

Members

Barnes H. Ellis, Chair
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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 12, 2009
9:00 a.m. - 1:00 p.m.
Clackamas County Circuit Court
Holman Building
821 Main St.
Oregon City, Oregon 97045

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's January 22, 2009 Meeting
<i>(Attachment 1)</i> | Barnes Ellis |
| 2. Presentations on Public Defense Delivery in Clackamas County
<i>(Attachment 2)</i> | Invited guests and audience members |
| 3. Post-conviction relief – Performance Standards, Task Force Recommendations, Training
<i>(Attachment 3)</i> | Dennis Balske (10:30)
Paul Levy |
| Presentations on Public Defense Delivery In Clackamas Count (cont'd.) | Invited guests and audience members |
| 4. Defense Representation in Drug Courts
<i>(Attachment 4)</i> | Barnes Ellis
Ingrid Swenson |
| 5. OPDS Monthly Report
<i>(Attachment 5)</i> | OPDS Management Team – Budget Update; Annual Report |

Please note: Box lunches 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 Weeks at (503) 378-3349.

Next meeting: The next meeting of the commission is scheduled for April 16, 2009 from 9am to 1pm at a location to be announced in Salem, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Thursday, January 22, 2009
9:00 a.m. - 1:00 p.m.
Jury Conference Room (B 148)
Marion County Courthouse
100 High Street NE
Salem, Oregon 97301

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

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

Agenda Item No. 1 Approval of the Minutes of PDSC's November 20, 2008 Meeting

MOTION: Shaun McCrea moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Agenda Item No. 2 Review of PDSC Service Delivery Plan for Marion County

Chair Ellis introduced the discussion of service delivery in Marion County by noting that it appeared that there had been two positive developments that had arisen out of the changes implemented since 2005, the opening of the public defender office (PDMC) and improvements made by the Marion County Association of Defenders (MCAD).

Tom Sermak introduced the current and former chairs of the public defender's Board of Trustees, Bill Copenhaver and John Hemann. The office began taking cases in July of 2007 and in the calendar year 2008 represented approximately 30 percent of the indigent criminal defense clients in the county. The attorneys have had good success in trial. The office has worked effectively with the District Attorney, the Sheriff and with MCAD. He described the system for receiving appointments in new cases and said that the office continues to work on its calendaring system and on getting its lawyers to court on time. Board members have participated in discussions with the court about this issue and the office has enlisted the assistance of the Professional Liability Fund. Bert Putney with the Southern Oregon Public Defender office will be consulting with PDMC about it as well. A training manual has been

developed. New attorneys are assigned only misdemeanors at first. Mr. Sermak identified each of the attorneys employed by the office and their prior legal experience. He said that he had not been able to establish pay equity between the attorneys in his office and deputy district attorneys except at the entry level and that this had been a detriment to his recruiting efforts. The office has been able to hire a number of staff members and one attorney who speak Spanish. Mr. Sermak would like to add three or four lawyers in the future. Mr. Copenhaver described the composition of the board and said that it has been very active and is a good steward of public funds. He said that Tom Sermak receives input from the board without defensiveness. Mr. Hemann said that it had been a challenging period for the new office but that Tom Sermak is doing a good job and has managed to create a functioning law firm in only eighteen months.

Paul Lipscomb said it had been a year of significant change at MCAD after the former executive director resigned. He became the executive director in July of 2008. The MCAD board set a goal of excellence that has been communicated to members who were already very motivated to make positive changes. It was a shock to the organization to lose 25% of its market share. One of Mr. Lipscomb's goals is to stem the further loss of market share. MCAD currently has 52 members. The group also experienced a significant change in its compensation system, going from an hourly rate to a unit rate. MCAD is not currently adding new members although six to eight newer lawyers are about to complete their probationary periods and some of them will be seeking approval to handle felony cases. The work groups that were established in 2005 to improve quality continue to meet on a regular basis. Four MCAD members are currently on or developing professional improvement plans. MCAD would like to become the best indigent defense provider in the state. Mr. Lipscomb recommended that the relative shares of the caseload handled by MCAD and the public defender office remain the same in the next contract cycle. This would be a recognition of the progress made by MCAD and would allow the public defender to mature as an organization.

Olcott Thompson said that although the criticisms of MCAD that were made in 2005 were deserved a lot of growth has occurred and is continuing. The use of individual court dockets in Marion County contributes to the problem.

Paul Lipscomb has been working with the court to address issues identified by the judges and court staff. He has met with the judges as a group on two occasions and meets with individual judges as well. He provided the bar's Performance Standards to all MCAD members and suggested that each work group review them.

Prof. Mike Weiss teaches at Willamette Law School and is a member of the MCAD board. He believes that commitment to quality is an important goal of both the membership and the board.

Paul Lipscomb said that the PDSC's challenge is to insist on quality representation even in an underfunded system. It will be very difficult to replace experienced lawyers when the pay is not commensurate with the level of experience needed.

Richard Condon testified that the Juvenile Advocacy Consortium (JAC) has added four new members since the last Commission review, including one Spanish speaking lawyer. The consortium has also created bylaws and an affiliation agreement for members. The administrator of the consortium now receives compensation for his administrative work. Fourteen of the eighteen lawyers are full time and all are juvenile law specialists. The newest members are assigned to misdemeanor delinquency cases. More senior attorneys handle felony and dependency matters.

Commissioner Welch said that she had sat as a senior judge in Marion County Juvenile Court for three weeks and that in her observation there is no better group of lawyers representing juveniles in the state.

Pam Sornson testified that she is the director of the Marion County CASA Program. She said that she had contacted the CASAs who work in the program and received responses from a third of them. Of this group a number had concerns about whether the attorneys were having adequate contact with their child clients. Attorneys struggle with immense caseloads but she believes the system appears to be improving.

Mr. Condon said that the consortium requires attorneys to meet with their child clients and that the court monitors the extent of their contact.

Agenda Item No. 3 Defense Representation in Drug Courts

The discussion of defense representation in drug courts was postponed until the March 2009 meeting.

Agenda Item No. 4 Continued Review of PDSC Service Delivery Plan for Representation in Death Penalty Cases

Matt Rubenstein reported that as the capital resource attorney he plans and conducts trainings and consults regularly with capital trial teams. Preservation of issues for federal review has been a problem in capital cases in Oregon and elsewhere and he is working with the Federal Defender office to train trial lawyers in how to identify, litigate and preserve issues. The resource center has a password protected website on which attorneys can share work product such as an exhaustive demurrer to Oregon's capital sentencing scheme prepared by Steve Krasik. Mr. Rubenstein has entered cases to assist the trial attorneys in jury selection and argument. He is also serving as a guardian ad litem for two men on death row with competency issues. He met with members of OPDS's management team and discussed how OPDS could enforce the ABA Guidelines and make a record in the trial court regarding deficient performance by the appointed attorney. Mr. Rubenstein's contract is being modified to permit him to act on behalf of a defendant whose counsel is deficient. Another function of the resource center will be to help ensure that effective teams are put together and that they are developing an investigation plan, a litigation plan and a mitigation investigation plan early in the process. He is also exploring the creation of a capital mitigation specialist resource position to provide training and consultation on the mitigation function.

Commissioner Lazenby asked whether having a staff attorney appearing in these cases made OPDS the guarantor of quality representation.

Ingrid Swenson said that the Commission may have already assumed that role when it adopted the ABA Guidelines.

Chair Ellis said that the Commission had assumed that role in the appellate unit.

Ingrid Swenson will meet with Commissioner Lazenby to discuss this issue further.

Chair Ellis inquired whether a legislative change was being sought to require the state to file a notice of intent to seek the death penalty in accordance with the practice in Washington State. Matt Rubenstein responded that the Oregon Criminal Defense Lawyers Association (OCDLA) had filed such a bill.

Agenda Item No. 5 OPDS Monthly Report

Ingrid Swenson and Kathryn Aylward reported on anticipated cuts in state agencies' budgets to address the projected budget shortfall in the 2007-2009 biennium and identified the members of the Ways and Means Public Safety Subcommittee who will be making recommendations on the OPDS budget.

Peter Gartlan discussed the United States Supreme Court's ruling in *State v. Ice*.

Paul Levy reported that the Oregon State Bar task force's performance standards in post-conviction relief cases had been approved by the Board of Governors and that the standards would be discussed at an OCDLA CLE event in March.

The date of the April 2009 PDSC meeting was discussed. Commissioners approved a change of the date from April 9 to April 16.

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

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, January 22, 2009
9:00 a.m. - 1:00 p.m.
Jury Conference Room (B 148)
Marion County Courthouse
100 High Street NE
Salem, Oregon 97301

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
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Peter Gartlan
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Agenda Item No. 1 Approval of the Minutes of PDSC's November 20, 2008 Meeting

04 Chair Ellis I apologize for being late. You can assume that I was directionally challenged. The first item, and we do have a quorum, is approval of the minutes for November 20. Are there any additions or corrections? If not, I would entertain a motion:
MOTION: Shaun McCrea moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Agenda Item No. 2 Review of PDSC Service Delivery Plan for Marion County

37 Chair Ellis The next item on our agency is a review of Marion County. I think it is kind of useful to think back because it was in 2005, if I have my dates right, that we did our initial series of meetings here in Marion County. I found those very productive, very helpful, and the Commission really did push for creating and bringing on line a public defender. That has happened and I think it is a good to look now at the county, both MCAD and the Marion Defender, and see how we are doing. My own sense of it before we hear all the testimony is that we have had two good things happen. One is the public defender has gotten up and going, and the other thing is MCAD has made wonderful strides. I know there are bumps in the road and things we are going to have to work on, but at least my impression, before we hear otherwise, is that this has been a county where a lot of progress has occurred. Ingrid, do you want to start with this?

2:11 I. Swenson I don't need to add very much. The materials I provided you essentially summarized your previous discussions of service delivery in Marion County. In addition to the two criminal providers we will also hear from the juvenile provider today. We did hear something about that earlier. I have a couple of corrections to the material I provided you. I am referring to the orange attachment which is Attachment 2. If you will look at page five, when I mentioned John Hemann I neglected to include the name of one of his partners in the firm. It was the "Garrett Hemann" as we all know, but it didn't get into print here and it should be corrected. Then it says down at the bottom of paragraph D, "The office (meaning the public defender office) opened April 2." Well, Tom Sermak was there but it didn't really open until July 2. The final sentence talks about when court appointments began and that would have been July 5, 2007. We are approximately 18 months out from that date and that is when you had asked to review what was happening with respect to both of the providers. That is where we are.

3:52 Chair Ellis I am not sure that you had a plan as to who would go first?

3:59 I. Swenson I think that the most people here are probably from the public defender's office. You might want to start with Tom and his board members.

4:11 Chair Ellis Tom, do you want to come forward.

4:17 T. Sermak Mr. Chair, and members of the Commission, I would like to introduce John Hemann and Bill Copenhagen.

4:17 Chair Ellis Nice to meet you.

4:17 T. Sermak John is the former chairman of the Board of Trustees and Bill is the current chairman of the Board of Trustees. The process that we went through to get us where we are today was interesting to me. I have had conversations with a number of the judges and with Ingrid, and Ms. Aylward, and others about this process. The public defender's office is up and running. We represented approximately 30 percent of the indigent defense clients, the public defender clients, in 2008. We started with nothing, literally, in April of '07. By July we had an up and functioning office with I think three lawyers, some support staff, a part-time investigator and by January of '08 we had six lawyers, four full-time staff, and a part-time law clerk. We have a program that we have started very generally which is a program to use volunteer law students from the university who come over and do legal research for us. When they become able to be certified we get them into court. I am hoping to have the program merge into a sort of practicum program for students at the university, but I don't want to start doing that until we get our own house in order. In our discussions and in the information that was presented in the summary, it was noted that there are some difficulties in our office. I recognize that that is the case. One of the questions was whether or not the training that we do is appropriate. I think that I can say with confidence that the representation that we have given from day one has been excellent representation for them. We take a large number of cases to trial. We have good success in trial when we do that. I think our motion practice is appropriate. I think we negotiate firmly and appropriately with the district attorney's office. I think we have the respect of the district attorney's office. We have integrated quite well and I think Judge Lipscomb can speak to that quite well with MCAD. We enjoy a good working relationship. I think Judge Lipscomb and I, as executive directors of our various entities, do a good job of communicating with each other and coordinating things. There have been bumps along the road. Among other things we are, of course, always tweaking the system that we have. The budget has needed to be adjusted. The "due today" database system has had to be tweaked to some extent. We have a calendar system, a centralized calendar system that has needed to be tweaked as well. We take cases one day a week at this point. We take whatever cases come through the door and assign those out to our lawyers. Of the six staff members that we have we have one that has 16 years of experience in other public defender offices. We have one who has seven years as a prosecutor before coming to us. Two of our lawyers did not practice law before being hired by our office. All of them have been in court and all

of them have had trials. Our training process is that we have a training manual which covers substantive law and procedural law, trial techniques, sentencing issues, client interviewing techniques and so forth. Each new lawyer is introduced to the court system and local practice by shadowing a lawyer for a day or two. We will have them observe trials before they go into court. When they have their first trial or court appearances they are observed either by me or by some other senior lawyer. We debrief with them about what is going on. We have regular attorney meetings and at the end of each attorney meeting we staff cases. That is virtually with the entire law staff. Sometimes one of the lawyers will have to be in court or something like that. That is a good learning tool both for the lawyer who is staffing the case and for the other lawyers. Issues in their cases will come up and be discussed. I think that that is quite a common practice and we do it on a regular basis. Virtually any case that goes to trial gets staffed. I would say that 80 percent of the cases that go to trial are staffed with me personally. I think the lawyers talk among themselves on the other cases. I consider that an integral part of the training system.

9:31 Chair Ellis Do you tend to assign by specialty? Do you break it up into subject matter divisions?

9:41 T. Sermak Normally what we do is based on the level of experience. The new lawyers get only misdemeanors. Every lawyer that we have had, even the ones who started as only misdemeanor qualified, within the year had enough cases and experience to where they are all minor felony qualified at this point. As far as type, I know that certain lawyers like or have an interest in certain types of cases. I assign those to them but that is informal. An A felony, for example, might go to any A felony qualified lawyer. With criminal mistreatment, for example, there are issues that one of my lawyers is eagerly raising on those cases and I tend to assign those to her more than to the others. I do try to take into consideration the particular strengths and interests of the attorneys as I assign cases to them.

10:35 Chair Ellis It would help me if you could profile the lawyers you have. Give me a little bit of their background. You have given some indication of their experience level but where you are recruiting from and how that is going?

10:50 T. Sermak We have pretty much recruited out of county. I did make an effort to find local lawyers when I first got here and was unsuccessful initially in getting any Marion County lawyers to join us. My first hire was Nancy Cook. She was a public defender down in Coos County and Douglas County for 16 or 17 years. She has some experience as a Department of Human Services caseworker. Largely it was she and I in the office when we first started taking cases. She is the one who has an interest in the criminal mistreatment cases and other things that relate to children. She is also the lawyer that we have that does habeas corpus for us because she has some experience. In Coos County there is a correctional facility there and she had some experience with habeas corpus. That is part of our contract. We have a local lawyer, Daniel Carroll, who joined us in November of 2007. He has experience both as an appellate lawyer and in private practice here doing mostly criminal law. He has been a really valuable asset to us in terms of local court practice and that sort of thing. My third lawyer is Tony Schwartz. He was a prosecutor in Colorado for seven years before he came here. I have a natural reluctance to hire a prosecutor right out of the prosecutor's office. I talked to his employer in Colorado and got a glowing review of this man's trial skills and his sense of fairness and justice. I then called the public defender for that jurisdiction and spoke with them about Mr. Schwartz. I happened to catch the very person who manned the same courtroom as Mr. Schwartz did. He had the same glowing accounts of his abilities. Tony went into private practice for a brief period of time up in Portland, thought better of it and joined us in February of 2008. He is, in my estimation, an extraordinary trial lawyer. I have seen him in court and, with the exception of some of those present, I know very few lawyers that are as effective in front of a jury as he is. As a matter of fact, I don't mind mentioning that he has won his last eight trials getting not guilty verdicts in all of them. I think that is pretty extraordinary for a public defender. Laura Coffin and Erik Eklund are my two newest lawyers. I am leaving somebody out. Laura came from University of Oregon. She was fresh out of law school

when she came to us. She has a very good reputation among the lawyers here. She also has won the majority of her cases. I think she is fine trial lawyer. I think she is coming along very nicely. She handles felony cases for us. She does a good motion practice and I think she does a good job of representing her clients. Erik Eklund is a lawyer that I believe had his educational background at Portland State. He worked for a brief period of time down in Medford for Bert Putney. His family is in Portland and he wanted to be closer to home. Bert highly recommended him and I don't regret for a moment having hired him. He is also a fine and very effective trial lawyer. As part of the training and supervision I will talk with – especially when my newer lawyers have a case in court - I will go and talk to the judge, getting advice as to what they think could be improved and how they think they did. Interestingly, in the course of my last discussion with the judge who heard Mr. Eklund's most recent case, I had occasion to ask her how long she thought he had been practicing law. She said, "I'm pretty sure he must have been trying cases for a few years." I had the pleasure of telling her that Mr. Eklund tried his first case in this courthouse in front of Judge Norblad in, I think, April of 2008. He has progressed to the point that she thought he was a much more experienced lawyer. I think that speaks volumes about his abilities personally and also about the training and supervision that has been provided by our office. My most recent hire is a fellow who worked at Lane County for a period of time, Bob Nagler. Bob has only been with us about four months or so. He is still in his probationary period and he is making progress. He is a work in progress and I'm not certain how that is going to come out. Then there is me. I have been taking cases – I think the first person in the office was assigned to me. I might have done that for historical reasons as well as the nature of the case. I still carry a caseload. When we started the office I did an evaluation of the types of cases that come in and assessed it to be a fairly large volume of low level cases, misdemeanors and low level felonies. That turned out to be inaccurate I think possibly because the nature of the filings changed at about that time. We ended up with a lot more serious cases than we previously had. I have a caseload now that is almost exclusively Measure 11 cases or cases of a similar severity.

17:33 Chair Ellis

You indicated that your office is taking about 30 percent.

17:37 T. Sermak

Based on the figures that Ingrid provided, yes.

17:42 Chair Ellis

How does that work out? Is it whoever happens to be there on a particular day? How do the cases get assigned between your office and MCAD?

17:55 T. Sermak

Well, I don't know if the history reflects this or not but the practice has been MCAD was sort of delegated the responsibility to decide how the cases would be divided and who would get them. They do that by assigning an attorney of the day to take cases in courtroom A out at the annex. They usually have a felony attorney, a misdemeanor attorney, and a Spanish speaking attorney. Those lawyers are there personally to take the cases. The easiest way to integrate into that system was for us to simply take a day. We presently take every Tuesday and the second and fourth Wednesdays of each month. We take all the cases, felonies, misdemeanors, and Spanish speaking cases. If there are Measure 11s on the docket we take the Measure 11s. If there are nothing but misdemeanors, we get nothing but misdemeanors. On the second and fourth Wednesdays, to even out the caseload and balance it between my contract and MCAD's contract, we only take misdemeanors. When they get to us I will be there usually. Sometimes I have to have someone replace me, but usually I am there to take the cases. The court system likes to have a name to put on the file, so I will assign it to a lawyer there in the courtroom. There is a rather complex system for assigning days. There are usually four or five different dates depending on what kind of case it is. Up until recently I was in the habit of simply picking a day that was compatible with the court's calendar, ignoring the calendar of the individual attorney, and then simply assigning that case with that court appearance date to that lawyer. Again, no lawyer who was unqualified to take the case would get a case - in other words an A level felony would go to the lawyer who had the experience and qualifications to handle that case.

20:12 Chair Ellis

I am sure you have seen the draft report and we all went to the sentence that I want to get your reaction to. Page 7 – it says, “While the substantive legal work of the office is said to be good, there have been on-going issues related to the deployment of the office’s attorneys, timely appearances at court hearings, office management, and adequate training of new attorneys.” We are not here to cross-examination because this is not a review of that kind, but I would like to get your comment on that.

20:55 T. Sermak

First of all let me say that I recognize that the issue of the problem of getting lawyers to the office and scheduling is a serious one. I will confess at the outset that I did not give it the attention that it desired in the beginning. I did not ignore it but I did not approach it from the proper perspective. As I began to indicate Marion County has a relatively elaborate or complex system of court appearances. We have cases down at the courthouse and we have cases out at the annex. I would say roughly 70 percent of the cases are out at the annex. Once that case is moved downtown it will fit into one of approximately 10 different individual dockets. All of them have their own scheduling for status conferences, pretrial conferences, and any motion hearings that might happen. That creates some confusion. There is a possibility of conflicting court appearances between what is out at the annex and what is down at the courthouse. In addition, my office practice of assigning cases without adequately taking into account the lawyer’s calendar at arraignments has exacerbated that situation. As it became apparent that we had those problems, I attempted to address those as individual difficulties for the lawyers. In other words, the solution is to help the lawyer, facilitate the lawyer managing his own calendar. I think that was incorrect. I met with Judge Rhoades and she pointed out that there were some systemic problems that could be addressed, and in fact we started addressing those. Without going any farther into the complications I would like to indicate to the Commission some of the changes that we have made. These are changes that have taken place in the last two months or so. We feel the effects of some of them and others are still coming on. Let me again parenthetically say that not only did I talk to Judge Rhoades and get good advice from her but my board meets once a month. They became aware of this problem and they also have given me some regular guidance and forced me in the right direction with a lot of this. One board member in particular - Theresa Cox, she is executive director of a very large non-profit - gave me some very good advice about how to address these issues. I have now assigned my office manager to be directly responsible for the calendaring of events. Each day, the only calendars that are available to us electronically are the ones that are out at the annex. Each day near the end of the day I have a staff person tasked with going through that calendar, the court calendar, and she looks for the names of our lawyers. If she finds a name that is on the attorney’s individual calendar - they are all electronically gathered together in a single database - she notifies that attorney by email that he has that appearance the following morning. My attorneys are all directed to check the annex docket themselves, but we don’t rely on that. The failsafe is the clerk that makes those inquiries. When an attorney schedules a court appearance, or a staff person schedules a court appearance, they are required to enter that into our database, our central database, as soon as possible. A lot of times the lawyer doesn’t get back from court until later in the day, but we make that requirement. Near the end of every day the office manager will look at every attorney’s calendar and see which cases they made appearances on that day. She will then check our database to see if a future court date was set. If there is no future court date set then she goes to OJIN and checks to see, on that particular case, if it was closed because it was resolved by sentencing, or if they scheduled a new date. If there is a new date she enters that into our database and notifies the attorney. If neither OJIN nor our database gives her a new court date, or explains why the case does not have a new court date she contacts the lawyer. If there is a pattern of not making the necessary entries into the database then I am advised of that and I speak with the lawyer about that problem. This is a failsafe that we have in place. Our practice of assigning cases out of arraignment created the difficulty. We tried to match the system that was used by MCAD which is one day, for each attorney, for each type of case. That proved unworkable and was identified to be part of the problem. We have changed the way we assign cases out at the annex now. We have a form that has been provided to each attorney. They are required to fill that form out and give it to us by noon on Monday so we

then can fax it out to the annex. Each lawyer picks his own date. I think that is going to be key to addressing this problem. That is in effect now and I think we have seen in the last few weeks, at least I think we should see that improving the conflicts very soon, because 70 percent of the court appearances are out at the annex and probably the majority of them are not really substantive -you get a new date, or enter a plea, or accept discovery. We are instituting an attorney of the day program. Each one of my lawyers is assigned one day a week. They will represent the office and they will represent the client in the case, whether it is their client or not, as long as it is not a substantive court appearance. If it is a change or plea, or in some other way advances the case for a client in a substantive way than the main lawyer will appear. We do that to preserve vertical representation. My own sense is that vertical representation requires, or benefits, from having the assigned attorney there all the time. That is not workable in a jurisdiction such as ours where we have the two courthouses so far apart. I think that is going to make a major change. In addition to that we have instituted a sort of technical solution to the problem as well. The board and I have discussed this, and I will be buying smart phones for each of our lawyers. That will enable them to access their calendars electronically and it will enable them to send and receive emails directly to their phones. We are going to be using I-Phones because we have an Apple based system in the office and I-Phones are much more compatible with them. We anticipate that that will improve communication. The biggest problem that we had - missed appearances and things like that - were lawyers who were double booked down at the courthouse and out at the annex. We are addressing that issue. I was not firm enough in establishing the office protocols. We now have a zero tolerance policy with failures to make your court appearances.

29:29 Chair Ellis

There is an irony because when we had our hearings in '05 probably the most audible criticism we heard of MCAD was missed appearances, failure to communicate, hard to access, so there is a history here.

29:55 T. Sermak

I understand that, and I am aware of that, and I attribute that partly to the complexity of the system. The fact that we have multiple lawyers in a single entity simply exacerbates the problem. It doesn't make it insurmountable. It could have been addressed earlier; it should have been addressed earlier. I think the measures we are taking are appropriate. As you know, the PLF has managerial advisory personnel, Dee Crocker being one of those. We tried to get her to come down before the holidays but were unable to get her until fairly recently.

30:38 Chair Ellis

You have to wait until the ice melts until she can get here.

30:38 T. Sermak

Talking with Dee yesterday, she travels around so much that a trip down to Salem is like a bus ride for her. We explained to her the system that we were dealing with and we explained to her either the methods we had in place or were going to put in place. She thought we were on the right track. She thought this would work for us. She did suggest that we include in our Smart phone package and protocol the ability of the lawyers to access the office immediately. If they go to court they can immediately email the office and have the newest event entered into the system. I don't want them to have the ability to do that remotely because it makes the calendaring system too vulnerable to difficulties and collapse. We will have that in place. I had my technical advisor come in and while he was there we figured out a way to make that work. He also suggested that we take a look at this in 30 to 60 days. She has agreed to come down and help us review just to make sure that it is meeting our needs and helping us address our problems.

31:58 Chair Ellis

Your office has only been operating a relatively short period of time. You probably haven't had much experience with conflict problems yet. Because you are a single unit you have more to worry about on conflicts than a consortium would. My question is are you anticipating that? Are you building in a conflict checking system that will avoid one of the big system costs that we have observed, which is lawyers getting started on a case and then a month two into after having spent time it turns out a key witness is a former client and they

have to withdraw and that time is lost. Can you address conflicts and what you are doing there?

32:58 T. Sermak

When we started the office back in April of '07 we researched, the best we could, the various databases that were designed to deal with public defender offices. The main issue in public defender offices is a way to capture information necessary to avoid conflicts. We found a system, actually the one they are using in Lane County, which coincidentally I had been involved with during its development so I was familiar with it. We found that that best met our needs. From the day that we opened our office we entered conflict information into that database. Our procedure when we open cases is to get the docket off of the internet the night before. A staff person goes through and runs the name of each defendant against our conflict database. As small as our conflict base is at this point we still catch a significant number of cases where that person is entered into our system some way or another. They will then make a note on that docket and present it to me. I will look at it and assess whether or not that particular association creates a conflict. If necessary, I will go on OJIN and see how that case was resolved.

34:31 Chair Ellis

What is the Marion DA's policy on discovery? Are you able to get reasonably good, early access?

34:37 T. Sermak

That actually is a problem. Interestingly enough we have no problem getting discovery on misdemeanor cases. Usually when the person is arraigned on the information they hand us a packet of discovery. Sometimes it is not meaningful discovery. It is just a probable cause statement or something like that, but there usually is something. The district attorney's practice with felonies is to not present the discovery at the time that the person is arraigned on the information. That means the earliest we get discovery, by their practice, is at the indictment. If the person is in custody that is not less than one week. If the person is out of custody it is 30 days later. I might have a client out of custody on my caseload for 30 days before I have the police reports.

35:43 Chair Ellis

Has that lead to conflicts that you then had to withdraw?

35:47 T. Sermak

I think that that is going to be more of a problem when we get a larger caseload. We do, of course, check for conflicts as soon as we get the discovery. All of those things are entered into the database as well. We catch those usually at that time and then we send those out of the office to MCAD. I guess that would cause some delay. It is a fact if we don't get the discovery for 30 days we won't know if we have a conflict.

36:17 Chair Ellis

But it hasn't happened yet?

36:21 T. Sermak

It has happened but it has not become a problem. It is not an epidemic problem at this point.

36:30 Chair Ellis

I am glad to see your present and former chair our here. You guys feel free to chime in but I am interested in how the board is functioning and how they perceive you and you perceive them as you go forward.

36:50 T. Sermak

I love these guys. When I took this job I was interviewed by the board. Both of these gentlemen happened to be on it. There have been some changes since them. I told them, perhaps precipitously, that I thought a key to a successful public defender's office was to have a strong and active board of directors. I now have a strong and active board of directors. We meet monthly. I am held to task for the monthly budget. There were some glitches in the way cases were assigned - the value of the cases that we were getting at different times. We ended up with somewhat of an arrearage in the cases that we had. We were not taking in enough cases to justify the amount of money we were being paid. Of course OPDS was aware of that and still is. My board required me then to give them a monthly accounting of how many cases were coming in, where we were on it, what efforts I was taking to make sure that that

was done correctly. When issues within the office are raised, anything of any significance, I bring it to the board and get some very good advice. They are not shy about telling me when I am doing something wrong. They were not shy about telling me that I needed to take more aggressive steps to deal with this scheduling problem, for example. It is not always a comfortable experience to be the executive director with this board of directors, but it has always been supportive and a valuable tool for me.

- 38:42 Chair Ellis John or Bill, do you want to chime in? I am interested.
- 38:47 B. Copenhaver I have been on the board almost since its inception. Judge De Muniz, whom I have known for many years, asked that I participate. I am one of the lay members. I am not a lawyer. My observations of Tom, and of the board's working, have been generally very positive. Tom is correct when he says that there have been many very direct conversations. I think this issue of being late, as an example, to court's hearings is totally unacceptable from the board's perspective. John and I have met with Judge Rhoades personally, communicated with the judges directly, and certainly we are motivated to ensure that the delivery system to the defendants is done as well as possible and the relationship with the DAs and the judges is professional.
- 40:01 Chair Ellis How large is the board?
- 40:08 B. Copenhaver Seven members.
- 40:10 Chair Ellis You don't have to give me everyone but what is the mix?
- 40:15 B. Copenhaver We have two non-lawyers and five lawyers, one retired lawyer, excuse me. My own personal feeling about Tom is I think he has been a real good listener in this process. He is one of the least defensive people I know. I think he takes it in and he will disagree or agree, but then he will work on the issues. That is a very positive trait. We have a very active board.
- 40:58 Chair Ellis Do you feel the finances – what I am interested in is the quality of the accounting and whether you feel – there is public money here.
- 41:13 B. Copenhaver I think we are good stewards of that public money. I think there are a number of us, myself included, that have a real financial bent to them. I am confident that the internal, financial controls they have in the office are robust. I believe Tom is equally concerned with and involved in the financial aspects of his office. They have got outside CPA assistance now. We get a monthly report. We ask for anomalies to be discussed. I think, as a group, I feel pretty comfortable that we are good stewards.
- 42:06 Chair Ellis You mentioned that your hiring, with the one exception that you identified, has been out of county. I am interested whether that is your choice? Is there some issue with recruiting in county? How has it worked out that way?
- 42:28 T. Sermak It was not my choice. As a matter of fact I think one of the first things I did when Mr. Gorham was the executive director was to notify him that I intended to send a mailing to the criminal defense lawyers in Marion County. Most of them were already associated with MCAD. I did that and invited anyone who was interested to apply with my office. I don't think I got any responses to that letter at all. I advertised statewide and I would seek out lawyers in Marion County and just chat with them about the possibility of them coming here. As a matter of fact, it was a chance conversation like that with Daniel Carroll that opened the negotiations that got him to my office. It has not been my intent to take lawyers outside of Marion County. There has just not been much enthusiasm for joining our organization among the lawyers in Marion County.
- 43:30 Chair Ellis How would you describe your relationship with MCAD?

- 43:32 T. Sermak I think that when I took the appointment, accepted the position that was offered to me by the board of directors, the first phone call I made was to Steve Gorham. Despite the fact that he was on the verge of a big trial, I think we talked for an hour on the telephone discussing how we could work together and what we could do. Steve and I enjoyed, I think, a good, strong working relationship from the very beginning. When Steve left MCAD there was a period, when they didn't have an administrator in place, when there was some difficulty as to who to contact and how to talk with them. Once Judge Lipscomb became the executive director, he and I met probably within a day or two of that happening. As a matter of fact we met before then and he told me that he thought that that would happen. He and I have enjoyed a close working relationship since then. I think Judge Lipscomb would agree with that. We are jointly addressing certain problems. There are certain practices in Marion County that are somewhat ingrained that need to be changed. Paul and I are working together to address those issues. We are trying to do it in a fashion that is cooperative and not terribly intrusive with the other players in the system. Most notably there is going to need to be a change, I think, in the way clients are arraigned in Marion County. It requires changes in practices for the jail, the court, the transport deputies, and the district attorney's office. Paul and I went jointly to Judge Rhoades and presented the problem to her. She saw the problem immediately and agreed to work with us on it. We are in the process of bringing those changes about. I think that is a fairly good representation of the level of cooperation Paul and I enjoy.
- 45:44 Chair Ellis How have you felt about the broader system? In other words, your relationship with the DA, the sheriff, victims' advocates, the judges, the broader criminal justice community?
- 46:01 T. Sermak I think it is good. I periodically will check in formally with district attorneys, the ones who go to court against our lawyers, and I talk with them about that. I don't hear very many problems. Of course anytime you are in an adversarial relationship there is going to be a certain chaffing between the parties. I don't think there is anything extraordinary about that. Anecdotally I have heard that the district attorneys have talked amongst themselves about the fact that our office has caused them to raise their game. They know when they go into trial against somebody from the public defender's office they are going against someone who has the collective experience of the office. I take that to be a high compliment to us. I have a good working relationship with Walter Beglau too. He is not as easy to reach as Paul is. He is a very, very busy guy. With the transport deputies and the sheriff's department I think we have a good working relationship. I have not heard of any problems. I do check with them occasionally too to make sure that neither I nor my lawyers are causing their job to be any harder. The victims' assistance people in criminal cases work out of the district attorney's office. We don't really have very much contact with them. It is not like the juvenile system. We don't do any juvenile law in my office. I think that we get along well with them. Parole and probation we have contacts with. I know of no difficulties there at all.
- 47:42 Chair Ellis You mentioned that you are taking Spanish speaking cases. Do you have Spanish speaking lawyers? Do you work with translators? How does that work?
- 47:55 T. Sermak One of my main ambitions was to get a lawyer who was at least conversant, if not fluent, in Spanish. Mr. Nagler is conversant in Spanish. We hired him largely because he has that ability. A significant portion of our caseload is Spanish speaking. We have a bilingual receptionist. My office manager is bilingual. My legal assistant has taken classes to improve her Spanish. I encourage our lawyers to learn Spanish. I try to do that myself, but we only have the one lawyer, Mr. Nagler, who is the most proficient in Spanish at this time. We do work with an interpreter. We have a bank of interpreters that we can call. A number of them fortunately are available on short notice. We will occasionally use non-court certified interpreters for office appointments and to read police reports to non-English speaking defendants. That system seems to work out pretty well.
- 49:17 C. Lazenby What about Russian. Are you getting a significant number of Russian defendants?

49:19 T. Sermak We certainly get more than in other jurisdictions. Not as many as you might think. We don't have anybody on staff who speaks Russian. Laura Coffin has studied Russian but is not fluent. I usually give the Russian speaking clients to her if their cases are ones that she is qualified to deal with. We do have Russian interpreters who are available to us. That actually is a problem. Believe it or not the other problem we have here is Marshallese defendants. There is a significant Marshallese population and Marshallese interpreters are very hard to come by. We often will have to do those by telephone. There is one Marshallese speaking interpreter and we have established a relationship with him as well. It is a problem. I don't have enough, a big enough staff to be fluent in all languages that we would need.

50:30 Chair Ellis Your lawyer level is eight at this point and it has been for a year plus.

50:39 T. Sermak We have seven lawyers counting myself.

50:48 Chair Ellis Do you feel that it is at a level that is large enough to get the benefits of full-time defender office?

51:01 T. Sermak Frankly, no. I think that an office that is probably three to four lawyers larger would do that. That would enable us to be able to address some of the other issues of specialty courts and things like that. These are handled by MCAD now but those could be centralized. There are other elements of a public defender's office in terms of community liaison and things like that. I do as much as that as I can. Right now I am on the Marion County Public Safety Coordinating Committee. In this jurisdiction it is very active, or at least my impression is that compared to others it is very active. Through that organization we are currently engaged in a sort of outreach program to the smaller communities in Marion County. There is a lot more along those lines that can be done. A public defender's office that is a little bit larger I think would be able to absorb that. I think we would be able to be more efficient if we were to get a little larger. At this point I intend to hire one more lawyer in our office just to help us deal with the volume of cases that we have now. Because we had the shortage of cases there really wasn't justification for having more lawyers. There are staffing issues that we need to address. Those will create budgeting issues that I will need to address. We have the funds and the funding and the ability to restructure around increasing our staff, both attorney and non-attorney staff, to become a more efficient office.

52:58 Chair Ellis How do you handle the investigative function?

53:00 T. Sermak We have a full-time investigator. He is able to, at this point, deal with the volume of cases that we have or at least he assures me of that. The lawyers, I think, are satisfied with the volume of that. We all recognize that there needs to be an increase. We are going to be increasing our staff. The way we are going to do that is to create a sort of hybrid position that is about 40 percent investigator and 60 percent legal assistant position to address that issue. Internally we have forms that communicate the wish to make an investigation request. I required certain information be provided to the investigator with regard to further court dates, copies of the police report, or anything else that is necessary. I think that works pretty well. When it is used, and used properly, then the investigator has all that he needs to efficiently investigate the cases. At this point the investigator we have is doing a really fine job for us. We have had at least one and maybe two cases in the office where it has been advisable to use outside investigators. Specifically I had a client who had very serious charges in Marion County. He had previously faced similar charges with virtually the same victims in Benton County. I petitioned OPDS for permission to retain him as an outside investigator much as a MCAD lawyer would. That way my investigator would not have to duplicate his efforts. We have that resource available to us. We don't have to use it very often.

54:54 Chair Ellis You have background being in Lane County. You were in the Oregon system for quite awhile before you took this job. Are you able to get the benefit of the experience of the Bert Putneys,

and the Jim Hennings, and the others around the state? Have you had a site visit yet? I know you have been on the other side of those.

- 55:22 T. Sermak We have not yet had a site visit yet. Interestingly, Bert is a fellow who not only do I know him and respect him in many ways, he had already been involved in the formation of the Marion County Public Defender's Office before I was hired. He was sort of a consultant or advisor to the board. Bert and I talked when I first started the office. I went down and visited his operation. I was one of the people who had done an assessment of his office at some point or another. Oh no, I'm sorry, that is not true. I visited it on a couple of earlier occasions because we were interested in looking at his computer system when I was in Lane County. So I was familiar with his operation down there. When I took the job I went down and visited with him and toured his office. Bert was an advisor to me when I had questions in the beginning. As the burden of running the office and representing cases grew I sort of fell out of the habit of talking with Bert. In the course of this process, getting ready for this hearing and seeing and learning the difficulties that were perceived within our office, I actually contacted Bert, as recently as last night, and he has agreed to come up to our office and act in a consultant capacity. I would tend to have him go through it and help me see where things could be improved or changed. Frankly, he has started two offices himself. I don't think there is a person more familiar with indigent defense in Oregon and running a public defender office than Bert. I look forward to his input.
- 57:26 Chair Ellis One other area I wanted to ask about is how is it going with OPDS staff? Is there anything we can do to make your job easier other than more money, which is not the topic on the table today?
- 57:40 T. Sermak They are a phone call or a short drive away for me. Shelley Winn is our contract analyst. I talk to her on a fairly regular basis. I don't have any problems with that. She worked with us when we had the shortage and we had not caught up. She was aware of that and we discussed it. She became alarmed at one point because she thought we were a lot farther behind than we were. It turned out to be a data entry difficulty which we cleared up on the telephone much to my relief. Things are on track with that. Kathryn Aylward advises me. I don't perceive any problem from my side with my relationship with OPDS. Hopefully they don't either.
- 58:40 Chair Ellis Other topics?
- 58:43 J. Potter Tom, I am interested a little bit on the compensation that you provide your lawyers. Specifically in relation to what the DAs provide. Where do you stand?
- 58:55 T. Sermak One of the first things that I did when I set the scale for pay in my office was I got Walt Beglau to provide me with his pay scale. The only one that we could even hope to match was the entry level position and I was able to do that. A lawyer starting in my office makes the same amount of money as the lawyer starting his office. They go up much more rapidly than we do. I don't know if it was this body I mentioned to or not but if I was employed with my level of experience at the district attorney's office, given their pay scale, I would make about \$20,000 more a year than I am making as executive director of the public defender for Marion County. My goal is to be able to compete with them on that level. The fact that we now help with the cost of educational bills brings us more up to par, but we are still far behind.
- 1:00:10 J. Potter Has that been a detriment in your recruiting efforts?
- 1:00:14 T. Sermak Yes. There is just no question about that. A lawyer can go into a private practice with a medium size firm and make more money than they are making with me. They probably have less stress too.
- 1:00:32 J. Potter Maybe this is related but you had mentioned that when you first came here you recruited locally and got no responses. What would happen today if let's say three more positions

became available and you were able to recruit. Do you think you would get the same kind of non-response?

- 1:00:50 T. Sermak I don't know. We had an advertisement out for a Spanish speaking attorney for some time. All of my other hires were done in February of 2008. I have not looked at it recently. I really can't answer that question.
- 1:01:15 J. Potter Maybe if I asked what were the factors, do you think, that caused you to get the response the first time and have those factors changed?
- 1:01:25 T. Sermak I think what we had was there were lawyers in Marion County, particularly MCAD lawyers, who were established, had a practice, had an income, and they saw this upstart organization and they had no idea whether it was going to go up or down. They were just stepping back to see what would happen. If I am right in that assessment then there would be more interest in coming to work for us.
- 1:01:59 Chair Ellis We had a visit out to eastern Oregon not too long ago. Some of the issues that were most challenging there were representation in cases arising out of the prisons. Do you take prison cases and can you tell me how that has gone.
- 1:02:15 T. Sermak I'm not sure what problem they have out in eastern Oregon with the prison population. We do take prison cases. We have inmate assault cases. We have inmate versus officer assault cases. They are problematic. Sometimes the people are moving around within the system and they are hard to reach. OSP is actually closer than the annex is so it is not hard to get out there. Getting in is a little bit difficult. They pose a special problem because the clients tend to be more difficult. Also any offense that is committed when you are in custody has to be a consecutive sentence and there are other restrictions on sentencing offers that they have. They are hard to negotiate and more often go to trial. My experience with them is they are much more difficult to please. It is almost like they want to go through a lawyer or two before they will actually get the case to trial. We will frequently pick up cases where they have fired another lawyer. When we get on the case it is a struggle to stay on. We have had to be removed because of attorney/client conflict. They pose a special problem. Not an overwhelming one and they are not big a portion of our caseload at this point.
- 1:03:54 S. McCrea I have a question, Tom. You said that you were carrying a caseload currently. Is that a full caseload?
- 1:03:57 T. Sermak No.
- 1:03:57 S. McCrea And how are you doing with it? If you hire more lawyers are you going to try and get rid of the caseload? It sounds like you have a lot on your plate as it is.
- 1:04:08 T. Sermak Yes. One of my goals is to, in fact, reduce the caseload. The difficulty is there are an awful lot of Measure 11 cases in Marion County. I don't whether there's an increase statewide but it seems higher now than it has been in previous years from my experience. The lawyers who are qualified to do Measure 11 cases are the more expensive lawyers. They also are the ones who tend to be more established in their own practices. It is difficult to do, but I do intend to hire another lawyer, redistribute the caseload, and stop taking Measure 11s. I would like to stop taking Measure 11s completely and deal with less demanding cases as part of my caseload. I do hope to keep taking cases so that I continue to be in court. Both because it is an administrative tool and it helps me to get a sense of what is going on. Does that answer your question?
- 1:05:10 S. McCrea Yes, yes it does. My other question is overall how are you feeling? Are you having a good time? Are you sorry you are here?

- 1:05:27 T. Sermak When I came here I thought this was going to be an extremely difficult and challenging job. I underestimated that. The level of budgetary concerns that I have and the personnel problems. I tried to do this right. We have an employee manual that was put together and was signed off on by the board of directors. That is a year old and we have tweaked it once already. Just the hiring and managing the office, writing and supervising the office procedures that we need to put into place, tweaking the calendar system to get it to meet our needs, closing cases became an area that required a good deal of attention because we want to close them electronically and getting a system in place that enables us to do that. That proved to be a nightmare. I thought that given the technology age that we are in right now, everybody would have that available and it would be no problem. Majorly wrong, but we are getting through it. I haven't had a vacation. I had five days in Mexico City about a year ago and that is the only vacation I have had in two years.
- 1:07:05 S. McCrea I think you need to talk to your board about that. They need to be thinking about your mental health.
- 1:07:15 J. Hemann Chair Ellis, I have got to say some things in Tom's defense. This has not been an easy couple of months for Tom. He deserves better praise than that. I want to thank all the members of the Commission, by the way, for their confidence in creating this office and I really want to thank Ingrid and Kathryn for all the support they have given the board. I also have an arm that is still recovering from being twisted. The Chief Justice can be fairly persuasive and Peter Ozanne took me to coffee. I felt like I was at the inception of all of this. We talked about who would be great members and that is how we came up with our banker friend, Mr. Copenhagen. He tells you the financial side of the operation has a steady hand watching, that is the steady hand. Tom is doing a good job.
- 1:08:14 Chair Ellis It use to be when we heard a banker was on the board that was good news.
- 1:08:19 J. Hemann It still is in this case though I don't take investment advice from him. Some of you may know this and some of you may not. I was involved in management at my firm of 20 plus lawyers. The thought of creating a law firm, which is what has happened here in 18 months, going from no place to hang your hat to creating an office, staffing it, getting it filled with the equipment you need, figuring out how you are going to hire people and to have seven lawyers on board now and a support staff in 18 months, in my estimation I am dumbfounded that we haven't had more problems than we really have. I remember the difficulties in trying to make good hires and the regret you had in bad hires. Not everything has gone perfectly but Tom has busted his back. He had been living in Eugene until the end of August, commuting, and I don't feel good about the fact that the guy hasn't had a vacation. He needs it. We have been hard on him. I am the one that doesn't drip sensitivity. I am the one that is a little on the harsh side of calling things as they will be. I will take ownership of that. He has responded extremely well and I think it is in good hands. I think you are going to see a lot better product next year and the year after that. This glitch we have about scheduling I believe is a problem that we can overcome. Bert Putney is a genius at administration and I know Ingrid mentioned that you had also endorsed Bert as a possible resource for us. Bert and brother Hennings, who was a classmate of mine in law school, were instrumental in getting us set up.
- 1:10:10 Chair Ellis I didn't think you were that old.
- 1:10:13 J. Hemann Hennings looks significantly younger than I because I don't think he has had the worries I have had. Jim and I were classmates together. Those guys were just fantastic. The thing that I found encouraging was your comment at the offset about the level of all boats rising on a tide of improvement.
- 1:10:38 Chair Ellis That is clearly my impression.

- 1:10:38 J. Hemann I think that is probably right. I think Paul's good work is evident in all that too. We are very pleased. We are not thrilled with the lack of prompt arrival at the appointed court times, but that problem is going to be taken care of.
- 1:11:05 Chair Ellis Any other comments or questions? Thanks a lot. Why don't we take about a five minute break.
- 1:15:12 Chair Ellis If the folks from MCAD could come forward. If we could come to order. We have our guests from MCAD. If you guys would like to identify yourselves for the record.
- 1:16:02 P. Lipscomb I'm Paul Lipscomb. I am the executive director of MCAD. With me today at the table are two of our board members. Mike Weiss who is a professor at Willamette. He is one of our public board members. Three of our nine members are public members. Olcott Thompson is here. He is on board of directors. He is also our treasurer. We have two other board members here - Susan Taylor. She is one of our regular board members and a working member of MCAD. Lindsey Partridge is also here. He is an outside board member at this point. He is a member of the juvenile consortium, but he is not a contract member of MCAD at this time. He is very valuable on our board because we get to find out how they are handling some of the problems over there. I think that is in terms of board members. We have got some other members here if you want me to introduce them. I think you know those people. I want to begin with sort of an apology. I had hoped to have the written materials into your office in time so that they could be distributed with the regular packet of information that I expect that you folks get in advance of these meetings. I was able to get it into the office no earlier than yesterday. I know that you have them with you but that you haven't had the benefit of probably reading it in advance.
- 1:18:05 Chair Ellis Don't apologize. I was late today too. If you want to kind of give us a summary of how things are going.
- 1:18:18 P. Lipscomb I don't know how to address that without noting that historically it has been a tough year. It has been a year of abrupt and significant changes in MCAD in terms of the overall management of the organization. I think we went through a dangerous time when that happened because things could have come apart. I think is a real credit to the board members, and to the membership, that people gathered again immediately together after the changes were pushed through the board of directors. The board hired in March several of its members to take over the functions that had previously been performed by the executive director, Steve Gorham and the office staff. They did a credible job of keeping things afloat while they recruited a new executive director. As it happened, I was in a position where I could offer my services and was asked to step in. I took over management of the organization on July 1 and I had one part-time office staff at that point, Leslie Summers, who had been working there for three months, four hours a day. Together we learned the organization and began working with the board on a change in direction as strongly suggested by your body in the past. We began the process of setting a goal of excellence for MCAD and pursuing excellence as we went forward. The board has been wonderful to work with in terms of embracing that standard and spreading the message to the membership. The membership are colleagues, and long-term colleagues, of six of our board members and that was of great assistance. The organizational structure was such that we met as a group once a month for an hour long meeting over lunch. We passed out the checks for that two week period at that time. It is also the time where we distribute daily calendar assignments. That also promotes attendance as well. I think the communications were pretty effective in terms of carrying the message to the membership. The membership was very motivated toward improving the situation because frankly you folks are frightening to the membership of MCAD. Bringing the public defender's office to Marion County was a real shock to the organization that I now represent. They lost 25 percent of their market share. That was a real financial pinch. Candidly it is a financial pinch that continues with our membership. We have lost some members so things are beginning to improve financially for the lawyers that do the bulk of our work. You got

their attention so they were an easy sell in terms of terms of embracing a new standard of excellence. I pitched that to them that it was the only way that we were going to stem the tide that had risen over the past couple of years. I really view my job and my challenge on their behalf, first to provide excellence in representation and everything else that we do as an organization but secondly, and also importantly, to stem the loss of market share to the public defender's office. That is a principle goal of mine. I probably should stop talking. It is a long winded answer to a very simple question.

1:23:34 Chair Ellis

How many members are there?

1:23:38 P. Lipscomb

We have 52 members under contract. Of that number approximately 40 do the daily business of representing clients on routine misdemeanors, felonies, and Measure 11 cases. The others either do specialty courts or murder cases. On the aggravated murder cases which we do not have a contract for currently in MCAD, but there are people with strong, historical ties to the organization and they want to remain members of MCAD. The practice has been to allow them to do that as long as they sign a contract.

1:24:35 Chair Ellis

I know one of the major changes that has happened, I think within just the last year, is a shift from an hourly compensation structure to a unit compensation structure. I would be very interested in how you perceive that and how that is going.

1:24:54 P. Lipscomb

In my report what I said was it would be hard to over emphasize the significance of that in terms of the change in practice for our members. That was a difficult transition for many. It was a culture shift as well as a financial shift. It was not enthusiastically embraced by all of members. It was by some but there were others who continue to think to this day that the old system, the hourly based system, is a better, fairer way to compensate lawyers. Organizationally it is much easier for me to run a system based on a contract rather than an hourly basis. Cases are what they are from day one so organizationally it works better. With the change there had to be a change in the billing practices to reflect that. The first instrument that was utilized by the board for the first half of last calendar year, for the first six month of 2008, was a spreadsheet system that I think pretty much universally people came to recognize was not user friendly for the lawyers who attempted to use it. It was clumsy and difficult for the office staff as well. It was very labor intensive on both ends. The lawyers had to spend a lot of time inputing data and the staff had to spend a lot of time extracting data so that we could verify the information provided and then get checks out. This all occurred before my time. Also before my time the board decided, I think, and Olcott can correct me if I am wrong, it was in March or April that the board made a commitment to switch to a database program, Quickbase. As Quickbase gradually took over the billing from the old spreadsheet system it improved month by month in terms of the ease of effort for the lawyers entering data, and the ease of effort for office staff in extracting data out and verifying the information and writing checks. That was a struggle for the membership, though. People are very sensitive to issues that affect the timeliness of their pay and the accuracy of their pay.

1:28:12 Chair Ellis

But, at least from my perspective, it was one of those things that marked the shift in, I think, positive direction of MCAD from some perceived it five years ago as kind of a privately managed appointment system to now much more of a consortium provider. I encourage it. I think those changes have been good.

1:28:45 P. Lipscomb

I think the timing was such that it would look like that from the outside. I think actually what was happening was a gradual, culture change. Olcott has got the whole history on that and could answer better than I. What I saw initially as an outsider and then eventually as someone closely connected with the process, is that you were taking an organization that had strong, historical roots as basically a pass through organization in terms of funds, very loosely structured because that is what the members initially wanted. They didn't want a lot of top down management. Gradually over time, and based on outside threats that you folks provided, I think there was a cultural shift and the members recognized that if we were going

to compete successfully that there needed to be stronger leadership from the organization. I think that was one reason I was chosen to come in as executive director to make those changes happen.

1:29:54 Chair Ellis How does it work today in terms of entry to membership, and if you have issues with particular members how you deal with those?

1:30:08 P. Lipscomb Let me first address entry to membership. Membership is closed now. We lost 25 percent of our market share. We don't have enough business to go around for the lawyers who are already in our organization. I have had three lawyers approach me since July expressing an interest in joining MCAD. I strongly recommended against it to the board because we can't continue to thin the soup. We are going to lose the best people that we have within the organization already. Secondly, under the structure, that precedes my time, when there are quality concerns about the performance of lawyers, those are addressed through the work groups that were established after 2005. Those are groups that are led by one of the more experienced lawyers. They meet on a frequent basis. They discuss cases, they discuss performance issues when there are performance issues that have been referred to the group for group peer processing. After I came on board, I told the board that when there was a problem that was identified and brought to my attention, I wanted to meet with the individual first before referring the matter to the group. I think that has been really successful, at least for me, and for the half dozen or so members that I have been called upon to contact and then meet with and follow up. We currently have four members who are either on, or who are developing and about to go on, professional improvement plans that I am working with them in designing and they are being implemented and processed through the work group. I think it is a system that is making a difference and continues to work well. I have also addressed general performance problems with our members through our email system, the MCAD pond, which is a list of our group. I can send out a message by email and it is received immediately by our entire membership addressing systemic problems or reminding people of things as simple as being proactive about calling the court when cases go off. Then the court staff knows what they are facing in terms of the trial calendar that is coming at them. Just sensitivity to problems of the other people in the system and awareness of that.

1:33:25 Chair Ellis Your background is kind of unique to play the role you are playing now. You have seen it from the other side.

1:33:34 P. Lipscomb It seems like an odd fit but I have found that it has been a really good fit for the system. I haven't asked the board that but I would suspect that they would agree. There have been some aspects of my old job that have been useful and helpful in this job. The experience that I have had with changing an organization, a renewed commitment to excellence, this isn't the first time that I have gone through that. We did that in Marion County Circuit Court as well and really set the goal of becoming the best circuit court system in the State of Oregon and met that goal within a few years thereafter. That is the same goal that this organization, MCAD, has set for itself. We want to become the best indigent defense provider in the State of Oregon.

1:34:38 Chair Ellis One of the issues that we struggled with, and I think that is a fair word, in Lane County was how do you design a system that allows younger lawyers to become criminal defense lawyers. The Commissioners on either side of me were very concerned about that. I am not starting with an answer because I don't have an answer. As you describe it I understand what you have said. The market share is reduced; you have members that are essentially full-time criminal defense lawyers, or a lot of them I assume.

1:35:26 P. Lipscomb Probably about half of our lawyers who are taking cases on a monthly basis.

1:35:33 Chair Ellis So you kind of, to use a loaded phrase, pull up the ladder.

- 1:35:47 P. Lipscomb I think we did and we had to.
- 1:35:47 Chair Ellis You cut off new admissions. Now the PD office is hiring some younger lawyers so there is an entry point there. Do you see a way that MCAD will have an entry point going forward, or is the PD office going to be the place that new lawyers can come into the system.
- 1:36:08 P. Lipscomb I was expecting that you were going to ask that question. If we continue to lose market share we can't. We simply cannot. The next contract go round, if we lose more market share, I can't see anyway we can open our doors again.
- 1:36:32 O. Thompson Closing the doors predates Paul being our executive director. The board did that more than a year and a half ago because we knew what was going on. Prior to that, two years ago, we knew that the PD office was coming on and we told people we allowed into the organization that we didn't know if there was going to be enough business. They accepted membership knowing that. If we lose market share we will not be able to let people in. I expect, based on the number of lawyers who are leaving for all kinds of reasons, we had one lawyer move to Lakeview because she had a job opportunity down there. We will continue to lose lawyers naturally. As the number of lawyers shrinks there will be more business. Even if the cases remain the same there will be fewer people to distribute them to and we will open it back up again. There is no question having gone through this with a number of new lawyers, it is difficult for a consortium to bring on and train a brand new lawyer. Having looked at it I think it does work better in a PD's office just because of the structure. I think probably there are about as many criminal defense lawyers doing public defense in Marion County as there were two years ago. It is just that seven of them now work for the PD office.
- 1:38:22 P. Lipscomb There is some good news here too and I don't want to skip over that. We have either six or eight lawyers now who are on probation, and have been for more than a year, and are about to come off probation this spring. These are lawyers who came in on a probationary status and began with misdemeanor cases. They are graduating from probation because they have proven themselves. They are doing well. I would expect that some of them will be seeking to have their qualifications raised so that they are able to do felony work. Through our mentoring system they have worked with lawyers that are doing felony work. The mentoring system is something that applies only to either new lawyers who are on probation or more established lawyers who are on voluntary, professional improvement plans. Through that system they are gradually getting experience and gradually growing professional to the point that they can handle felonies, then ultimately Ballot Measure 11 cases and murder and Jessica's Law cases and more serious cases.
- 1:39:54 Chair Ellis You heard Tom earlier, and I think I am accurately reflecting what we said three or four years ago, that we wanted the PD office to reach critical mass and then we would take a look at the PD office and MCAD and try to adjust caseloads as seemed best. The question I want to put to you and you can take your MCAD advocates hat off.
- 1:40:26 P. Lipscomb It is going to be the same answer either way. I know where you are going.
- 1:40:34 Chair Ellis How would you go about balancing that going forward? What criteria? How would you advise us?
- 1:40:41 P. Lipscomb I think if you asked the judges in this county you would get the same answer you are about to get from me. I don't think this is the time, in the next contract that is going to be negotiated this fall, to increase the market share of the public defender's office. MCAD is doing now what you wanted them to do. You put considerable effort in getting MCAD to change. They are now meeting your expectations. Going forward you are seeing exactly the response that you wanted to see. If you again cut their market share it will feel like punishment. On the other side of the coin, Tom is doing a good job growing a new organization, but you have heard something from others, and you won't hear it from me, about how they are continuing

to struggle a bit. There are many organizations that fail because they do it too fast in the business world as well as the social services world. I think that is a danger for the public defender office. If I were you I would first let them get more comfortable with the work load they already have and the organization that they now have in place. I would give them two more years at this level before I would consider making a change.

- 1:42:25 Chair Ellis Olcott, you have been with MCAD for a long time.
- 1:42:27 O. Thompson From the beginning.
- 1:42:27 Chair Ellis And you certainly were very visible, and audible, and present in '05 when we had our meeting. I would be very interested to know how you think things have gone.
- 1:42:43 O. Thompson One thing I told Peter when you folks decided to create a PD office in Marion County – at that time I was chair of the board if I remember right, if not, I was on the board - and my comment to Peter was that I'm going to show you that you didn't need to do it. I think we have shown some and I think there is still a lot of growth that we still need to do to show that MCAD, as an entity, can provide the quality of service that is expected. We have gotten much better, absolutely. There are still issues out there. There always will be. The criticism that we got in '05 we deserved, absolutely. Some of it will never go away. You heard problems with Tom and the appearances out at the annex and downtown approximately 20 minutes away at the same time. That issue will always remain in Marion County. You have individual judges, who have individual calendars, who have individual desires about how they are going to run their courtrooms. At times they will consciously put the attorneys in the middle of their fights with another judge. At the present time there is Judge Ochoa out at the annex. He is not – I'm not sure "happy" is the right word. He knows our problems and he is willing to deal with them as long as we keep him informed of what is going. We have gotten much better at that. There are still problems and I am not sure at this point how to solve those. Some people are just resistant to listening to their voice mail, but we are working on it and we will continue to work on it. As Paul said - the communication thing - we just have to keep communicating with the judges.
- 1:44:49 P. Lipscomb That is much improved in the last six months. I see a noticeable difference. In the beginning there were complaints on a regular basis from the court directed to me as the new executive director. They wanted to make sure that I was aware because the problem was a continuing one. I don't get those calls anymore. I really feel that our lawyers have really responded to the need for communications with the court. When I got a complaint from a court staff, a judicial assistant that she was having to call lawyers to see if their case was still going to trial that was something we were able to fix immediately with a message on the pond. I think lawyers just hadn't been aware how burdensome that is on court staff to actually have to do that. While the lawyer can make one phone call the court staff may have to make 20 to each different lawyer. I urged my membership to be giving them more information rather than less. When in doubt call the court even if there is nothing to report. You don't know from your client yet if they are going to take the plea or not because they are still making up their mind. Tell the court that. Even non-information can be important information to a calendar clerk who is trying to decide how to juggle too many cases.
- 1:46:34 Chair Ellis How do you feel communications and relations are going between you and the PD?
- 1:46:40 P. Lipscomb Tom and I have become friends. I didn't know him very well when I was presiding judge. We had a friendly relationship at that point but it was strictly professional. I think our friendship has grown since I came into this position and frankly share more of his professional concerns. We are able to talk more about common problems because they are not common problems. I like dealing with Tom.

- 1:47:13 Chair Ellis It is frankly a real tribute to all of you because we recognize we were injecting something that could have lead to a very tense confrontational, unfriendly relationship. I think both sides of it, from what I can tell, have done a really good job of getting the best of having a system that has an alternative in it as opposed to a monochromatic kind of system that we had before. I just want to commend you. From our perspective I think that it went remarkably well.
- 1:47:55 P. Lipscomb I think that goes all the way through both organizations. I have seen no friction at the level of the troops either. There are good relationships between the lawyers in both organizations. They help each other and share ideas. These are mostly new people who have come to town in the last year and a half and set up a criminal practice. The members of my organization have always treated them well I think. I don't know of any incidences where there has been any conflict at all.
- 1:48:34 Chair Ellis How about your relationship with OPDS staff? How has that gone?
- 1:48:45 P. Lipscomb You have great staff. I got great support from my board when I took over in July. I was green as grass about some of the things that needed to happen. I had no information at all about the relationship with the business office. Shelley Winn and Kathryn Aylward could not have been better people to work with. They were helpful. They came and visited me and my office manager, Leslie Summers, in our office. They have always been available by phone and email. They have been helpful in every way they possibly could. I have to tell you, having had some experience in negotiating for money, because we had some cases over our contract allotment. That is the way the system is set up. The current contract the PD office contracts for a certain number of cases and we get the balance. They weren't meeting their objective and we were over, but we were also over their number as well. There was a surplus over both contracts. Kathryn is a very tough negotiator. She wouldn't even discuss our extra cases over both contracts until we had first solved the problem of making sure that the PD office would make it numbers by the end of the year. Even after that she is challenging. She is a negotiator on the opposite side of the table. I would much rather have her on my side.
- 1:50:55 Chair Ellis Good. We appreciate that.
- 1:50:55 C. Lazenby I just had a small question. It seems from reading this that the way you discover performance problems is through these work groups which is more sort of a – I'll date myself – sort of a self credit system where they get together and compare notes about what is going on.
- 1:51:15 P. Lipscomb I would correct that. That is not the way we discover them that is the way we process them. Problems come to me two ways. My lawyers are all in court together all the time. They pick up on performance problems of other lawyers. It is more comfortable for them to bring that to my attention sometimes rather than the other lawyer's attention. Sometimes both happen.
- 1:51:41 O. Thompson We are all frequently out in the annex at groups. There is a fair amount of individual lawyers talking to individual lawyers about issues that never get any further than that.
- 1:51:56 P. Lipscomb The other thing is downstream from the judges. Because of my prior relationships with them it is nothing for them to pick up the phone or send me an email about a problem. Sometimes I get a CD disk and say, "You might want to review the performance of your lawyer on this disk."
- 1:52:15 Chair Ellis One of the things we hoped would happen, and I think it may have happened, I'm optimistic it happened, is MCAD members would realize they all had a stake in the performance success of their colleagues.
- 1:52:31 P. Lipscomb The message that I gave them early and often and some of them are here and they will recognize hearing this. Anything that any of us does affects all of us.

- 1:52:47 C. Lazenby Where I was going with this is that with either one of these modes, and I don't mean this in a negative way, it is a little bit like triage. We talked earlier about building a world class organization or building a quality organization, much as what you experienced with the courts. What are you doing besides the sort of momentary improvement that is being noticed that I have described as triage? You have set these higher standards for people to start being measured by. Is it too early to talk about that?
- 1:53:21 P. Lipscomb It is a little early. I have met twice with the judges as a group in the last six months. It is about time to do that again because I want to share with them what I am sharing with you. This annual report and the draft of our mission statement, business plan and vision plan. They haven't seen any of that. I think it time that they did. I also meet informally with the presiding judge, Judge Rhoades, and with the other judges. I have met with Judge Wilson, Judge Norblad, and Judge Ochoa. Judge Ochoa probably more than the other trial judges, but with Judge Rhoades more than any of the others. I have met with our trial court manager here and with our trial court administrator. I have met with court staff and said, "How are our lawyers doing?" That is an open question. We have to identify, I think, fairly early where problems continue to persist. The other thing that we have done with our work groups, and I am struggling to remember the wording of the document, but on the Oregon State Bar's website there is a very helpful outline of what the duties and responsibilities of a criminal defense lawyer should be. I was surprised to find that and I found it by accident. I wasn't sure that all of our lawyers were aware of that. I printed that off for myself and also sent the link out by email to all of our lawyers. I suggested to the leaders of our workgroup that they process this document through their workgroup. I thought it was extremely helpful. Rather than trying to reinvent the wheel I view that as the blueprint that our lawyers should be following in terms of raising their professional level of service to their clients, to the level of true excellence, which is where I think they need to go.
- 1:55:58 M. Weiss Partly in response to your question, but also more broadly perhaps, I am on the board because of your changes and interventions in 2005. I teach at Willamette Law School and I serve as the Dean's designated member on the board. I came in when MCAD was responding to that and was in the process of implementing these workgroups and also considering all kinds of other things that they needed to do to be more effective. I am not a criminal lawyer; I am an outsider. I do have the pleasure of knowing a number who are members of the consortium because they went to Willamette Law School. One of the things I have been impressed with is the way that everybody has taken our charge seriously. Commitment to quality is something that people see as being both a good idea, but also something that is important to them to work together and do even when there are big disagreements about how to get to that end. I have been impressed with the commitment that the membership and the board have shown toward trying to achieve that. I think that setting up these structures and seriously implementing new ways have brought great progress.
- 1:58:00 Chair Ellis We feel it. This isn't unexpected. I think we all felt there has been good, positive movement the last three, four years, but it is nice to kind of take stock and think about it.
- 1:58:23 O. Thompson We expect more progress. We are not stopping.
- 1:58:29 P. Lipscomb What I point out is that the timing of the meeting is such that it happens in January. When I structured my report to you I did it in the structure of annual report, the first annual report. Whether we meet in January or not, I would like to keep up the practice of giving you a folks an annual report on historically what has happened over the last year, how do we self-assess where we are at, and what activities are planned going forward in the future.
- 1:58:59 Chair Ellis We would be happy to do that. I will give you an open opportunity. Any advice you have to offer?

- 1:59:18 P. Lipscomb I came into this organization from the outside. I was not a criminal defense lawyer except for a brief moment very, very early in my career. I that has not been an area I have dealt with before. I could see the activities from a different perspective but this is the first time I have been focused on it. What you have proposed is very challenging. You are faced with a system that is under-funded, with lawyers that are under compensated for their efforts. It is your job to insist that they improve the quality of their performance. It is very difficult to improve quality of performance when people are under funded because they have other professional opportunities that are available to them. Without the emotional commitment of these people to the kind of the work that they do that would be an impossible task. The system is based on lawyers who are not overworked, but are worked far in excess of the level of compensation that they receive. We have been able to make progress, and we are making continuing progress on improving quality, but you are squeezing the last drops out of turnips at this point. Unless compensation for lawyers is improved in this system you won't see the kind of quality gains that you want to see. You are going to lose your best lawyers at the top even more seriously than has already happened. The challenge is not to keep the younger lawyers who are learning the ropes. The challenge is to keep the experienced lawyers on board. The pay is not commensurate with their level of experience or expertise. It is as simple as that. The challenge for you is to go to the legislature and get more money for the system.
- 2:01:40 J. Potter I have no disagreement with that statement and it is a statement that you and your board should be echoing to legislators individually. We certainly do. OPDS staff certainly does, but having it come directly from those providing the service, you, the board members and your members, is even more effective than anything we can say.
- 2:02:07 C. Lazenby I have been on this Commission for awhile and I think we know that we are constantly struggling with that, but I think the judgment that we have made has been worn out because there was an increase last time that happened. There is not a natural constituency for this down the street. The judgment that I think we made was that if we can demonstrate quality and demonstrate cost-effectiveness then historical circumstances have also shown that you are indispensable to the running of the system. The combination of that is really the path to greater compensation.
- 2:02:48 P. Lipscomb I think what has gotten traction, and again this is as an outsider, but I think what got traction last session was joining hands with the prosecution and the judges. What happened in the BRAC committee last time there was a budget crunch, and Kathryn was a member of that as was I at that time, were the prosecutors, the defense attorneys, and the judges, all came together and said the system can't function unless each of the three member groups are adequately funded.
- 2:03:19 Chair Ellis I would like to echo what Chip was saying. At the last legislature I thought we had the best reception that I have ever seen in the time that I have been doing this at legislative committee. The reason was that we presented them with a kind of a business case. I think they gained confidence that the system they are now funding is one where the money is being well spent and not just spread out with no impact. It almost feeds on itself. As your quality improves I think the confidence, at least of that committee, of putting money into that system is money well spent. It kind of pushes us up that way. This is probably a very hard year to see an incremental improvement, but I think it may be a year that we don't lose ground because of that argument.
- 2:04:43 P. Lipscomb The relationships between the defense attorneys and prosecutors are important. It is negative for the system and negative for our financial welfare when defense attorney and prosecutors in any community are fighting. Because what happens is the prosecutors end up going to the legislature and anecdotally disparage the public defender system. That is what has caused considerable damage in the past. I am thinking of a particular district attorney over on the coast.

2:05:15 Chair Ellis In Clatsop County.

2:05:33 C. Lazenby I am going to echo what Barnes said. I am at Portland State now as you may know it. We are looking at this daily as more sobering budget numbers come in. Last Friday they doubled the deficit number from 1.2 to 2.3. I really thinking holding ground is going to be our key objective this year.

2:06:22 Chair Ellis Thank you. I think the juvenile court is up next. Welcome.

2:06:43 D. Condon Thank you. Good morning. I am Dick Condon. I think I have met most of you.

2:06:52 Chair Ellis I think that is true. Do you want to give us an update on the juvenile side.

2:07:01 D. Condon I am happy to. Since we reported last - and most of what I have to say is in the materials that I supplied to you - our efforts have focused on adding members and adding younger members. One of the concerns expressed to us in the past have been concerns that some of us have been around for a long time. There was concern that we be able to add youth to our membership and add numbers. There always appear to be concerns about whether there are enough juvenile attorneys. Since we met last we have added four and are now 18. One of my concerns has long been that we needed to add more Spanish speaking capacity because we serve a larger, and larger, number of Latinos in our practice and some Russians, but that is a much, much, smaller share. As was mentioned earlier some Marshallese and a smattering of others. We were able to add one native Spanish speaker in the process. We have had two other Spanish speakers who are able to communicate but not fluent to the point where they do not need interpreters to work with. We still rely on that system a lot. We have also created bylaws. We have created an affiliation agreement with our organization. That was drawn from my perspective, from a management's perception. It is not an employment agreement. It is an agreement that members will affiliate with us for the period of any given contract and that it expires at the end of that contract. It will be renewed if members continue to meet our expectations about their performance. Another significant change has been that what I did, historically in my extra time, I have been compensated for. I continue to carry a caseload but I serve as administrator.

2:10:12 Chair Ellis What is the division of your time? Is it fifty/fifty?

2:10:11 D. Condon No, no, it is much less than that. I indicated that it is between 10 and 20 percent of my time. It is a different kind of administrator than might be involved with a different kind of organization. Our organization has very much been one of shared responsibilities. We have divided up the most important functions of the group into committees. Most of the committees are committees of three. There are exceptions. They are specifically tasked with recruiting, with quality assurance, training, contracting issues, and mentoring. A lot of those functions might have been within the realm of a different kind of administrator. I am primarily a liaison between our group and all of the parties that we interact with - the juvenile court, DHS, the juvenile department - so I am sort of the point person for contacts from the court and each of the organizations with concerns about procedural issues. We have regular meetings with the juvenile court in a couple of forums - the Juvenile Court Operations Committee and the Dependency Improvement Group that meet periodically. While I appear at those so do other members of our group. That is the basic structure and those are the primary changes in our structure since we talked last.

2:12:40 Chair Ellis How large is the group?

2:12:40 D. Condon Eighteen.

2:12:45 Chair Ellis Within the eighteen, what percentage of their practice is juvenile?

- 2:12:52 D. Condon We have tried to become juvenile specialists that are essentially full-time. I would say each of the people who call themselves full-time have to do some outside work, not a lot.
- 2:13:11 Chair Ellis Of the eighteen how many would call themselves full-time.
- 2:13:13 D. Condon Fourteen. As far as the others are concerned, we intend to increase the percentage of what they do as their skills increase and as our confidence in what they do increases. We consider ourselves to still be in the recruiting business. I think our staffing level is about right for the caseload that we have. We are looking at one retirement toward the end of the year that we need to anticipate and I expect there will be others. We will continue to look to hire younger members. While we have done that it sort of conflicts with how we initially sought members. We looked for members who had practiced, who had some history of practice, and whose skills we respected and then we actively recruited them. It is a little bit different to the extent that we need to hire younger members. There is a balancing point. There is a trade off. You can't always hire experience.
- 2:14:49 Chair Ellis Do your lawyers break out between the ones that focus on delinquency and the ones who focus on dependency, or do most of them do both?
- 2:14:57 D. Condon Well, historically most have done both. That is still true to some extent but it is not entirely true. Our newest members do their first work with us doing misdemeanors in the delinquency side of the practice. The delinquency practice is a smaller portion of what we do by far. The more experienced attorneys who have fulltime caseloads still do delinquency cases. They do the more serious delinquency cases. The most difficult of the delinquency cases that we deal with are sex cases and sex cases that involve younger and younger defendants and 15 year old Measure 11 cases. We have three members that we considered qualified to do that work and they share those cases. We have had a lot of them. We haven't had as many as were projected to have.
- 2:16:19 Chair Ellis Do you do termination of parental rights cases representing parents?
- 2:16:21 D. Condon Yes, and children. Those are handled by the 14 that I mentioned.
- 2:16:35 Chair Ellis Questions? Any advice for us before you lose the chair.
- 2:16:53 D. Condon No.
- 2:16:53 Chair Ellis Thank you.
- 2:16:59 D. Condon No. We have benefited from having very, very, good support from OPDS staff. Shelley Winn is also our analyst. I have never called her and ask for anything when I didn't receive it immediately. I have had tremendous support and feedback from her and also Ingrid and Kathryn. We are very grateful for that.
- 2:17:28 Hon. Elizabeth Welch I don't really have questions. I just wanted to make a few comments. I sat in Marion County Juvenile Court for three weeks in October, I think. It was very interesting. I travel around the state. There is, in my observation, no better group of lawyers representing juveniles than this group. They do a very good job. There are lots of issues. We had lots of things to chat and talk about. There are some very unusual challenges in this jurisdiction that they can only try to adapt to.
- 2:18:45 D. Condon Certain things are beyond our control - charging policies - but we benefit from having a very active court. I have said that in the past and it continues to be true. Our judge is very much involved in communication and improvement in all aspects of the juvenile court. She

deserves tremendous credit for everything we have been able to do. She is responsible for a lot of it.

2:19:31 Chair Ellis

Thank you.

2:19:31 I. Swenson

Mr. Chair, could I just make a couple of comments on the same topic? First of all I am glad Mr. Condon could be here. Lindsey Partridge, who is also a full-time juvenile attorney, is here too. Both of them are extremely highly regarded attorneys who do excellent work in this area. I want to acknowledge that. We have heard that information from a variety of sources and I am glad Commissioner Welch provided me the information she did - first hand observation of what was happening. I continue to hear very, very, good things. In the report you received there is some information from the CASA program, Pam Sorenson. She is here. She would like to put that in context because she certainly wants to acknowledge the good work that she and her CASAs see on a regular basis. The fact that they would like to see some other things happen doesn't take away from what she would like to tell you about this morning. I do want to acknowledge having received the information that you provided us updating us from where you had been in 2005. The consortium's adoption of best practices is really remarkable. They read about them, they pursue them, and they adopt them when they are suitable for this organization. I think that has been a real benefit and they continue to pursue those as they can.

2:21:07 Chair Ellis

There is a passage in the report where Ingrid makes reference to a CASA point of view that is not entirely complementary. Do you want to comment on that?

2:21:24 D. Condon

Well, sure. The CASA program provides a very, very, good service to the clients that we deal with in that they are comprised of members of the community who typically are on in years, have perhaps retired from what they did professionally or for other reasons have a lot of time. They are able to bring to the cases that we do tremendous assets both in terms of a variety backgrounds and perspective, and a significant amount of time to devote to meeting with kids, families, and connecting with various resources that might be of use to them, devoting essential time that children's attorneys don't have the time to do. For the most part we benefit tremendously from what they do. I have had personal experience with a lot of them. I have had friends who have decided to do CASA work and consulted me about it. I have been involved in the training of CASAs on a couple of occasions as well as CRB. That is it. I was quite surprised and disturbed to see some of the comments that were provided. We have members who I believe perform at a very high level almost all of the time. That is not to say that we don't do things that can't be criticized and that in every single case we do it perfectly. Where we have had the most significant conflicts with CASAs has been with some perhaps difficult cases, where there appears to have been a failure of understanding of the law regarding what minimally adequate parenting is. Some have taken positions that were different than ours. If we are working difficult cases I expect people to have different opinions. We have significant differences of opinions between ourselves on each case representing parents and kids as we advocate for very different positions. Even multiple representatives of the same child can have differences of opinion about what should happen at a critical juncture in a case. There have been a couple of cases where CASAs have appeared to be mystified by a failure to advocate for what is in the best interest of kids as that term is understood in domestic relations law. That has lead to some, I think, criticism and some hard feelings between CASAs and children's attorneys on a few cases. I would say that those cases are certainly not representative. I think they are the exceptional cases. To some extent that is unavoidable. In terms of what was quoted as far the number of attorneys who see their child clients, I take issue with that very directly. We have 14 members who perform that function. Essentially all of them do meet with their child clients. On the dependency side I require of our members that they see their clients. The court requires of our members that they see their clients and the court monitors that. That is something that we regularly report on. I am sure there have been cases where attorneys have not met the clients at critical times when they should have, but I would say those cases are exceptions and not the rule.

2:26:51 Chair Ellis Okay. Thank you.

2:27:06 Pam Sornson Commissioners. I am Pam Sornson and I am the director of the Marion County CASA Program. I did feel like I wanted to clarify a little bit about where this language came from so you understand how it got presented here before you. I really appreciate the opportunity to come before you today and explain our perspective. Ingrid was wonderful in sending me a series of questions regarding our interpretation or experience with the juvenile attorneys. I sent that questionnaire out to my advocates and asked for their input. What we have here is their input. What this language represents is their personal experience in the courthouse and in their cases with the attorneys. We have 55 advocates. We represent about 200 kids right now. They have been advocates for a number of years. They get trained. We get some pretty significant training on what the attorney's job is versus what the CASA's job is. Mr. Condon was absolutely correct. These people bring an amazing background to CASA. They have already been successful parents, and run successful businesses, and had successful careers. They do set pretty high standards in terms of what they are looking for for their kids. Many of the cases we are assigned in Marion - because there are 900 kids in foster care on any given day in Marion County - are cases in which judges have determined that they are going to use the CASA resource. Many of our cases have five or 10 kids and three or four different dads. They have a wide constellation of issues that make it really challenging for the attorneys to go and see all those kids that are in different placements. We have the same challenges with the Department of Human Services and their caseworkers trying to keep up on the permutations that this cases have. When our advocates set high standards for what they are hoping to achieve for their children, then, yeah, we absolutely butt heads sometimes with the attorneys in terms of what we think should happen for that child. We also recognize that our job is making sure our opinion is presented to the court. It is the court's job to make whatever decision the court is going to make. We understand there is a difference in perspective between what we are looking for and what they are looking for. I do think a really significant point in the literature you received is at footnote three. That is simply the caseload. I was happy to sit here this morning and listen to Judge Lipscomb talk about needing more people to do this work. These are our children. They are our future. I don't know if they are paying your social security but they are going to be paying mine. I would rather they work to support us rather than us put them in corrections. As I say, Marion County on any given day has 900 kids in dependency care and 900 kids in delinquency care. We have 18 lawyers working to support all that. That is just an immense amount of work. The defense bar, the juvenile bar does fabulous work in Marion. But the amount of work that needs to be done is immense.

2:30:17 Chair Ellis Just to get a sense here. You said you had 54?

2:30:23 P. Sornson Fifty-five advocates right now.

2:30:23 Chair Ellis The critical comments, are they coming from a lot of those? A few of those?

2:30:34 P. Sornson I think our response rate was 25 to 30 percent.

2:30:39 Chair Ellis That is the response rate, but the sources of the negative comments is that five people, 10 people?

2:30:46 P. Sornson Between 15 and 20. When I spoke with the staff - each advocate has a case manager. When I talked to the staff and got their impression about what they have heard and their impression from what their advocates experience in the field, I would say about 25 percent of the program, program members, contributed to the response that we got.

2:31:16 Chair Ellis Okay. I am trying to get a sense how many of the 14 full-time, 18 total juvenile lawyers might be the subject ...

2:31:28 P. Sornson Included in this?

2:31:30 Chair Ellis Right.

2:31:30 P. Sornson That is a really good question and a really good point. Our advocates work on one or two cases at a time. Some of the information they are providing here is anecdotal to one or two cases. Other advocates have been advocates for quite period of time and they have experience with a number of attorneys over time. I think the ones who have been CASAs longer absolutely get more of an understanding of what attorneys can or cannot achieve with their very challenging caseloads.

2:31:55 Chair Ellis Do you have any observation whether this is an increasing trend or declining trend?

2:32:01 P. Sornson I think it is a declining trend, frankly. The rest of the report was interesting for me in terms of how the system appears to be improving its practice and I think we are seeing that with the juvenile attorneys as well. The mentoring opportunities that we see developing among them; consistency of advocacy from beginning to end of a case. I think it is absolutely improving and I don't know what to attribute that to. I have been in my job since summer of '05. Attorneys practice, struggling with the really immense caseloads that they have to deal with. I think our advocates have been gratified to be able to work with them, and I realize this is probably true too, the advocates have had to prove themselves to the attorneys as being reliable. As our practice has improved so has their ability to rely on us and the information that we bring to the case.

2:33:14 Chair Ellis Any other questions or comments. Thank you, Pam. I believe that is it on the Marion County piece.

2:33:25 I. Swenson It is.

Agenda Item No. 4 Continued review of PDSC Service Delivery Plan for Representation in Death Penalty Cases

2:33:31 Chair Ellis Should we go to Item No. 4?

2:33:31 I. Swenson Matt Rubenstein is here and I'm sure would like to be heard. Your lunches have arrived. I don't know if you want to have them now, or take a break a bit later, or wait until the conclusion.

2:33:48 Chair Ellis Matt, what is your estimate on time?

2:33:53 I. Swenson What is your timeframe today, Matt?

2:33:57 M. Rubenstein I am free all day. I don't have a prepared presentation. I was going to respond to requests that you or Ingrid had.

2:34:11 I. Swenson Let's say about 15 or 20 minutes maybe.

2:34:15 Chair Ellis Let's try to do Matt and then do lunch. This is sort of a follow on to our time together four or five months ago. Do you want to bring us up to date how things are going?

2:34:38 I. Swenson Let me do this if I could. For members it might be helpful to talk about a couple of issues which came up in October. The highlights of that presentation were essentially that Matt outlined for you the death penalty system in Oregon and some of the major issues. He talked about his resource center. As you know, he is our capital resource attorney but he is also the capital resource center. He described some of the services that he has been able to put in place for our death penalty bar. He brought with him two people. You heard from Professor

Sean O'Brien, one of the leading death penalty scholars and well as legal authorities in the country. He talked about the development of these mitigation standards. You heard about those and saw some presentations about what they amount to. Then Robin Maher from the ABA Death Penalty Project was here. She congratulated you on having adopted the ABA Standards and then talked a little bit about compensation in death penalty cases.

- 2:35:57 Chair Ellis She had a big error in there.
- 2:35:5 I. Swenson That is true. She wasn't aware of the percentage of our folks who work under contract. She also pointed out that the hourly rate that we pay is at the low end nationally, and that for mitigation specialists it is the lowest she is aware of. If you will recall, Commissioners had some interest in and concern about how we could pay more and attract additional mitigation specialists. That is one of the areas of significant need. I thought it would be useful for you to talk with Matt a little bit further about some of the things that came up. We didn't really have time for questions. We had far too full an agenda to allow you to pursue any of that. There have been some developments since then. Do you want to talk a little bit about the center?
- 2:36:54 M. Rubenstein Sure - just an overview of some of the work that I have been doing. I think I have presented this to some of you but there are some new members. I help plan and conduct trainings statewide with OCDLA and the federal defender. I work with the federal defender folks and the state folks in these different practices to try and coordinate and learn from each. Our federal colleagues are very concerned about our preservation and exhaustion of issues. I consult regularly with trial teams and help them build teams capable of providing high quality representation.
- 2:37:35 Chair Ellis When you talk about federal are you talking about Steve Wax's group and the post conviction process that they pick up from our system?
- 2:37:48 M. Rubenstein Yes. In the 2254 litigation they are very dependent on trial attorneys and post conviction attorneys litigating issues, preserving issues, and exhausting issues. They bring a unique perspective and our state practitioners are eager to hear from and learn from our federal defender colleagues.
- 2:38:13 Chair Ellis Have we had many instances of what I will call inadvertent waiver?
- 2:38:20 M. Rubenstein Yes. If you talk to our federal colleagues they will say that we do a poor job of preserving and exhausting our issues.
- 2:38:27 Chair Ellis What are we doing to address that?
- 2:38:29 M. Rubenstein We do training. The federal defender, in conjunction with OCDLA and our resource center have put on a seminar every spring for our capital defense bar. Then OCDLA puts on a fall seminar.
- 2:38:50 Chair Ellis I would have guessed that the inadvertent waiver problem would not have been in the capital cases. You are indicated that it is also there?
- 2:39:01 M. Rubenstein Primarily, there are two assistant federal defenders, Pat Ehlers and Renee Manes who are handling most of the litigation in federal court. The issues have come primarily - they are just getting into federal district court now - but the issues that are being actively reviewed are waiver and preservation issues right now. This is not unique to Oregon. It is a challenge across the country. Studies have been done about federal habeas litigation. The consistent challenge under the ADPDA is exhaustion and preservation. We are regularly training attorneys to do better. Steve Wax and the federal defender bring in attorneys who specialize in capital litigation. They help train our trial folks how to identify these issues, how to litigate

them, how to preserve them. Mr. Krasik is present and he has prepared an exhaustive demurrer to our capital scheme, capital statute. Renee Manes has – I think he has borrowed some of her work product and some of her challenges to our capital scheme. We are trying to feed that back into our demurrer at the trial stage. The resource center has a website that is password protected for our defense community. It is part of my work for you all. Trial attorneys are taking that 250-page demurrer and filing it in our cases. I think it was in a pending Multnomah County case, I entered the case as associate counsel. We put on expert evidence about Capital Jury Project data, the Oregon capital scheme, trying to make a record that we could rely on that we could use in other cases and try and get that record before the Supreme Court. I am also working regularly with trial teams helping them identify qualified people to compliment the team and provide high quality representation. I have entered cases to assist in jury selection and argument in the penalty phase. I am a guardian ad litem for two men on death row right now. There are issues about competency. I have been appointed by the court and I am working with their trial teams to try ensure they are providing high quality representation.

2:41:59 Chair Ellis

What is the status of the Guzek trial. The one over in Bend, the retrial.

2:42:10 M. Rubenstein

There is apparently a conflict with the two attorneys who have been representing Mr. Guzek for some time and they withdrew. Ingrid and OPDS know better than I. Counsel withdrew from the case. A qualified attorney, Richard Wolf, has taken over as lead counsel. He is putting together a defense team in that case. It is unfortunate that a lot of energy, and work, and resources went into that.

2:42:56 Chair Ellis

Is that set for trial?

2:42:56 M. Rubenstein

Mr. Wolf has a very busy – I am actually co-counsel with him in a pending Multnomah County case. Part of the negotiation I understand was the trial court set a date out that was consistent with some of his other obligations. I believe a court date has been tentatively scheduled for 2010. After our last meeting Ingrid asked to meet with me and her management team. We have discussed some policies or procedures in an effort to ensure that the ABA Guidelines were being implemented and to increase the standard of practice in the capital defense bar. I would like to share some of those efforts that we are making. One of them was to try to come up with a system where the Office of Public Defense Services could enforce the guidelines, as opposed to their just being aspirational. You all are the responsible agency. You have an independent obligation to ensure high quality representation and when that is not being provided, to remedy the situation. In a case last year working with OPDS, we became concerned about the standard of practice in a post conviction case. Ingrid ultimately met with, or talked with the attorney on the case that was going to invite me into the case as conflict free counsel to advocate for the client. There was a problem there and I got subpoenaed to the hearing. I was not attorney of record. It has worked out very well. A new, very qualified team has taken the case over. It highlighted the fact that OPDS didn't have an attorney who could appear in court and make a record of deficient performance. We are in the process of modifying the contract I have so that if OPDS has concerns and would like the resource center person or counsel to meet with a client to make a record and to try to remove deficient counsel, ODPS has the vehicle. Another area we have discussed is the idea that when a new aggravated murder case is filed that the lead counsel would be required to present to the Capital Resource Center their efforts to build a defense team consistent with the ABA Guidelines and have a mitigation specialist who is skilled and experienced, as a way to increase the strength and opportunity to ensure high quality representation, not to just hear about it after the fact or from a judge at trial that there are concerns about the representation. I do that already informally where I am meeting with teams regularly. Ideally I am meeting with them when they are putting a team together, when they are putting together their investigation plan, litigation plan, mitigation investigation plan. But frequently the team is meeting with me two weeks before trial. If we can institute policies where there is an obligation on the trial team to provide that information to us, I think we can do a better job.

Another area that we have been discussing is the idea of having a Capital Mitigation Specialist Resource person that would work with me, or under my supervision, to provide training and act as a consultant to the defense team really focusing on the mitigation function, to look for opportunities with some of our social work programs and other educational institutions to put together programs that would help train people to get the skills for mitigation specialist work, or perhaps to set up an ongoing training program in conjunction with a social work program. I think Sean O'Brien shared some of the best practices in terms of mitigation specialist work with you that come from the mitigation guidelines that were adopted last year. The idea would be to develop those practices. In Oregon we have all these independent contractors. Everybody is reinventing the wheel, but we should take those best practices and collect them and then here is a system you can adopt. Those are some of the three primary areas that we are talking about.

2:48:29 C. Lazenby

Let me ask you a couple of questions about a staff attorney at OPDS appearing in these matters. Do we have standing to step up and appear in these matters simply because we are a funding agency? I'll just sort of tumble all my questions out. At the same time, as we move down this line, are we becoming more guarantors of the quality of assurance. It gives me a right to an aggrieved defendant whose legal services we paid for to come back against us and say, "Well, you know it is your fault, OPDS that you didn't provide me with adequate counsel. I am concerned that we may move down that line and change our function as an agency.

2:49:22 I. Swenson

Mr. Chair, if I could respond? Actually, in adopting the ABA standards we took on that level of responsibility by saying that we will be the agency who is responsible for that function here. The standards recommend that either a full-time defender organization or an administrative organization such as ours be the responsible agency, so we have undertaken that. In the discussions that we have had in the meantime the question was how well we are fulfilling that monitoring portion of our oversight function. All of this is an effort to assist us in monitoring. Suppose we do become aware - we have a complaint policy which has been in effect for a number of years and we receive complaints and information through other channels about the level of representation in various kinds of cases, but certainly in death penalty cases, and I think our obligation to respond in those instances when it is an ongoing case has been there from the beginning. I don't think we are assuming a new obligation. In this particular area, no, it is not our function to appoint. We don't have the authority to appoint at this stage. However, the issue that arises is how you get some independent advice to a client who is in a situation in which their appointed counsel may not be sensitive to or willing to explore those issues adequately with the court. We do have some additional work to do on it. The appropriate mechanism seemed to be for Matt Rubenstein to be available to perform that function. Then in some instances it would be through an approach to the trial judge but preferably to the presiding judge in a district to talk to the presiding judge and say, "We have an issue we would like to explore," and seek input and direction about how best to proceed. There are some details that would have to be worked out in every single instance. We ran into some unexpected obstacles in the case that Matt referred to.

2:52:17 C. Lazenby

Don't get me wrong because I am sympathetic. I also understand this sort of delicate piece of being a state agency within the judicial branch in matters where we are appointing counsel that is adversarial to the Attorney General's Office in some of these circumstances. I am concerned that we haven't plumbed adequately the legal posture. I understand the ABA Guidelines, but saying the ABA Guidelines requires that is different from saying that we are on solid legal ground and proceeding in this way. I don't know how to get an answer to that question. I don't know if I am the only one of the Commission that is concerned about this, but as we move further down this line of becoming this guarantor I think our role changes, more so than it does in these other matters. We can talk about quality control with people who contract with us, but now you are talking about taking an active role in serious cases where you are appearing as the funder and provider of legal counsel.

2:53:21 Chair Ellis We already do that at the appellate level.

2:53:24 C. Lazenby Do we?

2:53:24 Chair Ellis Sure. Those are FTEs.

2:53:31 C. Lazenby This just seems a little different to me. Maybe it is just me that is bothered by it.

2:53:42 I. Swenson I am concerned that you are concerned and I would like to discuss your concerns further with you. It is a different role, I think, for the resource center.

2:53:50 C. Lazenby I want to be able to see us do it.

2:54:00 M. Rubenstein In the vast majority of instances I am more effective as a resource to you as assisting counsel. Very rarely am I in a position where I am adversarial to counsel. In the one instance where that has come up at the direction of OPDS it was after careful consideration and evaluation of every option rather than litigation.

2:54:29 C. Lazenby The assistance of counsel pieces I am fine with. When we start intervening around these matters I think we need to be clear about where we are and what we are doing.

2:54:38 Chair Ellis Matt, when you met with us in October I remember one subject that was very interesting was your perception that in Washington where they have a built in delay in the charging decision. As I recall the discussion, that allowed the defense team to advocate to the prosecutor not to charge capitally. There was a significant variation between the capital cases up there and here. There was talk of trying to do something legislatively here. I think I understood that it was maybe too late in the process to try and do that this session. My question for you is a) has anything gone forward on the legislative front, and b) have you tried informally to get individual prosecutors to delay their decision to give time for a defense team to give them information to head off some of these capital charges?

2:56:03 M. Rubenstein Yes. The OCDLA Legislative Committee has adopted this death penalty reform as one of their higher legislative priorities. There is a bill that would ...

2:56:23 Chair Ellis Including that Washington type of statute.

2:56:25 M. Rubenstein Yes. It would require the prosecutor to formally notify a defense team that they intend to seek the death penalty. If they don't provide that formal notice the death penalty could not be obtained. It doesn't interfere with the state's opportunity to seek death or to obtain death. It just requires them to notify the defense team. That is consistent with many other jurisdictions, the federal scheme and the scheme in Washington. I mentioned that we have 54 cases pending in Oregon and they had four cases pending in Washington State. Washington has twice our population. I think Billy would know those numbers, but I think our numbers have gone up. There has been a rash of murder charges in the last few months. The legislation wouldn't delay their ability to file a death notice. The way it works in practice is the defense team would take that opportunity to ask the prosecutor to hold off on making that decision for 90 days or 180 days. We will waive that time. That is we will give you the opportunity to file a death notice for 180 days. What we ask for in return is an opportunity to present you with mitigation evidence, so that you can take in this additional information and make this very important life/death decision based on as much information as you can. Most prosecutors would say, "Yes. This is a serious decision that I am going to make and I would like that opportunity to review that information." I think it rationalizes the process. Instead of 55 cases we should have five cases in Oregon. That is something that OCDLA and others are pursuing. Your idea about sort of trying this out is an excellent one, and Ingrid has discussed that. I think we need to find the right jurisdiction to do that and to try that out. We could ask a presiding judge to institute an order, a standing order, for a year, two years, if the

prosecution would agree to it where we would institute this kind of policy. Twenty-one cases are currently pending in Multnomah County and 34 cases in Washington, Clackamas, and Multnomah.

- 2:58:52 C. Lazenby Thirty-four additional?
- 2:58:52 M. Rubenstein No, 34 total. It is a tremendous number of cases and not many cases are being tried. Last time three cases went to penalty phase where jurors were actually asked to make a life or death decision. We got life in those three cases. It is not a rational system.
- 2:59:19 Chair Ellis I am curious, and maybe this is – I mean we just talked about it afterwards. I know that Bend case has been very controversial for a long time and it surprised me to learn that conflicts emerged so late in the process.
- 2:59:36 I. Swenson As I understand it, Mr. Chair, they are of a nature that nobody can discuss directly with us, at least as far as I am aware. Everybody was satisfied, the court and everyone, that there was no alternative and it had to be done. To this day I don't know what the ground was or how it arose. I believe it arose during the course of meeting with the client and reviewing old discovery in the case. It wasn't a new development as far as I know. It was of such a nature that there was just no question about the impact.
- 3:00:22 Chair Ellis I can accept that. I guess the part that is troublesome, and I am sure it is troublesome to everybody here, has got to be an immense amount of invested costs.
- 3:00:35 I. Swenson Yes it was and they were on the eve of trial. Then I think it is not clear how much of that work can be used by Mr. Wolf and his team in view of those potential conflicts.
- 3:01:02 Chair Ellis Other questions for Matt? Thanks a lot. Ingrid, why don't we take five minutes and then we will have the OPDS report while we have lunch.

(Recess) (new recording)

Agenda Item No. 5 OPDS Monthly Report

- 36 I. Swenson I want to report that agencies were briefed by the Governor's staff and the legislative staff on Tuesday. You all know the fact that we are anticipating at least a billion dollar shortfall in the 09-11 biennium and continue to confront growing concern in the current biennium. Executive Branch agencies had already had some of their funds – what do we call it? There is a term for it.
- 1:23 K. Aylward Disappropriated?
- 1:29 I. Swenson Unallocated. That has not yet happened to us. We have to talk with LFO staff tomorrow as to when they will look to take the 1.2 percent that we talked about at the last meeting from this final biennium quarter's funding, how we can cover that without negatively affecting delivery of services, if possible. We can talk about that in further detail if you like. One thing that was interesting about the revenue forecast was despite the gloomy picture, there seemed to not be a sense of urgency or crisis among these agency folks. In fact, the inquiry was made, "How do we prepare for this? Should we be implementing changes?" Essentially the response was, "If you can make reductions, and they don't impair the accomplishment of your mission, then you should do it." That isn't the same thing as saying, "By all means cut every dime you can because we aren't going to be able to support you even to the extent of whatever your mission requires." It is a little bit concerning in some ways that the reliance appears to be on the federal bailout. I think that is where people are looking for some relief. Part of that has to do with the anticipation that both the Medicaid funds and Education Block grants that will come in that package to Oregon will be significant in size and relieve some of

the need for state funds to be used for those purposes. They are talking about up to 1.8 billion dollars in those funds. Oregon would get more than its share because its unemployment rate is higher than the average national unemployment rate. It is very high. I think it is 10 percent now and expected to go higher. They talked about the funds that are available in terms of reserves. There is \$53 million still in the emergency fund, \$393 million in the Educational Stabilization fund, and \$340 million in the Rainy Day Fund. If you used all those you could cover this biennium's shortfall. They don't intend to use them and the comment was that they would like to see this whole recession bottom out before they would want to start using those funds. In terms of direction from the new Ways and Means Committee, as you know we have new co-chairs so that will be a significant change this session. We got initial instructions on our budget presentation yesterday. They expect those presentations to occur between February and March for all agencies. They have given us information that they would like us to compile for them and how they would like us to present our agency's situation. Kathryn and I are going to meet with LFO and talk about some more details.

- 5:27 K. Aylward The only other thing is that state agencies have been asked to re-project their ending fund, their ending balances for other funds accounts. For our agency we have that application contribution sub account, which are other funds. That number is not due until Monday so I haven't done it yet. It is going to be close to a million dollar ending balance. I suppose that is good news, that there is something there. I don't know whether the intention is to withdraw those funds or apply what they call a "fund shift." They might say, "Okay, we will take a million dollars out of your general fund and you can use that other fund money instead." At least there is money there.
- 6:19 C. Lazenby Can I ask where we were in the Governor's recommended budget and whether the Governor's budget will be sent to the same place that all Governor's recommended budgets have, which is in some round receptacle in the legislature right now or they asking to use that as a guide?
- 6:35 I. Swenson It appears to be very much in play. The initial discussions are in terms of what you would do to meet the Governor's budget recommendations with your agency budget? No reason to think that it has been tossed aside. Other than that, I don't know internally how the legislators are looking at it. We were treated the way we usually are. Whatever across the board average increase or cut is being recommended for Executive Branch agencies was recommended for Judicial Branch agencies as well, with no details. The recommendation was a 6.2 percent cut in our essential budget level. It was just general fund dollars, I believe.
- 7:30 Chair Ellis I had a chance to talk with the Chief Justice the other day. He was more optimistic than I thought it he would be in part because of a concept of a federal intercept which I didn't fully understand until he explained it. There are a lot of judgments against people who have gone through the criminal justice system that never get paid, but there is a new potential system if there is a federal payment of any kind, tax refund or otherwise, coming and it hits the system it never gets to the recipient it comes straight to those with the judgments. He seemed to think that was likely to be pretty helpful.
- 8:29 I. Swenson That is right. I think about \$63 million, maybe a little bit more, annually that was potentially available.
- 8:35 Chair Ellis He tends to be an optimist and I do know, so this conversation should probably be discounted by about 20 percent. Do we know the composition of the committee that we appear before?
- 8:52 I. Swenson We do.
- 8:52 Chair Ellis Can you share that with us?
- 8:56 I. Swenson Let's see if I can recall all the names. This year the subcommittees will have co-chairs instead of the alternating chairs. In the past they alternated between the Senate Chair and a

House Chair. They have gone to a co-chair system so Chip Shields will be the House Co-Chair of that subcommittee. Senator Verger from the Coos area is the Senate Co-Chair. Returning members, we don't have very many which is unfortunate. Representative Barker from Portland is one of the returning members. We have some new legislators on our group - Representative Kahl, Rep. Freeman. And Representative Nathanson from Lane County is a returning member. Senator Walker is a new member of this subcommittee. We have lots of new faces. Kathryn and I have met with a number of them and we have appointments to meet with the others. At this stage we are just sort of acquainting them with our situation and budget requests and answering any questions.

- 10:27 Chair Ellis Okay. Did you want to talk about this big, thick document.
- 10:35 I. Swenson That is for you, Mr. Chair.
- 10:35 K. Aylward I chose this opportunity to deliver that to you because you will be presenting our budget to the legislature. We all talked about that.
- 10:47 I. Swenson You have seen the same document except without all the tables and fine print. This is your official version, which was delivered to the legislature.
- 11:00 Chair Ellis Okay.
- 11:00 I. Swenson Pete's appellate division developments. He could probably tell us what happened in the Supreme Court case.
- 11:07 P. Gartlan Right. The most significant event over the last few months was the *Ice* decision. *Ice* came down last week, *Oregon v. Ice*. It had to do with whether or not a judge can impose consecutive sentences, make factual findings to impose consecutive sentences or whether a jury must first make those factual findings before a judge has authority to impose consecutive sentences. The Supreme Court issued a decision a week ago yesterday holding that a judge could make that finding. It did not violate the Sixth Amendment right to a jury trial to have a judge make those factual findings. The majority opinion kind of rests on two principles; one was, well, this was not historical practice.
- 12:00 Chair Ellis History trumped logic.
- 12:03 P. Gartlan Right. That was the Chair saying that. And, two, kind of another rationale that didn't hold up in prior cases and that was simply that this is kind of within the state's sphere with respect to criminal justice. This is traditionally something that the states would do. That rationale I thought was thrown out the window under prior case law, *Apprendi*, *Blakely*, *Cunningham*. In any event, two justices kind of moved, Justice Ginsberg and Justice Stevens, and so we ended up with a 5-4 decision against us.
- 13:00 Chair Ellis Was Alito a surprise? He was in the majority too?
- 13:02 P. Gartlan We weren't surprised. We knew that Alito would be against us. The swing votes were really Ginsberg and Stevens.
- 13:15 Chair Ellis Sorry about that.
- 13:15 P. Gartlan We were very disappointed. I was pleased with the way our office handled it. Ernie Lannet did a wonderful job and Becky Duncan was excellent. Our office rallied around producing a lot of good documents. I thought the office did well.
- 13:47 Chair Ellis You could ask for a do over.

13:53 P. Gartlan I don't think we would get one. I think perhaps the other piece of information to report on and that is the status of the juvenile appellate section. The juvenile appellate section is up and running in full force. The feedback that we are getting from both the Court of Appeals and the Attorney General's Office is very favorable. Apparently, we are raising issues that have not been decided yet in juvenile law. Both the court and the attorney general is feeling challenged by the issues that are being raised and so far, so good.

14:36 Chair Ellis That can actually be very good for the system as a whole. It isn't just deciding cases but it is giving some guidance. There are a lot of issues and that seems to be working.

14:50 P. Gartlan I was surprised that the Juvenile statutory scheme has been in place for several years but there doesn't seem to be all that much caselaw addressing the statutes. I think one of the reasons for putting a juvenile appellate section in our office was to kind of develop some case law that would provide guidance to the bench and practitioners. Apparently, that is being realized.

15:22 I. Swenson Kathryn, do you have other things from the division that you want to talk about?

15:21 K. Aylward No.

15:27 I. Swenson Paul, anything for the Commission?

15:31 P. Levy Just two things, but really three. I wouldn't eat your cookie if I were you. I took one bite and I think they are peanut butter cookies. The Chair asked Matt Rubenstein about what is being done to deal with this waiver of default in PCR. We have been reporting to you periodically on the progress of the post conviction performance standards which we have been working on in a task force. Sally LaJoie who was here - she may have left - is the bar liaison to that task force. Both our performance standards and a report from the task force were approved by the Board of Governors Public Affairs Committee several weeks ago and will be before the Board of Governors at their meeting in February. We expect them to be approved there. OCDLA has a program in March where they will be presented to some practitioners. We are in the middle of our second annual statewide public defense performance survey of judges, prosecutors, juvenile departments, and CRB courts. At our next meeting we should have information for you about that.

17:27 I. Swenson Our next meeting isn't going to be until March. I am hoping that will be in Clackamas County. I will certainly let you know. I need to pull together some things that I haven't yet.

17:44 Chair Ellis Okay.

17:46 C. Lazenby As we said that March meeting - I think spring break is toward the latter part so we might want to think about meeting in the early part of the month.

17:54 I. Swenson I think it is the 12th.

18:03 Chair Ellis I haven't looked but I am going to be away the first two weeks of April. Do we have a conflict there?

18:08 I. Swenson It should be the third Thursday in April. I think.

18:19 J. Potter I show it on the 9th.

18:20 I. Swenson Maybe we moved it.

18:23 Chair Ellis If it is the 9th I'm not available.

18:30 I. Swenson Well, should we look at moving that meeting? Does the 16th work for everybody?

18:53 Chair Ellis The 16th is fine. You can pay your taxes and then come to the meeting.

19:39 I. Swenson The only other item on the agenda, Mr. Chair, is this defense representation in drug courts. We can do with that whatever you like.

19:47 Chair Ellis Why don't we bump that to March.

19:51 I. Swenson Sure. We can do that.

19:58 Chair Ellis Any other issues? Anybody want to make a motion?
MOTION: John Potter moved to adjourn the meeting, Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting adjourned.

Attachment 2

**OPDS's Draft Report to the Public Defense Services Commission
On Service Delivery in Clackamas County
(March 2009)**

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. From 2004 through 2008, the Commission completed investigations of the local public defense systems in Baker, Benton, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Clackamas County undertaken in preparation for the PDSC's public meeting in Oregon City on Thursday, March 12, 2009.

PDSC's service delivery planning process

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

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

Third, after considering OPDS's preliminary draft report and public comments during the Commission's meetings in a county or region, PDSC develops a

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

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

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

Background and context to the service delivery planning process

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

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

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and lawyers have visited contractors in Benton, Clackamas, Columbia, Crook, Deschutes, Douglas, Clackamas, Jackson, Jefferson, Lane, Lincoln, Linn, Multnomah, Umatilla and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

Another area of practice in which significant concerns about quality of representation have been raised by the Oregon State Bar and others is post conviction relief cases. In March 2008 PDSC heard from judges, the Department of Justice and a number of attorneys whose practice includes post conviction relief about the need for improvement in the quality of representation being provided by public defense attorneys. A work group was convened by the bar at the request of PDSC to create performance standards for attorneys in these cases. Those standards are expected to be approved by the bar's Board of Governors in the near future. The work group was also asked to make additional recommendations to PDSC for improving services in this area of practice. Those

recommendations will be presented to PDSC at its March 2009 meeting.

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

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

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

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

Most of PDSC’s other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the “performance” of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time to time in the course of the Commission’s service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and

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

management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission's deliberative processes. OPDS, with advice and assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

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

Organizations currently operating within the structure of Oregon's public defense delivery systems.

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

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

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

PDSC intends, first, to review the service delivery system in each county and

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

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

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

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

While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated

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

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.

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

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

³ Id.

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 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.

PDSC's Preliminary Investigation in Clackamas County

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

In February 2009 OPDS Executive Director Ingrid Swenson, accompanied on some interviews by OPDS General Counsel Paul Levy and Clackamas County CBS Analyst Amy Jackson, visited with stakeholders in Clackamas County. In addition to talking to PDSC's contractors in the district, they met or spoke by phone with six of the Circuit Court judges, a pro tem judge, the District Attorney and his chief deputy, the Citizen Review Board attorney, two DHS managers, the Juvenile Department Director, the CASA director, and one of the Assistant Attorneys General assigned to the area.

This draft report sets forth the information obtained in those interviews and recommends areas of further inquiry for Commissioners at the March 12, 2009 meeting in Oregon City.

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.

OPDS's Findings in Clackamas County (Judicial District No. 5)

The Circuit Court and the District Attorney

There are eleven Circuit Court judges in Clackamas County. Judge Steven Maurer is the presiding judge. Judge Deanne Darling is the primary juvenile court judge. The Trial Court Administrator is Mari Miller. The County has seven specialty courts.

John Foote is the District Attorney and Greg Horner is his chief deputy. There are currently 29 deputies and the number of positions is expected to remain stable. While, as noted below, the defense bar rarely adds new lawyers, the District Attorney's office does have turnover in its staff and has become the point of entry for new attorneys seeking criminal law experience in the county.

Procedure in criminal cases

There are five special courts for criminal cases. The adult drug court is designed for defendants with significant, long-term drug or alcohol addiction. A guilty plea is required for the defendant to participate in the program. One Clackamas Indigent Defense Consortium (CIDC) attorney is assigned to cover the drug court. The mental health court is limited to defendants charged with non-violent offenses whose behavior is principally attributable to mental illness rather than substance abuse or anti-social behavior. There is also a DUII Court, a community court and a domestic violence deferred sentencing program. CIDC lawyers cover these courts as well.

A consortium attorney is present in court for felony and in-custody misdemeanor arraignments. Each case is generally assigned to a particular attorney on the same day as the arraignment. That attorney checks for conflicts, and if a conflict is found the case is reassigned to another consortium attorney.

Arraignments for clients who are in custody, either at the Clackamas County jail, at the Inverness jail in Multnomah County or in a state correctional facility⁴, are generally done by video. Only a few prisons (such as the Columbia River Correctional Institute) do not have video capacity.

Three of the Clackamas County courtrooms are fully wired for video appearances and there is a portable "polycom" unit that can be used in other courtrooms. While the capacity for confidential communication between attorneys and clients is limited, the video system is used principally for routine appearances.

⁴ Arraignments from the state institutions are usually on warrants.

The county uses a master calendaring system. There is a court liaison team which includes CIDC, the district attorney's office, the bar president, the trial court administrator and the judges which addresses system issues on a regular basis. Based on the recommendation of this group the county has been using a "case manager" system for scheduling criminal cases since 2003. Except for serious cases such as Measure 11 cases, the parties are expected to resolve cases or set them for trial by the 35th day after the first appearance. The district attorney's office is required to include a settlement offer when it provides discovery to the defendant. Motions must be filed 21 days before trial and are generally heard on Mondays. There is no trial docket call but lawyers are required to notify the court 24 hours in advance whether their cases will actually be going to trial.

The state issues subpoenas in only about 15% of criminal cases. The trial rates in Clackamas County, however, are higher than the statewide average.⁵

Clackamas County is growing and the court anticipates that the criminal caseload will continue to grow as well. Jail capacity has been an issue in the county. In 2005, the Circuit Court judges sitting en banc issued an order prohibiting the sheriff from closing additional beds. After the voters approved a levy in November of 2006 the Clackamas County Board of County Commissioners unanimously agreed to devote \$50 million towards construction of a new adult jail and to construct the first phase of an expanded jail at another site with a planned completion date of 2010. There are currently approximately 400 jail beds available in the county.

OPDS contracts with CIDC to handle 6,844 cases per year. CIDC is currently just slightly under quota. The district attorney's office notes arrest rates have been fairly constant for the past eight years in Clackamas County even though the crime rate appears to be dropping.

Procedure in juvenile cases

The Clackamas County Juvenile Court is located with other county offices in a group of buildings several miles from the County Courthouse. Mondays and Thursdays are the principal juvenile court days, although preliminary hearings are held daily as needed. There are two juvenile drug courts, the juvenile dependency drug court and the delinquency drug court. Both meet on Wednesdays and are staffed by Independent Defenders, Inc. (IDI) attorneys. Citizen Review Board hearings are held on Tuesdays.⁶

⁵ From January 1, 2008 through June 30, 2008 the statewide trial average for felony cases was 5.4% and for misdemeanors, 4.4%. In the same period the trial rates in Clackamas County were 7.1 for felonies (39 to the court and 37 to juries) and 6.7% of the misdemeanors (53 court and 87 jury).

⁶ Clackamas County is one of a very few counties where the Citizen Review Board has been able to schedule its hearings to accommodate attorneys' schedules. Instead of having review dates scheduled automatically in accordance with the DHS calendar, the Clackamas Board schedules

Attorneys are not present for preliminary hearings in juvenile dependency cases. Attorneys generally receive notice of their appointment, however, on the same day as the preliminary hearing. Dependency cases are scheduled for “judicial review of the petition” 30 days after the preliminary hearing. This hearing serves as a settlement conference. Once jurisdiction is established (either by trial or by admission) a review is scheduled before the Citizen Review Board at five months. Upon the court’s instruction, the CRB focuses its attention at this hearing on creating realistic concurrent plans to be implemented if the primary plans cannot. Since these hearings are scheduled with input from the attorneys, attorneys are almost always present. The court then conducts a review at approximately eight months and a permanency review at thirteen months. A second CRB review occurs prior to the permanency hearing at ten months. This hearing is scheduled at the time of the first CRB review, which, again, allows attorneys to participate in the selection of the hearing date. There are two DHS offices in Clackamas County, the North Clackamas office and the Oregon City office. Both DHS offices are reputed to do a good job of transitioning cases from the initial protective services worker to the on-going worker, both of whom usually appear at the dispositional hearing. There is an active CASA program in the county and CASAs are assigned in approximately 60% of the cases.

An attorney from IDI is present for delinquency preliminary hearings. Youth sometimes appear for initial hearings by video. Ellen Crawford is the Juvenile Department director. This department makes extensive use of formal accountability agreements and other informal approaches. Petitions are filed only in the more serious cases. It is the district attorney’s office that generally files the petitions. The county has access to fourteen detention beds at the Donald E. Long facility in Portland. The delinquency drug court currently has fifteen clients. The court works with youth fourteen to eighteen years old. The drug court team continues to refine the structure and operation of the court.

Public defense contractors

There are two public defense contractors in Clackamas County, the Clackamas Indigent Defense Consortium (CIDC) which contracts with PDSC to handle criminal cases, and Independent Defenders, Inc. (IDI) which contracts for juvenile and civil commitment cases.

CIDC

CIDC has 28 members. It has a board of directors, five of whom are permanent members. All members, except one, are consortium attorneys. The board was

its hearings at the time of disposition when the parties and their attorneys are present. The second review is scheduled at the time of the first review. The Citizen Review Board of Washington County has also moved to this system and the Marion County CRB is exploring the use of a similar system in that county.

recently restructured when two of its permanent members resigned. Their positions were taken by two younger members. The board has a president who serves at the pleasure of the board. The current president is Brad Jonasson. Every year two members of the board are replaced with other non-permanent members. CIDC operates under written bylaws; executes written agreements with members and has a manual for attorneys.

Ron Gray is the administrator of the consortium. Mr. Gray serves on two advisory groups to OPDS, has served on site review teams, and, at OPDS's request, prepared a list of best practices for consortia which is attached as Exhibit A. CIDC uses a portion of its PDSC funds for administrative functions and sets aside a certain amount to cover supplemental compensation for lawyers who handle particularly complex cases. Mr. Gray is assisted by Janan Billesbach, who has worked for the consortium for many years. Currently she is partly retired but continues to work half time from her home where she has a dedicated phone line and computer and is able to make consortium appointments on a daily basis.

The consortium president has assumed responsibility for creating an attorney evaluation process. He has assembled a committee which is working on a questionnaire to be sent to clients and a questionnaire to be sent to system representatives. Among the factors that will be analyzed in terms of attorney performance will be trial rates.

The work of the consortium was reviewed by an OPDS site team in 2004. OPDS has also conducted two statewide surveys which included Clackamas County. In the most recent of those surveys, the respondents were principally the local Circuit Court judges. They described the work of CIDC on average as good. Comments noted that the range of skill varied from one attorney to another and that there was some frustration with the less skilled attorneys.

Comments received by OPDS staff prior to this review from members of the local criminal justice system indicated that: CIDC has a lot of very good, experienced attorneys; they maintain a good relationship with the district attorney's office and the court; the county is fortunate to have them; Ron Gray is responsive to concerns from the bench and court staff; the consortium is able to provide mentoring when attorneys need it; the judges' workload is very high in Clackamas County and it is very helpful to have a provider that is as flexible as CIDC; it would help to have more attorneys; members cooperate with the court to make the system work, as does the district attorney's office; CIDC has also been a "partner" in the creation and operation of the treatment courts. Although there is a range of quality, on the whole it is very good with only a couple of attorneys who are problematic. CIDC attorneys are, on average, significantly more experienced trial attorneys than deputy district attorneys in the county.

IDI

There are currently eleven attorneys in the consortium. Most of them have been part of the consortium for more than 20 years⁷. The consortium has a board of three members, one of whom is not a consortium member. The consortium has hired a former DHS worker who uses her expertise as a child welfare specialist to assess child clients' circumstances, advise attorneys about appropriate services for children, review DHS files and otherwise assist attorneys in representing children. The consortium does not sponsor trainings for its members. Members are active participants in juvenile court system-wide meetings and trainings, however.

Marty Cohen is the administrator of the consortium. Concerns about performance by consortium members are brought to his attention. He handles delinquency cases and staffs the juvenile drug court. He and the attorney with whom he shares office space both have a significant private practice.

In view of the declining juvenile caseload⁸, he has advised other members of the consortium to take on private cases.

OPDS conducted a quality assessment site review of IDI in 2007. Responses to the 2008 statewide survey indicated that representation provided by this group varied from good to excellent in both dependency and delinquency cases. Caseloads were deemed to be "about right to somewhat too large" in dependency cases and "about right" in delinquency cases. Specific comments noted that most juvenile lawyers were involved in other kinds of practice and that too often they met clients at the courthouse, did not meet with foster parents and didn't have sufficient contact with clients.

Comments received during visits to the county by OPDS staff prior to this review indicated that the juvenile attorneys are "top notch" and do a great job; some of them have too many court appearances although this is getting better as the caseload declines. (It was acknowledged that their income from public defense cases has declined and that they are probably required to do other kinds of cases. It was also noted that they do a good job of making sure that someone appears for them if they cannot be present for a hearing, although the substitute attorney does not always have the needed information.) One commentator said OPDS should make sure attorneys understand the extent of their duties to clients, especially with respect to contacting them and keeping them informed about the status of the case. It was also suggested that OPDS consider changes in how it compensates lawyers in dependency cases. Some attorneys believe they get paid only for attending hearings, not for continued representation of the

⁷ One of the senior attorneys is currently training a new lawyer in juvenile representation however.

⁸ All categories of juvenile cases appear to be declining in the county. In the calendar year 2008, the consortium received credit for a total of 2,574 cases.

client. It was also recommended that the consortium consider terminating one of its members. Marty Cohen is generally considered to be responsive to concerns about members and willing to intervene. Another commentator noted that some of the attorneys are very effective at getting appropriate services for their clients while others seem disengaged. Some attorneys meet with foster parents, others don't. Some children are not seen by either their attorneys or their caseworkers.

One of the effects of limited attorney availability is the lack of representation at shelter hearings in dependency cases. DHS indicates that this is a disadvantage to the consortium's clients because DHS cannot work closely with the parents until the parents have met with their attorneys and decided whether or not to contest the petition and whether or not to cooperate with DHS in service planning. If attorneys were present at shelter hearings they could also argue against removal or in support of a particular placement.⁹

Many attorneys apparently do not have sufficient time to meet with their clients before the judicial settlement conference. While it is reported that attorneys are generally familiar with the case and the documents prepared by DHS, they often have not discussed the case with their clients before the court hearing.

Attorneys do participate on a regular basis in child safety meetings. Now that the Oregon Safety Model¹⁰ is in place, decisions about placement are generally not made at these hearings but attorneys who are very committed, especially to child clients, nevertheless attend and participate. It was reported that it would be helpful to have one of the attorneys specialize in the representation of older children who will transition out of foster care to independent living.

In delinquency cases, the quality of representation is rated fairly high even though it was reported that lawyers don't always meet with their clients.

OPDS's recommendations for further inquiry at PDSC's
March 12, 2009 meeting in Oregon City

Based on the information provided to OPDS during its visit to Oregon City, OPDS recommends that the Commission consider the following in developing a service delivery plan for Clackamas County.

The structure

⁹ It should be noted that despite the absence of attorneys at these hearings they can sometimes be quite lengthy when the court requires DHS to produce evidence of the need for removal and proof that reasonable (or active) efforts have been made to prevent removal as required by ORS 419B.150.

¹⁰ The Oregon Safety Model approach to child protection was adopted by DHS in March of 2007.

The current system includes two consortia, with overlapping membership, that handle criminal and juvenile cases, respectively. The structure appears to be working satisfactorily although a number of commentators point to the need for additional attorneys and for better quality monitoring.

Attorney evaluation

While CIDC attorneys are given credit for providing high quality representation in most cases, some of the judges express concern about the attorneys' availability, about the need to be bringing in and training new attorneys to eventually replace current members, and about the need to consider removing some consortium members on performance grounds. As the Commission is aware from its service delivery reviews in other areas of the state, one of the weaknesses of the consortium model is that consortia often lack a system for evaluating the work of the attorneys and methods for addressing underperformance. It appears that CIDC is undertaking to create such a system. Ron Gray and CIDC have provided statewide leadership on quality assurance procedures. The Commission may want to follow closely the development of an attorney evaluation process in this county as a possible model for use by other consortia around the state.

Need for Additional Attorneys/Compensation

In Clackamas County, there is a significant discrepancy between the general assessment that the lawyers in juvenile cases are skilled and experienced and the frequent observation that they are not having timely and adequate communication with their clients.

In juvenile cases, the need for attorneys to handle cases in addition to their public defense caseloads may affect their availability for court hearings and the ability of some of them to provide appropriate representation. It appears that the principal dilemma for these providers is that PDSC's case rates do not permit attorneys to limit their caseloads and add new members without finding supplementary sources of income. Significant additional funding for juvenile representation as proposed in PDSC's Policy Option Package No. 100 and SB 450 sponsored by Sen. Jeff Kruse¹¹ may be needed to ensure that attorneys are meeting their obligations to their clients.

While the burden of high caseloads is understood, attorneys should not allow their caseloads to prevent them from attending shelter hearings, meeting with clients before court hearings, meeting with youth, child clients and foster parents, litigating motions to suppress and taking other actions that may be necessary for good representation.

¹¹ SB 450 proposes an increase in funding to PDSC specifically for the purpose of improving representation in juvenile dependency cases.

If current funding undermines attorneys' ability to comply with PDSC contract provisions regarding timely contact with clients, representation at hearings and the like, the contractor needs to raise these issues with the Commission and with OPDS prior to and during contract negotiations.

Attachment 3

Foreword to Chapter Four of the Principles and Standards
for Counsel in State Post Conviction Relief Proceedings

This chapter is an addition to the existing Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (“The Performance Standards”). Those standards were originally approved by the Board of Governors on September 25, 1996, and were revised and updated in 2005.

The new chapter of the standards describes the expectations of counsel for the petitioner in state post-conviction relief proceedings. These cases are collateral challenges to criminal convictions brought under the Oregon Post-Conviction Hearing Act, ORS 138.510–138.680.

As noted in the Foreword to the original Performance Standards, “The object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.”

These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however, which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented."

We hope that the standards will serve as a valuable tool for all lawyers in providing competent, diligent, high quality legal representation

Gerry Gaydos
Oregon State Bar President

Preface

The legal community in Oregon is dedicated to the preservation and the enforcement of the rule of law. That dedication is based on the recognition that it is the rule of law that is the very foundation of our way of life -- ensuring our liberty, our safety, our health, our education, our commerce, and even our spirituality.

Protecting the fundamental constitutional rights of all individuals is an essential element of our shared commitment to the rule of law. The importance of post conviction proceedings -- the last opportunity in this state's justice system to ensure fundamental fairness, accuracy, and transparency in all criminal proceedings that impact individual liberty -- cannot be understated.

The Principles and Performance Standards that follow are an acknowledgement of the complex and specialized nature of post conviction proceedings, their finality, and counsel's critical role in those proceedings. Lawyers protecting individual constitutional rights must be committed to excellence at each stage of the criminal justice process, including post conviction proceedings. Effective representation in post conviction proceedings requires that counsel possess a unique combination of experience and skills in criminal law, civil pleading and practice, civil discovery, and the law of federal habeas corpus. The Principles and Standards represent a first step in establishing the expectation and the commitment to excellence in this specialized area of law. I commend the Task Force and Oregon's dedicated criminal defense bar for their fidelity to the high standards they have set for themselves.

Chief Justice Paul J. De Muniz

Oregon Supreme Court

Oregon State Bar Post-Conviction Relief Task Force
Report to the Board of Governors

Introduction

On September 28, 2007 the Board of Governors approved a request to create a task force on Post-Conviction Relief Proceedings. The purpose of the task force was to identify and draft performance standards for counsel for petitioners in state post-conviction relief proceedings.

The Board of Governors appointed thirteen members to the task force. The task force included a broad array of attorneys with post conviction experience, including a current trial court judge and the attorney in charge of the Department of Justice criminal and civil rights litigation section.

The task force held eight meetings in 2008. It reached consensus on performance standards. These standards have been submitted to the Board of Governors for approval and adoption. The Chief Justice is writing a preface to the standards.

The recommended performance standards are one response to longstanding concerns about the quality of representation that petitioners receive in state post-conviction relief cases. The task force found, however, that there has been no appreciable improvement in post-conviction practice since a number of concerns were identified in the May 22, 2000 report of the Oregon State Bar Indigent Defense Task Force III (Task Force III).¹ Many of these concerns were also identified at a February 14, 2008 hearing on the quality of post-conviction representation before the Public Defense Services Commission.²

The task force has concluded, therefore, that performance standards alone will not significantly improve representation without other systemic changes to the manner in which post-conviction cases are handled in Oregon. This report identifies a number of systemic improvements which, if implemented, would improve representation in post-conviction relief cases. The task force requests that the Board of Governors review and adopt these systemic recommendations, and further, that the bar actively pursue these changes through its public affairs, regulatory and educational functions.

¹ http://www.osbar.org/surveys_research/idtf3/intro.html

² For details and a transcript of that meeting, see <http://www.ojd.state.or.us/osca/opds/Agendas/index.html>

Task Force Recommendations

I. Providing Representation

The principal systemic recommendation of the task force concerns the manner in which counsel is provided to financially-eligible petitioners, and is the same as the recommendation of the Task Force III. There is consensus among task force members that the Office of Public Defense Services (OPDS) should develop a specialized group of attorneys with expertise in post-conviction cases to represent petitioners, comparable to the trial division of the Oregon Department of Justice, which handles the cases for the state.

Whether such an entity would be a unit within OPDS or a provider that contracts with OPDS, is a matter that should be studied and determined by the Public Defense Services Commission. In either case, such a unit could develop and maintain expertise in post-conviction cases, provide peer support and review for this difficult work, and serve as trainers and mentors for other attorneys representing petitioners. The task force notes that in order to be effective, such a unit must be adequately funded.

For those appointed counsel who do not work as part of a specialized post-conviction unit, compensation should be significantly increased in order to attract qualified attorneys and to allow for smaller caseloads for those who contract to handle post-conviction cases.

II. Education

Post-conviction representation is a complex practice of law that requires specialized knowledge and skills. The performance standards, which the task force believes may be the first comprehensive description of non-capital post-conviction practice expectations in the country, should be the focus of educational and training programs by the Oregon State Bar, the Oregon Criminal Defense Lawyers Association, and other entities concerned with advancing the quality of representation in this field.

The Public Defense Services Commission's *Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense* should be amended to specifically require familiarity and adherence to the performance standards for those attorneys who accept court-appointments to represent petitioners in post-conviction proceedings. The qualification standards currently require no more than qualification for appointment to a criminal proceeding involving the highest charge in the post-conviction proceedings. This fails to recognize the specialized nature of post-conviction practice.

Additional Areas Discussed

This task force discussed challenges arising from the issues of venue and the burden of raising and preserving claims. The task force has not made a recommendation regarding these issues and instead suggests that additional study be completed.

I. Issue Identification and Pleading

Identifying, pleading and litigating appropriate issues for post-conviction relief is an area that needs substantial improvement among post-conviction relief practitioners. This was a major finding of the Task Force III, which attributed the deficiencies in large part to current requirements, established by caselaw, that place the burden of raising and presenting legal issues upon the petitioner personally. The task force did not reach consensus on resolving this issue, but did agree that adoption of the task force performance standards, better education and training about post-conviction practice, and pursuing a study of other methods to improve representation could be of assistance.

II. Venue

Currently, ORS 138.560(1) establishes venue for post-conviction cases in the county in which the petitioner is imprisoned. Venue may be changed when the court finds that “the hearing upon the petition can be more expeditiously conducted in the county in which the petitioner was convicted and sentenced,” ORS 138.560(4).

Venue for post conviction relief cases is typically established in the mostly rural counties where many of the state’s prisons are located. These are often counties that are underserved by public defense attorneys, and finding local qualified lawyers willing to accept this class of cases is problematic. Because these counties are in judicial districts that typically have only a few judges, special “visiting” judges are often appointed to hear the cases. The visiting judges often participate by video connection from a remote location. Usually, relevant witnesses and documentary evidence will be located in the county of conviction, which is often neither the county of imprisonment nor the site where the judge is located. It is often impossible for witnesses to attend the post-conviction hearings. All of these factors converge to make post-conviction hearings less effective proceedings.

One option discussed is to change the presumption of venue to the county of conviction. This might broaden the pool of attorneys available to represent petitioners and remove other barriers to effective advocacy in these cases. However, if the hearing is held in the county of

conviction, the petitioner will still be located in prison in a different county from the actual court proceeding. Video communications equipment can alleviate some issues raised, but the problems of increased travel costs, and prioritizing who should be present remain. Also of concern is the additional expense likely to be incurred by the Oregon Department of Justice, which represents the state in cases of imprisoned petitioners, if it were required to appear in these proceedings throughout the state, and the probability of increased costs to some state courts.

This is a complex issue without an easy solution and the task force suggests it be studied further to determine whether additional methods for improving representation exist. The members of the task force do not agree on whether venue should be changed.

Submitted this 12th day of December, 2008.

Oregon State Bar Post-Conviction Relief Performance Standards Task Force:

Dennis Balske, Chair, Law Office of Dennis Balske, Portland
Anthony Bornstein, Office of Federal Public Defender, Portland
Steven H. Gorham, Attorney at Law, Salem
Noel Grefenson, Noel Grefenson, P.C., Salem
Lynn Larsen, Dept. of Justice Criminal and Collateral Remedies Litigation Section, Salem
Harrison Latta, Attorney at Law, Portland
Paul Levy, Reporter, Office of Public Defense Services, Salem
Ingrid MacFarlane, Office of Public Defense Services, Salem
Mark Olive, Mark E. Olive, P.A., Tallahassee, Florida
Rita Radostitz, Eugene
Matthew Rubenstein, Capital Resource Center, Portland
Marc Sussman, Marc Sussman, P.C., Portland
Hon. Youlee Y. You, Multnomah County Circuit Court, Portland
Sally LaJoie, Oregon State Bar, Staff Liaison, Tigard

Introduction

This chapter describes the expectations of counsel for the petitioner in state post-conviction relief proceedings. These cases are collateral challenges to criminal convictions brought under the Oregon Post-Conviction Hearing Act, ORS 138.510–138.680. Representation of post-conviction petitioners is complex and specialized, requiring counsel to combine knowledge and experience in criminal law with an understanding of pleading and practice in a civil action. Moreover, because representation in state post-conviction proceedings significantly affects a petitioner’s ability to collaterally challenge a state court conviction in federal court, counsel must also maintain a current knowledge of the complex law of federal habeas corpus. Faced with the burden of proof as the moving party in a civil case, counsel for petitioner must also undertake competent factual investigations and be proficient in the discovery and presentation of evidence.

Counsel in post-conviction cases often represent clients embittered by conviction of a crime, losses on direct appeal, the prospect of lengthy incarceration, and a belief that prior attorneys failed them, presenting counsel with unique challenges for meaningful communication and consultation. Because many of Oregon’s prisons are located in rural parts of the state, the challenges to counsel are especially great when clients are incarcerated—and venue for the case may be—hundreds of miles from counsel’s ordinary place of business or the location of critical witnesses in the post-conviction proceedings. Yet, at stake for petitioners in these cases is an opportunity for a full and fair hearing of grounds, not available in earlier proceedings, which might invalidate the criminal conviction or sentence. At stake for the legal system of the entire state is the integrity of an essential remedy for discerning and correcting violations of fundamental constitutional rights.

The standards set forth in this chapter apply to counsel for petitioner in all post-conviction relief proceedings; however, they do not address many of the special obligations and responsibilities of counsel representing the petitioner in death penalty cases.

STANDARD 4.1

Prerequisites for Representation

A lawyer in post-conviction relief proceedings shall provide competent representation to each client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Implementation

1. A lawyer representing petitioners in post-conviction cases should be proficient in applicable substantive and procedural law, including but not limited to current familiarity with the following:
 - a. The Oregon Post-Conviction Hearing Act, ORS 138.510–138.680, and the case law interpreting this act.
 - b. A knowledge of the substantive and procedural requirements of competent representation in criminal cases in Oregon, including familiarity with the relevant provisions of the American Bar Association Criminal Justice Standards, the Oregon State Bar (OSB) Principles and Standards for Counsel in Criminal Cases, and the current edition of the OSB’s *Criminal Law* (*see* (d), *below*).
 - c. The applicable provisions of the Oregon Rules of Civil Procedure, the Oregon Evidence Code, the Oregon Uniform Trial Court Rules, any applicable Supplementary Local Rules, and any other statewide or local court rule or practice governing post-conviction relief proceedings.
 - d. The current edition of *Criminal Law* (Oregon CLE 2005 & Supp 2006): Postconviction Proceedings (ch 30) and Federal Habeas Corpus (ch 31).
 - e. The provisions of the federal habeas corpus statute, 28 U.S.C. §2254, and the case law interpreting it, concerning the exhaustion of remedies requirement, the procedural default doctrine, the statute of limitations, and the necessity of adducing evidence in support of claims in state court.

- f. The federal Antiterrorism and Effective Death Penalty Act of 1996, and the case law interpreting it (*see also* Standard 4.8(11)).
 - g. The current version of *Preserving Your Issues For Federal Habeas Corpus Review* (Oregon Federal Defender).
 - h. *Uncovering the Injustice: The Role of Post-Conviction Litigation in the Criminal Justice System*, by Wendy Willis (Oregon Criminal Defense Lawyers Association 2002); *Post-Conviction Litigation*, by Steven Wax (Oregon Criminal Defense Lawyers Association 2000); and other current post-conviction training materials available from the Oregon Criminal Defense Lawyers Association.
 - i. Other post-conviction treatises and practice guides as they become available.
2. A lawyer representing petitioners in post-conviction relief proceedings should have appropriate experience, skills, and training.
 - a. A lawyer should obtain formal and informal training in post-conviction relief representation, and should consult with other lawyers, investigators, and paralegals that practice in the field.
 - b. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers. More experienced lawyers should mentor less experienced lawyers.
3. A lawyer should have adequate time and resources to provide competent representation to every client.
 - a. A lawyer should not accept caseloads that by reason of size and/or complexity interfere with the provision of competent representation.
 - b. A lawyer should have access to support services and other resources necessary to provide competent representation.
4. A lawyer appointed by a court to represent a post-conviction client at public expense shall meet and certify compliance with the Public Defense Services Commission's applicable *Qualification Standards for Court-Appointed Counsel*.

STANDARD 4.2

Role of Post-conviction Counsel

Counsel should not undertake representation in a post-conviction relief proceeding unless counsel fully understands the requirements of a collateral challenge to a criminal conviction, and how that differs from a record-based direct appeal of a criminal conviction.

Implementation

1. Counsel should be familiar with the type of claims that may be raised in post-conviction relief proceedings, and understand that most direct-appeal-like, record-based claims are not cognizable.
2. Counsel should understand that a “collateral” basis for post-conviction relief, by statutory and common sense understanding, will ordinarily not be entirely established by the previously compiled record of the case, and must be supported by factual and legal grounds that arise outside the record.
3. Counsel should not accept appointment or a retainer in a post-conviction relief proceeding unless he or she is prepared, knowledgeable, and skilled to undertake a comprehensive extra-record investigation, as described in Standard 4.4.
4. Counsel should treat a post-conviction relief proceeding as both the first and last meaningful opportunity to present evidence not contained in the trial record on a variety of constitutional violations that may have taken place in the underlying criminal case, including but not limited to: claims involving the competence of the defendant; police and prosecutorial misconduct; judicial misconduct; faulty eyewitness evidence; unreliable informant testimony; coerced confessions; flawed forensic methods; juror misconduct; ineffective and inadequate assistance of trial and appellate counsel; and whether a plea of guilty is entered knowingly, intelligently, and voluntarily.
5. Counsel should understand that while a client’s innocence may not itself constitute a cognizable claim of post-conviction relief, its relevance to the case is important.

Claims of innocence are typically intertwined with other recognized bases for post-conviction relief. For example, a meritorious “*Brady* claim” is typically based on suppression of evidence pointing to innocence. Similarly, a claim of inadequate or ineffective assistance of counsel may be predicated on trial counsel’s failure to investigate sources of important evidence that support the client’s assertion of innocence. Accordingly, post-conviction counsel should be prepared to carefully evaluate the need to investigate evidence of innocence that can support a recognized claim for post-conviction relief.

6. Counsel should ordinarily not have represented the petitioner during the underlying criminal case or direct appeal, since the post-conviction proceeding may be the only opportunity to raise claims of ineffective or inadequate assistance of trial and appellate counsel. Trial or appellate counsel who seek to represent their clients in post-conviction relief proceedings should do so with caution, and must abide by the conflict of interest provisions of Oregon Rule of Professional Conduct 1.7 and consult OSB Formal Ethics Op. No. 2005-160.
7. Counsel should understand, prior to undertaking representation of any client in post-conviction relief proceedings, that ordinarily any meritorious claim not contained in a first original or amended petition will likely be waived or otherwise unavailable as a ground for relief in a second petition for post-conviction relief, or in subsequent federal habeas corpus litigation. Any lack of diligence, mistake, or other omissions by counsel will ordinarily be attributed to the client. However, those claims and other pleadings to be signed by counsel must comply with ORCP 17(C), requiring a factual basis and support in existing law or in a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

STANDARD 4.3

Communications with the Client

Upon appointment or retainer in a post-conviction proceeding, counsel should promptly notify the client of counsel’s entry into the case and make arrangements for an interview with the client as soon as possible. Thereafter, counsel should continue to consult with

the client concerning the objectives of the representation and the means by which those objectives are to be pursued, keep the client informed about the case, promptly comply with reasonable requests for information, explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the objectives of the representation, and abide by those decisions.

Implementation

1. Counsel in post-conviction proceedings must fulfill all ethical requirements of the Oregon Rules of Professional Conduct, including Oregon RPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), Oregon RPC 1.4 (Communication), and, where applicable, Oregon RPC 1.14 (Client with Diminished Capacity).
2. Upon entry into a post-conviction case, counsel should begin to establish a relationship of trust with the client. Depending on the circumstances, it is not unusual for post-conviction counsel to encounter impediments to achieving this foundation of a meaningful attorney-client relationship when the client feels especially aggrieved by prior experiences with lawyers or with the criminal justice system, or when the client suffers isolation and despair because of imprisonment far from family, friends, and counsel's place of business. Counsel should be prepared to account for these challenges by making necessary adjustments to the frequency and mode of communication with the client.
3. Counsel should take appropriate steps to ensure that the client has the mental capacity to assist counsel in the identification and presentation of all viable claims for relief.
4. As soon as practicable after entry into a post-conviction case, counsel should meet with the client in person, allowing sufficient time at the prison or other interview location for a meaningful rapport to develop between attorney and client, to reveal facts within the knowledge of the client necessary for the litigation, and for counsel to consult with the client concerning the objectives of the representation and the means to achieve them.
5. Counsel should keep the client informed about the progress of investigation, the development of post-conviction claims, litigation timelines and deadlines, and consult

with the client concerning amendments and challenges to the pleadings, discovery, pretrial hearings, and other preparations for trial.

6. Counsel should advise the client concerning the consequences of prevailing on a petition for post-conviction relief, including the likelihood—in cases where petitioner has previously entered a plea of guilty pursuant to a plea agreement with the state—that the petitioner would face conviction on additional charges and/or a lengthier period of incarceration upon a new trial.

STANDARD 4.4

Independent Investigation

Upon appointment or retainer in a post-conviction case, counsel for petitioner should promptly begin an independent review and investigation of the case, including obtaining information, research, and discovery necessary to file or amend pleadings and to prepare the case for trial.

Implementation

1. Counsel should conduct a thorough and independent investigation of the validity of the underlying criminal trial, sentencing, and, when applicable, appellate proceedings. Counsel's investigation should examine the entire criminal case for evidence of a substantial denial of state or federal constitutional rights in the trial level or appellate proceedings. Although counsel may have been appointed or retained following the filing of a pro se petition for post-conviction relief, counsel's investigation will determine, in consultation with the client, whether the pro se petition should be amended with additional claims or by withdrawing some claims.
2. Counsel should seek the assistance of qualified investigators and expert witnesses where necessary for the investigation, preparation, and presentation of the case. For petitioners determined to be financially eligible, counsel should seek preauthorization for these expenses from the Office of Public Defense Services, pursuant to ORS 135.055.

3. Counsel's investigation shall include a thorough review of all available transcripts of the proceedings in the criminal case. Counsel should seek to obtain, review, and transcribe any necessary portions of the proceedings that were not already transcribed. Where both the petitioner and post-conviction defendant have an interest in obtaining the same transcription, and in other instances where transcripts and other documents may be obtained by or provided to the defendant, counsel for petitioner should seek the cooperation of the defendant in sharing the cost of producing such transcripts and documents.
4. Counsel should obtain and review other relevant records and documents, including the complete file of trial counsel and appellate counsel in the criminal case, and, where appropriate, files and records of investigators and experts who worked with trial counsel, prosecutorial and police files and records, and records of the trial and appellate courts.
5. Counsel should ordinarily interview trial and, where applicable, appellate counsel in the criminal case. Prior counsel will possess records relevant to the post-conviction proceedings, and be a source of information about claims of prosecutorial and judicial misconduct, in addition to the possible subject of claims involving inadequate and ineffective assistance of counsel.
6. Post-conviction counsel should be prepared to exercise skill and tact in relations with prior counsel, seek cooperation with post-conviction counsel's investigation, and insist upon access, with a release of information from the client, to prior counsel's "entire file." See OSB Legal Ethics Op. No. 2005-125. Post-conviction counsel should also be prepared to explain to prior counsel the limits on prior counsel's disclosures to counsel for the post-conviction defendant. While prior counsel must make his or her own determination of what communications may be exempt from the attorney-client privilege if the client alleges inadequate or ineffective assistance of prior counsel, *Petersen v. Palmateer*, 172 Or App 537, 19 P3d 364 (2001), post-conviction counsel should be familiar with the limited nature of the attorney "self defense" provisions in both Oregon RPC 1.6(b)(4) and Oregon Evidence Code 503(4)(c). OSB Legal Ethics Op. No. 2005-104; Kirkpatrick, *Oregon Evidence*, at 322 (5th ed 2007). Post-conviction counsel should also consider requesting protective

orders limiting access to and the use of disclosures made by prior counsel during the course of post-conviction litigation. OSB Legal Ethics Op. No. 2005-136; *Bittaker v. Woodford*, 331 F3d 715 (9th Cir 2003).

7. Counsel's investigation should also include, where necessary, interviews with other witnesses who may or may not have testified in earlier proceedings, forensic testing and examination of physical evidence, and forensic evaluations of the petitioner.

STANDARD 4.5

Asserting Legal Claims

Counsel should be familiar with all legal claims potentially available in post-conviction relief proceedings and assert claims permitted by the facts and circumstances of a petitioner's case so as to protect the client's rights against later contentions that the claims have been waived, defaulted, not exhausted, or otherwise forfeited.

Implementation

1. Counsel should assert all arguably available claims mindful that legal challenges to the conviction not raised in a first post-conviction relief proceeding will likely be forfeited for purposes of any subsequent state post-conviction or federal habeas corpus proceedings.
2. Counsel should ensure that all viable claims are asserted in the petition. Current Oregon law prohibits judgment in favor of a petitioner on a claim not explicitly pled in the petition, even if the claim was litigated during the hearing, briefed in a trial memorandum, and decided on the merits by the court. Counsel who discovers that a contested claim is not included in the petition should seek leave of court to amend the petition to include the claim.
3. Counsel should seek to raise every claim in explicit state and federal constitutional terms and should include supporting facts, in order to comply with the federal habeas corpus doctrine of exhaustion of state remedies. To do so, counsel should be familiar with applicable Oregon pleading requirements and with state and federal constitutional law. The failure to properly plead the claim in the appropriate

constitutional terms may preclude the petitioner from obtaining relief on a meritorious claim in state or federal court.

- a. Federal due process violations should be pled under the Fourteenth Amendment to the United States Constitution. (The Fifth Amendment due process clause only applies to federal prosecutions.) The Oregon Constitution does not contain a due process clause, but Article I, § 33, states that the enumerated rights in Article I are not exclusive; therefore, counsel should consider Article I, § 33, as a basis for a state due process claim.
- b. It is not sufficient to allege that counsel was inadequate and ineffective to preserve an ineffective-assistance-of-counsel claim for federal review. Counsel must allege that prior counsel was inadequate under Article I, § 11, of the Oregon Constitution and ineffective under the Sixth and Fourteenth Amendments to the United States Constitutions.
- c. Counsel should carefully identify viable issues that were not previously raised or federalized by trial or appellate counsel and determine whether prior counsel's failure can be viably argued to be ineffective. By alleging ineffectiveness of prior counsel, under the Sixth Amendment for trial counsel and under the Fourteenth Amendment for appellate counsel, post-conviction counsel can ensure that issues overlooked in the past are federalized to meet the exhaustion-of-state-remedies doctrine. If post-conviction counsel fails to raise any such claims, federal habeas corpus counsel will be barred from doing so under the federal procedural default doctrine.
- d. Counsel should recognize situations in which multiple claims are implicated and should ensure that all applicable claims are raised in appropriate state and federal constitutional terms. For example, if a petitioner was coerced into pleading guilty by counsel who failed to investigate and discover a viable defense, two separate claims are implicated and should be pled: petitioner entered into a plea that was not knowing, voluntary, and intelligent, in violation of Article I, § 33, of the Oregon Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution; and petitioner received inadequate and ineffective assistance from his or her

counsel in violation of Article I, §11, of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

- e. When alleging claims of trial court error, prosecutorial misconduct, and other violations of the petitioner's constitutional rights, counsel should allege facts establishing why the claims were not and could not reasonably have been raised at trial or on direct appeal.
4. Counsel should be familiar with local rules and customs and with ORS 138.580, which governs petition pleading requirements, and applicable case law respecting inclusion of "affidavits, records or other documentary evidence supporting the allegations of the petition" pursuant to 138.580. Although seldom enforced in the past, many courts are now enforcing this requirement pursuant to local rules and supplementary local rules by dismissing petitions that fail to comply with the requirement. Counsel should be careful to avoid such a dismissal, because a federal court may later hold that the dismissed petition was not "properly filed," with a result that the one-year federal statute of limitations will not have been tolled by the post-conviction litigation.
 - a. Just as the applicable and controlling federal constitutional provisions must be properly and fully pled for federal exhaustion purposes, the fullest possible factual basis for a claim for relief must be presented to the state post-conviction court.
 - b. Fair presentation of the factual basis for a claim for relief requires that a petitioner provide the state court with all of the facts necessary to give application to the constitutional principle upon which the petitioner relies.
 - c. If the petitioner fails to develop and present the facts in state court that the petitioner is attempting to rely upon in federal court, then no evidentiary hearing will be allowed for the presentation of those facts in federal court under 28 U.S.C. § 2254(e)(2).

STANDARD 4.6

Litigating Claims

Counsel should ensure that all available legal opportunities are pursued to protect the client's right to a full and fair hearing on the claims asserted in a petition for post-conviction relief.

Implementation

1. Amending the petition.
 - a. Counsel should be familiar with and adhere to the requirements imposed by statute, court rule, or case law for properly pleading claims for post-conviction relief. As necessary and in consultation with the client, counsel should be prepared to file an amended petition to add or delete claims raised in a pro se petition for post-conviction relief, and to make other corrections and changes.
 - b. Counsel should seek leave of court, where required, for amending a petition and file an amended petition that complies with the applicable Oregon Rules of Civil Procedure, other court rules, and relevant case law.
2. Discovery.
 - a. Counsel should be familiar with the opportunities for seeking formal discovery, under applicable Oregon Rules of Civil Procedure, and pursue discovery where appropriate in the manner best suited for the particular case.
 - b. Counsel should be familiar with the defendant's rights to discovery, including the opportunity to take the deposition of the petitioner, and explain those rights to the petitioner, informing the petitioner of possible sanctions, including dismissal of the petition, for refusal to respond to defendant's discovery requests.
 - c. Upon the scheduling of a deposition of petitioner, counsel should promptly notify the petitioner of the date and time of the deposition and take steps to prepare the petitioner to participate in the deposition. Whenever possible, counsel should be present with the petitioner when the deposition is taken in

order to consult with petitioner as necessary during the course of the deposition.

- d. Counsel should object to discovery by defendant, or seek to limit it, where appropriate and take other steps to maintain such privileges and rights retained by the petitioner during depositions and other discovery by the defendant.
3. Motions.
- a. Counsel should consider motions for change of venue where another permissible venue will permit more effective presentation of petitioner's evidence.
 - b. Counsel should respond, within the time permitted and as appropriate, to motions to dismiss or for summary judgment or other challenges to the petition.
 - c. When defendant challenges the petition as successive or time-barred, counsel should develop and present a factual and legal basis for any available exception to that challenge.
 - d. Counsel should consider what other pretrial motions might be necessary to protect the petitioner's right to a full and fair hearing on the claims asserted in a petition for post-conviction relief.
4. Trial.
- a. During the hearing on the petition for post-conviction relief, counsel should develop a factual basis through the presentation of evidence to establish the claims asserted in the petition. In so doing, counsel should consider that:
 1. A certified transcript or other records and documents will be necessary to prove events occurring in the official proceedings that resulted in the conviction and/or sentence challenged in the petition for post-conviction relief.
 2. Ordinarily, the testimony of the petitioner alone will not suffice to prove allegations concerning inadequate or ineffective assistance of counsel or other claims.
 3. Allegations of inadequate or ineffective assistance of counsel may require post-conviction counsel to offer proof of the standard of

reasonable professional skill and judgment that prior counsel failed to provide.

4. Allegations of inadequate or ineffective assistance of counsel will also ordinarily require proof that, under the state constitution, counsel's unreasonable performance had a tendency to affect the outcome of the case; or, under the federal constitution, that there exists a reasonable likelihood that the outcome of the case would have been different.
 - b. Counsel should seek to present all evidence on behalf of the petitioner in the manner most likely to protect the petitioner's right to a full and fair hearing on the claims asserted in the petition, including oral testimony by witnesses present in a courtroom, depositions, affidavits, or other competent evidence.
 - c. Counsel should object to time limitations or other constraints on the presentation of evidence, on behalf of the petitioner, that might interfere with a full and fair hearing.
 - d. Counsel should prepare and file a trial memorandum outlining the factual and legal basis for the petitioner's claims, properly delineating the grounds for relief under both state and federal law. Similarly, counsel should gather and present all supporting exhibits, affidavits, depositions, and other documents, accompanied by a list of such items, that counsel intends to introduce as evidence in support of the petition.
 - e. Counsel should protect the petitioner's right to testify and make offers of proof if the post-conviction trial court denies or limits such testimony or other evidence presented on behalf of the petitioner. Counsel should object to other limitations that interfere with a full and fair presentation of petitioner's case, making offers of proof as appropriate.

STANDARD 4.7

Obligations of Counsel After Trial

Counsel for petitioner will ordinarily have continuing obligations to the client following a trial, or other dispositive ruling, on the petition for post-conviction relief, that should be fulfilled to protect the interests of the client.

Implementation

1. Counsel should seek opportunities to draft proposed findings of fact and conclusions of law, even when the ruling will deny a petition for post-conviction relief, in order to advance the interest of the client on appeal and in subsequent proceedings.
2. Counsel should review the judgment filed by the court and object to unfounded findings of fact and incorrect conclusions of law entered by the court. Pursuant to ORCP 62, where appropriate, counsel should request other, different, or additional special findings of fact.
3. Counsel should take all necessary actions to effectuate rulings favorable to the petitioner, including but not limited to ensuring compliance with the requirements of ORS 138.640 for an enforceable judgment.
4. Counsel should determine and advance the client's wishes for appeal from an adverse judgment. In determining the client's choice concerning whether or not to pursue an appeal, counsel should make the client aware that the failure to appeal will likely result in a finding that the claims made in the petition will be forfeited in any subsequent state or federal proceeding.
5. Ordinarily, when the client wishes to appeal an adverse judgment, post-conviction trial counsel should prepare and file a notice of appeal. Appointed counsel should be familiar with the current protocol, available at the Office of Public Defense Services' Web site, for securing the appointment of appellate counsel to represent the petitioner on appeal.
6. Counsel should organize and preserve records of representation on the petition for post-conviction relief.

7. Counsel should cooperate with appellate and federal habeas corpus counsel for petitioner.
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STANDARD 4.8

Duties of Appellate Counsel

Appellate counsel for a post-conviction relief petitioner has special responsibilities to both advance the interests of the client in the Oregon appellate courts and ensure the proper preservation and exhaustion of claims for purposes of federal habeas corpus review. In addition to observing applicable provisions of the preceding performance standards, counsel on appeal has additional duties and responsibilities, including those set forth below.

Implementation

1. A lawyer representing petitioners in appeals of post-conviction cases should be proficient in applicable substantive and procedural law, including but not limited to familiarity with the current rules, laws, and publications identified in Standard 4.1, and also with the Oregon Rules of Appellate Procedure, the Oregon Appellate Courts Style Manual, and the current edition of *Appeal and Review* (Oregon CLE 1993 & Supp 2002).
2. Upon appointment to or retainer in a post-conviction appeal, counsel should contact the client as soon as practicable to provide information about the time frame for the appeal and the nature of the appeal, obtain any materials in the client's possession that may be pertinent to the appeal, and respond to any questions the client may have about the appeal. Counsel should inform the client that he or she may be responsible for a prevailing party fee of \$100, under ORS 20.190(1), plus the opponent's brief printing and mailing costs, under ORS 20.310(2) and ORAP 13.05, and that these fees and costs are recoverable even against an indigent and/or incarcerated person.
3. Upon appointment to or retainer in a post-conviction appeal, counsel should contact post-conviction trial counsel as soon as practicable for information about the case and

to obtain a complete copy of the client's file, including copies of all exhibits in the case.

4. Upon appointment to or retainer in a post-conviction appeal, counsel should make arrangements, or confirm that arrangements have been made, to secure transcripts of any hearings from the post-conviction trial-level proceedings.
5. Upon receipt of materials from the client and trial counsel, counsel should confirm via the case register that all trial-level materials have been received, and if they have not, counsel should obtain or review any missing materials by viewing the trial court file.
6. Throughout the course of the appeal, counsel should inform the client of all developments, including requests for extensions of time in the briefing schedule and any other motion filed by either petitioner's counsel or counsel for the state.
7. Counsel shall diligently search the record for meritorious appellate claims, and perform legal research under state and federal law to support such claims. Counsel's review should also identify those portions of the record that undercut adverse findings made by the court in denying post-conviction relief.
8. Counsel should raise all meritorious federal constitutional claims in order to ensure state appellate court consideration and to preserve those claims if later federal habeas corpus review is sought. Failure to raise a claim under the federal constitution will result in the procedural default of that claim in federal habeas corpus litigation. Accordingly, to avoid default, the appellate brief in state court should cite the provision of the United States Constitution that provides the basis of the claim. The same constitutional provision should be cited in the pertinent section of any Petition for Review filed in the Oregon Supreme Court.
9. If the state files a motion for summary affirmance of the judgment under ORS 138.225, counsel should file a response.
10. Counsel should rarely file a brief under ORAP 5.90(4); *see State v. Balfour*, 311 Or 434, 814 P2d 1069 (1991). While in direct criminal appeals, appointed counsel is permitted to select the issues that will be presented to the court, Oregon law constrains that decision-making in post-conviction cases. In post-conviction cases, the petitioner bears the responsibility for pursuing the case. Accordingly, in those

instances in which the petitioner seeks to pursue his claims, counsel should ordinarily abide by the petitioner's decision. To fulfill counsel's ethical responsibility, the brief should cite any controlling adverse precedent and those facts necessary to a proper resolution of the case. It is, of course, appropriate to advise a client against pursuing an appeal. Counsel must also be fully aware of the legal definition of *frivolous*, which is not synonymous with a weak issue. A claim is frivolous only if it is entirely "without factual basis or well-grounded legal argument." *Davis v. Armenakis*, 151 Or App 66, 74, 948 P2d 327 (1997). In those instances where counsel does file a brief pursuant to ORAP 5.90(4), counsel should advise the client regarding the manner in which claims must be asserted in the "Section B" brief in order to preserve and exhaust federal constitutional claims.

11. Counsel shall understand the operation of the one-year statute of limitations established by the federal habeas corpus statutory provision known as the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §2244(d) (*see also* Standard 4.1(1)(f)). Failure to meet the one-year deadline will result in the dismissal of the federal habeas corpus case. Accordingly, during the pendency of the post-conviction appeal, counsel should advise the petitioner of the one-year federal filing deadline, and inform the petitioner that any time that passed between the date of the appellate judgment following a direct appeal (or trial court judgment if there was not a direct appeal) and the date of filing the post-conviction petition counts against the one-year federal timeline. Counsel should ascertain on behalf of the petitioner the amount of time remaining within which to file for federal habeas corpus relief.
12. If the Oregon Court of Appeals affirms the judgment of the trial-level court denying post-conviction relief, counsel should review with the client the advisability of filing a petition for review with the Oregon Supreme Court. In any case in which the petitioner intends to pursue federal habeas corpus review, counsel must file a Petition for Review.

Attachment 4

Agenda Item 3:

Excerpts from standards and treatises on the role of defense attorneys in drug courts and the interests of defendants that should be protected

1. Qualified representatives of the defense bar should meaningfully participate in the design, implementation and operation of the court including the determination of eligibility and the selection of service providers. (The defense should ensure that those accepted into the court reflect a cross section of the whole population of those who are similarly situated. Racial or gender disparities should be identified and challenged. (ACCD: “Ten Tenets of Fair and Effective Problem Solving Courts” (ACCD))
2. Defense counsel should be meaningfully involved in developing the policies and procedures that ensure confidentiality and address privacy concerns. (ACCD)
3. PD as participant in planning and operation of drug court: The public defender has an institutional role in drug court – to ensure that court is designed and operated to service interests of clients, ensure their rights are fully protected and advanced and promote recovery. The PD shall cooperate with others to promote recovery through a coordinated response. The PD should strive to ensure that defender is involved in planning for the court; if court is designed or operated without PD participation, the PD should strive to be included in future planning and operation. Before supporting a drug court the PD should attempt to ensure that all major policy issues of importance to the defense are resolved. The PD should strive to resolve issues in a way that is beneficial to participants. With respect to each issue the PD will have to gauge whether something less than the optimum still provides a better alternative than traditional local practices. Some of the Issues to consider:
 - a. Pre-adjudication v post-adjudication and legal benefits of successful completion. The ideal program is a pre-adjudication, diversionary drug court that results in dismissal with no stipulated facts or evidence, no waiver of jury trial, no guilty plea. It may be necessary to agree to waive a speedy trial and a preliminary hearing.
 - b. With voluntary and involuntary terminations, the PD should strive to see that no negative consequences result. “A drug court should not punish a participant’s failed attempt at completion.”
 - c. Eligibility – PD should promote broad eligibility without sacrificing likely success of participants

- d. PD should support early intervention but without sacrificing the client's legal rights and with adequate time to consult.
 - e. The PD should support voluntary participation by the defendant and voluntary continuation.
 - f. The PD should strive to protect the client against use of statements made in drug court as evidence outside of the drug court setting. Defense counsel should create a record to ensure that all promises of benefits are legally enforceable, e.g. through a signed agreement with the prosecutor. The defendant should not be required to waive the right to have a hearing before another judge if defendant terminated from program. The PD should protect the client's confidential information. (Note: Federal law prohibits the disclosure (or re-disclosure) of "the identity, diagnosis, prognosis or treatment of any patient" by "any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States." 42 USC Sec 290dd-2 (2002). (Because of breadth of the language, this prohibition applies to virtually every drug court program.) Attorneys are included in the prohibition against disclosure. Any person who violates the section is subject to a fine. Defense attorneys should be involved in the design of "waiver" documents and in the client's execution of any waiver document.
 - g. The PD should advocate that costs and fees not be unduly burdensome.
 - h. The PD should promote effective evaluation and monitoring of the court's performance measured by agreed-upon criteria, including e.g. completion rates, failure rates and recidivism rates.
 - i. The PD should continue to strive to make the court better and guard against prosecutorial dumping of otherwise weak evidentiary cases into drug court.
 - j. The defense should advocate that credit be given on any ultimate prison sentence for days spent in jail as a drug court sanction. (National Drug Court Institute monograph (NDCI))
4. There should be resource parity between the prosecution and defense with respect to access to grant funds and other resources for training and staff. (ACCD)
 5. Participation by the defendant must be voluntary (ACCD)
 6. The accused should have the right to review with counsel before deciding whether to participate in the court the program requirements

and possible outcomes, and counsel should be given a reasonable amount of time to investigate before advising the client how to proceed. (ACCD)

7. The accused should be able to withdraw from the court within a reasonable time without prejudice to his or her trial rights. (ACCD)
8. The defendant should be protected against self incrimination. (ACCD)
9. No policy or procedure of the court should compromise counsel's ethical responsibility to zealously advocate for the client, to obtain complete discovery, to challenge evidence used against the client in the drug court or the findings made by the court, or to recommend alternative treatments or sanctions. (ACCD)
10. Constitutional rights of defendants must be protected. Examples of concerns include implications for First Amendment freedom of religion of mandatory participation in AA/NA 12 step programs that require commitment to the existence of a supreme being; due process right to notice, hearing and fair procedure in termination/revocation proceedings; due process right to fundamental fairness in procedure for testing of drug court participants for drug use; due process right to impartial judicial officer in termination proceeding. ("Ethical Considerations for Judges and Attorneys in Drug Court Cases," National Drug Court Institute, May 2001 (NDCI))
11. Defense attorneys' ethical obligation of competence includes a duty to explore disposition without trial, a duty to become familiar with all sentencing alternatives, a duty to obtain a thorough understanding of the drug court model and court practices and to participate in interdisciplinary training regarding substance abuse and treatment and locally available treatment options. (NDCI)

Missouri Guidelines - for adult drug treatment courts (summary)

12.2 - Public defender has dual roles: attorney for the client, participant in the planning and operation of the court.

12.3 – primary role is as attorney for the client, maintaining the traditional defense attorney function of protecting the client's legal interests while adding promotion of client's physical and mental well being and client's interest in recovery. Although the defense strategies used in drug court may be nontraditional, the PD is not a guardian *ad litem* but is the attorney for the client. The attorney's ethical duties remain the same. The public defender should not

participate in proceedings regarding defendants who are not PD clients and should not advise those defendants.

At the Initial consultation the attorney should meet the client in a private setting before the client has to decide if he or she is going to participate. At that meeting the attorney should:

1. review the eligibility documents and complete the client interview form
2. give the client a copy of the discovery and review discovery and the charges with the client
3. discuss the drug court program – its nature, purpose, rules regarding eligibility, fees, the nature of a therapeutic courtroom, staffings, and adversarial as opposed to non-adversarial processes
4. review the drug court contract and related documents
5. discuss the consequences of complying with or failing to comply with drug court rules, including any system of graduated sanctions, rewards, the nature of proceedings to impose sanctions or terminate
6. explain the legal consequences of successful completion or voluntary or involuntary termination
7. explain the requirement that the client waive preliminary hearing, speedy trial, jury trial, or stipulate to facts or evidence or plead guilty prior to entering drug court and any other rights the client will give up.
8. explain the role of the public defender in court and in staffings and that counsel may request the client's permission to agree to or not oppose imposition of certain sanctions and possible disclosures of attorney-client communications in the course of representation.
9. explain the nature and extent of any investigation or other trial preparation to be done
10. discuss whether pretrial motions may be litigated
11. review the client's alternatives to drug court, the likelihood of success, the advantages and disadvantages; offer advice on whether the client should enter drug court (based on client's legal interests and interest in recovery)
12. if sufficient legal protections exist, encourage the client to be open and truthful to judge and staff re substance use
13. secure an informed and voluntary decision from client as to whether he or she wishes to enter drug court, explaining that entry includes acceptance of role of public defender as explained
14. explain it is client's decision to enter and to remain.

In addition, it is the duty of counsel to:

1. consult with client as necessary
2. maintain a complete file
3. review the discovery. If no opportunity before client enters, the public defender should reserve the client's right to withdraw after entry and not lose any rights

4. investigate as necessary to allow the client make an informed decision and to preserve exculpatory evidence in the event of termination
5. Be prepared for all drug court proceedings; present all beneficial information that is permitted; advocate on behalf of client when it is appropriate and reasonable to do so
6. Avoid conflicts but be aware that representation of one drug court clients is usually not directly adverse to the interests of others.

It is also the duty of counsel to obtain adequate training in the following areas:

1. cultural competence – “culture” refers to a set of customs, beliefs, ideals, linguistic practices, and institutional practices deployed within and, in many instances, peculiar to a given community. In drug court, some of the cultures are professional ones (police, judge, prosecutor), institutional culture as it affects treatment options for the client; lifestyle culture includes demographic markers, family circumstances.
2. treatment issues: the nature of addiction, the spectrum of treatment options (including self-help options), alternatives to drug court, success rates of various programs, treatment of coexisting disorders, net widening, links between domestic violence and substance abuse, use of drug court clients as informants
3. reliability limits of individual drug tests (e.g. potential false positive readings, the standard error of measurement, exceeding minimum testable quantity, poor lab procedures
4. protection of due process rights
5. confidentiality protections for drug records, medical records, etc.

Attachment 5

PUBLIC DEFENSE SERVICES COMMISSION

THE EXECUTIVE DIRECTOR'S ANNUAL REPORT (JANUARY 2009)

INTRODUCTION

2008 was a year of growth and stabilization for the Office of Public Defense Services (OPDS). With the additional positions approved by the 2007 legislature, the Appellate Division was able to recruit, hire, train and integrate eight new criminal appellate lawyers into the Criminal Section and, with a significant amount of assistance and support from the Contract and Business Services Division, was able to open the new Juvenile Appellate Section.

With respect to the provision of trial level services, the Contract and Business Services Division, applying the priorities established by the Commission in August of 2007, was able by December 2007 to enter into contractual arrangements with providers in every county, which met at least the minimal needs of these organizations to survive and provide quality representation around the state.

Throughout 2008 OPDS continued its effort to integrate the administrative functions of its two divisions allowing both divisions to operate more effectively, eliminate duplication, improve efficiency and achieve the agency's performance goals as outlined in its Key Performance Measures and its strategic plan. The Oregon Legislature met in special session from February 4 to February 22. OPDS provided fiscal impact information on a number of legislative proposals but had no proposals of its own. For the first time in many biennia, as of the date of this report, PDSC has not been required to seek additional funding from the Emergency Board or the Legislative Assembly to meet its financial obligations for the 2007-09 biennium.¹

PDSC'S CHALLENGES AND ACCOMPLISHMENTS IN 2008

1. Major Achievements by OPDS's Contract and Business Services Division (CBS)
 - (a) CBS staff administered more than 100 contracts for the provision of legal services statewide. It also processed more than 10,000 requests for pre-authorization of non-routine expenses. The division's five accounts payable staff processed more than 20,000 operating bills and fee statements submitted for payment from the

¹ Of course, the 2009 legislature could still reduce PDSC's budget allocation for 07-09. If a significant reduction were imposed, PDSC might again be required to seek supplemental funding to complete the biennium.

Public Defense Services Account. Despite the high volume of transactions processed, division staff received very positive feedback from its “customers.” The OPDS Customer Service Survey in 2008 received over 200 responses from the 600 contract attorneys, private bar attorneys and service providers to whom it was sent. The individual and overall ratings of division staff in terms of their helpfulness, accuracy, timeliness, knowledge and expertise, and their willingness to provide information were remarkable, ranging from 88.7% to 98% of respondents who rated their work as either excellent or good. A typical comment was, “Every contact I have had with OPDS has been a very pleasant and professional experience. The decisions made by OPDS employees I have dealt with are made with a great deal of thought, respect, fairness, and an overall understanding of the system.”

- (b) Budget preparation – The agency prepared a budget that addressed Essential Budget Level requirements and included Policy Option Packages to improve the provision of public defense services statewide.

2. Major Achievements by OPDS’s Appellate Division

- (a) With a lot of technical and other assistance from CBS staff members, the Juvenile Appellate Section of the Appellate Division was launched. OPDS was able to contract with a highly regarded appellate attorney who specializes in juvenile law, Angela Sherbo, to assist in the creation of the section and the hiring and training of the attorneys and staff. A juvenile case management database was created that will serve as the model for a revised case management system in the Criminal Appellate Section. In May, the section began accepting cases and as of the end of the year had already argued several cases before the Court of Appeals and achieved a reversal of a trial court judgment in a termination of parental rights case.
- (b) With two additional chief deputy positions, the division was able to complete a number of important administrative tasks including revision of the attorney manual. The additional management positions also allowed for the participation of both a team leader and a chief deputy in all team meetings and freed the Chief Defender and the Assistant Chief Defender of some of their administrative responsibilities so they could devote more of their time to legal work. The division now holds monthly all-staff meetings to keep employees informed and to recognize special achievements. The division’s management team meets weekly to discuss legal issues and strategies, and office procedures.

Coordination with CBS is achieved by having the Director of CBS attend these meetings.

- (c) As of January 26, 2009, the Appellate Division reduced the case backlog (cases that have not been briefed within 210 days of record settlement) to 62 cases (50 cases between 210 and 250 days and 12 cases above 250 days). In 2008, the Court of Appeals lowered the “no further extension” (NFE) due date from 300 to 250 days, and the Court of Appeals is expected to lower the NFE brief due date from 250 to 180 days in the spring, which will impose additional strain on the division.
- (d) The Appellate Division continues to increase the support it provides to trial level public defenders through various means. For example, every brief the division files is electronically sent to the trial attorney. The attorney of the day is available as a resource to respond to trial attorney inquiries about specific issues and opinions. The “Appellate Review” webpage contains information about issues under advisement in the appellate courts, links to briefs, and links to several government websites. The AD death penalty unit has agreed to provide focused and direct assistance to the trial attorneys appointed in a high profile death penalty case currently pending in Marion County. Finally, AD attorneys regularly present at CLE events throughout the year, including the OCDLA annual conference, the OCDLA Winter CLE at the Benson Hotel, the OSB Criminal Law Section CLE in the spring, various other OCDLA CLE programs throughout the year, and two half-day AD sponsored CLE programs. The evaluations from attendees consistently indicate a high level of satisfaction with the content and professionalism of AD presentations.
- (e) In 2008, the Appellate Division argued its second case (Oregon v. Ice) in the United States Supreme Court in the past three years. Though the Supreme Court ultimately rejected the division’s position in a 5-4 decision, the division served its client and the Oregon defense community well.
- (f) Technical improvements to AD’s database have provided the ability to generate documents from the database thereby minimizing errors and automating document production. Files are now maintained electronically allowing all users to access case files electronically.

3. Other Activities

Take a Legislator to Court - OPDS in partnership with the Circuit Court Judges Association, the Oregon District Attorneys Association and the

Criminal Defense Lawyers Association organized and participated in a number of events for legislators, referred to as the "Take a Legislator to Court Project." Legislators participated in court visits, the length of which ranged from an hour in one location to all-day events in others. Such visits occurred in Coos, Jackson, Lane, Marion, Multnomah, Tillamook, Umatilla, and Washington Counties. A typical visit included a meeting with the judges, a meeting with the district attorney, a meeting with a public defense provider, observation of court proceedings in criminal and juvenile court, and a question and answer period over lunch or coffee with the sponsors. In most instances a "white paper" was also developed for use by the legislator, which described the operation of the local court system and the role of the participants.

Support of Educational Opportunities - In addition to the direct educational services provided by Appellate Division lawyers and the agency's General Counsel, OPDS staff participated in a number of planning groups which prepared and presented education and training sessions for public defense attorneys. OPDS's Executive Director, its General Counsel and a Deputy Defender II serve on the Education Committee of the Oregon Criminal Defense Lawyers Association (OCDLA). This committee is responsible for planning most of the training events sponsored by OCDLA. In addition the Executive Director serves on the CLE subcommittee of the Oregon State Bar Juvenile Section, the planning committee for OCDLA's annual juvenile law training and on the Juvenile Law Training Academy Workgroup. Service on these committees permits OPDS staff to monitor and make recommendations regarding the scope and quality of training available to public defense attorneys statewide. The Executive Director is also a member of the Advisory Committee of the Juvenile Court Improvement Project. This project is a federally funded Judicial Department project that seeks to improve outcomes in juvenile dependency cases by improving the handling of such cases in the court system. Among other important functions, the project supports training programs for judges, state's attorneys, and children and parents' attorneys. In addition, OPDS and OCDLA jointly planned and presented the annual Public Defense Management Conference for contract managers.

Structural Reviews and Site Visits - In 2008, PDSC reviewed the delivery of services in a number of both substantive law areas and geographic areas of the state. The Commission continued its structural review of public defense services statewide by holding hearings, receiving testimony and other information, and crafting service delivery plans for Jackson and Josephine Counties, and for Grant, Harney, Baker and Malheur Counties. It also received updated information regarding service delivery in Clatsop County. In March, the Commission held an initial hearing on service delivery in post-conviction relief cases. Since that meeting, at OPDS's

request, the Oregon State Bar convened a workgroup of highly qualified members representing petitioners, the state and the court for the purpose of creating performance standards for attorneys in post conviction relief cases. OPDS's General Counsel staffed that workgroup and assisted with all phases of the project. It is expected that the bar's Board of Governors will approve the new standards in February of 2009. In addition, the Commission has begun the review of service delivery in drug court cases, having taken testimony in both October and November. The Commission also began a review of its service delivery plan in death penalty cases at its October meeting and will continue its review at one or more meetings in 2009.

The agency's General Counsel continued the "site visit" contractor evaluation process begun in 2004 by assembling teams of volunteer lawyers to conduct an in-depth review the quality of representation provided in Lane, Crook and Jefferson Counties. With the completion of these visits, PDSC and OPDS have now conducted either service delivery reviews or site visits in all counties of the state, except for Polk and Tillamook.

Statewide Survey – OPDS conducted a second annual quality of representation survey regarding all of its contractors at the beginning of January 2009. Surveys were provided to judges, district attorneys and the Citizen Review Board. Chief Justice Paul De Muniz assisted in this effort by notifying trial judges that the survey would be forthcoming and recommended their participation. It is hoped that the results of this survey will permit OPDS over time to measure the impact of funding and policy changes on the quality of services being provided.

Management Evaluation - As part of its self-evaluation process, OPDS conducted a second annual all-staff survey. Responses to the survey were reviewed by OPDS's management team and agreed-upon changes were incorporated into manager's work plans for the coming year. The performance of all members of OPDS's management team, other than the Executive Director, was evaluated in a process which included self evaluation, input from staff, from other management team members and from the Executive Director. All managers are functioning at a very high level but more effective communication with staff and between managers remains an important goal. Two management team retreats were held. An all-day retreat was facilitated by Geoff Guilfooy in July and a year end half-day retreat originally scheduled for December has now been rescheduled for early February.

Participation in Public Safety Planning – In addition to the meeting with other representatives of the public safety system in the normal course of business, OPDS representatives served on a number of workgroups and

task forces that seek to coordinate the efforts of multiple agencies to address issues within the larger public safety system. The executive director serves on the Chief Justice's Criminal Justice Advisory Committee, the Governor's Public Safety Team and in 2008, the Forest Payments Taskforce Public Safety Subcommittee on Courts and District Attorneys. General Counsel continued his participation on the Jury Orientation Video Committee, a project of the Oregon Judicial Department's Access to Justice for All Committee.

Consultation and Collaboration with Providers and Others – OPDS management team members met with contract administrators in the course of structural reviews, the annual Public Defense Management Conference and in meetings of contractor advisory groups. The Contractor Advisory Group, the new Juvenile Contractor Advisory Group, the Quality Assurance Task Force and the Death Penalty Peer Panel continue to provide invaluable information and advice to OPDS management.

Recruitment and Retention of Public Defense Attorneys - OPDS representatives including its executive director, chief defender and assistant chief defender attended a number of job fairs and recruiting events in 2008. Some of these events were focused on recruitment of members of minority groups. In an effort to increase the number of minority lawyers providing public defense representation, the Contractor Advisory Group participated in planning the first survey of contractors regarding the cultural composition of their staffs. It is expected that the survey will be initiated in February of 2009 with responses due in March or April. Survey responses will allow OPDS and its contractors to identify providers who have been the most successful in recruiting a diverse staff and provide model strategies for others to use. As a result of the PDSC's service delivery review in eastern Oregon in the summer of 2008 and the development of a service delivery plan for that area, OPDS has been instructed to participate in additional recruitment events and planning in order to attract a sufficient number of new attorneys to public defense practice to ensure that high quality representation can be provided in the future.

CHALLENGES FOR 2009-11

1. Quality Concerns. As noted above, while the agency's contract and hourly rate providers continue to provide quality representation in most areas of practice and most regions of the state, PDSC is well aware that in juvenile dependency cases and in post conviction relief cases significant

quality concerns remain despite the agency's continuing efforts to address those concerns².

Post conviction - In post conviction cases the agency increased rates moderately and directed some cases to particular providers whom it believed could provide quality representation. As of March 2008 when PDSC conducted a formal review of service delivery in this area of practice, however, continuing concerns were expressed by representatives of the judiciary, the Department of Justice and practitioners about the overall quality of representation being provided. Since that meeting, at OPDS's request, the Oregon State Bar convened a workgroup of highly qualified attorneys representing petitioners, the state and the court for the purpose of creating performance standards for attorneys in these cases. The agency's General Counsel staffed the workgroup and assisted with all phases of the project. It is expected that the bar's Board of Governors will approve the new standards in February of 2009. In addition PDSC asked the work group to make other recommendations for the improvement of practice. Those recommendations will be received by the Commission at its March 12 2009 meeting. It is anticipated that one of those recommendations will be to create within OPDS or under contract, a group of attorneys who would specialize in post conviction relief and provide training and mentoring to others. The agency's 2009-11 budget proposal includes Policy Option Package No. 101 which would authorize the creation of such a unit within the Office of Public Defense Services.

Juvenile Dependency Representation – Over the course of the last five years, PDSC has evaluated and sought to improve the work of its juvenile contractors through a number of approaches including the site visit evaluation process described above, its complaint policy, a service delivery review conducted by PDSC in 2006, its statewide quality assurance survey in 2007 and 2008, the creation of the Juvenile Law Training Academy Workgroup which sponsors trainings for juvenile lawyers, the creation of a Juvenile Appellate Section in its Appellate Division, and the establishment of a juvenile law resource center for

² The Oregon State Bar in its Indigent Defense Task Force Reports 2 and 3 issued in _____ highlighted these areas of practice as ones in need of improvement. In a 2005 letter from the Audits Division of the Oregon Secretary of State's office, two areas of management risk were identified to the agency: "OPDS may not ensure that contract and private bar public defense attorneys provide adequate representation in juvenile cases," and "OPDS may not ensure that contract and private bar public defense attorneys provide adequate representation in post-conviction relief." In the fall of 2006, at the request of a group of legislators, legislative staff convened a juvenile dependency work group to make recommendations for legislative proposals that would improve representation in dependency cases. The work group recommended that Oregon, like Washington reduce attorney caseloads, increase compensation for attorneys, create a quality improvement resource center for attorneys and establish performance standards for participating attorneys. Had it passed, SB 411 in the 2007 session would have allocated an additional \$23 million to PDSC for the purpose of implementing these recommendations.

parents' attorneys in 2009. In order to achieve the kind of success experienced in Washington State as a result of its parent representation pilot project³ significant additional funding would be needed in Oregon. PDSC's Policy Option Package No. 100 would allocate an additional \$17 million to the agency for the express purpose of decreasing caseloads for attorneys who practice in this area. PDSC has determined that caseloads for these attorneys exceed national standards by 30%, and in October 2006 when OPDS requested a total client tally on two separate dates, many PDSC contract attorneys reported caseloads that exceeded those of their Washington State counterparts by more than 100%.⁴

2. Lack of Parity

As PDSC reported in its presentation to the Public Safety Subcommittee in April of 2007, our trial level public defense system in Oregon has relied for a long time on highly committed veteran lawyers who were drawn to the work by a sense of commitment to public service. It cannot be assumed that younger attorneys can or will make the same kinds of sacrifices these older attorneys have made, especially in view of the sizeable loans the younger attorneys have had to assume in order to finance their college and law school educations. PDSC's contractors, particularly its non-profit public defender offices, report that recruitment and retention of attorneys are at record lows. The table on page ___ of the appendix shows that the salaries of the attorneys who work for non-profit public defender offices on average lag significantly behind district attorneys salaries, even though these attorneys do essentially the same work. The Oregon State Bar's 2007 Economic Survey of bar members indicates that among attorneys in both private and government employment, the lowest paid attorneys were public defenders at an average salary of \$55,388. The second lowest paid were public prosecutors at an average salary of \$78,872.⁵

The other category of public defense providers who have been chronically underpaid are attorneys and investigators who work at hourly rates. Although the 2007 Legislature authorized funds sufficient to increase both these rates in the 2007-09 biennium, that was the first increase in 16 years. For attorneys in non-death penalty cases the hourly rate was increased from \$40 to \$45 per hour. For death penalty cases, the rate was increased from \$55 to \$60 per hour and for investigators from \$25 to \$28 and from \$34 to \$39, respectively. Again, this biennium PDSC has

³ Complete information about the project as well as outcome studies that document its remarkable success may be found at the Washington State Office of Public Defense Website at www.opd.wa.gov under the heading "Parents Representation."

⁴ In counties participating in the Washington State pilot project, attorneys are permitted to have no more than 80 individual parent clients at any given time. In a spot survey in 2006 of its full time juvenile contract providers, the number of clients per attorney varied from a low of 87 to a high of 267.

⁵ The complete survey may be found on the bar's website, www.osbar.org, under "Surveys and Research."

submitted a policy option package, No. 102, that would fund increases to \$70 and \$95 for attorneys and \$35 and \$45 for investigators.

PDSC's overriding challenge is to maintain a statewide public defense system that is cost-efficient but that provides the kind of representation required by statute, constitution and national and local standards of justice. The long term health of this system is in jeopardy when the sacrifices required of providers as a result of consistently inadequate compensation and excessive caseloads outweighs the benefits they receive for providing this vital service to their clients and to the community as a whole.

CONCLUSION

OPDS continued to pursue its statutory mission and the goals and strategies approved by PDSC in its strategic plan for the 2007-2009 biennium. It continued to provide quality representation in criminal appellate cases, created a juvenile appellate section and managed more than 100 public defense contracts, providing representation and related services in more than 170,000 cases during the FYE 2008. The agency has continued to effectively manage the funds devoted to public defense, to promote quality representation in the most cost efficient manner possible, and to provide leadership within the criminal and juvenile justice systems. Challenges remain and it is hoped that at least limited progress can be made toward improving quality in juvenile and post conviction relief cases and toward achieving parity for public defenders with their prosecution counterparts in the next biennium.