition to a number of other likely “housekeeping” changes that will be explained at that time, the proposed RFP will include the new provisions set forth below. New language is either in bold or otherwise indicated.¹

¹The entire text of the existing RFP can be viewed on the agency’s website at: <http://www.oregon.gov/OPDS/docs/RFPs/OldRFP/RFP.pdf>.

PART I—GENERAL INFORMATION

Request For Proposals (RFP) Description

The Public Defense Services Commission (PDSC) is seeking contract proposals to provide legal services to persons determined by the state courts to be financially eligible and entitled to court-appointed counsel at state expense. PDSC is accepting proposals for all case types in all counties. The contracts awarded may have one-year, two-year, or four-year terms beginning **January 1, 2012, or such other length of term and beginning date** as determined by PDSC. The basic services required are legal representation and support services necessary to provide **adequate and** effective legal representation that meets established professional standards of practice.

[Second paragraph of existing document is deleted, and portions incorporated in next two sections.]

This RFP contains **the applicable procedure**, instructions and requirements for proposals. It is organized in four parts:

Part I	General Information
Part II	Proposal Application Instructions and Requirements
Part III	Proposal Application and Proposal Outline
Part IV	Contract General Terms

Applicable Contracting Procedure [This provision is new and includes language moved from the current section above.]

ORS 151.216 authorizes the PDSC to adopt policies and procedures for the contracting of public defense services. As part of the Judicial Branch, PDSC is not subject to the Department of Administrative Services administrative rules and procedures that govern contracting for personal services contracts. The PDSC adopts the policies, procedures, instructions, requirements and other provisions of this RFP as the PDSC policy and procedures for contracting for personal services. The model rules of the Oregon Attorney General do not apply to PDSC contracting but will be reviewed each time the Attorney General modifies them to determine whether PDSC should modify the policies and procedures contained herein.

Minority, Women and Emerging Small Business [new section]

Pursuant to ORS 200.035, PDSC shall provide timely notice of RFPs and contract awards to the Advocate for Minority, Women and Emerging Small Business if the estimated value of the contract exceeds \$5,000.

MEMORANDUM

March 10, 2011

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Responses to RFPs shall include a certification, on a form provided by PDSC, that the applicant has not and will not discriminate against a subcontractor in the awarding of any subcontract because the subcontractor is a minority, women or emerging small business enterprise certified under ORS 200.055 or against a business enterprise that is owned or controlled by or that employs a disabled veteran as defined in ORS 408.225.

Schedule of Events

Release of RFP

Proposal Submission Deadline

Notice of Intent to Award Contract

Contract Awards

Contract Effective Date

[Following the existing paragraph in this section would be the following new paragraph:]

PDSC will provide notice of its intent to award contracts to all applicants at least seven (7) days before the award of contracts, unless exigent circumstances require a shorter period of notice.

Attachment 6

Report on the Fourth Annual Statewide Public Defense
Performance Survey
Paul Levy, OPDS General Counsel
March 10, 2011

In early January 2011, the Office of Public Defense Services (OPDS) conducted its fourth annual statewide public defense performance survey. A summary of the survey results, along with the results of the 2008 and 2009 surveys, is attached to this report. Because OPDS used a somewhat different instrument for its first survey in late 2007, the results of that survey are not easily compared to subsequent surveys.

Overall, the 2011 survey shows general satisfaction with the quality of public defense representation in Oregon, a result similar to that seen in each of the three earlier surveys. With the caveat that the survey is not a scientifically designed or validated instrument, the survey appears to confirm the efficacy of quality improvement efforts by the Public Defense Services Commission (PDSC), its staff, public defense contractors, and others, particularly in the area of juvenile representation and the death penalty. As with the previous surveys, the written comments included in responses to the 2011 survey will allow OPDS to follow up on specific concerns in local justice systems. OPDS is in the process of reviewing each of the comments and, where appropriate, contacting judges, public defense providers and others.

Conduct of Survey

OPDS uses an online survey tool, SurveyMonkey.com, to collect and tabulate responses. OPDS sent a link to its online survey to all Circuit Court judges, all elected district attorneys, the director of each county juvenile department, and to all coordinators of local Citizen Review Boards (CRB). As in prior years, Chief Justice Paul De Muniz sent an email message to all Circuit Court judges endorsing the survey and urging judges to respond. There was a significant increase in the number of responses this year from judges, and more prosecutors also responded. On the other hand, fewer juvenile department directors responded to the survey compared to last year, and the number of CRB coordinators also declined somewhat.

Criminal Representation

As in previous surveys, most respondents (86.2%) report that overall representation in criminal cases is good (65.5%) or excellent (20.7%). Most respondents say that the quality of criminal representation has remained about the same, although nearly 25% say it improved in the past year and just a handful say it has gotten somewhat worse. Although most respondents report that criminal caseloads are too large, the number who say so continues a decline that began three years ago. As with the survey last

year, about half of all respondents indicate that they question the competence of some attorneys handling criminal cases. In connection with this information, the 51 comments provided by respondents will permit further inquiry. As mentioned above, OPDS is following up on comments concerning specific counties and providers.

Juvenile Representation

In response to the first annual survey in late 2007, respondents rated the overall quality of juvenile representation slightly less favorably than the representation in criminal cases. For two years now representation in both dependency and delinquency cases is said to be good or excellent by a higher percentage of people than in criminal cases, with no indication that opinions about criminal representation have worsened. Unlike in criminal cases, the vast majority of respondents do not question the competency of any attorney providing representation in either dependency or delinquency cases. The comments regarding competency concerns focus on timely and appropriate contact with clients, and the need for stronger advocacy in an increasingly complex area of law.

Death Penalty Representation

The survey presented one open-ended question concerning death penalty representation, inviting any comments concerning representation in those cases. The 31 comments, from those who said they were familiar with the quality of representation in death penalty cases, generally remarked upon the very high quality of the work now being performed. While most of the comments were very favorable and noted improvements in the group of lawyers assigned to these cases, several comments remarked upon what were seen as unnecessary defense expenses. Other comments remarked upon the difficulty of scheduling matters when lawyers are committed to several capital cases at the same time, and other comments noted that improvement is still needed in selecting and assigning lawyers to death penalty cases.

Civil Commitment Representation

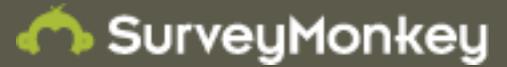
The 2010 survey was the first to ask about the quality of representation in civil commitment cases. Just as with the survey last year, in 2011 the results show a very high level of satisfaction with public defense representation in these cases.

Conclusion

While undoubtedly not a comprehensive measure of the quality of public defense services, survey results do permit OPDS to track significant changes in reported quality from year to year in specific areas of the state and types of practice. The overall favorable opinion about the quality of public defense services, including the indication that many respondents see improvement in these services, supports the conclusion that

PDSC is largely fulfilling its principal responsibility to deliver quality public defense services in Oregon. At the same time, many respondents identified specific concerns about inadequate client contact, need for better or more training, and issues of professionalism. These comments, which are similar to ones received in past surveys, point to the need for continued efforts to improve provider management and the importance of ongoing PDSC engagement with all justice system stakeholders in Oregon.

2011 Annual Statewide Public Defense Performance Survey



1. Please tell us your role in your county's justice system.

		('09)	('10)	Response Percent	Response Count
Judge		95	92	70.8%	109
Prosecutor		11	13	13.0%	20
Juvenile Department		16	25	9.1%	14
Citizen Review Board		14	10	7.1%	11
Other				0.0%	0
			Other (please specify)		0
answered question					154
skipped question					0

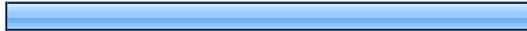
2. How long have you worked in your county's justice system?

		('09)	('10)	Response Percent	Response Count
1 to 3 years		8.8%	7.2%	7.4%	11
3 to 5 years		7.4%	6.5%	7.4%	11
5 to 10 years		11.0%	10.9%	11.4%	17
10 years and more		72.8%	75.4%	73.8%	110
answered question					149
skipped question					5

3. Please tell us where you work (Judicial District).

		Response Percent	Response Count
JD 1 Jackson County		5.2%	8
JD 2 Lane County		3.2%	5
JD 3 Marion County		7.8%	12
JD 4 Multnomah County		15.6%	24
JD 5 Clackamas County		13.0%	20
JD 6 Morrow & Umatilla Counties		2.6%	4
JD 7 Hood River, Wasco, Sherman, Wheeler, Gilliam Counties		1.9%	3
JD 8 Baker County		0.6%	1
JD 9 Malheur County		1.9%	3
JD 10 Union & Wallowa Counties		1.9%	3
JD 11 Deschutes County		3.9%	6
JD 12 Polk County		1.9%	3
JD 13 Klamath County		3.2%	5
JD 14 Josephine County		1.3%	2
JD 15 Coos & Curry Counties		4.5%	7
JD 16 Douglas County		2.6%	4
JD 17 Lincoln County		3.2%	5
JD 18 Clatsop County		2.6%	4
JD 19 Columbia County		1.9%	3
JD 20 Washington County		8.4%	13
JD 21 Benton County		1.3%	2
JD 22 Crook & Jefferson Counties		1.9%	3

JD 23 Linn County		1.9%	3
JD 24 Grant & Harney Counties		1.9%	3
JD 25 Yamhill County		2.6%	4
JD 26 Lake County		1.3%	2
JD 27 Tillamook County		1.3%	2
answered question			154
skipped question			0

4. Are you able to comment on the quality of public defense representation in adult criminal cases?			
		Response Percent	Response Count
Yes		79.9%	123
No (the survey will skip questions related to these cases)		20.1%	31
answered question			154
skipped question			0

5. Please rate your overall impression of the quality of public defense representation in adult criminal cases.					
		('09)	('10)	Response Percent	Response Count
Excellent		15.8%	13.4%	20.7%	24
Good		68.3%	74.2%	65.5%	76
Fair		15.8%	12.4%	13.8%	16
Poor				0.0%	0
answered question					116
skipped question					38

6. Within the past year, has the quality of public defense representation changed in adult criminal cases?

		('09)	('10)	Response Percent	Response Count
Improved significantly		1.0%	1.0%	2.6%	3
Improved somewhat		20.0%	21.9%	22.2%	26
Remained about the same		69.0%	68.8%	69.2%	81
Worsened somewhat		10.0%	8.3%	6.0%	7
Worsened significantly		0.0%	0.0%	0.0%	0
answered question					117
skipped question					37

7. Do public defense attorneys in your judicial district provide satisfactory representation of clients in adult criminal cases?

		('09)	('10)	Response Percent	Response Count
Always		22.0%	18.9%	25.6%	30
Often		65.0%	73.7%	65.0%	76
Sometimes		13.0%	7.4%	8.5%	10
Rarely		0.0%	0.0%	0.0%	0
Never		0.0%	0.0%	0.9%	1
answered question					117
skipped question					37

8. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in criminal cases?

		('09)	('10)	Response Percent	Response Count
Yes		44.4%	54.6%	49.6%	57
No		55.6%	45.4%	50.4%	58
If "yes," please describe your concerns.					51
answered question					115
skipped question					39

9. How would you describe the adult criminal caseloads of public defense attorneys in your judicial district?

		('09)	('10)	Response Percent	Response Count
Significantly too large		9.3%	16.0%	10.1%	11
Somewhat too large		60.8%	41.5%	42.2%	46
About right		29.9%	41.5%	45.9%	50
Somewhat too small		0.0%	0.0%	1.8%	2
Significantly too small		0.0%	1.1%	0.0%	0
answered question					109
skipped question					45

10. Are you able to comment on the quality of public defense representation in juvenile dependency cases?					
				Response Percent	Response Count
Yes				56.4%	84
No (the survey will skip questions related to these cases)				43.6%	65
				answered question	149
				skipped question	5

11. Please rate your overall impression of the quality of public defense representation in juvenile dependency cases.					
				Response Percent	Response Count
		('09)	('10)		
Excellent		24.4%	29.5%	31.8%	27
Good		61.0%	61.5%	60.0%	51
Fair		14.6%	7.7%	8.2%	7
Poor		0.0%	1.3%	0.0%	0
				answered question	85
				skipped question	69

12. Within the past year, has the quality of public defense representation changed in juvenile dependency cases?

		('09)	('10)	Response Percent	Response Count
Improved significantly		4.8%	1.3%	4.7%	4
Improved somewhat		27.7%	28.2%	35.3%	30
Remained about the same		63.9%	67.9%	57.6%	49
Worsened somewhat		0.0%	2.6%	2.4%	2
Worsened significantly				0.0%	0
				answered question	85
				skipped question	69

13. Do public defense attorneys in your judicial district provide satisfactory representation of clients in juvenile dependency cases?

		('09)	('10)	Response Percent	Response Count
Always		34.1%	31.6%	29.4%	25
Often		48.8%	58.2%	64.7%	55
Sometimes		17.1%	10.1%	5.9%	5
Rarely				0.0%	0
Never				0.0%	0
				answered question	85
				skipped question	69

14. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in juvenile dependency cases?

		('09)	('10)	Response Percent	Response Count
Yes		21.7%	23.4%	18.3%	15
No		78.3%	76.6%	81.7%	67
If "yes," please describe your concerns.					16
answered question					82
skipped question					72

15. How would you describe the juvenile dependency caseloads of public defense attorneys in your judicial district?

		('09)	('10)	Response Percent	Response Count
Significantly too large		11.1%	4.1%	7.4%	6
Somewhat too large		43.2%	45.2%	32.1%	26
About right		44.4%	47.9%	59.3%	48
Somewhat too small		1.2%	1.4%	1.2%	1
Significantly too small		0.0%	1.4%	0.0%	0
answered question					81
skipped question					73

16. Are you able to comment on the quality of public defense representation in juvenile delinquency cases?

		Response Percent	Response Count
Yes		84.5%	71
No (the survey will skip questions related to these cases)		15.5%	13
answered question			84
skipped question			70

17. Please rate your overall impression of the quality of public defense representation in juvenile delinquency cases.

		('09)	('10)	Response Percent	Response Count
Excellent		22.1%	23.5%	32.9%	23
Good		63.6%	67.6%	57.1%	40
Fair		14.3%	8.8%	10.0%	7
Poor				0.0%	0
answered question				70	
skipped question				84	

18. Within the past year, has the quality of public defense representation changed in juvenile delinquency cases?

		('09)	('10)	Response Percent	Response Count
Improved significantly		1.3%	4.4%	2.8%	2
Improved somewhat		26.9%	20.6%	25.4%	18
Remained about the same		67.9%	73.5%	67.6%	48
Worsened somewhat		3.8%	1.5%	2.8%	2
Worsened significantly		0.0%	0.0%	1.4%	1
answered question					71
skipped question					83

19. Do public defense attorneys in your judicial district provide satisfactory representation of clients in juvenile delinquency cases?

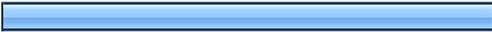
		('09)	('10)	Response Percent	Response Count
Always		32.5%	27.9%	32.4%	23
Often		53.2%	64.7%	60.6%	43
Sometimes		14.3%	7.4%	7.0%	5
Rarely				0.0%	0
Never				0.0%	0
answered question					71
skipped question					83

20. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in juvenile delinquency cases?

		('09)	('10)	Response Percent	Response Count
Yes		20.5%	23.5%	9.9%	7
No		79.5%	76.5%	90.1%	64
If "yes," please describe your concerns.					10
answered question					71
skipped question					83

21. How would you describe the juvenile delinquency caseloads of public defense attorneys in your judicial district?

		('09)	('10)	Response Percent	Response Count
Significantly too large		5.3%	3.0%	0.0%	0
Somewhat too large		30.7%	25.8%	29.0%	20
About right		62.7%	65.2%	68.1%	47
Somewhat too small		1.3%	4.5%	2.9%	2
Significantly too small		0.0%	1.5%	0.0%	0
answered question					69
skipped question					85

22. Are you able to comment on the quality of public defense representation in death penalty cases?			
		Response Percent	Response Count
Yes		25.3%	37
No (the survey will skip questions related to these cases)		74.7%	109
answered question			146
skipped question			8

23. Please provide any comments you have concerning the quality of public defense representation in death penalty cases.		Response Count
		31
answered question		31
skipped question		123

24. Are you able to comment on the quality of public defense representation in civil commitment cases?			
		Response Percent	Response Count
Yes		47.3%	70
No (the survey will skip questions related to these cases)		52.7%	78
answered question			148
skipped question			6

25. Please rate your overall impression of the quality of public defense representation in civil commitment cases.

		(' 10)	Response Percent	Response Count
Excellent		23.4%	35.7%	25
Good		70.2%	51.4%	36
Fair		6.4%	11.4%	8
Poor		0.0%	1.4%	1
answered question				70
skipped question				84

26. Within the past year, has the quality of public defense representation changed in civil commitment cases?

		(' 10)	Response Percent	Response Count
Improved significantly		0.0%	0.0%	0
Improved somewhat		16.7%	15.7%	11
Remained about the same		81.3%	84.3%	59
Worsened somewhat		2.1%	0.0%	0
Worsened significantly			0.0%	0
answered question				70
skipped question				84

27. Do public defense attorneys in your judicial district provide satisfactory representation of clients in civil commitment cases?

		(' 10)	Response Percent	Response Count
Always		48.9%	47.1%	33
Often		40.4%	45.7%	32
Sometimes		10.6%	5.7%	4
Rarely		0.0%	1.4%	1
Never			0.0%	0
answered question				70
skipped question				84

28. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in civil commitment cases?

		(' 10)	Response Percent	Response Count
Yes		4.3%	4.3%	3
No		95.7%	95.7%	66
If "yes," please describe your concerns.				4
answered question				69
skipped question				85

29. How would you describe the civil commitment caseloads of public defense attorneys in your judicial district?

		('10)	Response Percent	Response Count
Significantly too large		0.0%	0.0%	0
Somewhat too large	<input type="checkbox"/>	0.0%	4.5%	3
About right	<input checked="" type="checkbox"/>	91.3%	88.1%	59
Somewhat too small	<input type="checkbox"/>	8.7%	4.5%	3
Significantly too small	<input type="checkbox"/>	0.0%	3.0%	2
answered question				67
skipped question				87

30. Please provide any comments, concerns, or suggestions that you may have about the quality of public defense representation in your county or judicial district.

	Response Count
	65
answered question	65
skipped question	89

31. Your name (optional)

	Response Count
	51
answered question	51
skipped question	103