Members

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

Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Friday, March 21, 2008
9 a.m. to 1 p.m.
First Floor Conference Room
Aldrich Kilbride & Tatone LLC
1011 Commercial St., NE
Salem, Oregon 97301

AGENDA

1. **Action Item:** Approval of the Minutes of PDSC's February 14, 2008 Meeting *(Attachment 1)*	Barnes Ellis
2. Delivery of Services in Post Conviction Relief Cases – Commission Discussion (*Attachment 2)*	Barnes Ellis and Commissioners
3. **Action Item:** Approval of Service Delivery Plan for Judicial District 15 (Coos and Curry Counties) *(Attachment 3)*	Ingrid Swenson
4. **Action Item:** Contract Approval – Blue Mountain Defenders	Kathryn Aylward
5. Executive Director's Work Plan for 2008 (*Attachment 4)*	Ingrid Swenson
6. OPDS's Monthly Report	OPDS's Management Team

7. **Executive Session:** Approval of Minutes of December 13, 2007 Executive Session Reviewing Performance of Executive Director — Barnes Ellis

The executive session will be held at approximately 12:30 p.m. pursuant to ORS 192.660(2)i.

Lunch will be provided at the end of the meeting for Commission members. Members will convene for a Commission retreat immediately following the lunch break

The next meeting of the Commission will be on April 10, 2008 from 9:00 a.m. to 1:00 p.m. in the jury room at the Jackson County Courthouse, Medford, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

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

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

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Peter Gartlan
Becky Duncan

TAPE 1, SIDE A

[The meeting was called to order]

Agenda Item No. 1 **Approval of Minutes of PDSC's December 13, 2007 Meeting**

MOTION: (inaudible); hearing no objection, the motion carried: **VOTE: 4-0**

Agenda Item No. 2 **Delivery of Services in Post Conviction Relief Cases**

Noel Grefenson and Marc Sussman testified about their experiences as attorneys who represent petitioners in post conviction cases as well as their observations about the post conviction system and recommendations for improvement in representation. Their recommendations included standardization of PCR procedures statewide, a separate scheduling process for the handling of complex cases, an amendment to the venue statute requiring the petitioner to file in the county of conviction instead of the county of imprisonment, and a central PCR office with adequate resources.

Judge James Hargreaves said that the quality of representation in PCR cases in Malheur and Umatilla Counties is poor. Although most cases lack merit, three to five percent may be entitled to relief but attorneys are not pursuing potentially valid claims effectively. New procedural rules will be implemented in these counties beginning March 14, 2008 that will help to address some of the pleading and proof issues. OPDS should provide peer review for PCR lawyers.

Department of Justice attorney Lynn Larsen said that in his experience trials in PCR cases had always been paper trials with rare exceptions. His office deposes the petitioner in every case and submits the record because claims are not well identified by the petitioner and a reviewing court must have an adequate record to review. The quality of representation in Umatilla County was not good when he started handling cases there. He recommended standardization of procedures and more frequent status conferences as possible system improvements. He recommended that OPDS adopt a peer review process and that attorneys be given adequate time and resources to handle the cases effectively.

Erin Largesen with the Attorney General's office has civil litigation experience and was surprised to find that it is common in PCR cases to see poorly developed cases, a lack of evidence, a failure to use civil discovery tools and a failure to identify issues.

Chris Mullmann, with the Client Assistance Office of the Oregon State Bar, said that 32.85 percent of the 2,210 complaints received by the bar in the last two years came from inmates, a significant portion of them arising out of PCR cases. These issues generally do not rise to the level of ethical violations but may constitute ineffective assistance of counsel. The bar generally refers these complainants to OPDS.

Steven Wax, the Federal Defender for Oregon, has handled or supervised more than 3,000 federal habeas cases that came out of the Oregon system. There is a negative culture for state PCR cases in Oregon. OPDS needs to get qualified lawyers to do the work and then needs to monitor their performance. Attorneys need to focus on identifying and developing issues in these cases. They cannot do this without investigating the facts. An appropriate caseload for an attorney is approximately 25 new cases per year.

Drew Chilton handles post conviction appeals. There is a big difference in the quality of representation provided in Marion County compared to representation provided in the eastern Oregon counties. The legal communities are too small in the latter counties and there is too much emphasis on expediting cases. Additional resources are needed but changing the venue statute to permit trial in the county of conviction would also help.

PDSC members and OPDS staff discussed the difficulty of finding well-qualified attorneys to handle PCR cases. The bar has established a task force to create performance standards for attorneys in these cases.

Steve Gorham expressed concern about the new rules for PCR cases in Umatilla and Malheur Counties. He said that a central PCR office would be a good idea if it had sufficient resources.

Agenda Item No. 3 **Contract Approval**

After hearing testimony from Kathryn Aylward about proposed contracts with Kathleen Correll and a new two-attorney consortium in Tillamook County that were not ready for approval with the other contracts in December, Commissioner Greenfield expressed his discomfort with the fact that the Commission had given only implicit direction rather than explicit policy direction to OPDS staff regarding contracts for the period beginning January 1, 2008. He said that if PDSC were to issue an RFP and not receive any bids, instead of asking staff to do the impossible, PDSC should go to the legislature and ask for more money. Commissioners then decided that a retreat should be convened in the near future to permit additional discussion of its role in the contracting process as well as additional issues that had been raised in previous meetings by Commissioner Welch.

MOTION: Mike Greenfield moved to approve the contracts; hearing no objection, the motion carried: **VOTE: 4-0.**

Agenda Item No. 4 **OPDS Compensation Plan**

MOTION: Mike Greenfield moved to approve the OPDS employee compensation plan; Hon. Elizabeth Welch seconded the motion; hearing no objection the motion carried; **VOTE 4-0.**

Agenda Item No. 5 **Approval of Service Delivery Plan for Judicial District 15**

Consideration and possible approval of the proposed service delivery plan for Judicial District 15 was postponed until the March meeting.

Agenda Item No. 6 **Executive Director's Work Plan for 2008**

Discussion of the Executive Director's work plan for 2008 was postponed until the March meeting.

Agenda Item No. 7 **OPDS's Monthly Report**

MOTION: John Potter moved to adjourn the meeting; Mike Greenfield seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

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9 a.m. to 1 p.m.
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MEMBERS PRESENT: Shaun McCrea
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Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
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TAPE 1, SIDE A

[The meeting was called to order]

Agenda Item No. 1 **Approval of Minutes of PDSC's December 13, 2007 Meeting**

003 Chair McCrea This is the meeting of the Public Defense Services Commission. I will be chairing since Barnes could not be here today. The first matter we have is an action item, approval of the minutes. Does anyone have any corrections or comments?
MOTION: (inaudible). hearing no objection, the motion carried: **VOTE: 4-0**

Agenda Item No. 2 **Delivery of Services in Post Conviction Relief Cases**

007 Chair McCrea The second item on the agenda is Delivery of Services in Post Conviction Relief cases. Do you need to narrate, Ingrid?

010 I. Swenson Unless Commissioners would like me to do that there is an outline in your materials. This portion of the process involves hearing directly from the providers, so I think we are prepared to proceed.

013 Chair McCrea Noel and Mark, do you want to present together?

013 M. Sussman It would make sense to me.

013 Chair McCrea Okay. Please do. Come forward.

014 N. Grefenson Good morning. For those of you who don't know me I am Noel Grefenson.

015 M. Sussman I am Marc Sussman.

016 N. Grefenson I am a criminal law practitioner. I have been practicing law in Oregon for about 20 years now. During that period I have also handled post conviction cases. In 2006 I entered into a contract with the state to handle post conviction cases. I would say that the major portion of my practice right now involves handling appointed post conviction cases. I would be happy to answer any questions that you may have as we go along.

Most of the cases come out of certain law libraries. The Oregon State Penitentiary has two paralegals who are actually working for the prison system. There are also jailhouse lawyers who help inmates complete the petitions. The court appoints us on a rotating basis. I know that there are other indigent service providers in Marion County for the overflow cases. In my office we send out an authorization for release of information to prior counsel [inaudible], scan the information and try to organize the materials. There are a lot of challenges in these cases. The cases involve a hybrid of criminal and civil practice. The cases come from all over the state. I will give you an example of a case that originated in a place called Williams, Oregon. I can't tell you where Williams, Oregon is. It is somewhere down south, but the participants lived in a tepee and so I am in Salem, Oregon and I am looking for witnesses in a tepee in Williams, Oregon. That is just an example of how very difficult it can be to investigate these cases. There are great distances that are involved and that is a problem. I use as much of my resources in the office as I can. I use my staff a lot to find witnesses and send out letters. I used an investigator in that tepee case and he came up empty-handed. He couldn't find the witness. Other problems that we have in these cases would probably include just the claims themselves. The inmates have a right, an obligation if you will, to ensure that all viable claims are raised. There is really not a procedure set up for doing that. I know that ORCP 17 talks about not certifying claims that you don't really believe in, or that you don't have a good basis for moving forward on, but post conviction law says that the inmates have to stand up and complain if the claim is not being raised and should be raised. These people are not really in a great position to be identifying claims. Very frequently they suffer from intellectual and emotional impairment. Expecting somebody who is in prison under those circumstances to identify legal claims that practitioners miss is really asking a lot of them. They have a mistrust of the system and so what you end up with is you are forced to raise claims that probably have marginal merit. The alternative, of course, is to simply say; "No, I am not raising the claim." We are not going to go that route and in my experience when you go down that road you lose control of your practice very quickly. The prison system is like growing up in a town of 1,000 people. Everybody knows what everybody else is doing and if you have a significant number of cases and you alienate somebody that has some respect in the institution, then you are going to have problems in a lot of these cases. There is this tension between maintaining a good reputation and managing your cases and filtering out and focusing in on the good claims. What I have done - the first thing I did when I got the contract is I went out to the institutions and found the paralegals and sat down and met with each of them because that is the front end, that is where it all starts. So I sat down with them and asked them what I could do to try and help them. I recognized that they are really in a worse position than a lot of post conviction practitioners. They have incredible caseloads. They are out in the yard with people that are potentially dangerous. They know things about their cases and they have expressed to me that it is a really hard job but they like doing it. What I did is I started sending them resources. I sent them case law. I did whatever I could to get information into the prison law library and it has worked really well. They write me frequently and ask me for cases, for information to look up, and I do that for them. In return, when I have problems in cases they let me know. I have asked them to put their own initials on the petition so that I know what paralegal is handling what case. So far, since '06 I think I have had one bar complaint that was from somebody who wasn't even up at the law library. I know bar complaints are an issue in post conviction cases. That has worked out really well. I

have done it in OSCI as well. I have not had an opportunity to do that in other areas because I have very few cases outside Marion County.

094 Chair McCrea How many cases do you have at a time?

095 N. Grefenson How many cases am I appointed to at a time or do I handle? I probably have 30 cases going on at a time. Some of the cases are resolved immediately. The inmates don't understand that, for instance, if there was a plea agreement, they don't understand that if they overturn this plea they are not going to be released and set free, they're going back to face all the charges that were dismissed. Once they realize that then reasonable minds prevail and quite a few of the cases are resolved that way. In other cases people just decide they don't want to pursue them anymore. There is a good percentage of the cases that drop out relatively quickly and then there are other cases that are just huge, nightmare messes where you have thousands of pages of transcript and you read, and read, and read, and read. That is why I scan things in. I go back to the office and I read lots. From my standpoint, I am really careful and I try to make sure that I don't get bogged down in cases. I try to move them along and keep on top of them, because I know that, historically, other practitioners have had significant problems in that area. They have had a contract and they have received cases and just got bogged down in the cases. I have seen - I do some federal habeas work as you know - and I have seen pleadings come in that, it seemed apparent to me and this was some time ago, but it seemed apparent to me that nobody ever read anything in the case. I can see how if you got bogged down and overwhelmed in cases that that would probably be you reaction, just a claim that says, "ineffective assistance of counsel for failure to call witness", without identifying who the witnesses were and how they were affected. It would be great in civil practice if you could do that without a motion to make more definite and certain; you could just come into trial and throw the kitchen sink in, but I don't think [inaudible].

122 Chief Justice De Muniz Noel, I am interested to know how many cases you handle a year? I couldn't get that from your answer.

125 N. Grefenson Last year the contract was for four cases a month.

127 Chief Justice De Muniz Are you paid by the case?

127 N. Grefenson Two thousand dollars per case is what they pay me. I can't speak for anybody else.

129 K. Aylward It is $2,100.

132 Chief Justice De Muniz So you have how many cases a month now? Four?

132 N. Grefenson That was last year. Probably five a month this year.

134 Chief Justice De Muniz What percentage is that of your practice?

136 N. Grefenson Probably 50 to 75 percent.

137 Chief Justice De Muniz Do you have an investigator on your staff?

137 N. Grefenson No. I use investigators from other areas.

140 Chief Justice

	De Muniz	So out of your five cases a month, how many do you use an investigator on?
142	N. Grefenson	I can't answer that question. Not many, but I have to tell you that my staff does a lot of that. I run witnesses down.
145	Chief Justice De Muniz	What kind of discovery do you engage in typically?
146	N. Grefenson	I will get information from the District Attorney's Office. I will get information from trial counsel, trial counsel's file. I will get medical records. If there are medical issues we immediately send out authorizations for release. I will get crime lab reports, if they are not in trial counsel's file, which oftentimes they are not. I get my hands on whatever I possibly can.
151	Chief Justice De Muniz	Do you utilize the civil discovery process?
152	N. Grefenson	Requests for production of documents?
152	Chief Justice De Muniz	ORCP.
153	N. Grefenson	No. I have not had to do that. I just send the authorization to request them.
154	Chief Justice De Muniz	Do people always give you the information?
154	N. Grefenson	Yeah, the only place that I have had issues has been in capital post conviction cases in Multnomah County where I sought the district attorney's file and they didn't want to turn the file over. I think what we did was we had it transferred to the Attorney General's office and then I took my scanner over there and I scanned all of their materials in that way.
159	Chief Justice De Muniz	Have you ever taken a witness's deposition in a post conviction case?
160	N. Grefenson	Yes.
160	Chief Justice De Muniz	How frequently?
161	N. Grefenson	Not frequently. Usually I use affidavits for witnesses.
161	Chief Justice De Muniz	How many hearings on these cases do you have a year, actual hearings?
162	N. Grefenson	In every case we have a hearing. Now if you are talking about calling witnesses …
164	Chief Justice De Muniz	I was going to get to that next.
164	N. Grefenson	Um, most of the time you are not calling live witnesses, you are doing it through depositions and you are doing it through affidavits, so infrequently.
166	Chief Justice De Muniz	How do these get docketed? Your practice is mainly in Marion County, right?
167	N. Grefenson	Correct.

168	Chief Justice De Muniz	How do these cases get docketed in Marion County? Is there any priority or how to they get set?
170	N. Grefenson	I am not sure I understand.
170	Chief Justice De Muniz	How do you get a case on for hearing?
170	N. Grefenson	If you get appointed to the case then the court sets a status conference. Each of the judges has a different approach. When the case is ready to go, you notify the court and set up a hearing.
174	Chief Justice De Muniz	Is it individual calendaring or is …
174	N. Grefenson	Individual calendaring.
174	Chief Justice De Muniz	So if the case gets assigned to an individual judge from the beginning?
175	N. Grefenson	That judge is who appoints me.
176	Chief Justice De Muniz	Can you tell us how long it typically takes, in an average case, from the time you get the case until there is a decision by the circuit court?
180	N. Grefenson	In an average case, about eight months.
180	Chief Justice De Muniz	About eight months?
181	N. Grefenson	I would think about eight months. At least eight months.
182	Chief Justice De Muniz	We won't let this answer leave the room. What do you consider the attitude of the circuit judges that you deal with about handling these cases?
187	N. Grefenson	I have not had judges tell me that they are a pain in the rear. I don't think there is a poor attitude.
188	Chief Justice De Muniz	I am not saying that there is. I am just asking what you think.
190	N. Grefenson	I think their attitude is that it is just another case to process and they process it. They are different in the sense that lots of times the inmates will be writing the court directly and they can be very difficult. I am sure that there is some alienation that goes on in that respect. Usually in private practice you don't have your clients calling up the judge up and saying, "This is a corrupt system and you are a part of it."
197	Chief Justice De Muniz	Do these cases get spread out evenly among the fourteen Marion County judges to your knowledge, since you are handling most of these cases, or is it centered on one or two judges?
200	N. Grefenson	No. They are spread out pretty much evenly. I think that the judges out at the annex are probably not doing post conviction cases because they are out there handling arraignments

and things of that sort. I know that all of the other judges have them except for Judge Wilson. I think Judge Wilson does a lot of criminal cases so I haven't had post conviction cases with him.

204 Chief Justice De Muniz — Thank you. Thank you for the hard work that you do.

206 J. Potter — Just a quick follow-up. In those cases where you do use investigators, the investigators are not paid out of the money that you receive for the case, right?

207 N. Grefenson — No. Those are extra expenses. We request those expenses and it is the same thing for psychologists. I know I settled with the Attorney General's office, or we are in the process of settling it, a case where defense counsel did not call a psychologist so we got a psychological evaluation. Some of those cases never make it through the system because we are settling them. I have to tell you that, from my perspective, the Attorney General's division that handles the post conviction cases are incredibly easy to deal with when you have issues and you need information. And I am not just saying that; it's true. It has been that way ever since I have been doing post conviction cases. They are real easy to deal with. If you need extra time, if you need information, if you need particular documents, they are usually happy to provide them to you, and vice versa.

221 J. Potter — And from your perspective dealing with OPDS and getting the funds necessary for investigation and psychologists, are you having any difficulty getting funds?

222 N. Grefenson — No. I only do it when I need to. In every case I am not asking for an investigator. I could do that and I could have investigators running all over the place, but after you go through the case you can figure out where the heart of the case is, what really went wrong, and you try to focus your resources on that. I can tell you one of the other issues that I have is successive petitions. I have got probably at least three or four cases now where the conviction is from the 1980s and the person has been all the way up through the federal system and litigated extensively in the federal system and the case has come back down. The way that we handle them is through motion practice. You end up having to go through the motion to dismiss, the motion for summary judgment and they actually take quite a bit of time. The idea was, I think, that some of those cases would be dealt with relatively quickly and easily and you could focus on the harder cases. I got involved, and I will just tell you quickly how I got involved in doing this. Peter Ozanne, who was appointed Executive Director, approached me and indicated there was a problem with post conviction and asked if would I handle them. I can't speak for him, but I think in his mind the idea was that sooner or later they should probably have a kind of public defender type program that was set up to do these cases. I had no clue what the funding would be, but I told him that I would agree to do a contract and I would try to figure out how you could set up a system for handling these cases efficiently, and then bailing out. I had no intention of running things [inaudible].

250 M. Sussman — Was that a lead in for me.

253 Chair McCrea — Why don't you go ahead and talk, Marc?

254 M. Sussman — I came to this post conviction work from a slightly different perspective. I have been practicing criminal defense for the better part of 30 years. It's been a little over 30 years that I have been practicing law. I wound up kind of accidentally getting into post conviction and habeas corpus cases about 13 or 14 years ago. One of the things that happens is that if you put in a lot of work on the case, a post conviction case, word sometimes gets around and other inmates start calling you. Over the course of the last year or so I have developed, as a significant side part of my practice, a post conviction practice. It sort of dovetails with the comment that Noel made because I get a lot calls and a lot of requests on cases out of the prisons in Eastern Oregon. Interestingly, I have been getting fewer calls, especially in recent

years, out of Marion County. Most of the cases that I have been getting retained on over the years have been out of Two Rivers, Eastern Oregon, and Snake River. It points to one of the issues that I know was addressed in your materials and the literature and it has to do with the perceived quality of representation. It has to do with caseloads and the way the cases are handled and the kind of representation people are getting in post conviction cases. My experience has been - I have been a public defender, I have been in private practice, and for the last 20 years I have also been doing death penalty defense. I now am a contractor doing death penalty defense and as part of that practice I do capital post conviction cases. Paul, as you probably well know since I have made a career out of representing someone Paul represented years ago, for about the last 13 years. All of the state post conviction cases that I have, that are non-capital cases, I have come to in a different way. I can select the cases and when I say I can select them, there are two parts to that. I can decide whether or not there is merit to case, but I also feel an obligation to the clients because frequently people will call me and say, "I have a case. I have an appeal going," and I have to sit down and consult with people who call me to talk about the issues in the case and what is going on there. A lot of times people are coming to me and basically the idea is they want to retry the case. I will do some preliminary work to look at the case to see if I think there may be some legitimate issues for post conviction relief before I take on the case because, since I am charging private attorneys fees and I have an idea in my head what needs to be done to do a case properly, I am going to then be tapping into significant resources that most people, and we are talking about family members, are willing to put up. It is a lot of money. There are times when I will simply say that I am not going to take the case because I don't feel like I can accept it if I don't feel there is some merit to the case. Depending on where it is, I am more or less comfortable in recommending - and I always tell them in court - they are entitled to appointed counsel. But there has been a huge disparity and range of quality of representation that people get from appointed counsel in post conviction which is partly why I have developed a practice over the years. Again, please, I'll answer any questions at any point in time. But looking at the materials that you received here I notice what Wendy Willis presented in terms of what goes into the preparation for a post conviction case. I have to say that that probably describes how I approach and prepare a post conviction case. Sometimes I get into a case after somebody has filed the petition. More often than not I get into a case, a private case, when somebody contacts me to work up a case and look into it. Then I will work with the person for a while before we file the petition, keeping in mind the time limits. The federal one year statute of limitations is in place and that is a timeline to keep in mind. The interplay between the federal habeas corpus requirements and federal timelines is something that very much informs how I approach post conviction cases because there are two levels. First, to give the client the best chance of success at the post conviction level I need to make a record on the federal issues in the post conviction process, but I also know that if I do not fully develop the evidence in the case and present a complete factual record that if the case is not successful in the state courts, the federal court will not give my client a chance to present new evidence or evidence that could have been presented, and wasn't, in the post conviction proceeding. If I don't carefully look at the issues and raise them on the federal issues the risk is that my client will not be able to raise those issues in federal court. One of my earliest cases was a case on which I was retained to do the post conviction. I did not handle the appeal. I took the case on again in federal court in habeas and I wound up arguing it in the Ninth Circuit over an issue where the appellate lawyer had not specifically cited the Sixth Amendment in the claim of ineffective assistance of counsel in the petition for review to the Oregon Supreme Court, although he relied on the briefs below. It was an historic lesson in how important it is to make sure that we raise and preserve all of these issues and make the appropriate record in post conviction proceedings. The other point is that you have to look at what the issues are and what the main issues are in post conviction. Well, as the materials tell you, most cases revolve around the issue of ineffective assistance of counsel. That is because under the statute and under our jurisprudence, if a constitutional issue was raised in the trial court and on appeal then it is not an issue that can be raised in post conviction relief. A motion to suppress issue or a statement in violation of Miranda - if the issue was raised we can't re-litigate that. If it wasn't raised then one can raise that but it has to be raised in the context of the attorney's

failure to raise the issue. What does that mean as a practical matter for counsel in the post conviction proceedings? The requirements or standards for proving a claim of ineffective assistance counsel mean that you have to show that the attorney failed to do something. There was some omission that prejudiced the client. You have to show that there was a serious error or omission by the lawyer. Even if you can show that you don't prevail unless you show that there was prejudice to the client. A great example is one case the state cites in their trial memos to us all the time. It is not enough for the client to say, or the petitioner to say, "I told my attorney about a witness who could have shown that somebody else had the drugs when we were all stopped." You can come in and the lawyer can say, "Yeah, I didn't call the witness. That witness might have said that they had the drugs." But the post conviction lawyer would have to find the witness, bring in the witness, or show that the witness was available and actually would have said, "Yes. They were my drugs." Otherwise the petitioner has failed to show prejudice. What this means is when I go back and I am looking at a case, I am looking at it from almost two perspectives. I am looking at it from the perspective of a trial lawyer who is looking at the case from the beginning and looking at what would need to be done if I were starting this case fresh and analyzing this case and preparing it and looking at potential defenses, not just at what the lawyer did but what needed to be done in this case. What was done? What was not done? Were there witnesses who were not interviewed? Were there defenses that were not explored? Were there areas of expert testimony that could have been used that were not used? Then I work that up from the perspective of the trial lawyer. There is also the perspective that is something like appellate practice because you are not really dealing with this as a jury trial case where it is tried as a complete factual record, we are also applying legal standards to the issues that we are presenting so that the trial memo that I prepare and present to the court involves a fairly significant amount of legal analysis and I am applying the facts of the case as well. You are basically combining some of both of those elements. As I say, it is routine for me I think in almost every case that I work up to use an investigator because I am almost always raising claims of failure to investigate. I do that because one of the most fruitful areas of post conviction practice, where relief has been granted, is where you can show there has been a failure to investigate, a failure to call witnesses. In the course of that sometimes we will discover other kinds of post conviction errors. The greatest successes I have had are with cases involving a failure to investigate or failure to present certain defenses. That means investigating and consulting with experts and calling those experts and presenting those witnesses and evidence at trial. Those can dovetail with some of the practical issues in terms of preparing the case, the way the process is set up, and particularly because of the logistical difficulties of preparing and presenting these cases for trial in eastern Oregon. There is a tremendous dynamic toward presenting a case on paper. The trials in Marion County are scheduled for appearance at a particular time. I can ask for more time and may do so depending on the complexity of the case. The court will accommodate that. But as a practical matter, what happens in eastern Oregon cases is that most of the cases now are being heard by retired judges, which I will say from my perspective, is a great system because you have judges who have time to read the materials and read the record. They are not so bogged down in a large volume cases and they are less likely to be as jaded perhaps as one can get if you are doing post conviction cases for years and years. The problem with that is the judges are typically hearing the cases here in Salem in a hearing room at the Justice Building. Now the Attorney General can appear at that and on occasion, if I make special arrangements, I can be there, but it means then that I would be a hearing room in Salem and my client would be on the video screen, monitor, in prison on the other side of the state. The other logistical problem in the presentation of cases is this: if I have a case in Malheur County or even if I have a case in Umatilla County, that is the venue for the trial. The hearing room is not equipped, is not set up, and I cannot bring a witness to the hearing room to testify in most cases. I have been instructed that if I want to bring a witness to testify it needs to be in a courtroom in that particular county. That is what I have encountered sometimes. In terms then of trying to present a case and call witnesses the system is not always conducive to trying the case the way I would like. I often rely on affidavits for tactical as well as practical reasons. I also do depositions on a routine basis. What depositions I do vary in the case. I

obviously have to be concerned about cost factors if the clients have retained me. I have been doing them regularly, and particularly now with cases where I am raising claims of failure of counsel to raise motions to suppress, I have actually got to do hearings. I have to bring in the police witnesses, and provide the testimony that would show what the record would be so that the post conviction court can say, "Okay, if this suppression issue had been raised…," and so that means deposing police witnesses. And, under the Rules of Civil Procedure, if I understand things, I need do to the deposition where the witness is. Sometimes we are doing depositions all over the state. I had to do one case between Baker City and Enterprise up in the mountains an hour from John Day, and had to get the officer served and go through that process. I will frequently use records depositions as a means of getting records from agencies or sources that would otherwise not be prepared to hand them to me.

512 Chair McCrea — Mark, how much of your practice is post conviction? I know you do capital cases as well.

514 M. Sussman — I would say now that about 25 percent of my practice, besides the capital cases, has got to be post conviction work.

519 Chair McCrea — What I am getting from both of you is how complex this area is. I have had personal experience with both of you, with Noel because he had to depose me in a federal habeas case, and I testified for you as an expert, and both of you were very, very prepared and very helpful and very knowledgeable about what you are were doing. I know you are here to give us basically an overview and I have a twofold question. The first part is what is your take, if you are willing to tell us, on how the rest of the PCR attorneys are doing? The second part of the question is what do you see we can do to improve PCR? He is looking like the deer in the headlights.

532 M. Sussman — No. I am just processing. As I said to you in the beginning of the case, my post conviction practice built up. These cases started coming to me, people started contacting me because the quality of representation in parts of the state in post conviction practice has not been good. Some of those attorneys, or individual attorneys who were providers, may not be doing them anymore, but the reality was, and I say this again having come from a public defender practice, and understanding the differences in caseloads and dynamics between private practice and public practice, that when cases are done on a volume basis and the pay per case is sufficiently low, there is sometimes a built in dynamic which works against putting in the type of effort and time that is required to work up a post conviction case where there are legitimate issues. Sometimes cases don't necessarily start out when you first look at them as appearing to have legitimate issues. But when the investigation and the work on the case is done you find they do have them. That takes time with the client and it takes time looking at the materials in the case. Sadly, if you have a volume of cases and you don't have the support, the work isn't going to be done. I have come to think that if you do move in the direction of setting up a statewide office that can handle post conviction that would be appropriately staffed and have the resources to do the cases, that it could provide more uniformly competent representation for indigent people who are doing post conviction cases. I am getting closer to retirement so if it dries up my practice that is fine. The important thing is getting quality work done.

576 J. Potter — Do you think it would dry up your practice? Is it safe for us to assume that you are getting paid more than $2,100 on a case?

581 M. Sussman — That is why I don't have a lot of them. There have been cases that I have taken on at reduced fee levels and I have capped my fees on cases, because once I get into cases I have an obsessive quality and I know that sometimes I can't keep charging for everything. I have had cases where I reduced my fee or capped the fees, particularly where I have seen or felt there was a serious injustice at trial. But will it dry up my practice? I think not. I think in the end one of the other things that fuels the practice besides the quality of representation has been Measure 11 and the long terms that people get.

600 Chair McCrea Noel?

600 N. Grefenson What was the question? What you could do to improve the process?

601 Chair McCrea Well, the question was how do you rate the quality of PCR in Oregon generally, and then how do you think we can improve?

605 N. Grefenson It is average. It could be improved. If I was going to start out fresh, I would probably want to standardize some of the procedures. Various courts have different approaches. One will give you 30 days to file your petition. We have recently meet with one of the Marion County judges and figured out that we needed at least 90 days. I want to say 90 or 120 perhaps, days to get the pleadings filed. I have gotten different rules from different judges and some standardized procedure would be helpful. A complex case designation would allow you to separate out the cases that really don't need, from your perspective, as much attention from those are going to take some time. Some of them just take a long time to resolve. It is not unusual to have a post conviction case, a bigger case, going on for a year. The capital cases are a whole different area. I am moving out of doing capital post convictions when I can get away from them. It is a resource issue when you get down to it. If you give me five cases a year I can litigate every one of them like a capital case. As caseloads increase it becomes harder to do that.

632 Chair McCrea So do you think a public defender or a central office would be a good thing for us to have?

635 N. Grefenson Ultimately yes. Definitely. I think there are a lot of logistical problems. One of the things I did when I first started doing this is I contacted Snake River to see what video equipment they have because I was thinking it would be nice to be able to interview clients from your office. You have to have staff in your office or you loose control of your caseload. I have to take phone calls or have staff take phone calls. If I could have personal contact through video conferencing it would be wonderful. I have clients that are over in eastern Oregon and they understand that we talk by phone, but it is not the same as sitting down and talking with somebody. A public defender office could probably set something like that up. I saw some numbers, maybe 600 and some post conviction cases a year. I don't know how many attorneys it would take to do that but I imagine it would be substantial, so you would have to have the resources. Would it be desirable? I think ultimately, yeah.

658 M. Sussman If I could add just a couple of things to that. In creating a central office, client contact is real critical. Phone conferences are not always easy with the prisons in Oregon, although some are better than others. I try to get over to the prisons and see my clients periodically. I think that is essential. The public funding for travel would have to be a serious consideration. One of the things that is an issue in a case and that can drive up the cost is the location where the cases are tried. Because the law says that the case has to be filed where the person is in prison and doesn't give you the option of filing the case where, or close to the place where, the offense occurred, it means you may be going out to Malheur County or Umatilla County to try the case involving witnesses and events that took place in Coos County. If you call witnesses and things like that you have a venue problem. At some point, if there are recommendations for amending the statute to provide some flexibility in the area of where cases are heard, it might make the system a bit more efficient.

688 Chair McCrea Questions from other Commissioners?

689 Hon. Elizabeth Welch On this ethical issue, it is fascinating and obviously involved. I am curious if you have only retained clients.

696 M. Sussman No, my capital post conviction is not retained work.

696 Hon. Elizabeth Welch — Leave those out.

697 M. Sussman — Yes. All of my other post conviction clients are retained.

698 Hon. Elizabeth Welch — How many of them do you tell, "You don't have a case?" What is the percentage?

703 M. Sussman — I would have to think about that for a second. I would say about 25 percent of the people who contact me I tell that I won't take on the case at all. There may be a smaller percentage where I will review a case and may tell people, "I don't feel comfortable taking it on," and then help them continue the process with court appointed counsel.

715 Hon. Elizabeth Welch — How many would you like to say no to? Would you mind answering that?

718 M. Sussman — To how many do I say, "You don't have a case?" A fair percentage, a fair percentage where I don't see anything there. But they have a right to go forward with the case and I can also qualify that by saying, "I have said that before and been completely wrong." There have been cases where there was a real good case, a real good issue, and I thought they didn't have one. I am careful. I came to the conclusion, and this was a long time ago, but I went through an aggravated murder post conviction case that came out of Springfield. I went through everything. I used experts, and I went through this case and put in a lot of effort and came to the conclusion in my own mind that the person was responsible for the offense. And the person was innocent. In a separate case that was going on for a co-defendant it was determined that someone else had committed the crime and we went and picked the guy up at the prison and he was absolutely innocent. I have been very careful since then because I was completely wrong. These guys are in custody. They are in prison, and they are very much in need of help.

744 Hon. Elizabeth Welch — So you would proceed with all of those, is that what you said?

745 M. Sussman — I proceed with the case if I am instructed to proceed with the case. If I can't certify the claims because I don't feel they have any merit - there is no procedure really for doing that - but I will file an amended petition and I will indicate in there that I am not certifying these claims under ORCP 17, but I sign off. I go forward with it or the inmate will file their own petition. There is no real procedure that I am aware of. I know the case law seems to say that the petitioner has an obligation to stand up and complain, but it would be nice to have some set procedures so that those claims could be addressed.

760 Chair McCrea — Anybody else? Thank you gentlemen. Next we will hear from Judge Hargreaves on the challenge of representing clients in post conviction cases – the view from the bench.

767 Judge Hargreaves — I am Jim Hargreaves and I am the senior judge out of Lane County. Until about five years ago I had never seen a post conviction case or read a post conviction statute. When I began to do my 35-day pro tem work for my retirement I got called and asked if I would come to Salem and try some cases on television. I knew nothing, truly knew nothing, and over the last five years I have tried several hundred now and know a little bit more than when I started. I have kind of a unique and narrow view that I think is important for everybody to understand. My experience in post conviction is with Malheur and Umatilla Counties. That is my view of post conviction. Snake River, Two Rivers and EOCI, they are my friends. No they are not. So I can't talk about the rest of the state. I don't know what goes on in the rest of the state. I can tell you that when I started trying these cases, and this is – I guess I can say it here because I have said it lots of other places - I was appalled. The quality of the lawyering was

appalling. It was a combination of what I believe was – some were just bad lawyers; some were good lawyers doing bad work. I was stunned because having been a judge for 20 years I had sat around the state some from pro tem work and what not. I had just never seen that low a level of practice anyplace. It became clear to me that the standard procedure was that prisoners would file these petitions and many of them were just long laundry lists of anywhere from 10 to 30 or 40, a list of, "My lawyer didn't"s. They would ask for a lawyer. They would get a lawyer and the lawyer would be given, at that time I think it was 30 days, to file an amended petition. The amended petition would be filed and it would be the same laundry list right down to the misspellings, literally down to the misspellings. All we had in a great number of cases was simply petitions that looked prettier. Somebody had been a scrivener and given this to some typist to put in a pretty format, but it was absolutely the same document. Sometimes there might be a claim added or whatnot. Rarely would you see one disappear, but that it what I encountered. I sort of looked in amazement at this and somebody, maybe Marc, was talking about ORCP 17. People had never heard of that. I started asking lawyers you know, "Did you ever read ORCP 17 where it says, you know, when you sign a pleading that it means something?" They would sort of look at you like, "What are you talking about?" Literally scrivener work, that is all it was, in many, many of these cases. I know that I became somewhat unpopular in these two counties with the lawyers because I simply said it was not going to happen that way, not if I am here so its the luck of the draw when I am going to sit on these cases. I am going to ride you about this stuff because it does mean something. There is a culture in both of those counties that accepts poor practice in my opinion. As I say, to me it is a combination of some who are truly terrible lawyers and some who are good lawyers who are just doing what the culture allows over there. When I began to complain about this and talk to lawyers when they would show up on the T.V. screen with me, they would say, "Well Judge, you just don't understand. These people just have all these things and they want to be heard. They want their claims heard." I understand that part, but I also understand that you as a lawyer are supposed to be lawyering not just being a scrivener. We would go around and around on that and over the five years I would say the practice may have improved a little bit. I think Umatilla particularly still has a very big problem. It has gotten so bad I have actually filed a bar complaint against one lawyer. I am not trying Umatilla cases anymore.

902 Chair McCrea — So are they tried somewhere else.

902 Judge Hargreaves — If I try them I just try Malheur because I haven't bitched to anybody at the bar about Malheur County. Anyway, it is a huge problem in those two counties. I think it is education. It is the quality of lawyers, but it is usually a cultural thing. It is a very small pool of people. It is a bunch of prisoners and changing the culture is difficult. It is difficult for the lawyers, particularly out there because the pool is so small, and it difficult to find people who really want to take these cases and do them. The firms that do them, and they are good lawyers, they do them obviously for the cash flow, but I don't see that their level of practice is a whole bunch better than anybody else's. What they face is I am sure what they face in other places around the state … [end of tape]

TAPE 1; SIDE B

Judge Hargreaves — ... nothing wrong and they don't want to hear some lawyer tell them that that is not a basis for post conviction or we can't prove this. There seems to be this overriding idea that if I don't laundry list everything that can conceivably be thought of that I can't get into federal court. That seems to be the driving force behind some of that. They don't want to hear that they don't have a case. They don't want to hear anything that they don't believe. They also have what I am going to call the claim de jour. You see, over the several years that I have done this; I have watched it change from prison to prison. I don't know if they get new legal assistants or what happens but you will be going along and I know this is Two Rivers and I am going to see these kinds of complaints coming out of Two Rivers. They are going to raise

these issues along with everything else because that is what they do there and some place else it will be the same thing. Then all of a sudden a new issue will pop up. I am assuming that somebody new showed up on the scene or somebody read a new case and all of a sudden everybody has the same problem. It is the claim de jour. That goes on for a while and then sometime later there is another claim. The lawyers that I have talked to say, "You know we also have this problem that we really don't want to make these guys mad because they threaten you. They threaten your family. They file bar complaints. They sue you." There is again kind of this culture that says just go along, get along, get this paper into court and get rid of it. That is kind of what I see. There is the occasional case where there is some real effort that goes into it. My experience has been with the cases out in these two counties that in talking to some of the other pro tem judges and from my own experiences, probably ninety percent of the cases that come down through the system have no basis whatsoever. Then there is probably 10 percent that you need to take a serious look at. Overall, probably three to five percent you can actually do something with. You have this huge flow into the system and the way the system has been working out in Malheur and Umatilla, that whole mass moves down through the system. They all go down to trial and then they get weeded out at trial which has caused a lot of issues both for the AG's office in terms of cost and effort in the courts. You have all these cases going through here and statistically we know 90 percent or more are of no value. They can't succeed and won't succeed but they are in the pipeline. In Umatilla and Malheur they have had a process where they do them by television. I think Marc was describing earlier that as a judge I sit in the courtroom up here with the AG usually. The prisoner and the lawyer are in the prison out in eastern Oregon. What happens is that under those rules out there in those courts all the exhibits that are going to be used have to be filed 10 days before trial. Then those files are shipped to the pro tem judges. As soon as they hit the 10-day mark they go in a box and get shipped by Fed Ex to us. We get them a few days ahead of time so we can read the file because the whole process is predicated on the fact that we have read the files and we know everything that is in there. Once is a while the lawyer will call their client for five or ten minutes of redundant testimony and then you rule. You have read everything and you know what is there and that is why they are scheduled on 30-minute blocks because you have had the opportunity to prepare.

084 Chair McCrea — It is really a paper trial.

084 Judge Hargreaves — It is a paper trial. Absolutely. That is the only way they can get through them, frankly. There are the exceptions. I have had a case with Marc and some lawyers where we have had real trials with real people, real witnesses and real issues. In fact, I had one with your dad one time, but those are rare in these cases. So you have had this problem and I think part of the issue in Malheur and Umatilla also is the fact that all these cases are heard by pro tems. It is mostly senior judges. I think the local judges, let me see if I can say this nicely, the local judges may not be quite as concerned as one might like because they are not trying them day in and day out. They aren't sort of rubbing up against the practice and what it looks like on a daily basis. I think it is sort of an "out of sight, out of mind" issue as part of the culture. That has been my view out there. I guess the main thing to know is that it is going to change rather markedly. The 14th of March, I believe, is the effective date for Umatilla or is it both Umatilla and Malheur? New rules are going into effect in Malheur and Umatilla Counties and that whole process is going to change. Startlingly enough they have decided to follow the statute which nobody in the State of Oregon has done up until now. It is going to make a major change in the way these cases work. I think you have been supplied with a copy of "The Pleading Edge" that I wrote. I have been working with these guys for about a year and a half on trying to develop an approach that meets the statutory requirements and brings some order out of this rather chaotic system that they have. If you read the pleading statute and you read the statutory scheme and you read the legislative history, the statute really says that to go forward with a post conviction claim you have to file a petition and show a prima facie case before you can go forward. That is what is going to happen out in Umatilla and Malheur counties. The scheme has been redesigned so that - when the prisoner files a petition it will never be adequate to begin with, we all know that and expect that - so there is a time built in

of 120 days to get an amended petition filed. This is designed to allow the lawyer to go out, do some investigation, get documents, and pull this petition together to meet the statutory requirement because when that amended petition gets filed, it is my belief that Lynn Larsen's folks are going to jump on it and move against it and move to dismiss it if it doesn't show a prima facie case. By far, the bulk of the cases will not be able to show a prima facie case and they will go away in the pleading stage. The plan and desire is to weed out that high volume of meritless cases early on so that we can then concentrate on and move through the system those cases that have clearly demonstrated some merit. How all that will work I think is all in there. One other comment I guess I am making, and I will just sort of put it out there and let you ask questions, is one of the lawyers was talking about investigating and not being able to find any basis for the claim going forward. Well, ORS 138.590, one of the post conviction statutes which has been there a very long time, is unique in that it requires lawyers when they get a case, if they can't plead a viable claim, to file an affidavit with the court saying, "I cannot find a viable claim." At that point the court can consider whether or not to dismiss. The statute is mandatory and it says, "shall," but as I say nobody has ever followed the statute and some of these things are going to come as a real shock. A couple of weeks ago I did two different video conferences with the prisons out in eastern Oregon and I spent about an hour and a half with each county's prisoners, the legal assistants, teaching them about the new process, new procedures, new pleading rules and whatnot, trying to get them up to speed the best we could and I sent them all the material that has been developed so that they will have that in the law library out there. They are the ones who have the early impact on these cases to some degree. It was interesting to talk to these guys. They said, "Well, we see some but there are lots of people who do them on their own. There are lots of people who talk to other prisoners to do them so we don't, by any stretch of the imagination, see all of them." The other thing that I have found very interesting in all three prisons, and we did the one in Malheur, Snake River, by itself and then the two in Umatilla together. In both of those groups the big issue they wanted to talk about when we got through talking about post conviction was, "Can you do anything about the quality of lawyering out here?" They raised that. We talked about it and at both prisons they said that more and more people are filing their own petitions because they don't want a lawyer. In fact, in Umatilla the legal assistants were recommending people file their own rather than take a court-appointed lawyer. I had a particular discussion with them about these new procedures and, like it or not, I highly recommended to them that they ask for an appointed lawyer because it is almost going to be impossible to follow the statute without a lawyer and get the things you need to get from prison.

182 Chair McCrea — Did they make specific complaints, Judge? Was it, "The lawyer doesn't come see me? The lawyer doesn't contact me, or the lawyer doesn't investigate my case or doesn't do the work on my case?"

186 Judge Hargreaves — All of that. Yeah. The truth is that some are better than others in that regard. It is a constant flow of complaints. As an adjunct to the hearing at the end some guy takes off on the lawyer, or in the beginning takes off on his lawyer. It is a whole combination of those things. That is my view.

196 Chair McCrea — I like your illustration.

197 Judge Hargreaves — I was told the Chief didn't particularly like it. I am happy to try and answer any questions if you have any. That is my perspective of the two counties.

199 Hon. Elizabeth Welch — Tell us about the motion procedure. Who rules on motions? Is that going to be you and the other judges or the local guys?

202 Judge Hargreaves — Under the rules motions are supposed to be heard by the presiding judge. That was one of the things that I pushed a little bit on and I thought it was very important because they need to

develop that consistency. They need to develop that control themselves. If they shove that on to the pro tem judges it is going to be all over the map. I have had discussions with them, what the rule is, and I believe that the State Court Administrator's Office is expecting to be setting only trials.

213 Chair McCrea — Any questions?

213 Chief Justice De Muniz — I don't know that anybody knows the answer to this but do you have any sense of what the forces were that caused this culture to treat these cases as just paper cases?

218 Judge Hargreaves — Well, out there, it was pretty much necessity because once they went to the video process, the stuff that Marc talked about , getting witnesses, getting people in places and whatnot is very difficult.

222 Chief Justice De Muniz — So the system was inhibiting, you think, the lawyer's ability to meaningfully call witnesses?

225 Judge Hargreaves — Certainly in some cases that would be true, but in the bulk of the cases no because they are not going to have viable witnesses anyway. There were very few in the years that I did these, there were very few cases where you even ended up with affidavits of witnesses and that sort of thing. The fact is that you have this whole big laundry list…

233 Chief Justice De Muniz — How can you win a collateral attack on a judgment?

233 Judge Hargreaves — You can't. That is the point. But you have to consider also what you start with which is this laundry list that is, as I say in my experience with cases out there and other judges, 90 percent of them are going nowhere. The ones that do have something, most of those have been paper cases.

240 Chief Justice De Muniz — Would it be fair to say we don't know which ones could have had some merit because they never got developed?

241 Judge Hargreaves — Sure.

241 Chief Justice De Muniz — I am very uncomfortable with the idea that, "Well these cases just don't have any merit." when what you hear is that nobody investigates, nobody calls any witnesses, and this is supposed to be a collateral attack on a judgment. It is not an appeal.

246 Judge Hargreaves — Right. That is another thing that prisoners don't understand.

247 Chief Justice De Muniz — Do the lawyers?

247 Judge Hargreaves — I think the lawyers understand it. Some better than others, but at the same time I think that what you see, and I am guessing here, that if I am a lawyer sitting out there and one of these things gets assigned to me and I see this 26 lines of "my lawyer didn't," I have got to guess that that lawyer looks at that and says, "Oh, another one of those." I am guessing, but I bet they do. They do hire investigators, I know that. On how many I don't know. Are there some that are getting missed in terms of real claims? Probably. I think it would be almost inevitable that there are. Whether your system was such that you could call witnesses easily and whatnot, would it make a difference? I don't think so. I think the difference is in the beginning and in evaluating the case and looking at the claims.

265 Chief Justice De Muniz — How many times do you see, for example, in these paper cases that the lawyer went out and deposed the lawyer or deposed somebody else?

268 Judge Hargreaves — It is more that you get affidavits from them. Sometimes you will get a deposition. The AG almost always takes the deposition of the petitioner, but you get affidavits from the trial lawyers. The thing that I think is missing in so many of these cases is you want to raise legal issues. The trial lawyer didn't adequately cross-examine a particular witness. That is a legal issue. That is not one where I can just sit there and read the transcript and decide. That is something some other lawyer needs to come in and say. It is kind of like a medical malpractice case. "The doctor didn't do this procedure right." Well, as a judge I can't sit there and make that decision. I need some other doctor to come in and tell me what was wrong with that.

280 Chief Justice De Muniz — Or you could have it live; have somebody cross that witness in front of you and show the questions that could have been asked and the answers that could have been given.

282 Judge Hargreaves — That could happen.

282 Chief Justice De Muniz — And considered in the context of the trial, that is what collateral attack is about. So I don't share the view that that is a legal question.

289 Judge Hargreaves — No. I mean a legal question in the sense that you can't just say, "Here is the transcript" and have the lawyer say, "You didn't do this right. You didn't do that right." When I get those claims they always fail.

290 Chief Justice De Muniz — They can't win because they haven't done anything to demonstrate that.

291 Judge Hargreaves — In my experience, when you are going to win one of those it is because you go out and find a lawyer who reads the transcripts and says, "Oh, my God! This guy should have done this and this and asked these questions," and you have some expert testimony, or as you say, you as the lawyer for the person could have called a witness and produced it that way. Yeah, without something like that you are not going to win, absolutely not. I think that is one of the things that is a big deficiency in almost all the cases that I see that raise particular types of issues. There is rarely any sort of expert testimony and when you are raising these questions somebody other than the prisoner needs to say, "He didn't do it right." It almost never happens.

305 I. Swenson — One quick question for Judge Hargreaves, and I would invite all the presenters to do the same. Just because there is a large number of staff here from OPDS, don't feel you can't tell us what you think we can do better. We are open to hearing whatever you have to say.

310 Judge Hargreaves — I think you need some system of peer review or some kind of review system that watches the work that these people do. All this stuff is recorded. You could get CDs and have them burn them and listen to them. You could send somebody around to sit in and watch some of the cases. I think just simply giving somebody a contract and sitting back and letting it fly isn't appropriate. I think, at least in my experience in these two counties, they certainly need to be reviewed because I think the practice is extremely poor. I really think you should have some sort of organized review process where you just don't give people contracts and turn them loose and then deal with it when the lawyer [inaudible]. That would be a huge step forward.

331 Chair McCrea Anything else? Thank you. Do we need a break? Okay, let's go with Lynn Larsen and Erin Lagesen, the prosecution perspective.

340 L. Larsen Technically, we aren't speaking from the prosecution standpoint since, we are one step removed.

343 E. Lagesen We are actually the defendant in these proceedings.

346 L. Larsen I wanted to touch just a little bit on what the Chief Justice asked right before he left. That was what has driven PCR cases to become paper trials? I have been at the DOJ for 18 plus years, and in my experience they have always been paper trials except in a few cases where, sort of like what Noel was talking about, it becomes a complex case. The statute, ORS 138.620, specifically provides for affidavits and deposition testimony. I think as a practical matter they have always been, for the most part, paper trials simply because of the numbers. If you look, for example, in Umatilla and Malheur counties, I don't have full numbers but I would guess there is not a big civil practice there. In Malheur County Judge Yraguen was very concerned to have a 3,000 person prison suddenly come into the community, creating a lot more cases. I don't think the system has been driven to paper trials. I have been at DOJ for about 18 years and we have always had paper trials for the most part. What we have done – well EOCI went online first in, I forget, 1989 or something like that. We would drive out there to do all the depositions. Maybe I should start by telling you what we do in a PCR case first.

378 Chair McCrea Okay.

378 L. Larsen Right now we have about 650 post conviction cases in our office. I think we handle all of the felony post conviction cases in the state. Every once in a while we also do a misdemeanor if the DA wants us to, but generally we do all of the felony PCRs. Now in our appellate division, we have separated it out. I am in the trial division and we have historically handled all the post conviction death penalty cases as well. Just within the last six months or so we rearranged it that so all the death penalty litigation is now housed in our appellate division. Tim Sylwester is the attorney in charge of the capital cases, so any of those cases are now his. Just logistically it was almost impossible to keep them moving because we have six lawyers handling our 650 post conviction cases. I think we had 40-some PCR cases filed this last month. Many of those deal with an opinion that came out of the Supreme Court. But we have to deal with them. A lot of them are intermixed with other claims. Somebody sees a live issue. I think Judge Hargreaves said there is an issue de jour. We get spikes. When *Apprendi* came out we didn't get as many. When *Blakely* came out we had a lot of them. We have to take each one on its own and deal with that. Right now we have 650 cases, six lawyers, and I don't think it is so much the attitude of the courts or even the lawyers, but I think just the press of cases quite honestly. I looked at the number a while back on the total felony prosecutions in Oregon and a couple of years ago it was something like 17,000 prosecutions. Right now we are doing about 1,100 direct appeals a year, so you start out at 17,000 and it goes down to 1,100. We have about 400 post conviction cases filed every year in the circuit courts. Marion used to be the primary one because that is where the prisons were, but it is now about half and half between Marion County and the others counties, primarily Umatilla and Malheur. We have a few cases coming out of Multnomah County, that is Columbia River Correctional Institution, and we also have a few from the women's prison in Washington County. I think it is right inside the line there and so we have a few coming out of Washington County. Every once in a while we get a few out of Coos County. That is where Shutter Creek - I think they call it the Summit Program - is, boot camp and we have now gotten a few cases. I think we are going to have our first hearing out of Lake County. When we were just doing them in Marion County, we would handle almost everything here. We would actually go to the prison.

In almost every case we depose the prisoner, our office does, essentially asking the prisoner, "What are your issues?" By then the person has had a lawyer so we wait until there is an

amended petition so at least we don't do it right after the *pro se* petition. We try to find out exactly what the issues are. We used to go to the prisons here, to OSCI and to OSP in the Parole Board room upstairs. We would go back up in there and have our depositions. We used to drive to Pendleton and Ontario. It takes about two and half days to drive out there and have our hearing and drive back. I know what Mark is talking about with the logistics. Judge Yraguen was instrumental in getting the video conferencing set up. He was used to driving to Lake County and all over the place and he apparently didn't want to do that anymore. I can't blame him. So it got set up with the Department of Corrections as a video with the prisons and now the counties also have video capabilities that are operated through the courts. We have used the Fifth Floor of the Justice Building and while this was all getting moved we had it in the Robertson Building. We do all our depositions by phone. Because of the numbers that is what we decided to do. For a while we thought we wouldn't depose the petitioner because it is fairly expensive for our office in every case, as you might imagine, with 400 a year and the cost of the court reporters is $3.00 a page or something. You add those up over a whole year and it becomes a fairly significant amount, but we still do that with the idea that mostly likely that is going to be the testimony of the petitioner in front of the post conviction judge. Quite honestly if we had to try every case like a regular civil case, I think it would roughly equivalent to having every DA's office try every case. The whole point behind plea bargaining is try to move things along and we all know that it takes forever to try these things. So my answer is that it has not moved toward paper trials, it has always been that way at least since '89 when I started working here. I couldn't tell you, but I have a feeling it was kind of like that before then too. We did just meet with the judge, as Noel mentioned, in Marion County who I think has a good idea. If the lawyers think a given case is a complex case, it gets set on a different timeline and we are able to approach it that way. I would agree with Judge Hargreaves that a good percentage of the claims don't appear to have a lot of merit. The challenge for our office, or the petitioner's bar, is to sort through everything. I was a criminal defense attorney when I first start practicing for a number of years. Then I worked for the federal court in Eugene for a number of years also, so I saw it from every side. I think even now I still have sensitivity to the plight of a criminal defense lawyer, given the time constraints that they have with the 60-day rule especially if someone is in jail or in prison and that person doesn't want to waive the 60-day rule. We have had a number of cases where, for example, the petitioner is bound and determined to get a trial within 60 days and the lawyer keeps telling him, "Hey, I don't have the time here. I don't want to go ahead." So then we get a claim of ineffective assistance. What I see, and I think somebody mentioned the list of claims, there will always be a tension between the federal court and the state court. In federal court there is a principle that if you have not raised a federal claim about an issue the federal court will not review it. Part of our thinking should be to orient our entire system based on what is going to happen in the federal court. That is a bigger decision than one just for me to make. My office also handles all of the federal habeas cases, and right now I think we have about 400 federal habeas cases pending also, so we handle them all the way through the system. That is a concern and that is something the Commission should look at. Even under Judge Hargreaves proposed rules – well, I guess they aren't proposed rules anymore - he says the petitioner can file the *Church v. Gladden* notice. *Church v.Gladden* essentially said that it is up to the PCR petitioner to make sure you have all the claims straight. An ethical problem does arise under ORCP 17.C if a lawyer truly believes there is no valid claim but you have to preserve an issue if the petitioner wants to preserve it. The lawyer has a problem there too but I think that is a good compromise. In Malheur County for a while there was a general lawyer out there who would file a *Church v. Gladden* petition or something and include a whole bunch of claims that petitioner wanted. There is always this tension of trying to know what the valid claims are. I might add that our office, on a number of occasions, though we work hand in hand with the DAs, we also try to be as objective as we can as advocates. I don't know how objective anyone is as an advocate. We look at them and if we are given what we think is a reasonable argument we do settle them. What happens is as we are going through the system our settled cases won't show up later and won't show up in federal habeas. We settle cases in federal habeas. Just so everyone knows though, what we generally try to do is get buy-in from the DA's office. We don't just like to pull the case out from under them.

Somebody has gone to a lot of trouble and a lot of expense and so we generally try to get that agreement. We have had a couple of occasions where we haven't. Generally, the tie goes to the DA's office at least that is how we have had to approach it.

We depose the petitioner in almost every case. We are in a bit of a unique position in that we talk with the DDA who handled it, but we also talk with the trial attorney. We don't represent the trial attorney, we represent the people. If they win a conviction we want to get the information we can from the trial attorney. Some are very cooperative. Some aren't. We have a view on what happens to the ethical obligation to a client by the time an allegation has been made. Under the Rules of Professional Conduct I think our position has always been that once a claim has been made against somebody all bets are off as far as the allegations are concerned. We can't ask them about anything that doesn't pertain to the allegations. That has been our position. We are looking at both sides and then, of course, we will get an affidavit from the attorney. Either they will write us a letter or we will work with them on an affidavit and prepare that. As you might imagine - I know when somebody asks me about a case that I worked on however many years ago - you put it away; you never want to look at it again and you have it in a file box someplace. That is what Erin does for us. I think there is an inherent tension or something when we go back and talk to the trial attorney. You are being accused of doing something wrong and they don't like to talk about it. They don't want to pull it out and quite honestly they aren't getting paid for it. That is maybe something you could think about because the person who may have been paid by OPDS or the state to represent somebody years later has to pull out everything again. They are getting no money for it. I have always thought, "Well, I don't how you would ever get paid later to talk about what you did." I think that has always been an inherent tension. Like I said, we have 650 cases with six lawyers. Out of necessity we have an essentially reactive practice because we have to deal with the claims as they come to us. Most of the time we will take a quick look at the transcript and we have an idea of what has happened. I will have to say that we don't look at ourselves as an appellate court in the sense of judging if I had been doing that I would have done it quite differently. We have to say, "Well, this is what happened; can we make a case or not? In most cases our office submits, if there is a trial we will submit the trial transcripts. If it is a plea there usually will not have been an appeal, so we will have to go out and get the plea transcribed. If there are any witnesses who we know are out there we will usually go and try to talk to them. The whole issue of the expert witnesses and the ORCP and all that in some ways has caused a little problem in that we don't normally hire an expert because the economics of it don't work if we don't see that there is a real issue. We had a big case recently in Marion County where we had to hire a couple of experts and the other side had a couple of experts. It was one of those complex cases where we hired a lawyer, we hired a psychologist. But if we had to do that in every case what would happen to our office? Quite honestly the cost would be pretty prohibitive, but we try to at least get the full record of what we can get. We also then prepare a trial memorandum and the rather interesting part of it is that everybody submits a trial memo at the same time, so you don't really know what the other side is saying. In my view, the better practice would be if the petitioner would submit something, we submit a response, and then the court rules. I don't know if that would require a statutory change or a rule change.

703 Judge Hargreaves — That is going to happen in Malheur and Umatilla under the new rules. You will have a structure like that.

706 L. Larsen — So you are sort of blindly shooting at the issues. In federal habeas the way we handle it is at least one side will submit a memo, the other side gets to respond and sometimes it goes and on. At least then you know what the issues are. That is one possibility. The typical case time? I know somebody asked that. It is longer in Marion County than it is in the other counties. The docket in Umatilla and Malheur had been set up by Judge Yraguen and I think he was shooting to have everything done within 12 months. In Marion County - I haven't done a longitudinal study on all these - but I think it is more like 18 months probably

because…. And some of the capital cases we don't even want to talk about how long those take.

730 Chair McCrea So Lynn, what do you think about the level of practice on the other side?

731 L. Larsen I think there is certainly a difference between Marion County and Umatilla and Malheur. I don't really want to name names or anything.

735 Chair McCrea I'm not asking you to.

736 L. Larsen What we historically had seen when I first started in Umatilla County was there were not very good people doing it and we would rarely see a trial memorandum. It would be the petitioner showing up at the hearing. We would have already deposed the attorney, and the attorney would ask essentially the same questions we had asked in our deposition. I have had folks in my office come to me over the years saying, "Why are we still putting in everything when it is the petitioner's burden?" I said, "Well, one, I want any reviewing court to be able to see what the issues are. I don't want it to look like we are hiding the ball or anything." That certainly wouldn't do the state any good scurrying around behind the scenes trying to hide something. That is why we have done all this and quite honestly why we depose everybody is because sometimes the petitions aren't crystal clear. There are several cases that say you have to allege any claims in your petition. We don't want it to morph into something different. We get to trial and we talk to the attorney and say, "Here is what we are thinking," and then it somehow goes launching off somewhere else and we have to ask for more time. We at least want to nail it down as much as we can. A lot of times the response in a deposition will be, "I don't know. Ask my lawyer." We can't ask the lawyer because there is the attorney/client privilege. That is at least our theory in trying to depose people.

782 Chair McCrea So what can PDSC to improve PCR on the defense side?

784 L. Larsen I was looking at what Noel mentioned. I think he had a couple of good suggestions. I think to standardize the procedures is a good idea. We have had limited success, I think I would say, with the argument that ORS 138.580, which describes the petition and what is in the petition - it has some interesting language in it - but it says that affidavits in courts shall be attached to the petition to support the allegations. Some time ago, because we were getting rather skinny petitions, not quite knowing what it was, we filed under that statute saying that, "It says you are supposed to include this." We want to get the information so we don't wait until the end of the proceeding and don't know what it is. We usually get it after we have sent in our trial memo. Judge Hargreaves has been ruling on those, but not every other judge has. But I think standardized procedures would help. Malheur and Umatilla are quite different than Marion. I don't know if PDSC has any authority over the judicial branch. Each county, essentially, as I understand it, within some guidelines, gets to have their own rules. This is what the judges out there have done. We haven't run into the same issues, as much, in Marion County. One, we get more time to handle the cases. There are more judges here. It is spread out a little more. We have this process where we have these status conferences where you set a time to file your amended petition and then the court will either call the parties or have everybody come in and say where they are on the case. The court will then maybe set another status conference, or if everybody is ready they will set the trial. We don't have that over in the other counties. It is pretty much on a strict timeline. There doesn't seem to be a lot of room to set over cases. So I think standardized procedures would help. I don't know how, as Judge Hargreaves mentioned, a peer review process would work. That might be helpful because that is something the Commission or OPDS can do. Quite honestly, I think it boils down to the two things nobody wants to talk about which is time and money. The fewer cases a person has the longer time you have to work on them. I think in some of our capital cases they have gone on a long, long time. We have gone into seven or eight amended petitions and keep going. That is sort of the outer edge of a long time with some variation on the theme. It can go to federal court and that is in a whole different system and different

funding issues and all that. Our office has always objected to any efforts of the legislature to remove funding for PCR cases. The simple reason is that it is easier to litigate a case with counsel.

895 Chair McCrea Playing tennis against the wall versus …

895 L. Larsen Yeah, and if we go to Judge Hargreaves' diagram, I am not sure who is who.

900 Chair McCrea Notice we didn't ask him to identify them.

901 L. Larsen Yeah, but we have always resisted that. Our office does not ever think it is good to have someone who is actually innocent in prison.

905 Chair McCrea That is comforting. [end of tape]

TAPE 2; SIDE A

001 L. Larsen … but not a giant group of cases. Do I have to stop now?

005 Chair McCrea Yes. I have a witness who has to leave by 11:30 and another who has to leave by noon.

006 L. Larsen I guess we are done.

008 Chair McCrea Erin what did you want to talk about?

008 E. Largesen I was just here to help out Lynn and provide moral support.

009 Chair McCrea You have done a great job of that. If you have something you want to add I don't want to cut you off.

010 E. Largesen I think I would just echo a lot of what Lynn said. I do appeals only and maybe 30 percent of my docket right now is state post conviction appeals and federal habeas appeals, so I am in the Monday morning quarterback position. I guess leaving aside the question of resources, I come from a civil litigation perspective. Since I started doing these cases the thing that surprises me most about them when I get the file is sometimes the lack of the development of the record in trial. Our office sees many, many cases as Lynn explained. A lot of times the only thing in the record is the trial file and because this is a collateral attack, I was surprised not to see some kind external evidence there. There are files where, if we don't get trial counsel's affidavit, there is no evidence from trial counsel which pretty much defeats the claims of trial counsel inadequacy. I have also been surprised by lack of the use of civil discovery tools, presentation of evidence in terms of the attachments to the petition. Unlike on a summary judgment motion where civil litigators know how to underline the relevant portions that support their claims, a lot of time in PCR we just see big lumps, piles of evidence that are not segregated out in any way for the judge or opposing counsel to identify what they are relying on to present their claim. In many cases you still see the argument that was made on direct appeal and not a colorable attack. The final thing is trial memo practice. It just baffles me because nobody is responding to anybody at the trial. Finally, there is a problem with issue selection and I don't know how to address those problems. I think that our state post conviction counsel are in a really difficult position with difficult clients and then the tension between the federal habeas exhaustion requirement which requires them to raise everything versus the way to win a case in state court. I think that is the real problem with the system. In terms of solution, I do think that treating these as the civil cases they are and providing PCR petitioners with counsel with a little more civil litigation training would help. Looking at them more from the perspective of trying to prove a case may shift the mindset. Sometimes it does seem like they are being treated as if they are still criminal defense cases rather than somebody who is trying to prove that something went wrong with their lawyers'

performance, which resulted in an error of constitutional magnitude in the case. More resources, standardizing the rules or just using the rules that we follow in summary judgment motions, I think would be very helpful in handling PCR petitions. Finally, having it at the Office of Public Defense Services where we would have not only the peer review after the fact but would also have at least two heads to look over a case.

052 Chair McCrea Thank you. Good summary. Here is what we are going to do. At the risk of all of you telling Barnes I was really mean and didn't give you a break, anyone who needs to go out can go out, but we are going to go ahead and take Chris Mullmann on the ethical perspective because he has to leave by 11:30. Then we are going to take Steve Wax because he has to leave by noon. I am assuming Drew could probably stay, so we can do a little break after that and then we will have Drew Chilton and the appellate perspective and then the OPDS perspective. Then I know Mr. Gorham wants to comment on something and we are going to be going through the action items really, really quickly. Thank you for your patience with us.

061 C. Mullmann Thank you for accommodating us. Thank you, Steve.

061 Chair McCrea So the ethical perspective.

062 C. Mullmann Maybe I'll start off by telling you how many complaints we get involving criminal law. In the last two years we had 708 out of a total of 2,210 cases coming from inmates primarily. That was 32.85 percent. I didn't break those down into PCR cases versus trial court cases, but it is a significant amount. In the PCR cases a lot of them are inmates saying that, "My lawyers didn't raise X, Y and Z and therefore they have provided ineffective assistance of counsel." We have a standard letter that goes back that basically says we are not going to second guess a lawyer, that is within the professional judgment of the lawyer and we don't consider that to be an ethical issue. An ethical issue is whether the lawyer provided competent representation and that is a pretty low standard. I know that John and I have talked about this before but the rule is quite simple. It says that, "1.1 A lawyer is to provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary to provide representation." So ineffective assistance of counsel is a constitutional issue while competent representation is an ethical issue. The ethical violation is extremely difficult to prove. There is sort of a minimum level of competence. I will give you a civil example where we were able to prove it, because when I was in that office I charged it many times. I think I only proved it once or twice. This was a civil case involving a young lawyer in a federal malpractice case involving a podiatrist. He had never tried one before. He didn't associate with anybody who had ever tried one. He didn't do much legal research. He waited until the Friday before trial to prepare. He hired a nurse practitioner as his expert. He put on his case. He didn't call his nurse practitioner; the judge probably wouldn't have accepted her testimony anyway as an expert in podiatry. The other lawyer jumped on it and got the directed verdict and the young lawyer then said, "Can I reopen my case?" and the judge said no. We charged that lawyer with a lot of things, one of which was incompetence. That is a pretty crummy performance. The PCR cases we get - we have seen, as Judge Hargreaves said, a lot of them out of Umatilla and Malheur Counties and many of them involve the same lawyer. There are cases where we have had a lawyer who had more than 130 bar complaints filed against him. He knows how to walk the line; he knows what an ethical line is. It is difficult to charge and then to prove. We have done it in a few cases. About a year ago Paul and Kathryn met with my staff. We send a lot of cases to OPDS when it is a quality assurance issue. We met to talk about how we could better integrate our office and their office on particular issues involving criminal defense lawyers in general, public defense contractors. We have a system where every week we print a report that shows how many complaints came in and who the lawyers are that have been charged with misconduct. We now electronically send that every Monday to Kathryn and Paul and to Ingrid so that they can at least watch to see if lawyers they have contracts with appear. One of the things that I always put on my wish list - I don't think it has ever happened for a variety of reason - but I would like us to be able to postpone bar proceedings until relief was granted

in post conviction. In that one case we denied it, relief was granted, the lawyer complimented the petitioner's lawyer on what a good job this lawyer had done in PCR – I have never seen that - and we reopened the case. In the Client Assistance Office we get all the initial complaints. We look at them and screen them to decide where our burden is and if we can find out whether we believe there is sufficient evidence to support an allegation of misconduct. If we do, we send it to Disciplinary Counsel's office for further investigation. This year - I looked at the statistics yesterday before I came here - we sent about 365 cases to the Disciplinary Counsel's office out of about 2,800 that we looked into. A lot of the ones we look into are, you know, "My lawyer won't talk to me in civil cases." Our caseload is very large because we only have three lawyers to handle those. I didn't break those down statistically as to how many were criminal versus other matters. The criminal side would be a smaller portion than the other cases. A lot of them are just, "My lawyer didn't raise issues they should have at trial. My lawyer didn't talk to me." We usually don't see a lot of the criminal cases going very far. We have prosecuted lawyers for misconduct in criminal cases, including neglect and failure to communicate. One area we see is small practitioners. They don't have mentors. They don't have anybody to help them out. That is problem. The sole practitioner's group pointed out to me, and I have to remember, that they comprise about 75 to 80 percent of the practicing lawyers in the state. It is pretty logical that they have the larger portions of complaints against them and I accept that. We do see a lot of those cases coming through. We see a lot of the same lawyers. We see a lot of the same criminal defendants as well. The issues are all very similar in most of those cases. We try to resolve some by telephoning the lawyers and saying, "Why don't you phone your client and talk to them?" The lawyer had been on vacation for four weeks and I said, "Call your client and explain that and I don't think your client going is to file a bar complaint." One client – an inmate - filed three bar complaints against two different lawyers and said, "I need time to file my complaint, but I am going to file a complaint for ineffective assistance of counsel." You would have to open that up. I sent it back to him and said I would give him 30 days. A lot of this stuff just doesn't go anywhere. There are some lawyers who are not providing adequate representation. Judge Hargreaves sent one to our office and I was the lawyer assigned to take that case. It was a clear case where the lawyer was not prepared. He got a set over from Judge Hargreaves when he had just been denied a set over from the presiding judge. I don't remember who told Judge Hargreaves, but somehow the judge found out about it and denied it again. I think it was fairly straightforward, on the record, that he had not been prepared. We had 199 cases appealed two years ago and 193 were upheld. Two were dismissed, one was reprimanded and two were [inaudible].

170 J. Potter — Can you comment a bit on the sole practitioner? It strikes me that there is within the sole practitioner group, there are sole practitioners that really are sole in the sense that they are by themselves, they don't have a legal secretary, they don't have staff support at all, and then there are sole practitioners that have some office support. Have you ever made a distinction between those two groups?

175 C. Mullmann — I have never made a formal distinction but my impression is that the first group is more likely to see a complaint. There are a couple of lawyers, criminal defense lawyers, whose voicemails are full, who aren't returning calls, who have basically disappeared, and those we immediately refer to Disciplinary Counsel. I can't give you any statistical information but my impression is that the former group is more likely to get into trouble. The small groups of five that all practice criminal law, they talk to each other.

184 J. Potter — I ask that question as something that OPDS should be taking into consideration when we are looking at contracting with a sole practitioner.

185 C. Mullmann — I think it probably should be. I think their record, their past record, is something you should be calling in and asking for if they want a contract. Our office is taking a tough stance on quality of services.

196 Chair McCrea Any other questions? Thank you so much. Mr. Wax, would you like to talk to us about the federal defender's perspective?

200 S. Wax Good morning.

200 Chair McCrea Good morning. Thank you for being here.

201 S. Wax It is a pleasure to be invited. It seems a little silly to start by saying why I even have a perspective as the federal person, but since you are creating a record I will start there. During the past 25 years I have either personally handled or supervised more than 3,000 federal habeas cases all of which have come from the state system. In addition, I have responded to probably in excess of a similar number of letters from state prisoners asking about various things and complaining about various aspects of the representation that they have been receiving. It is based on that experience that I will offer some thoughts about the state PCR system. I want to make a couple of comments about the culture and pick up on some of the comments that were offered by Judge Hargreaves and then make a few comments about the process and then offer the solution.

217 Chair McCrea Good.

217 S. Wax It seems to me at the outset, in terms of culture, that what the judge identified as a failing in representation is consistent with my observation. The culture among the defense bar, the culture in the prisons and the culture on the bench have all combined in a very negative, synergistic way to produce the type of problems that we are dealing with today. The culture in prison - it seems as though many of the inmates feel, and perhaps are, neglected, abused, ignored, mistreated and that some of the problems that we encounter when we are representing those clients in federal habeas are the same problems that PCR counsel are encountering. It comes in part, I think, from the fact that they don't feel as though they are getting a fair shake. If they don't feel as if they are getting a fair shake they are going to act as though they are not getting a fair shake and make demands that become unrealistic. How do you address that? It seems to me you frontload the communication that lawyers have with the clients in the prison. When you do, you can start to change things. I think that Marc's comments about the word getting out that he is a person to call if you have some money to hire someone, is a perfect illustration of how you can have both a positive and a negative culture. Culture in the courts? It seems as though the 30-minute block of time and the paper trial is consistent with the view of the prisoners that they are not getting a fair shake. They want a hearing. They want a trial and they don't get one in any meaningful sense. The culture among the lawyers? Well, when the attorney the state has contracted with racks up bar complaints in excess of 130 that is a very negative and unfortunate culture. The reality is that a number of the people who have been providing services for many years have now been disbarred or resigned from practice. In terms of what can be done I think that the comments that were made about the importance of communication between OPDS and the state bar, and between OPDS and the contractors in terms of reviewing what is happening is absolutely critical. You have to get good people on board and then you have to monitor what is happening so that you don't get a system that says we are going to process these cases in a way that can't be won. I am familiar with the materials you have from Wendy Willis, having reviewed them before they went out, I'm sure, and obviously it is a brilliant approach to how cases should be handled. But it seems to me that as you think about changes you need to focus on the fact that in PCR representation you are dealing with issue identification and issue development - two very distinct things. And part of the negative culture is created by *McClure v. Maass* and *Church v. Guire* which have said to the entire system - the lawyers, the clients, the judges, and the AGs - that the uneducated, unsocialized, nowadays often non-English speaking, petitioner has to identify the issues. That just doesn't work so, in terms of bigger fixes, the statute needs to be changed, the law needs to be changed and OPDS needs to recognize, and the legislature needs to recognize that, notwithstanding those legal pronouncements, it is an impossibility. The lawyers who are doing the work need to be given

the money to do issue identification; the client cannot. It is ridiculous to think that they can. And these laundry lists of 26 claims that are filed in PCR, that are filed in federal habeas, are filed in part because, "I don't know what happened to me. I was screwed." That is all the prisoner knows. The paralegals have these lists that are produced by the Federal Defender Office, by OPDS, in all the books that are available to them. "These are the 26 things that I can say in legalize that will convey that I was screwed. I don't know which one fits." That needs to be changed. The lawyers have to do better issue development, investigation. You cannot identify issues unless you investigate. You cannot identify issues unless you have gathered the necessary materials. The unfortunate reality seems to be that a culture among too many of the lawyers has been not to gather the raw materials. You go back to the process that Wendy laid out. You can't know what claim to present, if there is any claim to present, unless you have read the trial transcript, read the trial attorney's file, consulted with your client in a meaningful way, talked to the attorneys who came before you and then figured it out. "Are there any issues and what facts do I need to prove them?" It seems to me, in terms of solution, how else do you address this? I love the comment that was just made that these are complex cases and the Attorney General says that you need civil lawyers. Part of the problem, it seems to me, is that we have been treating the post conviction cases as a continuation of the criminal case. It is not. In the Federal Defender Office I say repeatedly that this is the one type of case where we get to drive the train. We are the plaintiffs. These aren't criminal cases. We are not being reactive and I don't think that that sense has yet been really brought home in the state post conviction process. I would encourage you in looking for contractors to get people who can cross over. You have to understand the criminal law otherwise you are not going to have any sense of what the issues are, but you also have to understand state civil procedure, the deposition opportunities, interrogation opportunities, all of the things that you can use for discovery and how to be a plaintiff, how to take charge, how to take control. It seems to me that you can accomplish that through your contracting process. You also can accomplish it through the type of training that is provided. We have on occasion brought Dave Markowitz to address the people doing habeas and PCR work. Markowitz comes in wearing his very expensive civil deposition suit and says, "This is how I do a civil deposition." That's great and we need that type of interaction. In terms of changing things, I am sympathetic, Lynn, to the plight of the state in a system of simultaneous pleadings. It is ridiculous. But to me what is equally ridiculous is the fact that the process is built around the deposition of the petitioner. I think the Attorney General is wasting hundreds of thousands of dollars a year in taking depositions of the petitioner. They don't know anything and their lawyers should be providing the information. Now they can't depose the lawyer, but the court rules can, and apparently soon will in eastern Oregon, require the lawyers to identify the claims. That is where it should come from. Get the petitioner into the system with his pro se petition and from the federal perspective the clock is stopped. Okay, now in the state system approach the cases in a rational way. I don't think 120 days is enough for the state PCR lawyers to actually file an amended petition because in that time they need to gather the record and conduct investigations and meet with the client. It's just not possible. It seems to me that the rules that are going to be put into effect in Umatilla and Malheur, while I disagreed strongly with some of them, are a step in the right direction of having some rational way of handling the cases. Get a lawyer in early, give the lawyer the tools to do the work the lawyer needs to do - issue identification and development. Stop the simultaneous filing, let the AG know what is there, and as part of the training process for the PCR lawyers, the PCR lawyers need to be active participants in the deposition if the state is going to continue to do them. They should be able to be cut out of the process entirely. As the plaintiff in the PCR case, it should be the PCR lawyer who is presenting the evidence of the prior attorney's ineffectiveness or the prosecutorial misconduct. Now as part of the tools for that, he or she needs to get the state court record. What we are in the process of getting adopted, we hope, in the federal system is a process in which a pro se petition is filed, the state comes forward - because in theory it has all the records from its appeals and it has gathered up everything - and files the record. Then the petitioner will be able to have the basic tools. Now the AG is not going to be able to provide the trial lawyers or the direct appeal lawyer's files, so the PCR lawyer needs to have time and money to gather those tools

because they need to be reviewed. Then if you think your client has something worthwhile to say the client says, "I saw juror No. 3 snarling at me when the shackles became visible as the uniformed sheriff's deputy moved me in and out of the courtroom." You put in that statement from your client. You don't wait for the AG to depose the client with the client being unprepared. You have to use your client as a witness, as a source of facts if the client has facts to offer. Or, you pick up the phone, you call the trial attorney and you say to the trial attorney, "Look. My client, your former client, alleges that he told you about the alibi witness and I have got your file - because you are probably not having the conversation until after you have looked at the file - and I see this handwritten note that has the word 'alibi' on it. What can you tell me about that?" Then you are presenting the trial lawyer's statement, not the AG writing the affidavit for them, which they sign, which screws your client. You can't win the case that way. When the Chief is saying, "What about evidence?" we are failing in the system. How do you get a system structured like this? I was surprised to see the data and if these numbers are correct, out of 179,000 prosecutions, there are 672 PCR cases. If indeed the number of PCR cases is in the 600 range, it seems to me this is a situation that is relatively easy to solve. Yes, I know the legislature doesn't want to give any money for PCR, but when Lynn says he has got six lawyers doing the PCR cases as the plaintiffs, 12, 15, 18 lawyers should be able to handle those cases. I was a little disturbed to hear that Noel is taking in five cases a month. It seems to me that in terms of contracting that is too much. You can't do it effectively because from that group of 60 in a year you may have 30 pleas where the total record is going to be relatively slim. Where the client says, "My plea was coerced," and you are going to have to do some minimal investigation. But if you have 30 trials and of those 30 trials you have half a dozen where you need to do some meaningful investigation, you can't do 60 a year in an effective way, my opinion, at least the types of cases that I see that come into the federal system. I am assigning roughly 25 cases per year, per lawyer. Right now when we have …

437 J. Potter — Is that a national standard, 25? I have seen that number before.

438 S. Wax — Yes, I think so, John. I can't tell you specifically where you can find it, but, yes I have seen it and in terms of the reality of our practice, that is what seems to work. The lawyers in the Federal Defender Office with habeas cases will probably have between 50 and 60 cases in their caseload at any given time. The average length that a case lasts in the federal system is between two and three years. So if the state system is moving more rapidly, the 25 per year assignments may go up to 30 or 40 at a time. It seems to me that that is pretty much what is reasonable. Six hundred divided by 25 is 20 lawyers. Well, maybe you can get by with 15, but it is not just the lawyers. If you are creating a system you have to have investigators and paralegals working side by side with the lawyers. When setting up a PCR office, if a PCR office is going to be set up, it seems to me that we need a support person for each lawyer and maybe if you have 12 lawyers, six investigators, six paralegals is enough, but in terms of the amount of paper that comes in that needs to be processed, that needs to be reviewed, you have got to have paralegals do that. It is a lot less expensive than to have the lawyer doing it and then you have to have the investigators being able to go out and look for the harm and the prejudice. As I have said before, we have to prove both. I think you should set up a PCR office and adequately staff it. Try again, for whatever, the 800,000 bucks you asked for. I don't think it is enough, but it is a start. I think that if the system is restructured with some of the rules, the eastern Oregon method, but with a little bit more human a face to it and a little bit more time built in, I think it can work. Six hundred cases is not too much to deal with.

481 Hon. Elizabeth Welch — You will be able to tell from my question that I wasn't born in Oregon.

482 S. Wax — Neither was I.

482 Hon. Elizabeth

	Welch	Are you aware of a state or states that have a good model. Is there a way to identify people that are doing better than we are?
486	S. Wax	The Spangenberg group, which came out to Oregon however many years ago, has done analyses in states across the country. I think they are likely to be a good source. Ross Shepard worked with them for a while and he is back in town, so we have in Oregon people who have contact. I am sure John has the Oregon Spangenberg report and access to it. Part of the problem is that the model isn't necessarily carried out, because of funding issues. Kentucky is thrown out as having a fine model. When I have looked at some of the work that has come out of Kentucky I have questioned whether or not the model is so good. There are politics involved in the public advocacy system there and that I think are horrible. No public defender can get appointed and keep an appointment or run for election and win unless he starts unloading the dump truck. You don't get very far.
506	Chair McCrea	Any questions? Thank you Steve.
507	S. Wax	Thanks for the invite.
508	Chair McCrea	What I would propose to do is take our last invited guest and then take a break. We have Drew Chilton with the appellate perspective.
515	D. Chilton	My name is Drew Chilton. What I do is after cases go through the PCR trial process I handle them in the appellate system. I am one of the two co-directors of the Oregon Appellate Consortium and we have a contract to handle non-capital cases. The comments I have are restricted to non-capital cases, the non-capital cases in the appellate system. I am not 100 percent sure what order to take these issues in, but I have a few comments. I should say first that I want to complement the Attorney General's office on their degree of professionalism. Mr. Larsen's office and the Appellate Division as well, are highly professional and they do a very good job. I know their resources are greater than ours but not unlimited either. They find ways to make some things work well for them with the limited resources. By way of explaining what I do in an appeal in a post conviction case - the first thing I do is open up the file and I read the petition to find out, in general, what the case is about. Once that is done, and this is an unfortunate reality about much of the quality of post conviction lawyering at trial level in this state, the most effective thing that I can do to figure out the case is to read the defense trial memo, because what we see coming out of the Attorney General's office is the most informative document in the file. I don't think that should be the case, I am just telling you that that happens. There is a very distinct difference in quality – most of the post conviction cases that occur come out of Marion County, Umatilla County and Malheur Counties. There is a big difference in the quality of lawyering that we see coming out of Marion County - in Marion County we have attorneys like Noel Grefenson and Olcott Thompson who do good and excellent work - and what is coming out of Umatilla and Malheur Counties. There were numerous comments about the cultures in Malheur and Umatilla Counties that are contributing to the poor level of representation. When I started five years ago the representation, particularly out of Umatilla, but also out of Malheur County, was an unmitigated disaster. Now, some years later, it has probably improved to being a mitigated disaster. Little is being done and I think there are a couple of different sources of the problem. One of them is if you look at a place and it is probably most extreme in a situation like Malheur County - I believe the statistics are that something like 10 percent of the people in Malheur County are in the Snake River Correctional Institution. There are about 30,000 people there and about 3,000 in the prison. The result is that what you have is a small court system handling an enormous number of post conviction relief cases. I am not 100 percent sure but my guess is that something like a third of the post conviction relief cases in the state go through the Malheur County court system. That results in, I think, some institutional resentment towards this type of case because they have a lot of them, they are difficult cases, and the judges are frankly hostile to this type of case. Whenever you are talking about criminal defense you are talking about swimming upstream to some extent, but

it is a very, very different animal out there. To a lesser extent, I think we have a similar problem in Umatilla County. It is a larger county so the percentage of cases that are coming through as post conviction cases is certainly lower, but it is still a significant portion of the docket and they are most interested in getting an expeditious disposition of the case. An expeditious disposition is not necessarily the best one for my client. I know too that you will hear judges say things like, "These cases are taking a year." Well a post conviction case on a public appointment is a little different from an ordinary civil case. In an ordinary civil case what happens is there is investigation, there is a filing, there is probably a little more investigation at the beginning part of the case and the investigation always continues, but it is investigation file, litigate. In a post conviction case it is file, investigate, litigate, because there is no lawyer, there are no resources. Until that first incident of filing is done nothing is going on in the case. There is no screening and there is no investigating of the cases being done at all. I don't know what percentages of cases receive investigative funds or receive investigation, but I see almost no evidence of meaningful investigation in cases coming out of Malheur or Umatilla County.

607 Chair McCrea — In the appeals that you are doing?

607 D. Chilton — Right. Let me clarify. Just because the record doesn't reflect the result of the investigation doesn't mean the investigation wasn't done, so in any given case you can't say, "Well, they didn't get an investigator in this case," just because I don't see any exhibits, but when you see over a period of years dozens and hundreds of cases and you never see any evidence resulting from an investigation, you begin to see a pattern I'll say, so I very seriously doubt that very many cases are getting investigation.

620 Chair McCrea — Let me ask you this and I don't know if you can answer it. Based on the appeals that you are doing can you tell whether investigation would make a difference?

623 D. Chilton — I have absolutely no idea. There is no way. Judge Hargreaves made some comments to the effect that most of the cases that are coming into the system are not meritorious and I think that that is probably true. I think that maybe 95 percent of the filings, even if they had investigation, they still are not going to be successful. I don't think you have any way of knowing which cases those are until the investigation has been done. When I was doing trial level work and when I was doing the direct appeal work, in 95 percent of the cases that came into my office as a trial level attorney there were no meritorious defenses. Most of the cases are going to wind up being pleas and in most of those cases, even if they go to trial, you don't necessarily have too much to say. You don't know that on any given case. A case doesn't just land on your desk where you are going to be able to say, "Well, this case is clearly a trial and this case is plea." You can't know that until after you have met with the client, investigated the case, discussed it and so forth. So while I think it is true, as Judge Hargreaves said, that the vast majority of cases are, in some sense, losers, without investigation you have no idea which ones they are. To that end, I would note that there has been some discussion of paper trials. We absolutely hate them in our office. I will tell you that the single worse part of it is the trial counsel affidavits and this is not the fault or anybody in particular. The problem with the trial counsel affidavits is very straightforward. What happens is you get a petition filed, the petition contains some allegations some of which are kind of open-ended, the Attorney General's office takes a copy of that petition, mails it to trial counsel and says, "What do you have to say about this?" In many cases the trial counsel's response is, "He's saying I didn't call witnesses. I don't know who he is talking about. Maybe if you could tell me more I could identify them. He said I didn't make sentencing objections and I am not sure what that is about either," and then an affidavit is cobbled together and the affidavit is often hopelessly vague. It doesn't address the issues and isn't particularly related to what the ultimate claims are. Moreover, I would say as good advocates it is the Attorney General's office who winds up drafting a lot of the affidavits, drafting them in a manner that is helpful to them, as they should. They are advocates and that is entirely appropriate. The trouble, of course, for us is that it is most unhelpful to us on appeal. We

have got the affidavit as framed by the other side on the issues and in many cases the attorney's responses are vague and open-ended.

685 Chair McCrea Don't we also have an inherent tension in the system where if there is an allegation of ineffective assistance of counsel, the trial counsel is put into a sort of dilemma? Do you want to be really forthcoming and helpful to your former client and say, "Oh yeah, I really screwed up," and open yourself up to civil liability, or are you going to hang back and sort of say, "Well, I am going to wait and see what happens."

694 D. Chilton I agree with you; that tension does exist. I have been post convicted and…

697 Chair McCrea That has quite a ring to it.

697 D. Chilton I should say I have never been successfully post convicted but post conviction allegations have been raised against me. I have been on the receiving end of that and the position that I take now, and I still get post conviction claims filed against me now and then, but the position I take is that I am happy to talk to the AG's office about why I did what I did, but that I am not going to do an affidavit. Sometimes I will do an affidavit if it is a very minor issue, but if it is anything of substance I tell them that I am happy to come and testify - and I have been called to testify on about three or four occasions - testify at post conviction hearings, but that I don't want to do affidavits.

711 Chair McCrea Well it is also an issue, I would think, for the attorneys who do the post conviction relief because they have to investigate the case and if they find something they have to indicate that a fellow criminal defense lawyer did not do what he or she was supposed to do, which is probably, at least in some cases, not going to be a fun position to be in as the PCR lawyer.

722 D. Chilton It certainly can be awkward and I have done some PCR trials. My general experience is that most of the criminal defense attorneys are open and receptive to discussing issues. Most of them take the attitude of, " I screwed up that case and I would like to see my client [inaudible]." Most of the time they say, "This is why I did this. I think this was the right call." If it comes out different most of them are circumspect. It is a potentially awkward situation and it is potentially difficult. I have never actually had any problems when it comes up. I see where there is a structural tension but I don't think it is a real problem.

741 Chair McCrea So what do you recommend for us to improve the system?

743 D. Chilton The number one way to improve the system is going to involve spending a lot more money. We are talking about solutions that don't necessarily involve spending a lot of money. I do have one suggestion which is to let the venue statute be changed in these cases. I think the best way to handle this would be to have venue lie in the county where the conviction occurred. Then you have an attorney and the attorney won't be close physically to where the client is, but you have an attorney who is going to be closer to where everything else to do with the case is. The witnesses are going to be at hand. It is going to be easier for him to actually get live witness testimony. Even it is a matter of getting affidavits, or depositions, or so on, it is easier for them to access that. To have attorneys in Malheur County investigating and communicating with witnesses and developing records in cases that occurred here in the valley is crazy. We see cases coming out of every county because there are circumstances where venue properly lies in a situation where the petitioner is incarcerated out of the state or is on probation with post-prison supervision, and then it properly lies in the county of conviction. The quality of lawyering in those cases is consistently better. I think you get appointed counsel who is not routinely doing these types cases so they are paying more attention. Also I should note that the judges are more attentive to the cases for similar reasons. When I have had these cases, a couple of them, came out of Deschutes County the judges in Deschutes County are always like, "How does this work. Oh, this is interesting." It is something different and it is not just a matter of feeling like they are there to just mill these

cases through the system. It is not the attitude of the senior judges who do the trials in these PCR cases, but it is the attitude of the institutions that currently exist. We are seeing more out of Washington County now because of the women's prison and we are seeing some good, some reasonably good representation. I think in Marion County you are also seeing a situation where there is a burden of dealing with all of these post conviction cases. It is spread out over a much larger number of judges and the burden associated with post conviction cases if venue is changed to the county of conviction is going to be much more proportional to the number of cases in the court. The number of criminal cases filed four years ago in Multnomah County is going to be reflected now in the number of post conviction cases. I think that would be the one thing that could probably be done without significant financial expense.

817 Chair McCrea — I think you make a good point.

817 D. Chilton — I would like to make one further comment and I will be brief. One thing that I haven't heard people talk about is that if you had an effective PCR system in the state, which we don't now, there is an additional value to that as a potential measure of the quality of the performance of criminal trial and criminal appellate counsel. If you have a meaningful post conviction system and you see attorneys getting post convicted it is like a traffic accident. Somebody could get in a traffic accident once, but if you see somebody in a traffic accident every six months you begin to question their competence as a driver. I think the post conviction system, if it functioned properly, could also be a useful tool to assess the quality of trial counsel and appellate counsel.

842 Chair McCrea — Okay. It is five minutes to noon and we are going to take a 10-minute break.

Break

850 Chair McCrea — Okay. The OPDS perspective. We have Paul and Kathryn.

853 K. Aylward — Post conviction is a problem for our office. It is frustrating. Nobody wants to do these cases. No matter how much money I offer them they still don't want to do them. If you are paying $2,000 for a PCR now, and you want somebody to do a better job, paying somebody $3,000 is probably not going to get that much better a job out of that person. What we need to do is put the rate up really high, advertise it a lot, and bring some people out of the woodwork. Ann tried for 15 years to get the PD's office in Umatilla to do PCR and the response was, "I don't care how much you pay me, it is not good for the office and I don't want to do it."

878 Chair McCrea — Do they say why it is not good for the office?

880 K. Aylward — Not specifically. They did take some for a while. I like the idea of having them spread around the state a little bit more. Actually now that we have contracts with Noel Grefenson and Dick Cowan, they are taking a lot of the eastern Oregon cases. All it takes is something like *Blakely* or *Ice* and suddenly it is the claim de jour and even if you look at them and say, "Oh, well they are all triggered by the same issue," you still have to look at them because they might actually have a genuine claim that isn't necessarily related to that issue. It is a tremendous amount of work. You heard testimony that five cases a month is too big a caseload, so we need seven attorneys or more on hand for January. I am open to suggestions. As far as the culture at OPDS of continuing to contract with people who may not be providing adequate representation, there is no choice. I am thrilled if I can get someone to just say yes but I know that is perpetuating the problem. [end of tape].

TAPE 2; SIDE B

33 M. Greenfield — Is it fair to say that if we had a more bureaucratic process for our requests for proposals, with a number attached to it, and we didn't go out and try to encourage people or beg them to take the cases, we wouldn't have anybody bidding on these contracts?

037 K. Aylward — I think that is correct. Every time we put out an RFP emphasizing that we are really looking for someone to handle PCR cases, nobody is interested. I think there are probably death sentence PCRs because even if we have a death penalty qualified attorney who says, "You know I have never done a PCR and I would be willing to," but I don't want to learn how to do a PCR on a death sentence case." It takes time to develop them. I wish that there weren't state level PCR. It seems to me like so many of these people are just doing this on their path to the federal system. Ideally it would be nice if it were providing feedback and quality control but we are not getting the benefit out of it. I don't think the clients are getting the benefit.

050 I. Swenson — Well, no. There certainly are people who do get relief in the state system who would not necessarily be entitled to relief in the federal system.

053 J. Potter — What about the plan that we had this last budget cycle about setting up a dedicated PCR office with salaried lawyers and staff. If you did that would you still run into the same problem getting people to do that?

056 K. Aylward — I think it is likely. You will hear later about the problems we have had filling the positions in the juvenile appellate section. I think it would be difficult to fill the positions.

060 P. Levy — Real quickly I want to give you the OPDS perspective but I also want to give you a little bit of my own experience and perspective because I did work for my first six years as a PCR lawyer in a state PCR office which I think could serve as a model.

066 Chair McCrea — Was it in Kentucky?

066 P. Levy — It was in Indiana and it certainly wasn't a perfect model but I think it worked quite well. From my current perspective, what I do see is practically no requests for non-routine expenses for experts in PCR cases outside of the capital PCR cases. There are some contractors who never ask for these expenses. It is somewhat appalling and you have all heard the testimony. On the other hand we get lots of complaints. Our relationship with the Oregon State Bar is not exactly as productive as Chris described it because what we get from the bar are copies of the letters that they send to the complainant saying, "This doesn't concern us. If you have appointed counsel bring up your complaint, if you choose, with OPDS." They are not highlighting cases where there has been really bad work and letting us know about it. They are giving us the cases they reject and inviting people to contact us if they wish. I will be honest with you, though. I am the one that has to deal with those and I have been relatively swamped by those complaints. One positive in all of this is that the Oregon State Bar - you have heard about this before - has created a task force to produce performance standards for PCR counsel for petitioners. I was asked to put that group together and we put together a very good group. Some of the folks spoke here - Lynn Larsen, Noel Grefenson, Marc Sussman, among others. We had a first meeting and we are having our second meeting in March. We are looking at producing a set of performance standards that will look very much like the standards that you see now in the criminal and the juvenile area. They will emphasize the importance of client contact, the importance of investigation, the importance of issue identification and issue development, understanding and appreciating the differences between a direct appeal in a criminal case and a collateral challenge and being conversant in and being able to do civil procedure. That is a positive because what we have been able to do to some extent, and probably most clearly with juvenile standards, is use them both as a yardstick by which to judge and review attorney performance but also to educate about what it takes to do the job well. Finally, just real briefly - my own personal experience. I worked in an Indiana State Public Defender Office which was largely a PCR office. I was Chief Deputy there when

I left. We were experienced, civil practitioners. That is all we did. We had very good client contact. We would go on field trips, road trips to the prisons. We were able to control the pleadings. We were appointed after a *pro se* petition was filed. We would amend those petitions for clients. As you heard here, the venue in Indiana is what is being recommended by someone here and that is filing petitions in the county of conviction and that made sense to me. That is where the witnesses are and that worked very well. That office had its faults. We did not have an investigator and did not know about how to do investigation well.

134 I. Swenson — I just wanted to make a couple of quick comments. At the next meeting we will have a chance to explore all these issues and I will make some additions and revisions to this report and we can discuss some of the things that you might want to consider. There are just a couple of things I would like to mention today. One is, I think before today's hearing I didn't realize how much of a system problem this was. I always looked at it in terms of, "Why aren't the lawyers doing a better job and what can we do to make them do it better." But it is not just a problem with the quality of representation. It appears to me that there are some important system issues that need to be addressed. As people left after their presentations today, I talked with some of them about their thoughts about that and they agreed that it may be appropriate to convene a larger discussion and that they would be willing to participate. In the meantime, I would just say that I know Kathryn has been struggling to do the best she possibly can. It sounds like we just continue to tolerate bad representation. Well, I want you know that she has done everything she could. People will come to her and say, "You have got to get rid X. X is doing bad work." Of course she has limited funds for that part of our work. She has done her best to identify who is going to do a good job and then it doesn't always turn out and she is told, "Fine, you replaced X but didn't you know that Y is really no better than X?" And then she has to start over. We do receive complaints from the judges. When they contact us they generally provide very useful information and we respond to those. It is not possible for us to select the best qualified people and put them in place out there. We have got to attract them to the work. We have got to make it possible for them to do it and that is just really hard. It is more of a struggle than you might realize from just hearing about it today.

162 P. Levy — If I may, this task force, although it was only charged with creating performance standards, did decide at its first meeting that it should also look at systemic issues. The group includes the spectrum of participants. A judge serves on it and Judge Hargreaves, even though he is not a member, is invited to come to the meetings, so that discussion will occur.

169 Chair McCrea — Any questions?

169 J. Potter — I don't have any questions but listening to Ingrid and actually listening to Chris too and hearing his example of 130 ethical complaints that were brought …

172 I. Swenson — One of them is systemic.

172 J. Potter — Notwithstanding those particular kinds of instances, I think OPDS and the Commission have always, first of all, wanted to set up a system in which the lawyers are encouraged to succeed. We are not out to discipline lawyers or get them removed. We want to develop a system that they can succeed in. We probably periodically have to rededicate ourselves to that when we hear these guys' comments, but I was interested when I asked Chris about sole practitioners and the distinctions between sole practitioners - ones that have support staff and ones that don't - if there is a distinction there then we may want to take a look at our contracting with those folks and suggest that we will contract with them only if they meet particular standards. That doesn't apply just to PCR but to juvenile, to adult work, appellate work, everything that we do. There may be lessons out there and we can learn to tweak our process. It is a little discouraging though that in this particular area of the law it is so hard to find folks that want to do it.

191 Hon. Elizabeth Welch

I wonder if in the model you have described there is an esprit de corps and a sense of purpose and a sense of specialization. Perhaps that is the only way to overcome the notion that this is just the lowest form of practice of law that there is. What is the alternative other than to go to each PD in each jurisdiction that has one and say, "If you want to contract with us you will need to take post conviction relief cases that come out of your county as part of the deal." Are there any other options?

202 K. Aylward

We did actually try that with Intermountain Public Defender. We tried it with MPD and they came back and signed and said, "Okay, we'll do them for $4,000 a case," and that was back when Measure 11 cases were $800 or $900 or something like that.

209 J. Potter

Would a change of venue statute that allowed for venue in the county of conviction change the number of people who might be willing to participate?

211 K. Aylward

I think so. Partly it is the fact that nobody wants to haul themselves out to eastern Oregon. The other problem you have is if you return the venue to the county of conviction then the attorney that represented the person on the underlying case was probably in the PD's office, or 50 or 65 percent of the time they are in the PD's office. You may have a bigger pool, but you may have many more conflicted out.

218 I. Swenson

The legislature has amended the post conviction statues, including the venue statute a number of times. I think there may be institutional opposition at this point to changing it. Just chatting with the Attorney General's representatives today, they obviously like it being centralized.

223 K. Aylward

The judge can move the venue to the county of conviction but I think judges are unlikely to do that because they feel like they are dumping their case, their problem case, on some other judge.

227 J. Potter

There might be problems with the judges themselves not knowing how to do post conviction relief. We heard Judge Hargreaves say that he was a practicing judge for up to 20 years and up until five years ago he never read the post conviction statute.

230 P. Levy

We did encounter that problem.

231 K. Aylward

I would recommend that in Marion County we not scatter the cases, especially if we get a PCR unit.

234 Hon. Elizabeth Welch

In terms of the actual trials, it is my understand that the Marion County judges aren't doing them, that it is the senior judges that are doing them.

237 I. Swenson

Except in Marion County.

241 Chair McCrea

That will be the question for the next meeting. We have half an hour left and I know Steve wants to say something and we have the three action items and Mike has to be out of here at 1:00.

246 Hon. Elizabeth Welch

I can't come to the next meeting. I have not missed one since I came on and I don't want to miss a meeting and I am just wondering , if there are other people who are not going to be able to come next time, whether there is any possibility of getting the meeting moved. I am not being pushy. I just want to raise the issue. I would love to not miss it.

252 Chair McCrea — The next meeting is set for March 13. Right now I am scheduled to start a federal methamphetamine case in front of Judge Aiken in Eugene on that day. Barring the creek's rising, that case is probably going forward.

258 I. Swenson — How long is the trial?

259 Chair McCrea — Probably a week.

260 J. Potter — We could do it on the 20th or the 9th.

261 Chair McCrea — Are you available then?

261 Hon. Elizabeth Welch — I can be. I don't have a lot of things going like you people who work for a living.

262 I. Swenson — I will check with the Chair and see what his schedule is.

266 J. Potter — I can move my schedule on the 20th.

267 I. Swenson — I will explore that.

274 Chair McCrea — Mr. Gorham.

277 S. Gorham — A lot of what I had to say has already been said. Those of you up there who saw me while the other presenters were speaking, I think saw me squirming quite a bit. I guess I just want to emphasize some of the things that were said that I think are important. Clearly the culture in PCR is the problem. Everybody has a complaint. Not only the attorneys, not only us here in indigent defense, the AG's office, the court, the bar, the clients, everybody has a complaint. I started doing post conviction in 1976. I am doing post conviction appeals still. I try to avoid any at the trial level only because they are horrible cases. You do something that the judge doesn't like and he complains. You do something that the AG doesn't like and he complains. You do something you client doesn't like they take it to the bar. The bar goes after you tooth and nail. I think the bar has improved quite a bit since Jim Hennings got involved in the bar task force several years ago. Their new process is a better process for complaints so that you are not always looking over your shoulder. This is a specialized area. It is civil and criminal work combined and frankly, Judge Hargreaves's rules, and I apologize that he is not here so I could discuss this with him, but his rules are an abomination. If those rules become statewide rules they are horrible rules. The key is what Steve Wax said. Indigents must have their day in court. His rules prevent them from having their day in court. They are basically meant to exclude the litigant who is the person who starts this and is left out. In some of the places they are only there by telephone if they are there at all. Some of the rules aren't so bad, but what I think Steve Wax said and I think the judge was sort of saying, is these are civil cases. They should be treated like civil cases not like a special civil case where we are going to limit everything. Maybe there are some limits or some special rules, but these special rules are horrible, horrible and they will not cause anybody to feel better except bad attorneys and bad judges.

326 Chair McCrea — Now, Steve, tell us how you really feel.

327 S. Gorham — Okay. I'll stop saying that. Venue? Except for the cultural part you should be in Marion County because Marion County has the ability to deal with that. If there was a statewide PCR public defender - the AG certainly wants venue in Marion County because they are here - if there was a statewide PCR PD, being here would make sense, except for the cultural thing. Marion County started by having one judge do PCR. That was an abomination. He never granted post conviction petitions. Frankly, part of the culture started with him in the early '70s. Now that we have individual assignment judges, and not just the judges willing to do it,

you are getting a more consistent way of handling cases in the sense that they are being handled more like civil cases. The judges are used to handling civil cases. That may be a reason for having venue all over the state. Judge Hargreaves at the beginning probably didn't feel the way he does now about PCR cases after doing it for five years. He has gotten involved in the culture. These rules were written, in essence, by Judge Yraguen who hated post conviction cases, but they were written by him or started by him and the AG's office basically to limit the ability of the litigants to do their job. The AG has some responsibility here. They do do a good job and they handle them professionally until they think they are going to lose. Their attitude changes immensely when they think they are going to lose. They will take the gloves off when they think they are going to lose. I have been involved in those kinds of cases. But the normal case they handle well because they have civil attorneys that are doing them. I think a central office makes sense now. Years ago I probably would have fought it but I think it is a good idea. The problem with a central office, the problem with what people have been doing in the past is that you have to put some resources into it and not putting enough resources into it will cause the same problems that we have now. So why change it if you are not going to put in the resources? I saw Jim Hennings's proposal and I understand why it didn't get funded. It may have been a little high but it was kind of close to the resources that his office would need. Certainly an office here could do it less expensively, but if you have a segregation of who is doing what function; you have the lawyer, you have paralegals, you have law clerks, and you have staff to do that. The problem with sole practitioners, I think, is there haven't been enough resources or the perception has been that the resources haven't been there, but when you are getting so little per case or so little per hour, you can't have that kind of staff. If you force people to have staff and you fund that, that would help, but forcing people to have staff and not funding it won't work.

388 Chair McCrea — Okay. Thanks. We have three action items. Do you want to take them in this order?

Agenda Item No. 3 — **Contract Approval**

392 K. Aylward — We entered into a contract with Kathleen Correll. We delayed doing this because we were hoping to separate the mitigation component so that mitigator would be cut loose and could work for a number of different people. When it came down to it, this mitigator would then have had to get her own health insurance, pay rent, and it just wasn't going to work out financially. The last thing you want to do is set something up that minimizes our ability to keep a mitigator, so we thought we'd just leave it alone for now. So this contract includes a small percentage increase and a cost of living adjustment. It is a two- year contract.

404 M. Greenfield — Is that an extension of an existing contract?

404 K. Aylward — We did an extension to get us beyond December 31 and in those kinds of extensions we say, "If we reach agreement then it supercedes it."

407 M. Greenfield — In this negotiation there is no request for proposals that went out?

408 K. Aylward — No. This was submitted together with the fall request. It was basically a contract that we didn't get around to finalizing because they were going to be out of town. The second one I am actually pretty excited about. Tillamook has been the last county that had no contract. It was all private bar and the court didn't want to have contracts. They didn't trust that we would contract with people they wanted us to contract with. However, Dawn McIntosh's office - the Commission may recall I think she testified in Clatsop County and is in association with Mary Ann Murk and is not doing criminal work anymore under the Mary Ann Murk contract. She is just continuing with the juvenile work so now she has time to set up a consortium with Stacy Rodriguez. Both attorneys had been taking cases hourly in Tillamook and the court loves them. We are hoping that this will be a consortium that will grow and that it will add local members.

422 J. Potter — Who in Tillamook County won't be doing cases as the result of this?

424 K. Aylward — Nobody. They will still have a large private bar list. They will go through the list so maybe you will get a call less often, but I am hopeful that they won't need to go so far afield. They are pulling attorneys from Hillsboro who have to drive and we are paying them money to do that.

429 M. Greenfield — Is this also in response to an RFP?

430 K. Aylward — That is correct.

431 M. Greenfield — And these are the only…

431 K. Aylward — No. We actually had two other bids in Tillamook County. One of them was from Alex Hamailian who is part of the Rose City Defense Consortium. Again, the issue there was I really don't want to be hauling attorneys from Hillsboro if I can avoid it.

437 M. Greenfield — Was that an element that was in the RFP in terms of how to evaluate bids?

439 K. Aylward — No.

440 M. Greenfield — Let me just comment. I think my role in some respects here is, I am not an attorney, I am a career bureaucrat and I have mentioned this a couple of other times and I think we have really asked Kathryn to just go finesse it and make it work. Certainly based on what we heard today, based on Mr. Crabtree's testimony at the last hearing, I am not comfortable with the way we contract and I don't think that that is the fault of the staff, I think it is the fault of the Commission for giving implicit direction rather than explicit policy directions. If I were a contractor and I wanted to work in this field, I wouldn't be that happy because it seems kind of arbitrary and so I just want to put that on the table since we are considering approving contracts here. I certainly don't think it is the role for this Commission to review each contract and if somebody is not happy with it try and go through it again. It is the role of this Commission to ask for some proposals which make this a more, I'm sorry to say it, more bureaucratic process and less reliant on Kathryn's ability to finesse and do the other things that we apparently need to do to get people to become contractors. The second point I would think is that one of the things we have talked about here is why in the world won't the legislature give us more money? It is because we are not willing to say, "Here is the amount of money the legislature has given us, anybody want to do it?" and get a no. In that case the problem is the legislature's problem but we have agreed that it is our problem and more specifically her problem. On this occasion I just want to raise this issue and suggest that at some point we need to, and I understand we came up with some criteria at the last retreat, but that is not an explicit decision about how we are going to contract. Those are my comments.

478 Hon. Elizabeth Welch — How do we get there?

479 M. Greenfield — Well, we are thrilled that we don't have to follow the DAS rules and that is fine, but if we don't want to do that then we have to develop internal rules that accomplish the same things the DAS rules accomplish.

482 I. Swenson — Maybe it is part of the discussion which you wanted the Commission to have and which I think most Commissioners agree needs to be had about the role of the Commission plays and how you oversee the contract function. You have a lot of discretion.

487 M. Greenfield — It is policy making. In some respects it is perhaps just asking, "What direction would you like to have or what models are there?" I have said at least on three occasions in open meetings that we are asking Kathryn to go out and do things which are hard to do and are really kind of

our responsibility. So far, we don't have a story to tell in the legislature that there isn't enough money to do that because she goes out and makes sure it gets done.

497 I. Swenson — Do people think that we need to convene, say, a whole day to have this discussion. It would be hard to cram it into a regular meeting. We could have an extended meeting. We could do a full day. We could do a retreat of some kind.

503 M. Greenfield — I don't think this Commission needs to invent something. I think that there are strategies for contracting which are not too mysterious and certainly we could ask for some examples. Maybe I am out to lunch here and the Commission doesn't agree with me. As the certified, lifetime bureaucratic, I am not comfortable with the way we are contracting. That is not a criticism of this Commission.

515 Hon. Elizabeth — How would we get there? How would we go about that? I think you have an answer.

518 M. Greenfield — There are any number of ways to get there. Most of them will end up with us putting an RFP out and not getting any people wanting to bid because we are not offering sufficient money, in which case we would say to the legislature "Hey, we can't do it."

522 Chair McCrea — Okay, well as non-lifetime bureaucrat, just as a poor criminal defense attorney who is chairing this meeting today, my immediate question is, based on the concerns that your raise, Commissioner Greenfield, are you suggesting that we should table …

528 M. Greenfield — I move approval to the contracts.

529 Chair McCrea — Alright.

530 M. Greenfield — And compliment Kathryn for doing an excellent job.

530 Chair McCrea — Any further discussion? All in favor of both of the contracts?

VOTE: 4-0.

540 Chair McCrea — I am sure Ingrid is making notes about this issue and we will definitely take it up as appropriate, when appropriate, to move forward.

543 Hon. Elizabeth Welch — I worry about when, because at the last meeting it was too late and Kathryn talked about the time frame in which she had to do this tremendous amount of work after you all came up with whatever you came up with at your retreat. The issue is when are these principles, approaches, whatever, going to be delineated so that staff can do their job. I think the timing is kind of critical.

547 Chair McCrea — That is why I was asking Commissioner Greenfield if he thought we needed to table this particular aspect for today. I guess the way I would answer your question is I firmly believe that that is going to be an issue that Ingrid is going to bring up to the Chair when she talks to him about the timing for the next meeting. My expectation is that we are going to have an email or some communication within the Commission as soon as possible to try to deal with this issue.

557 M. Greenfield — Let me just say that there is no system so bad that you can't make it worse.

558 Chair McCrea — I am not feeling better.

559 M. Greenfield The last thing I think you want to do for the staff here is to suddenly get interested in this and start fooling with it. In some respects my sense of this ideally would be for the Commission to say that we want to support the staff in a more structured approach to this so that we are not sending people out to negotiate and then to make a proposal to the staff. The timing of this has to be so that we don't overwhelm the staff or the contractors with some sudden change in the contract structure. The timing is not that critical. What is critical is deciding whether or not we want a more structured approach. If we explicitly say we just can't do it any other way but this, and we give that instruction, then we have done it explicitly. I would not rush into this. I am just bringing it at this last moment so we can talk about it.

575 J. Potter It occurs to me that this is an important item. We have gone through the contracting process and there were a couple of little loose ends here and there, but we have gone through the process and we are done with it for this cycle. We won't have to do it again another for two years.

579 I. Swenson The next cycle starts right away. By June we will be asking this Commission to identify the priorities to be included in our budget proposal which will go the Governor and the legislature this fall, so we have to …

586 J. Potter When is our retreat scheduled?

587 I. Swenson Not until August. We have a June meeting in Deschutes County in conjunction with the OCDLA conference and that is the meeting at which we had intended to ask the Commission to set some priorities. You may want to look at April if not March.

593 J. Potter I am wondering if setting priorities is different than wanting to …

596 I. Swenson It is, so we have to go forward with this discussion. I think it is urgent. As Madam Vice Chair indicated, I will be in contact with the Chair as soon as he returns and let him know about the need and see if March turns out to be the date that we should do that.

602 M. Greenfield It could be the staff will respond to this by saying, "No. This is perfect. This is just the way we want it," and then the Commission can say, "Yes, we bless that," or it could be "Yeah, we would like a little more structure." In some respects, adding more bureaucracy to this and less dealing will probably end up with our having some places where we don't get providers.

610 Chair McCrea Now you threw out the talismanic phrase which is what could we present to the legislature about why we need more money.

612 M. Greenfield Well, so far we haven't really had anything real good to present to them. We are getting it done but we need more money.

615 Chair McCrea That is what I am saying. You got our attention.

616 M. Greenfield Okay. On the other hand I think that the community is not interested in having a defendant that doesn't have an attorney.

619 Chair McCrea Okay. Do we need to address this aspect anymore? We have about six minutes.

Agenda Item No. 4 **OPDS Compensation Plan**

625 Chair McCrea Okay, let's try to at least talk about the OPDS employee compensation plan.
MOTION: Mike Greenfield moved to approve the compensation plan; Hon. Elizabeth Welch seconded the motion; hearing no objection the motion carried; **VOTE 4-0.**

Agenda Item No. 5 **Approval of Service Delivery Plan for Judicial District 15**

630 Chair McCrea — Ingrid, do we need to try to approve the service delivery plan for Coos and Curry Counties today?

631 I. Swenson — We do not and probably don't have enough time to have a meaningful discussion so I would recommend that we postpone it.

Agenda Item No. 6 — **Executive Director's Work Plan for 2008**

635 Chair McCrea — Very well we will do that. What about your work plan for 2008? Can we address that at the next meeting?

636 I. Swenson — You certainly may. I will continue to work regardless.

Agenda Item No. 7 — **OPDS's Monthly Report**

638 Chair McCrea — And we know that of you. Is there anything that we should hear from the management team in terms of the monthly report?

640 I. Swenson — The major item was to address Judge Welch's concerns and I think we will convene that discussion very soon. I think the rest can wait. I am not aware of anything that needs to be resolved.

645 Chair McCrea — I would entertain a motion.
MOTION: John Potter moved to adjourn the meeting; Mike Greenfield seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Attachment 2

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

(March 21, 2008)

Introduction

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

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

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

PDSC's Service Delivery Planning Process

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

Second, starting with preliminary investigations by OPDS and the

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

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

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

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

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

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

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

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

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

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

"Structure" versus "Performance" in the Delivery of Public Defense Services

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Description of Post Conviction Relief

What is post conviction relief?

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

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

What are the grounds for relief?

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

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

The most frequent circumstance in which relief is sought is upon the petitioner's claim of ineffective assistance of counsel. Among the other circumstances in which relief has been granted are cases alleging faulty guilty pleas, governmental

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

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

misconduct, denial of adequate defense resources, and the mental incompetence of the defendant.

What forms of relief are available in PCR?

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

What is the appropriate venue for PCR proceedings?

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

How are proceedings initiated?

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

What is the deadline for initiating proceedings?

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

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

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

How are PCR hearings conducted?

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

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

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

How should an attorney prepare for a post conviction proceeding?

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

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

enforcement personnel, jurors, DNA evidence, appellate counsel)

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

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

B. Quality Concerns

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

Indigent Defense Task Force III Report

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

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

C. Possible Solutions

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

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

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

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

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

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

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

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

Although neither the federal nor the state constitution require appointment of counsel at public expense in post conviction cases, in the past when the legislature has considered the elimination of the right to representation, the Department of Justice, among others, has advised against such action. [9]

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

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

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

Testimony provided by invited guests and others at the Commission's February 14, 2007 meeting highlighted additional concerns and included additional recommendations for improvements. In addition to the measures previously recommended for consideration - enhanced compensation, a continued effort to centralize services either at OPDS or through contract providers, and additional training opportunities for attorneys - presenters at the February 14 meeting identified changes to statutes, rules and practices that might impact quality.

Summary of Testimony at February 14, 2008 Meeting

At its meeting on February 14, 2008, the Commisison heard testimony from attorneys Noel Grefenson and Marc Sussman, both of whom represent petitioners in trial level PCR cases.

Mr. Grefenson said that he had been asked by PDSC in 2006 to enter into a contract to handle PCR trial level cases, that he agreed to such a contract, that he currently receives approximately five appointments per month and has about 30 active cases in his office at any one time.

After accepting this assignment he met with the paralegals at the prisons and offered to assist them in getting the materials they needed to do their work. They agreed to let him know if his clients were expressing dissatisfaction with his representation. He has received only one bar complaint since 2006.

Upon receiving an appointment in one of these cases, his office sends the former attorney a release of information from the client and begins gathering records that are then scanned and organized. He receives cases from all parts of the state. Investigating cases that arise in other parts of the state can be difficult. Petitioners have a right, and if they will later be seeking relief in federal court, an obligation, to ensure that all viable claims are raised. Prison inmates often lack the skill to do that. ORCP 17 requires lawyers to certify only meritorious claims, but the case law holds petitioners responsible for not raising any other issues that they might claim as a basis for relief. For lawyers this creates a dilemma. In order to maintain a good relationship with his clients an attorney may not be able to filter out the groundless claims from the meritorious ones. Some cases are resolved quickly when the inmate realizes that if he is successful in overturning his plea agreement the result will not be a dismissal of the case but a return to court to face all of the charges again, including those that were dismissed. Other cases are huge cases with thousands of pages of transcript. If an attorney gets bogged down with too many cases, the attorney may just file claims without setting forth the evidence to support them.

Mr. Grefenson receives $2,100 per case and post conviction work is approximately 50 to 75% of his practice. He does not have an investigator on staff but hires them as needed. He does not use an investigator in many cases. His staff does contact some witnesses directly. He obtains documents from the District Attorney's office and from trial counsel. He gets medical and crime lab reports when they are involved. He does not use the Oregon Rules of Civil Procedure to request production of documents. He does not often take depositions of witnesses and uses affidavits instead. Although there is a hearing in every case, most of the time he does not call live witnesses.

In Marion County, PCR cases are assigned to all of the judges except those at the annex and to one of the criminal judges. The case remains with the original judge throughout the proceeding. A status conference is scheduled in each case. Counsel notify the court when the case is ready to proceed to trial and the court schedules a hearing date. The average case is resolved within approximately eight months. The judges seem to treat these cases no differently from other cases. The petitioners are unlike the plaintiffs in other cases since they sometimes contact the court directly and express concerns about the actions taken by the court.

In the division of the Attorney General's office that handles post conviction cases the attorneys are easy to deal with.

It has not been difficult to get approval from OPDS for funds for investigation or for experts but Mr. Grefenson requests them only when he needs them.

Mr. Grefenson believes the quality of representation statewide is average and could be improved. One change he would make would be to standardize some of the procedures since different courts have different approaches. One court gives the attorney 30 days to file an amended petition, others allow 90 or 120 days. A complex case designation would allow the attorneys to separate out the cases that need more attention.

A central PCR office would be a positive development. Among other things it could install a video system to permit more contact with clients.

Mr. Sussman said he had come to this work from a slightly different direction. He has practiced law for more than 30 years and started doing post conviction cases about 13 or 14 years ago. Those cases are now about 25% of his practice, not including the capital post conviction cases he does under his death penalty contract. If an attorney puts a lot of effort into a case, word can get around and other inmates start calling you. Post conviction has become a significant part of his practice. He gets fewer calls from prisoners in Marion County than from eastern Oregon prisoners.

Having been both a public defender and a private practitioner, he knows that attorney caseloads have a lot to do with the kind of representation people get . In his retained work he can select the cases he wants to handle and sometimes declines to take a case that doesn't have merit. In some areas he is comfortable recommending that prisoners accept appointed counsel but there is a huge disparity in the range of quality of representation that people get in these cases. The approach to representation outlined by Wendy Willis in the Commission's materials for the commission meeting describes his own approach to preparation of these cases.

The interplay between the state post conviction and the federal habeas timelines is very important to his practice. Most PCR cases revolve around the issue of ineffective assistance of counsel. In order to obtain relief you have to show that counsel made a serious error or admission and that the client was prejudiced. It is not enough to show that trial counsel didn't call a witness, you have to show what the witness would have said and that it would have affected the outcome of the case. The attorney has to look at PCR cases from two perspectives – that of the trial lawyer in reviewing what was done and not done, and that of the appellate lawyer in reviewing the record and applying legal standards to the issues. He uses an investigator in almost every case because that has been one of the most fruitful areas of post conviction practice. He investigates and consults with experts and calls those experts and witnesses at trial. In eastern Oregon there is pressure to present cases on paper. Marion County judges will accommodate live witnesses. It has been a good idea to use retired judges to handle cases in eastern Oregon because they have time to review all the materials but typically those judges are in Salem in a hearing room at the Department of Justice and the petitioner and his lawyer are in a prison on the other side of the state. It is hard to get a witness to a hearing room to testify in most cases. He relies on affidavits for tactical reasons in some cases and on depositions, which may be held anywhere in the state.

If PDSC moves in the direction of setting up a statewide office to handle post conviction and it is adequately staffed and has appropriate resources it could provide more uniformly competent representation.

Mr. Sussman said that one thing that has to be considered with PCR cases is that the cost will be driven by fact that the case is tried in the county in which the petitioner is imprisoned even though the underlying offense may have occurred on the other side of the state. The system might be more efficient if venue lay in the county in which the conviction occurred.

Judge James Hargreaves testified that he is a senior judge from Lane County who had never tried a post conviction case until he assumed senior status five years ago. He has now tried hundreds of post conviction cases filed by prisoners in the three prisons in Umatilla and Malheur Counties. When he began trying these cases he was appalled at the poor quality of the legal work. He had been a judge for 20 years and had never seen such poor practice. There is a culture in both counties that accepts poor practice. Umatilla County, in particular, still has a very big problem. He filed a bar complaint against one of the attorneys.

The legal community in both counties is so small that it is difficult to find attorneys to take the cases. Even the firms that do good work in other cases don't do much better than anyone else in these cases. The standard procedure in both counties was for a prisoner to file a petition which included a laundry list of complaints about what his trial lawyer had not done. After counsel was appointed an amended petition would be filed by the lawyer that generally recited the same list, including misspellings. Lawyers disregarded ORCP 17 which requires them to certify the merit of the claims. Prisoners are concerned that if they don't submit the laundry list they cannot get their cases into federal court.

Periodically a new claim will be filed by one inmate and then all of the other petitions from that prison will include the same claim. Lawyers are concerned about angering their clients by not complying with their demands regarding the claims to be filed. Angry clients threaten attorneys, threaten their families, file bar complaints and sue their attorneys. The culture that has developed is a "go along, get along" approach. Occasionally an attorney puts some real effort into a case.

Ninety percent of the cases probably lack merit; 10 percent require a serious look and only three to five percent have merit, although it is true that you can't know which cases have merit if they never get developed because so few are investigated. Most cases in Malheur and Umatilla Counties are tried via television. The judge (who is usually a senior judge, not one of the judges from the court where the matter is pending) is located in a hearing room in Salem with the Assistant AG. The petitioner and his counsel are usually in one of the prisons. All of the exhibits are provided to the judge before the hearing. Only occasionally is live testimony presented at the hearing except for brief testimony by the petitioner. It is a paper trial and that is the only way these cases can get done.

Beginning March 14, 2008 new rules will be going into effect in Malheur and Umatilla counties. Judge Hargreaves worked with both sides to develop rules that comply with the PCR statutes. The rules are set forth in a document he wrote entitled "The Pleading Edge." Among other things

the rules will required that the petitioner make a prima facie case before he will be allowed to go forward. There will be a 120-day period within which the amended petition must be filed. He hopes the new process will weed out meritless cases at the pleading stage. The judge made presentations on the new rules to the legal assistants at all three eastern Oregon prisons. The main issue the prisoners wanted to discuss was the poor quality of representation they receive from court-appointed counsel. The legal assistants were recommending that prisoners represent themselves. Judge Hargreaves urged them to get counsel to assist them in complying with the new rules.

Attorneys could be more effective in cases if they used some expert testimony instead of just relying on the transcript. OPDS needs to have a system of peer review. All these trials are recorded and copies of the CDs could be reviewed. The practice in Umatilla and Malheur is extremely poor. People should not get contracts without being reviewed.

Lynn Larsen has been with the Department of Justice (DOJ) for more than 18 years. In his experience, because of the number of these cases, the trials have always been paper trials. DOJ currently has 650 PCR cases in the office, which represents all of the felony PCR cases in the state. The trial division used to handle the death penalty PCR cases as well but these cases have now been transferred to the Appellate Division. There are six lawyers in the trial division. They received 40 new cases this month. They see spikes in case numbers when new Supreme Court opinions are issued. Statewide there are around 17,000 criminal prosecutions per year. There are 1100 appeals and 400 post conviction cases filed every year. Most of the cases used to be in Marion County but now about half are there and half in other counties, primarily Umatilla and Malheur. The trial division also handles all of the federal habeas cases as well.

The AG attorney deposes the petitioner in almost every case once counsel has been appointed and an amended petition filed. All of the depositions are done by phone. It is expensive for DOJ to take the depositions when the cost of a court reporter if approximately $3.00 per page. Some cases are settled but DOJ tries to get agreement from the DA's office since they have gone to a lot of trouble and expense to prosecute the case. Even though they don't have the burden of proof the state deposes the petitioner so that the issues can be narrowed before trial. The state also submits the record of the case so that a reviewing court has an adequate record on which to proceed. Parties submit their trial memos at the same time so neither side knows what the other side will be saying. The better practice would be to require the petitioner to submit a memo and allow the state to respond (which Judge Hargreaves indicated will be the practice under the new pleading rules in eastern

Oregon.) The Department of Corrections and the courts have both set up video connections for the trial of these cases.

The practice in Umatilla County when he first started handling cases there was not very good. Trial memoranda were seldom filed. The petitioner would attend the hearing and the attorney would generally ask some of the same questions that had been asked in the state's deposition.
In order to improve the quality of representation standardizing the process would be helpful. Status conferences like those held in Marion County could be used to set time frames for pleadings and the trial. A peer review process is something that the Commission or OPDS could do. But it really boils down to a question of time and money. The fewer cases an attorney has, the more time there is to work on each case. DOJ has objected to legislative proposals to removed funding for appointed counsel in PCR cases principally because it is easier to litigate a case with counsel. DOJ does not want innocent people in prison.

Erin Largesen is an AAG who handles PCR and habeas appeals. She has a background in civil practice and was surprised to see how poorly developed the record sometimes is in these cases. There is often only a trial file and no external evidence. She was also surprised by the lack of the use of civil discovery tools, the lack of attachments to the petition, the simultaneous filing of trial memos and the lack of issue selection. The lawyers appear to need more training in civil litigation. Standardization of practice and additional resources would also be helpful. The creation of a unit within OPDS would offer not only the peer review component but would add the benefit of having two attorneys looking over a case.

Chris Mullmann is with the Client Assistance Office of the Oregon State Bar. In the last two years the bar received 2,210 complaints. Seven hundred and eight of those or 32.85 percent came from inmates. A significant proportion involved PCR cases. The issues raised by inmates generally do not amount to ethical violations although they may constitute ineffective assistance of counsel. The bar generally informs complainants that the lawyer's conduct does not fall below the level of competent representation although it might be constitutionally defective. There was one PCR attorney in eastern Oregon who had 130 bar complaints. He knew what he had to do to meet the bar's ethical standards. The bar now refers complainants with complaints about the quality of representation provided by court appointed counsel to OPDS and also provides OPDS with a weekly report of new bar complaints. This year, out of 2800 complaints that the Client Assistance Office received, approximately 365 were sent to Disciplinary Counsel for further action. Most practitioners are sole practitioners and most complaints are about sole practitioners. His impression is that sole practitioners who share space with attorneys in a

similar practice seem to have fewer complaints than those who are entirely on their own and lack support staff.

Steven Wax is the Federal Defender for Oregon. He has handled or supervised more than 3,000 federal habeas cases all of which came from the state system. The culture in the prisons, among the defense bar and on the bench have all combined to create the problems that exist in the system today. There needs to be communication between the bar and OPDS and between OPDS and its contractors. The law which requires the petitioner to identify the issues needs to be changed. But regardless of whether the law is changed, OPDS needs to get qualified lawyers to do the work and then monitor their performance. The issues which need to be focused on in PCR representation are issue identification and issue development. The attorneys can't identify the issues unless they investigate and gather the necessary materials. Part of the problem is that these cases are treated like a continuation of the criminal case. They are civil cases where the petitioner is the plaintiff. OPDS should use lawyers who understand both criminal law and civil practice. Simultaneous pleadings also present a problem. The AG should not be taking depositions of the petitioners in these cases. Identification of the claims should come from the petitioner's attorney. If the AGs continue to take petitioner depositions, the petitioners' attorneys should be active participants.

Caseloads need to be appropriate. Federal defenders are assigned 25 new cases a year and have 50 to 60 cases in their caseload at any given time. Cases in the state system don't last as long so if they receive 25 new cases per year they might have 30 or 40 at a time. There also needs to be a sufficient number of investigators and paralegals. If OPDS establishes a PCR unit of 12 lawyers it would also need approximately 12 support staff.

Drew Chilton is a co-director of the Oregon Appellate Consortium and handles not-capital post conviction appeals. The Attorney General's office is highly professional and does good work. As an appellate attorney Mr. Chilton reviews the post conviction file and generally the most informative document he finds in that file is the AG's trial memo. There is a big difference in the quality of representation at the trial level in cases in Marion County as compared to those in the eastern Oregon counties. In Marion County attorneys like Noel Grefenson and Olcott Thompson do excellent work. Five years ago the representation he saw in Umatilla and Malheur Counties was an unmitigated disaster. Today it is merely a mitigated disaster. Some of the causes are the small size of the legal community in Malheur County, the desire by the court to expedite PCR cases, and the lack of meaningful investigation. Additional resources would improve the system but other things could help as well including

changing the venue statutes to have cases heard in the county in which the conviction occurred. The quality of representation is consistently better in cases tried in the county of conviction. Both the lawyers and the judges are more attentive. A properly operating PCR system provides a useful measure of the quality of performance of trial and appellate counsel.

OPDS staff and members of the commission discussed the difficulty of finding well-qualified attorneys to handle PCR cases. Commissioner Greenfield asked whether OPDS would receive proposals if it were to simply issue an RFP for these cases. Kathryn Aylward indicated that she did not believe OPDS would receive any proposals. It would also be difficult to recruit attorneys for a PCR unit at OPDS. Paul Levy described his experience with a PCR firm in Indiana. He noted that very few PCR attorneys, except in death penalty cases, seek approval for non-routine expenses for investigators and experts in PCR cases. He reported that the bar, at the request of OPDS, has established a workgroup to create performance standards for attorneys in PCR cases. The group has met and is scheduled for a second meeting in March. In addition to creating performance standards the group is interested in making recommendations for improvements. Ingrid Swenson said that although concerns with the quality of representation in PCR cases were well known to OPDS, the system problems identified at the hearing were not. She noted that OPDS had tried to address quality concerns but had few options.

Steve Gorham testified that Judge Hargreaves's rules will prevent petitioners from having their day in court and are meant to exclude litigants from the process. The Attorney General's office handles cases professionally unless they believe they are going to lose. A central PCR office is a good idea if you provided sufficient resources.

Service Delivery Plan for Post Conviction Relief Cases

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

Attachment 3

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

Introduction

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

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

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

PDSC's Service Delivery Planning Process

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

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] Id.

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

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

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

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

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

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

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

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

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

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

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

OPDS's Preliminary Investigation in Judicial District 15

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

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

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

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

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

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

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

OPDS's Preliminary Findings in Judicial District 15

A. Overview of Funding Crisis in Coos and Curry Counties

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

B. The Court

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

C. Coos County

(a) Judicial Assignments

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

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

(b) Special Courts

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

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

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

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

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

(c) The District Attorney

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

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

(d) Public Safety Agencies

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

(e) Criminal Case Processing

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

The docket moves quickly in Coos County. It is described as a county-wide "rocket docket." In 2006 cases going to trial in Coos County were about half the age of the average case statewide. Once a plea offer is declined a case may be reset if the request is made within two weeks of the initial setting or thereafter, only for good cause shown. The state, of course, has the option of dismissing[4] and refilling the case but the defendant who is denied a continuance must either plead to all counts or proceed to trial. There are no judicial settlement conferences in Coos County.[5] Trial rates, particularly jury trial rates, are significantly higher for felony cases in Coos County than for cases in rest of the state[6]. Whether or not the relatively high trial rate is related to the fast pace of the docket is unknown. The system works well in the opinion of the Chief Deputy District Attorney. His office has been able to provide deputies to try the cases and except on very rare occasions there have always been judges and courtrooms to accommodate all of the trials set on a particular day. One key player in the local court system said that the court is not very understanding of the parties' struggle to keep up. This individual feels that disregard for the interest of the litigants has led to a less than cordial relationship among the

[4] Statistics provided by the court indicate that the District Attorney's office dismisses about 32% of felonies and 37% of misdemeanors that are set for trial.
[5] Judge Barron reports that in a discussion that occurred several years ago both the prosecution and the defense advised the court that judicial settlement conferences would not be helpful.
[6] The average trial rate for felonies in Oregon in calendar year 2006 was 5% with approximately 8 court trials for every 10 jury trials. In Coos County 7.8 percent of felony cases went to trial and there were roughly six times as many jury trials as court trials.

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

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

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

(f) Juvenile Dependency System

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

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

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

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

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

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

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

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

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

(g) The Juvenile Delinquency System

The Coos County Juvenile Department lost one third of its staff in the recent budget cuts. Rather than leaving the decision about which positions to cut to the Juvenile Department, the County Commissioners made the decision. The fewest cuts were made to detention center staff. The facility holds twelve youth and includes a treatment center. Two beds are rented to Curry County. Most of the cuts were made to the probation staff, which declined from six to two and three/fifths FTEs. The Juvenile Department Director reported that youth are now exhausting local options sooner and more youth are being committed to the training school. The county routinely exceeds its cap at the training school and consequently pushes for adjudication on Class A felonies[9] since commitments on

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

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

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

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

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

(h) Coos County Public Defense Providers

There are two contract providers in Coos County, Southwestern Oregon Public Defender Services, Inc. and the Coos County Indigent Defense Consortium. The consortium handles only conflict cases[11].

Southwestern Oregon Public Defender Services, Inc.

This non-profit public defender office currently provides services only in Coos County although it previously served both Coos and Curry Counties[12]. The firm has a Board of Directors comprised of three outside members, one selected by the president of the county bar association, one appointed by the presiding judge and one selected by the other two members.

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

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

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

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

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

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

Coos County Indigent Defense Consortium

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

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

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

Hourly rate providers

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

(i) Comments regarding the quality of representation

SWOPDS

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

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

Most attorneys work cooperatively with DHS in dependency cases. Some parents complain that the attorneys who represent them in dependency cases see them only outside the courtroom for five minutes prior to court hearings[13]. One CASA volunteer said that some attorneys don't read the file until they get to court and don't seem to know where their clients are. Some attorneys do excellent work. All of them seem overworked. Two public defenders were identified as being particularly good at getting things done for their dependency clients between hearings.

With respect to delinquency cases it was reported that Coos County defense attorneys are doing good work. They are looking for the best outcome for kids[14]. They see their juvenile delinquency in-custody clients regularly. The two attorneys who handle these cases spend a lot of time with their in-custody clients. Over time, representation in juvenile delinquency cases has improved in Coos County. There used to be an attorney who just didn't care, but the new lawyers are doing very good work.

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

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

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

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

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

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

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

Coos County Indigent Defense Consortium

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

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

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

Most attorneys work cooperatively with DHS in dependency cases[15]. Some parents complain that the attorneys who represent them in dependency cases see them only outside the courtroom for five minutes prior to court hearings. A CASA volunteer said that some attorneys don't read the file until they get to court and don't seem to know where their clients are. Some attorneys do excellent work. All of them seem overworked. Consortium attorneys sometimes fail to request discovery in dependency cases as required by a standing local court order. If they do not request it, it is not provided and attorneys have to appear in court without having reviewed the case developments. Three consortium attorneys were identified as being particularly good at getting things done for their clients between hearings.

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

Consortium attorneys are always ready to work outside the box.

Hourly attorneys

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

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

(k) Issues for Consideration

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

(1) A number of those interviewed indicated that there is a need for at least one additional attorney to handle the public defense caseload in the county. DHS believes that more attorneys would help to reduce caseloads and this would allow attorneys to spend more time with their clients and do more preparation for hearings. They could also have more direct contact with service providers[16]

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

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

(4) Recruitment and retention: One of the judges recommended that public defenders, who seem to have heavier caseloads and receive less compensation than consortium attorneys, be paid the same amount as the DAs.

(5) One judge recommended that all of the attorneys obtain additional training on the rules of evidence.

D. Curry County

(a) Judicial Assignments

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

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

(b) The District Attorney

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

(c) The Sheriff's Office

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

(d) Criminal Caseload

Although the proportion of cases charged as felonies in Curry County decreased in the first six months of 2007 as compared with the first six months of 2006, the total number of criminal cases filed in Curry County has actually exceeded the number of cases filed in the first six months of 2006[17].

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

(e) Juvenile Dependency System

There are 8 DHS staff persons in Curry County and forty children in foster care. All services within the county are located in Gold Beach which means that parties from other parts of the county must find transportation to the county seat for all required services[18] or travel to Coos Bay or Crescent City, California for services. District Attorneys appear only for contested hearings in dependency cases so DHS must prepare its own petitions and represent itself at all other hearings. The Attorney General's office has counsel present for permanency hearings, however. The Citizen Review Board conducts reviews every six months and attorneys are reported to be present for these hearings most of the time. Attorneys are rarely appointed for children in dependency cases and currently, due to an upheaval in the Curry County CASA program, there are only three

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

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

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

(f) Juvenile Delinquency System

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

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

(g) Defense Providers

Curry County Consortium

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

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

Hourly Rate Attorneys

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

(h) Quality of Representation

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

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

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

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

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

(i) Issues for Consideration

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

(1) Both Curry County judges, the trial court administrator and a representative of DHS indicated that there is a need for more attorneys in the county, although OPDS records indicate that only .7 cases per month are being assigned to the private bar. Although Mr. Inokuchi is apparently a third attorney handling cases assigned to the consortium It is not clear that he is able to handle a sufficient number of cases because his office is located in Coos County and he has a large caseload there. In addition, both of the principle attorneys in the consortium are approaching retirement age and need to have succession plans in place.

(2) Judge Margolis indicated that he believes that a public defender office would be the preferred model for service delivery in the county but understands that the conflict problem may not make that feasible[19].

(3) Although the caseload may decline due to shrinking public safety resources, consortium attorneys will need to be compensated sufficiently to make their practice in the county viable. Current rates for appointed counsel are simply not adequate to attract participation by private attorneys in the county. The billing rates for these attorneys is in the $200-250/hour range. The district attorney's higher salary range has also been insufficient to retain experienced lawyers.

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

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

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

PDSC's August 9, 2007 Meeting in Coos County

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Updated Information regarding Contractors

Since the Commission meeting in Coos Bay, all three of the Judicial District 15 contractors have signed contracts with PDSC for the two-year period beginning January 1, 2008.[21]

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

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

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

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

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

A Service Delivery Plan for Judicial District 15

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

Coos County

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

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

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

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

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

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

Curry County

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

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

Attachment 4

MEMO

To: The Public Defense Services Commission

From: Ingrid Swenson

Re: Work plan for Ingrid Swenson for 2008

Date: February 1, 2008

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

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

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

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

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

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

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

Goal II: Assure the Quality of Public Defense Services.

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

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

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

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

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

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

Goal IV: Strengthen Working Relationships with Public Defense Contractors.

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

Goal V: Continue to Strengthen the Management of OPDS

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

[1] Commissioner John Potter has made the extraordinary effort t o participate in each of these visits. It is extremely valuable to have the benefit of his input during interviews and in making preliminary assessments about the issues identified. It has also been possible for OPDS's analyst for the region to participate in many of the interviews.

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

In 2007, each member of the management team participated in an evaluation of their work as managers. All OPDS staff members were surveyed about the performance of each member of the management team in term of office leadership and related skills. Each manager was asked to perform a self-evaluation which included a discussion of the individual's goals for the coming year. The team then met to discuss ways in which other members of the team could support the individual in the accomplishment of those goals. I prepared a final evaluation incorporating the results of the survey, the self-evaluation and my own comments on the performance of the individual. I believe the team found the experience useful and we will plan to repeat it on an annual basis with such changes as we believe will enhance the usefulness of the process.
The employee survey also included questions about employee job satisfaction. It was clear from the responses that there was a desire for better communication within the office. As a result we will be having all staff meetings at least quarterly, LSD staff will meet on a regular basis for updates on developments within the section as CBS staff have done for some time. I will be providing email updates periodically on developments in the legislature, the issues before the commission, activities of groups and agencies affecting public defense, and the like.

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

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

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

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

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

Other Activities for 2008

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

At the invitation of the Governor's Public Safety Coordinator, I participate in monthly meetings with the heads of other public safety agencies[3] to learn about developments affecting public safety in the state and to exchange information about the activities of each of our agencies.

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

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

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

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

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

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

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

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

Members

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

Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION RETREAT

Friday, March 21, 2008
1:30 p.m.1 to 4:30 p.m.
First Floor Conference Room
Aldrich Kilbride & Tatone LLC
1011 Commercial St., NE
Salem, Oregon 97301

AGENDA

1. **Introductions:** Commission members will briefly describe their professional histories and their reasons for agreeing to serve on the Commission.

2. The Role of the Commission

   Type of Commission

   PDSC is a policy making/governing type of body.2 As such it develops and implements policy in the areas outlined in its governing statute (ORS Chapter 151).3 The PDSC is the final decision maker on issues within its jurisdiction, responsible directly to the public.

   Rules for Conduct of Commission Business

   Many of the matters which would ordinarily be addressed in a board or commission's bylaws are addressed in ORS Chapter 151, such as the name of the commission, its mission statement, its membership, officers, meetings, attendance requirements and its responsibilities.

   Commission Policies

   Among the various types of directives a board or commission is authorized to issue are rules, policies, procedural statements and administrative memoranda.4 ORS 151.216 directs PDSC to establish

1 Or earlier depending upon time of adjournment of PDSC meeting.
2 Other types of boards include advisory, licensing and judgment boards. Attachment 1 describes the various types of boards and commissions in the executive branch of government.
3 A copy of the chapter is included with these materials as Attachment 2.
4 Attachment 1 at pp 7-8.

and maintain a public defense system and to adopt "policies, procedures and standards" regarding financial eligibility for court-appointed counsel, the qualification, appointment, performance and compensation of counsel, and other related matters. (Emphasis added.)

Distribution of Responsibilities between the Commission and its Executive Director

See Attachment 3 and ORS Chapter 151.

3. Contract Oversight

Copies of the 2007 RFP and the 2008 OPDS model contract are included as Attachment 4.

ORS 151.216(d) requires the Commission to "[r]eview and approve any public defense services contract negotiated by the director before the contract can become effective." ORS 151.219 (d) requires the executive director to "negotiate contracts, as appropriate, for providing legal services to persons financially eligible for appointed counsel at state expense. No contract so negotiated is binding or enforceable until the contract has been reviewed and approved by the commission as provided in ORS 151.216."

What are some of the approaches the Commission could take towards the review and approval of public defense contracts?

a. Establish general priorities
b. Establish detailed priorities
c. Establish general or detailed priorities and review OPDS proposed implementation plan before approving contracts
d. Establish general or detailed priorities and review initial OPDS implementation plan prior to issuance of RFP. Issue RFP after final budget approved and review OPDS proposed statewide distribution plan. Direct OPDS to negotiate contracts in conformity with approved plan. Approve contracts.

In addition to these general approaches to budget oversight the Commission must decide whether it will review individual contract decisions. Such a review could be conducted upon a contract applicant's request. It could be conducted by the full commission or by a subcommittee of the full commission which would then make recommendations to the full commission.

Time frame for contract process. If the Commission were to adopt a two-step process for first establishing, and then reviewing the application of budgeting priorities as outlined in 3. d. above, the

timeframe for completing the process might be as follows:

a. June PDSC meeting in even numbered years to obtain Contractor input for budget request
b. June PDSC meeting/retreat in odd-numbered years to establish budget allocation priorities with or without a final budget amount
c. July or August - issuance of RFP in accordance with Commission priorities
d. September – Commission to review OPDS's proposed statewide distribution plan
e. September – December - OPDS to negotiate final proposed agreements
f. December – PDSC contract approval; and possible review of individual contract proposals

4. How should the Commission respond to issues outside its jurisdiction that arise in the course of structural reviews? Depending on the circumstances in each case, the Commission could decide to:

- "Shine a light" on the issue by including it in the PDSC report and providing the report to the members of the legal community under review.

- Issue a report and see that it is directed to the policy making body that oversees the particular activity in question.

- Seek to convene or request that another official or body convene a meeting of the appropriate stakeholders to examine the issue and consider appropriate responses.

- Other.

5. What is the scope of the Commission's authority to direct the activities of private contractors?

Statutory provisions: ORS151.216(1)(a) sets forth the mission of the agency to "[e]stablish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United Sates Constitution and Oregon and national standards of justice." In order for the Commission to determine that the services it provides are consistent with the articulated standards, it must have the capacity to evaluate the work of its providers and to seek to improve the work where standards are not met, either by encouraging and assisting the provider to make improvements or by finding an alternative

provider.

ORS 151.216((1)(f)(G) requires the Commission to adopt policies, procedures, standards and guidelines regarding "[p]erformance for legal representation."

Contract requirements: One of the criteria for qualifying as an independent contractor eligible to enter into a PDSC contract is that the contractor "provide labor and service free from direction and control, subject only to the accomplishment of specified results."

The tension between these provisions serves to remind PDSC that while it may be able to identify specific components of quality representation to be provided under its contracts, it may not be able to "direct and control" the means by which such components are achieved. For example, the Quality Assurance Task Force created a list of best practices which it recommended to PDSC contractors. PDSC has not treated this list as mandatory.

6. Need for Court-Appointed Counsel in Probate matters – Commissioner Elizabeth Welch

7. Key Performance Measure 9 – Best Practices for Boards and Commissions. See Attachment 5. Kathryn Aylward and Ingrid Swenson

8. Information regarding revised rules for public officials – Commissioner Chip Lazenby, Ingrid Swenson, Paul Levy – Attachment 6

9. Other issues for discussion

Attachment 1

MEMBERSHIP HANDBOOK

for

BOARDS & COMMISSIONS

Theodore R. Kulongoski

Governor

State of Oregon

Executive Appointments Office

900 Court Street NE, Room 160

Salem, Oregon 97301-4047

503-378-3123

503-378-6827 (fax)

www.governor.oregon.gov

Dear Board Member:

As Oregon state board and commission members, you are participating in a long tradition of citizen governance. Your generous contribution of time and talent assures the continuation of citizen involvement in government in the state of Oregon.

I am working hard to strengthen Oregon's economy, create jobs, and improve Oregon's quality of life. I can't achieve these goals on my own. I need your help. That is why I consider you and your fellow board members an invaluable part of my network throughout the state. By investing in local communities, listening to the needs of constituents and finding equitable solutions to problems, you enable Oregon to preserve its quality of life. Now that the recession has given way to strong economic growth and new family wage jobs - and I am optimistic that this trend will accelerate - we must not lose sight of the qualities and standards that make Oregon such a wonderful place to live, do business and raise our families.

An efficient system is one in which participants are aware of the purpose and function of their respective board and staff. That is the purpose of this handbook – to help you in your role as a board member. This role bestows upon you a responsibility to actively participate in your board's work by being prepared and regularly attending meetings. In addition, it is extremely important that you maintain the highest ethics and use taxpayer monies wisely. I have pledged to make government accountable to the citizens of Oregon, and you are on the frontlines of that commitment.

Every board and commission is an integral participant in state government. I realize the amount of time and energy such work takes from you and on behalf of all Oregonians, I thank you for your service.

Sincerely,

Theodore R. Kulongoski

THEODORE R. KULONGOSKI
Governor

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THE BOARD SYSTEM

At all levels of state government, contributions by members of boards increase efficiency, innovation and responsiveness of governmental decision-making. Most major state agencies and departments are headed by policy-making boards or commissions appointed by the Governor. Many additional committees, councils, boards and commissions establish policy in given areas or serve in advisory roles. (The term "boards" shall be used to refer to all of the above groups.)

With boards functioning at all levels, dedicated citizens have the opportunity to participate in developing a wide variety of governmental policies on major issues ranging from consumer protection to economic development, education, conservation, personal rehabilitation and criminal justice.

The board system contributes to the success of Oregon state government. It is key to bringing local citizens' talent and interest to the state level, keeping government innovative and responsive and improving state performance.

TYPES OF BOARDS & COMMISSIONS

The purpose and scope of each board are determined by the state law or executive order that created it. There are five main types of boards. Each is created to meet a specific need in the management of state government, so it is important to understand the distinctions between each type.

Policy Making Boards are given statutory power by the legislature to make policy decisions and enforce regulations. Policy is developed by interpreting legislative intent as outlined in the board's governing statutes or in officially adopted administrative rules, and by implementing procedures to carry out those laws or rules. Members of policy making boards are generally final decision makers, accountable directly through the Governor to the public.

Some policy making boards are also **Governing Boards**, responsible for directing a state agency and/or appointing the agency director.

Advisory Boards may be created by the Governor, the legislature, state agencies or existing boards. They serve as advisors on policy matters to their appointing authority who is responsible for the management and administration of the policy. These boards study existing policy and make recommendations for change or implementation. Although they do not have final authority to make or enforce rules, their research and advice to decision makers contribute to effective changes in state government.

Licensing Boards fall into either of the above types, depending on the statute or order that established them. These boards examine and license members of a profession or occupation to practice in Oregon. Some also have the power to discipline members of the regulated profession or occupation, and to suspend or revoke licenses.

Judgment Boards are created by the legislature as review and appeals boards which hear and rule on individual cases. The decisions made by most of these and all other boards may be appealed to a higher court.

Some boards share responsibility for policy making with their appointing authority or another state agency, even though they are called advisory boards.

YOUR ROLE AS A BOARD MEMBER

THE APPOINTMENT PROCESS

You have been appointed to serve on one of Oregon's boards because of your ability, experience and interest in serving. Many boards have specific statutory requirements for membership relating to years of licensed experience, occupation or position, residence, number of public members and other criteria. In selecting members, the Governor strives to balance the membership among geographic, gender, age and ethnic diversity.

The Governor receives recommendations on appointments from many sources. Primary consideration is always given to the ability of the prospective appointee to contribute to the productivity and effectiveness of the board.

Some of the Governor's appointees are required by statute to be approved by the State Senate before they are sworn in as board members. The Governor's appointee appears before the Senate committee which conducts an interview and then forwards the appointment to the full Senate for a vote. The appointment is not official until Senate confirmation has been obtained.

An appointee becomes an official member of the board *only* after the Oath of Office has been signed, notarized and filed with the Governor's office. The board member may not take any official actions until then, but is encouraged to attend board meetings and become acquainted with board issues.

Terms of membership are generally established by statute and vary from one to four years. In some cases, members serve "at the pleasure" of the appointing authority and do not have specific terms of office. Under the Oregon Constitution, a single term of office cannot be more than four years.

Statutes governing some boards prohibit serving more than two or three consecutive terms of office. To include as many citizens in the process as possible, a member will not generally be appointed to serve more than eight years on the same board. However, a board member might serve beyond eight years under certain circumstances, such as when the board is in the middle of a special project or decision.

If a member is interested in being reappointed to the board, it is appropriate for the member to inform the Governor of their interest.

If it is necessary to resign, the board member should send a letter to the Governor's Office of Executive Appointments with the effective date of the resignation. A copy of this letter should also be sent to the administrator of the board from which the member is resigning.

A member may be removed from office at any time for continued neglect of duties required by law, for failure to attend two consecutive meetings of the board without just cause, for incompetence, or for unprofessional or dishonorable conduct.

REPRESENTATION

It is important to keep in mind that all members have been appointed to the board to serve the public at large. The concerns and points of view of all interested parties must be represented and considered, but ultimately, the primary responsibility of every board member is to protect the health, safety and welfare of the general public.

If you were recommended by a professional association or special interest group, you will be expected to provide the board with your technical expertise, and to bring the point of view of the group to the board. However, you were not appointed to serve only as the representative

of a specific group. When the group's interest conflicts with that of the general public, your primary responsibility is to the public. All board members must work for the benefit of the public first, with the good of any particular profession, industry or special interest group taking a secondary position.

If you were appointed to fill a designated "public member" position, you may feel intimidated on occasion by other members' experience in the field or expertise with the subject matter. You are, however, a vital part of the board, representing the Oregon consumer's point of view. Each of you is encouraged to ask questions and seek information until you have a clear answer and good understanding of the items under discussion.

Public and special interest members working together form a productive, effective complement to one another in conducting the work of the board. Listening to all viewpoints and working as a cohesive group provides an excellent forum for developing good policies and procedures and finding fair solutions to problems.

BEING AN EFFECTIVE BOARD MEMBER

Oregon boards are generally small in size (three to 10 members) and are composed of a carefully balanced membership. Each board member has the potential to influence board decisions.

The most important factor to ensure the decisions your board makes are fair and meaningful is **regular attendance** by all members. In addition, it is important that you **prepare for meetings** by reading reports, proposals and other documents prepared or distributed by staff. If you are unsure about something, seek advice and information before and during each meeting that enables you to make a knowledgeable recommendation or decision.

State law also places an important emphasis on regular attendance. In ORS 182.010, it says that a member who has two successive, unexcused absences "shall forfeit his or her office unless prevented from attending" for reasonable cause.

To summarize, effective board members:

- Attend all board meetings.
- Prepare for meetings.
- Recognize that serving the public interest is the top priority.
- Recognize the board must operate in a public and open manner.
- Learn about issues affecting the board.
- Examine all available evidence before making judgment.
- Are aware that authority to act is granted to the board as a whole, not to individual members.

PUBLIC RECORDS/PUBLIC MEETINGS

Oregon is known for an open form of government that allows for citizen participation and involvement. Two illustrations of this are the public records and open meetings laws that have been on the books for many years.

These laws are designed to protect public interest, and to make sure the public's business is conducted in an open forum. As a board member, you should become familiar with these laws and how they apply to the board on which you serve.

AMERICANS WITH DISABILITIES ACT

The ADA sets criteria for accessibility and accommodation. Under the ADA, people who have disabilities have a right to an equal opportunity for effective participation in the activities of boards, whether as appointed members or as members of the public.

Meetings and other board sponsored activities should be held in wheelchair accessible locations. Qualified sign language interpreters, materials in accessible format such as Braille, large print and tape, and other forms of auxiliary aids for effective communications should be provided upon request. Reasonable modifications should be made to policies or procedures whenever they create a barrier to the full and equal participation of a person who has a disability.

COMMON SENSE

- Board members must be familiar with and operate within their board's governing statutes and bylaws, and state and federal laws at all times.
- To ensure accountability, all applicable policies and procedures adopted by the board should be in written form.
- No board member should make decisions or take unilateral action without the consent of the board as a whole.
- Questions about board issues should be directed to the board's administrative or executive officer, who will see that all board members receive full information by the next regular meeting.
- No details of board investigations or matters dealt with in executive session should be disclosed by a board member unless they are part of the public record.
- Board members should use caution about participating in private discussions on behalf of one party in the absence of other parties to a dispute.
- Board members should remember they are seen as representatives of the board when they appear at industry or professional gatherings. They must take care not to appear to be speaking for the board unless specifically authorized by the board to do so.
- Board members must keep in mind that their mission is to serve the public, and it is inappropriate to use board membership to create a personal platform.

GENERAL BOARD ACTIVITIES

BYLAWS

It is recommended that boards have a set of bylaws to direct and clarify its actions, procedures and organization. Bylaws are the guidelines by which a board functions and should include expectations of members. Issues such as attendance, responsibilities and discipline should be addressed in the bylaws. Board members are expected to adhere to bylaws and all relevant statutes.

An organization's bylaws generally include a number of articles, such as the following:

- Name of board
- Mission statement
- Membership

- Officers
- Meetings
- Executive board (if needed)
- Committees, subcommittees
- Parliamentary procedure, often including the name of the manual the board will follow
- Amendment procedures for changing the bylaws

BUDGETING

Every state board whose costs are paid wholly or in part from funds held in the State Treasury must submit to the Department of Administrative Services, before September 1 of each even-numbered year, a proposed budget for the biennium beginning July 1 of the following year.

The proposed budget identifies expected revenues, the expenditures necessary to maintain the existing service level, and expenditure requests—in priority order—to add or delete programs or activities. It also includes any requests for fee increases. Preparing and monitoring the budget is a process that involves many participants. As a board member, you may assist in creating your board's budget, or you may participate in studying the budgets of other agencies.

The budget process includes several steps. The board or its staff prepares an agency budget request and submits it to the Department of Administrative Services for review. A budget analyst in the Department reviews the board's request and submits recommendations to the Governor. The Governor may approve, reject or amend all or part of the budget analyst's recommendations. The approved budget becomes part of the "Governor's Recommended Budget," which is presented to the legislature by the agency and the budget analyst.

Approval of the budget is one of the principal issues in every session of the legislature. Because the Oregon Constitution provides that the state may not spend money in excess of its revenues, legislators go through a delicate budget balancing act each session.

Appropriation bills follow a procedure similar to other bills. The Joint Committee on Ways and Means conducts hearings and receives testimony on the Governor's Recommended Budget. The budget is then reviewed and approved by both houses of the legislature and signed by the Governor. Upon signature or effective date, the appropriation bill becomes law.

The legislatively approved biennial budget is administered by state agencies beginning on July 1 of every odd-numbered year. The budget specifies the maximum amount an agency can spend, subject to quarterly allotment approval by Administrative Services.

State board budget money comes primarily from three sources:

General Funds: This fund is primarily from personal income taxes, corporate excise and income taxes, cigarette taxes, liquor apportionment and insurance taxes. Other large resources of General Fund money include interest earnings, state court fees and fines and other fees. Budget approval for a General Fund board means the board is authorized to spend up to a certain amount of tax money for its operation. This authorization is called an appropriation.

General Fund money is generally used for programs that deal with health (public and mental health), education (higher education, community colleges, basic school support), public welfare, correctional institutions, legislative and judicial functions, general governmental administrative functions and public transportation.

Federal Funds: Some state boards are funded in whole or in part by federal funds. Such boards must get permission from the legislature to apply for this money (federal grants or enti-

tlement programs). A federal grant may be a gift to the state or may require that the state provide matching funds.

Other Funds: Most boards get their operating money from sources such as business and non-business license and permit fees, trust fund contributions and earnings (unemployment funds), selective sales and user taxes (gasoline tax, cigarette tax), sales of services (college tuition) or sales of commodities (timber from State lands). Generally, these sources are established by the legislature specifically to support the board or program.

Budget approval for a board financed with Federal or Other Funds establishes the maximum amount of money it can spend from its income source. This is called an expenditure limitation.

Other Funds money is used for most transportation oriented programs (highways, motor vehicles, marine); most employee protection programs (employment, retirement, workers' compensation); many regulatory activities (public utilities, banking, building codes); and some natural resource functions (forestry, wildlife).

Regardless of revenue source, authority for all state agency expenditures rest with the legislature. During a biennium, if your board finds it needs authority to spend more than the available funds due to an emergency situation, it may ask for a limitation increase from the Emergency Board or for an allocation of General Funds from the Emergency Board's fund known as the Emergency Fund. Such requests go to the Emergency Board only if they are approved in advance by the Governor.

The Emergency Board is a statutory committee made up of state legislators who usually serve on the Joint Committee on Ways and Means. The Emergency Board meets regularly throughout the legislative interim and considers only state agency requests (including boards). A board submits its request to the Department of Administrative Services, which reviews the request with the Governor, and if he approves, makes a recommendation to the Emergency Board. If items are sent to the Emergency Board, a budget analyst from the Legislative Fiscal Office also evaluates the request and sends a recommendation to the Emergency Board. The request is then considered by a subcommittee of the board which makes a recommendation to the full board, and a final decision is made.

Whether you are directly or indirectly involved in the budget process, you will find there are budget experts in Administrative Services and in your agency who can help you understand and deal with the process.

RECOMMENDING LEGISLATION

Many state boards work with the legislature in changing and developing state law. Your board may propose legislation and/or track bills relating to the work and concerns of your board. Legislation proposed by your board should be submitted to your agency staff liaison, to the Governor's assistant who works with your board, or to the Governor's legislative coordinator.

As a board member, you may also testify before legislative committees and advise legislators on issues that concern your board. The knowledge and expertise provided by state boards can be very helpful to the legislature. Be careful, however, that you do not represent yourself as a spokesperson for your board without the board's prior consent and approval.

RULEMAKING

To carry out prescribed duties and responsibilities, your board may need to prepare and/or adopt administrative directives. Generally speaking, there are four types of directives: Rules, policies, procedural statements and administrative memoranda. It is important to understand the differences between these types of directives and the extent of your board's authority to adopt one or more of the types.

A **rule** is a general administrative directive, standard, regulation or statement that implements, interprets or prescribes law. It may set forth standards and expectations in general terms or may specifically deal with day to day objectives. A rule, rather than a policy or procedural statement, is adopted when the subject matter affects the public or another agency of government, or when a statute directs that a rule be adopted. Once established, a rule has the force of law and all persons or entities to whom the rule applies must adhere to it.

Boards may engage in rulemaking *only* if the legislature has specifically delegated that authority in the board's enabling statute. Most boards have the authority to pass rules and regulations necessary to implement their own statutory powers. The board cannot pass rules which go beyond the scope of its statute, because rules are generally intended to provide interpretive support for the statutes.

Because rules affect the public, they must be adopted in compliance with the requirements of the Administrative Procedures Act (ORS Chapter 183) unless specifically exempted by statute. The Administrative Procedures Act (APA) is a comprehensive code that imposes requirements for several types of board procedures: Rulemaking, issuing declaratory rulings, holding contested case hearings, ensuring readability of public writings, and legislative review of state agency rules.

According to the APA, any individual or group can petition a board to adopt, amend or repeal a rule. Or the board itself may initiate a rule or rule change in response to a pattern of problems. Following is a common procedure for writing administrative rules:

1. Board staff, working with the board, develop the proposed rules, keeping these guidelines in mind:
   - the board must have legal authority to adopt the rule and may adopt only rules supported by statute;
   - the board must take into account the economic impact of the proposed rule on consumers and affected businesses, industries and occupations;
   - the board may not adopt a rule which violates the law or the constitution; and
   - the board must comply with statutory requirements for rulemaking procedures.
2. The board reviews and approves the proposed rules.
3. The board's legal counsel from the Attorney General's office may be asked to review the proposed rules.
4. Public notice is given of the intent to adopt the proposed rules.
5. A public hearing may be held to hear testimony on the proposed rules.
6. The board formally adopts the rules.
7. A copy of the rules is sent to the Secretary of State for filing, and public notice is given that the rules have been adopted by the board.
8. Legislative Counsel reviews the proposed rules.

A **policy** sets forth, in general terms, minimum standards and directives concerning internal management which do not substantially affect the interests of the public. They are generally issued by the board's administrative officer or appointing authority. They have the same status within the board as a rule, and all persons to whom a policy applies must adhere to it.

Policy development and adoption are not subject to statutory mandate or the requirements of the APA. However, to protect the interests of the board members, staff and other parties affected by the proposed policies, it is wise to develop a systematic procedure for policy making. Staff and other affected persons should always be given an opportunity to make suggestions or ask questions before final adoption.

Procedural statements give the specific details of the day to day processes that carry out policies and rules. They are issued by the board administrative officer, govern all persons affected, and have the same status within the board or agency as rules.

Administrative memoranda are simply the notes used internally to communicate temporary data, one-time announcements or requests, and page revisions of existing policies and procedure statements. There is no specific format prescribed for administrative memoranda.

ADDITIONAL REGULATORY BOARD ACTIVITIES

Many boards engage in regulatory activities. The philosophy of government regulation assumes the public would suffer physical, emotional or financial injury if the state did not exercise some oversight or control. Occupational and professional regulation is intended to ensure that people engaged in those activities having an impact on the public's health, safety or welfare, provide Oregon citizens with honest and competent service. In addition, the regulation system provides a means for the public to seek amends through a fair, objective process.

Members of regulatory boards help to set policy and give guidance to the regulated industry or profession under governing statutes. In addition, your responsibilities may include preparing and conducting examinations, evaluating applications, issuing or denying licenses, regulating by inspection, conducting investigations of alleged violations of the law, taking normal disciplinary action, issuing citations, holding hearings and imposing penalties. These responsibilities must be prudently exercised on behalf of both the public and the occupations and professions being regulated.

Following are key activities of regulatory boards:

TESTING

Effectively constructed and administered tests provide an important contribution to licensure. Licensing tests should be designed to ensure an applicant's education and experience have adequately prepared them to assume an occupational or professional role that impacts the public's health, safety and welfare.

DISCIPLINE

A principal responsibility of licensing boards is to determine whether a person should obtain or retain a license. Those licensing boards with regulatory authority not only establish the standards and prescribe the qualifications required for a license to practice, they are able to regulate the services provided by the licensee by enforcing compliance with those standards.

Most licensing boards may revoke, suspend or refuse to renew any license, registration or certificate they issue, and some are authorized to stay a suspension on probationary conditions. They may issue a letter of warning, reprimand or censure. Most boards may assess a fine for noncompliance with certain statutes or rules.

COMPLAINTS

Most boards receive complaints about licensees. Complaints are usually received from consumers of licensee services, other licensees or professionals, other regulatory agencies, or as a result of routine inspections or investigations. Each complaint must be reviewed, and every effort must be made to mediate and satisfactorily resolve all complaints.

If there is a question as to whether a complaint falls within the board's jurisdiction, the administrative officer should consult with the board's assigned Attorney General. If a complaint is not

within the board's jurisdiction, the board should transmit the complaint, together with any evidence or information, to the proper agency. The complainant should be notified of this transmittal.

HEARINGS

In some cases, an administrative hearing will need to be held to resolve a complaint. The Administrative Procedures Act establishes specific procedures that must be followed to take disciplinary actions against individuals or firms (e.g., suspending or revoking a license or assessing a fine). If the board conducts a hearing required by the APA, board members should not participate in the investigative or pre-hearing complaint handling functions. They must be impartial parties to the hearing.

Individual board members should disqualify themselves if bias or significant interest prevents fair and impartial participation in the hearing. Bias, or prejudgment, include issues of fact in a case as well as bias for or against a party in the case. Interest means the board member personally stands to gain or lose from the outcome of the hearing.

If members have any conflicts of interest or have received any communication on a fact or issue made outside the hearing during review of a case, they must place on the record a statement on the nature of the conflict or substance of the communication.

Hearing decisions made by boards may be appealed to the Court of Appeals.

Administrative details of hearings are generally handled by staff. The administrative officer of your board can give you more information about procedures for hearings the board conducts.

BOARD RELATIONS

In Oregon, most state agencies are relatively independent within their areas of responsibility. Overall policy guidance and direction are provided by the Governor, as the state's chief executive officer, and by the legislature, which writes laws and appropriates operating funds. To provide an overall management structure, the Governor uses the Department of Administrative Services.

The executive and legislative branches reflect the separation of powers principle that provides a system of checks and balances. The legislature creates state agencies, defines their functions and appropriates funds. The Senate confirms the Governor's appointments to certain offices. To ensure legislative intent is followed, the Legislative Counsel Committee reviews state agencies' administrative rules.

The Governor coordinates the activities of state agencies; actively participates in the design, development and approval of state agency budgets; appoints many agency directors, board members and other officials; and approves or disapproves all legislation affecting state agencies.

Board activities are subject to both legislative and executive oversight. Actions by the Governor and the legislature may result in revision of a board's authority or changes in appropriations.

OREGON STATE LEGISLATURE

Many board members have some involvement with the legislature during their period of service. Oregon's legislature consists of the House of Representatives, which has 60 members

elected for two-year terms, and the Senate, whose 30 members are elected to serve four-year terms.

The Oregon Constitution requires that the legislature meet every two years. * It convenes on the second Monday in January of every odd numbered year and stays in session approximately six months. The members of the legislature or the Governor may call a Special Session if there is a need to meet during the interim between regular sessions.

The Speaker of the House and President of the Senate, the two most significant leadership positions in the legislature, are elected by the majority of their respective houses to preside over daily sessions and perform other duties prescribed by rule, custom and law.

Both houses operate under an open committee system that allows public testimony on any issue. The committees are appointed by the presiding officers. Typically, some 2,000 bills are introduced each session, and about one-third of them become law. Most of the work in considering and revising bills during the session is done in legislative committees. Committees also conduct interim studies.

General information regarding the current organization of the legislature, including committee assignments, office locations and telephone numbers, may be obtained from the following offices:

SENATE
Secretary of the Senate
S-223 State Capitol
Salem, OR 97310
503-986-1851

HOUSE
Chief Clerk of the House
H-271 State Capitol
Salem, OR 97310
503-986-1870

* Senate Concurrent Resolution 1, considered and passed by the 2007 legislature, will convene a month-long special session in February, 2008. This session could be an initial step in proposing an amendment to the constitution instituting annual sessions of the Oregon legislature. In the meantime, this paragraph still applies.

LOCAL & FEDERAL GOVERNMENT

As a board member, you may represent state government in its relations with other governmental bodies. State government has a significant responsibility in the federal system of planning, funding and operating programs. About 70 percent of all federal grant dollars are funneled to state government or through state government to local governments. The other 30 percent goes directly to local programs.

State-Local Relations: Many state boards make policy decisions or recommendations, and conduct studies that directly affect the budget, programs and daily operations of cities, counties and other local government districts in Oregon.

Boards can work directly with local citizens and officials or through established associations. As in prior administrations, the goal is to strengthen local government to establish healthy communities. Boards help accomplish this goal by serving as the communications link between local communities and state government.

State-Federal Relations: Under the direction and leadership of the Governor, state government can affect the development and operation of federal regulations, funding and programs to ensure the state's priorities are considered. Each federal agency must publish significant regulations scheduled for review in the Federal Register. Comments from state governments are included in the review process. The review and comment procedures determine if existing regulations should be rewritten or eliminated.

WHERE TO GET INFORMATION & HELP

BOARD STAFF

Most state boards work within a state agency or have access to assistance and advice from the agencies. Typically, if a board works within an agency, certain central support services are provided to manage internal business. Some boards have their own staff to perform their day to day administrative functions.

Most often, the primary role of board staff is to carry out the rules, policies and programs developed by the board. Administrative officers or staff also bring to the attention of the board issues of importance, prepare meeting agendas in consultation with the board chair and compile background information for board study.

Additional responsibilities often delegated to board staff include:

- all meeting arrangements
- preparation of minutes
- processing of complaints
- staff supervision
- administering board programs
- designing forms to conduct board business
- preparing budget requests and Emergency Board requests
- monitoring income and expenditures to comply with legislatively approved budgets
- working with the board to develop proposed rules
- providing information to the board about proposed legislation
- tracking bills during a legislative session
- coordinating testimony before legislative committees
- representing the board before legislative committees and other groups

GOVERNOR'S OFFICE (503-378-3111)

The Governor manages and coordinates the operations of state government through a staff of professionals in his Salem office.

Most state agencies report to the Governor through the Department of Administrative Services. Staff in the Governor's Office are responsible for human resources, health care, natural resources, education, legislative relations, legal affairs, executive appointments, citizen representation, affirmative action, special projects and communications.

In addition to the Governor's Office, your immediate staff and affiliated state agency, there are resources available to you throughout state government. You may have occasion to request advice from legal experts, a fiscal manager or others with special expertise. Following are descriptions of the specific functions of state agencies that may affect board members and whose support services are available to all state boards.

DEPT. OF ADMINISTRATIVE SERVICES (503-378-3104)

The director of Administrative Services is appointed by the Governor. The Department was established to administer the Governor's programs, and to provide policy direction and support services to state agencies. As mentioned above, most state agencies report to the Governor through the Administrative Services Director.

The Budget & Management Division (503-378-3106) reviews all state agency proposed budgets to assure resources are allocated effectively, and prepares the Governor's biennial budget package for approval by the Governor and presentation to the legislature. All state agencies, including state boards, submit their proposed budgets to this Division for review and assistance. Additionally, the Division oversees expenditures to assure consistency with the Governor's policy and legislative intent. Board members participate in preparing, reviewing and presenting the budget to the Governor and legislature.

The Human Resource Services Division (503-378-8344) administers state personnel management programs; provides services to state agencies in recruiting, compensation, records and training; and negotiates collective bargaining contracts for the state with state employee labor unions. This Division is responsible for ensuring all state employees are hired according to the state merit system and affirmative action goals. The Division also approves the selection process and salaries for all staff. The contracts it negotiates with unions typically cover two-year periods.

Training & Organization Development (503-378-6334) conducts a training session for new as well as existing board members and staff. Members are strongly encouraged to take advantage of this free course that offers valuable information for a successful and fulfilling experience as a board member.

ATTORNEY GENERAL (503-378-4400)

The Department of Justice is the state's law firm, headed by the Attorney General. The Department provides most of the same services as do private law firms, but with a few important differences.

By statute, the Attorney General and lawyers within the Department are the sole providers of legal advice and representation to state agencies and officials. Any legal question must be asked of the Department of Justice. By the same token, the Department is required to answer any question asked of it.

The Department provides oral and written legal advice to all state agencies and state officials, acts as a legal adviser at meetings, and is an advocate for the state in hearings, trials and appeals.

Each state agency, and its governing board, is assigned at least one assistant attorney general who specializes in the area of law affecting the agency. These lawyers are assigned to identify any legal problems that may be posed by existing or proposed agency policies or actions. Your attorney is there to facilitate your policy choices by pointing out potential problems and evaluating the legal effect of other policy options that may accomplish the desired goal more easily.

If you act on the advice of counsel, the Department will defend you in court and any liability will be assumed by the state. Acting without consulting your lawyer, or acting contrary to his or her advice, may result in personal liability.

Getting legal advice from the Department can be as simple as a phone call. However, some issues require a more formal and comprehensive review through the opinion process. Each agency and board usually has an internal procedure for requesting legal assistance. You may wish to discuss that procedure with your board staff.

The Department also uses conferences, such as the biennial Administrative Law Conference; and publications, such as the Public Records and Meetings Manual, the Agency Administrator's Guide and the Administrative Law Manual, to help inform agency staff and citizen board members of their legal rights and responsibilities.

The Attorney General encourages board members to work through their agency staff to arrange personal meetings with their contact attorney and acquaint themselves with the statutes or rules providing their source of authority. Reviewing the Public Records and Meetings Manual and the Administrative Procedures Act is also a worthwhile task for board members.

SECRETARY OF STATE (503-986-1500)

The Secretary of State is an elected official who serves as the state's chief elections and public records officer, the auditor of public accounts and the administrator of the State Archives.

The Audits Division (503-986-2255) performs fiscal and compliance audits of all state agencies and boards as well as establishing and monitoring standards for municipal audits. Be certain you are provided reports on regular or special audits or any examination of your board.

The Archives Division (503-373-0701) preserves permanent government records and establishes retention schedules for public records of state agencies and boards. State boards must follow the guidelines established by the division on the care, accessibility, storage and destruction of its papers and records. No official records may be destroyed without the approval of the division. **Administrative Rules** receives and processes administrative rules adopted by all state agencies. This section edits, codifies and publishes Oregon Administrative Rules.

OREGON GOVERNMENT STANDARDS & PRACTICES COMMISSION (503-378-5105)

The Standards and Practices Commission enforces Oregon's government ethics and lobby registration laws. These laws require public officials to disclose potential conflicts of interest, prohibit use of office for personal gain and require certain officials to file statements of economic interest.

Lobby regulation laws require lobbyists to register and to file expenditure reports. Certain lobbying is prohibited. One example is making a monetary contribution to a legislative official's campaign fund during a legislative session.

The Commission has authority to conduct investigations and hearings, to issue advisory opinions on these matters, and to levy fines for infractions. An ethics guide is available upon request from the Commission.

SELF-ASSESSMENT

The following checklist may be useful in carrying out a regular review of your board's functions:

1. Is there a need for regulation?
   - When did regulation of the profession or occupation begin, and for what reasons? Does the need still exist?
   - Are the rules promulgated by the board consistent with the statutes and legislative intent?
   - Is the implementation (guidelines, procedures, etc.) consistent with the rules?
2. Does the board promote and protect the public interest?

- Are there contacts with consumer groups?
- What mechanisms encourage consumer participation in decision making?
- Are due process protections provided to applicants, licensees and the public?
- Is the board making itself known to, and open to, the public? Do any members of the general public attend meetings?
- How are board meetings, activities and decisions publicized?
- Does the board or its administrator produce an annual report summarizing its activities? Would the average citizen understand the report and be able to judge how well the board is doing its job? Where does the report place its emphasis?

3. Is the board involved in consumer education?
   - Are consumers informed of their rights? Are they informed of ways to get help when their rights have been violated?
   - Is information made available to help consumers avoid problems by knowing what to expect when they deal with members of your profession or occupation?
4. Does the board provide protection against deceptive practices, negligence and incompetence?
   - Are records of complaints kept to indicate patterns of abuse?
   - What actions does the board take to discipline licensees? Are they fair to licensees and to consumers?
5. Does the board avoid engaging in practices that limit competition?
   - Does the licensing process unduly restrict entry into the profession or occupation?
   - Are minimum or suggested fee schedules avoided?
6. Is the board operating efficiently?
   - Do meetings start on time? Do members arrive on time consistently?
   - Do members attend regularly? Do they notify the chair or staff when they are not coming or will be late? Are they aware of quorum requirements?
   - Are minutes of previous meetings mailed promptly?
   - Does the board spend much time in routine administrative items that could be taken care of by staff?
   - Do board members study written background material prepared by staff before coming to meetings?
   - Is the board meeting at a time most convenient for the members? Does it meet too often? Not often enough?
7. Does the board allow others to take up too much of its meeting time?
   - Do licensees or those connected with the occupation sit with the board and participate in its discussions and decisions?
   - Are people from the audience making comments when they are not part of the scheduled presentation at meetings?
8. Does each board member understand his or her responsibilities?
   - Do board members have a current copy of the agency budget to review, discuss and monitor?

- Do board members view, discuss and monitor the agency's monthly or quarterly expenditure report?
- Does the board review the Secretary of State's agency/board audit and take appropriate action?
- Does each board member have a packet or compendium of policies and/or administrative rules followed by the agency, as well as copies of all statutes for which the board has responsibility?
- Are board members informed of procedure followed by the administrative staff for processing licenses or other certificates for which your board is responsible; complaints from consumers; license revocation, hearings, etc.?
- Does your board or agency have a statement of goals and objectives? (Note: these goals and objectives should be reviewed on an annual basis for currency.)
- Does your board have a statement of the affirmative action policy of your administrative agency and statistics regarding its implementation?

SUMMARY OF PERTINENT LAWS

It is important that members be familiar with these laws—please review them!

ACTIVITY	REFERENCE
Senate Confirmation	Oregon Constitution, Article III Section 4
Holding Office, Tenure, Oaths	Oregon Constitution, Article XV Sections 1-3
Personal Liability	ORS 30.260, et seq.
Lobby Disclosure Act	ORS 171.725
Non-Attendance of Board Members	ORS 182.010
Administrative Procedures Act	ORS Chapter 183
Alternative Dispute Resolution	ORS 183.502
Public Records & Meetings Laws	ORS 192.610-192.710
Vacancies & Eligibility	ORS 236.010-030
Diversity in Appointment Criteria	ORS 236.115
Term Length, Removal, Prohibition from Accepting Certain Positions	ORS 236.140-147
Government Ethics Law	ORS Chapter 244
Expenses, Compensation & Parking	ORS 292.495
Oregon Documents Depository Program	ORS 357.003-004 & 357.090
Unlawful Trade Practices Act	ORS 646.608, et seq.
Licensing Boards Administration	ORS Chapter 670

Attachment 2

Chapter 151 — Public Defenders; Counsel for Financially Eligible Persons

2007 EDITION

PUBLIC DEFENDERS; COUNSEL FOR ELIGIBLE PERSONS

PROCEDURE IN CRIMINAL MATTERS GENERALLY

COUNTY CONTRACT FOR COUNSEL TO FINANCIALLY ELIGIBLE PERSONS

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PUBLIC DEFENSE SERVICES COMMISSION

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COUNTY CONTRACT FOR COUNSEL TO FINANCIALLY ELIGIBLE PERSONS

151.010 Public defender services by county. (1) The governing body of a county, on behalf of the county, may contract with an attorney, group of attorneys or full-time not-for-profit public defender organization for the provision by the attorney, group of attorneys or organization of services as counsel for financially eligible persons in proceedings in which a court or magistrate has the power to appoint counsel to represent a financially eligible person and the county is required to pay compensation for that representation.

(2) A court or magistrate may appoint an attorney who is, or an attorney member of a public defender organization that is, under a contract with a county as provided in this section to represent a financially eligible person in any proceeding in which the court or magistrate has the power to appoint counsel to represent a financially eligible person and the county is required to pay compensation for that representation. [1971 c.432 §1; 1973 c.836 §311; 1985 c.502 §11; 2001 c.962 §32]

151.020 [1971 c.432 §2; repealed by 1985 c.502 §13]

151.030 [1971 c.432 §3; repealed by 1985 c.502 §13]

151.040 [1971 c.432 §4; 1983 c.740 §22; repealed by 1985 c.502 §13]

151.050 [1971 c.432 §5; repealed by 1985 c.502 §13]

151.060 [1971 c.432 §6; repealed by 1985 c.502 §13]

151.070 [1971 c.432 §7; repealed by 1985 c.502 §13]

151.080 [1971 c.432 §8; repealed by 1985 c.502 §13]

151.090 [1971 c.432 §9; repealed by 1985 c.502 §13]

151.150 [1981 s.s. c.3 §117; 1985 c.502 §9; renumbered 151.460]

151.210 [Formerly 138.710; repealed by 2001 c.962 §114]

PUBLIC DEFENSE SERVICES COMMISSION

151.211 Definitions. For purposes of ORS 151.211 to 151.221:

(1) “Bar member” means an individual who is an active member of the Oregon State Bar.

(2) “Chief Justice” means the Chief Justice of the Supreme Court.

(3) “Commission” means the Public Defense Services Commission.

(4) “Director” means the public defense services executive director appointed under ORS 151.216.

(5) “Office of public defense services” means the office established by the commission under the director to handle the cases assigned and to carry out the administrative policies and procedures for the public defense system. [2001 c.962 §1; 2007 c.71 §43]

Note: 151.211 to 151.225 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 151 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

151.213 Public Defense Services Commission; membership; terms. (1) The Public Defense Services Commission is established in the judicial branch of state government. Except for the appointment or removal of commission members, the commission and employees of the commission are not subject to the exercise of administrative authority and supervision by the Chief Justice of the Supreme Court as the administrative head of the Judicial Department.

(2) The commission consists of seven members appointed by order of the Chief Justice. In addition to the seven appointed members, the Chief Justice serves as a nonvoting, ex officio member. The Chief Justice shall appoint at least two persons who are not bar members, at least one person who is a bar member and who is engaged in criminal defense representation and at least one person who is a former Oregon state prosecutor. Except for the Chief Justice or a senior judge under ORS 1.300, a member may not serve concurrently as a judge, a prosecuting attorney or an employee of a law enforcement agency. A person who is primarily engaged in providing public defense services may not serve as a member of the commission.

(3) The term of a member is four years beginning on the effective date of the order of the Chief Justice appointing the member. A member is eligible for reappointment if qualified for membership at the time of reappointment. A member may be removed from the commission by order of the Chief Justice. If a vacancy occurs for any cause before the expiration of the term of a member, the Chief Justice shall make an appointment to become immediately effective for the unexpired term.

(4) A chairperson and a vice chairperson shall be appointed by order of the Chief Justice every two years with such functions as the commission may determine. A member is eligible for reappointment as chairperson or vice chairperson.

(5) A majority of the voting members constitutes a quorum for the transaction of business.

(6) A member of the commission is not entitled to compensation for services as a member, but is entitled to expenses as provided in ORS 292.495 (2). [2001 c.962 §2; 2003 c.449 §15]

Note: See note under 151.211.

151.216 Duties; rules. (1) The Public Defense Services Commission shall:

(a) Establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.

(b) Establish an office of public defense services and appoint a public defense services executive director who serves at the pleasure of the commission.

(c) Submit the budget of the commission and the office of public defense services to the Legislative Assembly after the budget is submitted to the commission by the director and approved by the commission. The Chief Justice of the Supreme Court and the chairperson of the commission shall present the budget to the Legislative Assembly.

(d) Review and approve any public defense services contract negotiated by the director before the contract can become effective.

(e) Adopt a compensation plan, classification system and personnel plan for the office of public defense services that are commensurate with other state agencies.

(f) Adopt policies, procedures, standards and guidelines regarding:

(A) The determination of financial eligibility of persons entitled to be represented by appointed counsel at state expense;

(B) The appointment of counsel;

(C) The fair compensation of counsel appointed to represent a person financially eligible for appointed counsel at state expense;

(D) Appointed counsel compensation disputes;

(E) Any other costs associated with the representation of a person by appointed counsel in the state courts that are required to be paid by the state under ORS 34.355, 135.055, 138.500, 138.590, 161.346, 161.365, 161.385, 419A.211, 419B.201, 419B.208, 419B.518, 419B.908, 419C.206, 419C.209, 419C.408, 419C.535, 426.100, 426.135, 426.250, 426.307, 427.265, 427.295, 436.265 or 436.315 or any other provision of law that expressly provides for payment of such compensation, costs or expenses by the commission;

(F) Professional qualifications for counsel appointed to represent public defense clients;

(G) Performance for legal representation;

(H) The contracting of public defense services;

(I) Contracting with expert witnesses to allow contracting with out-of-state expert witnesses only if in-state expert witnesses are not available or are more expensive than out-of-state expert witnesses; and

(J) Any other matters necessary to carry out the duties of the commission.

(g) Establish a peer review system for the approval of nonroutine fees and expenses incurred in cases involving aggravated murder and the crimes listed in ORS 137.700 and 137.707. The review shall be conducted by a panel of attorneys who practice in the area of criminal defense.

(h) Establish a complaint process that allows district attorneys, criminal defense counsel and the public to file complaints concerning the payment from

public funds of nonroutine fees and expenses incurred in cases.

(i) Reimburse the State Court Administrator from funds deposited in the subaccount established under ORS 151.225 for the costs of personnel and other costs associated with location of eligibility verification and screening personnel pursuant to ORS 151.489 by the State Court Administrator.

(2) Policies, procedures, standards and guidelines adopted by the commission supersede any conflicting rules, policies or procedures of the Public Defender Committee, State Court Administrator, circuit courts, the Court of Appeals, the Supreme Court and the Psychiatric Security Review Board related to the exercise of the commission's administrative responsibilities under this section and transferred duties, functions and powers as they occur.

(3) The commission may accept gifts, grants or contributions from any source, whether public or private. However, the commission may not accept a gift, grant or contribution if acceptance would create a conflict of interest. Moneys accepted under this subsection shall be deposited in the Public Defense Services Account created in ORS 151.225 and expended for the purposes for which given or granted.

(4) The commission may not:

(a) Make any decision regarding the handling of any individual case;

(b) Have access to any case file; or

(c) Interfere with the director or any member of the staff of the director in carrying out professional duties involving the legal representation of public defense clients. [2001 c.962 §§3,106; 2003 c.449 §§1,2,42; 2005 c.843 §23]

Note: See note under 151.211.

151.219 Public defense services executive director; duties. (1) The public defense services executive director shall:

(a) Recommend to the Public Defense Services Commission how to establish and maintain, in a cost-effective manner, the delivery of legal services to persons entitled to, and financially eligible for, appointed counsel at state expense under Oregon statutes, the Oregon Constitution, the United States Constitution and consistent with Oregon and national standards of justice.

(b) Implement and ensure compliance with contracts, policies, procedures, standards and guidelines adopted by the commission or required by statute.

(c) Prepare and submit to the commission for its approval the biennial budget of the commission and the office of public defense services.

(d) Negotiate contracts, as appropriate, for providing legal services to persons financially eligible for appointed counsel at state expense. No contract so negotiated is binding or enforceable until the contract has been reviewed and approved by the commission as provided in ORS 151.216.

(e) Employ personnel or contract for services as necessary to carry out the responsibilities of the director and the office of public defense services.

(f) Supervise the personnel, operation and activities of the office of public defense services.

(g) Provide services, facilities and materials necessary for the performance of

the duties, functions and powers of the Public Defense Services Commission.

(h) Pay the expenses of the commission and the office of public defense services.

(i) Prepare and submit to the commission an annual report of the activities of the office of public defense services.

(j) Prepare and submit to the Legislative Assembly a biennial report on the activities of the office of public defense services.

(k) Provide for legal representation, advice and consultation for the commission, its members, the director and staff of the office of public defense services who require such services or who are named as defendants in lawsuits arising from their duties, functions and responsibilities. If requested by the director, the Attorney General may also provide for legal representation, advice and consultation for the commission, its members, the director and staff of the office of public defense services in litigation.

(2) The director may designate persons as representatives of the director for the purposes of determining and paying bills submitted to the office of public defense services and determining preauthorization for incurring fees and expenses under ORS 135.055. [2001 c.962 §§4,106a; 2003 c.449 §§3,4]

Note: See note under 151.211.

151.220 [Formerly 138.740; repealed by 2001 c.962 §114]

151.221 Status of officers and employees of office of public defense services. Officers and employees of the office of public defense services, who are appointed under a personnel plan adopted by the Public Defense Services Commission, are state officers or employees in the exempt service and are not subject to ORS chapter 240. [2003 c.449 §17]

Note: See note under 151.211.

151.225 Public Defense Services Account. (1) There is created a Public Defense Services Account in the General Fund. The Public Defense Services Account is continuously appropriated to the Public Defense Services Commission to pay compensation of counsel and other expenses in connection with the legal representation of persons for which the commission is responsible by law.

(2) All moneys appropriated to the commission to pay compensation of counsel and other expenses in connection with the legal representation of persons for which the commission is responsible by law shall be deposited in the Public Defense Services Account.

(3) All moneys received by the Judicial Department under ORS 135.050 (8), 151.487 (1), 151.505 (3), 419A.211, 419B.198 (1) or 419C.203 (1) shall be deposited in a separate subaccount created in the Public Defense Services Account to be used by the public defense services executive director to reimburse the actual costs and expenses, including personnel expenses,

incurred in administration and support of the public defense system.

(4) All gifts, grants or contributions accepted by the commission under ORS 151.216 shall be deposited in a separate subaccount created in the Public Defense Services Account to be used by the commission for the purpose for which the gift, grant or contribution was given or granted.

(5) As used in this section, “other expenses in connection with the legal representation of persons for which the commission is responsible by law” includes expenses incurred in the administration of the public defense system. [2001 c.962 §§5,106b]

Note: See note under 151.211.

151.230 [Formerly 138.750; 1983 c.740 §23; repealed by 2001 c.962 §114]

151.240 [Formerly 138.760; repealed by 2001 c.962 §114]

151.250 [Formerly 138.770; 1973 c.694 §19; 1987 c.320 §84; 1991 c.724 §26; 1993 c.33 §303; 1995 c.117 §3; repealed by 2001 c.962 §114]

151.260 [Formerly 138.780; repealed by 2001 c.962 §114]

151.270 [Formerly 138.720; repealed by 2001 c.962 §114]

151.280 [Formerly 138.730; 1983 c.740 §24; repealed by 2001 c.962 §114]

151.290 [Formerly 138.790; repealed by 2001 c.962 §114]

151.410 [1985 c.502 §2; repealed by 1987 c.803 §27]

151.420 [1985 c.502 §3; repealed by 1987 c.803 §27]

151.430 [1985 c.502 §5; 1987 c.803 §10; 1995 c.677 §2; 2001 c.962 §109; repealed by 2001 c.962 §115]

151.440 [1985 c.502 §6; repealed by 1987 c.803 §27]

151.450 [1985 c.502 §7; 1987 c.803 §11; 1991 c.724 §27; 1991 c.750 §9; 1993 c.33 §304; 2001 c.480 §13; 2001 c.962 §110; repealed by 2001 c.962 §115]

151.460 [Formerly 151.150; 1987 c.803 §12; 1989 c.1053 §8; 1995 c.677 §3; 2001 c.962 §111; repealed by 2001 c.962 §115]

151.465 [1987 c.803 §9; 1997 c.761 §13; 2001 c.480 §14; repealed by 2001 c.962 §115]

151.470 [1985 c.502 §15; repealed by 1987 c.803 §27]

151.480 [1985 c.502 §18; 2001 c.962 §112; repealed by 2001 c.962 §115]

DETERMINATION OF FINANCIAL ELIGIBILITY

151.485 Financial eligibility; determination; financial statement; termination of appointed counsel. (1) For purposes of determining the financial eligibility for appointed counsel of persons with a constitutional or statutory right to counsel in matters before the state courts and whose counsel is authorized to be paid by the public defense services executive director under ORS 151.219, a person is financially eligible for appointed counsel if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family under standards established by the Public Defense Services Commission under ORS 151.216.

(2) A determination of financial eligibility shall be made upon the basis of information contained in a detailed financial statement submitted by the person for whom counsel is requested or appointed or, in an appropriate case, by the person's parent, guardian or custodian. The financial statement shall be in the form prescribed by the Public Defense Services Commission. The form shall contain a full disclosure of all assets, liabilities, current income, dependents and other information required by ORS 135.050 (4) and, in addition, any information required by the commission and state courts as necessary to determine eligibility. The commission shall adopt uniform statewide guidelines and procedures that prescribe how to use the form and determine financial eligibility for appointed counsel.

(3) If at any time after the appointment of counsel the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel, the court may terminate the appointment of counsel. If at any time during criminal proceedings the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom the defendant has retained, the court may appoint counsel as provided in this section.

(4) In addition to any criminal prosecution, a civil proceeding may be initiated by any public body that has expended moneys for the defendant's legal assistance within two years of judgment if the defendant was not qualified for legal assistance in accordance with subsections (1) and (2) of this section. As used in this subsection, "legal assistance" includes legal counsel, transcripts, witness fees and expenses and any other goods or services required by law to be provided to a financially eligible person at state expense under ORS 151.216 and 151.219.

(5) The civil proceeding shall be subject to the exemptions from execution as provided for by law. [1989 c.1053 §13; 1991 c.825 §6; 2001 c.962 §33]

151.487 Ability to pay; effect. (1) If in determining that a person is financially eligible for appointed counsel under ORS 151.485, the court finds that the person

has financial resources that enable the person to pay in full or in part the administrative costs of determining the eligibility of the person and the costs of the legal and other services to be provided at state expense that are related to the provision of appointed counsel, the court shall order the person to pay to the Public Defense Services Account in the General Fund, through the clerk of the court, the amount that it finds the person is able to pay without creating substantial hardship in providing basic economic necessities to the person or the person's dependent family. The amount that a court may order the person to pay is subject to the guidelines and procedures issued by the Public Defense Services Commission as provided in subsection (4) of this section.

(2) Failure to obey an order under this section is not grounds for contempt or grounds for withdrawal by the appointed attorney, but any part of the amount ordered under this section and not paid may be:

(a) Enforced against the person as if the order is a civil judgment; or

(b) Enforced as otherwise permitted by law.

(3) Except as authorized in this section, no person, organization or governmental agency may request or accept a payment or promise of payment for assisting in the representation of a person by appointment.

(4) The commission shall promulgate and issue guidelines and procedures:

(a) For the determination of persons provided with appointed counsel who have some financial resources to pay in full or in part the administrative, legal and other costs under subsection (1) of this section; and

(b) Regarding the amounts persons may be required to pay by a court under subsection (1) of this section.

(5) The determination that a person is able to pay or partially able to pay, or that a person no longer has the ability to pay the amount ordered in subsection (1) of this section, is subject to review at any time by the court. [1989 c.1053 §14; 1993 c.33 §305; 1997 c.761 §3; 2001 c.962 §34]

151.489 Personnel to verify financial eligibility. For the purpose of aiding courts in making determinations of financial eligibility for appointed counsel at state expense under ORS 151.485 and 151.487, the State Court Administrator may locate eligibility verification and screening personnel or otherwise arrange for such services in the state trial and appellate courts or other locations and shall prescribe the policies and procedures for their use. [1989 c.1053 §15; 2001 c.962 §35]

151.491 Authority of person verifying financial eligibility. (1) State courts or authorized designees who conduct the verification of the financial statement submitted by a person seeking or having appointed counsel payable at state expense under ORS 151.216 and 151.219 may require the person to execute and deliver any written requests or authorizations as may be necessary under applicable law to provide the state court or authorized designee with access to records of public or private source, otherwise confidential, as may be needed to evaluate eligibility.

(2) In performing the verification duties under subsection (1) of this section,

the state courts are authorized to obtain information from any public record office of the state or of any subdivision or agency of the state upon request and without payment of any fees ordinarily required by law. [1989 c.1053 §16; 2001 c.962 §36]

151.493 Release of information by state agency to State Court Administrator. (1) Notwithstanding any other provision of law, any state agency as defined in ORS 192.410 that receives a request for release of information from the state courts for the purpose of verifying the financial eligibility of a person under ORS 151.485 to 151.497 shall release all requested information to the state court. The court shall forward to the state agency a certification signed by the person about whom the requested information is sought that authorizes the release of the information.

(2) Upon its own motion or motion of the public defense services executive director, a court that has appointed counsel for a person by reason of financial eligibility may order the release of any information relating to the person's financial situation held by any other person. [1991 c.825 §4; 2001 c.962 §37]

151.495 Confidentiality of information obtained by state courts; exceptions. (1) All information supplied by a person seeking appointed counsel and all information collected by the state courts for purposes of determining financial eligibility for appointed counsel under ORS 151.485 to 151.497 is confidential and shall not be used for any purpose other than determining financial eligibility.

(2) Notwithstanding subsection (1) of this section, information supplied by a person seeking appointed counsel and information collected by the state courts for purposes of determining financial eligibility may be:

(a) Introduced in a proceeding, criminal or civil, arising out of a determination that a person is not financially eligible for appointed counsel;

(b) Introduced in a proceeding, criminal or civil, arising as a result of an allegation that a person has supplied false information in seeking appointed counsel;

(c) Used by the court in a sentencing proceeding resulting from the defendant's conviction on the matter for which the information was provided or collected; and

(d) Used by the court, the Department of Revenue, or the assignees of the court or the Department of Revenue, for the purpose of collecting delinquent amounts owed to this state by the person. [1991 c.825 §5; 1997 c.761 §4; 2001 c.962 §38]

151.497 "Counsel" defined. As used in ORS 151.485 to 151.497 unless the context requires otherwise, "counsel" includes a legal advisor appointed under ORS 135.045. [2001 c.472 §10]

MISCELLANEOUS

151.505 Authority of court to order repayment of costs related to provision of appointed counsel. (1) At the conclusion of a case or matter in which the first accusatory instrument or petition in the trial court was filed after January 1, 1998, and in which the court appointed counsel to represent a person, a trial, appellate or post-conviction court may include in its judgment an order that the person repay in full or in part the administrative costs of determining the eligibility of the person for appointed counsel and the costs of the legal and other services that are related to the provision of appointed counsel.

(2) Costs repayable under this section include a reasonable attorney fee for counsel appointed to represent the person and a reasonable amount for expenses authorized under ORS 135.055. A reasonable attorney fee is presumed to be a reasonable number of hours at the hourly rate authorized by the Public Defense Services Commission under ORS 151.216. For purposes of this subsection, compensation of counsel is determined by reference to a schedule of compensation established by the commission.

(3) Costs repayable under this section do not include costs imposed and paid under a previous order under ORS 151.487, but may include costs imposed under an order under ORS 151.487 that are unpaid at the time the judgment is filed.

(4) The court may not order a person to pay costs under this section unless the person is or may be able to pay the costs. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the person and the nature of the burden that payment of costs will impose.

(5) A person who has been ordered to pay costs under this section and who is not in contumacious default in the payment of the costs may at any time petition the court for remission of the payment of costs or any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the person ordered to repay or on the immediate family of the person, the court may remit all or part of the amount due or modify the method of payment.

(6) Except for moneys payable under subsection (1) of this section pursuant to an order under ORS 151.487, all moneys collected or paid under this section shall be paid into the General Fund and credited to the Criminal Fine and Assessment Account.

(7) Any part of the costs ordered to be paid under this section that is not paid may be enforced against the person as provided in ORS 137.450 if the judgment is a judgment in a criminal action or in the same manner as unpaid costs may be enforced under ORS 151.487. [1997 c.761 §2; 2001 c.962 §39; 2003 c.334 §§1,2; 2003 c.449 §§18,19]

Note: 151.505 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 151 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

Attachment 3

RELATIONSHIP WITH STAFF

WHO'S RESPONSIBLE FOR WHAT

1. Review the checklist below. Identify which items are primarily the responsibility of the board/ commission members, which are primarily the responsibility of staff, and where responsibility is shared.

	BOARD	STAFF	SHARED
● Appeal of Board actions			
● Strategic planning			
● Performance reviews of staff (other than exec. Director)			
● Budget preparation			
● Implementing policy			
● Approving expenditures			
● Public relations/media relations			
● Legislative testimony			
● Setting/establishing policy			
● Budget execution			
● Asking the Attorney General for legal advice			
● Authorizing travel expenses			
● Personnel administration			
● Responding to complaints about Board actions			
● Enforcing rules			
● Identifying mission and values of the Board			
● Compliance with state accounting, purchasing and contracting rules			
●			
●			

2. What is the role of the Executive Director?

3. What is the role of the Board member?

4. How does the Board evaluate the Executive Director?

Attachment 4

PUBLIC DEFENSE SERVICES COMMISSION

REQUEST FOR PROPOSALS

FOR

PUBLIC DEFENSE LEGAL SERVICES CONTRACTS

BEGINNING

JANUARY 1, 2008

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PART IV - GENERAL CONTRACT TERMS

PART I – GENERAL INFORMATION

1.1 Request For Proposals (RFP) Description

The Public Defense Services Commission (PDSC) is seeking contract proposals to provide legal services to persons determined by the state courts to be financially eligible and entitled to court-appointed counsel at state expense. **PDSC is accepting proposals for all case types in all counties. Proposals for post-conviction relief representation, either as part of a broad case mix or proposals solely for post-conviction relief representation are strongly encouraged. The contracts awarded may have one-year, two-year, or four-year terms beginning January 1, 2008, as determined by PDSC.** The basic services required are legal representation and support services necessary to provide effective legal representation that meets established professional standards of practice.

As part of the Judicial Branch, PDSC is not subject to the Department of Administrative Services's administrative rules or the related statutes that govern competitive public bidding for personal services contracts. PDSC reserves the right to reject any or all proposals received by reason of this RFP or to negotiate separately in any manner necessary to serve the best interests of the PDSC and the state. PDSC reserves the right to seek clarifications of proposals and to award a contract(s) without further discussion of the proposals submitted. PDSC reserves the right to amend or cancel this RFP without liability if it is in the best interest of the state and public to do so.

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

Part I General Information

Part II Proposal Application Instructions and Requirements

Part III Proposal Application and Proposal Outline

Part IV Contract General Terms

1.2 Authority

ORS 151.219 authorizes the PDSC executive director to contract for legal services for financially eligible persons in proceedings in which:

1) a state court or magistrate has the authority to appoint counsel to represent the financially eligible person, and

2) the PDSC is required to pay compensation for that representation.

PDSC may contract with individual attorneys, groups of attorneys, private firms, and full-time, not-for-profit public defender organizations for these services.

Awarding these contracts is a proprietary function of PDSC. All such contracts are:

1) subject to PDSC's express approval under ORS 151.216(1)(d), and

2) considered contracts with independent contractors for personal services.

1.3 Funding Source

Under ORS 151.225, the Public Defense Services Account in the General Fund is continuously appropriated to PDSC to pay attorney compensation and other expenses related to the legal representation of financially eligible persons for which PDSC is responsible, including contract payments under ORS 151.219.

1.4 Schedule of Events

Release of RFP	August 31, 2007
Proposal Submission Deadline (Receipt by 4:30 p.m. OR Postmark)	September 28, 2007
Contract Awards	On or before December 14, 2007
Contract Effective Date	January 1, 2008

PDSC presently intends to award public defense legal services contracts according to the above time schedule. By publishing this schedule, PDSC does not represent, agree, or promise that any contract will be awarded on a specified date or any other time in any particular county or judicial district. PDSC intends, however, to adhere to these time frames as closely as possible.

1.5 General Proposal Review Procedures

The instructions and information necessary to prepare and submit proposals are found in Part II of this RFP. PDSC will evaluate proposals based on the contents of the applications, their review by the affected court(s), and any other information available to PDSC. Applicants must submit a completed application using the forms and format provided. Applications MUST be received by PDSC and the appropriate presiding judge(s) by 4:30 p.m. OR be postmarked on the submission deadline date. Applications faxed to the PDSC will be accepted only when the applicant has received prior consent to submit via fax. The following events will then occur.

A. Inadequate Proposals

PDSC may immediately reject proposals that do not meet the minimum service or RFP requirements. If a proposal is unclear or appears inadequate, PDSC may give the applicant an opportunity to further explain or provide additional information. If PDSC finds the explanation or additional information inadequate, PDSC's decision to reject the proposal will be final and not subject to appeal.

B. Facially Adequate Proposals

PDSC will evaluate proposals that meet the administrative and contractual minimum requirements as set forth in Part II of the RFP. PDSC will evaluate each proposal based on its total characteristics and any other information available to PDSC. During the evaluation period, PDSC may:

1) request additional information from applicants to clarify information or material in the proposal;

2) consult with judges, court administrative staff, and others who have knowledge of the applicant or the local caseloads and practices to aid in the review of the proposal's merits; and

3) request individuals with experience and expertise in the proposed case types to review the apparent qualifications of the applicants, the strengths and weaknesses of the management plans submitted by applicants and the apparent cost-effectiveness and quality of the various proposals.

C. Negotiations

PDSC must ensure that each contract is compatible with:

1) the needs of the particular court(s), county(ies), judicial district(s), region(s), and the state;

2) other public defense contracts in place or contemplated; and

3) budget allocations.

During negotiations, PDSC may discuss adjustments to proposed costs, caseload types, coverage, level of services, or service providers necessary to meet these objectives.

D. Contract Awards

Award of any contract will be final only when the applicant and the PDSC have properly completed and executed the contract documents.

E. General Contract Terms

PDSC will offer all applicants the same general contract provisions. Successful applicants will enter into a contract substantively similar to the general contract document in Part IV of this RFP, unless otherwise specifically agreed by PDSC.

An applicant may request in the proposal to amend general terms of the contract for good reason. PDSC must approve any change. Applicants who do not otherwise accept the general terms contract in Part IV may be disqualified.

1.6 Proposal Evaluation Criteria

PDSC shall evaluate proposals based on the criteria listed below. PDSC reserves the right to reject any proposals that do not comply with the RFP requirements. PDSC shall be the sole determiner of the relative weight given any criterion. Although price is an important criterion, the intent is to provide financially eligible persons with effective legal representation. The applicant with the lowest cost proposed will not necessarily be awarded a contract. PDSC reserves the sole right to make this determination.

CRITERIA:

1) The proposal and any modification is complete and timely, in conformance with the RFP.

2) The applicant meets the minimum attorney qualification standards for the types of cases proposed, as specified in PDSC's Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense.

3) The proposed plan for delivery of services is adequate to ensure effective legal representation. Among the factors PDSC may consider are the quality of legal

representation, the experience of the attorneys, staffing patterns, available support staff and other services, and caseload per attorney.

4) The applicant has the ability to perform the contract effectively and efficiently and to provide representation in the types of cases proposed. Among the factors PDSC may consider are financial ability, personnel qualifications, and successful experience providing public defense services under contract or on a private bar basis.

5) The cost for services is reasonable. PDSC may consider factors that affect the cost, including those outside the applicant's control, such as district attorney (DA) negotiation practices, local jail facilities, and court programs and procedures.

6) The budget is reasonable, and expenses are prorated to the proportion of applicant's time to be devoted to the contract. Among the factors PDSC may consider are the ratios of administrative cost, support services, and non-personnel expenses to direct legal services, as well as compensation, benefit, and other resource levels.

7) The proposal is consistent with the needs and best interests of the court(s), county(ies), judicial district(s), and region(s) involved. Among the factors PDSC may consider are the other service methods and service providers available, the applicant's ability to work with the court(s) and within its procedures, and the mix of service providers.

8) The proposal is consistent with the needs and best interests of the state as a whole. Among the factors PDSC may consider are the other service methods and mix of service providers available, and the applicant's ability to work with other groups affected by the contract, legislative mandates, or other directives that affect the entire statewide contracting patterns or terms.

In addition to the criteria listed above, PDSC will evaluate the available caseload, the current number of contractors or private bar providers, and the relative cost of administering current contracts and/or new contract proposals.

The PDSC has the sole discretion to apportion or not to apportion caseloads between applicants AND to award or not to award contracts.

1.7 Proposal Records

No materials submitted by applicants will be available for public review until after contract awards have been made.

Written inquiries on preparing applications may be directed to:

Kathryn Aylward, Director
Contract and Business Services Division
Public Defense Services Commission
1320 Capitol St NE, Suite 190
Salem, Oregon 97301

PART II -- PROPOSAL APPLICATION INSTRUCTIONS AND REQUIREMENTS

This part of the RFP contains the instructions and requirements for preparing and submitting proposals for public defense legal services contracts.

2.1 Submitting Proposals

The applicant is responsible for any costs incurred in preparing or delivering the proposal. The applicant is responsible for ensuring that the proposal is received timely by the Public Defense Services Commission and presiding judge(s).

There is no implied promise to award a contract to any applicant based upon the submission of a proposal.

A. Number of Copies

Except for applicants for **death penalty** contracts only, each applicant must submit one original and one copy of its proposal, distributed as follows:

1) PDSC--**Original**

Applicants must submit the **original** of each proposal, addressed to the attention of:

Kathryn Aylward, Director
Contract and Business Services Division
Public Defense Services Commission
1320 Capitol St NE, Suite 190
Salem, Oregon 97301

2) Presiding Judge(s)--One Copy Each (except Multnomah County)

Except for proposals for Multnomah County, applicants must submit one copy of each proposal to the presiding judge of each judicial district in which applicant proposes to provide services. For **Multnomah County,** one copy of each proposal must be submitted to the **Trial Court Administrator**, Mr. Douglas Bray.

Applicants for death penalty contracts only need to submit the original proposal to the Contract and Business Services Division; i.e., no copy needs to be provided to the presiding judges of counties in which applicant proposes death penalty coverage.

B. Deadline

Proposals MUST BE:

1) POSTMARKED no later than the submission deadline date; OR

2) ACTUALLY RECEIVED by PDSC and the appropriate presiding judge(s) no later than 4:30 p.m. on the submission deadline date.

The submission deadline for proposals is September 28, 2007.

Hand-delivery of proposals must be made to the appropriate presiding judge(s) AND the Contract and Business Services Division of the Public Defense Services Commission, 1320 Capitol St NE, Suite 190, Salem, Oregon.

A proposal submitted to the PDSC by fax will be accepted only when the applicant has received permission to do so prior to the transmission of the documents. If consent to submit a proposal is given, one original must be supplied to the PDSC, by mail or hand-delivery, by the date established when permission to fax the proposal is obtained.

If the applicant fails to submit the proposal(s) to all the relevant courts in accordance with the deadline, PDSC may disqualify the applicant's proposal(s).

If the applicant fails to submit the proposal(s) in accordance with the deadline to PDSC, PDSC will disqualify the proposal(s), unless prior authorization for late submission is granted by PDSC.

2.2 Application Format

Applicants must use the attached application format for submission of all proposals and must answer all questions or state the reason why a specific question is not relevant to the particular proposal. PDSC may disqualify any proposal that is not in the required format or is incomplete.

An electronic copy of this RFP is available at www.opds.state.or.us.

Applicants who do not or are unable to use an electronically produced form to prepare their application must, at a minimum, identify responses prepared on separate sheets of paper by the number, major heading, and each subsection subject.

2.3 Acceptance of RFP and General Contract Terms

A. Applicants are responsible for reviewing the terms and conditions of the RFP and the general terms of the contract.

B. By signing and returning the application form, the applicant acknowledges that the applicant accepts and intends to abide by the terms and conditions of the RFP. Further, the applicant accepts the terms and conditions of the general terms of the contract contained in Part IV, unless and only to the extent that the applicant proposes exceptions as described below.

C. The applicant must clearly state in its proposal any proposed exceptions to the general terms of the contract, including reasons to support the exceptions and estimated efficiencies/cost savings if PDSC accepts the proposed exception(s). PDSC reserves the right to accept, reject, or negotiate exceptions to the contract terms.

D. Any changes to the general terms of the contract terms proposed by PDSC will be provided, in writing, to each applicant.

2.4 Multiple Proposals

An applicant may submit more than one proposal. Each proposal must be complete in itself. The proposal must state whether it is in addition to or an alternative to other proposals submitted by the applicant.

2.5 Modification of Proposals

A. When Permitted

Applicants may not modify proposals after the submission deadline, unless PDSC agrees thereto, upon written request by applicant. Until that date, an applicant may modify its proposal(s) in writing. Modifications must be:

1) prepared on the applicant's letterhead;

2) signed by an authorized representative(s); and

3) must state whether the new document supersedes or modifies the prior proposal.

B. Delivery

Applicants must deliver any modifications in the same number and manner as required by Section 2.1 for original proposals. The envelope should be marked as follows:

Public Defense Legal Services Contract
Proposal Modification
from
(Applicant Name and Address)

C. Included in Proposal File

All documents relating to the modification of proposals will be made part of the proposal file.

2.6 Mistakes in Submitted Proposals

A. When Corrections Permitted

PDSC will permit applicants to correct mistakes on a proposal only to the extent correction is not contrary to PDSC's interest or to the fair treatment of other applicants. PDSC has sole discretion to allow an applicant to correct a mistake. PDSC will notify the applicant if and when PDSC allows corrections to proposals.

B. Procedure When PDSC or Applicant Discovers Mistake

If PDSC or the applicant discovers a mistake before the proposal deadline, the applicant may amend the error using the procedures for proposal modification in Section 2.5 above.

PDSC will proceed as follows when PDSC discovers or is notified of mistakes in proposals after the submission deadline but before contract awards are made:

1) Minor Inaccuracies

PDSC may waive or correct minor inaccuracies or insignificant mistakes. Minor inaccuracies are:

a) matters of form rather than substance that are evident from the proposal documents; or

b) insignificant mistakes that do not prejudice other applicants; e.g., the inaccuracy or mistake does not affect price, quantity, quality, delivery, or contractual conditions.

2) Mistakes Where Intended Correct Proposal is Evident

If the mistake and the intended correct proposal are clearly evident on the face of the proposal or can be determined from accompanying documents, PDSC may consider the proposal. Examples of mistakes that may be clearly evident on the face of the proposal are typographical errors, transposition errors, and mathematical errors.

3) Mistakes Where Intended Correct Proposal is Not Evident

PDSC may not consider a proposal in which a mistake is clearly evident on the face of the proposal but the intended correct proposal is not evident or cannot be determined from accompanying documents, including requests for correction or modification under Sections 2.5 and 2.6.

C. Included in Proposal File

All documents relating to correcting a mistake will be made part of the proposal file.

2.7 Withdrawal of Proposals

A. Request to Withdraw

An applicant may withdraw a proposal at any time by written request. Requests to withdraw a proposal from consideration must be:

1) on the applicant's letterhead;

2) signed by an authorized representative(s); and

3) submitted to PDSC and presiding judge(s) of the affected court(s) and should be marked as follows:

Proposal Withdrawal
from
(Applicant Name and Address)

B. Included in Proposal File

All documents relating to the withdrawal of proposals will be made a part of the proposal file.

2.8 Evaluation of Proposals

PDSC will begin to evaluate proposals upon receipt, subject to the procedures and criteria described in Part I, Sections 1.4, 1.5 and 1.6. PDSC intends to make contract awards on or before December 14, 2007.

2.9 Categories of Cases Available for Contract

A proposal for public defense legal services may include coverage of all, some, or any of the following categories of cases for which financially eligible persons have a right to appointed counsel in state court at state expense:

- Capital Murder (death penalty)
- Noncapital Murder
- Felony
- Misdemeanor
- Probation Violation
- Juvenile
- Post-Conviction Relief
- Habeas Corpus
- Civil Commitment
- Extradition
- Contempt

Applicants should refer to Part IV, the General Terms of the contract, section 10 for specific definitions of the categories.

2.10 Number of Cases

A. Available Caseload

To obtain the number of contract cases and/or workload likely for a particular court, county, or case type, the applicant should contact the Contract and Business Services Division of the Public Defense Services Commission at (503) 378-2478.

B. Fixed Caseloads and Value- or Hourly-Based Workloads

PDSC will contract for:

1) fixed workload by value of cases or hourly based; or
2) hourly-based workloads for death penalty contracts.

C. Proposed Caseload

The applicant should propose no more than the number of cases or hours for which the applicant can provide effective and efficient representation and adequate staff support resources.

2.11 Cost of Services

A. Expenses Included in Contract Price

Public defense contractors are responsible for all reasonable and necessary expenses that are ordinary and related to the proper preparation and presentation of the case.

PDSC bears the costs outside of any public defense contract for:

1) discovery;

2) transcripts;

3) witness fees and expenses; and

4) non-routine case expenses that are preauthorized (e.g., expert witnesses; psychiatric exams; and investigation requiring an investigator's services, unless Contractor has staff investigator(s) for this purpose).

Applicants should not include these case-related expenses in calculating the cost of providing contract services.

B. Reasonable Expenses

Applicants should project the cost of occupancy, staff, or other contract expenses at rates no greater than customary for the community and the type of service or expense. PDSC will not pay premium rates. PDSC expects contractors to provide facilities reasonably adequate to ensure an environment conducive to providing effective and efficient legal services and to maintaining the dignity of attorney, staff, and clients.

C. Factors to Consider

In calculating overall case cost figures, applicants should consider the percentage of appointments by case type (the "mix" of cases) and the percentage of appointments that:

1) usually terminate before trial or contested adjudication, and at what stages and why they terminate (such as, withdrawals, dismissals, multiple cases negotiated together, and bench warrants); and

2) usually go to trial or contested adjudication.

The applicant may consider any other relevant factors in constructing costs, as long as these factors do not jeopardize the delivery of adequate legal services at the prices proposed. Applicants must describe in the application all factors or premises on which costs are based.

2.12 Proposal Application Format (Part III of RFP)

The application format consists of:

1) Application Summary;
2) Certification Form; and
3) Proposal Outline divided in the following sections:

a) Service Delivery Plan

b) Proposed Estimated Allocation of Contract Funds

c) Proposed List of Contract Attorneys

d) Proposed List of Contract Non-Attorney Staff

e) Certificate of Attorney Qualification and Supplemental Questionnaire

f) Proposed Contractor Certificate of Compliance with Applicable Oregon Tax Laws

g) Proposed Contractor Independent Contractor Certification Statement

THE FOLLOWING PAGES APPL. 1 THROUGH APPL. 16 ARE THE RFP APPLICATION AND PROPOSAL OUTLINE.

PUBLIC DEFENSE SERVICES COMMISSION

REQUEST FOR PROPOSALS

FOR

PUBLIC DEFENSE LEGAL SERVICES CONTRACTS

PART III

PROPOSAL APPLICATION SUMMARY AND PROPOSAL OUTLINE

**(TO BE COMPLETED AND SUBMITTED TO PDSC
BY APPLICANTS WHO DO NOT CURRENTLY CONTRACT WITH PDSC)**

PART III
PROPOSAL APPLICATION SUMMARY AND PROPOSAL OUTLINE

3.1 APPLICATION SUMMARY

APPLICANT INFORMATION

County or Counties to be served: _____

Formal Name of Applicant: _____

Contact Person for Proposal: _____

Address: _____

_____

Telephone: _____ Fax: _____

Email (required): _____

Fed. I.D. No.:_____ ***or*** S.S.N.:_____

Type of Organization (*check one*):

☐ Sole Practitioner ☐ Nonprofit P.D. ☐ Partnership or P.C. ☐ Consortium

☐ Other (*describe*)_____

CASELOAD INFORMATION

A. Case Types Covered: All case types as defined in the general terms of the contract document that are subject to this RFP excluding:

_____

_____

B. Complete the section below:

Case Types	Value	# of Cases	Total Value
First Year			
	$		$
	$		$
	$		$
	$		$
First-Year Total			$
Second Year			
	$		$
	$		$
	$		$
	$		$
Second-Year Total			$
Contract Total			$

(Add additional years if necessary.)

A. METHODOLOGY, EXPLANATIONS AND ESTIMATES

1) Service Cost Basis. For the types of cases, extent of coverage, and services proposed, explain how costs were projected and the premises underlying the projection.

2) Case Costs.

Explain:

a) how the various case types were weighted;

b) how the cost varies by case type; and

c) how staff investigator, paralegal, and/or interpreter costs were factored.

Estimate:

d) what percentage of each case type is disposed by jury trial, court trial, plea, dismissal, withdrawal, and bench warrant;

e) the average number of hours required for each case type proposed;

f) the cost of providing contract counsel at arraignments to advise defendants regarding plea offers or resolution of probation violation or contempt matters if a

program were established to facilitate early resolution of cases. Describe the time required and the potential number of cases involved; and

g) the percentage of attorney time and staff time required for administrative duties, CLE, and other professional duties not related to a particular case.

3) Other Information. Include any other relevant information that PDSC should consider in evaluating proposal costs.

B. PROPOSAL STAFFING SUMMARY ("FTE" means "full-time equivalent"; e.g., four attorneys each committing 50% of their full time to contract work equals two FTEs.)

Number of Attorneys _____ / FTE_____

Number of Secretarial/Receptionist Staff _____ / FTE_____

Number of Paralegals/Legal Assistants _____ / FTE_____

Number of Administrative Staff _____ / FTE_____

Number of Investigators _____ / FTE_____

Number of Interpreters _____ / FTE_____

Number of Other Staff _____ / FTE_____

Identify "Other Staff" type: _____

3.2 CERTIFICATION FORM

I hereby certify that I have the authority to submit this proposal on behalf of the applicant and that I have read and understand the terms and conditions of the general terms of the contract.

_____ _____
Signature Date

_____
Typed or Printed Name of Authorized Representative

_____
Title or Representative Capacity

_____
Applicant Name

3.3 PROPOSAL OUTLINE

The following is an outline of the information each applicant MUST provide. ALL questions must be answered and all requested information must be completed. If a certain question or requested information is "Not Applicable" to the applicant's proposal, please note "NA."

Applicants who do not or are unable to use an electronic copy of the application form (allowing sufficient room for complete responses) must present their responses on separate sheets of paper in accordance with Section 2.2 of the Application Instructions.

A. SERVICE DELIVERY PLAN

The purpose of a public defense legal services contract is to provide cost-effective delivery of legal services that meet constitutional, statutory, and other legally mandated standards. Please describe, in detail, applicant's service delivery plan and how it will ensure effective and efficient legal representation. Include information on the following:

1. Contractor Staff Services. Describe legal, support, and other services to be provided under the contract. Include any express limitations on the range of services.

   IN ADDITION to providing the information requested above, each attorney included within applicant's proposal must complete a Certificate of Attorney Qualification and Supplemental Questionnaire, to be included with applicant's proposal (see pages Appl. 12-14).

2. Case Services. Describe the caseload and case types to be covered. Include any limitations in coverage by case type. Include any differing values per type of case that applicant proposes.

3. Service Delivery. Describe how applicant will provide timely, effective, and efficient case-related services. Include:

   a) how the court would assign cases to applicant;
   b) whether applicant attorneys would be present at first appearances;
   c) how applicant would assign cases to attorneys;
   d) how applicant would provide for interviews with both in-custody and out-of-custody clients in accordance with the general terms of the contract;
   e) how applicant would process cases from assignment through reporting to PDSC;
   f) how applicant would work with the court to coordinate services with other contractors and with the court; and
   g) how applicant would investigate and provide information, if any, on sentencing alternatives to the court.

4. Facilities. Describe applicant's office(s). Include information on:

   a) office sharing arrangements;
   b) conference room(s);
   c) library (size and contents);
   d) disabled access (if none, describe alternative arrangements for meeting disabled clients or witnesses) (if applicant is a consortium, describe the disabled access or alternative arrangements for each consortium member's office); and
   e) number of separate law firms/sole practitioners included.

Does each of applicant's attorneys have his/her own office?

Are any offices housed in a residence?

Does applicant or any of its members own or have an interest in the office building(s)?

If yes, please explain: _____
_____

5. Equipment. Describe equipment or information systems applicant has or will obtain to improve the provision of services under the proposal. If applicant uses or will use a computer system, please specify hardware and software to be used.

6. Professional Education and Supervision Plan. Describe plans for professional development and supervision of all attorneys, direct support, and administrative staff. Include:

   a) training;
   b) CLE;
   c) educational methods to maintain current awareness of new developments in criminal and public defense-related case law and procedures; and
   d) supervision and development of less experienced attorneys.

7. Readiness Status. Describe what applicant needs to do to be ready and able to begin services on the proposed contract effective date. If more time is needed, explain why and when applicant will be available. Include information on positions that need to be filled and equipment or facilities that need to be procured. If positions need to be filled, describe recruitment procedures and affirmative action plans.

8. Local Factors. Identify and discuss, in detail, local factors that affect caseload and case processing that may affect cost.

9. Other Information. Include any other information you believe is important or relevant to PDSC's review of the service delivery plan.

10. Contract Terms. Include any requests to modify terms in the general terms of the contract. Explain the purpose of and need for modification and how it will affect the service delivery plan and cost. Again, PDSC has sole discretion to allow modification of any contract term.

B. PROPOSED ESTIMATED ALLOCATION OF CONTRACT FUNDS

All applicants must complete the forms contained on the following five pages and estimate how contract funds would be allocated to cover service costs.

If applicant is a consortium, submit a separate form for each firm or member. In addition, you must compile all members' estimated allocations into one, overall consortium contract fund allocation form. To arrive at allocation figures, each member should estimate by line item the amount of funds reasonably necessary to perform the public defense services contemplated under the proposal. Generally, an attorney who would be spending 50 percent of his/her total billable time on public defense contract cases may allocate no more than 50 percent of total rent and other overhead costs to the proposed allocation.

Under no circumstances will the PDSC fund any lobbying or other political activities for a public defense contractor.

Each consortium must provide expense information in the allocation categories for all members, not just for the umbrella corporation or other umbrella entity. Any nonprofit organization or consortium that has expenses related to its Board of Directors' or Trustees' meetings should include that expense information with the proposed estimated allocation as well as any other expenses not otherwise listed.

APPLICANT'S PROPOSED ESTIMATED ALLOCATION OF CONTRACT FUNDS

Directions: Provide estimated cost information for all applicable categories. If a category is not applicable, list "N/A." Add any necessary categories not listed below. **Prorate all estimated expenses for part-time attorneys or staff by the percentage of time they will spend on contract work.** (Use additional pages if needed for longer-term proposals.)

1. GROSS SALARIES	**First Year**	**Second Year**
Attorneys (estimated gross income to attorneys after attorneys' overhead and F.I.C.A. self-employment taxes are deducted) _____# _____FTE	_____	_____
Secretarial/Reception/Clerical Staff _____# _____FTE	_____	_____
Paralegal/Legal Assistant Staff _____# _____FTE	_____	_____
Investigation Staff _____# _____FTE	_____	_____
Other Staff (identify _____ _____) _____# _____FTE	_____	_____
SUBTOTAL:	_____	_____
2. STAFF BENEFITS		
F.I.C.A. Self-Employment Tax (if applicable)	_____	_____
F.I.C.A. (Employer's portion or Social Security only)	_____	_____
Unemployment Insurance	_____	_____
Health and Other Insurance	_____	_____
Workers' Compensation	_____	_____
Retirement Program	_____	_____
SUBTOTAL:	_____	_____
3. STAFF EXPENSES		
Malpractice Insurance check ____ PLF or ____ NLADA	_____	_____
Other Professional Insurance (describe _____ _____)	_____	_____
OCDLA--Membership Dues	_____	_____
OSB--Membership Dues	_____	_____
Other Membership Dues Necessary to Contract (explain _____ _____)	_____	_____

3. STAFF EXPENSES (continued)	First Year	Second Year
Professional Licenses/Certificates (explain _____ _____)	_____	_____
Education Training/CLE's--Attorneys	_____	_____
Education Training--Other Staff (explain _____ _____)	_____	_____
Attorney Travel	_____	_____
Other Staff Travel	_____	_____
SUBTOTAL:	_____	_____
4. OVERHEAD (OCCUPANCY)		
Office Rent/Lease	_____	_____
Office Insurance	_____	_____
Building Utilities	_____	_____
Building Maintenance	_____	_____
Real Estate Taxes (if separate from rent)	_____	_____
SUBTOTAL:	_____	_____
5. OVERHEAD (OPERATIONS)		
Phone Services (Equipment/Local Calls)	_____	_____
Long Distance Calls	_____	_____
Office Supplies	_____	_____
Postage	_____	_____
Outside Photocopying/Printing	_____	_____
Library	_____	_____
Subscriptions	_____	_____
Other Case Expenses (explain _____ _____)	_____	_____
SUBTOTAL:	_____	_____
6. OVERHEAD (NONCAPITAL EXPENSES)		
Furniture & Equipment Leases	_____	_____

Description Annual Cost

_____
_____
_____

6. OVERHEAD (NONCAPITAL EXPENSES) (continued)	First Year	Second Year
Equipment Repairs/Maintenance	_____	_____
SUBTOTAL:	_____	_____

7. OVERHEAD (OTHER)		
Personal Property Taxes	_____	_____
Professional Contract Services (specify)	_____	_____
Miscellaneous (specify)	_____	_____
SUBTOTAL:	_____	_____

8. TOTAL OPERATIONS (total of 1-7)	_____	_____

9. CAPITAL (Items costing over $500 each and funded separately)

Computer--Hardware _____ _____

Description	Quantity	Unit Cost

Computer--Software _____ _____

Description	Quantity	Unit Cost

Office Furniture _____ _____

Description	Quantity	Unit Cost

Office Equipment _____ _____

Description	Quantity	Unit Cost

SUBTOTAL: _____ _____

GRAND TOTAL* (total of 8 and 9): _____ _____

*** Grand total must equal total proposed annual contract price.**

C. PROPOSED LIST OF CONTRACT ATTORNEYS

Directions: List every attorney position that applicant has budgeted to perform the contract. If the position is vacant, note that fact.

Firm or Office	Name	Bar #	FTE Contract Work	Annual Salary from Contract Funds

Total FTEs: _____

D. PROPOSED LIST OF CONTRACT NON-ATTORNEY STAFF

Directions: List every non-attorney position that applicant has budgeted to perform the contract. If the position is vacant, note that fact.

Firm or Office	Position Title	# of Employees	FTE Contract Work	Annual Salary from Contract Funds

Total FTEs: _____

E. CERTIFICATE OF ATTORNEY QUALIFICATION AND SUPPLEMENTAL QUESTIONNAIRE

(Submit one certificate and questionnaire for each attorney proposed to provide contract services.)

Name: _____ Bar Number: _____

Address: _____ Vendor or Tax ID#: _____

_____ Email: _____

_____ Foreign language fluency in: _____

Phone Number: _____ Years of Experience:

Fax Number: _____ Practice of Law _____ Criminal _____

Cell/Pager: _____ Juvenile _____ Appellate _____

For appointments in the following county(ies): _____

TRIAL LEVEL

- Capital Murder
  - Lead Counsel ☐
  - Co-counsel ☐
- Murder
  - Lead Counsel ☐
  - Co-counsel ☐
- Major Felony ☐
- Lesser Felony ☐
- Misdemeanor ☐

- Juvenile Delinquency
  - Major Felony ☐
  - Lesser Felony ☐
  - Misdemeanor ☐
- Juvenile Dependency ☐
- Juvenile Termination ☐

- Civil Commitment ☐
- Contempt ☐
- Habeas Corpus ☐

- Post-Conviction Relief
  - Capital Murder ☐
  - Murder ☐
  - Other Criminal ☐

APPELLATE LEVEL

- Capital Murder
  - Lead Counsel ☐
  - Co-counsel ☐
- Murder
  - Lead Counsel ☐
  - Co-counsel ☐
- Major Felony ☐
- Lesser Felony ☐
- Misdemeanor ☐

- Juvenile Delinquency
  - Major Felony ☐
  - Lesser Felony ☐
  - Misdemeanor ☐
- Juvenile Dependency ☐
- Juvenile Termination ☐

- Civil Commitment ☐
- Contempt ☐
- Habeas Corpus ☐

- Post-Conviction Relief
  - Capital Murder ☐
  - Murder ☐
  - Other Criminal ☐

Please check only one box below:

☐ I certify that I have reviewed the Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense (Rev. 2-8-07) and that I meet the requirements of those standards and wish to be listed as willing to accept appointment to the case types checked above.

or

☐ I certify that the above-named attorney will be working at a public defense organization as described in Standard III.2.C, which has provided the information required under Standard V.2.C.

_____ _____

Signature Date

SUPPLEMENTAL QUESTIONNAIRE TO CERTIFICATE OF ATTORNEY QUALIFICATION

If this questionnaire does not address important aspects of your experience, please feel free to attach additional information. If more space is needed to answer any of the questions below, please do so on additional pages.

1. Name (please print):

2. Date admitted to Oregon State Bar:

3. Oregon State Bar number:

4. Number of years and location(s) of legal practice in Oregon:

5. Number of years and location(s) of legal practice outside Oregon:

6. What percentage of your present practice involves handling criminal cases? juvenile cases? (or other cases as appropriate, such as civil commitment, habeas corpus, post-conviction relief)

7. What percentage of your present practice involves handling public defense cases?

8. Briefly describe the nature and extent of your work experience in the area(s) of law which you have certified and any related areas of law.

9. Before which courts and judges have you regularly appeared in case proceedings which you have certified?

10. What has been the extent of your participation in the past two years with continuing legal education courses and/or organizations concerned with law related to the case types you have certified?

11. List at least three names and addresses of judges and/or attorneys who would be able to comment on your experience in handling the case types you have certified.

12. List the most recent two cases by county and case number that have been tried and submitted to a jury, or if the attorney is certifying qualification for juvenile delinquency or civil commitment cases, tried and submitted to a judge, in which you served as counsel or co-counsel.

13. Have you ever been convicted of a crime? If yes, please provide the crime(s) of conviction, date and jurisdiction. (Do not answer yes or provide information for convictions that have been expunged or sealed.)

14. Are there any criminal charges currently pending against you? If yes, please identify the charges, the jurisdiction and the status of the proceedings.

15. Is there any complaint concerning you now pending with disciplinary counsel of the Oregon State Bar, or otherwise pending formal charges, trial or decision in the bar disciplinary process?

16. Has the Oregon Supreme Court, Oregon State Bar or any other bar association ever found you in violation of a Disciplinary Rule or Rule of Professional Conduct? If yes, please describe the violation and provide the date of decision.

17. Has a former client ever successfully obtained post-conviction relief based on your representation? If yes, please describe and cite to opinion, if there is one.

I certify that the above information is true and complete.

_____ _____

SIGNATURE DATE

F. PROPOSED CONTRACTOR CERTIFICATE OF COMPLIANCE WITH APPLICABLE OREGON TAX LAWS

Must be provided for a consortium (corporation) as well as for each consortium member.

I, the undersigned, being first duly sworn,

Mark only one: (X)

_____ hereby certify under penalty of perjury that I am not in violation of any Oregon tax laws.

_____ authorized to act in behalf of _____,
*(name and address of firm, corporation,or partnership **[PLEASE TYPE]**)*

hereby certify under penalty of perjury that _____
*(name of firm, corporation, or partnership **[PLEASE TYPE]**)*

is, to the best of my knowledge, not in violation of any Oregon tax laws.

For purposes of this certificate, "Oregon tax laws" are ORS chapters 118, 119, and 305 through 324; and any local tax laws administered by the Oregon Department of Revenue under ORS 305.620.

Signature:_____

Printed Name:_____

Title:_____

Date:_____

Federal ID # or
Social Security #:_____

Subscribed and sworn to before me this _____ day of _____, 200____.

_____
Notary Public

My commission expires:_____

G. PROPOSED CONTRACTOR INDEPENDENT CONTRACTOR CERTIFICATION STATEMENT

You can qualify as an independent contractor by certifying that you meet the following standards as required by ORS chapters 316, 656, 657 and 670:

1. You provide labor and services free from direction and control, subject only to the accomplishment of specified results.

2. You are responsible for obtaining all assumed business registrations or professional occupation licenses required by state or local law.

3. You furnish the tools or equipment necessary to do the work.

4. You have the authority to hire and fire employees to perform the work.

5. You are paid on completion of the project or on the basis of a periodic retainer.

6. You filed federal and state income tax returns for the business for the previous year, if you performed labor or services as an independent contractor in the previous year.

7. You represent to the public that you are an independently established business, as follows:

YOU MUST MEET FOUR (4) OR MORE OF THE FOLLOWING:

___ A. You work primarily at a location separate from your residence.

___ B. You have purchased commercial advertising, business cards, or have a trade association membership.

___ C. You use a telephone listing and service separate from your personal residence listing and service.

___ D. You perform labor or services only pursuant to written contracts.

___ E. You perform labor or services for two or more different persons within a period of one year.

___ F. You assume financial responsibility for defective workmanship and breach of contract, as evidenced by performance bonds or liability insurance coverage.

I hereby certify that the above information is correct.

Signature _____ Date _____

Entity _____

PUBLIC DEFENSE SERVICES COMMISSION
REQUEST FOR PROPOSALS
FOR
PUBLIC DEFENSE LEGAL SERVICES CONTRACTS

PART IV

CONTRACT GENERAL TERMS

PUBLIC DEFENSE LEGAL SERVICES CONTRACT
G E N E R A L T E R M S

JANUARY 1, 2008 TO DECEMBER 31, 2009

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KEY: Public Defender | Consortium or Law Firm

GENERAL TERMS

1 DEFINITIONS AND CASE CREDIT RULES

1.1 Interpretation of Terms

Words, terms, and phrases not specifically defined in this contract shall have the ordinary meaning ascribed to them unless the context clearly indicates otherwise. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. The word "shall" is mandatory and not merely directive.

1.2 Construction and Jurisdiction

This contract shall be construed in accordance with the laws of the State of Oregon. A party shall bring any action or suit involving any question of construction arising under this contract in an appropriate court in the State of Oregon.

1.3 Severability

If a court of competent jurisdiction declares or the parties agree that any term or provision of this contract is illegal or in conflict with any law:

(a) the remaining terms and provisions shall remain valid; and

(b) the rights and obligations of the parties shall be construed and enforced as if the contract did not contain the particular term or provision held to be invalid.

1.4 Definitions

1.4.1 Public Defense Services Commission

Public Defense Services Commission (PDSC) and "State of Oregon" includes the respective agents, employees, members, officers, representatives, and successors of PDSC and State of Oregon.

1.4.2 Contractor

"Contractor" includes Contractor's agents, employees, members, officers, representatives, successors, and subcontractors.

1.4.3 Public Defender

A “public defender” is a nonprofit organization established solely to provide contract services to persons qualifying for court-appointed legal representation.

1.4.4 Law Firm

A "law firm" is a sole practitioner, partnership, or professional corporation which provides contract services to persons qualifying for court-appointed legal representation and which may engage in non-court-appointed legal representation.

1.4.5 Consortium

A "consortium" is a group of attorneys or law firms that is formed for the sole purpose of providing contract services to persons qualifying for court-appointed legal representation. In addition to participating jointly to provide contract services, Consortium members retain their separate identities and may engage in non-court-appointed legal representation.

1.4.6 Client

A "client” is a person whom a state court has determined to be eligible for and entitled to court-appointed counsel at state expense.

1.4.7 Appointment

An “appointment” is the assignment of a contractor to represent or advise an eligible person on any matter under the terms of this contract.

1.4.8 Case

A “case” is any action in this state in which Contractor has been appointed to represent a client under the terms of this contract. Specific definitions of case types are listed in Section 10.

1.4.9 Credit

A “credit” is an event or circumstance which counts toward Contractor's satisfaction of this contract.

1.4.10 Value

The “value” of a credit is the negotiated rate by type of credit as set forth in the Caseload and Case Value Matrix.

1.4.11 Complex Case

A “complex case” is an appointment on a case type valued at $2,000 or more. Withdrawal for any reason from a complex case changes the credit type to "Other" (OTHR).

1.5 Rules for Counting Appointments

An appointment is credited, according to the following rules:

1.5.1 Criminal Complex Case Credit

An appointment to a client indicted on a complex case is one credit. No extra credit may be taken for multiple incident dates or charges.

1.5.2 Criminal Appointment Case Credit (Non-Complex Case Credit)

(a) An appointment on criminal charges alleged to have occurred on **specific calendar days** is one credit for each count charged in the charging instrument alleged to have occurred on different specific calendar days, regardless of the number of victims involved, up to a maximum of five credits per case.

(b) An appointment on criminal charges alleged to have occurred on **indeterminate dates** (e.g., "on or between January 1, 1996, and July 1, 1996") is a credit for each count charged in the charging instrument which can be determined to allege different calendar days, up to a maximum of five credits per case.

(c) Separate counts in a charging instrument that allege alternative theories of criminal liability on the same date are only one credit.

(d) One additional OTHR credit may be claimed when Contractor is appointed on a criminal matter that includes one or more counts of criminal forfeiture.

(e) No additional credit may be taken due to the following circumstances:

(i) more than one charging instrument (including Uniform Traffic Citation) is filed; or

(ii) more than one case number is assigned.

1.5.3 Case Type Credit
Except for complex cases, the case type credited is for the most serious offense alleged to have occurred on a specific calendar day, even if the charge is later changed to a different case type. For cases in which the most serious charge is a Class C felony, the most serious offense is assault IV domestic violence, DUII felony, or Class C felony, in this order.

1.5.4 Credit for Recommenced Representation
Except for complex cases, if a contract case proceeding has been interrupted for the following reasons and time intervals, Contractor receives a new credit if:

(a) 365 Days After Aid and Assist Delay
more than 365 days have passed since the client was originally found unable to aid and assist and the client is brought before the court for a rehearing on the issue or trial; or

(b) 180 Days After Bench Warrant
more than 180 days have passed since a bench warrant was issued; or

(c) 18 Months with Repeated Bench Warrants
more than 18 months have passed since Contractor was originally appointed and the case is recommenced and no additional credit has been received because of Section 1.5.4(b); or

(d) 180 Days After Pre-Indictment Dismissal
on a felony case, more than 180 days have passed since a dismissal of a case pre-indictment; or

(e) After Appeal or Postconviction Relief
a new trial or sentencing follows an appeal or postconviction relief; or

(f) After Interlocutory Appeal
a case resumes at the trial level, following an interlocutory appeal by the state; or

(g) After Mistrial or Hung Jury
a new trial is scheduled after a mistrial or hung jury; or

(h) After Prosecutorial Misconduct
a case is refiled after dismissal without prejudice and 180 days have passed since the dismissal.

1.5.5 Probation Violation Credit
An appointment on a probation violation proceeding arising out of a criminal or civil contempt sentencing(s), is one probation violation credit for each court case number to which Contractor is appointed. Provided however that if Contractor is appointed to more than one case number, additional credit is received ONLY for those case numbers in which the convictions involve different incident dates. Contractor receives no additional credit for appointments on new alleged probation violations if the original probation violation matter on which Contractor was appointed has not been adjudicated.

1.5.6 Show Cause Hearing for Diversion or Conditional Discharge Agreement
An appointment for a show cause hearing to address non-compliance issues related to a diversion agreement, conditional discharge agreement or any other type of deferred or delayed adjudication agreement is an SCDV credit if:

(a) Contractor did not receive a credit for the underlying charge; or

(b) more than 180 days have passed since Contractor represented the eligible person at a previous court appearance.

1.5.7 Juvenile Case Credit

1.5.7.1 General Provisions
A petition which is amended from or to a delinquency or dependency petition or the dismissal of one type of petition and refiling of another type of petition is not a new credit.

1.5.7.2 Prepetition Matters
An appointment to represent a child who is in custody and being interrogated or is otherwise detained is a credit, even if no petition is later filed on the allegations involved. The appointment continues through disposition on any petition that is later filed on those allegations and no additional case credit is received.

1.5.7.3 Delinquency Petitions
An appointment on a delinquency case is credited under the rules set out in Sections 1.5.2 - 1.5.4.

1.5.7.4 Dependency and Termination Petitions
An appointment to represent children, parents, or legal guardians on a dependency petition is generally one credit regardless of the number of petitions filed (see Section 1.5.7.4.1 for exceptions). Case credit in a dependency proceeding covers representation from appointment to the court's entry of the dispositional order required under ORS 419B.325. An appointment to represent children, parents, or legal guardians on a termination of parental rights petition is always one credit.

1.5.7.4.1 Representation of Multiple Children
An appointment to represent two or more related children in a dependency proceeding is a maximum of two credits if:

(a) the petition names as parents different mothers of different children; or

(b) the petition names as parents different fathers of different children, not including any putative father unless the putative father also appears in the case; or

(c) the children are living in more than one location.

1.5.7.4.2 Maximum Credit for Representing Parents
The maximum number of credits that may be counted when a Contractor attorney represents more than one parent or legal guardian in a dependency proceeding is one.

1.5.7.5 Postdispositional Juvenile Hearings
A postdispositional juvenile hearing is limited to a hearing before the court or Citizen Review Board (CRB) hearing that is held **after** the juvenile court enters the dispositional order required under ORS 419B.325 or ORS 419C.440. Postdispositional juvenile matters are a new credit for each hearing attended by Contractor. A single postdispositional hearing, even if it involves matters relating to more than one original juvenile petition, counts as only one postdispositional credit. Postdispositional hearings do not include probation violation hearings.

1.5.7.6 Juvenile Probation Violation Hearings
Juvenile probation violation hearings are governed by Section 1.5.5.

1.5.7.7 Waiver Proceedings
Contractor shall receive one additional "Juvenile Other" (JUDO) credit beyond that assigned for the original appointment for each waiver proceeding under ORS 419C.349.

1.5.8 Mental Health Case Credit
An appointment to represent an allegedly mentally ill or mentally retarded person is a credit. The appointment ends at the original disposition of that matter.

1.5.9 Contempt Case Credit
An appointment to represent a client on a contempt matter or matters is a credit. Contractor receives no additional credit for appointments on new allegations of contempt if the original contempt matter(s) on which Contractor was appointed has not been adjudicated.

1.5.10 Postconviction Relief Case Credit
An appointment to represent a client on petitions filed at the same time or petitions with sequential numbers counts as one credit. The appointment ends at the original disposition of that matter.

1.5.11 Habeas Corpus Case Credit
An appointment to represent a client on a petition for a writ of habeas corpus is one credit if Contractor does not represent the petitioner on the charge to which the habeas corpus case is related. Petitions filed at the same time or petitions with sequential numbers count as one credit. The appointment ends at the original disposition of that matter.

1.6 Appointments That Do Not Qualify for Credit

1.6.1 Verification Removal
All appointments and reappointments are subject to verification of financial eligibility for counsel at state expense and do not count as a case credit where:

(a) Finding of Ineligibility
the court finds, after screening or verification, that the client is not financially eligible for appointed counsel at state expense; or

(b) Withdrawal of Application for Counsel
the court withdraws counsel because the client withdraws the application for appointed counsel before the court completes verification.

1.6.2 Client Retains Counsel
An appointment to represent a client who later retains Contractor or, in the case of a consortium, retains the same consortium member, on the same case does not qualify for credit.

1.6.3 Reassignment Within Consortium
If a case is reassigned within a consortium for any reason, no new credit may be claimed.

2 MUTUAL RIGHTS

2.1 Waiver
Either party's failure to enforce any provision of this contract shall not constitute a waiver by the party of that or any other provision.

2.2 Attorney Fees
If a party brings any action, suit, or proceeding to enforce this contract or to assert any claim arising from this contract, the prevailing party shall be entitled to such additional sums as the court may award for reasonable attorney fees and costs incurred as a result of the action, suit, or proceeding, including any appeal.

2.3 Termination
The parties may agree in writing to terminate this contract at any time. Unless otherwise agreed in writing, termination or expiration of this contract does not affect any existing obligation or liability of either party. In lieu of terminating the contract, PDSC may agree in writing to alternative measures.

3 RIGHTS OF PDSC

3.1 Subcontracts
Contractor shall not subcontract for or delegate any of the services required under this contract without obtaining PDSC's prior written consent. PDSC shall not unreasonably withhold consent to subcontract. Under this contract, PDSC incurs no liability to third persons by making contract payments to Contractor.

3.2 Assignment of Contract
Contractor shall not assign Contractor's interest in this agreement without PDSC's prior written consent. PDSC shall not unreasonably withhold consent to assignment. Under this contract, PDSC incurs no liability to third parties, including subcontractors, for making contract payments to Contractor.

3.3 PDSC Powers for Failure to Obtain Workers Compensation

If Contractor fails to secure and maintain workers' compensation coverage or to provide PDSC with a certificate of exemption, PDSC may:

(a) withhold payment of any amount due Contractor until such coverage or certification is provided;

(b) suspend this agreement until Contractor complies; and

(c) terminate this contract:

(i) for willful or habitual failure to comply; or

(ii) for failure to comply within 30 days after PDSC suspends this contract.

3.4 De Minimis Changes in Contractor Reports/Documents

At any time and by written instructions, PDSC may make de minimis changes to the terms and conditions of this contract regarding any one or more of the following:

(a) format or content of any report or other document to be submitted by Contractor;

(b) number of copies of any report or other document that Contractor must submit; and

(c) time in which, or place at which, Contractor must submit any required report or other document. (See Section 6.2)

3.5 Termination by PDSC for Cause

3.5.1 Reasons for Contract Termination

PDSC may terminate this contract for cause, for the following reasons:

(a) Contractor's material breach of this contract including material misuse of contract funds;

(b) Contractor's willful or habitual disregard of the procedures required by the courts in which Contractor provides services;

(c) Contractor's demonstrated continued inability to serve adequately the interests of its contract clients;

(d) Contractor's willful or habitual failure to abide by minimum standards of performance and rules of professional ethics; or

(e) some other cause which has substantially impaired Contractor's ability to provide adequate legal services under this contract or fulfill the obligations of this contract.

3.5.2 No Appointments After Notice

When Contractor receives PDSC's notice of termination for cause, Contractor shall not accept any further cases under the contract unless PDSC otherwise agrees in writing.

3.6 Funding Modification, Suspension, or Termination

At the time this contract is executed, sufficient funds either are available within PDSC's current appropriation or are expected to become available to finance the costs of this contract. However, payments under this contract are subject to the availability of funds. PDSC may propose to modify, suspend, or terminate this contract if PDSC reasonably believes that funds will not be sufficient to pay anticipated costs of public defense services and PDSC has complied with the procedures set out below in Section 6.3 (State Funding Shortfall).

3.7 Increasing Workload: Renegotiation at PDSC Option

The parties <u>may</u> renegotiate this contract to increase the total work to be performed by Contractor under this contract at additional cost to the state, if:

(a) the probable number of available cases increases substantially; and

(b) PDSC determines that renegotiation is in the state's interest.

PDSC will not pay Contractor for credits in excess of the maximum value agreed to under the original contract, unless renegotiation and agreement occurs prior to Contractor's assignment to such excess cases.

3.8 Review, Verification and Inspection of Records

3.8.1 Request

PDSC may review or verify Contractor's records that relate to the performance of this contract:

(a) on reasonable written notice; and

(b) as often as PDSC reasonably may deem necessary during the contract term.

3.8.2 Access to Facilities and Provision of Records

PDSC may conduct fiscal or performance audits to monitor and evaluate the services provided under this contract. PDSC will give reasonable written notice to Contractor before any evaluation. On PDSC's proper request, Contractor shall provide access to its facilities and make records available to PDSC or PDSC's designee or agent at all reasonable times. PDSC will not remove Contractor's original office records or other property of Contractor from Contractor's premises without Contractor's approval. PDSC and its agents will comply with the American Bar Association's "Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor" (1991) when conducting any fiscal or performance audit.

Contractor shall keep such data and records in an accessible location and condition. Notwithstanding any other provisions of this section, no constitutional, statutory, or common law right or privilege of any client or Contractor employee are waived by Contractor.

3.8.3 Other Information
Upon the PDSC's determination that a significant question exists of Contractor's ability to perform this contract and subject to client confidentiality, personnel confidentiality and de minimis limits (Sections 4.4, 4.5 and 6.2), Contractor shall provide any other information that PDSC reasonably identifies and requests as needed to ensure proper disbursement of state funds.

3.8.4 Timely Reports by PDSC
When PDSC undertakes a review of Contractor, PDSC shall provide Contractor a draft review report for comment, clarification or rebuttal information. PDSC shall issue a final report to Contractor. Draft and final reports shall be provided in a timely manner.

3.9 Use of Equipment Purchased with Contract Funds
Contractor may purchase in whole or in part from contract funds equipment required to perform services under this contract. Any equipment Contractor acquires with funds expressly provided by this contract shall be used for these purposes.

3.10 Return of Equipment Purchased with Contract Funds
Any equipment purchased with expressly identified contract funds shall accrue to PDSC when this contract is terminated or expires and no new contract is agreed upon within 60 days of termination, expiration, or completion of a negotiated wind-down, whichever occurs last, if:

(a) Contractor purchased the equipment with separately identified funds from this contract or public defense services contracts with similar provisions or with insurance proceeds to replace equipment that Contractor had purchased with funds from this contract;

(b) had an original dollar value of $500 or more; and

(c) whose useful life exceeds the term of this contract.

3.11 Limit on Return of Equipment to PDSC
Section 3.10 does not apply to any Contractor that is a nonprofit, tax-exempt corporation whose articles of incorporation require the transfer or distribution of equipment to another nonprofit, tax-exempt corporation that provides public defense services in the event of full or partial wind-down.

4 RIGHTS OF CONTRACTOR

4.1 Termination By Contractor For Cause
Contractor may terminate this contract for cause should PDSC materially breach any duty or obligation under this contract.

4.2 Court Appointments Outside Contract
Contractor may accept additional court appointments to cases in excess of contract coverage or excluded from contract coverage, but only to the extent that the additional appointments do not interfere with Contractor's ability to fulfill this contract. PDSC shall not pay Contractor outside the contract for any services falling within the definition of "representation", set forth in Section 7.1, for cases assigned under this contract.

4.3 Request for Additional Credit
Contractor may make a written request for additional credit for cases Contractor believes required an extraordinary amount of time, effort, or expense, etc., on cases closed since the preceding periodic review (see Section 5.7). Only PDSC may approve additional credit for cases assigned under this contract. Contractors shall not make requests of the court or court staff to approve additional credit.

4.3.1 In General
Contractor shall submit in writing any materials needed to show extra services beyond the contract and the amount of additional credit proposed.

4.3.2 Complex Cases in Which Contractor Withdraws
Contractor shall submit any materials needed to show extra services performed prior to a withdrawal for any reason on a complex case and the amount of additional credit proposed beyond one OTHR credit.

4.4 Client Records
Contractor grants no right to PDSC or designee of PDSC to observe attorney/client consultations or to review information in case files that is:

(a) privileged because of the attorney/client relationship; or

(b) work product identifiable to a particular case or client unless the client expressly, knowingly, and voluntarily agrees in writing. Contractor shall keep records, including time records, in such a manner as to allow PDSC or PDSC's designee reasonable access to other information for review purposes. Notwithstanding other provisions of this section, Contractor does not waive any client's constitutional, statutory, or common law right or privilege.

4.5 Personnel Records
Contractor grants no right to PDSC or designee of PDSC to review information in any personnel file unless the Contractor's employee expressly, knowingly, and voluntarily agrees in writing. Contractor shall keep records in such a manner as to allow PDSC or PDSC's designee reasonable access to other information, including specific compensation of individual staff members, for review purposes. Notwithstanding any other provisions of this contract, Contractor does not waive any of its employees' constitutional, statutory, or common law rights or privileges to the confidentiality of personnel records.

5 MUTUAL OBLIGATIONS

5.1 Successors in Interest
This contract shall bind and shall inure to the benefit of the parties and their respective successors and assigns.

5.2 Compliance with Applicable Law

5.2.1 In General

The parties shall comply with all federal, state, and local laws, regulations, and ordinances applicable to the work to be done under this contract. Such laws include, but are not limited to, those pertaining to tax liability and independent contractor status.

5.2.2 Laws Incorporated by Reference

The provisions of ORS 279.312, 279.314, 279.316, and 279.320 are incorporated herein by reference as conditions of this contract and shall govern performance of this contract.

5.3 Notice of Contract Modification, Suspension, or Termination

A notice to modify, suspend, or terminate this contract shall:

(a) be in writing;

(b) state the reasons therefor and may specify what may be done to avoid the modification, suspension, or termination;

(c) become effective for willful breach not less than 14 days from delivery by certified mail or in person; and

(d) become effective not less than 60 days from delivery by certified mail or in person for non-willful breach.

5.4 Modification or Termination Due to Legislative Action or Court Interpretation

PDSC and Contractor may renegotiate this contract if there is a significant change in workload or cost of doing business contemplated under this contract due to amendments to or court interpretations of federal or state laws. In addition, PDSC may modify, suspend, or terminate this contract as needed to comply with amendments to or court interpretations of federal or state statutes that make some or all contract services ineligible for state funding.

5.5 Modification or Termination Due to Decreased Caseload

PDSC and Contractor may renegotiate this contract if there is a significant decrease in the probable number of cases available.

5.6 Renegotiation Shall Minimize Reductions in Staff

PDSC shall renegotiate with all Contractors affected by case decreases to apportion decreases in a manner that minimizes reductions in staff. Such renegotiations shall:

(a) reduce the total number of cases for the contract period and adjust the monthly payments to Contractor accordingly; or

(b) have Contractor refund or otherwise repay to the State any moneys saved.

5.7 Periodic Review

At the request of either party, PDSC and Contractor will periodically review case assignment trends, requests for additional credit and any other matters needed to determine contract compliance or any necessary contract modifications.

5.7.1 Review of Assignments to Multiple Contractors and Mixture of Cases

In counties where more than one Contractor provides legal services, periodic review shall include a review by PDSC, the court, and the Contractors of the number of appointments made to each Contractor. If the review shows that there is a substantial disparity in the actual appointment rates and the rates contemplated under the contracts, PDSC shall notify the court and Contractors that appointment rates must be adjusted and corrected, to the extent total cases are available. Similarly, if the periodic review discloses a substantial disparity between the case mix under the contract and the case mix actually assigned to Contractor, PDSC will notify the court and Contractors that appointment case mix must be adjusted and corrected, to the extent total cases are available. (See Section 7.8.2.5)

5.7.2 Fungibility

The parties agree that PDSC is contracting for the provision of legal representation by Contractor, as measured by value, and that the estimated workload, by case type, is the parties' expectation as to the distribution of the cases which may be available during the contract period. The parties expressly agree that Contractor may substitute one type of case for another, for the purposes of contract performance, with cases being fungible, except as specifically provided to the contrary in this contract.

5.8 Other Contractors and Vendors

PDSC may undertake or award other contracts for additional or related work. Contractor shall cooperate with PDSC and the courts to coordinate appointment procedures and other court activities necessary for efficient and effective administration of this and other contracts for public defense services.

Contractor shall reasonably assist non-attorney vendors in billing for services provided at Contractor's request.

6 OBLIGATIONS OF PDSC

6.1 Indemnity of Contractor by PDSC

PDSC shall protect, indemnify, defend and hold harmless Contractor from all liability, obligations, damages, claims, suits, or actions of whatever nature that result from or arise out of the activities of PDSC or State of Oregon under this contract.

6.2 De Minimis Changes in Contractor Reports/Documents

PDSC shall not make any change that would cause more than a de minimis increase in cost or time required to perform the contract except by written agreement signed by both parties. (See Section 3.4)

6.3 State Funding Shortfall

6.3.1 PDSC to Seek Additional Funding
If PDSC reasonably believes that appropriated funds will not be sufficient, PDSC shall seek additional funds from the Legislative Emergency Board or legislature at the earliest opportunity and, if possible, before modifying, suspending, or terminating this contract.

6.3.2 Negotiations
If the Emergency Board or legislature does not appropriate sufficient funds, PDSC shall seek to apportion expenditure reductions equally and fairly among all public defense service providers, including the private bar. PDSC shall seek first to modify the contract through negotiation with Contractor. In negotiating any modification, the parties will consider both cost and the level of representation that meets minimum allowable professional standards. PDSC may suspend or terminate the contract if the parties cannot agree to modification.

6.4 Accounting Model
Payment under this contract shall be based on when work is performed, consistent with Oregon state government accounting procedures. Except for contracts based on number of hours, the accounting model used for payment under the contract assumes the disposition of an average case assigned under the contract occurs within 90 days of the assignment. The model also assumes approximately one-third of the work is performed in the month the case is assigned and one-third of the work is performed in each of the following two months. PDSC shall pay Contractor according to this accounting model out of funds for the biennium during which the work is performed.

6.5 Payments in Addition to Contract Price
PDSC shall pay for the following case expenses from funds available for the purpose:

(a) Discovery
Discovery expenses;

(b) Preauthorized Non-Routine Expenses
Non-routine case expenses requested by Contractor and preauthorized by PDSC or other authority designated to approve non-routine expenses in compliance with the requirements of ORS 151.216 and ORS 135.055(3). Unless the services are performed by Contractor's staff or subcontractors, non-routine expenses include, but are not limited to:

(i) medical and psychiatric evaluations;

(ii) expert witness fees and expenses;

(iii) interpreters;

(iv) polygraph, forensic and other scientific tests;

(v) computerized legal research;

(vi) investigation expenses; and

(vii) any other non-routine expenses PDSC or other authority designated to approve non-routine expenses preauthorizes and finds necessary and proper for the investigation, preparation, and presentation of a case;

(c) Lay Witness Fees
Lay witness fees and expenses incurred in bringing defense witnesses to court, but not including salary or expenses of law enforcement officers required to accompany incarcerated witnesses;

(d) Copying Clients' Files
The cost, if it exceeds $25, of providing one copy of a client's or former client's case file upon client's or client's appellate, postconviction relief or habeas corpus attorney's request, or at the request of counsel appointed to represent the client when the client has been granted a new trial;

(e) Copying Direct Appeal Transcripts for PCR Trial-Level Representation
The cost, if it exceeds $25, of making copies of direct appeal transcripts for representation in postconviction relief cases. Contractor is limited to no more than two copies; and

(f) Other
Medical, school, birth, DMV, and other similar records, and 911 and emergency communication recordings and logs, when the cost of an individual item does not exceed $75.

7 OBLIGATIONS OF CONTRACTOR

7.1 Obligations To Appointed Clients

7.1.1 Representation At All Court Proceedings in the Relevant Court
Contractor shall provide representation at all stages of a case assigned under this contract as limited by this contract. Representation means the provision of competent legal advice and assistance by appointed counsel to a person that a state court has determined to be financially eligible and entitled to appointed counsel at state expense on all matters related to the appointment, except DMV license suspension hearings, civil forfeiture proceedings, domestic relations proceedings and other civil proceedings.

7.1.2 Standards of Representation
Representation further means providing a level of legal service that does not fall below the minimum professional standards and canons of ethics of the Supreme Court of Oregon, the Oregon State Bar, the American Bar Association, and any applicable case law and court rules that define the duties of counsel to their clients.

7.1.3 Specific Representation Services
Contractor shall provide services on any and all matters necessary to provide adequate representation of the client, including but not limited to:

(a) having an attorney present at regularly scheduled arraignments or other initial appearance to make the necessary contact and appointments with clients assigned to Contractor (Contractor may make alternative arrangements with the court for actual presence);

(b) establishing and following procedures to ensure prompt notification to the court of the specific attorney assigned to each case;

(c) filing all necessary motions, including pre- and post-judgment motions;

(d) representation through judgment or other final order of the court on the case, including but not limited to:

  (i) filing timely motions to dismiss in cases subject to diversion agreements, conditional discharge or similar provisions,

  (ii) filing necessary paperwork under ORS 161.705 ("reduction of certain felonies to misdemeanors"), and

  (iii) all prejudgment proceedings arising from a petition for a writ of mandamus or habeas corpus related to the case on which counsel was appointed;

(e) legal assistance to individuals who would be eligible for counsel at state expense if charged with a crime and where exigent circumstances preclude an appointment order (e.g., interrogation);

(f) preparing all documents, letters, research and referrals to appropriate agencies;

(g) continuous legal and support staff services, during case substitutions, to the extent necessary to ensure continuous representation and the establishment of the new attorney/client relationship;

(h) consulting with clients regarding appellate review;

(i) upon request, assisting in filing a notice of appeal and motion for appointment of appellate counsel and timely responding to appellate counsel's questionnaire or questions regarding the case;

(j) to the extent ethically possible, representing a client at a show cause hearing to determine client's financial eligibility;

(k) to the extent ethically possible, consulting with appellate or postconviction relief counsel on an appeal or postconviction relief proceeding; and

(l) upon request, providing copies to appellate or postconviction relief counsel in a timely manner.

7.1.4 Client Contact

7.1.4.1 In-Custody Initial Interviews

Contractor shall, whenever possible, speak to and conduct initial interviews in person with in-custody clients:

(a) within 24 hours of appointment; or

(b) by the next working day if the court appoints Contractor on a Friday, weekend, or holiday.

7.1.4.2 Out-of-Custody Interviews

Within 72 hours of the appointment, Contractor shall arrange for contact with out-of-custody clients, including notification of a scheduled interview time or what client must do to schedule an interview time.

7.1.5 Contractor Responsibilities – Financially Ineligible Clients

Contractor shall comply with the requirements of federal and Oregon constitutions, the Oregon Rules of Professional Conduct, and consider OSB Ethics Opinion 1991-34 if Contractor learns that the client is ineligible for state-funded legal services under this contract.

7.2 Withdrawal From Case Only on Court Approval

Contractor may withdraw only with the court's approval. Contractor shall promptly notify the court of any conflict of interest or any other reason requiring withdrawal from a case assigned under this contract. If the court approves Contractor's request to withdraw, the case shall be reassigned in the normal course.

7.3 Special Obligations To State of Oregon

7.3.1 Indemnity of PDSC By Contractor

Contractor shall protect, indemnify, defend and hold harmless PDSC and the State of Oregon from all liability, obligations, damages, losses, claims, suits, or actions of whatever nature that result from or arise out of Contractor's activities.

7.3.2 Independent Status of Contractor

For purposes of this contract, Contractor is an independent contractor and has so certified under Oregon laws. Neither Contractor nor any of its employees is an employee of the State of Oregon or a state aided institution or agency, by reason of this contract alone.

7.3.2.1 Ineligibility for Public Employee Benefits

Payment from contract funds does not entitle Contractor, its employees, officers, agents, members, and representatives, to any public employee benefits of federal social security, unemployment insurance, workers' compensation, the Public Employees Retirement System, leave benefits, or similar employment-related benefits.

7.3.2.2 Wages and Taxes

Contractor shall pay any compensation, wages, benefits, and federal, state, and local taxes to be paid under or as a result of the contract.

7.3.2.3 Workers' Compensation

As an independent contractor Contractor shall provide workers' compensation coverage for all subject workers performing work under this contract, including Contractor if self-employed or a business partner, to the extent required by all applicable workers' compensation laws and for the entire contract term. Contractor, its subcontractors, if any, and all other employers working under this contract are "subject employers." As such, they shall provide coverage for workers' compensation benefits for any and all of their subject workers as required by ORS chapter 659A and for the entire contract term.

7.3.3 State Tort Claims Act Not Applicable

For purposes of this contract, Contractor is not an officer, employee, or agent of the State of Oregon as those terms are used in ORS 30.265. Contractor accepts responsibility

for all actions of its members, officers, employees, parties, agents and subcontractors.

7.3.4 Equal Rights of Contractor's Employees
Contractor shall comply with Title VI of the Civil Rights Act of 1964, with Section V of the Rehabilitation Act of 1973, and with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations. Contractor also shall comply with the Americans with Disabilities Act of 1990, including Title II of that Act, ORS 659.425, and all regulation and administrative rules established pursuant to those laws.

7.3.5 Contractor Insurance To Protect State of Oregon
Contractor shall secure and maintain insurance coverage as set out below. Contractor shall provide PDSC a copy of the certificate of insurance listing the coverage and additional insured information.

7.3.5.1 General Liability Insurance
At its expense, in whole or in part from contract funds, Contractor and each law firm or sole practitioner member of a consortium shall procure and keep in effect during the contract term comprehensive general liability insurance with an extended coverage endorsement from an insurance company authorized to do business in the State of Oregon. The limits shall not be less than five hundred thousand dollars ($500,000) per occurrence for personal injury and property damage.

7.3.5.2 Casualty Insurance
At its expense in whole or in part from contract funds, Contractor shall procure and keep in effect during the term of this contract, sufficient casualty insurance to replace any and all property losses caused by theft, fire, flood, or other casualty.

7.3.5.3 Additional Insured
The liability and casualty insurance coverages required for performance of the contract shall include the State of Oregon, PDSC, and their divisions, officers, and employees as additional insureds but only with respect to the Contractor's activities to be performed under this contract.

7.3.5.4 Cancellation or Change
There shall be no cancellation, material change, potential exhaustion of aggregate limits, or intent not to renew insurance coverage without notice by Contractor to PDSC. Any failure to comply with the provisions of these insurance requirements, except for the potential exhaustion of aggregate limits, shall not affect the coverage provided to the State of Oregon, PDSC, and their divisions, officers and employees.

7.3.6 Malpractice Insurance
During the entire contract period, and at the Contractor's own expense in whole or in part from contract funds, Contractor shall ensure that each of its attorneys has malpractice insurance coverage in the minimum amount required by the Oregon State Bar. Contractor shall provide proof of such insurance to PDSC on request.

7.3.7 Internal Controls
Contractor shall establish internal controls, such as segregation of duties with respect to financial accounting, to ensure that contract funds are properly receipted, expended, and accounted for.

7.3.8 Oregon Judicial Information Network (OJIN)
For juvenile cases, Contractor shall limit use of OJIN to access only those cases that involve parties Contractor represents.

7.4 Staff and Equipment

7.4.1 Staffing Levels
Contractor has secured, or will secure at its own expense in whole or in part from contract funds, all personnel or employees necessary to perform services that this contract requires. Contractor shall maintain an appropriate and reasonable number of attorneys and support staff to perform its contract obligations.

7.4.2 Assigning and Associating Attorneys

7.4.2.1 Diligence in Hiring
Contractor shall use due diligence to hire, assign, or associate attorneys for this contract who are qualified to provide competent and effective services to their clients and the courts.

7.4.2.2 Supervision
Contractor shall have more experienced attorneys closely supervise lesser experienced attorneys' performance. Contractor shall provide information on the extent of supervision on PDSC's request. However, Contractor shall not provide to PDSC or any other person the contents of any employee's personnel files unless Contractor's employee expressly, knowingly, and voluntarily agrees in writing.

7.4.2.3 Certification
Contractor shall provide to PDSC the name and qualifications of any attorney added during the contract term to perform contract services. The newly added attorney shall meet the qualification standards established by PDSC, for the type of cases that will be assigned. A "certificate of attorney qualification" shall be provided to PDSC for each newly added attorney.

7.4.3 Interpreters
For out-of-court attorney/client communications, Contractor shall give preference to interpreters who are certified by the Office of the State Court Administrator (OSCA), under ORS 45.291. If no certified interpreter is available, Contractor may use a qualified interpreter, as defined in ORS 45.275(8)(b). Contractor shall ensure that all interpreters who are staff employees or who subcontract with Contractor and provide in-court interpretation comply with all certification requirements established by OSCA and the Code of Professional Responsibility for Interpreters in Oregon.

7.4.4 Limit on Contractor and Staff Noncontract Work
Contractor and Contractor's staff shall not let noncontract work interfere with adequate representation of court-appointed clients under this contract.

7.5 Record Keeping

7.5.1 Case Records

Contractor shall maintain current information, including case log notes, on individual contract cases. To the extent ethically possible, records shall be kept in a manner to be available on request for inspection by PDSC, or PDSC's designee or agent.

7.5.2 Financial Records

Contractor shall maintain financial records on an accrual basis. Contractor's records shall show that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.

7.5.3 Retention Period

For purposes of this contract only, Contractor agrees to preserve all appointment, service and financial records for a period of five (5) years after this contract expires. In addition, Contractor agrees to preserve all case files a minimum of ten (10) years from the date the case is closed for all cases except aggravated murder and Measure 11 cases. Case files in aggravated murder and Measure 11 cases shall be preserved a minimum of twenty (20) years from the date the case is closed.

7.6 Reports to PDSC

7.6.1 Case Inventory

Within twenty (20) days of the end of each month, Contractor shall provide to PDSC, in a format specified by PDSC, a reasonably accurate monthly case inventory report for the preceding month. Contractor may submit amended case inventory reports, if necessary, at any time up to forty-five (45) days after completion of a periodic review that includes the monthly case inventory report to be amended.

7.6.2 Case Disposition and Withdrawal Data

Contractor shall maintain data, using codes specified by PDSC, to track the disposition of, or withdrawal from, all cases reported under the contract. Contractor will make the data available for PDSC to review on request.

7.6.3 Penalty for Late Reports

Contractor shall submit timely and properly completed reports. If Contractor fails to submit a proper, reasonably accurate report within thirty (30) days of its due date, PDSC may withhold the next monthly payment until PDSC or the court receives the report and supporting documentation.

7.6.4 Enforceability

The reporting requirements set forth in this section are enforceable after the expiration of this contract.

7.7 Costs, Expenses and Client Clothing

7.7.1 Costs and Expenses

Except for the expense items listed in Section 6.5, Contractor shall pay for:

(a) all ordinary, reasonable and necessary costs, fees, and expenses incurred in providing contract services;

(b) all other routine expenses related to case preparation and trial; and

(c) staff services, including routine travel expenses, if Contractor has staff investigators, interpreters, or polygraphers.

Contractor shall not expend contract funds for out-of-state travel or other costs unrelated to a specific case without the express written authorization of PDSC.

7.7.2 Client Clothing

Prior to requesting preauthorization to purchase clothing for a client's court appearance, Contractor agrees to contact contractors who maintain "clothing rooms" to determine whether suitable clothing is available. (Contact PDSC for a current list.) If Contractor receives preauthorization to purchase clothing for a client, that clothing shall be provided to a "clothing room" upon completion of the case.

7.8 Special Notices

Contractor shall provide PDSC written notice of any significant changes affecting this contract. Such changes include, but are not limited to:

(a) Contractor's ability to carry out this contract, including changes in staff attorney names, staffing levels and office location;

(b) Contractor's ability to meet financial obligations; and

(c) matters affecting Contractor's ability to provide services to clients.

7.8.1 Time Requirement for Notices

All notices shall be provided to PDSC within thirty (30) days of the occurrence requiring the notice, unless a shorter time is provided.

7.8.2 Specific Notices Required

7.8.2.1 Insurance Cancellation or Change

Contractor shall provide notice of any material changes to any insurance policy listed in Sections 7.3.5 - 7.3.6 and immediate notice of the cancellation of any such policies.

7.8.2.2 Staffing Changes

Contractor shall provide, to PDSC and the affected court, notice of the names of attorneys who are hired or leave Contractor's employ and any other substantial staffing changes. Upon request by PDSC, Contractor shall provide a current list of attorneys and staff positions by full time equivalent.

7.8.2.3 Change in Contractor's Organization

Contractor shall notify PDSC of any change in Contractor's organization that might affect staffing, payment, or tax reporting under the contract. Contractor shall assure PDSC of its continued ability to meet contract requirements or shall propose reductions in caseload and price if Contractor is unable to meet contract requirements because of such organizational change.

7.8.2.4 Events Which Could Impair the Contract
Contractor shall notify PDSC within fourteen (14) days of when Contractor learns that one of the following has occurred:

(a) Criminal Charges
A member of Contractor's attorney or investigator staff has been charged with a crime in which the alleged victim is or was a client or witness in a contract case.

(b) Criminal Conviction
A member of Contractor's attorney or investigator staff has been convicted of a crime punishable by a term of incarceration of one or more years or involving moral turpitude.

(c) Formal Bar Complaint
A formal accusation of misconduct, that is alleged to have occurred with respect to representation provided in a contract case, has been filed by the Oregon State Bar against a member of Contractor's attorney staff.

(d) Bar Discipline
Disciplinary action is taken by the Oregon State Bar against one of Contractor's attorney staff.

(e) Uninsured Practice of Law
A member of Contractor's attorney staff has engaged in the practice of law in an area not covered by Contractor's or the attorney's professional liability insurance coverage.

7.8.2.5 Nonassignment of Available Cases or Early Quota
Contractor shall notify PDSC immediately upon determining that:

(a) the court is not assigning Contractor to cases available for appointment; or

(b) Contractor will reach its total contract quota before the expiration of the contract.

Within forty-five (45) days of notification to PDSC that the court is not assigning Contractor to cases available for appointment, PDSC shall propose a plan to Contractor and the court to remedy the nonassignment of available cases.

7.9 No Dual Payments for Contract Work
Contractor shall not:

(a) expend funds under this contract for work performed outside this contract;

(b) accept funds from anyone other than PDSC for work performed under this contract, except for grants or funds for work study, job experience, internships, or other such grants or funds; or

(c) accept or keep credit for a case for which Contractor's attorney is subsequently retained.

7.10 Independent Audit Required
Contractor shall, from contract funds, be subject to an annual independent audit by a CPA firm and shall provide a copy to PDSC.

7.11 Annual Expenditure Report
Forty-five (45) days after the end of each one-year period under the contract, Contractor shall provide to PDSC a one-year expenditure report listing the amounts of contract funds expended by the same line items as are listed in Contractor's "Estimated Allocation of Contract Funds".

7.12 Limits on Full Time Public Defender Attorneys
Attorneys employed full time by nonprofit public defender offices shall not accept employment for legal services on a retained basis and shall not accept appointment to a public defense case outside this contract without the authorization of PDSC.

7.13 Limits on Pro Bono Work
Nonprofit public defenders may provide pro bono representation only for:

(a) cases covered by contractor's or another's malpractice insurance; and

(b) cases that are:

(i) related to cases to which contractor's attorneys have been appointed; or

(ii) unrelated to contract cases, provided the pro bono services are rendered outside of the contract.

7.14 Public Defender Employee Compensation
No public defender employee shall receive a salary higher than that set by the legislature for a circuit court judge in ORS 292.415.

8 MUTUAL RISKS

8.1 Impossibility of Performance
Neither party shall be held responsible for delay or default caused by theft, fire, flood, or other casualty, if the delay or default was beyond the party's reasonable control. In the event of circumstances beyond a party's control that may render timely performance by that party impossible, either party may terminate this contract, or the affected part, by written notice.

8.2 Tort Liability
Each party shall be responsible for the torts only of its own officers, employees, and agents committed in the performance of this contract.

9 RISKS OF CONTRACTOR

9.1 Refund for Shortage

If Contractor's actual caseload value, at the expiration or termination of the contract, is less than the workload value Contractor agrees to refund to PDSC the shortage, unless PDSC agrees in writing otherwise.

9.2 Wind-Down Procedures

Unless PDSC agrees in writing, if either party suspends or terminates the contract, or the contract expires, Contractor shall complete timely and adequate legal services on all existing contract appointments on cases assigned before the effective date of suspension or termination.

9.2.1 Negotiations

If the contract expires or terminates, PDSC and Contractor shall negotiate wind-down procedures. Whenever possible, Contractor shall wind down pending cases within three months of contract expiration or termination by completing or, with PDSC's agreement, reassigning the cases.

9.2.1 Negotiations

Except when PDSC terminates the contract for cause under Section 3.5 and unless otherwise agreed, the parties shall, whenever possible, agree on wind-down procedures before the contract expires or terminates. If the parties cannot agree on wind-down procedures, PDSC alone shall decide what state funds, if any, will finance wind-down procedures based on what PDSC reasonably believes is necessary to ensure the clients' right to adequate assistance of counsel and that Contractor's legal obligations are met.

9.2.2 Reduction in Contractor's Caseload

If Contractor's caseload or contract amount is reduced significantly resulting in layoffs, whether as a result of contract modification or contract renewal, PDSC and Contractor may negotiate wind-down procedures.

10 APPOINTMENT TYPE DEFINITIONS

( ) denotes the applicable appointment code.

10.1 CRIMINAL CASES

10.1.1 Appointments After Diversion or Conditional Discharge Agreement (SCDV)

For <u>all</u> criminal cases, Contractor shall report separately on cases where Contractor is <u>first</u> appointed:

(a) after the defendant enters into a diversion or conditional discharge agreement or any other type of deferred or delayed adjudication agreement, and

(b) when the court orders the defendant to show cause why the agreement should not be terminated.

Contractor shall report these cases as SCDV rather than as the original case type.

10.1.2 Capital Murder Case (CMUR)

A capital murder case is any appointment to represent a person charged with aggravated murder as defined by ORS 163.095 except as provided under paragraph A.3., below.

10.1.3 Noncapital Murder Case (MURD)

A noncapital murder case is any appointment to represent a person charged with:

(a) murder as defined by ORS 163.115; and

(b) aggravated murder where the person is a juvenile under 15 years of age who is waived to circuit court on the charge (a convicted juvenile cannot be sentenced to death or life without parole under ORS 161.620) or aggravated murder where the person was 15, 16 or 17 years of age on the date the crime is alleged to have occurred (no death sentence may be imposed under ORS 137.707(2)).

10.1.4 Felony Case

A felony case is any appointment to represent a person charged with one or more crimes described by ORS 161.525, excluding capital murder and noncapital murder. It includes manslaughter and negligent homicide. A case is a felony case if it includes a felony charge at any time after defendant appears in circuit court, even if later reduced to a misdemeanor.

10.1.4.1 Measure 11 Felony (AM11, BM11, JM11)

Other than murder, a felony that is the subject of Measure 11 and ORS 137.700 or ORS 137.707. AM11 is a Class A Measure 11 felony with an adult defendant; BM11 is a Class B Measure 11 felony with an adult defendant; and JM11 is a Class A or Class B Measure 11 felony where a 15-, 16- or 17-year-old is indicted as an adult in circuit court.

10.1.4.2 Class A Felony (AFEL)

A Class A felony is a crime that a statute expressly designates as a Class A felony, other than an AM11 case.

10.1.4.3 Class B Felony (BFEL)

A Class B felony is a crime that a statute expressly designates as a Class B felony, other than a BM11 case.

10.1.4.4 Class C Felony (CFEL)

A Class C felony is a crime that a statute expressly designates as a Class C felony, other than a DUII felony (DFEL), or domestic violence Class C felony (DVIO).

10.1.4.5 DUII Felony (DFEL)

A DUII felony is a DUII case in which an element of the crime charged is that the defendant has at least three prior DUII convictions within the past ten years (ORS 813.010(5)).

10.1.4.6 Domestic Violence Class C Felony (DVIO)

An Assault IV case which is elevated to a Class C felony under ORS 163.160(3).

10.1.4.7 Unclassified Felony (UFEL)
A felony crime that the statute(s) do not expressly designate as a Class A, B, or C Felony.

10.1.5 DUII (DUIS)
A DUII case is any appointment to represent a person charged with driving under the influence of intoxicants, other than DUII felony (DFEL).

10.1.6 Misdemeanor Case (MISS)
A misdemeanor case is any appointment to represent a person charged with one or more crimes described by ORS 161.545 or by local ordinance as a misdemeanor, excluding DUII, misdemeanor contempt and the misdemeanor traffic cases defined below.

10.1.7 Misdemeanor Traffic Case
A misdemeanor traffic case is any appointment to represent a person on a misdemeanor traffic charge for which a convicted defendant may be incarcerated as an original sentence under the Oregon Vehicle Code, other than a traffic offense charged as a felony or DUII. For statistical purposes, report cases in the following categories:

(a) Misdemeanor Driving While Suspended (DWSS).

(b) Other Traffic Misdemeanor (OTMS).

10.1.8 Extradition Case (EXTR)
An extradition case is any appointment to represent a person in a proceeding under the Uniform Criminal Extradition Act, ORS 133.743 - 133.857. It includes representation on a writ of habeas corpus filed in a pending extradition proceeding.

10.2 PROBATION VIOLATIONS

10.2.1 Probation Violation
A probation violation is any appointment or reappointment to represent a person in a proceeding concerning an order of probation, including but not limited to the revoking thereof, arising out of a criminal or civil contempt conviction(s) and sentencing(s), under Section 1.5.5. For reporting purposes, Contractor shall report each type of probation violation case by the following subcategories:

10.2.1.1 Felony Probation Violation (FPV)
A felony probation violation case is any appointment to represent a person in a probation proceeding arising out of a felony conviction.

10.2.1.2 Misdemeanor Probation Violation (MPV)
A misdemeanor probation violation case is any appointment to represent a person in a probation proceeding arising out of a contempt case, or a misdemeanor conviction, except DUII.

10.2.1.3 DUII Probation Violation (DPV)
A DUII probation violation is any appointment to represent a person in a DUII probation proceeding arising out of a DUII conviction.

10.3 CONTEMPT CASES

10.3.1 Contempt Case
A contempt case is any appointment to represent a person charged with contempt of court. For statistical purposes, report cases in the following three categories:

10.3.1.1 Family Abuse Prevention Act (FAPA)
Contempt for violating a Family Abuse Prevention Act (ORS 107.700 - 107.732) restraining order.

10.3.1.2 Support (SUPP)
Contempt for failure to comply with an order or judgment in domestic relations or juvenile court proceeding for the payment of suit money, attorney's fees, spousal support, child support, maintenance, nurture, or education.

10.3.1.3 Contempt (CONT)
Misdemeanor contempt or any other contempt that is not a FAPA or SUPP contempt.

10.4 CIVIL COMMITMENT CASES

10.4.1 Civil Commitment Case (MHMI)
A civil commitment case is any appointment to represent a person in a proceeding brought under ORS Chapter 426 or 427.

10.5 JUVENILE CASES

10.5.1 Juvenile Case
A juvenile case is any appointment or a reappointment to represent a person(s) in a proceeding brought under ORS Chapter 419B or 419C. For statistical purposes, report juvenile cases in the following categories:

10.5.1.1 Juvenile Felony (JUDF)
If committed by an adult, alleged act would constitute a felony.

10.5.1.2 Juvenile Misdemeanor (JUDM)
If committed by an adult, alleged act would constitute a misdemeanor.

10.5.1.3 Juvenile Other (JUDO)

(a) if committed by an adult, alleged act would constitute a violation or infraction;

(b) alleged act is a status offense;

(c) an emancipation case (any appointment to represent a child in a proceeding under ORS 419B.550 - 419B.558);

(d) a waiver case (any appointment to represent a child in a proceeding to waive the child to adult court for further proceedings under ORS 419C.340);

(e) appointments under ORS 420A.203 (Eligibility for second look; report to sentencing court; hearing; disposition);

(f) appointments under ORS 181.607 (Relief from reporting requirement; juvenile offenders); and

(g) appointment to a juvenile case for which no other juvenile case type applies.

10.5.1.4 Probation Violation or Motion to Modify (JPV)

Proceeding based on allegation(s) that the child has violated the terms of probation or a proceeding based on a motion to modify a disposition.

10.5.1.5 Juvenile Dependency Case

A juvenile dependency case is any appointment to represent a person based on a new petition alleging that a child is within the jurisdiction of the juvenile court under ORS 419B.100(1)(a) - (g).

(a) Parent (JDEP): Appointment to represent parent(s) or guardian(s).

(b) Child (JDEC): Appointment to represent child(ren).

10.5.1.6 Postdispositional Proceeding

A postdispositional proceeding is any appointment in a juvenile court proceeding to represent a person at a court or CRB review hearing and shelter care hearings held after the original disposition. It does not include probation violation proceedings or family unity meetings. Probation violation proceedings are a separate category under delinquency.

(a) Parent (JPDP): Appointment to represent parent(s) or guardian(s).

(b) Child (JPDC): Appointment to represent child(ren).

10.5.1.7 Termination of Parental Rights Case

A termination of parental rights case is any appointment to represent the parent or child in a proceeding under ORS 419B.500 - 419B.530 OR in a contested adoption matter (Zockert v. Fanning) OR in a contested permanent guardianship proceeding under ORS 419B.365. Guardianship proceedings under ORS Chapter 125 are excluded.

(a) Parent (JUTP): Appointment to represent parent(s) or guardian(s), including contested adoption proceedings.

(b) Child (JUTC): Appointment to represent child(ren), including contested adoption proceedings.

10.6 OTHER CIVIL CASES

10.6.1 Habeas Corpus Case (CVHC)

A habeas corpus case is any appointment to represent a person in a proceeding for a writ of habeas corpus under ORS 34.355, excluding:

(a) habeas corpus petitions filed in a pending extradition proceeding; and

(b) habeas corpus petitions filed for a client whom Contractor represents on a related matter (not a separate appointment under the contract).

10.6.2 Postconviction Relief Case (CVPC)

A postconviction relief case is any appointment to represent a person under ORS 138.510 - 138.686.

10.6.3 Psychiatric Security Review Board Case (PSRB)

A Psychiatric Security Review Board case is any appointment by the PSRB to represent a person under ORS 161.346(11).

10.7 OTHER CASES (OTHR)

An other case is: a complex case from which Contractor withdraws; an appointment to represent a material witness; an appointment under ORS 137.771(2); an appointment under chapter 697, Oregon Laws 2001 (DNA testing); a criminal forfeiture credit; or an appointment to a case for which no other case type applies.

Attachment 5

LEGISLATIVELY ADOPTED 2007-09 KEY PERFORMANCE MEASURES

NAME OF AGENCY: PUBLIC DEFENSE SERVICES COMMISSION

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

2007-09 KPM#	Legislatively Adopted KPMs for 2007-09	Changes to 2005-07	Target 2008	Target 2009
1	APPELLATE CASE BACKLOG - Number of cases in the Legal Services Division backlog	No change	68	57
2	FEE STATEMENTS REDUCED - Percentage of fee statements reduced due to incorrect billing	No change	3%	3%
3	PROCESSING FEE STATEMENTS - Percentage of fee statements processed within 10 business days	No change	88%	89%
4	REVIEWING EXPENSE REQUESTS - Percentage of non-routine expense requests reviewed within 5 business days	No change	87%	88%
5	EXPENSE COMPLAINTS – Percentage of complaints regarding payment of expenses determined to be founded	No change	<10%	<10%
6	BEST PRACTICES - Percentage of contractors that have implemented best practices and resolved problems relating to the quality and cost-efficiency of their services, which are identified by PDSC's site visit process and the process's "360 degree" evaluations	No change	40%	50%
7	ATTORNEY PERFORMANCE COMPLAINTS - Percentage of complaints regarding attorney performance determined to be founded	No change	<10%	<10%
8	CUSTOMER SERVICE – Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.	New Measure		
9	BEST PRACTICES FOR BOARDS AND COMMISSIONS – Percentage of total best practices met by Commission	New Measure	100%	100%

2005-07 KPM#	*PROPOSED DELETIONS of 2005-07 Key Performance Measures (KPMs)*	Target 2008	Target 2009
	No proposed deletions		

For links to high-level outcomes and Oregon Benchmarks reference the agency's Budget Form 107BF04a.

LEGISLATIVELY ADOPTED 2007-09 KEY PERFORMANCE MEASURES

NAME OF AGENCY: PUBLIC DEFENSE SERVICES COMMISSION

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

LEGISLATIVE FISCAL OFFICE RECOMMENDATION: Approve the key performance measures with a recommendation that PDSC review its measures during the interim, and add realistic but aggressive targets. The review should focus on identifying areas where outcomes can be identified and tracked, as several of the measures relate to process rather than outcomes. This should include measures that track the effect of best practices on the cost of providing services. PDSC should also add a customer service measure, which is a standard requirement for all agencies, including Judicial Branch agencies.

SUB-COMMITTEE ACTION: The Subcommittee adopted the Legislative Fiscal Office recommendation.

Best Practice Performance Measure for Governing Boards and Commissions

Board and Commission Training, March 20, 2006

Rita Conrad, Executive Director
Oregon Progress Board

Overview

- Background
- Which Boards and Commissions?
- Timeline
- Best Practices
- Self-Assessment
- Data Documentation
- Data Reporting

Background

Why Measure

- Legislative interest
- Best practices lead to improved performance and accountability

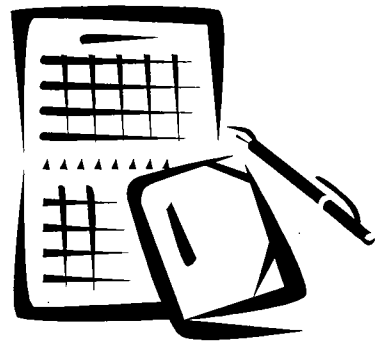
What to Measure

- Percent of total "best practices" met by the Board/Commission

Which boards and commissions are required to adopt the measure?

- **Boards or commissions that:**
  - Hire the executive director, and
  - Have an independent budget, or
    Oversee an agency with an independent budget
    (i.e. Environment Quality Commission or State Board of Forestry)
- **Current list:**
  www.das.state.or.us/DAS/OPB/docs/kpm/BrdCom_BudNote.doc
- **The Legislature has the final word**

Timeline



- July 2006
  Approved by the Legislature
- 2007 Legislative Session
  Measure will be added to 2007-09 performance measures for applicable boards and commissions.
- September 30, 2008
  First report on the measure is due.

15 Best Practices (you can add more)

- **Executive Director (#1-2)**
  selection, expectations and feedback.
- **Strategic Management (#3-4)**
  understand statutory mission, review agency strategic plan, and review Annual Performance Progress Report (KPMs).
- **Strategic Policy Development (#5-6)**
  define role in policy-making, review policy option packages, ensure appropriate policy communication occurs with major stakeholders.
- **Fiscal Oversight (#7-11)**
  review budgets, review key financial information, ensure compliance with resource accounting and reporting rules and standards.
- **Board Management (#12-15)**
  respect role as agency representative, manage board processes and ensure appropriate training is provided.

Progress is self-assessed.

- Annual conversation about application of best practices
- Documentation of performance against list of best practices
- Discussion of key questions
  - How are we doing?
  - How do we compare to others and/or our target?
  - What factors are affecting our results?
  - What needs to be done to improve performance?

Self-Assessment Criteria

Best Practices Criteria	Yes	No
1. Executive Director's performance expectations are current.		
2. Executive Director receives annual performance feedback.		
3. The agency's mission and high-level goals are current and applicable.		
4. The board reviews the *Annual Performance Progress Report.*		
5. The board is appropriately involved in review of agency's key communications.		
6. The board is appropriately involved in policy-making activities.		
7. The agency's policy option packages are aligned with their mission and goals.		
8. The board reviews all proposed budgets (likely occurs every other year).		
9. The board periodically reviews key financial information and audit findings.		
10. The board is appropriately accounting for resources.		
11. The agency adheres to accounting rules and other relevant financial controls.		
12. Board members act in accordance with their roles as public representatives.		
13. The board coordinates with others where responsibilities and interests overlap.		
14. The board members identify and attend appropriate training sessions.		
15. The board reviews its management practices to ensure best practices are utilized.		
16. Others		
Totals		
Percentage of Total		

Self-Assessment Example

- **Best Practices #1 and #2**
  - Executive Director's performance expectations are current, and he/she receives annual performance feedback
- **Sample Process**
  - Annual:
    Board/Commission and director agree on deliverables
  - Mid-year:
    Director reports progress on deliverables
  - Annual:
    Board/Commission and director review accomplishments and lessons learned

Self-Assessment Example

- **Best Practice (#10)**
  - Board appropriately accounts for resources
- **Sample Process**
  - Identify agency processes and controls, e.g.,
    - annual audit
    - agency controller processes
  - Review audit results or annual report from agency controller

Document the Data

- Fill out the criteria check list and calculate percent met
- Document the board/commission's self-assessment process of each best practice
  - Keep meeting notes
  - Keep annual review information as back up to your annual report
  - Suggestion: store everything in a binder

Best Practices Criteria	Yes	No
1. Executive Director's performance expectations are current.		
2. Executive Director receives annual performance feedback.		
3. The agency's mission and high-level goals are current and applicable.		
4. The board reviews the *Annual Performance Progress Report.*		
5. The board is appropriately involved in review of agency's key communications.		
6. The board is appropriately involved in policy-making activities.		
7. The agency's policy option packages are aligned with their mission and goals.		
8. The board reviews all proposed budgets (likely occurs every other year).		
9. The board periodically reviews key financial information and audit findings.		
10. The board is appropriately accounting for resources.		
11. The agency adheres to accounting rules and other relevant financial controls.		
12. Board members act in accordance with their roles as public representatives.		
13. The board coordinates with others where responsibilities and interests overlap.		
14. The board members identify and attend appropriate training sessions.		
15. The board reviews its management practices to ensure best practices are utilized.		
16. Others		
Totals		
Percentage of Total		

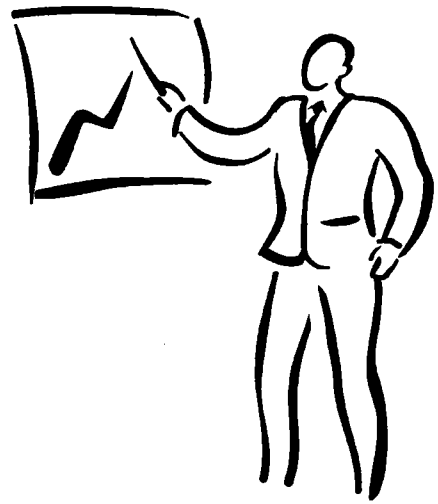
Report the Data

Annual Performance Progress Report

- Oregon Progress Board: www.das.state.or.us/DAS/OPB/GOVresults.shtml
- Report is due September 30

Dept. of Administrative Services Contacts

- George Naughton, Administrator
  Budget and Management
  Phone: 503 378 5460
- Rita Conrad, Executive Director
  Oregon Progress Board
  Phone: 503-378-3202



Questions?

- Can our board or commission adopt the measure even if we don't have to?
- What if my board or commission is not on the list and think I should be?
- Other questions…

Dawn Farr, Legislative Fiscal Analyst

Phone: 503-986-1828

Attachment 6

Top 10 Things Public Officials Should Know About Oregon's New Government Ethics Laws

1. There will be more frequent reporting for those public officials who must file a yearly statement of economic interest (SEI). In addition to the yearly SEI (still due on April 15), public officials must file a quarterly report that lists 4 things: 1) expenses for conventions, missions, trips, or other meetings paid for by tribes, governments, or certain non-profit organizations; 2) expenses for missions, negotiations, or economic development activities paid for by third parties; 3) honoraria greater than $15; and 4) certain income exceeding $1000. The first quarterly report is due April 15, 2008, for the January to March 2008 quarter.

2. Public officials may not have a direct beneficial financial interest in a contract they "authorized" as a public official for two years after they cease to hold that official position.

3. The yearly gift limit from a "single source" with a legislative or administrative interest is now $50. (It was $100.) That limit applies to the public official's relatives and members of the household.

4. Public officials (including relatives and members of the household) may receive NO gifts of entertainment from persons with a legislative or administrative interest unless the entertainment is "incidental" to an event or the entertainment is "ceremonial." (It was $250 per year and $100 per event.)

5. There is no longer a general trip expense exception to the gift limits. There are several narrowly defined new trip expense exceptions for certain givers (tribes, governments, public officials and limited non-profits) and certain defined trips (officially sanctioned trade-promotion or fact-finding missions; officially designated negotiations or economic development activities).

6. Food and beverage consumed in the presence of the giver is no longer a gift exception. Thus, food and beverage will be subject to the $50 per year unless another gift exception applies (e.g. reception).

7. A public body can hire the relative of a public official but a public official can neither be involved in the hiring process nor supervise a relative unless the public body authorizes such supervision.

8. Commission advisory opinions, staff opinions and staff advice now provide greater immunity or mitigation from sanctions. In addition, there are timelines for the commission and staff to issue their opinions.

9. State wide associations may adopt rules or policies interpreting the ethics laws and submit them to the ethics commission for review. The commission shall approve or reject them, giving reasons for any rejection. Officials who act in compliance with approved rules or policies may not be sanctioned by the ethics commission.

10. The ethics commission is still in the process of rulemaking to define new terms, create new forms, and otherwise implement SB 10 and HB 2595. The ethics commission's website is http://www.gspc.state.or.us/OGEC/contact_us.shtml. The website contains the statutes, rules, forms, and opinions. The ethics commission's phone number is (503) 378-5105.

** Prepared by Wendy J. Johnson, Deputy Director and General Counsel, Oregon Law Commission

Disclaimer: This information is not intended to constitute legal advice and should not be relied upon in lieu of consultation with the Ethics Commission or your legal counsel.

November 15, 2007

OREGON GOVERNMENT ETHICS COMMISSION

DIVISION 5

GIFTS

OAR 199-005-0005
Determining the Value Received by Public Officials

(1) Purpose. The purpose of this rule is to guide public officials, candidates and others in determining the value of items or services received by public officials to ensure accurate reporting in ORS 244.100 and to comply with gift and honoraria limits in ORS 244.025 and ORS 244.042.

(2) The fair market value of the merchandise, goods, or services received shall be used to determine benefit or value. Fair market value is the dollar amount goods or services would bring if offered for sale by a person who desired, but was not obligated, to sell and purchased by one who is willing, but not obligated, to buy.
(a) In calculating the benefit or value conferred to a public official, any portion of the benefit transferred to an entity that is tax-exempt under section 501(c) of the Internal Revenue Code shall not be included as part of the benefit or value to the public official, if the public official does not claim the charitable contribution on personal tax returns.
(b) In calculating the per person cost at receptions or meals the payor of the public official's admission or meal shall include all costs other than any amount donated to a charity.
(c) The following example demonstrates how the value of a charitable dinner would be calculated. A person with a legislative or administrative interest buys a table for a charitable dinner at $100 per person. If the cost of the meal was $25 and the amount donated to charity was $75, the benefit conferred on the public official is $25. This example requires that the public official does not claim the charitable contribution on personal tax returns.

(3) For receptions and meals with multiple attendees, but with no price established to attend, the source of the public official's meal or reception shall use reasonable methods to determine the per person value or benefit conferred. The following examples are deemed reasonable methods of calculating value or benefit conferred:
(a) The source divides the amount spent on food, beverage and other costs (other than charitable contributions) by the number of persons whom the payor reasonably expects to attend the reception or dinner;
(b) The source divides the amount spent on food, beverage and other costs (other than charitable contributions) by the number of persons who actually attend the reception or dinner; or
(c) The source calculates the actual amount spent on the public official.

(4) Upon request by the public official, the source shall give notice of the value of the merchandise, goods, or services received.

(5) Attendance at receptions that qualify as an exception to the gift definition under ORS 244.020(5)(b)(L) is permitted without regard to the fair market value of the food and beverage provided.
Stat. Auth.: ORS 244.290
Stats. Implemented: ORS 244.020, 244.025, 244.042 & 244.100

OAR 199-005-0010
Resale Value of Unsolicited Tokens or Awards

(1) The purpose of this rule is to assist public officials in determining the resale value of items provided under ORS 244.020(5)(b)(C).

(2) Engraved or otherwise personalized items that include a public official's name are deemed to have a resale value under $25, unless the personalized item is made from gold or some other valuable material that would have value over $25 as a raw material.
Stat. Auth.: ORS 244.290
Stats. Implemented: ORS 244.020

OAR 199-005-0015
Attendance at Receptions, Meals or Meetings under ORS 244.020(5)(b)(E)

(1) The purpose of this exception is to allow public officials to attend organized, planned events and engage with the members of organizations by speaking or answering questions, participating in panel discussions or otherwise formally discussing matters in their official capacity. This exception to the gift definition does not authorize private meals where the participants engage in discussion. The following list of factors may indicate whether expenditures are permitted under this exception, although the event may qualify even if not every factor is met:
(a) A large number of people or groups are invited. For example, all members of an organization are invited.
(b) The invitations or programs are sent in advance.
(c) The event is publicized.
(d) The reception, meal, or meeting is open to the public.
(e) Written materials such as a printed program are available.
(f) The public official delivers a planned speech or remarks to the entire audience.
(g) The public official participates in a formal question and answer session before the entire audience.

(2) The following definitions apply to this rule.
(a) "Organization" means any public body, corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust, or other entity other than an individual.
(b) "Speak" means to give a speech or otherwise formally address or converse with the members of the organization or participants at a reception, meal, or meeting. Self introductions or other perfunctory remarks do not constitute speaking for purposes of this exception.
(c) "Answer Questions" means to engage in formal discussion, such as on a panel or some other arrangement, where a moderator or the participants of the reception, meal, or meeting ask questions to a public official.

(d) "Reception" means a social gathering. Receptions are often held for the purpose of extending a ceremonial or formal welcome and may include private or public meetings during which guests are honored or welcomed. Food and beverages are often provided, but not as a plated, sit-down meal.
Stat. Auth.: ORS 244.290
Stats. Implemented: ORS 244.020

OAR 199-005-0020
Gift Exceptions in ORS 244.020(5)(b)(F) and (H)

(1) The purpose of this rule is to provide definitions and clarification for two of the gift exceptions that permit public officials to accept payment for travel conducted in the public official's official capacity, for certain limited purposes. Travel that meets the requirements of ORS 244.020(5)(b)(F) or (H) and this rule may be either within the United States or international.

(2) As this term is used in ORS 244.020(5)(b)(F) and (H), "representing" a unit of government (state, local or special government body) means that the public official is making an authorized appearance in an official capacity on behalf of the public body. Unless the employing public body determines otherwise in advance of the travel, the following is sufficient to constitute prior authorization:
(a) A supervisor may approve the public official's representation;
(b) A governing board or commission of a public body may approve the representation of the governing board members or commissioners, respectively;
(c) An appointed committee of legislators may approve the representation of individual legislators; or
(d) Individual elected officials, such as the governor, judges, district attorneys or local or statewide elected officials, may authorize their own appearances.

(3) As the term is used in ORS 244.020(5)(b)(F), a "not-for-profit corporation that is tax exempt under section 501(c)(3) of the Internal Revenue Code and that receives less than five percent of its funding from for-profit organizations or entities" is determined to qualify as an eligible not-for-profit corporation meeting the 5% threshold by the information on the most recent tax return filed by the organization prior to the time the expenses for authorized travel were incurred.

(4) For purposes of ORS 244.020(5)(b)(H),
(a) A "fact finding mission" is any activity related to a cultural or educational purpose, or any activity aimed at providing intergovernmental assistance, such as for the purpose of international aid or sharing best practices, or developing intergovernmental relationships directly related to the public official's duties. The sponsor of a fact finding mission should be directly and immediately associated with the event or location being visited.
(b) "Trade Promotion" means an activity for the purpose of encouraging or developing commerce or the buying and selling of goods and services.
(c) "Economic Development Activities" mean activities undertaken for the purpose of strengthening, expanding, or enhancing the economy, or activities that provide community development or cultural enhancement. Specific activities include, but are not limited to:

promoting tourism; promoting a favorable investment climate to strengthen businesses; creating jobs; raising real wages; assisting Oregon communities to build a capacity to retain, expand or attract business; improving national and global competitiveness of Oregon companies; improving transportation access; and marketing products, services, or opportunities.
(d) "Officially Sanctioned" means approved by a state or local public body in writing by a person authorized by the public body to provide that approval, or at a public meeting by the governing body to the public body. Unless the public body determines otherwise, the following is sufficient to constitute officially sanctioned:
(A) A supervisor may approve expenses for an employee;
(B) A governing board or commission of a public body may approve expenses for governing board members or commissioners, respectively;
(C) An appointed committee of legislators may approve expenses for individual legislative officials; or
(D) Individual elected officials, such as the governor, judges, district attorneys or local or statewide elected officials may authorize their own expenses.
(E) Local or statewide executive department heads who do not report to a supervisor may authorize their own expenses.
(e) "Expenses Approved in Advance" means expenses approved by the public body, either in writing by a person authorized by the public body to provide that approval, or at a public meeting by the governing body to the public body before the time of the activity. Unless the public body determines otherwise, the following is sufficient to constitute authorization:
(A) A supervisor may approve expenses for an employee;
(B) A governing board or commission of a public body may approve expenses for governing board members or commissioners, respectively;
(C) An appointed committee of legislators may approve expenses for individual legislative officials; or
(D) Individual elected officials, such as the governor, judges, district attorneys or statewide elected officials, may authorize their own expenses.
Stat. Auth.: ORS 244.290
Stats. Implemented: ORS 244.020

OAR 199-005-0025
Receptions and Entertainment permitted under ORS 244.020(5)(b)(L), (M) and (N)

(1) The purpose of this rule is to clarify terms used in the three gift exceptions in ORS 244.020(5)(b)(L), (M) and (N).

(2) A "reception" means a social gathering as defined in OAR 199-005-0015(2)(d).

(3) "Incidental" means secondary or minor, but associated to something more important. Entertainment that is incidental to the main purpose of another event is provided in conjunction with a primary event (such as a singer or band at an awards dinner). Incidental entertainment is secondary in importance and in time devoted to the entertainment compared to the primary, non-entertainment event. Entertainment that involves personal participation is not incidental to another event (such as a golf tournament at a conference).

(4) "Entertainment" means amusement or diversion. Entertainment may be provided by others (such as athletes at sporting events) but also includes events where the public official, relative, or member of household personally participates. Examples of entertainment include, but are not limited to concerts, plays, movies, operas, sporting events, participating in sports (golf, skiing, hunting or fishing, etc), comedy shows, and similar events.

(5) A public official appears at an entertainment event for a "ceremonial purpose" when the source of the entertainment requests the presence of the public official at a special occasion associated with the entertainment. Staff members accompanying a public official may also attend if they are performing official duties. An example of an appearance by a public official at an entertainment event for a ceremonial purpose includes, but is not limited to, throwing the first pitch at a professional or college baseball game, appearing in a parade, and ribbon cutting for an opening ceremony. To qualify, the entertainment must be provided by the source of the entertainment, and the public official must have an official role in the entertainment event.

(6) "Representing" state, local or special government bodies has the meaning defined in OAR 199-005-0020(2).
Stat. Auth.: ORS 244.290
Stats. Implemented: ORS 244.0020

OAR 199-005-0030
Determining the Source of Gifts

(1) ORS 244.025 and ORS 244.040(2)(e) limit the offering and receipt of gifts from sources that could reasonably be known to have a legislative or administrative interest in the governmental agency over which the public official holds any official position or over which the official exercises any authority. This rule is intended to clarify how a public official determines who the source of the gift is. Public officials need to be aware of the source of any gifts they receive (or those that are received by their relatives or members of their household), regardless of amount, to make sure that they comply with the $50 limit on gifts from a single source in a calendar year. To that end, public officials should not accept gifts in any amount without obtaining information from the person or entity offering the gift as to who is the source of the gift. It is the public official's personal responsibility to ensure that no single source provides gifts exceeding an aggregate value of $50 in a calendar year, if the source has a legislative or administrative interest.

(2) The source of any gift provided to a public official is the ultimate payor(s) of the expense.

(3) The $50 gift limit in ORS 244.025 applies separately to the public official or candidate, and to the public official or candidate's relatives or members of household. Each such individual may accept gifts from a single source of a total of $50 per calendar year.
Stat. Auth.: ORS 244.290
Stats. Implemented: ORS 244.0025, 244.040

OAR 199-005-0035
Guidelines for compliance with ORS 244.020(5), ORS 244.025, ORS 244.040, ORS 244.042 and ORS 244.047

(1) The purpose of this rule is to define certain terms and to clarify substantive provisions of ORS 244.020(5), ORS 244.025, ORS 244.040, ORS 244.042 and ORS 244.047.

(2) The terms "official capacity" or "official duties", means that the public official's actions are directly related to serving the state of Oregon or any of its political subdivisions or any other public body as a public official.

(3) An "official compensation package" means the wages and other benefits provided to the public official. To be part of the public official's "official compensation package", the wages and benefits must have been specifically approved by the public body in a formal manner, such as through a union contract, an employment contract, or other adopted personnel policies that apply generally to employees or other public officials. "Official compensation package" also includes the direct payment of a public official's expenses by the public body, in accordance with the public body's policies.

(4) As used in ORS 244.040(2)(c), "reimbursement of expenses" means the payment by a public body to a public official serving that public body, of expenses incurred in the conduct of official duties on behalf of the public body. Any such repayment must comply with any applicable laws and policies governing the eligibility of such repayment. Expenses paid by the public body to their own public officials need not be reported by the public official under ORS 244.100.

(5) "Confidential information" means any record that is exempt from public disclosure or inspection under state law, or any information obtained in the course of or by reason of holding position as a public official that is not publicly disclosed. The record or information is no longer confidential if it has been voluntarily disclosed by the public body, or been disclosed through a public records disclosure order or court order.

(6) As used in ORS 244.047, a public contract is "authorized by" a public official if the public official performed a significant role in the selection of a contractor or the execution of the contract. A *significant role can include* recommending approval or signing of the contract, including serving on a selection committee or team, or having the final authorizing authority for the contract.

(7) As defined in ORS 244.020(13), a public official includes anyone serving the State of Oregon or any of its political subdivisions or any other public body in any of the listed capacities, including as an "agent or otherwise." An "agent or otherwise" means any individual performing governmental functions. Governmental functions are services provided on behalf of the government as distinguished from services provided to the government. This may include private contractors and volunteers, depending on the circumstances. This term shall be interpreted consistently with *Attorney General Opinion No. 8214* (1990).
Stat. Auth.: ORS 244.290
Stats. Implemented: ORS 244.020, 244.025, 244.040, 244.042, & 244.047