

Members

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



Ex-Officio Member

Chief Justice Thomas Balmer

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Friday, March 22, 2013
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

AGENDA

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| 1. Action Item: Approval of minutes - PDSC meeting held on January 23, 2013 (<i>Attachment 1</i>) | Chair Ellis |
| 2. Action Item: Discussion and approval of Service Delivery Plan for Linn County (<i>Attachment 2</i>) | Chair Ellis
Commission members |
| 3. Loan Repayment and Forgiveness Options for Public Defenders | Bill Penn |
| 4. HB 2671 (<i>Attachment 3</i>) | Judge Welch |
| 5. Action Item: Commission Approval of Certification Process for Capital Providers (<i>Attachment 4</i>) | Paul Levy |
| 6. PDSC Budget Update | Kathryn Aylward |
| 7. Annual Survey Results (<i>Attachment 5</i>) | Paul Levy |
| 8. Action Item: Juvenile Appellate Section Senior Attorney (<i>Attachment 6</i>) | Peter Gartlan |
| 9. OPDS Monthly Report <ul style="list-style-type: none"> • OSB Bulletin Article (<i>Attachment 7</i>) | OPDS Management Team |

Please note: Lunch will be provided for Commission members at 12:00 p.m. The meeting location is accessible to persons with disabilities. Please make requests for an interpreter for the hearing impaired, or other accommodation for persons with disabilities, at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.

Next meeting: April 11, 2013, 10:00 a.m. – 2:00 p.m. at the Office of Public Defense Services. Meeting dates, times, and locations are subject to change; future meetings are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Wednesday, January 23, 2013
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Chip Lazenby
Shaun McCrea
John Potter
Per Ramfjord
Hon. Elizabeth Welch
Chief Justice Balmer

STAFF PRESENT: Nancy Cozine
Kathryn Aylward
Paul Levy
Joshua Crowther
Shawn Wiley
Billy Strehlow
Amy Jackson

The meeting was called to order at 10:00 a.m.

Agenda Item No. 1 Approval of minutes – PDSC meeting held on December 14, 2012

Chair Ellis noted one correction on page 5, last paragraph, third line down; change "magma" to "magna." **MOTION:** Honorable Elizabeth Welch moved to approve the minutes. Commissioner Potter seconded the motion; hearing no objection, the motion carried. **VOTE 6-0.**

Agenda Item No. 2 Discussion of Service Delivery Plan

Commission members discussed their impressions of the delivery of services in Linn County. Chair Ellis expressed his view that the county has very reasonably functioning consortiums. He expressed some concern regarding succession planning in the Linn County Legal Defense Corporation (LCLDC), but noted that the current members seem competent and conscientious, dedicated to criminal practice, and seem to be effectively mentoring their new member. He also expressed appreciation for the consortiums' commitments to establishing boards and following PDSC policies, which he noted as outweighing his general concern about having a single consortium provider. The Chair encouraged Paul Levy to provide assistance if LCLDC is struggling to find an insurance carrier. He also noted that though the "split the check" model might seem to put lawyers who limit their practice to appointed work

at an economic disadvantage, it seemed to be working for this group. Ms. Aylward pointed out that if the consortium wants to split the check, they need to split only what they earn, not the entire contract amount, so that if there are fewer cases than anticipated they have the reserves available to return to the state. Commission members supported the idea of requiring a reserve for compensation received in excess of actual credits earned.

Commissioner Lazenby questioned whether the Commission should be more proactive regarding concerns about succession planning by providing incentives for contractors who add newer practitioner to their groups. Chair Ellis recalled the value of Peter Ozanne's efforts to connect with law schools to encourage people's interest in defense practice, and asked whether there are opportunities to use the web to encourage urban practitioners to relocate to more rural areas. Mr. Levy offered his belief that it is a significantly more complicated situation because consortium groups don't have the additional funding necessary to add new members without impacting their own compensation. The economics of the situation don't support the addition of a newer member who doesn't have a current caseload to supplement limited compensation through consortium work. Ms. Cozine mentioned that the Appellate Division regularly participates in career fairs and suggested that OPDS could make an effort to make sure contractors are aware of these types of events. Commissioner Potter related the plight of Jack Morris, in Hood River, who needed a felony qualified attorney, but received quality applications from only newer attorneys. Lane Borg added that he advertised Mr. Morris's job posting to lawyers at MPD, and that Mr. Morris was also offering housing to entice a qualified candidate, but it still didn't yield a qualified candidate. Commissioner Potter suggested the use of a formal survey to document the problems contractors experience in attracting and retaining lawyers.

Chief Justice Balmer suggested that the Commission should also be working with the Oregon State Bar, as one of their three initiatives is to help recent law school graduates find jobs. The Bar is also working with career placement offices at each of the law schools, which are now spending more of their time placing people who are several years out as much as they are people who are second and third year law students.

Commissioner Welch added that the consortium groups should be encouraged to ensure appointment of counsel at first appearance, and to discourage waivers of counsel in juvenile delinquency cases.

Agenda Item No. 3

Commission on Public Safety – the final report and expectations for legislative session

Craig Prins provided PDSC members with an update regarding the work of the Commission on Public Safety. He began by explaining that the federal government provides support through the Council on State Government and other technical providers to states interested in controlling their prison growth and using the accrued savings to provide services at the local level. This effort, called Justice Reinvestment, has been done all over the country, even places that are very tough on crime, such as Georgia, Texas, Kentucky, and South Carolina.

Mr. Prins outlined the history of this effort, which began with Governor Kulongoski, back in 2008 – 2009, as an examination of the costs of sustaining prison growth over the next decade. The current Commission started in May of 2012 as an inter-branch, bipartisan effort. Pew has been providing assistance, and has explained the work as examining the cost of doing nothing: \$600 million of growth in the prison system, about 2300 beds, over the next decade, at a time when much of the local county system is being eviscerated. He stated Governor Kitzhaber's goal of stopping prison growth at 14,500; it is currently about 14,200. Mr. Prins indicated that the Legislature's actions will significantly impact Oregon's budget situation. If Oregon does nothing it will need over \$70 million dollars this biennium to start the prison building plan, and those costs were not built into the Governor's budget. The Governor instead invested \$23 million in avoiding foster care for young kids in the dependency system, \$9 million to support statewide drug courts, and \$32 million in a county incentive program where

counties that limit prison beds to the number used in 2012 can use the captured savings to provide services at the local level.

Mr. Prins explained that the policy options in the report are broken out into the most aggressive, which impact sentencing, then middle ground proposals, and one more that amounts to about an 80 bed impact. He noted that the Governor's budget is based upon the most aggressive options that allow control of growth through sentencing, and that the legislature created a joint committee that includes the four legislators who were on the Commission: Representative Chris Garrett, Representative Andy Olson, Senator Floyd Prozanski and Senator Jackie Winters. This joint committee will have to work through the proposals to determine which are most appropriate. Chair Ellis asked whether the district attorneys are mobilizing to oppose, and Mr. Prins indicated that they do oppose the proposals, but that Pew has done a very good job of trying to include all of the public safety stakeholders to build a broad coalition of support. He also noted the importance of ensuring that any savings found through limits on prison growth remain dedicated to funding public safety - specifically drug courts and community corrections. He noted the involvement of education advocates in the discussion, and their need to accept the notion that the reinvestment for this biennium needs to be into public safety. Once the reinvestment savings start building, there can be a corresponding infusion of resources into education in future biennia.

Judge Welch asked about the impact of youth being sent to the Department of Correction (DOC) but using Oregon Youth Authority beds. She noted that this dynamic has created a situation where OYA is less able to provide appropriate programming for young kids, and asked why that wasn't further explored in the report. Mr. Prins explained that OYA has about 700 closed custody beds right now, and that 359 of those are for youth treated as adults, which means they cannot be paroled. He said that the Commission's report did address second look, but explained that changing it in its entirety is difficult because it takes a two-thirds vote (it would impact all 22 of the crimes in Measure 11). The Commission therefore limited the focus to three crimes that impact many youth in the OYA system - robbery in the second degree, assault in the second degree, and sex abuse in the first degree, which account for over 100 of the 350 DOC beds. Judge Welch asked why second look isn't being used more now. Mr. Prins explained that when district attorneys charge a youth with a Measure 11 crime and then extend a non-Measure 11 plea offer, part of the deal is that second look is not an option.

Chair Ellis suggested that the PDSC typically offers to be a source of information for the Legislature when it is examining these types of policies, and expressed his desire to have OPDS provide any data that might be helpful to the conversation. Commissioner Lazenby asked about the impact of demographics, and whether anyone has looked at whether there will be future increases in the population of males between ages 15 to 35 that would have a corresponding increase in crime rate, and therefore on defense costs. Mr. Prins indicated that the 2010 U.S. census showed that the number of males in the 15 to 35 males age group is growing more than predicted in the previous census. Commission members discussed a broad range of topics related to the crime rate, programs focused on reducing recidivism, cost projections, and the lack of correlation between the crime rate and the number of charges filed statewide. Lane Borg noted that a slight decrease in the number of months in prison for a particular charge could have a large aggregate impact for corrections, but that the savings on the defense side would be minimal because there is still a charge filed. The reduction of a sentence by some number of months will not dramatically decrease the work required to provide an adequate defense in a particular case because the attorney is going to be working just as hard to avoid the prison sentence. Commission members concluded that defense savings will be less likely to happen until effective justice reinvestment strategies have had a corresponding decrease in recidivism.

Agenda Item No. 4

PDSC Policy Option Package Priorities

Ms. Cozine started by reminding Commission members that the PDSC's policy option packages were discussed and adopted by the Commission in earlier meetings when establishing the agency's request budget. She explained that this agenda item was included because the PDSC's Legislative Fiscal Office analyst requested that the Commission have a conversation about their policy option package priorities. Ms. Cozine indicated that several providers had asked to be heard on this topic.

Thomas Crabtree, from Bend, encouraged the Commission to prioritize packages that increase funding for public defenders and decrease dependency caseloads. Mr. Crabtree explained that when he started as a public defender in 1981, he hoped that the defense side would achieve parity with the district attorneys. Thirty-two years later the gap remains, with starting salaries of \$63,000 for defense attorneys, and \$78,800 for district attorneys. He reminded the Commission that this gap is just salary, not benefits. He noted that this inequity is compounded by the fact that when the caseload goes down, the office costs are the same, but they must return money to OPDS. The lack of consistent and predictable income creates an additional challenge, and with a significant gap of about \$16,000, it can be hard to retain experienced attorneys. Mr. Crabtree indicated that he has lost attorneys to the DA's office, just for salary reasons. He explained that his office has a number of really good, young attorneys who he believes would like to be career defenders if the office can provide them with the security to stay in Bend, buy a house, and ensure continued raises every year or every contract period. Without that, people will continue to look for something better. Mr. Crabtree's support for reduced dependency caseloads is a result of his observations after practicing in the juvenile arena exclusively for the last 10 to 15 years, where he sees people handling too many cases. He supports the concept of increased funding, additional training requirements, and increased monitoring for compliance with minimum qualifications to ensure that clients benefit from the efforts of competent counsel.

Chair Ellis expressed concern regarding the fact that policy option package 102 does not address increases for consortia. Ms. Aylward explained that it is difficult to include increases for consortia because they take private cases, making it much harder to build a model for increasing compensation for consortium members; their income includes both private and appointed work. Public defender offices have a pay scale, so calculating increases can be easily accomplished. Hourly providers are similarly easy to calculate, as it is just a certain number of hours at a certain rate. Mr. Crabtree noted that one challenge for public defender providers is that they cannot take retained cases, like consortium members can, to supplement their incomes if the appointed caseload drops. Public defenders are therefore entirely dependent upon the contract funds in a way that others are not. Chair Ellis noted that if the Legislature could provide additional funding, the Commission could then administer the additional funds to address areas of highest need, as was done in past biennia. Chair Ellis asked whether, if a particular policy option package were funded, it would tie the hands of the Commission. Ms. Aylward responded that if money is appropriated for a specific purpose it must be used to fulfill that purpose.

Greg Hazarabedian, Director of Public Defender Services of Lane County, spoke in support of policy option package 102, the public defender salary package, but expressed general support for all of the policy option packages. Mr. Hazarabedian explained that the average salary disparity in Lane County is 30 percent – and this does not include other benefits. His attorneys feel frustrated that they are so far behind the district attorneys, and behind attorneys at OPDS. He also noted that even if complete parity is not possible, the gap is too big. Mr. Hazarabedian also shared that while the money had been pretty flat during the last several contract cycles, office expenses haven't been flat; they have had to spend a lot more money on computer expenses, like server space and IT staff to maintain their system. When his expenses are going up at a time when the money is not going up, there is nothing left for giving raises. He suggested that the biggest piece of what the PDSC does in the provision of services to Oregonians is funding contractors, and that the backbone of the contracting system

is the institutional defenders. He supports policy package 102 because it speaks to funding the backbone of the PDSC's mission of funding services for low income Oregonians.

Angela Sherbo introduced herself as one of two supervising attorneys at Youths, Rights & Justice (YRJ), attending on behalf of Mark McKechnie, the Executive Director. Ms. Sherbo noted the October testimony provided to the PDSC by Conor Huseby, when he spoke about what it means to be a young public defender, and having to put off buying a house and starting a family. She suggested that his testimony should be used to set the framework for the discussion. She then shared three case examples illustrating the pay disparity. In the examples, the district attorneys' salaries are taken from public information from the Portland Business Journal. In the first case, "Attorney A" with seven years experience was trying a case against a DA who had six years of experience. There were gun cases with four motions to suppress, three or four days of trial with briefing on constructive possession and an adult co-defendant with an immunity agreement. The YRJ attorney won three out of the four cases. The district attorney, with one year less experience, makes \$32,000 a year more. In the second case there was an issue of waiver to adult court, which is rarely litigated anymore because of Measure 11; the charge was a distribution of cocaine. The client was sixteen years old with no prior criminal or juvenile court involvement. The DA had six years experience. The YRJ lawyer had 14 years experience and won the case. The disparity between those two people's salary was \$26,900. Had she tried this case against a deputy district attorney with her years of experience the disparity would have \$59,033. The last case is a dependency case and YRJ represented a mother who lives in Washington, but the events occurred in Portland, which raises interstate jurisdictional issues and evidentiary issues. There were claims of sex abuse which took place in yet a third state. Ultimately, the DA dismissed the case and the child was returned to the mother. The YRJ lawyer had 25 years of experience and was the highest paid lawyer, outside of management, in the office. The DA had 24 years of experience, and made \$56,121 more than the YRJ lawyer. Mrs. Sherbo pointed out that over time these disparities create a serious loss. The experienced lawyers at YRJ stay – they graduated from law school when education costs were lower, many have no children, have not had catastrophic life events, and they enjoy what they do. But YRJ is having a terrible time hiring new lawyers. They posted a position recently and were able to offer as either full or part-time, doubling the potential applicant pool, but they were not able to fill that position with a qualified person. Mrs. Sherbo concluded by saying that while she was not in a position to recommend any particular prioritization, YRJ strongly supports the parity package.

Jack Morris spoke next. He is with a private law firm that is the primary contractor in the seventh judicial district. They have an office in Hood River and one in The Dalles. There are seven attorneys. With rare exceptions, the attorneys do not take civil cases; they are something of a *de facto* public defender office. Mr. Morris has been running the firm since 1991. Back in the early 90's if a position opened they would run an ad in *The Oregonian* and typically get anywhere from 50 applicants to 75 applicants, sometimes 100. During that same period the DA's office would get about 20 percent more applications for their postings. His firm had little turnover during the last eight years, but Mr. Morris's partner, John Olsen, was appointed to be a judge by Governor Kitzhaber last year. It was the first time in many years they have had to fill a position. Then an associate left to work for a civil firm in The Dalles. Mr. Morris was shocked at the difficulty they had in replacing Mr. Olsen. They had very little response. When they posted a position for a felony qualified lawyer in November 2012, they basically got no response at all. By January 1, there were about 12 applicants. They really needed someone who was Measure 11 qualified, but they were not able to get even a felony qualified attorney. Mr. Morris believes that part of the reason is that the philosophy of people coming out of law schools is dramatically different than in past decades, when public defense was subsidized by people with liberal attitudes. Mr. Morris suggested that the current climate requires public defense providers to be more competitive. It is the worst job market for attorneys since time began, and they still can't get applicants. Mr. Morris indicated that they are losing people who would be interested because they can't afford to do the work. They have student loans, and they can't afford it.

Chair Ellis pointed out that Mr. Morris's firm wouldn't benefit from the policy option package because they are not a non-profit. Mr. Morris acknowledged this, and said that he would like to benefit since they are something of a *de facto* public defender but also feels that things are so bad that any additional money is better than no additional money. He also noted that public defenders are for the most part in bigger cities where people want to live, in Eugene, Portland, and Salem, and his firm is geographically disadvantaged. Before his partner left they had a very experienced group and were asked on a regular basis to take murder cases in Umatilla and Union counties. They are no longer in a position to do that, and it is really hard to get attorneys to take cases out there. Mr. Morris concluded by saying that he doesn't think his firm had realized how bad the situation had become, and he doesn't see it getting any better.

Lane Borg, Executive Director of Metropolitan Public Defenders and president of OCDLA, spoke next. He shared conversations from the OCDLA board retreat, which have focused on pay disparity, including the disparity between public defender offices and the Office of Public Defense Services, Appellate Division. Mr. Borg said that two candidates declined offers to work in his office to accept positions in the Appellate Division at OPDS. He looked back at the very first MPD contract, and the lead attorney salaries, adjusted for inflation, would be \$90,000 a year today, a figure well above the top end of attorney salaries today. He has also had a difficult time hiring an investigator; 100 percent of the applicants withdrew their applications once they saw the pay. Chair Ellis asked Mr. Borg whether they are successful in recruiting candidates. Mr. Borg said they are getting less than in the past; instead of 150 or 200 they have about 75. People have a hard time affording the work given their student load debt. Mr. Borg also expressed support for the dependency policy option packages, explaining that there are many meetings in dependency cases that lawyers must attend but for which they do not get credit. This creates a situation where there are too few lawyers to cover all of the necessary events.

Ms. Cozine added that Richard Garbutt, a provider in Klamath County, wanted his views regarding the dependency package shared with the Commission. He has a unique model in which they include social worker time in their contract. His concern is that if the Commission received the dependency policy option package and measured only attorney FTE, not support and social worker staff, it could actually erode the quality of services that they are providing. Mr. Garbutt supports additional funding for dependency cases, but is hopeful that it can be structured so that staff, not just attorney, FTE is considered. Mr. Borg noted that some of the small improvements in attorney salaries have been created by cutting support staff. He explained that this is particularly damaging in dependency cases where adequate support staff is critical to adequate representation.

Commissioner Lazenby followed up on Mr. Morris's comments about new lawyers who are more conservative, have a lot more debt, and are a lot more realistic. He asked, assuming all that is true, why more money would make a difference. Mr. Borg said that MPD is able to take advantage of the fact that there are young, enthusiastic, idealist individuals who want to live in Portland and want trial experience. More rural locations don't have this advantage. But even with this advantage, it is difficult to keep people; all of sudden they wake up and realize they're deferring getting a house and having children.

Mr. Crowther appeared in support of policy option package 101, which provides funds to address salary disparity at the appellate level. Mr. Crowther started by explaining that though the Appellate Division gets many applications, there is only a small pool of high quality applicants. He also noted the bigger problem, which is retention. He noted the importance of having very good, experienced attorneys who are able to handle a complex caseload.

Chair Ellis asked whether there is disparity between compensation for DOJ lawyers and district attorneys. Ms. Cozine offered that Ms. Aylward has the figures and that there is a disparity between those two entities as well.

Chair Ellis asked Commission members for their thoughts on the prioritization of the policy option packages. Judge Welch expressed support for policy option package 102, as it aligns with the overarching goal of PDSC, to support the representation of poor people who need lawyers in criminal and juvenile matters. She also expressed support for package 100, recounting the Washington state study, which revealed that a reduction in caseloads for lawyers representing parents in dependency cases yielded reduced times in foster care for children. Commission members discussed the great need for additional funding for public defense across the board, and the relative merits of funding for each package.

MOTION: Commissioner Lazenby moved to approve that the Commission continue to pursue all three policy option packages; Commissioner Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

MOTION: Commissioner Potter moved to adopt as PDSC priorities packages 102, 100, 101. Commissioner Ramfjord seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 5 Executive Director’s Annual Report to the Commission

Ms. Cozine gave a very brief overview of the Executive Director’s Annual Report. She touched on accomplishments of the PDSC, the Contract and Business Services Division, and the Appellate Division, each of which have worked hard to maintain services and capture efficiencies during a time of restricted funding.

Agenda Item No. 6 OPDS Monthly Report

Joshua Crowther provided an update for the Appellate Division, where they recently had two new attorneys join the office. The Division is also continuing to work on the attorney exchange program between the Appellate Division and the Public Defender of Marion County. Last week trial attorney Drew Jackson had an opportunity to argue an appellate case, and appellate defender Jed Peterson argued a few motions to suppress. Mr. Peterson is arguing one today before Judge Hart; the case involves witness identification issues explored in *State v. Lawson*. All indications are that it has been a positive experience and hopefully one that is opening dialogues between the two offices. The Appellate Division is currently in the process of annual attorney performance and evaluation reviews. As part of the office's continuing outreach and recruitment efforts, Mr. Crowther will be at Lewis & Clark Law School on Friday, and at the Oregon State Bar on Saturday, holding informational interviews as part of the diversity program. The next Saturday he will be at the Northwest Public Service Career Fair. Finally, he noted that the Juvenile Appellate Section had three great wins out of the Court of Appeals recently.

Ms. Cozine provided an update regarding the *Fuller* case. This was the Court of Appeals opinion that applied constitutional protections in certain violation cases. The Multnomah County District Attorney's office filed an appeal on that case. In the intervening time several additional cases were set before a different Multnomah County judge and that judge issued a ruling finding constitutional protections in those violation cases. The Multnomah County District Attorney's office filed a mandamus in that case, so both cases are now pending appellate review.

Ms. Aylward provided a budget update, explaining that expenditure projections for the current biennium have increased. Ms. Aylward said that she has informed LFO of the PDSC’s needs and is hopeful that those expenditures can be covered by 2011-13 funds. Commissioner

Lazenby asked about current cost drivers. Mrs. Aylward explained that there are counties with higher than projected case filings.

Paul Levy gave a brief summary of the Clatsop County peer review, which included Jack Morris as a member of the peer review team. He explained that this was the first time the team did not give promises of confidentiality, and that they received good information. The report was well received by PDSC contractors, and Mr. Levy believes the removal of confidentiality will be beneficial. The contractors know that there will be a follow up, and a report to the Commission about the visit. Mr. Morris shared his thought that the process went well, and that he was most impressed by the response from the head of the consortium, which gave the impression that the contractor would be making some pretty substantial changes. Mr. Levy noted that the contractor has already made some of the recommended changes. Mr. Morris said that he has participated in three peer reviews, and that each time he has learned a lot.

Ms. Cozine mentioned that at the Public Defense Advisory Group is meeting on January 25th, and will be discussing a proposed change in the peer review process that would involve following peer reviews with a system delivery review about six months after the peer review. The rationale is that the Commission can then consider quality issues as it examines structural issues. Ms. Cozine will provide an update on that discussion at the March meeting. Commissioner Ramfjord asked whether there is a different level of communication between providers in the peer review versus the service delivery review. Mr. Levy shared his view that there is better information provided through the peer review process because it involves people talking to their counterparts or colleagues in the communities, and they can really drill down on the quality of representation.

Mr. Levy provided a report of his activities as General Counsel, beginning with the recent circulation of the sixth annual Statewide Public Defense Performance Survey. This survey requests responses from judges and other system partners across the state regarding the quality of public defense services. Mr. Levy also explained that OPDS is exploring a process for evaluating all death penalty providers, including current contractors, that will include submission of the same information collected from the five contractors who were reviewed in 2012. The death penalty peer panel will be reviewing this proposal in a few weeks, and it will then be brought to the Commission. Mr. Levy also provided an update on Gary Haugen's effort to fight the Governor's reprieve in a civil declaratory judgment action. This was the case in which his *pro bono* lawyer requested compensation through OPDS funds, but OPDS objected to the request because it is a civil matter for which there is no right to appointed counsel. The trial court agreed, as did the Oregon Supreme Court. The lawyer filed a cert petition in the U.S. Supreme Court, and they denied cert a couple of weeks ago. Mr. Levy concluded his report by mentioning that yesterday Senior Judge Dickey in Marion County granted guilt phase relief and new trial on a death penalty PCR in a very difficult case.

Chair Ellis concluded by mentioning that the 50th anniversary of *Gideon v. Wainwright* is in March, and The Oregon State Bar *Bulletin* is featuring an article on public defense in Oregon. Mr. Borg followed up with a reminder of the March 18 OCDLA legislative drive-in at the Capitol in room 50, which will also celebrate *Gideon*.

MOTION: John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Wednesday, January 23, 2013
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Chip Lazenby
Shaun McCrea
John Potter
Per Ramfjord
Hon. Elizabeth Welch
Chief Justice Balmer

STAFF PRESENT: Nancy Cozine
Kathryn Aylward
Paul Levy
Joshua Crowther
Shawn Wiley
Billy Strehlow
Amy Jackson

The meeting was called to order at 10:00 a.m.

Agenda Item No. 1 Approval of minutes – PDSC meeting held on December 14, 2012

2:09 Chair Ellis

Thank you all for coming. The first item is the minutes from December 14, 2012. Are there any additions or corrections? There is one misspelling on page 5. On the paragraph at the bottom, third line down, "magma" should be "magna." Other than that I had no other corrections.

MOTION: Honorable Elizabeth Welch moved to approve the minutes. John Potter seconded the motion; hearing no objection, the motion carried. **VOTE 6-0.**

Agenda Item No. 2 Discussion of Service Delivery Plan

2:52 Chair Ellis

The next item is to talk over what we heard at the Linn County gathering. Shaun, I know you have carefully read the verbatim transcript so you are up to speed on that. Any particular thoughts or reactions to Linn County? I had a few. I actually was encouraged by it. I thought this was a situation where there was no strong negative feeling coming from either judges or prosecutors or others in the system. I did think the worry is their aging. It sounded to me like a very reasonably functioning consortium. They have all been there a long time. I think they all sounded to me like they were competent and conscientious. We had none of the kind of

things we have heard in some other counties over the years that gave us a pause. I thought the new entrant, it sounds like the consortium is really doing a good job of mentoring him and bringing him in, so I am optimistic that that part is working fine. I did not get the sense that they are either excluding people that ought to be allowed to practice. I thought their split the check concept was new to me. As I thought about it, what is wrong with that? They seem to be comfortable with that even though at least one of their members has a significant retained practice, so you might intuitively think that that one is probably contributing less than equal time, but they seem comfortable with it, so I did not see a concern there. I, personally, am always a little sensitive when we have a service delivery structure with a single provider, even when it is a consortium provider, because I am not sure that is in our best interest overall, but I didn't see a strong need to try to rethink whether that should be changed. I did sense they are responding to our directives or our policies. They have formed a board and they have obviously done that because of our policy. I thought we could be helpful to them in one area. They expressed concerns about the cost of insurance for their board. My own instinct is that I doubt there has ever been in the history of the globe been a monetary claim against a consortium board member in his capacity as board member, but Paul maybe you could help them. I know a lot of other – certainly the PDs have a lot of experience obtaining that insurance. Anything you can do to get them over that little bump.

- 6:48 P. Levy I can reach out to them. I know you offered my assistance at the meeting.
- 6:53 Chair Ellis And I am doing it again.
- 6:55 P. Levy I did not hear from Mr. Reed or anybody else about that. I certainly understand the desire of any board member to have that insurance in place.
- 7:08 Chair Ellis It shouldn't be very expensive. I think that I am right that there will be zero claim history anywhere on that, but if you would that would be helpful. I thought the fact that they are all essentially full-time defenders, which everybody here knows I favor because I think it makes the defense practice more professional. They were. I didn't sense that there was an excess of providers at this point or a deficiency of providers. My instinct is leave well enough alone but I think it is a county we need to watch as time unfolds. They are not attracting a lot of new lawyers into the community and the ones that are there are getting along. We could find a few years from now that that is a challenge. Any other thoughts?
- 8:26 Chief Justice Balmer Barnes, how many active lawyers are part of the consortium there?
- 8:29 Chair Ellis I think it was nine.
- 8:29 N. Cozine Nine in the adult consortium and it might have been 10 with the addition of Tyler and then six in the juvenile.
- 8:37 C. Lazenby You know, Mr. Chair, as we go around the state we continue to confront this graying of the bar problem. I just want to suggest that maybe this year we should start talking about ways in which, since we do have contractual powers, that we do something a little more proactive other than just sort of noting that it is a problem that we have around the state. Maybe we provide some incentives to providers to bring in younger folks within the contract. More proactively get younger lawyers involved in criminal defense. We run into it every place. Now in Linn County they pointed out some new, younger folks that they have there. It is a persistent problem and we just sort of note it without really doing anything about it.
- 9:23 Chair Ellis A few years ago I know Peter Ozanne made an initiative with the law schools to encourage people to come into the defense practice that might not otherwise have thought about it. I think that is valuable. The other thing that I think we have tried to do is have good communication through the web and the like, so that young lawyers at, say MPD, that might

be interested in going to a different community with the experience they have gotten with that or Lane County. Make sure the brokerage function is being handled well. Nancy and Paul maybe you want to comment. Are we doing what we can in terms of getting the word out? You don't want a situation where you have this somewhat – I don't want to say isolated but on its own area that is just not attracting young lawyers, but young lawyers elsewhere may not know that here is a community where there is a real opportunity for them if they chose to go there.

- 10:48 N. Cozine I am not aware, and Paul or Kathryn may have more to add, but I am not aware that we have a sophisticated way of connecting lawyers looking for work with rural counties that need that kind of talent.
- 11:03 Chair Ellis I think that is something that we could do. I think it serves both sides. I think it is no secret that young lawyers in the metropolitan counties are having less opportunities in the private sector available. They might welcome the ability to move to a county that is not otherwise attracting lawyers.
- 11:34 P. Levy Mr. Chair, I think you did hear though that it is significantly more complicated than that. Linn County is the example of what we have found around the state where you have a consortium they may be all graying, we will use that term, but they are not interesting in adding a new member and they can't add a new member because the gray people there want ...
- 12:06 Chair Ellis Still want the work.
- 12:06 P. Levy Still want the work and they don't want to dilute their income by adding another member with whom they would have to share the contract proceeds. It is not economically feasible for a new, young lawyer to come into a community with no established practice and begin work unless that person can move into a slot and be assured of a substantial caseload in which to make a living. So consortia around the state are graying but not welcoming and it is not economically feasible for them to do that. It is not just that there aren't lawyers available and interested in going some place. There is really no place for them to go.
- 12:56 Chair Ellis Although, the young lawyer they have taken in, they seem very upbeat about that.
- 13:05 P. Levy He is family. They had room and then they had another not so young, but young by comparison, who has been there for a number of years who is very well thought of. It is very hard to bring lawyers into consortia around the state.
- 13:30 Chair Ellis I recognize it is different than a PD where the active recruiting is easier.
- 13:39 N. Cozine Chair Ellis, you will hear from Josh Crowther, of our appellate division, later today. One of the things we regularly do within the appellate division is attend career fairs. I don't know if OCDLA has someone who attends career fairs that happen regularly, but working on something where we could make sure that we had someone representing the trial bar, who is aware of what counties might need assistance, or can contact those counties and consortia and have someone available at a career fair.
- 14:13 J. Potter I don't know if Jack Morris is planning to attend or not, but he relayed a story to me recently; he has an opening and has been having a very difficult time getting applicants. Then the applicants that he has received, many of them aren't qualified. Now, true, he is looking for a felony qualified applicant. His is a situation in which you can take on additional cases in a retained practice. I am not sure if his is an isolated situation in which there are no people applying for whatever reasons. Hood River seems like a potential. Lane's office, I'm assuming, still maintains a list of folks that are interested in applying to work at MPD? We

may be at a place where it is time to do more than just sort of an anecdotal thing to a more comprehensive survey of what is going on.

- 15:01 L. Borg Mr. Chair just a comment. I have had discussions with Rob Raschio about Jack Morris' opening. They did fill it with somebody who was not – they are very enthusiastic - but not felony qualified. But to show you how enticing they were, they even had the offer of a condo available for the person; so housing and employment. Not that I am trying to get rid of people, but I try to be encouraging. I see that as one of our roles at Metro, is to train lawyers and move them out, so I was trying to facilitate that. Is there anything that I can do to help somebody who is felony qualified if they are interested in moving up there? It is just very, very difficult. We still have many applicants for any openings that we have. It is difficult to get people to move out...
- 15:55 Chair Ellis Doesn't Jack have several who commute from Portland?
- 15:56 L. Borg Yes. There are two on his staff. The DA's office has the same thing. The DA's office in Hood River has a couple of deputies that commute from Portland.
- 16:07 CJ Balmer Barnes, just anybody who starts thinking about this and trying to do something about it should be in touch with bar. One of the bar's three initiatives, and they are just getting started with this, is to help recent law school graduates find jobs. I just came back from a root canal so I am slow in a lot of ways. One of the things they are looking at is underserved areas, and this is true for civil practice too, where there are lawyers who are nearing retirement who would like to find somebody who could move in and take over their practice at some point. They have done some thinking about that and they are also working with the career placement offices at each of the law schools, which are now spending more of their time placing people who are a year or two years or three years out, as much as they are people who are second and third year law students. Somebody should be in touch with them.
- 17:09 Chair Ellis Any other thoughts or observations on Linn County? Kathryn.
- 17:15 K. Aylward Mr. Chair, I would just like to make the comment about what we call "check splitting." It is a problem for our office. If the amount of the check is \$100,000, and say it is the 24th month of the contract and we send \$100,000 and turns out there were only \$80,000 worth of cases in that month, but they have already distributed the full \$100,000 and we say, "Okay. We need our \$20,000 back." I need \$2,000 from you and \$2,000 from you and then we had one time where somebody actually died and you hate to go to the widow and say, "Excuse me, can I have \$2,000." They can split the check if they want but only up to the value of the cases they got in that particular month.
- 18:03 Chair Ellis I understood this split the check concept was they weren't trying to do a lot of detailed accounting about you had so many hours or so many units. I guess I assumed naively that I thought they were splitting it after the month not at the beginning.
- 18:20 K. Aylward No. They split what comes in the door rather than what they earned. If you are on quota it is not a huge deal. I think a couple of years ago they were significantly below quota and with most consortiums it is no problem. The money is sitting in the bank and hasn't been dispersed because they haven't earned it. Here you go. Here is your money back. But in this case it would be a little more time consuming or difficult to get the money back out from each member.
- 18:51 C. Lazenby Couldn't you require them to do a reservoir on the front end when they get it?
- 18:55 K. Aylward I think that is what we will be doing in the next contract.
- 18:59 Chair Ellis Split maybe 80% and hold 20%.

19:00 K. Aylward Split if you want, but only split what you get. Don't split what you think you are going to get.

19:05 Chair Ellis I would assume this is something that your people will work with them on?

19:15 K. Aylward Yes.

19:15 Chair Ellis Any other comments or observations on Linn County?

19:20 J. Potter It seemed to me, Mr. Chair, even though we are talking about the graying is, it wasn't so much an issue in the juvenile arena.

19:27 Chair Ellis No. It was just in the criminal. Jack. Welcome. We have already been talking about you quite a bit before you got here. Alright, so you will go ahead and work the report on Linn County up with these observations in mind?

19:54 N. Cozine I will.

Agenda Item No. 3 Commission on Public Safety – the final report and expectations for legislative session

19:54 Chair Ellis Okay. Craig Prins do you want to come talk about the Commission on Public Safety?

20:08 C. Prins Thank you, Mr. Chair and the Commission. Judge Welch it has been a long time since I have seen you. I am feeling a little like I'm right out of law school, and back as a young DA. It is interesting to be in front of everybody. Nancy asked me to come and give you an overview of the Public Safety Commission. I think Nancy sent you the full report and here is a little one pager and I wanted to give you, an update, and answer any questions that you might have. I have got one of my Commissioners, Greg, is here. Greg is on my Criminal Justice Commission and has been attending the meetings and can give you his run down too. For those of you who don't know the Commission on Public Safety is this effort that the federal government has used with technical assistance with counsel of state government and other technical providers to provide assistance to states who are interested in controlling their prison growth and then taking the sum of savings in that and investing it in the local system. It is called Justice Reinvestment. It has been done Georgia, Texas, Kentucky, South Carolina, all over the country. It has been done in some places that you would think are very tough on crime. It has been a real lesson to me. This has been driven predominantly by a look at the fiscal realities of trying to sustain prison growth over the next decade. Myself and my staff, we have staffed this for the governor. I really think this started with Governor Ted back in 2008 – 2009; I am getting my years mixed up. He did a reset. I don't know if you remember that; trying to look at resetting government when the recession was brand new. It got started with that and then that morphed into having some legislators involved with a commission created by executive order. Then this effort really started in May of 2012. We did six months and 10 meetings. It is an inter-branch, bipartisan effort. We have had the Judicial Branch, legislators from the Senate and House, Democrat and Republican and the Executive Branch. It included a defender, Larry Matasar. It included a DA a sheriff and a Chief. I should say Chief's representative. A judge and really looked at what is driving our growth? What is the cost of that growth and can we look at recommendations for controlling that growth that the legislature could adopt in 2013. So that has been the effort. You can see, kind of, the costs of doing nothing, is how Pew has phrased it. I think it is a good way to look at it. It does look at it over a decade where we would spend another 600 million dollars over the decade to grow our prison system by about 23 hundred beds at a time when much of the local county system is being eviscerated.

24:08 Chair Ellis Is that just facility costs, or facility and operating costs?

24:10 C. Prins

That is facility and operating. The operating costs outstrip the cost of building within three years, but that includes both. The governor got this started with an executive order. I think one of the key things is that is all looking over the decade, and the governor wanted to do that long range planning, but his budget that starts for 2013-15, that you will be looking at for what you all do and what I look at for drug courts and all that, that also is affected because what the governor did is in his balanced budget he said, "I am going to look to this Commission to give me the way to hold the growth and really stop it at 14,500." We are about 14,200 right now. He is saying he wants ways to manage that so we can stop this growth. If we don't do that there will be, about, over \$70 million dollars that will need to be invested now, this biennium, to start with the building plan if we do nothing. So it has a long range impact and an impact this biennium, which those of you who have worked with the legislature know that impacts in 10 years don't really matter. Once we get here in February it is like, I need to cut a budget to get us through July of 2015. I think if the legislature, and I will talk about where we are with the legislative committee, so if the legislature doesn't do this, doesn't take significant actions to control some growth, it is really going to change the budget situation. They are going to have to find a significant investment for prison operations that the governor did not put in. The governor instead invested \$23 million dollars in avoiding foster care for young kids that are involved in dependency. He invested \$9 million dollars in drug courts to have the statewide drug courts, and put \$32 million dollars in a county incentive program to really try to work with the counties that want to try to work with the state to look at prison costs and prison growth differently where we would have basically an agreement more like the OIA model where the county uses the prison in a way that they actually have some skin in the game. If they agree to not use more than they did in 2012, for example, we will know that will avert the growth and we can give them the resources to handle folks in the local system. So those are kind of the budget impacts. Where it stands now is we had a meeting on the 17th. It was a meeting where all of the policy options that were talking about, we were looking at, what was this Commission going to recommend to the legislature? The Commission balked and they didn't know which ones they wanted to recommend. In the end they said, "We are just going to give the whole report with all of these policy options in it to the legislature." They did that unanimously. The policy options in the report, you can see, are kind of broken out into the most aggressive, where you are going to touch some of the sacred cows, basically, of sentencing. Then, one that is kind of a middle ground, and one that really amounts to about an 80 bed impact. We did those because those were different things that were put forward by different commissioners. Clearly the Governor's budget is based upon the most aggressive options, so that we are actually controlling growth through sentencing. Where it stands now is the legislature created a joint committee, kind of like a rules committee if you are familiar with it, so the four legislators that were on this Commission and have been working on this for a year and half going back to 2012, which would be Representative Chris Garrett, Representative Andy Olson, Senator Floyd Prozanski and Senator Jackie Winters. They are on a joint committee that is going to meet and hash out what they are going to pass. I would say it is very much – I have had my times during this effort where I have been encouraged and dismayed by the efforts of the Commission. Here is what I would say; I always knew that everything we are doing is just getting in the door of the legislature. This is where the votes have to happen, is in the legislature. We are in the door. I was disappointed that they didn't make specific recommendations. On the other hand, it was clear that if we force that issue we would loose

29:41 Chair Ellis

You would have a split.

29:43 C. Prins

I was okay with a split. I was not okay with the split that I was looking at. I do think that what I have seen from the encouraging side of it is the four legislators were not split. They were more together and were hanging together. It was really some of the stake holders were split.

30:05 Chair Ellis

Are the DAs mobilizing to oppose?

30:09 C. Prins Absolutely. They have for three years. The DAs are not going to support this. I think that is one of the hardest things; with the legislature it is a nice easy vote if the legislators can get the DA's support. It is clear to me that that is not going to happen for anything substantial. The real crux of the Pew work is to bring so many more voices to the table. So victim's advocates that they don't normally hear from are saying we need this investment from the business community. I think really changing the advocacy is one of the main things that Pew brings. Like I said, it has been really eye opening how they have done in, say Georgia or South Carolina, with large Republican majorities. It is very different than how we think of this. This is a fiscal responsibility issue and I think that looking at it from that lens is how we are going to look at it. John Foote was the DA on our Commission. He had an alternative report that basically said, "I don't know that there will be any growth. We don't need any sentencing changes other than marijuana and driving while suspended," which is that 80 beds over the next 10 years. I feel like my main job is telling the legislature that I am sorry but this is not going to be an easy vote, but to get through this session you know the Governor is looking at some difficult things with PERS reform ...

31:59 Chair Ellis Both of which he is counting on.

32:09 C. Prins I think the Governor, his budget is important to set where he would like to go. It is in some ways an aspirational budget. He understands that it is not what is going to fund state budget over the next two years. I think it was important for him to show, here is what it looks like if you do this. For much of public safety the main thing that they worry about is, it won't be a justice reinvestment into drug courts and community corrections.

32:43 Chair Ellis They will do what they did to the courts. You save some money and we will take it.

32:48 C. Prins Thank you, we will take that and we will kind of put it outside of that into so many other areas. We really worked in the Governor's budget to make clear that that was not the case. I think we were really successful on that.

33:03 Chief Justice
Balmer Who is bringing together the other aspects of law enforcement? You mentioned the sheriffs that have been involved in the process and where is the business community? Is somebody working with them?

33:15 C. Prins Yes. Pew does a full service lobbying, communications, stakeholder outreach, and so the Governor's Office and Pew are working together to continue that.

33:30 Hon. Elizabeth
Welch I have a question. It is my understanding from extremely reliable sources that the training schools are so filled with Department of Correction's kids that they basically don't have a program for young kids anymore. There is going to be a tremendous outflow of people who are going to quit, retire as soon as they can. I don't know if everybody understands what the issue is but in, particularly in a county like Multnomah, which is probably the worst place for this. Virtually any kid who can be charged as an adult is charged as an adult under Measure 11. Even if the charges are reduced they remain in the adult system, but they go to MacLaren because of their age. They are under the auspices of the Department of Corrections because they are adults. You kind of have to keep your crazy logy straight. I am just curious, was this talked about? I didn't see any reference in your wonderful report. It is really very informative. Is this a consideration?

34:52 C. Prins Yes. It was not referenced very much in our report for a couple of reasons. What the judge is referring to is – I am looking at the OYA and closed custody beds - they have about 700 now. They have been cut back quite a bit and 359 of those are for youth treated as adults. So they were charged as adults through the system and then plead down and out of Measure 11 in

many situations, particularly in Multnomah County, but they are treated as an adult throughout. What that means is they cannot be paroled. They are not in the normal juvenile system where if a youth, with more of a focus on rehabilitation, if the youth has done the programming and is ready to be paroled they can do so. The thing that we focused on was second look - it is in the report. Second look is a really interesting one. This is nothing new. We have tried to expand it. The keys are that Dick Withnell, from here in Salem, is keenly interested in this – he has really spent some time in the juvenile system and understands this issue here. He would like to see something on that. We talked about it quite a bit. Here is the rub; is it takes a 2/3 vote because it would impact all 22 of the crimes that we call Measure 11. What our focus has been is three crimes. There are a lot of youth in the OYA system for robbery in the second degree, assault in the second degree, and sex abuse in the first degree. Last I checked it was over 100 of those 350. We don't think that would require a 2/3 vote to work on that. The legislature already reduced the criminal sentence by doing a Senate Bill in 1997 and a House Bill in 2001, so we have been focusing on those crimes.

37:14 Hon. Elizabeth Welch

Would it address that issue.

37:12 C. Prins

It would address that issue in a quieter way, so that was our tact.

37:20 Chair Ellis

So given the history, if I understand it correctly, that Measure 11 was done by initiative.

37:30 C. Prins

Correct.

37:30 Chair Ellis

Is there a risk or potential that the legislature, even if they are supportive to a referendum, or risk or potential that if the legislature is supportive, you will see a citizen's initiative response and this whole thing will not get resolved without a public vote?

37:50 C. Prins

There is that risk. I think there is always that risk in Oregon of an initiative. We have not focused on that. We have tried to focus this on the next step which is legislation. I know that we were very clear with Pew this whole time. We don't think you have worked in a state like Oregon with a very, very active initiative system. They knew that going in. They knew that we were thinking about that next step. We are all thinking about that and we are mindful of how we do this with that possibility out there so we could sustain the changes. That is the difficulty for asking for a tough vote in Oregon on taxes or sentencing. It is like, why would I do that when it could get upended? I think the strategy has always understood that. It is nothing new to us that have worked on this for over a decade with these changes to Measure 11. We have changed a sentence and been passed by the voters several times. We have done it usually with the consent of the district attorneys and Crime Victims United with Senate Bill 1049 in 1997, and in 2001 or 2003 we did House Bill 2379, and then of course in 2009, we repealed Measure 57 without their consent. We got 40 votes in the House and got 20 votes in the Senate. We have done this before. It is very difficult to pull that together. I should say for 57 there was support for 57 with law enforcement. There was not support to suspend it. We have done this before and it is very difficult. We are mindful of the initiative process.

39:51 P. Ramfjord

I would just like to add that I thought the report was impressive. I think one of the things that is useful in dealing with this is the way the report details how the revisions and mandatory minimum sentencing laws in states like New York and Michigan have not resulted in increased crime levels. In fact there have been reductions in crime levels in those states nonetheless. They use of some early release mechanisms that provide the incentive for prisoners to actually improve their behavior, but also reduce recidivism. I think that those types of things being brought to the public attention are really a wonderful way of rebutting it. I think that the report did an excellent job of that.

40:30 Chair Ellis

I am thinking in my mind as I listen to this what role, if any, this Commission should play and it does seem to me your reports obviously focuses on the economics of reducing prison

populations. What I am wondering is have we taken a look at any potential reduction in defense costs that might come out of any of the recommendations of the Commission?

- 41:06 K. Aylward We haven't yet done that, but in fact we met with LFO and yesterday and they suggested that we do that in advance and be prepared because we will be asked those questions by legislators.
- 41:17 Chair Ellis That does seem to me where we might have a role to play. Typically in legislative, other than ones that are directly on our plate, we played the role of information source. I think that is likely to be the role that we play here. I do see that as potentially a factor in the debate. I would encourage us to do what we need to do to have the data to be able to respond to that.
- 41:52 C. Prins So we do focus on the economics of it and we have also looked at the crime ramifications. Really, what we are talking about is it a five year or six year sentence for a lot of these people. No one really thinks that that makes a big difference that marginal change in the severity of the sentence for a crime control. I think Mr. Ramfjord is referring to – you know New York has had bigger crime drops than Oregon during the time when they reduced their total use of incarceration. So while we increased it substantially, and it is that whole thing when you are only looking at your thing, what you are doing, and you are saying, “Wow. We reduced crime.” Well, if you can look up a little bit you see that crime is going down across the country in states that increased use of prison or didn't. It is really important to see that from that perspective. To answer your question of what the Commission could do, I just think there is a huge justice argument on this that we didn't make as a compelling argument in this report. We made it pretty much a financial argument, but I think for individual legislators, for example, I think legislators are lawyers who defended these types of cases. I am thinking of the majority leader in the house. There are folks that understand that we can do better than what we have used in the last 18 years in the interest of justice. I think that is a critical argument that folks need to understand. I think also understand that all of these changes, if you look at them, they are trying to give judges discretion. They are trying to return it to...
- 43:53 Chair Ellis That is why the DA's don't like it.
- 43:55 C. Prins There are three branches of government. The judge is the one to make an individual decision. It is a single case or controversy. This is how this system should work. I just think that this report was not really geared toward making that kind of argument, and helping people understand what this means in individual cases. But I think that there is an opportunity for the good defenders around the state to be able to talk to individual legislators.
- 44:25 Chair Ellis I think that is maybe more appropriate for OCDLA rather than this Commission.
- 44:34 C. Prins Absolutely. I agree with that.
- 44:35 Chair Ellis Other thoughts or questions from the Commission?
- 44:39 C. Lazenby You do make it a little harder to get back to that justice argument though when you fundamentally approach from any kind of a standpoint. Doesn't fit with the color scheme that you are going with if you know what I mean.
- 44:40 C. Prins Chip, you know we do these things off of polling. We looked at polling a lot. We looked at the kind of arguments thinking about a further initiative, thinking about public opinion, and these are the arguments that resonant. It is kind of, are we doing the best with our dollars? Are we getting the bang for our buck from our prison system? The prison system should be treated like any other government program. Those types of things. The polling on those are very, very encouraging. When you frame it that way they are very receptive to saying we should look at how we are doing this. That is how we came to that. I agree. It does make it harder to do that, but I think there is an opportunity in an individual situation.

45:42 C. Lazenby You know in the old days we use to talk about the crime kind of tracking that 15 to 29 demographic. Is that still the case? Is the reason it is declining because we are still seeing that 15 to 29 demographic shrink?

46:02 C. Prins The demographic of Oregon, of how many adult males there are in Oregon who still have their testosterone.

46:12 C. Lazenby I tried to clean it up.

46:14 C. Prins That trend is still encouraging in that we are continuing to age as a state.

46:27 C. Lazenby Some people still act that way no matter what their age.

46:30 C. Prins I believe that is still a lot of what is going on, because this is a trend across the whole country. There are not many policies that you can point to that were enacted across the county and say, "Ah ha." So I think demographics has always had a lot to do with this.

46:48 C. Lazenby Not to just have idol chatter but to get back to the Chair's point about our fundamental focus around defense costs. As you look at that 15 to 30 demographic, is that going to give us a bounce in the next 10 years?

47:02 C. Prins Yes.

47:02 C. Lazenby If so, then that is a type of predictor for our costs.

47:09 C. Prins That is a great point. I am also on the Forecast Advisory Committee for the Corrections Department. That is part of this growth in the 2010 U.S. Census that we just participated in, the number of adult males in that age group, if it is like 15 to 35 males in that age group, it is growing more than we thought in the previous census. That is part of the growth. That percentage is not going to grow as part of the total population.

47:48 Chair Ellis Greg.

47:48 G. Hazarabedian Thank you, Mr. Chair. It strikes me that the mantra in Oregon State government for the last number of years has been evidence based practices. It seems to me that this can be phrased as simply as bringing the evidence based practices to sentencing. If we can phrase the conversation to show that the district attorneys are fighting evidence based practices, that in my mind might be effective.

48:13 J. Potter I guess I am just slightly discouraged by the notion that the demographics are playing such a big role in this. It isn't easy for someone on the other side to say that evidence based practices don't mean a great deal. Why should we put a bunch of money into drug courts?

48:33 C. Prins John, this is a really important distinction. So, there are crimes at large and then there is how do you reduce recidivism? They are not totaling separate, but recidivism is evidence based practices. Once we actually have a person in the system, in the OYA system or the DOC system, there is a solid, solid base of knowledge about how to reduce the likelihood they come back. Oregon has made tremendous strides on that piece. That is not really driven by demographics or anything. That is what you do with them once they are involved in crime and you are trying to intervene and rehabilitate and make it so they don't do it in the future. I know what you are saying, but what we can say also is we should do the very best with those – bring the science to bear on the ones we are touching. We know we can do harm. We can make it more likely that they re-offend, or we can make it less likely depending on how we do the intervention. I think it is a great point of Greg's, that I think we can all say the corrections and community corrections have made a lot of strides in the last 20 years of trying to change

the way they supervise. I don't think our sentencing has really caught up with that. It hasn't caught up - we have a better knowledge base. In giving judges the ability and information to use that knowledge base would be the ...

- 50:08 J. Potter The calculus that Nancy and Kathryn have to come up with to figure out the defense costs, strikes me again that it is going to be driven by demographics in one sense. The other sense is the sentencing recidivism rates down the road, but for whatever the impact is on the defense, it seems like it is that five – ten year projection. That doesn't resonate well with legislators.
- 50:37 P. Levy It has been a calculation here that I know Craig has spoken to. The prosecution rate doesn't necessarily correspond to the crime rate.
- 50:47 Chair Ellis Lane
- 50:47 L. Borg I think we need to be careful about offering and saying there is going to be this big savings in defense. What I am seeing in these conversations being talked about is getting people away from prisons, so it is not, not prosecuting them and not filing the charges. The charges will be filed. I am involved with a project in Multnomah County that we are looking at doing and kind of what would it look like on the ground as justice reinvestment. It is sort of an informed judicial settlement conference around gang offenders. I can tell you this, I could make the argument that this is harder work. The easier thing is a presumptive they are going to prison. I have five minutes and I don't have to prepare for anything for sentencing, but I am going to be requiring the lawyers working on that, that they get it on it right away. To go to more meetings to try to gather information for this evidence based sentencing, so we can assure the public that we are not just not sending them to prison, we are doing something to try to keep the recidivism rate down and having safer communities. So I agree with what John is saying, in that five years from now there may be, through demographics and recidivism, a lower defense cost reflected there. In the short run there is not going to be a big change over because charges are going to be filed and they are going to be working just as hard to avoid that prison sentence.
- 52:08 Chair Ellis Let me just comment, when I encouraged that we get the data that doesn't mean I know the outcome or that we ought to skew the data to support one or another outcome. You may well be right.
- 52:24 Hon. Elizabeth
Welch I have kind of a little snarky question. The second look, I didn't understand what was said in the report about second look. It is not being done. Whose fault is that?
- 53:04 Craig Prins It was really revealing. I think some of the folks – some of the legislators, some of our commissioners who are experts on this, seemed to think that youth currently got second look all the time. You and I know that is not at all the case. I think it is the fault of the statute that says, "Those convicted of these offenses are not eligible and you are only eligible if you were convicted of a lesser included offense." You and I know that when a DA agrees to a plea bargain he usually says, "You are not eligible for second look if I am going to give you this opt out at the front end." I think it is the fault – I think the statute needs to change if we want it to look at youth who are convicted of these charges we should make it so.
- 54:02 J. Potter The loop around seems to me as you move through the process and watch this with a careful eye and we are asked to provide information, that the defense is not a place that they are going to find much money to save. It is just not going to happen. Keep the people out of the system that might happen. They are not in the criminal justice system. They are not in the mental system. They are not in the juvenile justice system. The client is not there, then you have got something.

54:33 P. Ramfjord That is that five years down the road. If you reduce the recidivism five years down the road, then you have fewer people being charged, then you are going to have an impact.

54:40 C. Prins I wanted to say two things before I forget. I didn't mean to say to John's comment that the policies don't matter for crime. I think the policies matter but there are so many things that happened with policing, with changes in foster care, and then you have the things that we almost laugh about, but when you take a serious look at the data you think maybe there is something there. Things like lead paint. Things like lead in gasoline that lead to low IQ for youth. There is actually a pretty compelling argument for some of these things that would affect some of these crime trends. I will be the first one to say, "Yes, crime is down across the country." If you look at the counties and cities where they don't have the local resources deployed in policing our jails, you are not seeing crime reduction. Gresham is not seeing a crime reduction. I don't think Lane County is. I think it is important that we put policies in place, that we figure are the best ones we can. Then the second thing is that role of the defense and the OCDLA, and it is a really – I have told Gail, maybe we don't want you too out front on this. I do think there is an opportunity for the bar or this Commission or business leaders to really have a place on this. Frankly, OCDLA is not always the best voice on sentencing reform. Maybe not the best messenger.

56:29 C. Lazenby I am sure, always objective.

56:29 Chair Ellis So will the education policy supporters be helpful to you on that?

56:39 C. Prins Yes. They are part of the strategy meetings. The balance with them, of course, is they would like the money now. We are saying if you help us do this you are avoiding hundreds of millions or operational costs in the next decade.

56:53 Chair Ellis That is where I thought the politics might go.

56:56 C. Prins They are at the table on these strategy meetings of how to get this through.

57:02 Chair Ellis They probably don't share your reinvestment concept.

57:06 C. Prins Correct. It is a two part message. We need to reinvest to shore up the local systems this biennium. If we do that it avoids hundreds of millions of dollars over the decade that can be invested in other areas that would be sucked into the operational prison budget. That is the critical thing. If we do nothing it starts right away. While we have had this conversation over the last year from January 2012 to January 2013, we have 368 more guys in prison. It is happening right now. If we don't do anything Junction City has to start. The next prison growth has to start and once you bring a prison online it ain't going away. The building costs are there and fixed. I think they understand that. It is important to get that message right for education. They have their own great needs for funding as well. That is the challenge.

58:13 Chair Ellis Okay. Any other questions for Craig? Thank you. Enjoyed the report.

58:19 C. Prins Thank you, Mr. Chair.

58:22 Hon. Elizabeth Welch Mr. Chair, I have an issue about Linn County. I was struggling with whether I should say anything and decided not to and then changed my mind after Craig started talking. That has to do with my favorite subject, and that is the issue of counsel for kids in the juvenile court. You will recall that the gal from CASA was really the only person that spoke to that in the transcript. Her comments couldn't have been more supportive of what the Commission is trying to do. I don't want to poke my finger in anybody's eye, but Linn County is kind of a key – well, it is the judges in Linn County that are leaders in the opposition to change there.

What I was hoping was that maybe when the report gets written that that issue at least get a paragraph, without regard to what it says.

59:36 Chair Ellis You are on the concept of always having counsel involved when there is a waiver of counsel, which you know my view.

59:44 Hon. Elizabeth Welch I just hope that it doesn't get ignored. Even if it is just very bland, at least saying that this appears to be a court in which this are still significant issues or words to that affect.

1:00:00 Chair Ellis I am glad you said that. It was not snarky at all.

Agenda Item No. 4 PDSC Policy Option Package Priorities

1:00:10 Chair Ellis The policy option packages, I don't know who wants to present on that.

1:00:16 N. Cozine If I could make a quick comment, I think we have one provider who wanted to offer some information by telephone. If there is a chance to take a quick break, I would like to contact that provider and let them know that this is the time if wants to do that.

1:00:36 Chair Ellis I didn't get my usual kick in the shin. We will take a 10 minute break.
(Break)

0:35 Chair Ellis Alright. The policy option packages.

0:42 N. Cozine Chair Ellis, if I may make a few comments before we delve into this discussion.

0:47 Chair Ellis You may.

0:47 N. Cozine This is an agenda item that this Commission has discussed before in the sense that you talked about different policy option packages. We talked about which ones to include in our budget. When we met with our LFO analyst at the end of last year, he indicated it would be very helpful to know what policy options the Commission would like to prioritize between the three. We have several providers in the room who, I think, wish to be heard on this topic. I think the providers can give the Commission, and all of you, a lot of background information about why these policy option packages are important that might help inform your discussion as you undertake the arduous task of trying to determine what priority they should have.

1:40 Chair Ellis So, Mr. Crabtree, you drove across the mountains. Good to see you. Thank you for coming.

1:57 T. Crabtree My pleasure. It is a topic that is near and dear my heart. When I started as a public defender in 1981, I thought well maybe one of these days we can get parity with the DAs. Here it is 32 years later and I am still saying, "Maybe one day we can get parity with the DAs." The increases that the Commission put through in 2008, with the additional funding that we had, brought us half way to that goal. In 2007, the district attorneys in Deschutes County started at \$69,000 a year. Our office started at \$43,000. In 2008, that gap was \$72,000 to \$60,000, so we were doing fairly well at that point. For a variety of reasons since then our starting salary has only gone up 5%. It is at \$63,000 now and the DAs are at \$78,800. We have got a gap of pretty close to \$16,000 now on the low end. On the high end they go up to \$116,000 for a Deputy DA. The DA is at \$131,000. They have quite a gap there. Here we are just talking salary. We are not talking benefits. We don't have PERS as you all know. For salary there is a significant gap at least in Deschutes County. I haven't studied where the other counties are at this point. District attorneys are able to guarantee steps for their employees which we aren't able to do with the flat contracts that we have some years, not every year. With not having a budget that is solid if the caseload goes down our costs are the same, but Kathryn

insists on sending money back. That has impacted us significantly in the past. I think for the amount of work that PDs do that having a significant gap of \$16,000, or thereabouts across the board, is a significant detriment. I have lost a few people to the DA's office over the years, just for salary reasons. That is not a good thing. I have had other people that would have stayed with us for a significant period of time but have gone into private practice. Again, because of financial reasons so I would ask that the board not only looks strongly at this, but highly recommend to legislative fiscal to adopt this policy package. One of the proposals is for increased funding for juvenile dependency work. This is an area of primary interest and concern to me. I have practiced in the juvenile arena exclusively for the last 10 to 15 years. It is an area that I still see a lot of people that are sub-par practicing in that area that are handling too many cases. They don't realize what the standards are and what they are arguing for when they are arguing best interests for a 15-year-old child. Having a package where caseloads are reduced. Perhaps additional requirements could be put into place to ensure that people know what they should be arguing in the first place. So when representing a client the training exists through OCDLA, through the Bar, through the Juvenile Training Academy, but it seems to me that the people that are going to those things aren't necessarily the ones that need the most. If we were able to have a package for juvenile dependency practice and the Business Services Division ensure that the only people practicing in that area are the ones that meet the qualifications. I think it would be a significant improvement on how things are currently at least in the rural areas of the state.

- 8:20 Chair Ellis I think when we were in Bend like two years ago, could have been three, you were having difficulty filling open positions. How is it going now?
- 8:37 T. Crabtree That was in 07.
- 8:43 Chair Ellis Time flies. I have a memory of you sitting there and me sitting here and you were saying that.
- 8:47 T. Crabtree That was definitely the case when the gap was \$26,000 between us and the DA. It was extremely hard to fill positions. We had a revolving door that people would leave because of the money. We would have a hard time finding somebody. Existing staff would have to assume the caseloads of the people that left which created more work, which created more stress, which lead to other people leaving and so forth. In 2008, with the increase that we had then that significantly changed the picture. We didn't have that big of a difficulty at that point. Then when the economy tanked there are a lot of people out there now that want a job.
- 9:44 Chair Ellis It particularly hit Deschutes County. You guys took a bigger hit on the economy than the rest of the state.
- 9:51 T. Crabtree Yeah. That has affected us more recently than early on. It took awhile for things to hit the city where they started. Having fewer police officers and once employment started increasing enough that the – as soon as the economy tanked the increase in property crimes and other minor crimes increased a bit. We weren't terribly affected by that at that point. We are starting to see more of that now with the city and financial difficulties and not replacing certain numbers of police officers and caseload is starting to go down. But from our end being a public defender is essentially a recession proof job. The crime rate will and has increased initially to keep us busy for awhile. With attorneys come out of law school and not having a huge job market to look into, we have seen a lot more people being interested in public service, public sector jobs. Basically since 2007 – since then we haven't had any difficulties filling positions.
- 11:48 P. Ramfjord Is the problem more with retention than initial recruitment?
- 11:50 T. Crabtree Yes. We are doing better at it now, but in the late 2000's we had a number of people leave for various positions that paid more or they thought they paid more. Two of the deputy district attorneys now are former employees of mine. They are making significantly more money

then they could with us. Their pay scale goes up. There are three people in the DA's office now that are making more than I am.

- 12:42 P. Ramfjord Is the DA's office having a similar with retention, or is it doing better than you do you think?
- 12:53 T. Crabtree It is an interesting situation. Two years ago a newcomer replaced Mike Dugan who was DA for 24 years. They have had all sorts of personnel problems. The DA has been in various difficulties with the bar and others, so I think their problems are related to that.
- 13:22 P. Ramfjord Prior to that instance were their similar problems or better retention rate?
- 13:33 T. Crabtree They had a much better retention rate. They started, for example, in 08 they started at \$72,000 and went up to \$107,000. Any turnover they had were people who weren't cutting it or just got tired of that line of work and wanted to do something else. There were and still are very many career prosecutors in that office.
- 14:13 J. Potter I am sort of interested to get your assessment of what do you think this policy option package will do for you? If I understand what you are saying is that the differential from high to low across the board is about \$16,000 from entry level to top. Have you been able to divine from the numbers that are here if this were proved what it would mean for your office? Does it mean a one-third increase? How much more money? What is the differential then if this segment is approved?
- 14:49 T. Crabtree Frankly I don't know – I haven't talked to Kathryn to see what she has allocated for Deschutes County. What I can tell you is with the current staff we would be looking at probably \$200,000 a year in salary total for our office just for attorneys. I have would have to add in whatever the extra social security you pay, but it will be somewhere around there. I think what that would do make sure we don't have switching to the DA's office because they can make an extra \$16,000 or \$20,000 a year. We have a number of really good, young attorneys at this point that I think would like to be career defenders if we can provide them with the security to stay in Bend, buy a house, and ensure continued raises every year or every other year every contract period. I have no doubt in my mind that the vast majority of people that we have now would stay under those scenarios. Otherwise I think we are going to have the standard type of turnover, not rushing for the door, but after a couple of contract cycles and they see if I present a raise every other year, they are going to be looking for something better.
- 16:53 Chair Ellis I don't know if you were involved in the drafting of 102 which is the one we are talking about.
- 16:58 T. Crabtree I was not.
- 16:59 Chair Ellis I will ask this question to you, but staff may want to take it. As I read this package it would support PDs of the kind you operate. It would support those that are part of the hourly rate, which is a diminishing segment, but if I understand it correctly it says nothing about consortia that work on a unit basis. I am just trying to get an understanding why it is presented that way?
- 17:47 T. Crabtree I can't answer that at all. I can answer why I think full-time public defenders deserve it.
- 17:58 Chair Ellis Maybe it is inadvertent but maybe it is conscious. I am just trying to understand it.
- 18:01 K. Aylward Nothing is inadvertent. The problem with looking at a consortia is that you ask them what is your salary and some of them will say, "Well I don't draw any salary. It supports my office and my staff." Or they draw their salary from retained work. Because there is so much variety and multiple sources of income, it is really difficult to say, "Well, if your share of the

check is \$10,000. Is your salary \$2,000? If your office costs you \$8,000, is your salary \$2,000?" We didn't address those because there was so much variation in how – I hate to say how good a deal but how likely you would be to stay and continue to provide these services because of the arrangement that a consortium gives you that flexibility to charge more for retained work. Public defenders really straightforward analysis. They cannot do anything other than work under the contract and they have salary schedules that we can say, "Let me see. What is your step?"

- 19:17 Chair Ellis But then why include the hourly?
- 19:21 K. Aylward Because that also is an area that is really quite clearly when we need to go to hourly people and we say that it is \$45 an hour, they can't afford to do it for that. For that hourly rate it was really simple, really clear, there is no doubt where is your money going for that hour of work. They were the easiest to calculate and the least likely to be ...
- 19:53 Chair Ellis But they are very different than the PD group in that the hourly providers have flexibility in their schedules. They can take other cases and so on. The argument for the PD is these are dedicated individuals who are exclusive to defense and the salary comparison with the DA counterpart is much more direct and easy to do. I did find kind of hard to figure. I could see a policy package for PD's. I could see a just give us more money and we will distribute it kind of package, but I didn't understand the logic of linking the hourly and the PD and excluding the consortia.
- 20:46 K. Aylward Well a lot of it has to do with – we have to be able to provide the service. If it is easy for me to get a consortium to take a case, then I don't have a problem. If it tough for me to find somebody to take a case at \$45 an hour then I have a problem. So we are trying to address what are systemic, ongoing, overriding, continuing problems with these policy option packages.
- 21:16 Chair Ellis Am I right there are no remaining consortia that are on an hourly?
- 21:20 K. Aylward That is correct.
- 21:23 Chair Ellis So am I also right that the percentage of our budget that goes to hourly providers is way small?
- 21:33 K. Aylward If you exclude death penalty, yes.
- 21:35 Chair Ellis And death penalty is not \$45. Alright. Do you have a position on whether we should favor public defenders in our policy package decision over hourly and consortium.
- 22:03 T. Crabtree I do and that is a totally bias position.
- 22:10 Chair Ellis This was a lobe. You hit it.
- 22:13 T. Crabtree As Kathryn pointed out we can't do anything else. We have a consortium and one private firm in town. The private firm pays very similar to what we do and then says, "Anything you bring in as civil work is yours." The director there can take one private case and he could bump his salary up \$20,000 a year. I can't do that. None of my attorneys can do that. I think the public defenders are a different breed. I can state why PDs and by that I mean any of the not for profit organizations. Whether it is juvenile or felony misdemeanor attorneys tend to set the bar for practice standards around the state. They come up with methods of training other attorneys. Like in Lane's office having the Oregon defense materials online. Having training for that. We try to do that in our county as well in terms of motion practice, juvenile standards and discussions on issues and so forth. We are hamstrung by the current pay levels.

We just can't get anything more than what we have in our salary schedule. For that sense the PDs need to be on the front line as far as this is concerned.

- 24:31 Chair Ellis Help me Kathryn if my memory is flawed, but in other biennia we have put in policy packages for trying to reduce the gap but always on behalf of all providers in the package. This feels to me different that we are singling out by line item and we leave out private firms. We leave out consortia. We put in PD. We put in hourly and we put in appellate. That could lead to a situation where if a miracle happened and we actually got one of these, you then have the legislature kind of committing us as to how we are going to allocate funding, but historically we have allocated funding through this Commission not through the legislature.
- 25:34 K. Aylward Let me make a couple of points. I remember probably eight years ago at OCDLA's management conference and talking about the budget and here is what it has and here is what it includes. I got down off the stage and Karen Stenard came up to me and said, "So there is nothing in this budget for consortia. Is that right?" I said, "Yes. That is right." We have always done this. I feel bad about it but it is right. It is consistent with what we have done. The other thing is the question of if the legislature gives us money for a certain purpose. I want to harp back to Tom's comment that Kathryn insists on sending money back. Part of what that is is that if we say to the legislature that we need \$10 million for increased caseload and \$10 million to increase compensation. They say, "Well, okay, we will give you the \$10 million for caseload. We are not so keen on the compensation thing." Then if the caseload doesn't materialize, I have insisted on saying, "You have got to give it back. They gave it to us for caseload. Caseload isn't there. You have got to give it back." It is not any agency's choice to redirect to funds contrary to what the legislature intended. We have no choice with that. There was one time where the legislature allocated – what do they call it – it is unspecified additional funding.
- 27:09 Chair Ellis This was 05?
- 27:13 K. Aylward I don't remember. It was \$1.8 million or something.
- 27:17 Chair Ellis I am remembering a meeting in Coos Bay.
- 27:23 K. Aylward But, yes. When it is unspecified then the Commission can get together and say, "Wow. What are our priorities? What do we want to spend it on?" But if the legislature says, "Okay. We like policy option package whichever and here is the entire amount." You have got to do that with the money or you set yourself up for a bad relationship with the legislature and a lack of trust. They can turn around and say, "Hey. We are going to disappropriate that because you didn't spend it on what we said you could spend it on." The other thing that happens is sometimes we don't get an entire policy option package. So if a policy option package is \$2 million and they say, "We can't fund the whole thing. Here is \$1 million." At that point the Commission could decide well there are three line items in here. We only got enough to do one. Do we do them all equally?
- 28:18 Chair Ellis Isn't my memory right that when we have dealt with the disparity issue, we have dealt with it in the aggregate and not broken it out into components the way these packages break it out?
- 28:35 K. Aylward In the time that I have been doing the budget it has always had those components of public defender salary, hourly rate.
- 28:47 Chair Ellis Why am I stuck with a different memory. I really thought that we have not wanted to get into this situation where in our legislative presentation we are picking and choosing from among our providers. I know I am right that in the Coos Bay meeting, which is the only time in my experience we have had additional funding available to allocate among providers, we went through quite an elaborate process as to how that would be done. I am very uncomfortable with the set of proposals that A) favors only some of our providers and I am not sure I could

make the case that all PDs are less relatively well funded than all consortia. I don't think I know that and I don't like a situation where you are agreeing, I think, that if the legislature – miracle happens and says, “Yes.” Then we have very little discretion and we would have to give it back under some circumstances. I would be more comfortable if we had a policy package option that was a request for additional funding for defender compensation, but without having it broken down and disaggregated the way this is.

- 30:32 T. Crabtree Could I respond to that?
- 30:33 Chair Ellis Yes.
- 30:33 T. Crabtree I was at the Coos Bay meeting in 07 too. I remember the big charts on the board and how are we going to prioritize these? You did have them broken down in various categories.
- 30:50 Chair Ellis Correct. Within the Commission we were looking at the categories, but we weren't asking the legislature to appropriate by category.
- 30:59 T. Crabtree Correct. That is correct. I think one of the possible advantages to doing it this way now is you can come in with a policy package that has a lower price tag on it, if you will. If you are going to say let's have parity between the DAs and the PDs. That is an easy, concrete thing to do.
- 31:31 Chair Ellis It is and it isn't because the degree of disparity varies around the state and I know I am never supposed to say this but I have understanding there are some parts of the state where defenders get paid better than DAs do. I don't think it is as simple as that.
- 31:50 T. Crabtree Okay. But it is a concept that is probably easier to sell to a legislator, or group of them, is fairness. Just take the example of appellate. The AGs office ..
- 32:10 Chair Ellis That is the cleanest case.
- 32:12 T. Crabtree Right. They pay this much and the defense in the appellate division gets this much. Now fairness would be that they are paid equally. That is easy to quantify and say, “Let's go for that.” I think if we said lets obtain parity for everybody across the board. Instead of looking at a \$4 million dollar package you are looking at an \$8 or a \$12 million dollar package and the legislature can say, “That is too much.”
- 32:49 Chair Ellis What we have done historically is quantify the gap and then seek an increment of that gap.
- 32:59 T. Crabtree And I think by doing it that way it has made it so we are always chasing a tail. For us in 08 it cut the gap in half, but then they get increases every year on the county scales. So since then the top end of our scale has gone up 33%. The top end of the DA scale has gone up 73%. You are always chasing that situation. If we were to get parity this time for PD, appellate division, whatever, then we are there essentially and then maybe the next time you go for a policy package that says, “Let's bring the level of the consortiums and the other contractors up closer to what we are able to get for the PDs now. So instead of presenting an astronomical figure to the legislature you are doing one that seems more reasonable has a greater chance of passage.
- 34:29 Chair Ellis There are two pieces that have anomalies or are different. One is the appellate because not only is the comparison more clean, but it is the same funding source. At the trial level the DAs are compensated out of a wholly different pool. The second one is a little different and I think this is historic is the hourly because isn't that still set by statute?
- 35:01 K. Aylward No. No longer. It was only set – there was a minimum. They shall not be paid less than \$30 an hour and then it went up to \$35 and then it disappeared altogether.

35:17 Hon. Elizabeth
Welch

Mr. Chairman, it seems to me that the essential point here is that Kathryn cannot say that there is a disparity between consortium lawyers pay for criminal work and DAs. Not to say there isn't but she can't say that. So the whole justification for this package is lost if it is across the board. Now that is not a statement in favor of it or not in favor of it but that is the reality. We don't know whether there is a disparity and the consortium lawyers have the benefit, at least some of them if not all of them, to charge \$250 an hour for doing civil work or whatever people charge.

36:10 Chair Ellis

For a high percentage of them it is like 90% of their practice.

36:16 Hon. Elizabeth
Welch

But that is their choice. It is a choice they have and defenders don't have that choice. That is why it is done this way. That doesn't mean that we have to do that, but add those other people in and take your disparity argument out because it has no legs.

36:35 Chair Ellis

I would be a whole lot more comfortable if we had a policy – I am happy enough to have one for the appellate group for the reasons I have said. It is different and then a package that addresses the disparity argument but without disaggregating at the legislative level. The way we have tried to address it in the past is quantify as best we can the gap and usually we do it spread out over three biennia. You are not going to get it all at once if you get any of it. If a miracle happens fine. I really don't like us at this stage discriminating between some of our provider community and other of our provider community. In part because I don't think I could make that case. I can't generalize that all PDs are unpaid and all consortia are fine. I don't think that is true. That is where I would like to go.

37:51 K. Aylward

Can I talk a little bit?

37:51 Chair Ellis

Sure.

37:52 K. Aylward

If you had asked earlier what were you recalling where it was across the board or for all provider types. We did look at caseload reduction. We had an amount of money that was to reduce the caseload and that was across the board and we talked about applying a certain amount to juvenile case rates. That was across the board whether it was a PD or a consortium. So we did do caseload reduction cuts – or additional money to reduce caseload across the board. The other thing that the Commission has always done is to try very hard to state that you cannot prioritize by case type. You are not going to say that one constitutional right is more important than another constitutional right. You are not going to say, "We will forget about PV cases and we will just do felonies." So I think that is part of the reason that policy option packages have never been prioritized because the Commission has firmly stated to the legislature you have to do all of it. You need to do every single piece of this. We are not going to come to you and say, "Well, if you are only going to do one piece we like this one best." No. You have to do it all. That is why in the past the Commission hasn't prioritized policy option packages. This time we have a new LFO analyst so we are sort of feeling our way. He asked quite reasonably really what the needs of this agency are. What are the most important needs? Now I can answer that question in a financial term. I am not making a decision whether misdemeanors or felony representation is more essential. I am just saying what services do I have trouble buying. Where do I see problems down the line? If right now we have employees of PD offices that love the work and can't continue to do it because of their law school debts that is my problem four years from now, six years from now.

40:00 Chair Ellis

But isn't it better, I am sure it is better, to have those decisions made at the Commission level than to ask the legislature to lock in to that sort of differentiation?

40:19 K. Aylward Absolutely and here is my last point. The 2015-17 budget policy option packages are your next opportunity to put forward different policy option packages. That would be prepared in the fall of 2014. I will leave a note on my desk.

40:42 P. Levy Mr. Chair, I know Kathryn has said that but you understand that this policy option package 102 reads exactly as it has every session that it has been submitted.

40:56 Chair Ellis You may be right. I know I am right that the one time we got some of this we made the allocation afterwards. The policy packages that I have a recollection of had to do with adding positions in the FTE area, not this sort of general compensation area.

41:27 T. Crabtree If I could say one thing on that. If we could get the legislature now or at any one time to make a commitment towards parity, towards equality and that would be huge. It would allow Kathryn or her successor to go back in the next time and say, "Hey. To keep that commitment that you made last time that is going to cost X amount and we also need this much to bring the other people up."

42:06 Chair Ellis How hard would it be to do it as a single policy package for trial level services rather than what we see here?

42:18 K. Aylward Are you talking about for the 15-17 budget, or are you talking about this one?

42:22 Chair Ellis This one.

42:23 K. Aylward No. It would be impossible.

42:27 Chair Ellis Why is that?

42:27 K. Aylward Because the deadline for submitting policy option packages was September 1, 2012, and the Commission discussed these and approved these and they were submitted. Once the agency request budget is in, it is in, and then the next stage is Governor's budget which has already come out. That ship has sailed.

42:54 Chair Ellis Okay. The one that for me that is simplest is the appellate. It comes out of the same funding source. If we are now being asked to put these in some kind of order...

43:14 K. Aylward I hope not. I hope this was on the agenda so that there would be a general sense and some input and discussion about really where are the needs. Where do you need to pour more money? I think you need to pour more money in PD salaries. I think you need to pour more money into juvenile representation. Those are the two areas that I would put money into for the long term health of the program. I wouldn't say it isn't a priority for parity upstairs. I think it is unfair. I think it needs to be fixed. I think it should be done.

43:59 Chair Ellis How do we answer the argument when we had open positions we had 100 applicants for every open position.

44:05 N. Cozine Chair Ellis if I might. We do have some other providers in the room. We have a law firm provider. I have input from a consortia provider who wanted to be here but couldn't. We have other PD providers here who might want to comment, and we also have Josh Crowther here from the appellate division. I think all of them probably have information that they could share. I realize you have delved quite deeply into many of these topics, but they would probably want to share.

44:35 Chair Ellis I am happy to have other people present if they would like to. Nancy, shall we distribute lunches and just keep eating and talking simultaneously. It is probably a good thing. We will do less talking and more eating. Proceed.

45:34 G. Hazarabedian For the record, Greg Hazarabedian, Director of Public Defender Services of Lane County. Mr. Chair, Chief Justice and Commissioners. First off I am going to speak on behalf of the public defender salary package. But let me be clear that none of these are bad things or things that shouldn't happen. Several years ago his Commission made a choice to increase the Appellate Division funding towards parity with the Attorney General's Office because correctly the Commission said there was more chance of getting parity with the appellate division lawyers with the attorney general's because it was much smaller numbers than there would ever be in starting off trying to get parity with public defenders and district attorneys. I don't remember how many years ago that was. I am guessing either four or six or something in that neighborhood. I did not disagree with that decision of this Commission. But now we are four or six years later and two things have not happened. The appellate division has not actually achieved parity with the Attorney General's Office, although they have gotten much closer than public defenders have, and certainly public defenders have seen none of the trailing effect that we were meant to see after the appellate division got closer to the AG. That was going to carry the defender offices along in its wake. That simply has not happened. What has happened is that we have created another set of gaps. We already have a gap between the appellate division and the AG. We have the larger gap between the public defenders and their DA counterparts. Now we have created a gap between the appellate division and the trial lawyers. The lawyers in my office see what people of equivalent experience make in this office in the appellate division. We have created, unintentionally, a new set of jealousies. I know that is not what was meant but I hear from my younger lawyers when they find out whether we are getting a raise of 3% next year or not, well if I was an appellate lawyer and I had PERS and had this and this and this. I am starting to hear that from my younger lawyers. That is how I know the attitude is out there. I am not saying it is my own. In my county, in Lane County, salary alone not counting other benefits the middle of last year, so numbers that are still accurate, we looked at equivalent years of legal experience for every lawyer in our office and what the salary was and did the same thing in our district attorney's office. While the disparities were not the same at every level of experience, if we average what that number was the average disparity was 30%.

48:55 Chair Ellis Like 25.

48:59 G. Hazarabedian I am not convinced we are ever going to achieve parity with full-time government employees who carry badges as nonprofit public defender contractors. I am not convinced we are ever going to get parity. I am not even entirely sure that parity is justified. We have so much more fun getting to work in private nonprofit than we would having to working as government employees carrying badges. I am here to say that I am not asking for parity. I am asking for that 30% to look like 5 or 10%. That is all that I am saying. The gap is too big. If the gap were 5%, I don't think I would be complaining about too much. I would see that as fair given the relative structure of things. Close to parity works for me. I don't speak for anyone else on that issue. Others may disagree. Four years ago for the first time in Lane County Public Defender history, I think, we lost a lawyer for money reasons. That lawyer could make about \$12,000 more represented about a 20% pay increase for her by going to work for the Attorney General's office in Eugene where they have a branch office. She came back a year and a half later for quality of life reasons that I had spoken about earlier, but she left because I couldn't match what they were offering her. Her and her husband had just had a kid and money mattered. That is the first time Lane County Public Defender has lost a lawyer for money. It won't be the last. The last several contract cycles the money had been pretty flat as you well know. My expenses haven't been pretty flat. I have had to spend a lot more money keeping up with digital, computer like thing. Server space. IT staff to maintain. As we go toward an eCourt model we are digitizing discovery. We are going to be ready for eCourt when it finally gets to Lane County someday, but we are already gaining efficiencies by doing things. We are gaining efficiencies in terms of our work flow and our time, but these are not things that come cheap. So my expenses are going up at a time where my money is not going up. That means I am not giving raises as often or as much as I would like to. I am not in a union

situation as some of my colleagues, so I am not bound by any contractual decision making in that situation. The biggest piece of what this Commission does to provide services to poor Oregonians accused of crime is funding contractors. The backbone of the contracting system are the institutional defenders. The Commission itself has said on numerous occasions when looking at a situation in a given county that the institutional defender is the primary contractor, is the backbone of the system and is the preferred provider to some degree. We get preferential rates because of the added value things we do besides just represent people on cases. This policy package 102 speaks to improving the funding of the backbone of your mission to poor Oregonians and I am speaking in support of it. Thank you.

52:52 Chair Ellis

Thank you.

52:52 A. Sherbo

Angela Sherbo. I am one of the two supervising attorneys at Youths, Rights & Justice. I am here on behalf of our Executive Director, Mark McKechnie, who wasn't able to be here. I want to start by declaring a conflict if you will. I am a public defender. I work for a firm that is largely dependency oriented. My son works here, in the appellate division. My husband does capital defense and has at times been on an hourly contract. So our family has an interest every one of the policy packages. But I am not here to speak to you as a mother or a wife. I was really impressed when I read the minutes of either your last meeting or the meeting before when Conor Huseby spoke about what it meant in real life to be a young public defender and having to put off buying a house and starting a family. That ought to inform everything that we do because there are really excellent young people out there defending the rights of poor people in Oregon charged with crimes. So I wanted to personalize it just a tiny bit in terms of three case examples from my office and the disparity between what the lawyer in my office made and the district attorney made. I am obviously not going to name names and actually salaries, but the salaries are taken from our salary scale. The district attorney's salaries are taken from public information from the Portland Business Journal. It will tell you the salary of each of the deputy district attorneys in Multnomah County. The average disparity is \$30,000 – I think is more like \$40,000 - the difference begins at a lower amount. By the time you are an attorney with 20 years of experience you have probably lost over that 20 years close to a million dollars in terms of the difference between what you made and what the district attorney made. So starting with what I am going to call "Attorney A" with seven years experience trying a case against a DA who had six years experience. Four cases, all gun cases, this is the gun DA, four motions to suppress, three of four days of trial doing one of them, briefing on constructive possession, an adult co-defendant with an immunity agreement. We won three out of the four. Remember the YRJ attorney has seven years experience trying against an attorney with six. The attorney for the district attorney's office with one year less experience makes \$32,000 a year more. A couple of years of that and you can pay off your law school debt. Case number 2) waiver to adult court. We rarely see them anymore because of Measure 11. This was a distribution of cocaine. A sixteen year old who never had a previous criminal or juvenile court involvement. The DA has six years experience. Our lawyer has 14 years experience. We won. The disparity between those two people's salary was \$26,900. Had she tried this case against someone with her years of experience, the disparity would have \$59,033. The last case. Dependency case. We represent a mother who lives in Washington. The events occur in Portland. It raises interstate jurisdictional issues. It raises evidentiary issues because there were claims of sex abuse which took place in yet a third state. This case was tried shortly after the Supreme Court issued the decision in GMW, which changed the playing field in terms of how the statements of the child could be admitted. At that time that case was set to be tried, and it eventually was not tried, what I am told is the DA is dismissing it today and the child is going home back to Washington with mother, our client, at the time that case was tried the variance in salary of our lawyer who is the highest paid lawyer outside of management in our office with 25 years experience, and the DA with 24, \$56,121. Take that over time and there is a serious loss going on. One of the things that I want to suggest is we are not having a terrible time in retention at this point. The people in my office have been there a long time. They are committed. As Greg said they have fun. I went to the young

lawyers and I said I am going to talk to these people and I am not telling you how much more other people make than do you. I hope to never find out why you stay. They said, "I love it. It is fun. I would never go to the DA. They don't get to have as much fun. They don't have much diversity in what they do." But those people have no children. The older people like myself have been fortunate. No serious illnesses among my children or my parents. No catastrophic events. Both my husband and I came out of law school with no debt. You can't say that anymore about the people coming in. While we are not having trouble retaining right now, we are going to have a terrible time hiring. We had a position recently and we were able to offer as either full or part-time. Our pool of applicants are doubled. People looking for full-time and people looking for part-time. We did not fill that position with a qualified person. We are just (inaudible). I think that is basically what I wanted you to hear from me. I am not in a position of prioritizing the packages, but I am in a position to say that I strongly, strongly urge you to look at the parity package. I want these people to be able to talk. I would be happy to answer any questions, as I am sure they would, about the issue of the consortium and also sort of the downstream effects of the amount of work that the members of the consortia in other than public defense.

1:00:10 Chair Ellis

Jack.

1:00:10 J. Morris

I am Jack Morris. I have the private law firm in the seventh judicial district. I am the primary indigent defense contractor. Most of you know how we are set up. A couple of you perhaps do not. Justice Balmer, Judge Welch, Mr. Ramfjord. We have an office in Hood River and an office in The Dalles. There are seven attorneys. We are a private law firm. We are basically a de facto public defender. The reason that I say that is with rare exceptions, I don't allow my attorneys to do civil cases. There are several private firms in the state doing our kind of work. I think once you start doing civil work it sort of waters down your ability to do indigent defense. So we are basically a public defender office although the structure is different. I am coming off a bout of the flu. I am over it, but if I say something that doesn't make sense. I think the reason that Nancy wanted me to talk to you was because of the recent experience that we have had with trying to fill a position. Before I tell you about that I want to real quickly give you some background. I have been running the firm since 1991. Back in the early 90's when we had an open position we would run an ad in The Oregonian and that is all that we would do. We would typically get anywhere from a bare minimum of about 50 applicants to maybe 75, sometimes 100. During that same period the DA's office when they ran an ad they would get the same response plus I would say maybe on average about 20%. Fortunately in the last six, seven, eight years, we have had very little turnover. We still don't have a lot but last year my partner, John Olsen, for whatever misguided reason decided he wanted to become a judge and Governor Kitzhaber appointed to the bench in Hood River. So that was a blow to us and that was the first time we had to deal with trying to fill a position for some time.

1:02:38 Chair Ellis

He probably didn't do it for the money.

1:02:38 J. Morris

I think he probably did it just to get away from me more than anything. Then recently we had an associate who left to work for a civil firm in The Dalles, so we again had to deal with that. What I want to say to you is one of the points I want to try to get across to you is even though in this room we have most knowledgeable people about indigent defense in the state, I think myself included we are still a little behind the curve in realizing how bad it is. I was shocked with the difficulty we had in replacing my partner last year. We got very, very little response. Then this time around in November when our associate left we ran an ad. We listed with OCDLA and we basically got no response at all. We kept waiting for the resumes to come in. I kept asking my office manager we have got the thing posted. Where are the responses? We ended up from about Thanksgiving to January 1, we got maybe 12 applicants. Of those we had ran an ad that said felony experience preferred. What we really needed was Measure 11 qualified, but we knew we wouldn't be getting that so we said felony experience preferred. Of those dozen maybe three had some. Among those even if you have people who are

qualified you are going to have people that you don't like. Judge did you have a question? You are holding your hand up.

1:04:12 Chair Ellis

She is trying to eat her salad. You thought she was doing an auction.

1:04:19 J. Morris

Basically we are just getting no response. I really don't think all of us realize how bad it has gotten. We are just so far behind the curve salary wise that we are not competitive in the least. I think for this conversation to be really candid, I have to admit that money is not the primary issue we are not getting a response. I think what has happened is that the philosophy of people coming out of law schools now is dramatically different than when I came out in 83. That is the primary motivator. Indigent defense was subsidized by people with liberal attitudes for decades. That liberal attitude doesn't exist anymore except with rare exceptions. People coming out of the law school now are sort of the same milk, and I am making a generalization, but they are sort of the milk of people coming out with MBA. It is just not there so we have more of a need to be competitive. Most of you saw the article in The Oregonian that came out awhile ago about how the job market for attorneys has hit rock bottom. It was unbelievably bad. You read that article and you think why anybody would go to law school. But the flipside of that is you think with the job market that bad that no matter how bad things were in indigent defense we would get deluged with applicants. It is not happening. The worst job market of attorneys since time began basically and we can't get applicants now.

1:05:53 Chair Ellis

How do you reconcile that?

1:05:57 J. Morris

I don't think even the people in this room realize how non-competitive it is. There is still a handful of people coming out of law school who have the philosophical bit that they want to do indigent defense. But we are losing those people because they can't afford to work for us. They have got student loans, as you know, and the handful of people we would otherwise have can't do it because they can't afford it.

1:06:30 Chair Ellis

If I read this package right you don't get any benefit from it.

1:06:35 J. Morris

I don't. I don't want to spend a lot of time talking about that, Chair Ellis, because my firm is unique in the situation that we are a public defender but we are not. I think that conversation is probably better played out with terms of the consortium. Frankly, I have really mixed feelings about that. I think because we are a de facto public defender we should be included. But at the same time my feeling is that things are so bad now and so desperate that if you can get money for any one segment or one group, get it however you can. The other thing that I would point out about the public defender split though is the public defenders for the most part are in the big cities. We are already at such a competitive disadvantage. People want to live in Eugene, Portland, and Salem. This policy package kind of reminded me. There was a meeting I was at probably about eight years ago. It was probably more like 14 just the way you remember things. I remember the proposal was made that we need to get more money for people in the cities because the cost of living is higher. I thought well I will just go nail my door shut right now because I can't compete with the big city firms and the people that want to live there. If you start paying them more instead of paying us more, which is the way I think it should be, there would simply be no point. But for years we have been saying that there is gonna come a day when you are not going to have attorneys to do cases. I think if you talk to Nancy and Kathryn you will find out in certain parts of the state, notably from where I am at east and south, we are already there. It is already there. Before my partner left we were real strong experience wise and we were being asked on a regular basis to take murder cases in Umatilla and Union counties and out in that area. We are not in a position to do that right now. They already couldn't get attorneys out there. We are in a world of hurt. I just really don't think, myself included, I don't think we realize how bad it is. I don't see it getting any better. I guess that is what I wanted to tell you.

1:08:49 Chair Ellis

Thanks.

1:08:52 L. Borg

For the record, Lane Borg, Executive Director of Metropolitan Public Defenders. I also want to make some comments to you. In my position of this year's president of OCDLA, mostly because some of these conversations came up at our board retreat, our board this has been a constant theme what I will reference here in a minute, but one of the things just a couple of thoughts on this. One, I am glad that Greg brought up the issue of the new disparity. I can give you a real tangible, the disparity between public defender offices and this office, the Office of Public Defense Services, Appellate Division. In the last two years I have had head to head in the same week offering a job to somebody that then was offered the job here and they took the job here because of the pay. That may not be the only reason. They looked at this and I couldn't compete. I couldn't compare that way. We have also lost ground over the years just from where we were at. I was reminded when inheriting the job I did I have inherited a bunch of historic documents. I look back at the very first contract that was approved by ...I can't remember who the chair of that MPD board was. The salary you paid Jim Hennings in 1972, by union reminded me that if you ...actually it wasn't his salary it was the lead attorney salaries. If you were to account for inflation and bring it forward it would be \$90,000 a year. That is well below what the top end of my staff attorney salaries are. So we have lost ground even within ourselves. We are losing ground to our state agencies. We are losing ground to where we were in the past. We aren't able to do that and it is not just with attorneys. We tend to focus on attorneys and I understand that because that is the legal services that you are buying. We recently an investigator position open in our Hillsboro office. We had 100% of the outside applicants withdrew once they saw once what the pay was. They couldn't work for that. It is not just the attorney salaries but it is the full time employees of the public defender's office. When I talk to my union in bargaining in this last fall we had a re-opener where we were trying to look at where things were at. I want to preface this that I am very grateful for the fact that this office on the contract services side looked at our caseload and was able to give us an adjustment. Caseloads are up. They are up in Multnomah County for a variety reasons. We were adjusted. I was able to do some things that made them happen. I bought back the furloughs days. I was actually able to give a 2% COLA to the staff and that was okay, but in having those conversations and we were talking about this. What I have to tell them is first of all it is so important that this Commission ask for those policy packages, even though we are not probably going to get them because when I tell the union how are we going to do this? They want to go lobby the legislature. I am saying why would the legislature give anything that the agency isn't even asking for. It is very important – because I had heard at one point and I wasn't privy to who that was, but at one point in late summer that maybe this policy package 102 wasn't even going to be submitted. It is so important to ask for that even if it isn't going to be given because if you don't even ask then we have no hope with that.

1:12:47 Chair Ellis

So Jack says he has trouble recruiting in Hood River because everybody wants to be in the big city. How are you doing on recruiting?

1:12:51 L. Borg

We are getting less than we did in the past. We have had a lot of turnover recently. In my first three and a half years in this job I hired about nine lawyers. That was up until about July of last year. Since July of last year I have hired 11 lawyers. That is because we have had two go out into private practice and admittedly they went out too soon. They decided that they just needed to try something. We had another lawyer leave the country. He had an opportunity in London. So we have had people leaving and that is natural. Remember if you look at Metro's historic turnover we have hired on average about 10 to 12 lawyers a year. Part of this was just pent up frustration. People just hadn't moved and hadn't gotten along. In doing our calculations – like we just reopened last month. We are going to do another hiring round building our pool this next February and March. Instead of having a 150 or 200 to look at we have about 75. People are looking at the salary issues mostly because of what Conor Huseby testified to you at the management conference in Silverton. They want to work there. They want to do that but they have huge debt. It becomes this issue about how long they can

do it. I try to explain to people the public defender model, I think it was mentioned here before, we are subsidized in a way. We were subsidized on this idea that you are young, enthusiastic, inexperienced, so you are not getting so much pay you will get experience and move on. That is changing. Certainly within my office I have got over 50 – 55% that are at the top end. They have been there for more.

1:14:54 Chair Ellis

A career.

1:14:54 L. Borg

They are a career public defender. It didn't really matter that you had a flat top end. That your top end was so far behind that nobody actually reached the top end. Now they are there. Some of them have been there for six or seven years. The fact that I was even able to buy back the furlough days and to offer a 2% was huge. That was offering people that gone like three years without any sort of pay raise. One comment I want to make on this consortia at the risk of kind of stepping in there. I think rephrasing as Kathryn was saying as she does in a very politic way. It is an unregulated industry. I don't how much scrutiny they want. I don't know if they want Kathryn in their saying, "Give me this. Give me that. Let me look at your books." I don't know that she wants to do that. That becomes this whole can of worms out there that they have this ability to kind of move things around to decide what they are going to take in terms of – excluding Jack's office – but sort of take contract work or supplementing it with other work. I think it is a real vulnerability if you go down that path the next time that you can do that because the legislature is smart. LFO is smart and they are going to start asking questions well what about that and I know if these people necessarily want to get into that level of detail. Whereas we are about as transparent as it can be.

1:16:17 Chair Ellis

You are an open book.

1:16:17 L. Borg

We are an open book. The last thing that I want to say about parity and it is a really small problem but it is symbolic. By contract provision and I haven't got back to look if that is a statutorily based thing. There is a provision and again, I am talking about what is the symbolism here. How do I talk to my union about that? What does this mean? There is a provision in there that says that nobody at a public defenders office can make more than a circuit court judge makes, and yet there are staff people at OPDS that make more than what a circuit court judge makes. They should be paid that. I think they are worth every penny that they are paid, but you are sending the wrong message when you don't also go in a say, "You know what. We agree. Circuit court judges are paid a lot less than they should be paid and a lot less than the top end people at some of these firms should be paid." Because it does attract talent and there is some meaning to that. When you don't point that out, when you don't do that, you are sending the message that that is not important. It is a small one and I hesitate to bring it up. I talked with Ken Allen about it in our discussions. If you don't know he is the head of ASMCE. We had quite broad discussions just generally about this whole issue and topic. He is very interested and concerned about the pay for his members. If we don't look at this and if we are sending the message that we are not even asking or it doesn't matter, then we are sending the wrong message. We have got to start having this conversation about it. I don't know if you have any questions or not. Oh wait one other thing on the juvenile package. It has got to be asked for the same thing even if it goes down, but there is an even more fundamental change that I think needs to be looked at because it is killing us in our county with the way – I am not commenting on the mechanism with the way OPDS is administering the contract, it is the structure of the contract. We are paid per event. This is the same thing the health care industry is dealing with and almost the perfect analogy with juvenile. It is like we are paid for event and not for outcomes. What I think really needs to be done on juvenile because it is especially in the Metropolitan area, especially in Multnomah County, there is such a clear vision about what the representation should be about that we really should be looking at an FTE model on that. It is so difficult because we lose credits that OPDS wants to give us, but we lose them because at the end of the case, oh by the way, can you sign that chit sheet for me to get paid. They want to have this cumbia moment. They want to come together. We are helping. We are reuniting. It is not that same kind of tension

always that you get in a criminal case where it is the DA and I am against, and by God if you are going to do something to my client you can damn well pay for it. We go in there and everybody kind of wants to work things out and they are really moving in the right direction, but to have us – and I don't know how (inaudible) but to have us kind of stand up and say, "By the way, we need to get paid here." It is not working. When I talk to Judge Waller about where we are going, we may end up because of the way the funding structure is, we may end up losing an attorney in juveniles this year because of where that caseload is and what we are looking at with that. Yet, when I talk to Judge Waller and I talk to Judge McKnight, they are saying don't do this. We can't lose these bodies. We need people going to these family decision meetings and all of the good work that we are doing, we are going to erode that if we are the ones saying, "Well, under our funding structure we just can't pay for that." I would really hope in the future they look at an FTE model.

- 1:20:26 Chair Ellis Do one of you that is involved in juvenile want to answer my question? This focuses on dependency, nothing about delinquency? Is that intentional, right?
- 1:20:53 N. Cozine Chair Ellis, if I may.
- 1:20:51 Chair Ellis Yes.
- 1:20:51 N. Cozine This would be a good time to comment. I had a phone call also from Richard Garbutt who is a provider in Klamath County. He wanted his views shared regarding the dependency package. He has a unique model in his county. He is a consortium and that is the county where part of the contract is structured so they have – instead of an investigator time they have social worker time built into their contract. It is less expensive for this agency, just like with an investigator, to actually help them build that into their contract. That is the way they structure it. His concern was if the Commission were to be tied to a policy option package that measured only attorney FTE, not support staff, and social worker staff that it could actually erode the quality of services that they are providing. It is not that we have the opportunity to restructure the way that we have done our policy option packages this time, but it also goes to this idea that when we talk about the policy option packages and the funding that they provide, we have to think about it in terms of what flexibility it can offer. So if it is increasing FTE delegated towards dependency work, we are not just talking about attorney FTE. He wanted that vision shared. I think that is it. Thank you.
- 1:22:26 Chair Ellis Greg, you wanted to respond.
- 1:22:31 G. Hazarabedian I was just going to say with my work on what used to be called the Quality Assurance Task Force, it just seemed like aside from the issue of children being represented in delinquency cases, there didn't seem to be a lot of complaints from around the state as to how children were represented by lawyers in delinquency cases, whereas with dependency cases there was a lot of unevenness found and that seems to be the area that there has been troubles.
- 1:23:02 Chair Ellis Tom.
- 1:23:10 T. Crabtree If I could just add on some comments that were made earlier. Jack talked about hiring problems that he has had in Hood River. I have some problems when I have tried to hire experienced attorneys even recently. We have been lucky in that when we have tried to hire somebody with experience and we didn't get that, we have been able to change things internally and promote some people up and hire people right out of law school. I do think that that is a problem as you get higher into the pay scales, higher into the experience level, that when our pay levels are suppressed that you don't get people with a lot of experience that want to make that jump. I am not having any problems at all getting people right out of law school. That is great as long as you have got somebody that you can move up into Measure 11 or that experienced felony attorney role. At some point that is going to be a problem. Regarding what Lane was saying regarding the top salary, I would echo that. The

Commission needs to look at getting rid of that requirement in the contracts. I don't know if it is only in the PD's contracts. I am hearing that it is. As far as experience is concerned, yes, the judges are underpaid. I have been head PD for 31 years. I have been PD longer than the two most experienced judges combined in Deschutes County. There are three people in the DA's office that make more than a circuit court and that apparently isn't a problem for them. If it is a problem for us that needs to be looked at. Also, I consider my job hard. I have 13 attorneys in my office that I have to supervise. I can't imagine what it would be like with 50 attorneys in my office. I don't know how many Greg has at some point, 20?

1:25:30 G. Hazarabedian Roughly.

1:25:32 T. Crabtree What is a managing partner in a law firm going to be making when there are that many attorneys there. So I think that that needs to be recognized as well. It might look good to say that none of us make more than a circuit judge, but what is the reality here. What message are we sending by capping in that manner? I would also like to echo Lane's comment that we need to ask whatever policy packages we can at the legislature. You don't get what you don't ask for. Maybe we are not going to get it, but at least you have to ask. I think that that sends a message to every attorney that is practicing indigent defense that the Commission is there looking for backs. They are looking to get us more money. They are looking to get us more benefits. They are looking to get us equality and if that isn't happening then I think it is definitely sending the wrong message.

1:26:54 Chair Ellis Let me ask one other question. Package 100 is juvenile dependency representation. Package 102 is public defense provider compensation, but several of the public defenders have dependency practice. How do we handle the duplication there?

1:27:18 T. Crabtree I don't think it is duplication. I think what you are doing with 100 is it is a reduction in the caseload that each dependency attorney would handle. So if anything you are creating a potential for an additional opening to hire an additional staff person to do that work. You don't have as many cases on your caseload.

1:27:48 Chair Ellis Thanks.

1:27:53 C. Lazenby Let me just say that I have been chasing the holy grail of parity for about 30 years too. Some of my questions are going to sound like I am not in support of parity. Some of the folks you have said are a little bit internally – contradict me and have an opportunity to clarify. One is people are saying to you that I am not going to go work for the DA's office because I have a lot more fun being a public defender. That is consistent with my experience. That consistency with my experience and they are really in agreement with it. But then Jack raised the point that this younger group of lawyers that are coming out have come out of a more conservative time. They are dealing with a lot more debt and they are a lot more realistic. Career wise going into criminal defense may not necessarily be something that is positive for them. From that standpoint assuming all that is true, why is more money going to make any difference?

1:28:46 L. Borg First of all, I think that may be the urban rural effect a little bit. Because not to make to light of it but Port Landia is a phenomenon and everybody I have interviewed from outside of the state has seen it and kind of in my office they like it. I am not getting that at all. I am getting people that are hard core, progressive liberals, frankly, applying to ... but I am the big PD office in the state. They are having fun and they are there is that the only people that I could to them, oh well, you know what you are getting into is the people who have left and come back. Because we have built a model for good bad on taking of advantage of young, enthusiastic, ideology, idealist individuals who maybe the thing they think they are getting out of it, which they are, is trial experience. They are doing that but what happens, and this is the big fear. What happens is in five years they wake up and they see how little they are making compared to their counterparts. What Angela was saying is absolutely right. The emails just fire around my office whenever that public thing comes out about what the district attorneys

make. They come in and I just had to go against the idiot and he making \$30,000 more than me. They get angry and they get really discouraged and they get bitter.

- 1:30:13 Chair Ellis And you tell him you could be a Steve Houze someday, just be patient.
- 1:30:25 L. Borg That is the problem. It creates this morale issue when all of sudden they wake up and realize am I a big chump and what Conor talked about deferred life. Are they deferring getting a house? Are they deferring having children? I had debt but I was lucky that it was manageable.
- 1:30:49 Chair Ellis Conor knows how much impact his testimony has had. I have heard this from a surprising number of sources.
- 1:30:54 L. Borg I think he does. He is in our death penalty unit right now, so he is doing a little bit better. Conor is doing a little bit better. It is still not enough. I listened to that and we focused on Conor, but I think all three of people that talked had compelling stories to tell.
- 1:31:30 Chair Ellis There is one voice that hasn't been heard from yet. You all can stay right where you are. You may feel like the skunk at the garden party when they kept saying forget appellate, but I want to hear from appellate.
- 1:31:41 J. Crowther Thank you, Mr. Chair. Joshua Crowther on behalf of the Appellate Division, Office of Public Defense Services.
- 1:31:50 Chair Ellis You are use to talking standing up.
- 1:31:50 J. Crowther I would just parrot many of the things that these providers said about parity, and emphasize that I think that there are three critical aspects to achieving parity, at least on behalf of appellate public defender and our counterparts in the attorney general's office. First, it is a recruitment issue and when you look at just the quantity of applicants that doesn't tell the real story. It is the quality of applicants as well. Obviously we get a lot of applicants. There is only a small percentage of those that have this criminal public defense pedigree to it. So I would be interested to compare the Attorney General's quality of their pool versus ours instead of just looking at the number of applicants.
- 1:32:40 Chair Ellis Help me on the number. Have they had open positions so you have a number of applicant data to compare?
- 1:32:46 J. Crowther Mr. Chair, I don't know the number. I know they kind of have a rotating basis too that they do over there. I forget what they call it. There is a program where right out of law school they get some people in there and kind of rotate them through different positions. My point on that is it does affect recruitment. Like when you are dealing with water, it is not just an issue with quantity it is a quality issue. The other is retention, obviously, and a lot of people have mentioned that. For us by the time we get somebody here who is interested and train them to handle complex felonies, they are starting to see these numbers as well and they are ready to go private practice.
- 1:33:40 Chair Ellis But they don't go over to the AG's office.
- 1:33:42 J. Crowther They have gone to a variety of places. Nobody off the top of my head has gone directly to the AG's office.
- 1:33:46 Chair Ellis Part of our sales pitch is come to the appellate division and get some really good experience. Be on your feet in front of the appellate courts, and then if you do well you may go into private practice and do very well.

1:34:01 J. Crowther Sure. But we also need to keep good quality people here. We have a complex caseload too that somebody needs to handle and we lose a lot of those people to private practice or in some cases the Federal Public Defender's Offices around the nation.

1:34:13 Chair Ellis So address the question that has been put out on the table by the trial level people. They say they are experiencing a second disparity, which is between the trial level and the appellate group. We are given the task of having to prioritize these packages. Do you have a counter you want to make, or do you accept what they are saying? What is your thought on that?

1:34:40 J. Crowther I would like to see parity across the board for all public defenders. I think they are all, whether it is the trial level or the appellate level, hard working folk. But as far as that horizontal disparity that I heard about it, it is easier to see the vertical disparity between the attorney general and our office because we are doing the same thing.

1:35:02 Chair Ellis You are using horizontal and vertical the opposite of how my poor mind tracks. I would think it would be horizontal.

1:35:11 J. Crowther You are right. I confused the two.

1:35:12 Chair Ellis I was struggling here thinking what is he talking about.

1:35:16 J. Crowther No. So the vertical disparity between state trial level and appellate level, there are more issues going on. We are doing different things. This office, at least, is a commuter office. I think that is reflected in that as well. A lot of our attorneys here commute and commuting is very expensive.

1:35:28 P. Ramfjord Do you know if there is a similar vertical disparity on the DOJ and the Attorney General's Office?

1:35:39 J. Crowther I don't know that. I think the third critical aspect for achieving parity is just fairness, really. I will do the exact same work and pour my heart into a case that the attorney general does, and at the end of the day we are both going home with the same amount of debt.

1:35:57 Chair Ellis You are preaching to the choir on that. I think the harder issue is

1:36:02 J. Crowther I think the other aspect of parity is even if we achieve parity numerically, that is not really even parity because at least when I got out of law school a lot of my colleagues that went to the DA's office and Attorney General partake in different loan and repayment programs that were never offered to public defenders.

1:36:23 Chair Ellis They are offered today but not funded.

1:36:28 J. Crowther So that is another thing to think about. There are other things besides just numeric parity going on too. It would be nice if we could at least get that.

1:36:37 Chair Ellis Okay. Anybody else?

1:36:36 N. Cozine Chris asked about whether there is disparity between district attorney salaries and DOJ salary. I believe that Kathryn has the numbers and that there is a disparity between those two entities as well.

1:37:00 K. Aylward I have the numbers. I have only done horizontal comparisons. No verticals on the state side. I can look into that. I think, obviously, it has to be if appellate makes more than trial.

1:37:22 P. Ramfjord It appears from looking at some of this information that there is a gap at the appellate level between what our people are making and what DOJ is making. There is a gap at the trial level

between what public defenders are making and what district attorneys are making. So there must be a similar vertical gap there to some extent as well. I just don't know how large it is.

- 1:37:41 L. Borg I think it is county by county. The Washington County DA office is very well funded. I haven't seen the numbers on everybody in that office. I think my recollection is that the Washington County DA's make more than the Multnomah County DA's. I think they make substantially more than say Hood River.
- 1:38:04 P. Ramfjord All I am saying is on average one would expect that a county DA may make less than a DOJ appellate lawyer.
- 1:38:13 A. Sherbo I actually have a couple of figures if that would be helpful.
- 1:38:17 Chair Ellis You are going to confuse us with facts?
- 1:38:20 A. Sherbo I didn't prepare these Mr. McKechnie did. At year six an Assistant Attorney General I makes \$6,700 a month. An Assistant District Attorney makes \$6,500 a month.
- 1:38:41 Chair Ellis That is Multnomah?
- 1:38:44 A. Sherbo OPDS makes \$6,100 a month. My staff attorney makes \$4,300 a month.
- 1:38:49 Chair Ellis That is pretty stark.
- 1:38:56 Hon. Elizabeth Welch Speaking of stark, I loved her case examples. Those were just splendid.
- 1:39:07 Chair Ellis You all have proved you are good at what you do. You are very articulate and it is a pleasure to hear that. Is there more general comment before we ask the Commission to try to cut the Gordian Knot here?
- 1:39:19 L. Borg I wanted to follow up on the comment that Mr. Garbutt made from Klamath Falls about not including the cost of a social worker. I think it is really unfortunate and we have made a big mistake over the years that when you talk about funding we talk about attorney compensation and that is all we talk about. The reason that I say that is the disparity between what our attorneys make versus what other attorneys make has real artificially done better than it really looks. I think every contractor, especially the large contractors, have cut back on support staff and that is where part of the monies for attorneys has come from. I think that is really unfortunate because particularly in the area of juvenile representation, support staff is so critical to maintain the contact that we need with the kids and the families. If we had not made those cuts on support staff, I think the gap would be even more horrendous than it is.
- 1:40:19 Chair Ellis Which gets you to a quality issue along with a comp issue. Do I understand correctly the question we are being asked is to A) do we still support the package? That will be an easy one, and then B) have been put in a position that Sophie's Choice we are supposed to rank them?
- 1:40:41 N. Cozine Chair Ellis and members of the Commission, are LFO analyst is interested in the Commission's discussion on the three policy option packages so that he had an idea of whether or not there was any kind prioritization possible.
- 1:41:00 Chair Ellis Okay.
- 1:40:58 N. Cozine So I told him I would bring the issues to the Commission for their discussion.
- 1:41:04 Chair Ellis I would open it to that question. Anybody want to weigh in.

1:41:14 Hon. Elizabeth Welch Sure. The overall function of this organization is to support the representation of poor people who need lawyers in criminal and juvenile matters. I believe that package 102 should be our first priority. That kind of a provision should always be the first priority unless there is some kind of screaming emergency. The thing with juvenile is, and I don't think the Chair got a complete answer to his question, the reason why this is in there as I understand it - this is like the third time this has been submitted isn't it this precise thing. It has to do with representing parents, primarily, in dependency cases. It feeds off their wonderful experience in the state of Washington. It has been about five years ago that they initiated a program that cut down the caseloads. The results in terms of reuniting of families, shortening time in foster care, all sorts of other savings besides the human is what is really being sought here. It is much harder to represent parents in dependency cases than to do any other kind of work in the juvenile court. They are not necessarily ...

1:42:37 Chair Ellis That includes the termination of parental rights.

1:42:44 Hon. Elizabeth Welch You bet. It is very hard to do because there is a reason why they lost their kids. It is not trivial and the question is whether they have done well enough to get them back. I would support that one No. 2, and the next one, No. 3. I don't know if a motion is in order, but I can make one.

1:43:04 Chair Ellis Let's get other comments and then I think a motion would be in order.

1:43:10 J. Potter If I were to do it I would do is just based on getting more money in the system. I would go 2, 1, 0, as my order of priority.

1:43:19 Chair Ellis She was 2, 0, 1.

1:43:23 J. Potter I am for getting more money into the system to do the good that we have to do. I don't particular like having to make a decision and I would hope that we really wouldn't have to make a decision. If they gave us the money for 2 and 1 and reduced the 0, we can manage that money to best reach these goals. It might include more money for consortiums.

1:43:54 Chair Ellis Let me use a word that in the timber industry they call it "substitute." You couldn't export federal source timber, so the private - I have forgotten just how this works, but the idea is if you get money anywhere you can adjust elsewhere in the system.

1:44:18 J. Potter Exactly.

1:44:18 P Ramfjord I would probably follow Judge Welch in her priorities in part because I am not really sure whether we could substitute money around as effectively. I think on a quality basis, given that quality is such an important part of our mission, the testimony that we have heard today suggests that there is a greater difficulty in recruiting and retaining people at the public defense services level. That is sort of the area of biggest priority. That is a big dollar level. I think it is very important. I think that is very important. On the juvenile level I think there is a clear indication that there is some suffering in terms of the quality of service being provided. I think that trying to address that immediately is exceedingly important. While I agree 100% with the notion that it would be wonderful if we could get the appellate salaries up to a greater level of parity, we don't seem to be suffering the same difficulty in either recruiting talented individuals or in having talented individuals in the office providing appellate services. I don't think that the need there is as great. I am not sure, I guess, if we got that money in the door it could be transferred to use in helping in the juvenile services area as effectively. That would be my choice.

1:45:39 Chair Ellis Do either of you two want to weigh in?

1:45:39 C. Lazenby I am pretty much in line. I think the PD funding is important and I think that there is a larger systematic problem in the juvenile in terms of compensating a broader range of professionals. As Lane was pointing out getting credit for the work that they do that doesn't necessarily show up in their stats. More money could certainly help with the talent search piece. I am just concerned that it is all still just little bandages around this. We didn't talk about the fact that the money to fund the DA's comes from the counties. It doesn't come from the state. It isn't like we or the legislature are funding that and not funding this. There are other reasons that have to do with representation, unionization, and other things that cost. I certainly have experienced that myself. Five year point I looked up and said, "I need to go do something else to make more money."

1:46:50 Chair Ellis Shaun?

1:46:50 S. McCrea 2, 1, 0.

1:46:52 Chair Ellis Okay. So by my rough count there are four that are 2, 0, 1. And two that are 2, 1, 0. I think I would go the 2, 0, 1. Why don't we break it into two motions. One is does the Commission want to reaffirm its desire to see all three policy packages past. Somebody want to move that?

MOTION: C. Lazenby moved to approve the motion; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

1:47:55 Chair Ellis Then certainly open to more discussion on the sequences, but I think it is pretty well indicated there are two routes that people have proposed.

1:47:55 J. Potter Can I get clarification on 0. It changes the standard. It doesn't add any more money. It says that if you have X number of cases your new contract will have less cases. But now that I have less cases am I going to be paid any more for those cases?

1:48:16 Chair Ellis As I understand it the answer would be no, but there would be more money in the system because you are talking about additional positions.

1:48:21 C. Lazenby With the thought being that those resources could be spread out to better staff the process.

1:48:34 Chair Ellis The other issue that was raised and I would be interested, Kathryn, I would assume if the legislature adopted 101, the appellate one, we would have zero discretion about that. That goes to a different item in the budget.

1:48:57 K. Aylward I believe you have zero discretion about any funds that are appropriated for a specific purpose.

1:49:07 Chair Ellis But the others there is a way of - let's say they appropriated for juvenile dependency representation - actually that wouldn't work either.

1:49:13 K. Aylward The only discretion you have is if it is package 102 and it is not fully funded without specifics. Then you could decide do we do the hourly rate or do we do PD salaries or do we do investigator hours.

1:49:34 Chair Ellis Wouldn't you also have the discussion that great they have funded at a more generous level PD? I suppose in our contract negotiations we could find it in our hearts to be more generous than we had been to consortia.

1:49:51 K. Aylward You never know what happens in negotiations.

1:49:55 Chair Ellis Thank you. You have answered the question.

1:50:02 N. Cozine If I might, if I am hearing Kathryn right the 2007 funding that the legislature provided was unspecified appropriation. That is the other type of appropriation that can give the Commission flexibility in how we decide ..

1:50:17 Chair Ellis Which is why I have such fond memories of Coos Bay and why I like that.

1:50:25 N. Cozine The interesting thing about an unspecified appropriation, of course, is that it allows the Commission to be responsive to current emerging issues should they change or develop throughout the months of session. A budget isn't built, however, on unspecified requests for money. They are built upon current service level and policy option packages. I am sure Kathryn will correct me if I am wrong, but that is the structure that we have to fit within.

1:50:52 C. Lazenby And the unspecified piece came about because of the BRAC right? Wasn't that at the same time?

1:50:56 K. Aylward No. It came about because of the gang of four and that was that weird chart that I did where you could did caseload reduction and salary. They ended up picking the smallest number on my chart - what was I thinking and so that is why it was unspecified. It was just here is some money, make it better.

1:51:23 J. Potter I am prepared to offer a motion.
MOTION: We move to adopt as our priorities 2, 0, 1. Per Ramfjord seconded the motion.

1:51:32 Chair Ellis Any further discussion?
Hearing no objection, the motion carried: **VOTE 6-0.**

1:51:36 Chair Ellis Alright. You have unanimity on both motions.

Agenda Item No. 5 Executive Director's Annual Report to the Commission

1:51:53 Chair Ellis Nancy, do you want to talk about your annual report and then the management team.

1:52:01 N. Cozine Yes. I included the annual report with the Commission materials. As I reread it this morning, it occurred to me that the Commission review really ought to have been so familiar because it was everything that you did this year. So there were eight meetings and a very short retreat in the spectrum of retreats, and two service delivery reviews along with a lot of discussion about budget. When I read this it occurred to me that this is an annual report that speaks to making small improvements where we can, but treading a lot of water because of, in my view, the budget situation. We haven't been able to launch really aggressive, new programs targeted at improvements. We have been doing the best we can with the resources that we have and we made some significant accomplishments, both within Contracts and Business Services and within the Appellate Division. Contracts and Business Services, as you know, Kathryn has done an amazing job creating programs that allow us to be incredibly efficient. There is a story that I read to my children that is called "Joseph Had a Little Overcoat." What this story is about is a man who had an overcoat and it gets old and worn and he turns into a vest. Then he turns it into a scarf. Then it he turns into a button. Pretty soon he has, as my daughter would say, nothing. But then Joseph out of nothing created a story. That story developed and pretty soon Joseph had more than he could ever want. In some ways I think that is what Kathryn has done with public defense for Oregon. She has worked so tirelessly to take what was really a broken system within this office and statewide to very, very strategically allocate funds in targeted ways so that we have a system that is very respectable in this state. I thank Kathryn, but I think it is everyone, Pete, so I give that to you. Kathryn still works on making improvements. She did the paperless system. We have the added feature of lawyers getting

copies of the billing statements that are investigators and other service providers sent in to this office so there is an extra level of accountability. So out of nothing we continue to create something that is fairly remarkable. In the appellate division it is the same thing. You have these lawyers who you have heard today and they don't make as much as their counterparts across the street. They do leave after a period of time, but the wins that are so rare on the defense side you really see both in the juvenile unit and in the criminal division, rulings from the Court of Appeals and the Supreme Court that are remarkable. They are remarkable because in the juvenile area they really develop the case law. In the criminal division where there has been more case law over time than in the juvenile division, we still have landmark rulings coming out of arguments made by lawyers in this office. In terms of the activities that I have been able to participate in this year, working with this Commission and working with policy makers at the national and state level. It has been a year of learning for me and we continue to push some rocks up hills in my mind.

- 1:55:50 Chair Ellis Is that a Sisyphus analog?
- 1:55:54 N. Cozine It is. They are moving slowly.
- 1:56:04 Chair Ellis I like the one about the little engine that could. That is a happier outcome.
- 1:56:11 N. Cozine That is better. Kathryn, Paul, and I will be attending the Annual Summit on Indigent Defense put on the ADA and the NLADA in Texas. It is February 9. It is a one day conference but it really targets so many issues that are critical to the work of this office. Things that we have been chipping away that are addressed in this annual report. The National NLADA committee that I participated on that looks at data and its use in public defense is one of the topics that will be addressed at the conference in Texas. We will also be hearing from advocates who will be talking about why pleas without representation are problematic and what issues those raise. It is a really good agenda. It will help us continue to chip at the policy issues that we have in Oregon utilizing our advocates at the national level in addition to our own work. The management team continues to meet regularly. We continue to talk about priorities. We continue to talk about how we can utilize the resources that we have available to us to make strides to move ahead, and we have moved forward additionally on our contracting process so that we can bring someone in to help us with our documentation of rules and responsibilities.
- 1:57:46 Chair Ellis This is the consultant that you have talked about?
- 1:57:46 N. Cozine It is. That is my summary of the annual report. If you have read it and you have question then I will be happy to answer them.
- 1:57:55 Hon. Elizabeth Welch I thought it was wonderfully straightforward.
- 1:57:59 J. Potter The agency is unrecognizable from 10 years ago.
- Agenda Item No. 6 OPDS Monthly Report**
- 1:58:05 Chair Ellis Shall we go ahead with the OPDS report?
- 1:58:12 Hon. Elizabeth Welch I have a question back from this morning and maybe it doesn't need to be addressed in any full way. I am concerned about what role this organization might play in regard to the Public Safety Commission? I don't know how that decision gets made or if it has been made. I assume it hasn't since the full report is fairly newly available. I am worried about it.
- 1:58:49 N. Cozine The Commission on Public Safety.

1:58:53 Chair Ellis What role we should play?

1:58:54 Hon. Elizabeth
Welch Yes.

1:58:54 Chair Ellis It would help, I think, we have a policy on how we approach legislation. Maybe send that to Judge Welch. That is sort of where I was coming from. I think it was adopted before you joined the Commission.

1:59:14 N. Cozine It is my understanding that typically this agency has not taken any position on a policy matter.

1:59:29 Chair Ellis Other than our own funding.

1:59:29 N. Cozine Right. Other than our own funding. I felt that it was important to present this Commission with this information. This is a situation where we have a big policy conversation at the state level that is built into the Governor's recommended budget. It very dramatically affects the way that funding will be moving in the next biennium. We will be submitting fiscal impact statements. That is our responsibility. That is how we have responded to these types of things in the past. We will send out the policy. We could even add it as an agenda item if we want to revisit what that policy is, or have a discussion. I would be happy to send it out.

2:00:12 Hon. Elizabeth
Welch I was just wondering - well, never mind.

2:00:16 Chair Ellis Why don't you circulate the policy to the Commission. If somebody wants to raise it as something to reconsider that is fine.

2:00:33 N. Cozine And with that the appellate division update if Josh wants to come back up.

2:00:35 J. Crowther Once again for the record, Joshua Crowther. I am playing the role of Peter Gartlan today.

2:00:39 Chair Ellis You are not tall enough.

2:00:41 J. Crowther He is away from the office right now probably somewhere where freezing rain isn't in the forecast. I just have a few quick points to update the Commission on. Just following up on the some comments that Peter Gartlan made last month. We have undergone a hiring and interview process and we have had two new attorneys join the office. So they have started and they are undergoing the six month training program we have here. Second, just a quick update on the attorney exchange program between the Appellate Division and the Marion County Public Defender. So last week Drew Jackson from the Marion County Public Defender got an opportunity to argue an appellate case. I believe the panel he argued in front of included former Chief Justice De Muniz. I am sure that was a pretty good experience for him.

2:01:36 Chair Ellis There is an irony here because that is where Chief Justice De Muniz had his first experience was as an intern at a PD.

2:01:50 J. Crowther That is right. We sent down appellate defender Jed Peterson and he argued a couple of motions to suppress. In fact he is arguing one today, maybe as we speak, in front of Judge Hart in Marion County that involves witness identification issues applying the win that we just had in *State v. Lawson* that De Muniz wrote.

2:02:14 Chair Ellis It is a small world.

2:02:14 J. Crowther But all indications are that it has been a really positive experience and hopefully opening dialogues between the two offices and the two different divisions of public defense.

2:02:21 Chair Ellis Is he getting direct client interaction as well?

2:02:23 J. Crowther Yes. That is right. He is. There is a chance that there might still be a trial. His is still ongoing but Drew Jackson has handled his case and argued it. Now we will just have to wait for however long it takes to see the results there. Also, the appellate division is currently in the process of our annual performance and evaluation review of our attorneys. That is going to finish up in February. Then as part of the office's continuing outreach and recruitment efforts, I will be doing a bunch of different mock interviews and informational interviews. On Friday I will be at Lewis & Clark Law School. On Saturday I will be at the Bar doing informational interviews as part of the diversity program. Then the next Saturday I will be at the Northwest Public Career Fair hopefully getting out the word about what a great office this is, and then finally just an update on the juvenile appellate section. Their pattern of great wins has continued and they had three really great wins out of the Court of Appeals recently. I just wanted to flag that for the Commission.

2:03:40 Chair Ellis That is amazing. Somebody today said wins are kind of few and far between on the defense side normally.

2:03:51 J. Crowther I know the juvenile appellate section is having a banner year for sure.

2:03:58 Chair Ellis Is there a counterpart to them in the AG's office?

2:04:02 Hon. Elizabeth Welch There are certainly lawyers that specialize in doing juvenile stuff. I don't know if there is a unit.

2:04:06 Chair Ellis But not a systematic....

2:04:13 J. Crowther I don't know if they have a juvenile appellate section over there.

2:04:13 N. Cozine Chair Ellis, it is my understanding that they have historically sent their dependency appeals to their appeals division and that those are handled by attorneys who handle both criminal and juvenile matters. It is also my understanding that they have started examining that system.

2:04:32 Chair Ellis Since we have specialist and they have generalists and we seem to be doing pretty well.

2:04:32 N. Cozine Right. I think they actually have one attorney who is dedicated to doing the dependency work, but other than that one attorney historically they have spread it out among many attorneys.

2:04:43 Chair Ellis Interesting. Thank you.

2:04:43 J. Crowther Thanks.

2:04:50 Chair Ellis *Fuller?*

2:04:56 K. Aylward We are going to tune in online. Billy wants to hear the capital part. We have training at 1:30, but we can listen to it.

2:05:03 Chair Ellis Okay.

2:05:03 N. Cozine The *Fuller* update. We had spoken about the *Fuller* at an earlier meeting. This is the case that triggers constitutional protections in certain violation cases. It is still hanging out there.

It has been fairly manageable from a contracting standpoint. The district attorney's office did end up filing an appeal on that case. That appeal is pending. They also in the intervening time had several additional cases set before a different Multnomah County judge. That judge issued a ruling finding that there were constitutional protections in those violation cases. They were some of the occupy Portland cases. They filed a mandamus in that case and as far as I know that petition is still pending. We don't have an outcome on either of those two fronts but the matters are pending appellate review.

2:06:00 K. Aylward

Do you want a budget update?

2:06:00 N. Cozine

Why don't you go ahead.

2:06:00 K. Aylward

We don't have much news. Current biennium we are obviously still short our \$3.5 million dollars of special session appropriation. We got two million. In my mind there at least \$1.5 sitting out there that should come to us, but in the meantime the expenditure projections have increased quite a bit.

2:06:23 Chair Ellis

For the current biennium.

2:06:24 K. Aylward

For the current biennium. We have informed LFO of what our needs are to finish the current biennium. I doubt it will include testimony. It may involve a letter similar to an E-Board letter. Some kind of documentation and the reasons and why and what the need is. My hope is that even if we don't get everything we need in February, they always have a chance by the end of the biennium when they do your budget bill for next biennium they can put in a little one liner that says, "Oh, and by the way, we are tossing you X amount for 11-13." At that point you have a really much more accurate number of what your needs are. I am hoping to fill in the picture for LFO. The whole thing about if we don't need it we give it back, but if we need it, we need it. I know budgeting is atypical for state agencies. I want there to be that understanding that I don't hold back just in case, but likewise I don't ask for stuff that we don't need. We are working on that understanding.

2:07:47 C. Lazenby

What is driving the cost projections? Is it one particular thing?

2:07:55 K. Aylward

Um, no, I think caseload in Multnomah has picked up. We actually closed out the last round of contracts with overages. Even if the caseload stayed static, if we thought it was going to drop down a little and then it was static, we ended up with contract overages. So when we closed out the last round of contracts, we had to spend a lot of money to say, "Wow. You sure ran over. Here is your money." So that dipped into our resources as well as ongoing stuff.

2:08:28 Chair Ellis

Okay. Mr. Levy.

2:08:32 P. Levy

Last, but maybe not least. I want to talk about a couple of things. One of them is on your agenda. While Jack Morris is still here I wanted to mention that we have completed and provided a final report to our contractors in Clatsop County.

2:08:55 Chair Ellis

Where you had the site review.

2:08:55 P. Levy

We had the site review. I like to call them "Peer Review." A site visit is a part of the review. This was under our new model. This is the first time where we were not giving promises of confidentiality. There was some concern about whether we would get good feedback in our interviews. I think we got pretty good information. The report was well received by our contractors somewhat to our surprise. I think it was beneficial that there was not this shroud of confidentiality. The contractors know that we will be doing a follow up. We will be reporting to the Commission in more detail about these visits. Jack can share his impressions,

but I think the peer review team is really encouraged by the response that we got from our contractors there. Do you want to say anything about that Jack?

- 2:10:11 J. Morris I thought the process went well. I agree with what Paul is saying. I was most impressed by the response that we got from the head of the consortium afterwards. It was a pretty critical report. The impression that I got from him was that he is going to be working real hard to make some pretty substantial changes. I think we are all pretty optimistic about that.
- 2:10:35 P. Levy And he already has made some. In the process of finalizing the report the administrator spent a lot of time on the phone with Billy Strehlow and myself. I have referred him to two other members of our peer review team who have experiences and expertise.
- 2:10:53 Chair Ellis Who are the other two?
- 2:10:53 P. Levy Well, the Chair of the team was Keith Rodgers and Jennifer Nash who heads the consortium in Benton County, and Jennifer Kimble who is a member of a very small consortium in Crook and Jefferson counties.
- 2:11:12 Chair Ellis I just want to say that I really appreciate your contribution and those others who do give their time to help a fellow agency get the benefit of what you can bring.
- 2:11:24 J. Morris You know the people doing the peer reviews get a lot out of it also. I have done three now. I am really glad that I have done them because each time I have learned a lot. It is a reminder of how things are different in different parts of the state. I think sometimes we get more out of it then the people we are reviewing.
- 2:11:45 P. Levy We hear that frequently and it is not as though we don't enjoy ourselves during our reviews either. We will share with you at another meeting. We are not really sure how we are going to do this. One thought was to actually have you come to Clatsop County. I will also say that ...
- 2:12:05 Chair Ellis I am a taxpayer there so it is alright.
- 2:12:07 P. Levy Because the reports are no longer shielded from public disclosure the presiding judge last week asked for a copy. We provided it to him.
- 2:12:22 Chair Ellis Anybody with the initials JM ask for a copy?
- 2:12:38 P. Levy No, but he is welcome to have it if he asked. We met with him and his deputies and it was a good meeting. We got good information from him. We will have more on that. I should also say that our report touched on most of the major concerns of the Commission. Representation of delinquency cases. High level of waiver in the appointment of counsel. Counsel at first appearances at shelter hearing and quality assurance.
- 2:13:15 Chair Ellis They had an issue with early disposition in Clatsop County that we looked at three years ago. How is that coming?
- 2:13:25 P. Levy When you looked at that in 2007.
- 2:13:30 Chair Ellis Okay. Six years ago.
- 2:13:31 P. Levy The contractors were not willing to participate in early disposition programs because they felt that they were being asked to provide something less than full representation. They are still of that view. There is not a traditional early disposition program there. In fact the drug court is staffed by a non-contractor. Not much has changed. When you see our report you will see

that our first conclusion was not much had changed in the couple of years ago. Real quickly we are in the middle of our sixth annual Statewide Public Defense Performance Survey where we ask judges from all over the state, all the judges, to give us feedback about public defense along with prosecutors and Citizen Review Board coordinators and Juvenile Department directors. We will have a report on that in March. The agenda item here that is mentioned, as you will recall, last year we began a review of death penalty contractors and we looked specifically at five. One of the questions was how will we follow up that effort and what will we be doing with the remainder of the contractors. One of the recommendations of that report is that we change, fairly significantly, the way we review and approve lawyers to do capital defense. We have drafted and will be proposed to the Commission a fairly radical change in how we review and approve lawyers to death penalty defense at all levels, trial, post conviction, and appellate. What we are likely to be proposing to the Commission as it is now drafted actually involves a process that we will be asking all lawyers, including current contractors, to provide us the very same information that we asked the five contractors to provide in our review of them. We have a meeting scheduled next month with our peer panel to go over this proposal to get their input and some refinements and suggestions. Then we will be bringing it to you. It changes how we look at lawyers now where - our process now and I don't think I have shared it with you. We say check a box to tell us you are qualified and tell us you are qualified promises that you are qualified. That is all we ask in addition to some questions like do you have a criminal record and the like. Our new process will really be asking lawyers to demonstrate that they have met our minimum qualification. That they tell us about the five felony trials or the homicide trials or the murder trials and that they provide references and writing samples. They do a number of other things that we asked the five lawyers to do when we reviewed them last year. You will have that proposal at our next meeting hopefully with the review and the blessing of our peer panel. Real quickly on the death penalty two other things. As you recall I reported to you on our ongoing efforts to decline an effort to pay for Gary Haugen's lawyer in his effort to fight the Governor's reprieve in a civil declaratory judgment action. We are all for Mr. Haugen having representation at trial level, post conviction, direct appeal, but we did not pay for his lawyer in the effort to challenge the Governor's reprieve. It is a civil matter. There is no right to appointed counsel. The trial court agreed with us on mandamus. The Oregon Supreme Court agreed with us. The lawyer filed a cert petition in the U.S. Supreme Court. I wish I could say that they agreed with us, but they did deny cert a couple of weeks ago on that.

- 2:18:35 Chair Ellis That seemed like an improbable petition.
- 2:18:40 P. Levy We made the decision to not respond to the cert petition which I think was the correct decision to make.
- 2:18:55 Chair Ellis Right. You want it to look very low key.
- 2:18:59 P. Levy He made an excellent case in his cert petition for why it should not be granted. He pointed out, rightfully, that it was a unique question and unlikely to recur.
- 2:19:11 Chair Ellis Very little risk of a circuit split on that one.
- 2:19:15 P. Levy You had a report a couple of meetings ago about our work in death penalty PCR and the great success that petitioners have had, including the petitioner represented by Commissioner Ramfjord and other Stoel Rives lawyers. Just yesterday Senior Judge Dickey in Marion County granted guilt phase relief and new trial on a death penalty PCR in a very difficult case. As my van mate a Department of Justice lawyer said they won one and lost five on these.
- 2:20:05 Hon. Elizabeth Welch That is impressive.
- 2:20:05 Chair Ellis Anything else?

- 2:20:05 N. Cozine I wanted to follow up just for a moment on the Clatsop County peer review. Paul and Kathryn and I met with analysts last week, week before, to talk about various quality assurance efforts that we make. One of the ideas that emerged from that meeting was the concept of actually using the peer review as the first level of contact with a county, but then having something that is like a service delivery review six months later. What we find is that when we do a service delivery review and then we don't return for quite some time, sometimes when we return nothing has changed and the same is true of peer reviews. We go and do one and then we come back and some of the same issues still exist.
- 2:20:55 Chair Ellis The peer review is only advisory.
- 2:21:00 N. Cozine Which is absolutely true. So the idea emerged that we have a peer review. The report issues and the provider has some time to respond to that and then approximately six months later the Commission goes for a visit. If there are remaining issues that need to be addressed the Commission then has the opportunity to address those issues. We have our first quarterly meeting of the Public Defense Advisory Group meeting this Friday. We thought we would bring this concept to that group and get their feedback, but I wanted you to know that that was something we would be discussing and perhaps you have thoughts on that type of a process change.
- 2:21:36 P. Ramfjord Do you have some sense whether there is a different level of communication between providers in the peer review versus the service delivery review? Are they more open to talking in a peer review setting? Less likely to talk?
- 2:21:54 P. Levy I think that we get better information in the peer reviews. We have lawyers like Jack and the other that I mentioned who are doing the work, talking with people who would be their counterparts or colleagues in their communities, and can really drill down on the quality of representation. There is still this boilerplate language, I think, in your service delivery reviews that say that we are not looking at the quality of representation. We are looking at the structure of it. That probably hasn't been true since the beginning. We are very purposely looking at the quality of representation and people tell us about that. In Linn County you didn't get that. You got a comment from the administrator that ...
- 2:22:54 Chair Ellis He had two people he was looking at.
- 2:22:56 P. Levy They remarked to Commissioner Welch that they have been watching these people for a long time. You have to do more than just watch if you have lawyers who aren't doing the job well. I think you will see with this peer review it may be considered advisory, but the administrator right now is very concerned about what it says and what it might mean for his contract. We have recommendations to OPDS and we have had recommendations in peer reviews to the Commission. I think we get good information through that process.
- 2:23:42 N. Cozine Commissioner Ramfjord, historically those peer review reports were confidential. So they weren't shared with the Commission. They weren't even shared necessarily with the analyst who contracted with that county. The idea by somewhat merging these two difference processes would be you would get an in depth look at quality issues and then you follow up with a system delivery review that would give you the opportunity to consider those quality issues as you looked at structure. I think the concept would be that when you do go back six months later you do have interviews so the Commission still gets a report on this was what was happening six months ago. Here is where we are now.
- 2:24:33 Chair Ellis What I like about it is the likelihood of someone changing is so much stronger if you have a deadline and a group coming in. You know you have to report and you know it is going to be public. It is just a great behavior modification pressure.

2:24:55 Hon. Elizabeth Welch One would hope.

2:24:55 N. Cozine So we will talk with out Public Defense Advisory Group and we will let you know what their thoughts are on making this kind of change.

2:25:05 Chair Ellis Okay. Anything else today?

2:25:09 N. Cozine Not for today unless you have questions for us.

2:25:11 Chair Ellis Anybody else have something for the good of the order?

2:25:14 Hon. Elizabeth Welch I do. I assume most everybody knows that they should have read a book by Jeffrey Toobin called "The Nine." It is about five years old and it is a fabulous book. There is a new one called "The Oath" that he wrote. It just came out and it is even better. It has some pretty remarkable stuff in it. I would recommend it very highly. It is a real experience to read it. It is talking about the current composition of the Supreme Court and has some very interesting and surprising stuff to say about both Roberts and Clarence Thomas. Very provocative, I promise.

2:25:55 Chair Ellis If you are interested in history in that same institution "Scorpions" is an absolutely fabulous book. Back in the 30's.

2:26:07 Hon. Elizabeth Welch When the lawyers were talking about how hard it was to have the less experienced prosecutor get paid twice as much as the more experienced defender, and there was a passing reference to the compensation of judges, I just wanted to say multiple that by heaven knows what when you have a judge who makes less money than anybody else in the room. I recently had occasion to talk to one of my fellow ex-judges, former judges, who was doing a lot of mediation and charging rather well for his time. He and I were having a modest debate about the variety of that. He said, "It is about time. It is about time that I made some good money." That kind of worries me a little bit.

2:26:59 Chair Ellis I think it is month after next is the 50th anniversary of *Gideon v. Wainwright*. You all are encouraged to read your Oregon State Bar bulletin. Lane is quoted at some length in there.

2:27:17 L. Borg March 18, OCDLA is sponsoring a legislative drive in at the Capitol in room 50. We are going to have a line up. I am hoping we will get Justice Balmer there. If you are around.

2:27:31 Chair Ellis It is a drive in not a drive by.

2:27:36 L. Borg The actually anniversary is the 18th.

2:27:43 C. Lazenby Adding to people's reading list, I went to a presentation in Portland last week by Michelle Alexander who has written a book called "The New Jim Crow." It is about the over representation of African-Americans in the prison system and how it is really not an accident. It is quite a good read.

2:28:04 Chair Ellis Okay. Anything else? Is there a motion to adjourn?
MOTION: John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Attachment 2

**Public Defense Services Commission
Service Delivery Plan for Linn County
Draft Final Report
(March 2013)**

Introduction

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

The service delivery planning process is a multi-step endeavor, which begins with an investigation of the jurisdiction selected by the PDSC. The investigation is completed by the Office of Public Defense Services (OPDS). 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 regarding the initial findings within a particular area.

PDSC's investigations of local delivery systems in counties or judicial districts across the state serve another important function. They provide useful information to public officials and other stakeholders in a local justice system about the condition and effectiveness of that system. The Commission has discovered that "holding a mirror up" to local justice systems for all the community to see can, without any further action by the Commission, create momentum for local reassessments and improvements.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district 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 for a particular area.

This report includes the results of OPDS's preliminary investigation into the

conditions of the public defense system in Linn County.

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

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

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

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

Background and context to the service delivery planning process

The 2001 legislation establishing the 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, now called the Public Defense 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.

The Public Defense Advisory Group is also responsible for planning and implementing "peer reviews," an evaluation or assessment process for all public defense contractors. This process is aimed at improving the internal operations and management practices of offices that provide public defense, and to improving the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and attorneys have visited contractors in Benton, Clackamas, Columbia, Crook, Deschutes, Douglas, Jackson, Jefferson, Klamath, Lake, Lane, Lincoln, Linn, Multnomah, Umatilla, Washington, Yamhill, and Clatsop counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

Another area of practice in which significant concerns about quality of representation have been raised by the Oregon State Bar and others is post conviction relief cases. In March 2008 PDSC heard from judges, the Department of Justice and a number of attorneys whose practice includes post conviction relief about the need for improvement in the quality of representation being provided by public defense attorneys. A work group was convened by the bar at the request of the PDSC to create performance standards for attorneys in these cases. Those standards have now been approved by the bar's Board of Governors and adopted by the PDSC as the standards to be observed by court-appointed attorneys. The work group also made additional recommendations to the PDSC for improving services in this area of practice. Those recommendations were presented to the PDSC at its March 2009 meeting. The PDSC reviewed a service delivery plan for post conviction relief cases at the April 16, 2009, and June 18, 2009, PDSC meetings.

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. In 2012, the PDSC again began a review of death penalty providers, beginning with five providers. The process developed during that review will be applied to the remaining death penalty providers as part of the evaluation of the qualifications of each individual seeking a death penalty contract for the 2014 contracting cycle.

"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 the PDSC, whose volunteer members are

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.,

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 the 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 attorneys 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 Public Defense Advisory Group and others, is usually in the best position to address performance issues.

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

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

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

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

Spangenberg and Beeman, "Indigent Defense Systems in the United States," 58 Law and Contemporary Problems 31-49 (1995).

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 attorneys 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 ten 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 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

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

³ *Id.*

PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few attorneys 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 attorneys and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's attorneys retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

In addition to the access to experienced public defense attorneys, 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 Oregon 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

attorneys 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 Oregon 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 of aggravated murder cases and in geographic areas of the state with a limited supply of qualified attorneys. In light of PDSC's ability to select and evaluate individual attorneys and the one-on-one relationship and direct lines of communications inherent in such an arrangement, the Commission can

ensure meaningful administrative oversight, training and quality control through contracts with individual attorneys. Those advantages obviously diminish as the number of attorneys under contract with PDSC and the associated administrative burdens on OPDS increase.

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

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

PDSC’s Preliminary Investigation in Linn County

In November 2012 Public Defense Services Commissioner, John Potter, OPDS Executive Director, Nancy Cozine, and OPDS Analyst, Shelley Winn, visited Linn County and met with the following stakeholders:

- Presiding Judge Daniel R. Murphy, Judge Carol R. Bispham, Judge James C. Egan, Judge Thomas A. McHill, and Judge DeAnn L. Novotny, and court staff
- Representative Andy Olson
- Senator Betsy Close
- District Attorney Jason Carlile
- Sheriff Tim Mueller, and his deputies and staff
- Ric Bergey, Director, Adult Parole and Probation, & probation staff
- Lisa Robinson, Supervisor, Probation Services, Juvenile Department
- Marco Benavides, DHS District Manager, and John Meade DHS/Child Welfare Program Manager
- Lene Garret, Executive Director, CASA
- Roger Reid, Administrator, Linn County Legal Defense Corporation, and all members of the consortium
- Melissa Riddell, Administrator, Linn County Juvenile Defense Corporation, and all members of the consortium

In addition, Nancy Cozine later met in person with Ryan Phillips and Kristen Williams, Assistant Attorneys General, Oregon Department of Justice, Child

Advocacy Section (assigned to Linn County), and with Erin White, with the Citizen Review Board.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for a particular area and OPDS is grateful to the stakeholders in Linn County for their contributions to this report.

OPDS's Initial Findings in Linn County

The Circuit Court

There are five judges in Linn County: Presiding Judge Daniel R. Murphy, Judge Carol R. Bispham, Judge James C. Egan, Judge Thomas A. McHill, and Judge DeAnn L. Novotny. The court had a pro tem judge, but the position was cut during the February 2012 budget reductions.

Linn County Circuit Court uses a centralized docketing system, but each judge has some time in the day to schedule specific matters on their own dockets. The judges hear a mix of cases, though some dockets are assigned to specific judges. Judge Egan hears delinquency hearings, and Judges Murphy and Novotny hear juvenile dependency hearings. All of the judges hear delinquency detention hearings and dependency shelter hearings. Other dockets rotate between the judges. Linn County Circuit Court employs a "one family, one judge" rule, assigning family members to the same judge whenever possible.

There is a criminal drug court in Linn County. Judge McCormick (now retired) was the judge when it started, Judge Murphy presided over the drug court when Judge McCormick left; Judge McHill is the current drug court judge. The drug court has a combined population of "traditional" participants, who have simple possession of a controlled substance (PCS) charges, and "Measure 57" property offenders, who have much more extensive criminal histories. Measure 57 participants are sent to prison if they are not successful in drug court. All parties report that the mix of these two populations has made it more challenging to get people interested in participating in drug court, especially those with PCS charges. The participant population has therefore shifted, with the majority of participants facing Measure 57 sentences. Potential Measure 57 participants are initially identified by the District Attorney's Office. The probation officer, treatment representative, and defense attorney discuss the candidate and then vote on whether to accept the candidate. Warrants are issued within 15 minutes of a missed treatment appointment. The court employs swift and certain sanctions, utilizing many non-jail sanctions. Alternative sanctions include work crew, community service, journals (homework), support groups, day reporting center, drug tests, and job searches. Participants are offered assistance with housing, dental care, mental health counseling, treatment, food, clothes, GED,

and rent subsidies. The drug court team would like to start including a medication component, but they need additional funding. The drug court team had a retreat in October, and will need to address alternative funding options for the next biennium.

Linn County has three additional treatment or accountability courts. The Juvenile Accountability Court (JAC Court) is designed for high risk kids. It is considered a last step before commitment to OYA. This program has improved over the years, and is seen as a success. There is also a Family Treatment Court (FTC) which meets every Friday. This is for the parents of children who have been removed by DHS for abuse or neglect allegations. All defense attorneys appear for these FTC appearances. The FTC has no funding and relies on existing funding for treatment through DHS. Another key element of the FTC is the outreach workers, who are paid for by Linn County Drug and Alcohol and DHS. The FTC has been in existence since 2008 and has demonstrated remarkable success. The recidivism rate for those completing the program is less than ten percent. Finally, there is a domestic violence court in which defendants are ordered to participate. This program is reported to have declining participation, and is defined by the court as an accountability court and not a treatment court. It offers batterer intervention services but there is no probation officer involvement in the court, and very few victim services. It is also reported that because there isn't a competitive market for batterer's intervention services, there is no alternative if the provider isn't a good fit.

System partners report that the trial rate seems low in Linn County. The 2011 statewide "cases tried analysis" reveals a felony case trial rate of 2.8 for Linn County, compared to 4.4 statewide. Linn County's misdemeanor trial rate of 3.5 is closer to the statewide rate of 3.8. Those interviewed speculated that the lower trial rate is a result of the court's policy against generous day of trial plea offers. The district attorney's office makes its best plea offer at the start of the case, and the offers get progressively worse unless new information is discovered. Parties also report that cases are dismissed at the pretrial phase, rather than on the day of trial, which also encourages settlement before the day of trial.

Linn County Cases Tried Analysis

TYPE OF CASE	JUL 01 TO DEC 31, 2011						JAN 01 TO DEC 31, 2011					
	Total Cases Term.	Total Trials	%Term by Trial	Court Trials	Jury Trials	Ave Age	Total Cases Term.	Total Trials	%Term by Trial	Court Trials	Jury Trials	Ave Age
Felony	519	17	3.3	5	12	232.1	1,053	30	2.8	13	17	225.5
Misdemeanor	513	16	3.1	9	7	136.8	1,136	40	3.5	16	24	184.7
Violation	2,437	219	9.0	219	0	134.0	4,986	404	8.1	404	0	118.8
Subtotal	3,469	252	7.3	233	19	140.8	7,175	474	6.6	433	41	131.1

Statewide Cases Tried Analysis

TYPE OF CASE	JUL 01 TO DEC 31, 2011						JAN 01 TO DEC 31, 2011					
	Total Cases Term.	Total Trials	%Term by Trial	Court Trials	Jury Trials	Ave Age	Total Cases Term.	Total Trials	%Term by Trial	Court Trials	Jury Trials	Ave Age
Felony	14,617	652	4.5	232	420	210.3	29,967	1,320	4.4	467	853	207.6
Misdemeanor	30,505	1,137	3.7	510	627	156.9	61,956	2,352	3.8	1,069	1,283	179.1
Violation	111,211	5,183	4.7	5,181	2	100.6	217,690	10,160	4.7	10,154	6	170.7
Subtotal	156,333	6,972	4.5	5,923	1,049	120.0	309,613	13,832	4.5	11,690	2,142	175.6

Linn County Circuit Court will be transitioning to the new Tyler Odyssey eCourt system in December of this year, days before the Commission's meeting in Albany. The new system will allow for electronic transfer of court documents, and system partners will be able to view case files electronically. New physical court files will not be created once the Odyssey program is installed; old files are already being scanned so that they can be stored in the new system. The court will be sharing Tyler Odyssey demonstration videos with court staff and system partners in preparation for the conversion.

County Challenges

Most individuals interviewed indicated that there are not enough treatment resources in the county. Like other counties, the statewide economic circumstances have impacted Linn County's ability to establish and maintain a more expansive list of treatment program options. There is some lack of faith in the drug and alcohol assessments, and some preference for private providers, many of whom are not available to those who qualify for court appointed counsel. There are, however, more resources available to those who are participating in treatment courts, and the probation office is able to allocate some of its resources to support treatment programs. There are no residential treatment beds in Linn County.

The Sheriff's office was also affected by the economic downturn and reduced its staff through 13 layoffs in February 2012, resulting in a 25% reduction in available jail beds. Defense providers indicate that though jail staff works very hard to make clients available, it is difficult to see clients due to space constraints at the jail. There are three non-contact visit booths, but the conversations are not private, and the rooms are often in use by DHS caseworkers, attorneys, and others. Telephone contact is easier, but in person visits are often necessary. Contact visits must be reserved in advance, and are strongly discouraged, as inmates must have a full body search before and after the visit.

Availability of qualified interpreters is another challenge. One person interviewed indicated that there is a large Hispanic population in Linn County, and speculated that this population might be overrepresented in Linn County's criminal justice system. No statistics were found regarding the percent of cases in Linn County in which the defendant is Hispanic. According to the U.S. Census Bureau's "State and County QuickFacts",⁴ approximately eight percent of the population in Linn County is of Hispanic or Latino origin. When interpreters aren't available, the court must use interpreters over the telephone, which can be very difficult.

⁴ <http://quickfacts.census.gov/qfd/states/41/41043.html>

Collaborative Efforts in Criminal and Juvenile Justice

There is a Local Public Safety Coordinating Counsel, coordinated by Presiding Judge Murphy; it meets a few times each year. One County Commissioner, Will Tucker, is reported to observe court on a regular basis. Though Linn County does not have a parole and probation office that is county funded (it receives funding directly from the Department of Corrections), the LPSCC is still seen as a forum for addressing system resource issues, such as jail transports and visits, use of jail beds for inmates in state custody, and court docket issues.

Judges host regular meetings with system partners. Judge Murphy meets with the defense bar once each month, and also meets regularly with Melissa Riddell, the contract administrator for the juvenile consortium group. He facilitates two dependency work group meetings. Judge Egan facilitates a delinquency meeting approximately once each month and asks his judicial assistant to attend the meetings, which is reported as being very helpful. Judge Bispham hosts quarterly Domestic Violence Court meetings.

One notable comment made by almost everyone interviewed was that the court staff in Linn County is remarkably helpful, and that their efforts make a big difference in keeping the system working smoothly.

The Linn County justice system has a collegial prosecution and defense bar, members of which are able to socialize comfortably outside of the work environment. Both prosecutors and defense attorneys are reported as getting along well with each other and the court, and they regularly participate in community and Linn-Benton Bar Association activities together.

Procedure in Criminal Cases

Arraignments are held at the same time each week. Litigants who qualify for court appointed counsel are assigned an attorney, but attorneys are not present at arraignment unless privately retained. Defendants are told to contact their attorney. The court tries to provide defendants who have a pending case and are being arraigned on new charges with the same attorney on both cases. Attorneys usually receive notice of the appointment within a day or two of arraignment.

As mentioned earlier, the court employs what they call “The No-Negotiation” rule, which discourages settlement after the trial date has been set. The pretrial conference is scheduled approximately 60 days after arraignment. Cases can be settled after the pretrial conference with a plea agreement that is better than the original plea offer only if new information justifies the change in position.

Linn County District Attorney Jason Carlile is retiring at the end of the year. Douglas Marteeny will start as the newly elected District Attorney in January 2013. Those who work with the District Attorney's (DA's) office expect it to be a smooth transition, as Mr. Marteeny has worked closely with District Attorney Carlile for many years and they have similar philosophies. The DA's Office uses a vertical prosecution model, meaning each deputy district attorney is able to decide what cases to charge, what charges to include, and the deputy district attorney keeps those cases throughout the life of the case. There are three small teams with a senior district attorney supervising each team. This model allows the deputy and senior district attorneys to make reasonable offers at the outset of each case, and helps parties resolve cases at the earliest opportunity. There is some specialization in the office, with a domestic violation deputy DA, and a few drug deputies. The District Attorney's office does not allow DA diversions or agree to deferred sentences.

The District Attorney reports that domestic violence charges are the most common charges issued, and sex offenses are the second most common. Domestic violence cases are one exception to the rule against day of trial settlement – they often settle on the day of trial, and usually settle within 28 days. There was concern expressed about the failure to appear rate being high, especially in Domestic Violence court. Possession of methamphetamine is also common in Linn County. DUIL charges rarely go to trial because the BAC levels tend to be very high.

The District Attorney's office is in the process of moving to an electronic discovery system. The process is expected to be completed by the time of the Commission's visit in December. Discovery will be available to defense attorneys through a website where they will be able to "harvest" the materials. The District Attorney's office says they will keep discovery charges the same at the beginning, but will reconsider later.

Procedure in Juvenile Cases

Dependency Cases

As in all other case types, attorneys are not present at shelter hearings unless privately retained or the attorney is already representing the client on a prior petition. The court assigns the attorney based upon a list provided to the court. During the shelter hearing, the court requests that the clerk have the parents sworn under oath, advises that they should not speak about the incidents that brought their child or children into care, and then asks for their positions regarding placement of the child or children. The parents are also asked about Indian heritage. A settlement conference is typically scheduled two to four weeks after the shelter hearing, though at the time of the preliminary visit they were being set approximately six to seven weeks after the initial appearance.

The attorney usually receives notice of the appointment within a day or two after the shelter hearing. Consortium members adjust assignments as needed to address conflict issues. Attorneys rarely receive discovery before the attorney's first meeting with the client, and sometimes not until a day or two before the settlement conference. In most cases, children are in substitute care during this time. The Department of Human Services (DHS) indicates that they are unable to provide discovery earlier due to work load issues, and this has reportedly been a problem for many years. DHS is moving to an electronic discovery model in December and is hopeful that this will improve their ability to share discovery at an earlier date.

Linn County has an active CASA Program, with 85 volunteer CASAs. All CASA staff members have prior CASA experience. The program is widely viewed as having made significant improvements during the last two years under the leadership of Lene Garrett.

The county does rely on Citizen Review Board (CRB) hearings, and juvenile consortium attorneys regularly attend, though there are scheduling conflicts for the attorneys. Attorneys also attend family decision meetings (FDMs) unless they already have a court appearance. Attorneys routinely ask that FDMs be rescheduled when this happens, so that they can be with their client during the meeting.

DHS reports that the number of cases in which the court takes jurisdiction is actually lower in Linn County than in other jurisdictions. Linn County DHS has five mental health workers on staff, as well as a domestic violence coordinator, and has offered wrap around services for three to four years. System partners seem to agree that the county would benefit from an increased focus on preventing removal, as once a child is removed, it can be very difficult to get the child (or children) returned home. Getting parents into substance abuse treatment is difficult. It is offered at the shelter hearing, but if it doesn't happen right away, it often doesn't happen until late in the case. Participation in family court does help parents gain access to services.

Parties report that parents and children need more visitation, and that there is very limited visitation early in the case. As in other counties, transportation resources are a barrier. Attorneys are requesting alternative visitation utilizing non-DHS transportation and supervision. DHS has visitation guidelines that require more visit hours for children under the age of five, and less for those over the age of five, but recent budget cuts have curtailed the agency's visitation resources, and hampered its ability to meet their own requirements.

There is also a need for improved transition services. Families have little support when children return home, and there are limited supportive services for parents in recovery during the time children are returned to their parent's care.

The county is also reportedly seeing an increase in “crossover kids” – kids who are in the dependency system and end up in the delinquency system. The CASA program is seeing this so frequently that they are now asking the juvenile department to help train CASAs. Some speculate that this is due to a lack of quality, appropriate foster care placements, a lack of training and supportive services for foster care providers, and a lack of services for children in the dependency system.

Delinquency Cases

Judge Egan has been the juvenile delinquency judge for eighteen months, but will soon be leaving for a position on the Oregon Court of Appeals. As in adult criminal cases, attorneys are not present at the first appearance. The Juvenile Department discusses the right to counsel with kids before court starts, and then advises the court if the child wishes to have an attorney appointed. Judge Egan makes a statement at start of court about the right to counsel, and tells kids to request that an attorney be appointed if they wish to be represented. Generally, attorneys are appointed in felony cases, but in probation violation proceedings attorneys are appointed only if there is a likelihood of an out of home placement or commitment to the Oregon Youth Authority (OYA).

Torri Lynn is the Director of the Linn County Juvenile Department, which has nine juvenile court counselors (JCCs) on staff. Two counselors are assigned to work with kids with sex abuse adjudications, as there are a high number of referrals for sex offenses; the youngest child referred was 11 years old. Treatment resources are also limited in this area. Unless kids are on the Oregon Health Plan, there is no outpatient sex offender treatment available in Linn County. The Juvenile Department must refer kids to outpatient in Benton County, and it can be very difficult for families to get their kids to treatment without impacting employment or other responsibilities. The Juvenile Department has a good working relationship with defense providers and others in the delinquency system, views its role as helping youth and families achieve positive change, and uses a risk-based model of service to focus available resources on those youth who are most likely to recidivate. The Juvenile Department also operates a twenty bed juvenile detention facility.

The court does allow alternative dispositions, and the Juvenile Department is often able to support motions for alternative disposition. Attorneys are litigating motions when the juvenile department is not in support. The Juvenile Department indicates that Linn County is leading the state in competency evaluations. When a child is unable to aid and assist, the case is sometimes dismissed, and other times there is a state evaluation and a special placement. The Juvenile Department is concerned about the possibility of dismissal followed by future criminal conduct, so prefers to find a way to offer services if possible.

The District Attorney's office does provide a deputy for juvenile delinquency proceedings. This assignment rotates on a regular basis. Parties report that it is helpful to have consistency in representation from the DA's office, as the learning curve is steep and frequent changes make it difficult to achieve consistent resolutions.

Kids appearing before the court are not shackled unless there is a documented reason to do so. Very few juveniles are held in adult facilities, but that trend was reported as changing recently, with one sixteen year old developmentally disabled girl reportedly being held in an adult facility.

Civil Commitment Cases

There are very few civil commitment cases in Linn County. People who are undergoing a civil commitment proceeding are housed at the Good Samaritan facility in Corvallis.

Public Defense Providers in Linn County

PDSC contracts with two providers for non-death penalty cases in Linn County: the Linn County Legal Defense Corporation (LCLDC), and the Linn County Juvenile Defense Corporation. PDSC does not have a provider in Linn County to provide representation in capital cases.

LCLDC has ten members. The contract administrator, Roger Reid, does not accept appointments, but remains available to the court and others when issues need to be addressed. The consortium began establishing a board in 2011, but is still in the process of adding members, and continues to work out other details. Mr. Reid indicates that board insurance has been a barrier, and that the consortium will request additional funds to cover this expense during the next contract cycle. Tim Felling, one of the consortium members, has been drafting a best practices manual and a client feedback form. Consortium members have a "split the check" model; they strongly prefer this, as each member can count on a consistent monthly income. LCLDC added a new member this year, and assigned mentors (see Attachment A) from the consortium to help with training. The consortium hopes to increase its focus on succession planning, and to address concerns regarding a lack of diversity within its consortium as part of that process.

The Linn County Juvenile Defense Corporation has six members. Melissa Riddell is the contract administrator. Ms. Riddell began as contract administrator in 2011, taking the reins from Jody Meeker, who had been the administrator for the previous eleven years. Reports from system partners indicate that the transition has gone smoothly, and that the consortium is functioning well.

Linn County Juvenile Defense Corporation does have a Board of Directors with two outside board members, one of whom is a municipal court judge. The board meets annually, at a minimum, but more often when necessary. The board is reported to be very engaged and supportive. Ms. Riddell meets with consortium board members, consortium attorneys, and the Presiding Judge, on a regular basis, and fully addresses any complaints raised regarding the representation provided by consortium members.

The consortium sends all clients (kids age 12 and up) an evaluation form with a self-addressed, stamped envelope, when the case closes. The responses are sent to Ms. Riddell, then scanned and sent to the attorney. The return rate is 10-20%. Consortium members meet at least quarterly, but were meeting monthly during the transition from the previous to current contract administrator. The consortium does offer training to its members. They recently provided a two day training for all members, and they provide new members with training, four to five months of observation, and informal feedback from other consortium members. All members are expected to meet OPDS CLE requirements. The group plans to continue development and documentation of the training and mentoring process. The Linn County Juvenile Defense Corporation Board of Directors, By-Laws, Independent Contractor Agreement, Client Evaluation Form, and Complaint Form, are included as Attachment B.

Comments from Linn County Stakeholders Regarding Providers

Criminal Cases

Overall, LCLDC is described as providing competent representation. Attorneys are reported as regularly calling and visiting in-custody clients on weekends and in the evenings, communicating with each other and the Presiding Judge regarding case distribution so that assignments can be adjusted if necessary, behaving in a professional manner and avoiding interpersonal conflicts that would interfere with resolving cases, and requesting and receiving authorization for investigation and other professional services. LCLDC attorneys are considered trustworthy by the court and their adversaries.

Some providers are described as doing a “very good job,” but there are inconsistencies. Though there is no systematic way of measuring quality of services, there are attorneys who tend to meet and consult with clients for the first time in the courtroom or courthouse hallways on the day of the settlement conference. Others in the system express some concern about this. They recognize that there are times when it is difficult for attorneys to contact clients, but their observation is that there are certain attorneys who are more proactive, and work harder to meet their clients in advance of court. Those attorneys tend to be prepared for court on the day of the settlement conference, have excellent

client management skills, and their clients rarely request a new attorney. There are also attorneys who need to improve their client communication skills. Many clients are observed as having limited verbal skills, and their attorneys forget to modify the language they are using so that clients can understand.

LCLDC attorneys are described as being available for court hearings, though it is more difficult when providers have a significant number of privately retained cases.

Representation of Parents

The Linn County Juvenile Defense Corporation attorneys are described as being very competent, having made significant improvements in the last few years. Some of the members are described as providing representation that is superior to what is found in many other Oregon counties. Attorneys in the consortium are described as being proactive, advocating well, and cooperating with other system partners to avoid unnecessary delays. For example, when the CRB is scheduling a hearing, the attorneys are regularly contacting the CRB when an interpreter is required. This is something done by DHS in other counties, but has become routine for Linn County attorneys because they want to avoid having the reviews rescheduled. Though a few attorneys are described as not being the strongest advocates for their clients, the majority of consortium members are described as being among the best at representing children and parents.

The consortium is still adjusting to the membership and contract administration changes, but the changes are viewed very positively. The attorneys are described by everyone as being very committed, rarely taking vacation, and constantly striving to make improvements. Attorneys are also described as being more settlement oriented than in the past, but this is not viewed as a negative – just something to monitor. Others describe parents' attorneys as zealous advocates who sometimes let their advocacy get in the way of DHS or CASA access to parents or parents' treatment records. All parties note an appreciation for discussion around these topics, with mutual respect for the roles that each other play in the dependency system.

While the Linn County Juvenile Defense Corporation attorneys are described as being very committed and rarely taking vacations, they are also described as having limited availability. The court and others report that it is difficult to work around attorney schedule conflicts, which makes it difficult to schedule court hearings, FDMs, CRBs, and meetings with DHS and CASA. Some participants in the system feel that the scheduling conflicts can extend the length of time a child spends in care simply because critical meetings happen later than they should due to attorneys' unavailability. Consortium members agree that scheduling is difficult, but note that this is also a result of adjusting to the changes within the consortium, scheduling around court closures (holidays and

furlough days), limited docket time for juvenile matters, and natural challenges associated with scheduling when there are multiple parties in a case.

Representation of Children

The Linn County Juvenile Defense Corporation is also providing competent representation for child clients. There were concerns about specific attorneys not visiting child clients, but those concerns have been and are being addressed by the contract administrator. The board was made aware of the concerns, and was supportive of the contract administrator's efforts to rectify the situation. Some parties suspect that there are still attorneys who are not seeing their child clients, but they seem to have confidence that the issue is being addressed within the consortium. Linn County Juvenile Defense Corporation attorneys were specifically commended by some as taking strong positions when representing children, and being leaders in the case planning.

Delinquency Cases

Linn County Juvenile Defense Corporation attorneys are reported to be very strong advocates for their juvenile delinquency clients, providing zealous representation, with significant improvement over the last five years. The attorneys have very good working relationships with the court and others in the delinquency system. They meet with clients, and work well with them in all case types. Attorneys regularly request alternative dispositions in sex abuse and other case types, and also provide favorable mitigation information.

OPDS's recommendations for further inquiry at the PDSC Meeting on December 14, 2012

Based on the information provided to OPDS during meetings and telephone conversations with justice system stakeholders, OPDS recommends that the Commission consider the following in developing a service delivery plan for Linn County.

Structure

The current structure, with one consortium providing representation in criminal cases, and another providing representation in juvenile cases, appears to be working satisfactorily. The Commission may wish to hear more from LCLDC regarding its board, and succession planning. Although the Linn County Juvenile Defense Corporation is reported to be doing very good work, there may be a need for additional funding to allow them to hire more attorneys so that attorneys have more time to attend shelter hearings, detention hearings, CRB reviews, and meetings.

Criminal Representation

LCLDC attorneys are reported to be providing competent representation, with some inconsistency in the quality of representation. Concerns expressed related to a perceived high failure to appear rate, particularly in domestic violence cases, a low trial rate in felony cases, lack of client contact prior to the pretrial conference, a lack of training with regard to the use of “plain language,” and a lack of availability among attorneys with a high volume of privately retained work. Some of these factors may be resolved, at least partially, by having attorneys available at arraignments, where they can make initial contact and schedule a time to meet with the client. The lack of a strong board and formalized structure could make it more difficult for the consortium to maintain quality representation as time passes and current consortium members retire.

Juvenile Representation

As noted above, on the whole, the Linn County Juvenile Defense Corporation provides excellent representation. The consortium would benefit from adding an attorney or two if that is what is necessary to provide representation at shelter and detention hearings. The consortium also noted interest in having a social worker as part of the consortium. While the stresses of high caseloads are understood, the consortium should be raising these issues with PDSC to secure the funding necessary to provide representation at all critical meetings and court hearings, including shelter hearings.

Attorney Advocacy at Initial Court Appearance

There are many standards of representation available to guide practitioners regarding the timing of appointment of counsel. Compliance with these standards requires that the attorney be present at initial court appearances.⁵

The Office of Public Defense Services, *Best Practices for Oregon Public Defense Providers*, includes Best Practice IV, which addresses case assignment, says: *Providers should establish, in collaboration with the courts and others, a system for receiving court appointments and assigning counsel that assures high quality representation from a client's first appearance in court to the final disposition of the judicial proceeding.*

The Oregon State Bar's Specific Standards for Representation in Criminal and Juvenile Delinquency Cases includes Standard 2.6 - Initial Court Appearances: *A lawyer should make a statement on the record or request that the statement be*

⁵ The best practices and standard outlined here are Oregon-specific. Similar standards have also been adopted by the American Bar Association and other entities.

contained in the order to preserve all of the client's constitutional and statutory rights at initial court appearances.

Implementation

A lawyer should:

1. Promptly advise the client of, and take action to preserve, all constitutional and statutory rights of the client, including the right to remain silent, to file motions challenging the charging instrument, and to enter a plea of not guilty or deny the allegations contained in a delinquency petition and to request a jury trial, when failure to do so may result in the client being precluded from later obtaining such rights.
2. Request a timely preliminary hearing as provided by law or the rules of the court, unless there is a sound tactical reason not to do so.
3. If a preliminary hearing is held, review the allegations, marshal the evidence, and prepare to challenge the state's evidence and arguments.
4. Review probable cause documents and any probable cause arguments, and, if no probable cause is established, move for release of the client or dismissal of the charges if appropriate.
5. Ensure that bail has been set, seek reductions in bail if appropriate, and seek alternative release options.

The Oregon State Bar's Specific Standards of Representation in Juvenile Dependency Cases are similarly instructive. Standard 3.5 contains the obligations of a lawyer regarding shelter hearings and pretrial placements: *When a child has been removed from the parent's home and placed in shelter care, a lawyer should advocate for the placement order and other temporary orders the client desires, unless the client is a child incapable of considered judgment, in which case a lawyer should advocate for the placement order and other temporary orders that are in the best interests of the child.*

Implementation

1. A lawyer should be familiar with statutory and case law that requires DHS-CW to make reasonable efforts or active efforts to prevent removal of a child.
2. A lawyer should be familiar with the types of placements available to children and placement issues, including:
 - a. the impact of removal and placement on the child;
 - b. the necessity of placement;
 - c. specially certified placements for the client;
 - d. relative placement;
 - e. the importance of placing siblings together when appropriate;
 - f. alternatives to placement;
 - g. the appropriateness of the placement;
 - h. the efforts that can be made to ensure a smooth transition to a new placement;
 - i. the effect of the placement on visitation;
 - j. the effect of the placement on service needs of the child or family;

- k. the transracial, transcultural, and language aspects of the placement; and
 - l. placement preferences under the Indian Child Welfare Act.
3. At the shelter care hearing, a lawyer should:
- a. obtain copies of all relevant documents;
 - b. take time to talk to the client, caution the client about self incrimination, and ask for a recess or continuance if necessary;
 - c. if appropriate, assert client's Fifth Amendment and other constitutional rights; and
 - d. assist the client in exercising his or her right to an evidentiary hearing to demonstrate to the court that the child can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process before adjudication;
 - e. when appropriate, present facts and arguments regarding:
 - (1) jurisdictional sufficiency of the petition;
 - (2) appropriateness of venue;
 - (3) adequacy of notice provided to parties, and tribes if applicable, particularly if they are not present;
 - (4) the necessity of shelter care;
 - (5) why continuation of the child in the home would or would not be contrary to the child's welfare or why it is or is not in the best interests and for the welfare of the child that the child be removed from home or continued in care;
 - (6) whether reasonable or active efforts were made to prevent removal;
 - (7) whether reasonable and available services can prevent or eliminate the need to separate the family;
 - (8) whether the placement proposed by DHS-CW is the least disruptive and most family-like setting that meets the needs of the child;
 - (9) the possibility of placement with appropriate noncustodial parents and relatives;
 - (10) a plan for release of the child prior to the jurisdictional hearing;
 - (11) if the child remains in shelter care, arrangements for visits and alternatives to shelter care to be explored such as relative placement, intensive in-home services, and mediation; and
 - (12) applicability of the Indian Child Welfare Act and appropriate parties and tribes to receive notice.
 - f. propose return to parents or placement that is the least restrictive with regard to the client.
4. If a child is returned to parents or placed in shelter care or other state placement, a lawyer for the child should ensure that the child's needs for safety and right to receive treatment are met by the child's caretakers or agencies responsible for the child's care. A lawyer should inform the court,

- DHS-CW, and the caretakers for the child about any medical, psychiatric, or security needs of the client, if directed by the client.
5. A lawyer should request any temporary orders that the client directs or, if representing a child not capable of considered judgment, that are in the best interests of the child, including:
 - a. temporary restraining orders, including orders expelling an allegedly abusive parent from the home;
 - b. orders governing future conduct of the parties, i.e., remaining clean and sober while the child is present, etc.;
 - c. orders for any services agreed-on before adjudication;
 - d. visitation orders that are reasonable and flexible and take into consideration the parties' work and counseling schedules and available transportation and that specify the terms and conditions of visitation;
 - e. orders for the parent or parents to pay child support if appropriate;
 - f. orders for DHS-CW to investigate relatives and friends of the family as potential placements, or to place sibling groups together; and
 - g. orders for the agency to provide appropriate treatment for the child.
 6. A lawyer should consult with the client about transfer of the case to tribal court and take appropriate action as directed by the client.
 7. A lawyer should inform the client of the possibility of a review of the referee's or court's order at the shelter care hearing and the possibility of pursuing a writ of habeas corpus.
 8. If the court sets conditions of the child's placement, a lawyer should explain to the client and any third party the conditions and potential consequences of violating those conditions. A lawyer should seek review of shelter care decisions as appropriate and advise clients or any third parties of changes in conditions for pretrial placement that would be likely to get the court to agree with the client's plan.
 9. A lawyer should ask the court to inquire of parties concerning the paternity of the child and the applicability of the Indian Child Welfare Act.

Testimony at December 14, 2012, PDSC Meeting in Albany, Oregon

Chair Ellis then invited Linn County District Attorney Jason Carlile to share his thoughts. Mr. Carlile started by explaining that he has supported the rule prohibiting negotiations after the trial setting, noting the importance of making decisions early in the life of a case. Mr. Carlile says that he encourages his eleven deputy district attorneys to be realistic with their negotiations in order to be efficient, and that the defense bar seems in general agreement. Mr. Carlile's attorneys engage in a vertical model of prosecution, meaning that the deputy DA assigned to the case handles it from the very beginning to the very end; they know if they don't give a reasonable offer, they will have to try the case. Mr. Carlile has one deputy assigned to juvenile court work, both delinquency and dependency, and two deputy DAs assigned to domestic violence cases, but the rest are generalists.

Mr. Carlile explained that the DV Court started with a federal grant, and that though federal funding stopped, through the courtesy of the defense bar and the court, they have been able to maintain two elements. First, the court has cooperated in getting trials set and tries to close cases within 45 days. The sheriff holds the defendant in jail. Defendants can bail out, but most are conditionally released when they see the judge the next day. This delay eliminates the revolving door of getting out of jail and returning to the house to fight.

Chair Ellis asked Mr. Carlile about the felony trial rate in Linn County. Mr. Carlile explained that the vertical representation model, with early, reasonable offers, and the no-settlement rule help. He also noted that there is open file discovery early in the case, and that there is a high level of trust between the defense bar and his office. Commissioner Ramfjord asked whether other district attorneys around the state employ the same rule. Mr. Carlile indicated that it varies statewide, but his impression is that many counties do not.

Chair Ellis asked Mr. Carlile about his thoughts regarding defense representation in Linn County, and he said that many of the attorneys are of his generation, are colleagues and friends, and that the trust level is very high. The recent addition of a new attorney has been a good thing, because transitions need to happen. Chair Ellis asked about recruitment on the prosecution side, and Mr. Carlile said he has hired people with experience from other counties, noting that the current market is good for hiring. Mr. Carlile indicated that the appointment information goes quickly to the defense bar, the discovery goes out, and in most cases, the plea offer goes out right away. Mr. Carlile also pointed out that the report says the pretrial conferences are 60 days out, but in custody cases are scheduled about two weeks after arraignment, and out of custody cases are about four weeks after arraignment. Commissioner Potter asked whether the District Attorney's office implemented its new electronic discovery system. Mr. Carlile said that it has been implemented and is working pretty well, but that there is still some work to do.

Captain Todd Vian, the Linn County Sheriff Commander, provided information regarding the jail. He indicated that there are two "non-contact" attorney visiting rooms that allow communication through glass, over telephones. These are as private as the Sheriff's office can make it; it is not monitored by cameras or audio recordings. Attorneys are also allowed to use the video courtroom as a meeting space, which is within the secure perimeter of the jail. If an attorney needs to have physical contact with the client, that room can be used. It isn't monitored with any recording equipment, but deputies can visually watch and make sure that the inmate doesn't do anything he is not supposed to do. There are three additional contact visiting areas, but they try very hard not to use those because there is absolutely no monitoring in them - they cannot see into those rooms - there are no windows, so it is a security and safety risk to use them.

Commissioner Potter asked whether there is any potential solution to the limited number of attorney visit rooms. Captain Vian said that they could possibly add one or two rooms in the general vicinity of the inmate visitation area, where family members come in and visit, but that money is the problem. Captain Vian added that he could understand the concern because he often sees one, two or sometimes three attorneys waiting. Commissioner Ramfjord asked whether there is a system for scheduling interviews, and Captain Vian said no. The jail is open 24 hours a day, seven days a week, and rooms are available on a first come, first served basis. Commissioner Lazenby asked whether there are overcrowding problems in the jail. Captain Vian indicated that they routinely release people through a matrix system. In March, 48 of 230 jail beds were eliminated, and Captain Vian personally laid off 11 staff members. The Sheriff's office has been working with the courts, and the district attorney, to manage.

Chair Ellis invited Roger Reid, administrator for the Linn County Legal Defense Corporation, and Paul Kuebrich, a member of the consortium, to share their thoughts. Mr. Reid explained that he and Paul have been practicing together for more than 30 years. They started together in private practice, and about 25 years ago the two of them formed a Linn County consortium of attorneys, and handled district court misdemeanors. When the circuit court criminal case attorneys disbanded, they took over that work, and have been contracting with the state for more than 25 years. During that 25 years there have only been three who have withdrawn from the consortium. One of them was killed in an automobile accident. Janet Botano left last year to join the juvenile consortium, and Mr. Reid semi-retired several years ago. Mr. Felling took over Mr. Reid's cases. The consortium currently has nine attorneys. Tyler Reid is the newest; he joined in October. He graduated from Willamette University, and the consortium has assigned two mentors for him - Paul Kuebrich and Tim Felling.

Chair Ellis asked about consortium members' percent of the practice in criminal versus other case types. Mr. Reid indicated that it varies among all of them, with 70-85% of them practicing criminal law fulltime. Chair Ellis asked about members with significant retained work. Mr. Reid said that one attorney has about 35% retained cases and 65% court appointed cases, but other consortium members have less retained work.

Chair Ellis asked about the consortium's structure, noting that it appears to be fairly informal. Mr. Reid agreed that it has always been informal, but explained that the nine attorneys want to be independent contractors, and that they have a corporation that was formed in 1998. There are four members on the board: Mr. Reid, Mr. Felling, and two outside members, an accountant and Derek Hews, an attorney with the juvenile consortium. Mr. Reid clarified that the two new board members were just added in response to the Commission's requirements. Mr. Reid indicated that board insurance is expensive, and that he will be asking for funds to cover that expense during the next contract cycle.

Chair Ellis asked about the consortium's "split the check" model. Mr. Reid explained that each member of the consortium receives the same, equal amount each month, which works well for the consortium members. Mr. Kuebrich explained that by the end of the month and end of the year, each of the nine attorneys should have been appointed to a relatively equal number of cases. The attorneys who choose to do retained cases work longer hours to cover the larger caseload. Chair Ellis asked whether Mr. Reid took an equal amount of the funding; Mr. Reid said he takes very little - just for administration.

Chair Ellis asked about the experience level of participants in the consortium. Mr. Reid said that seven out of nine of them have over 25 years of experience. Mr. Felling has about 10 years of criminal experience. The newest member has only two months. Chair Ellis asked about the consortium's quality assurance mechanism. Mr. Reid said that he handles any complaints about the attorneys, and explained that the court sends him notifications of any client or any defendant who is dissatisfied. Mr. Reid contacts the defense attorney and inquires about the matter. Mr. Reid also receives complaints from the Oregon State Bar, and contacts the attorney immediately. He asks the lawyer to provide him with a copy of the attorney's response letter to the Bar. Since June of '08, the consortium has handled about 15,000 cases, and they have had 29 complaints. All 29 of those were resolved, and he believes that they were resolved favorably. He said it is very important to him and to the members of the consortium that clients be treated fairly, and that they get the best defense possible. He also noted that some defendants are unreasonable. Chair Ellis asked whether they ever had to let someone leave the consortium because quality was inadequate, and Mr. Reid indicated that they have not, but that there are a couple they are watching now.

Chair Ellis asked about the process for adding members. Mr. Kuebrich responded by explaining that he has known Tyler Reid since he was a young boy, that he knew his academic record - he graduated magna cum laude - and knew of his passion. Though there was not a formal structure in place, the members came to consensus and brought him on board. Most consortium members feel that a more formal process needs to be developed, and that now it is just a question of taking what has worked extremely well for 25 years as an informal relationship among eight or nine people that care very deeply about the work they do, and feel very deeply about each other. Chair Ellis asked whether other lawyers in the community have ever had an interest in becoming part of the consortium. Mr. Kuebrich said they have never been made aware of it, and that they hadn't had a new, young lawyer come to town, with the exception of Tyler, in recent memory. He believes the reason is that the economics of law have changed drastically, and it is virtually impossible to establish a practice in a town where a person is not known. Mr. Kuebrich stated that when they do need to attract new lawyers, they will need to actively recruit from outside the area.

Chair Ellis asked whether consortium attorneys are compensated at the same level as district attorneys in Linn County. Mr. Kuebrich said that he doesn't believe they are - consortium lawyers don't have retirement or health insurance. They have to pay a secretary, phones, offices, equipment – it is all expensive.

Chair Ellis asked about the demographics of Linn County, and whether there is a significant minority population. Mr. Kuebrich said that there is a significant Hispanic population, and that they have very good interpreters who are available with very short notice.

Chair Ellis asked about the gender mix in the consortium. Mr. Reid said that the only female here left six months ago, that the juvenile consortium has women lawyers, and that in Linn County, women comprise about 30% of the Bar.

Commissioner Ramfjord asked about the best management practices manual and client survey that are being developed. Mr. Felling explained that their client survey is similar to the juvenile client survey, and covers topics like how quickly the attorney returns the client's call, how quickly they met with the client, how responsive they were, and how well they explained the law and the process. Mr. Felling described the best practices manual, saying they took the Public Defense Services best practices document and explained how the consortium is meeting those standards, or why a particular standard might not apply. If they aren't meeting a standard, Mr. Felling is reaching out to other consortium groups to determine how they might best meet the standard.

Mr. Felling shared that he feels very passionate about the work that he does, and he has absorbed that from every member in the consortium; everybody wants to provide high quality representation. He also expressed a desire to attract new lawyers, but explained that part of the problem is the compensation and high student loan debt, which Chair Ellis noted is around \$110,000 for law school graduates. Mr. Felling explained that for many, augmenting their income with private work is necessary. Commissioner Potter asked whether an attorney can make a living wage solely through the contract. Mr. Felling said that is a challenge, with the burden of law school debt.

Commissioner Welch asked about the rule regarding no negotiating after the trial date is set. Mr. Kuebrich said he was a vocal opponent when it was implemented by Judge McCormick, but that in fairness, with the current presiding judge, it is a rule, but there are exceptions to that rule, the exceptions are granted based upon the merit of the need, and that the presiding judge is likely to let parties settle notwithstanding the rule. Commissioner Welch asked what the rule accomplishes. Mr. Kuebrich shared his belief that its intended purpose is to send a message to defendants to quit wasting time, and another intended goal is to send a message to deputy district attorneys to look at the case early on. Commissioner Ramfjord asked whether the rule is imposing unfair consequences on defendants who take a little time to decide upon pleading guilty, and then

must plead guilty to something that is harsher than what they could have pleaded to earlier. Mr. Kuebrich replied that he believes the more serious consequence is not that they are being forced to plead guilty to something more serious, but that they are forced into a trial that has the potential to have an outcome that is far worse than what the attorneys could have negotiated. Mr. Felling added that one mitigating factor is that the DA's office is often willing to agree to a continuance when required by the circumstances of a particular case.

Chair Ellis asked about the system without lawyers at arraignment. Mr. Kuebrich indicated that the group has considered watching the arraignments to see if there is anything they could add to the process, noting that there is a push for early resolution through the courts. They've heard that the state would be making limited offers to the defendant that may or may not be available later down the road. These offers are made in minor cases, because nobody at the time of arraignment is going to take a deal if it means going to jail. The consortium has not wanted to be involved with this kind of situation. Mr. Kuebrich suggested that the DA has become aware that this is an issue. This week he received a call from the deputy district attorney who was going to do walk in arraignments; that district attorney said he was suspending that practice and was not going to make offers any longer. Mr. Kuebrich said that he doesn't see that there is a lot for lawyers to do at walk in arraignments, but that they are willing to be there.

Chair Ellis asked Mr. Kuebrich whether there is anything the Commission can do to improve. Mr. Kuebrich said that while he has not dealt with the Commission, he has dealt with the OPDS staff, and they have been wonderful when approving non-routine expense requests, explaining why a request is denied, and that the analyst has been great about keeping in contact and making sure that problems are resolved.

Chair Ellis asked for more information regarding the consortium's training and supervision program. Mr. Kuebrich indicated that Tyler Reid is shadowing Mr. Felling and Mr. Kuebrich. Tyler will sit through misdemeanor trials and felony trials, including Measure 11 trials, with Mr. Felling and Mr. Kuebrich. The goal is to have him start doing solo appearances on relatively routine misdemeanor probation violations and maybe even some routine non-serious felony probation violations, then work him into doing misdemeanor trials. Mr. Kuebrich added that Tyler came to the group with some experience - he clerked at the Marion County District Attorney's Office while he was in law school, and had some significant responsibilities in juvenile court, and tried juvenile cases on his own.

Chair Ellis asked whether all consortium members are independent practitioners, and Mr. Kuebrich indicated that they are; no law firms; all in separate offices. Chair Ellis asked about the consortium's experience working with the appellate division. Mr. Kuebrich said the system works well, and that there is very good communication.

Chair Ellis invited Lene Garrett, CASA Director, to share her thoughts. Ms. Garrett noted that the preliminary report was very accurate as it reflects the work of the juvenile consortium and the juvenile court process, but noted that CASA serves only about 40% of kids – around 90 to 95 cases - so the information that she has is based only on the kids they are serving, and not the other 200 who do not have a CASA. Ms. Garrett explained that a CASA attends every shelter hearing, and receives the petition and the affidavit. Cases are prioritized based on four criteria: (1) whether children are placed in non-relative foster care (2) whether there was a significant injury or the death of a child or a sibling in the case, (3) does the child have significant identified needs, and (4) age, with a focus on ages zero to three and 12 and over. Because data shows that once a child enters the dependency system at around age 12, they are likely to age out of the system, they want to ensure that there is a CASA in their life that is helping them navigate their way, particularly around educational needs and placement to ensure that they at least graduate from high school and have some connections when they leave the system.

The CASA program has grown in the last three years from 36 to 94 CASA volunteers, and as the program has grown, Ms. Garrett expressed her feeling that relationships with system partners have improved immensely. They have worked very hard to understand legal processes in Linn County, and to train CASA volunteers about processes, so there are clear expectations regarding the role of each party in the case. Ms. Garrett indicated that the consortium has also improved in a number of areas. Children are seeing, or at least hearing from, their attorneys more frequently than they did two and a half to three years ago. There is more open communication, when it is appropriate, between CASA volunteers and attorneys for parents. Ms. Garrett explained that contact between the CASA and the parent early in a case can help CASA volunteers get support to kids. She also pointed out that while children are in foster care, CASA volunteers are the connection that is pretty consistently involved, consistently seeing the child and consistently showing up at all meetings, making parents' relationships with the CASA volunteers that much more important. Ms. Garrett indicated that this is one area where there is still room for continued discussion within Linn County, so that in instances where the attorney for the parent is not comfortable with the CASA meeting with the parent, at least they can facilitate a meeting with the attorney present. Ms. Garrett expressed appreciation for the dependency work group, where there is open dialogue about what is working well and what isn't working well, and the open communication she is able to have with Melissa Riddell, the consortium administrator. Ms. Garrett said that while attorneys are having more face to face contact with clients now than in the past, there is still room for improvement, and she expressed support for the idea of having more lawyers in the consortium. She also shared support for the idea of having attorneys at shelter hearings, and more safety planning and exploration of options that would avoid removals. Ms. Garrett also noted the lack of visitation services, and the need for additional visitation options. She shared the plight of a 13 year old girl who has been in foster care for almost three years, who is to the

point where she may not want to visit her parents any longer because she misses half a day school and thinks it is affecting her grades. To be able to accommodate visits after school hours would be ideal, particularly for kids who are of school age and are missing school. If they live in the outer areas of the county and they have to come into Albany, they could miss almost an entire day depending on the time of the visit.

Ms. Garrett expressed confidence in Linn County's abilities to address families' needs, and the commitment level from the attorneys, the child welfare staff, and the judges, to ensure that they are providing services with the resources that they have available. Ms. Garrett also noted the increase in kids who are "crossing over," meaning they start in the dependency system and end up also in the delinquency system. CASA is providing training to advocates on the delinquency system and how to effectively advocate when kids start committing minor delinquency offenses. She explained that that is one of the reasons why teens also have a CASA, though it is not typically a priority – they tend to look at the zero to three or the zero to five - but with the studies of brain development, and knowing what happens, there is an opportunity to help in those teen years.

Commissioner Potter asked about the number of CASA volunteers in Linn County compared to other counties, and Ms. Garrett responded that Linn County has about the fifth highest number of volunteer advocates in the state. She noted that the average time of volunteerism with their group is almost three years, and that in Jackson County, where Ms. Garrett used to work, it was hovering around the five year mark. Commissioner Potter asked what should be done in Linn County that is not being done, as relates to public defense. Ms. Garrett said there is still room to continue to learn about each other, and to improve the communication avenues for CASA volunteers and the parents of the children they serve, so that parents are less suspicious of CASAs, and understand that the motivation of the CASA is to benefit children and not to ding a parent for doing something wrong. Commissioner Ramfjord asked whether there any efforts to try to have a more standardized process by which certain contacts are made to ensure both the opportunity for contact, and improved communication. Ms. Garrett said that they have not, but that it is a good idea and something to explore, and emphasized hope for such dialog based upon the relationship between defense providers and CASA, which has improved dramatically in the last few years.

Commissioner Lazenby asked about diversity within the pool of CASA volunteers, and within the population they are serving. Ms. Garrett said that they are very diverse. Linn County CASA applied for a national grant two years ago, and found that they match almost exactly between the diversity within kids and the CASA volunteers. CASA continues to work on it; they are up to nine volunteers who speak Spanish, a couple of others who speak another language, and they also have the ethnic component. Though they are not extremely

diverse in the county as a whole, the volunteer base is pretty reflective of the kids.

Chair Ellis invited Melissa Riddell to share information about the Linn County Juvenile Defense Corporation. Ms. Riddell said that there are six members, and she has been the administrator since January of 2011; the previous administrator, Jody Meeker, held the position for 10 years, and Ms. Riddell has been a member of the consortium since 2008. Ms. Riddell worked for Ms. Meeker while she was in law school, starting in about 2002, and continued as an associate when she passed the bar in 2004. Ms. Riddell explained that in addition to the administrator changes, the consortium has had a shift in its membership over the last few years, and that they do not suffer from the “graying of the defense bar” issues that are confronting other consortiums around the state; they also have a good gender balance within the consortium.

The consortium has a board of directors with six board members, and they have independent contractor agreements. The board includes a municipal court judge, Doug Moore and Mark Taleff who are both former members of the consortium, John Hawkins, who used to work for the Linn County Juvenile Department, and Mack Walls and Derek Hews who are attorney members. Chair Ellis requested clarification, and Ms. Riddell confirmed, that of the six board members, two are attorney and four are outside members. She indicated that there is some office sharing, but each attorney has their own staff.

Ms. Riddell noted challenges attorneys face regarding availability, noting that they must be available to the court a significant amount of time. She explained that consortium members are not opposed to adding members, but that the compensation would have to increase, as it is very hard for people to do this work on a part-time basis given the amount of time attorneys are expected to be certain places. Chair Ellis asked whether consortium members do this work on a full-time basis. Ms. Riddell said that some do some municipal court work and a little bit of retained work, but at least four members are exclusively dedicated to the juvenile contract. Ms. Riddell used to do some retained work, but she feels that representation for contract clients is very time intensive, and doing it well requires all of an attorney’s time.

Chair Ellis asked about appointment of counsel in delinquency cases. Ms. Riddell explained that in Linn County, the juvenile department explains the right to counsel, and that the court sometimes goes through the colloquy with kids. While she doesn’t believe that there is enough questioning of the youth, there have been times when judges appoint attorneys for kids even when they say they do not want counsel. Ms. Riddell expressed support for appointment of counsel in all juvenile delinquency cases. Ms. Riddell also addressed the matter of attorney appearances at shelter hearings, explaining that as a group, they are not opposed, but the court docket makes that challenging. Right now shelter hearings and delinquency hearings are held at 1:30 every day, but will be moving

to 2:30 every day. Consortium attorneys are in regular juvenile court appearances at that time on Thursdays and Fridays, and the court will not allow attorneys any time to be able to be present at shelter hearings. The court is concerned that proceedings will take more time if attorneys are present. The court has recently also canceled all dependency settlement conferences; they are all off the docket and will be set on a Friday afternoon for a pretrial conference. She noted that the court docket is a problem, and though statutorily juvenile dependency cases should be scheduled within 60 days, other cases get priority. Commissioner Welch expressed concern about the cancelation of settlement conferences, and asked Ms. Riddell about the plan. Ms. Riddell indicated that they just found out about the cancelations, and they are hopeful that they will be able to work things out with the assigned deputy district attorney and DHS, but there is no plan at this point, and she is also concerned.

Chair Ellis asked Ms. Riddell whether there is anything the PDSC could do better for providers. Ms. Riddell indicated that they get a lot of support from OPDS. Ms. Riddell indicated that the consortium has just gone through a period of transition, during which they were short at least one full position, which contributed to availability challenges. Now that they are back up to six attorneys, they have more time. She also confirmed Commissioner Potter's suspicion that it would help to have an increase in compensation. Ms. Riddell ended by introducing the other members of the consortium.

Chair Ellis invited John Meade from DHS to share his views with the Commission. Mr. Meade said he has 34 years of experience in ten different counties, and he was not accustomed to the level of advocacy that exists in Linn County. He explained that in his previous experiences, attorneys were more inclined to encourage their clients to cooperate with DHS, but he says they have worked through most of that, and he has been really pleased with the dialogue that has gone on, and the willingness of the defense bar to have discussions. He noted the Family Treatment Court as an example, as it requires parents to make an admission to participate. Everyone worked through that together as a group, which felt very cooperative, but he also expressed his wish that attorneys wouldn't feel the need to be at initial family decision meetings, where he wants to have his staff engage with families as soon as they can, in a spontaneous way, when the family needs help. From his viewpoint, having an attorney in that meeting is sometimes very cumbersome and also creates a level of distrust. He noted that this is probably a natural tension everywhere. Chair Ellis expressed support for a blend of the two styles – adversarial and cooperative. Mr. Meade said they have reached a very good balance, and that Judge Murphy does push everyone to work together to improve the system.

Commissioner Welch asked whether the resources available to DHS are at an all time low. Mr. Meade confirmed that this is the worst it has been in 34 years. Commissioner Welch asked whether, with the absence of treatment resources or the restriction of them, the defense bar is putting pressure on the agency to fulfill

fundamental federal and state legal obligations. Mr. Meade said that they do get challenged on reasonable efforts, but noted that despite the lack of resources statewide, Linn County does better than most. The Linn County Council is pulling system partners together to discuss coordinated services in order to avoid huge gaps. Linn County DHS is severely understaffed, which has brought constituent complaints when there used to be none, but they do have a staff that matches fairly well the ethnic makeup of the community, and they do the best they can.

Chair Ellis invited Torri Lynn and Lisa Robinson from the Linn County Juvenile Department, and asked about the practice of juveniles waiving the right to counsel, and the role the department plays in talking with the juvenile about the right to counsel. Mr. Lynn explained that the probation officer meets with the youth and family, reviews the police report, and asks them if they are going to be requesting an attorney. The probation officer advises them of their rights, but does not offer any legal advice. Chair Ellis expressed the concern that a young person might think, "if I waive counsel then they will think more favorably of me." Ms. Robinson explained that the initial conversations are done with families present, and parents who can help guide and direct the youth. If there is any indication that they are confused, don't understand, or need more time to think about it before they make an appearance before the court, if that is where they are headed, they revisit all of those rights again before any statement is made before the court. Mr. Lynn added that it is not unusual for a youth to request an attorney. Chair Ellis asked whether it would be a big wrench in the system if the rule prevented waiver without an attorney counseling on the issue of waiver. Mr. Lynn said that he didn't think it would be a big wrench, but that they have worked pretty hard as a system and with the defense consortium around timeliness of the system, and that usually, in more serious cases, the court is going to appoint an attorney whether the kids say they want to waive or not. Commissioner Ramfjord asked whether there is variation from judge to judge, in terms of the depth or nature of the inquiry. Mr. Lynn replied that there is a standard judge on the main dockets, where it is pretty consistent, but that in detention review hearings there might be some variety on how in-depth the judge goes, with some going a little more in-depth than others. Commissioner Welch noted that parents are part of the problem – they are often mad that the kid did something wrong, they have to miss work, etc., and that pressure alone is enough. Ms. Robinson noted that the department is not opposed to having defense attorneys at detention review hearings or the initial appearances.

Chair Ellis thanked everyone from Linn County for their comments, and invited them to come to the next meeting, on January 23, in Salem, when Commission members will talk about what they learned and whether there are areas of concern in the service delivery plan for Linn County. He explained that after that, the discussion will be incorporated into a revised draft of the report and circulated, and after comment on that, the Commission usually adopts the final report. Chair Ellis invited participants to send Nancy Cozine any additional

comments or thoughts so that those could be shared with Commission members in January.

Updates Following PDSC Meeting on December 14, 2013

Judge Egan was elected to the Court of Appeals effective January 6, 2013. The Governor will appoint Judge Egan's successor, and has begun the selection and recruitment process.

A Service Delivery Plan for Linn County

At the PDSC meeting held on January 23, 2013, Commission members discussed the current service delivery plan for Linn County. Commission members identified the strengths of the structure in Linn County, which include the strong working relationships within the consortium groups, as well as between the consortiums and the court and other members of the juvenile and criminal justice systems.

While the juvenile consortium group has worked through changes in its composition, the Commission noted the need for the criminal provider, Linn County Legal Defense Corporation, to plan for transitions within its member group. While the addition of one new member is encouraging, there is a clear need for this group to continue development of its structure and succession planning. The group must also implement a fiscal management system that holds in reserve compensation for case credits in excess of those actually received.

The consortium groups are also encouraged to pursue measures to ensure the appointment of counsel in juvenile delinquency and other cases where the client has a right to counsel. Additionally, they are encouraged to be present at the client's initial appearance in court.

The Commission does not see any need to make adjustments in the provision of services in Linn County as a result of this review, but will continue to monitor the quality of services provided by both consortium groups as well as efforts made by the Linn County Legal Defense Corporation to develop its structure and succession planning. The Commission will determine whether there is any need for adjustments during future contracting cycles.

Attachment 3

House Bill 2671

Sponsored by Representative DOHERTY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Creates State Office of the Public Guardian and Conservator to provide public guardian and conservator services for persons without relatives or friends willing or able to serve as guardians or conservators. Directs Governor to appoint Public Guardian and Conservator as administrative head of office. Prescribes duties and responsibilities of Public Guardian and Conservator and office. Requires office to certify and train deputy public guardians and conservators. Requires office to develop volunteer program to assist office. Imposes certain limitations on court orders in proceedings brought by office.

Establishes Public Guardian and Conservator Advisory Committee.

Renames existing offices of public guardian and conservator as county offices of public guardian and conservator.

Creates State Office of the Public Guardian and Conservator Fund and continuously appropriates moneys in fund to State Office of the Public Guardian and Conservator.

A BILL FOR AN ACT

Relating to fiduciary services in probate courts for persons with inadequate resources; creating new provisions; amending ORS 125.240, 125.410, 125.700, 125.705, 125.710, 125.715, 125.720, 125.725 and 125.730; and appropriating money.

Be It Enacted by the People of the State of Oregon:

STATE OFFICE OF THE PUBLIC GUARDIAN AND CONSERVATOR

SECTION 1. Sections 2 to 10 of this 2013 Act are added to and made a part of ORS chapter 125.

SECTION 2. For purposes of sections 2 to 10 of this 2013 Act:

(1) "Client" means a person who receives public guardian and conservator services from the State Office of the Public Guardian and Conservator.

(2) "Deputy public guardian and conservator" means a person who is employed by or under contract with the office, who is certified by the office and who provides services as a fiduciary appointed by the court to clients under sections 2 to 10 of this 2013 Act.

(3) "Public guardian and conservator services" means services, including but not limited to information, assistance, legal representation and services as a court-appointed fiduciary in guardianship or conservatorship proceedings that are provided by deputy public guardians and conservators, volunteers and staff in the office.

SECTION 3. (1) The State Office of the Public Guardian and Conservator is established, to function separately and independently from any other state agency.

(2) The Governor shall appoint the Public Guardian and Conservator, subject to Senate confirmation under ORS 171.562 and 171.565, for a four-year term from a list of three nominees nominated by the Public Guardian and Conservator Advisory Committee established

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 under section 9 of this 2013 Act. The Public Guardian and Conservator must meet the qual-
 2 ifications required by the office for certification to provide fiduciary services. The Public
 3 Guardian and Conservator serves at the pleasure of the Governor and may be removed by
 4 the Governor for good cause or upon the recommendation of the Public Guardian and
 5 Conservator Advisory Committee. Vacancies must be filled within 60 days in the same man-
 6 ner as appointments are made. The Public Guardian and Conservator shall receive a salary
 7 as is fixed by the Governor, and be reimbursed for all reasonable travel and other expenses
 8 incurred in the performance of official duties.

9 (3) The Public Guardian and Conservator shall be the administrative head of the State
 10 Office of the Public Guardian and Conservator.

11 (4) The Public Guardian and Conservator may hire staff, and may hire or contract with
 12 attorneys, professional fiduciaries described in ORS 125.240 and deputy public guardians and
 13 conservators, as necessary to carry out the powers, duties and functions of the office. The
 14 Public Guardian and Conservator may prescribe the duties and assignments and fix the
 15 compensation of persons hired by or under contract with the Public Guardian and
 16 Conservator, subject to the State Personnel Relations Law. Subject to any other applicable
 17 laws regulating expenses, the persons hired by or under contract with the Public Guardian
 18 and Conservator shall be allowed reasonable travel and other expenses incurred in the per-
 19 formance of official duties.

20 (5) The Public Guardian and Conservator may delegate the exercise or discharge of any
 21 power, duty or function that is vested in or imposed by law upon the Public Guardian and
 22 Conservator to any deputy public guardian and conservator or staff person for the purpose
 23 of conducting an official act in the name of the Public Guardian and Conservator. The official
 24 act of any person acting in the name of the Public Guardian and Conservator by the au-
 25 thority of the Public Guardian and Conservator is an official act of the Public Guardian and
 26 Conservator.

27 (6) The Public Guardian and Conservator may solicit and accept gifts, grants and do-
 28 nations from public and private sources for the purpose of carrying out the provisions of
 29 sections 2 to 10 of this 2013 Act, which moneys shall be deposited in the State Office of the
 30 Public Guardian and Conservator Fund created under section 8 of this 2013 Act.

31 (7) In accordance with applicable provisions of ORS chapter 183, the Public Guardian and
 32 Conservator, in consultation with the Public Guardian and Conservator Advisory Committee,
 33 may adopt rules for the administration of the office and to carry out the provisions of
 34 sections 2 to 10 of this 2013 Act.

35 **SECTION 4.** The State Office of the Public Guardian and Conservator shall:

36 (1) Educate the public about the role and function of the office and about public guardian
 37 and conservator services.

38 (2) Provide public guardian and conservator services for persons who do not have rela-
 39 tives or friends willing or able to assume the duties of guardianship or conservatorship and
 40 for persons who lack the financial resources to obtain a private guardian or conservator.

41 (3) Certify persons as deputy public guardians and conservators.

42 (4) Develop model standards of eligibility and professional conduct for deputy public
 43 guardians and conservators and of practice and procedure in public guardianship and con-
 44 servatorship proceedings.

45 (5) Develop and implement training and educational materials for deputy public guardians

1 and conservators.

2 (6) Establish and operate a program to recruit, train and supervise volunteers to provide
3 assistance to the office, deputy public guardians and conservators and clients.

4 (7) Establish a process, including criteria and standards, to determine the eligibility of
5 persons to receive public guardian and conservator services and for the needs assessment
6 required under section 5 of this 2013 Act.

7 (8) Cooperate with county offices of public guardian and conservator operating under
8 ORS 125.700.

9 (9) Work with existing local and county programs and with other organizations and en-
10 tities to develop and expand public guardian and conservator services in this state.

11 (10) Make recommendations to the Legislative Assembly for policy and legislation re-
12 garding implementation, improvement and expansion of public guardian and conservator
13 services in this state.

14 **SECTION 5.** (1) Prior to filing a petition for the appointment of a fiduciary under ORS
15 125.055 or any other pleading under this chapter, the State Office of the Public Guardian and
16 Conservator shall conduct a needs assessment with the person who would be the respondent
17 or protected person under the petition or pleading. The needs assessment must be done by
18 a deputy public guardian and conservator. The purpose of the needs assessment is to deter-
19 mine the person's eligibility to receive public guardian and conservator services and to de-
20 termine the appropriateness of filing a petition for the appointment of a fiduciary or other
21 pleading on behalf of the person in a court having probate jurisdiction. The assessment shall,
22 at a minimum:

23 (a) Assess the person's capacity to:

24 (A) Care for the person's own safety;

25 (B) Manage the person's own financial affairs; and

26 (C) Attend to and provide for necessities such as food, shelter, clothing and medical care;

27 (b) Assess the person's financial resources, based on information available or supplied to
28 the office at the time of the assessment;

29 (c) Determine whether the available information about the person is sufficient to support
30 a finding that the person is incapacitated or financially incapable, and the entry of a court
31 order for the appointment of a fiduciary under ORS 125.010;

32 (d) Inquire whether any other person may be willing and able to serve as the person's
33 guardian or conservator and, if appropriate, locate and contact that other person;

34 (e) Determine the type of fiduciary, if any, to request in a petition filed under ORS
35 125.055, giving preference to the least intrusive form of fiduciary relationship consistent with
36 the best interests of the person; and

37 (f) Determine how best to provide public guardian and conservator services to a client
38 that are least restrictive to the client's liberty, that are least intrusive to the client and that
39 provide for the greatest degree of independence that the client is capable of exercising.

40 (2) For each person determined to be eligible for public guardian and conservator services
41 under this section, the office shall develop a written plan setting forth the type and duration
42 of services to be provided by the office. The plan shall be included in any nonemergency pe-
43 tition or pleading filed with the court.

44 **SECTION 6.** (1) A deputy public guardian and conservator providing public guardian and
45 conservator services under sections 2 to 10 of this 2013 Act:

1 (a) Must be certified as a deputy public guardian and conservator by the State Office of
 2 the Public Guardian and Conservator; and

3 (b) If appointed by the court as public guardian and conservator for a client, shall serve
 4 as provided in this chapter and ORS 127.005 and 127.015, except as expressly stated otherwise
 5 in sections 2 to 10 of this 2013 Act.

6 (2) A volunteer of the office who, in the course of providing authorized public guardian
 7 and conservator services, has personal contact with a client must provide the office, in
 8 writing, with the volunteer's criminal history and must submit or consent to a criminal re-
 9 cords check, including fingerprint identification.

10 (3) Volunteers of the office:

11 (a) May not conduct the needs assessments required under section 5 of this 2013 Act;

12 (b) May not engage in conduct that constitutes the unlicensed practice of law;

13 (c) Shall be under the supervision and control of the Public Guardian and Conservator,
 14 of the Public Guardian and Conservator's designee or of a deputy public guardian and
 15 conservator;

16 (d) Shall be instructed in confidentiality and shall maintain the confidentiality of clients
 17 and of written information and materials relating to clients;

18 (e) May not receive compensation or any other benefit but may be reimbursed by the
 19 office for reasonable travel and other expenses incurred in the performance of their duties
 20 on behalf of the office; and

21 (f) Are immune from civil liability for any acts or omissions occurring, or errors in
 22 judgment made in good faith, in the course of providing authorized public guardian and
 23 conservator services.

24 SECTION 7. (1) A court may not appoint the State Office of the Public Guardian and
 25 Conservator, the Public Guardian and Conservator or a deputy public guardian and
 26 conservator as a fiduciary for a person unless the office, the Public Guardian and
 27 Conservator or a deputy public guardian and conservator has petitioned for or consented to
 28 the appointment.

29 (2) The Public Guardian and Conservator shall file an official bond in such amount as
 30 may be fixed from time to time by the Public Guardian and Conservator Advisory Committee
 31 or the court having probate jurisdiction. The bond shall inure to the joint benefit of the se-
 32 veral public guardianship and conservatorship estates in which the office, the Public Guard-
 33 ian and Conservator and the deputy public guardians and conservators are providing
 34 fiduciary services but a bond is not required to be filed in individual estates.

35 (3) The court may not charge a fee for the filing of a petition or any other pleading under
 36 this chapter by the office, the Public Guardian and Conservator or a deputy public guardian
 37 and conservator when the filing is made in connection with the provision of public guardian
 38 and conservator services under sections 2 to 10 of this 2013 Act.

39 (4)(a) The court shall order the client or the client's estate to pay for reasonable ex-
 40 penses incurred, including compensation for services rendered, in the provision of public
 41 guardian and conservator services to the client, including but not limited to court costs and
 42 attorney fees.

43 (b) If a client is indigent, the office shall have a claim against the client or the client's
 44 estate for the portion of any payment ordered under paragraph (a) of this subsection that
 45 remains unpaid.

1 (5) The court may not order the office, the Public Guardian and Conservator or a deputy
2 public guardian and conservator to pay court costs or attorney fees in a proceeding brought
3 on behalf of a client under sections 2 to 10 of this 2013 Act.

4 **SECTION 8.** (1) There is created within the State Treasury, separate and distinct from
5 the General Fund, the State Office of the Public Guardian and Conservator Fund. Interest
6 earned on the State Office of the Public Guardian and Conservator Fund shall be credited to
7 the fund.

8 (2) Moneys in the State Office of the Public Guardian and Conservator Fund shall consist
9 of:

10 (a) Amounts donated to the fund;

11 (b) Amounts appropriated or otherwise transferred to the fund by the Legislative As-
12 sembly;

13 (c) Interest earned on the moneys in the fund; and

14 (d) Other amounts deposited in the fund from any source.

15 (3) Moneys in the fund are continuously appropriated to the State Office of the Public
16 Guardian and Conservator for the purpose of implementing sections 2 to 10 of this 2013 Act.

17 **SECTION 9.** (1) There is established the Public Guardian and Conservator Advisory
18 Committee consisting of seven members to be appointed in the following manner:

19 (a) One person appointed by the Speaker of the House of Representatives;

20 (b) One person appointed by the President of the Senate;

21 (c) One person appointed by the House Minority Leader;

22 (d) One person appointed by the Senate Minority Leader;

23 (e) Two persons, to be appointed by the Governor, from a list of four names submitted
24 by individuals and organizations that provide guardianship and conservatorship services in
25 this state; and

26 (f) One person appointed by the Governor.

27 (2) Members described in subsection (1)(e) and (f) of this section are subject to confir-
28 mation by the Senate under ORS 171.562 and 171.565.

29 (3) The term of office of each member is four years. Before the expiration of the term
30 of a member, the appointing authority shall appoint a successor whose term begins on July
31 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause,
32 the appointing authority shall make an appointment to become immediately effective for the
33 unexpired term.

34 (4) The members of the committee must be residents of this state who are broadly rep-
35 resentative, to the extent possible, of persons who provide guardianship and conservatorship
36 and other fiduciary services to persons in this state, who have knowledge and interest in the
37 problems of persons who have inadequate resources to obtain their own fiduciary services
38 and who are representative of all areas of this state.

39 (5) The committee shall select one of its members as chairperson and another as vice
40 chairperson, for such terms and with duties and powers necessary for the performance of
41 the functions and duties of these offices as the committee determines.

42 (6) A majority of the members of the committee constitutes a quorum for the transaction
43 of business. Decisions may be made by a majority of the quorum.

44 (7) The committee shall meet at least once each month at a place, day and hour deter-
45 mined by the committee. The committee also shall meet at other times and places specified

1 by the call of the chairperson or of a majority of the members of the committee. The com-
 2 mittee shall confer each month with the Public Guardian and Conservator.

3 (8) A member of the committee is entitled to compensation and expenses as provided in
 4 ORS 292.495.

5 (9) The State Office of the Public Guardian and Conservator shall provide staff support
 6 to the committee.

7 **SECTION 10.** The Public Guardian and Conservator Advisory Committee shall:

8 (1) Monitor the State Office of the Public Guardian and Conservator.

9 (2) Advise the Governor and the Legislative Assembly on the State Office of the Public
 10 Guardian and Conservator.

11 (3) Nominate, after interviews and according to prescribed criteria, three persons to fill
 12 the office of Public Guardian and Conservator.

13 (4) Make recommendations to the Governor for removal of the Public Guardian and
 14 Conservator when appropriate.

15 (5) Consult with the Public Guardian and Conservator in the adoption of rules to imple-
 16 ment the provisions of sections 2 to 10 of this 2013 Act.

17
 18 **COUNTY OFFICES OF PUBLIC GUARDIAN AND CONSERVATOR**

19
 20 **SECTION 11.** ORS 125.700 is amended to read:

21 125.700. The county court or board of county commissioners of any county:

22 (1) After making a determination that there exists a need within the county for a guardian or
 23 conservator for persons who do not have relatives or friends willing to serve as a guardian or
 24 conservator and capable of assuming the duties of guardianship or conservatorship, may create
 25 [*within the county*] the **county** office of public guardian and conservator and such subordinate posi-
 26 tions as may be necessary to operate effectively the **county** office of public guardian and
 27 conservator [*within the county*].

28 (2) May expend county funds for the purpose of operating the **county** office of public guardian
 29 and conservator.

30 (3) After establishment of the **county** office of public guardian and conservator [*within a*
 31 *county*], upon the finding that the county does not need the service of a public guardian and
 32 conservator, may terminate the office.

33 **SECTION 12.** ORS 125.705 is amended to read:

34 125.705. (1) The person appointed to the office of **county** public guardian and conservator shall
 35 serve in the office at the pleasure of the appointing authority. If the person holding the office of
 36 **county** public guardian and conservator [*in a county*] is removed from office, dies, becomes inca-
 37 pacitated or resigns, the removal, death, incapacity or resignation shall operate to remove [*such*]
 38 **the county** public guardian and conservator as guardian and conservator of all estates then under
 39 the guardianship and conservatorship of the person.

40 (2) As used in ORS 125.700 to 125.730, “**county public guardian and conservator**” means
 41 **the person appointed to the county office of public guardian and conservator created under**
 42 **ORS 125.700.**

43 **SECTION 13.** ORS 125.710 is amended to read:

44 125.710. (1) The **county** public guardian and conservator may serve as the guardian or
 45 conservator, or both, of any person of whom the court having probate jurisdiction in the county may

1 have jurisdiction. The **county** public guardian and conservator may serve as guardian or
 2 conservator upon the petition of any person or upon the [own] petition of the **county** public guard-
 3 ian and conservator.

4 (2) When appointed as guardian or conservator by the court having probate jurisdiction, the
 5 **county** public guardian and conservator shall serve as provided in ORS chapter 125, ORS 127.005
 6 and 127.015, except as specifically stated to the contrary in ORS 125.700 to 125.730.

7 (3) The **county** public guardian and conservator in the discretion of the **county** public guardian
 8 and conservator may employ private attorneys if the fees for the attorneys can be defrayed out of
 9 funds of the guardianship or conservatorship estate.

10 **SECTION 14.** ORS 125.715 is amended to read:

11 125.715. (1) Before entering into office as **county** public guardian and conservator, the person
 12 appointed to the office shall file an official bond in such amount as may be fixed from time to time
 13 by the board of county commissioners or the court having probate jurisdiction, which bond shall
 14 inure to the joint benefit of the several guardianship [or] **and** conservatorship estates in which the
 15 person is acting as guardian or conservator and the county. The **county** public guardian and
 16 conservator shall not be required to file bonds in individual estates.

17 (2) Upon removal of the **county** public guardian and conservator in accordance with the pro-
 18 visions of ORS 125.705, the surety on the **county** public guardian and conservator bond shall be
 19 exonerated upon order to that effect of the court having probate jurisdiction in the county.

20 **SECTION 15.** ORS 125.720 is amended to read:

21 125.720. All funds coming into the custody of the **county** public guardian and conservator shall
 22 be deposited in the county treasury and disbursed by proper warrant, or shall be deposited in one
 23 or more banks or invested in one or more insured savings and loan associations authorized to do
 24 business within the county, or as provided by ORS 125.445 (5).

25 **SECTION 16.** ORS 125.725 is amended to read:

26 125.725. The **county** public guardian and conservator shall have a claim against the ward's or
 27 protected person's estate for reasonable expenses incurred in the execution of the guardianship or
 28 conservatorship and such compensation for services and those of the attorney of the **county** public
 29 guardian and conservator as the court having probate jurisdiction in the county deems just and
 30 reasonable. If the **county** public guardian and conservator is compensated by the county for ser-
 31 vices, any reimbursement of expenses or compensation shall be paid to the county.

32 **SECTION 17.** ORS 125.730 is amended to read:

33 125.730. No fee shall be charged or received by any court having probate jurisdiction for the
 34 filing of any petition asking for the appointment of the **county** public guardian and conservator **as**
 35 **the guardian or conservator** or for any official service performed by that court in the course of
 36 the guardianship or conservatorship proceedings.

37
 38 **CONFORMING AMENDMENTS**
 39

40 **SECTION 18.** ORS 125.240 is amended to read:

41 125.240. (1) If a petition seeks the appointment of a professional fiduciary as described in sub-
 42 section (5) of this section, the petition must contain the following information in addition to that
 43 information required under ORS 125.055:

44 (a) A description of the events that led to the involvement of the professional fiduciary in the
 45 case.

1 (b) The professional fiduciary's educational background and professional experience.

2 (c) The fees charged by the professional fiduciary and whether the fees are on an hourly basis
3 or are based on charges for individual services rendered.

4 (d) The names of providers of direct services to protected persons that are repeatedly used by
5 the professional fiduciary under contract.

6 (e) The disclosures required under ORS 125.221 if the person nominated to act as fiduciary will
7 employ a person in which the nominated person has a pecuniary or financial interest.

8 (f) The number of protected persons for whom the person performs fiduciary services at the time
9 of the petition.

10 (g) Whether the professional fiduciary has ever had a claim against the bond of the fiduciary
11 and a description of the circumstances causing the claim.

12 (h) Whether the professional fiduciary or any staff with responsibility for making decisions for
13 clients or for management of client assets has ever filed for bankruptcy and the date of filing.

14 (i) Whether the professional fiduciary or any staff with responsibility for making decisions for
15 clients or for management of client assets has ever been denied a professional license that is directly
16 related to responsibilities of the professional fiduciary, or has ever held a professional license that
17 is directly related to responsibilities of the professional fiduciary that was revoked or canceled. If
18 such a license has been denied, revoked or canceled, the petition must reflect the date of the denial,
19 revocation or cancellation and the name of the regulatory body that denied, revoked or canceled the
20 license.

21 (j) A statement that the criminal records check required under subsection (2) of this section does
22 not disqualify the person from acting as a fiduciary.

23 (k) Whether the professional fiduciary and any staff responsible for making decisions for clients
24 or for management of client assets is or has been certified by a national or state association of
25 professional fiduciaries, the name of any such association and whether the professional fiduciary or
26 other staff person has ever been disciplined by any such association and the result of the discipli-
27 nary action.

28 (L) The name, address and telephone number of the individual who is to act as primary decision
29 maker for the protected person and the name of the person with whom the protected person will
30 have personal contact if that person is not the person who will act as primary decision maker for
31 the protected person.

32 (2)(a) If a petition seeks the appointment of a professional fiduciary as described in subsection
33 (5) of this section, the professional fiduciary and all staff with responsibility for making decisions for
34 clients or for management of client assets must undergo a criminal records check before the court
35 may appoint the professional fiduciary. The results of the criminal records check shall be provided
36 by the petitioner to the court. Results of criminal records checks submitted to the court are confi-
37 dential, shall be subject to inspection only by the parties to the proceedings and their attorneys, and
38 shall not be subject to inspection by members of the public except pursuant to a court order entered
39 after a showing of good cause. A professional fiduciary must disclose to the court any criminal
40 conviction of the professional fiduciary that occurs after the criminal records check was performed.
41 The criminal records check under this subsection shall consist of a check for a criminal record in
42 the State of Oregon and a national criminal records check if:

43 (A) The person has resided in another state within five years before the date that the criminal
44 records check is performed;

45 (B) The person has disclosed the existence of a criminal conviction; or

1 (C) A criminal records check in Oregon discloses the existence of a criminal record in another
 2 jurisdiction.

3 (b) The requirements of this subsection do not apply to any person who serves as a **county**
 4 public guardian [or] **and** conservator, or any staff of a **county** public guardian [or] **and** conservator,
 5 [who is] operating under ORS 125.700 to 125.730 or 406.050 [and who is otherwise required to acquire
 6 a criminal records check for other purposes], **or to the State Office of the Public Guardian and**
 7 **Conservator, the Public Guardian and Conservator, a deputy public guardian and conservator**
 8 **or the staff or volunteers of the State Office of the Public Guardian and Conservator, oper-**
 9 **ating under sections 2 to 10 of this 2013 Act, unless the person is otherwise required to**
 10 **submit to a criminal records check under ORS 125.700 to 125.730 or sections 2 to 10 of this**
 11 **2013 Act.**

12 (3)(a) If a petition seeks the appointment of a **county** public guardian and conservator operating
 13 under the provisions of ORS 125.700 to 125.730, **the appointment of the State Office of the Public**
 14 **Guardian and Conservator, the Public Guardian and Conservator or a deputy public guardian**
 15 **and conservator operating under the provisions of sections 2 to 10 of this 2013 Act,** or the
 16 appointment of a conservator under ORS 406.050 (8), the petition need not contain the information
 17 described in subsection (1)(d) or (L) of this section.

18 (b) If a **county** public guardian and conservator operating under the provisions of ORS 125.700
 19 to 125.730, **or the State Office of the Public Guardian and Conservator, the Public Guardian**
 20 **and Conservator or a deputy public guardian and conservator operating under the provisions**
 21 **of sections 2 to 10 of this 2013 Act,** is appointed to act as a fiduciary, or a conservator operating
 22 under the authority of ORS 406.050 (8) is appointed, the **county** public guardian [or] **and**
 23 conservator, **the office, the Public Guardian and Conservator, the deputy public guardian and**
 24 **conservator or the conservator** must file with the court within three days after receipt of written
 25 notice of the appointment a statement containing the name, address and telephone number of the
 26 individual who will act as primary decision maker for the protected person and the name of the
 27 person with whom the protected person will have personal contact if the person named as primary
 28 decision maker will not have personal contact with the protected person.

29 (4) If the court appoints a professional fiduciary as described in subsection (5) of this section,
 30 the professional fiduciary must update all information required to be disclosed by subsection (1) of
 31 this section and provide a copy of the updated statement upon the request of the protected person
 32 or upon the request of any person entitled to notice under ORS 125.060 (3). The professional
 33 fiduciary must provide an updated statement without demand to the court, the protected person and
 34 persons entitled to notice under ORS 125.060 (3) at any time that there is a change in the informa-
 35 tion provided under subsection (1)(L) or (3)(b) of this section.

36 (5) The provisions of this section apply to any person nominated as a fiduciary or serving as a
 37 fiduciary who is acting at the same time as a fiduciary for three or more protected persons who are
 38 not related to the fiduciary.

39 **SECTION 19.** ORS 125.410 is amended to read:

40 125.410. (1) Except as provided in subsection (2) of this section, the court shall require a
 41 conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservator
 42 according to law, with sureties as specified by the court. Unless otherwise directed, the bond must
 43 be in the amount of the aggregate capital value of the property of the estate in the control of the
 44 conservator plus one year's estimated income minus the value of securities and money deposited
 45 under arrangements requiring an order of the court for their removal and the value of any real

1 property that the conservator, by express limitation of power, lacks power to sell or convey without
2 court authorization.

3 (2)(a) The court may waive a bond for good cause shown.

4 (b) Subsection (1) of this section does not affect the provisions of ORS 709.240, relating to a trust
5 company acting as fiduciary, ORS 125.715, relating to a **county public guardian and conservator**
6 **acting as fiduciary, section 7 of this 2013 Act, relating to the State Office of the Public**
7 **Guardian and Conservator, the Public Guardian and Conservator or a deputy public guardian**
8 **and conservator acting as fiduciary under sections 2 to 10 of this 2013 Act,** or ORS 406.050 (8),
9 relating to the Department of Veterans' Affairs acting as fiduciary.

10 (3) Sureties for a bond required under this section are jointly and severally liable with the
11 conservator and with each other.

12 (4) Letters of conservatorship may not be issued until the bond required by this section is ap-
13 proved by the court.

14 (5) The bond of the conservator continues in effect until the sureties on the bond are released
15 by order of the court.

16 (6) The court may at any time increase or reduce the amount of the bond required of a
17 conservator for the protection of the protected person and the estate of the protected person.

18 (7) If a surety on a bond required by this section gives notice of intent to cancel the bond, the
19 conservator shall execute and file in the protective proceeding a new bond before the cancellation
20 date specified by the surety. The new bond shall be in the amount and subject to those conditions
21 that may be required by the court. If the conservator fails to file a new bond, the authority of the
22 conservator ends on the date specified by the surety for cancellation of the bond. The letters of
23 conservatorship issued to the conservator are void from that date, and the conservator must make
24 and file the final accounting of the conservator.

25
26 **UNIT CAPTIONS**

27
28 **SECTION 20. The unit captions used in this 2013 Act are provided only for the conven-**
29 **ience of the reader and do not become part of the statutory law of this state or express any**
30 **legislative intent in the enactment of this 2013 Act.**

31
32 **APPLICABILITY**

33
34 **SECTION 21. Sections 2 to 10 of this 2013 Act and the amendments to ORS 125.240,**
35 **125.410, 125.700, 125.705, 125.710, 125.715, 125.720, 125.725 and 125.730 by sections 11 to 19 of this**
36 **2013 Act apply to protective proceedings commenced on or after the effective date of this**
37 **2013 Act.**

38 _____

Attachment 4



Oregon

Office of Public Defense Services
Contract and Business Services Division

1175 Court Street NE
Salem, Oregon 97301-4030
Telephone (503) 378-3349
Fax (503) 378-4462
www.oregon.gov/opds

CERTIFICATE OF ATTORNEY QUALIFICATION FOR APPOINTMENT TO CAPITAL CASES

**ALL CERTIFICATES MUST BE TYPED – HANDWRITTEN
SUBMISSIONS WILL NOT BE ACCEPTED**

I. INSTRUCTIONS

By signing and submitting this certificate of attorney qualification, you are certifying that you have read the Public Defense Services Commission's *Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense* (hereafter, *Qualification Standards*); that you meet the qualifications for the capital case types you select in Section II below; that the information you provide is true and complete; and that you agree to comply with the continuing obligations of counsel approved for appointment in capital cases described in Section VI below.

The *Qualification Standards* authorize the Office of Public Defense Services to request the detailed information sought on this form. *Qualification Standard IV(5)(A)(h)*. The questions in Section VI below correspond to the minimum qualifications for the specific case types identified there and are identified as such. In addition to providing the information requested on this form, you must also submit the attachments identified in Section VIII below. Your certification will not be considered until all requested attachments are received.

Not all attorneys who meet the minimum qualifications will be approved for the reasons set out in *Qualification Standard V(4)(A)*.

You must sign and date this certificate as provided in Section IX below.

If you have questions regarding this certificate, please contact General Counsel at the Office of Public Defense Services.

II. CERTIFICATION OF QUALIFICATION FOR:

Trial Level: lead counsel co-counsel
 Appellate level: lead counsel co-counsel
 Post-conviction: lead counsel co-counsel

III. ATTORNEY INFORMATION

Name of Attorney:
 Business Address:
 City/State/ZIP:
 Office Telephone:
 Mobile Telephone:
 E-mail Address:
 Bar Number:

IV. CAPITAL CASE EXPERIENCE

a) If you have served as defense counsel in a capital case, please provide the information requested below on the five most recent cases.

<i>Case Name</i>		<i>Dates of Representation</i>	
<i>Case #</i>	<i>Judge(s)</i>	<i>Prosecutor(s)</i>	<i>Co-Counsel</i>
<i>Any appellate decisions</i>			
<i>Role in case, Posture of case and Result of representation</i>			

<i>Case Name</i>		<i>Dates of Representation</i>	
<i>Case #</i>	<i>Judge(s)</i>	<i>Prosecutor(s)</i>	<i>Co-Counsel</i>
<i>Any appellate decisions</i>			

Role in case, Posture of case and Result of representation

<i>Case Name</i>		<i>Dates of Representation</i>	
	<i>Judge(s)</i>	<i>Prosecutor(s)</i>	<i>Co-Counsel</i>
<i>Any appellate decisions</i>			
<i>Role in case, Posture of case and Result of representation</i>			

<i>Case Name</i>		<i>Dates of Representation</i>	
	<i>Judge(s)</i>	<i>Prosecutor(s)</i>	<i>Co-Counsel</i>
<i>Any appellate decisions</i>			
<i>Role in case, Posture of case and Result of representation</i>			

<i>Case Name</i>		<i>Dates of Representation</i>	
	<i>Judge(s)</i>	<i>Prosecutor(s)</i>	<i>Co-Counsel</i>
<i>Any appellate decisions</i>			
<i>Role in case, Posture of case and Result of representation</i>			

b) List of other involvement with capital cases:

- i. Observation of capital trials or other capital case proceedings (include case identifying information and stages of case observed);

- ii. Other participation in the field of capital defense, including research, motion writing, non-attorney support services;

- iii. Other relevant experience.

c) References:

Attach written statements from at least three persons, including at least one judge whom you have appeared before in a legal proceeding and one attorney who is currently providing representation in capital cases, which describe why that person believes you will provide high quality representation in capital cases.

If you wish to name additional references who can describe your qualifications to provide high quality representation in capital cases, please do so here:

d) Legal writing samples:

Attach two samples of substantial legal writing that include an analysis of complex legal issues, preferably filed in a capital case. Writing samples should be your own written work or include a statement describing the extent of your authorship and a clear acknowledgement of any other person's authorship of any drafts, sections of the document or editorship. Writing samples that are not substantially authored by you should not be submitted.

e) Oregon State Bar MCLE Attendance Report

Attach the most recent Minimum Continuing Legal Education (MCLE) Compliance Report that you have submitted to the Oregon State Bar, and your current MCLE transcript (available at member login at osbar.org).

f) Other information relating to professional qualifications

- i) Describe the nature of your current law practice and the workload that you are currently handling.

- ii) List the courts and judges you have regularly appeared before in the last two years.

iii) Have you ever been convicted of a crime in any state? If yes, provide the crime(s) of conviction, date and jurisdiction. (Do not answer yes or provide information for convictions that have been sealed or expunged.)

iv) Are there any criminal charges currently pending against you? If yes, identify the charges, the jurisdiction and the status of the proceedings.

v) Is there any complaint concerning you now pending with the Office of Client Assistance or Disciplinary Counsel of the Oregon State Bar, or otherwise pending formal charges, trial or decision in the bar disciplinary process? If so, please explain.

vi) 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, including matters resolved by stipulation or admonition? If yes, please explain.

vii) Has a former client ever successfully obtained post-conviction relief based upon a finding that you provided inadequate or ineffective representation? If yes, please explain and cite to court order or opinion, if there is one.

V. STATEMENT OF RELEVANT PROFICIENCIES

Provide a written statement describing the extent and source of your proficiencies in the following categories (from *Qualification Standards*, section IV(5)(g)):

- a) a commitment to providing zealous advocacy and high quality representation in the defense of capital cases;
- b) substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases;
- c) skill in the management and conduct of complex negotiations and litigation;
- d) skill in legal research, analysis, and the drafting of litigation documents;
- e) skill in oral advocacy;
- f) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- g) skill in the investigation, preparation and presentation of evidence bearing upon mental status;
- h) skill in the investigation, preparation, and presentation of mitigating evidence; [and]
- i) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing arguments[.]

If seeking approval for appointment in direct appeal cases, in addition to the above proficiencies, also describe the extent and source of your proficiency and commitment necessary for high quality representation in capital murder cases (from *Qualification Standards*, section IV(9)(C)). *Space below will expand as necessary, or attach additional pages.*

VI. MINIMUM EXPERIENCE REQUIREMENTS FOR CERTIFICATION

Complete the section below for the role to which you are certifying qualification for appointment.

a) Minimum Qualifications for Trial Lead Counsel

(i) Have you read the current version of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the Supplemental Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases? *Qualification Standards*, section IV(5)(A)(a).

(ii) Have you represented clients in major felony cases for at least five years? *Qualification Standards*, section IV(5)(A)(c).

(iii) Have you served as lead counsel or co-counsel in at least five major felony cases tried to a jury, which include at least one murder case that was tried to a jury? If yes, identify the cases. *Qualification Standards*, section IV(5)(A)(d).

(iv) Have you served as lead counsel or co-counsel in a death penalty case?

(v) Have you completed comprehensive in-person training in the defense of capital cases? If yes, identify the program and date of completion. *Qualification Standards*, section IV(5)(A)(e).

(vi) Have you attended and successfully completed within the last two years at least 18 hours of specialized training on current issues in capital cases through an establish training program awarding CLE credits? If yes, identify the programs and dates of attendance. *Qualification Standards*, section IV(5)(A)(f).

(vii) If you cannot answer “yes” to one of the above questions, list here or provide as an attachment any equivalent alternative skills and experience that you believe demonstrates that you will provide competent representation in capital cases. *Qualification Standards*, section IV(5)(C).

b) Minimum Qualifications for Trial Co-Counsel

(i) Have you read the current version of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the Supplemental Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases? *Qualification Standards*, section IV(5)(B); *Qualification Standards*, section IV(5)(A)(a).

(ii) Have you represented clients in major felony cases for at least five years? *Qualification Standards*, section IV(5)(B); *Qualification Standards*, section IV(5)(A)(c).

(iii) Have you served as lead counsel or co-counsel in at least five major felony cases tried to a jury, which include at least one homicide case that was tried to a jury? If yes, identify the cases. *Qualification Standards*, section IV(5)(B); *Qualification Standards*, section IV(5)(A)(b).

(iv) Have you served as lead counsel or co-counsel in a death penalty case?

(v) Have you completed comprehensive in-person training in the defense of capital cases? If yes, identify the program and date of completion. *Qualification Standards*, section IV(5)(B); *Qualification Standards*, section IV(5)(A)(e).

(vi) Have you attended and successfully completed within the last two years at least 18 hours of specialized training on current issues in capital cases through an establish training program awarding CLE credits? If yes, identify the programs and dates of attendance. *Qualification Standards*, section IV(5)(B); *Qualification Standards*, section IV(5)(A)(f).

(vii) If you cannot answer “yes” to one of the above questions, list here or provide as an attachment any equivalent alternative skills and experience that you believe demonstrates that you will provide competent representation in capital cases. *Qualification Standards*, section IV(5)(C).

c) Minimum Qualifications for Appellate Counsel (lead and co-counsel)

(i) Have you read the current edition of *Criminal Law* (Oregon State Bar), *Appeal and Review* (Oregon State Bar), and the Oregon Rules of Appellate Procedure? *Qualification Standards*, section IV(9)(A).

(ii) Do you have at least three years of criminal defense experience as an active trial or appellate lawyer? If yes, describe your experience relevant to appellate practice. *Qualification Standards*, section IV(5)(B).

(iii) Number of cases within the last three years in which you served as lead counsel in the direct appeal of felony convictions in federal or state court (please identify the three most recent appeals filed):

(iv) Number of cases within the last three years in which you served as lead counsel or co-counsel in the appeal, in federal or state court, of a case(s) where a sentence of death was imposed (please identify the three most recent appeals filed):

(v) Have you attended and successfully completed within the last two years a legal training or educational program on defending capital cases at which a substantial portion of the program was directly relevant to appeals in capital cases? If yes, identify the program(s) and date(s) of attendance. *Qualification Standards*, section IV(5)(E).

(vi) Have you attended and successfully completed within the last two years a legal training or educational program on appellate advocacy in criminal cases? If yes, identify the program(s) and date(s) of attendance. *Qualification Standards*, section IV(5)(F).

(vii) If you do not meet the minimum qualifications for appointment as lead or co-counsel, list here or provide as an attachment any equivalent alternative skills and

experience that you believe demonstrates that you will provide competent representation in capital case appeals. *Qualification Standards*, section IV(5)(G).

d) Minimum Qualifications for Post-Conviction Cases (lead and co-counsel)

(i) Have you read the Oregon Post-Conviction Hearing Act, ORS 138.510 – 138.686, and the Oregon State Bar’s performance standards for counsel representing petitioners in post-conviction relief proceedings and the authorities cited therein? *Qualification Standards*, section IV(11)(B).

(ii) Have you attended and successfully completed within the last two years a legal training or educational program on post-conviction relief cases? If yes, identify the program(s) and date(s) of attendance. *Qualification Standards*, section IV(11)(B).

(iii) Do you have prior experience as post-conviction counsel in at least three major felony cases? If yes, please identify the three most recent cases in which you have served. If no, please describe the extent of your prior experience and training in post-conviction cases. *Qualification Standards*, section IV(11)(C).

(iv) Do you meet the minimum qualifications for co-counsel in trial level capital cases? If yes, please complete the section 5(b) above. *Qualification Standards*, section IV(11)(D).

(iv) If you do not meet the minimum qualifications for appointment as lead or co-counsel, list here or provide as an attachment any equivalent alternative skills and experience that you believe demonstrates that you will provide competent

representation in capital post-conviction relief cases. *Qualification Standards*, section IV(11)(E).

VII. CONTINUING OBLIGATIONS OF ATTORNEYS APPROVED FOR APPOINTMENT TO CAPITAL CASES

By submitting this certificate, I also certify I will comply with the continuing obligations of counsel approved for appointment in capital murder cases identified below:

- a. Fulfill the obligations and expectations of counsel described in the American Bar Association Guidelines for the Performance of Defense Counsel in Death Penalty Cases (Revised 2003), and fulfill other applicable state and national performance standards.
- b. If seeking to remain on the roster of attorneys approved for appointment to capital cases, attend and successfully complete 18 hours of specialized training on current issues in capital cases through an established training program awarding CLE credits every two years.
- c. Promptly respond to requests for information from the Office of Public Defense Services, including completion of a Capital Case Representation Plan following a new appointment to a capital case.
- d. Upon request of the Office of Public Defense Services, confer with the death penalty resource attorney under contract with the Public Defense Services Commission regarding available assistance with the representation of capital trial level, direct appeal and post-conviction cases.
- e. Preserve all documents, notes, files, physical evidence or any other items created or received in the course of the representation in an orderly and organized manner such that it can readily be made available to successor counsel, if one is appointed or retained.

VIII. ATTACHMENTS

Checklist of Required Attachments:

Legal writing sample 1

Legal writing sample 2

(include statement of authorship if not your sole work product)

At Least 3 Letters of Reference regarding qualification to serve as defense counsel in a capital case, including from at least one judge and one defense attorney who is currently providing representation in capital cases.

Copies of the most recent MCLE compliance report submitted to the Oregon State Bar and your current MCLE transcript.

IX. CERTIFICATION AND SIGNATURE

I certify that I have read the PDSC Qualification Standards and that I meet the requirements of those standards and request appointment to capital cases in the role I have selected in Section II above. I further certify that I have provided complete and accurate response above, and that I will fulfill the continuing obligations of attorneys described in Section VII above.

Signature

Date

Attachment 5

Report on the Sixth Annual OPDS Statewide
Public Defense Performance Survey
Paul Levy, OPDS General Counsel
March 22, 2013

In early January 2013, the Office of Public Defense Services (OPDS) conducted its sixth annual statewide public defense performance survey. A summary of the survey results, along with some results of four preceding annual surveys, is attached to this report. Because OPDS used a somewhat different instrument for its first survey, the results of that survey are not easily compared to subsequent surveys.

As with surveys from previous years, the 2013 survey shows general satisfaction with the quality of public defense representation in Oregon. The responses show a particularly favorable opinion of the work of public defense providers in juvenile, civil commitment, and death penalty cases. As with previous surveys, the narrative comments included in responses to the 2013 survey are among the most helpful features of our survey effort. A significant number of the approximately 150 comments identified specific concerns with the quality of public defense services. OPDS staff is able to associate responses and comments with particular judicial districts and, where a respondent has provided a name, with a specific person. This allows OPDS to follow up on concerns with local justice system stakeholders, and to provide contractors with feedback about the services they are providing.

Conduct of Survey

OPDS uses an online survey tool to collect and tabulate responses. OPDS sends a link to its online survey to all Circuit Court judges, all elected district attorneys, the director of each county juvenile department, and to all coordinators of local Citizen Review Boards (CRB). In keeping with the tradition begun by his predecessor, Chief Justice Thomas Balmer sent an email message to all Circuit Court judges endorsing the survey and urging judges to respond. The overall response rate this year was similar to earlier surveys, with the exception of the record high response rate last year when over 30 deputy district attorneys in Multnomah County responded to the survey.

Criminal Representation

As in previous surveys, most respondents (86.8%) report that overall representation in criminal cases is good (63.6%) or excellent (23.2%). Most respondents say that the quality of criminal representation has remained about the same, while 21.5% say it improved in the past year and 5.1% say it has gotten somewhat worse. As in each previous survey, most respondents say that criminal caseloads are too large. And consistent with previous surveys, about half of all respondents indicate that they

question the competence of some attorneys handling criminal cases. In connection with this information, the 39 comments provided by respondents are especially helpful. The themes of these comments are similar to those in prior surveys: lack of client contact, inadequate case preparation, lack of professionalism, and insufficient or ineffective attorney training and supervision by contractor administrators. As mentioned above, OPDS is in the process of following up on comments concerning specific counties and providers.

Juvenile Representation

In response to the first annual survey in late 2007, respondents rated the overall quality of juvenile representation slightly less favorably than the representation in criminal cases. In subsequent surveys, including the current one, representation in both dependency and delinquency cases is said to be good or excellent by a higher percentage of people than in criminal cases, with no indication that opinions about criminal representation have worsened. Unlike in criminal cases, a significant majority of respondents do not question the competency of any attorney providing representation in either dependency or delinquency cases, although the comments provided in connection with this question provide useful information for further inquiry and work by OPDS. Also unlike the responses regarding criminal cases, most respondents indicate that the size of both dependency and delinquency caseloads are about right.

Death Penalty Representation

Each year the survey presents one open-ended question concerning death penalty representation, inviting any comments concerning representation in those cases. The 29 comments from those who said they were familiar with the quality of representation in death penalty cases are appended to the attached summary of survey results. The comments generally remark upon the very high quality of the work now being performed, although several comments question the work of some attorneys. One judge remarked, “[t]he improvements over the last decade in this area is something that the Office of Public Defense should be very proud of.”

Civil Commitment Representation

The 2010 survey was the first to ask about the quality of representation in civil commitment cases. As with responses from that year and since, the results in 2013 show a very high level of satisfaction with public defense representation in these cases.

Conclusion

While not a comprehensive or scientific measure of the quality of public defense services, survey results do permit OPDS to track significant changes in reported quality

from year to year in specific areas of the state and types of practice. The overall favorable opinion about the quality of public defense services, including the indication that some respondents see improvement in these services, supports the conclusion that PDSC is largely fulfilling its principal responsibility to deliver quality public defense services in Oregon. At the same time, many respondents identified specific concerns about the quality of representation in their counties. These comments, which are similar to ones received in past surveys, point to the need for continued efforts to improve provider management and the importance of ongoing PDSC engagement with all justice system stakeholders in Oregon.

2013 Annual Statewide Public Defense Performance Survey



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

	('09)	('10)	('11)	('12)	Response Percent	Response Count
Judge	95	92	109	104	70.3%	97
Prosecutor	11	13	20	45	8.7%	12
Juvenile Department	16	25	14	20	12.3%	17
Citizen Review Board	14	10	11	10	8.7%	12
Other					0.0%	0
Other (please specify)						0
answered question						138
skipped question						1

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

	Response Percent	Response Count
1 to 3 years	10.2%	14
3 to 5 years	3.6%	5
5 to 10 years	13.9%	19
10 years and more	72.3%	99
answered question		137
skipped question		2

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

		Response Percent	Response Count
JD 1 Jackson County		5.8%	8
JD 2 Lane County		6.5%	9
JD 3 Marion County		7.2%	10
JD 4 Multnomah County		11.5%	16
JD 5 Clackamas County		6.5%	9
JD 6 Morrow & Umatilla Counties		2.9%	4
JD 7 Hood River, Wasco, Sherman, Wheeler, Gilliam Counties		5.8%	8
JD 8 Baker County		1.4%	2
JD 9 Malheur County		2.9%	4
JD 10 Union & Wallowa Counties		2.2%	3
JD 11 Deschutes County		5.0%	7
JD 12 Polk County		1.4%	2
JD 13 Klamath County		1.4%	2
JD 14 Josephine County		4.3%	6
JD 15 Coos & Curry Counties		6.5%	9
JD 16 Douglas County		2.2%	3
JD 17 Lincoln County		2.2%	3
JD 18 Clatsop County		1.4%	2
JD 19 Columbia County		0.7%	1
JD 20 Washington County		7.9%	11
JD 21 Benton County		2.2%	3
JD 22 Crook & Jefferson Counties		1.4%	2

JD 23 Linn County		2.9%	4
JD 24 Grant & Harney Counties		1.4%	2
JD 25 Yamhill County		3.6%	5
JD 26 Lake County		0.7%	1
JD 27 Tillamook County		2.2%	3
answered question			139
skipped question			0

4. Are you able to comment on the quality of public defense representation in adult criminal cases?

		Response Percent	Response Count
Yes		75.4%	104
No (the survey will skip questions related to these cases)		24.6%	34
answered question			138
skipped question			1

5. Please rate your overall impression of the quality of public defense representation in adult criminal cases.

		('09)	('10)	('11)	('12)	Response Percent	Response Count
Excellent		15.8%	13.4%	20.7%	16.9%	23.2%	23
Good		68.3%	74.2%	65.5%	66.9%	63.6%	63
Fair		15.8%	12.4%	13.8%	14.7%	12.1%	12
Poor						1.0%	1
answered question							99
skipped question							40

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

		Response Percent	Response Count
Improved significantly		3.1%	3
Improved somewhat		18.4%	18
Remained about the same		73.5%	72
Worsened somewhat		5.1%	5
Worsened significantly		0.0%	0
answered question			98
skipped question			41

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

		Response Percent	Response Count
Always		26.5%	26
Often		64.3%	63
Sometimes		9.2%	9
Rarely		0.0%	0
Never		0.0%	0
answered question			98
skipped question			41

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

		Response Percent	Response Count
Yes		43.3%	42
No		56.7%	55

If "yes," please describe your concerns. 39

answered question 97

skipped question 42

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

		Response Percent	Response Count
Significantly too large		14.0%	13
Somewhat too large		38.7%	36
About right		44.1%	41
Somewhat too small		3.2%	3
Significantly too small		0.0%	0

answered question 93

skipped question 46

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

		Response Percent	Response Count
Yes		61.0%	83
No (the survey will skip questions related to these cases)		39.0%	53
answered question			136
skipped question			3

11. Please rate your overall impression of the quality of public defense representation in juvenile dependency cases.

		('09)	('10)	('11)	('12)	Response Percent	Response Count
Excellent		24.4%	29.5%	31.8%	26.3%	42.5%	34
Good		61.0%	61.5%	60.0%	64.6%	52.5%	42
Fair		14.6%	7.7%	8.2%	9.1%	5.0%	4
Poor						0.0%	0
answered question							80
skipped question							59

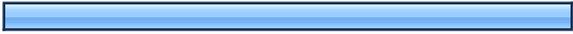
12. Within the past year, has the quality of public defense representation changed in juvenile dependency cases?

		Response Percent	Response Count
Improved significantly		2.5%	2
Improved somewhat		35.4%	28
Remained about the same		62.0%	49
Worsened somewhat		0.0%	0
Worsened significantly		0.0%	0
answered question			79
skipped question			60

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

		Response Percent	Response Count
Always		44.3%	35
Often		50.6%	40
Sometimes		5.1%	4
Rarely		0.0%	0
Never		0.0%	0
answered question			79
skipped question			60

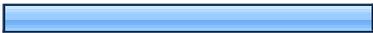
14. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in juvenile dependency cases?

		Response Percent	Response Count
Yes		13.9%	11
No		86.1%	68

If "yes," please describe your concerns. 11

answered question	79
skipped question	60

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

		Response Percent	Response Count
Significantly too large		3.9%	3
Somewhat too large		39.0%	30
About right		55.8%	43
Somewhat too small		1.3%	1
Significantly too small		0.0%	0

answered question	77
skipped question	62

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

		Response Percent	Response Count
Yes		76.3%	61
No (the survey will skip questions related to these cases)		23.8%	19
answered question			80
skipped question			59

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

		('09)	('10)	('11)	('12)	Response Percent	Response Count
Excellent		22.1%	23.5%	32.9%	28.4%	41.0%	25
Good		63.6%	67.6%	57.1%	66.7%	52.5%	32
Fair		14.3%	8.8%	10.0%	4.9%	6.6%	4
Poor						0.0%	0
answered question							61
skipped question							78

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

		Response Percent	Response Count
Improved significantly		0.0%	0
Improved somewhat		25.4%	15
Remained about the same		72.9%	43
Worsened somewhat		1.7%	1
Worsened significantly		0.0%	0
answered question			59
skipped question			80

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

		Response Percent	Response Count
Always		50.8%	31
Often		44.3%	27
Sometimes		4.9%	3
Rarely		0.0%	0
Never		0.0%	0
answered question			61
skipped question			78

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

		Response Percent	Response Count
Yes		10.0%	6
No		90.0%	54

If "yes," please describe your concerns.

6

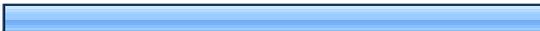
answered question

60

skipped question

79

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

		Response Percent	Response Count
Significantly too large		3.3%	2
Somewhat too large		13.3%	8
About right		81.7%	49
Somewhat too small		1.7%	1
Significantly too small		0.0%	0

answered question

60

skipped question

79

22. Are you able to comment on the quality of public defense representation in death penalty cases?

		Response Percent	Response Count
Yes		25.0%	33
No (the survey will skip questions related to these cases)		75.0%	99
answered question			132
skipped question			7

23. Please provide any comments you have concerning the quality of public defense representation in death penalty cases.

	Response Count
(see below)	29
answered question	29
skipped question	110

24. Are you able to comment on the quality of public defense representation in civil commitment cases?

		Response Percent	Response Count
Yes		46.9%	61
No (the survey will skip questions related to these cases)		53.1%	69
answered question			130
skipped question			9

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

	('10)	('11)	('12)	Response Percent	Response Count
Excellent	23.4%	35.7%	37.1%	41.9%	26
Good	70.2%	51.4%	52.9%	56.5%	35
Fair	6.4%	11.4%	10.0%	1.6%	1
Poor				0.0%	0
answered question					62
skipped question					77

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

	Response Percent	Response Count
Improved significantly	1.6%	1
Improved somewhat	13.1%	8
Remained about the same	83.6%	51
Worsened somewhat	1.6%	1
Worsened significantly	0.0%	0
answered question		61
skipped question		78

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

		Response Percent	Response Count
Always		59.0%	36
Often		39.3%	24
Sometimes		1.6%	1
Rarely		0.0%	0
Never		0.0%	0
answered question			61
skipped question			78

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

		Response Percent	Response Count
Yes		6.6%	4
No		93.4%	57

If "yes," please describe your concerns. 5

answered question			61
skipped question			78

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

		Response Percent	Response Count
Significantly too large		1.7%	1
Somewhat too large		0.0%	0
About right		93.2%	55
Somewhat too small		5.1%	3
Significantly too small		0.0%	0
answered question			59
skipped question			80

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

	Response Count
	57
answered question	57
skipped question	82

31. Your name (optional)

	Response Count
	47
answered question	47
skipped question	92

Page 9, Q23. Please provide any comments you have concerning the quality of public defense representation in death penalty cases.

1	None; very qualified and competent	Jan 29, 2013 2:37 PM
2	We have an outstanding cadre of lawyers handling capital cases. They know the law and the ABA standards adopted by the OPDSC.	Jan 28, 2013 12:39 PM
3	needing a little more experience in negotiation and cutting unnecessary costs	Jan 26, 2013 1:59 PM
4	They provide excellent representation.	Jan 24, 2013 11:49 AM
5	Generally very good.	Jan 24, 2013 10:33 AM
6	The representation has been excellent.	Jan 24, 2013 10:24 AM
7	Only have experience with 2 attorneys: one was excellent, one should not be allowed to represent anyone....	Jan 24, 2013 10:24 AM
8	I have had only a few. The representation seemed adequate.	Jan 24, 2013 10:11 AM
9	I have dealt with three death penalty cases in the last two years. None of those cases went to trial. In all of the cases the attorneys provided a high level of representation.	Jan 24, 2013 8:59 AM
10	From what I have seen in the past and at present, the public defender representation has always been very good.	Jan 23, 2013 10:26 AM
11	The representation has been very good.	Jan 22, 2013 11:20 AM
12	some of the attys who are appointed from out of county are in over their heads, are unethical, wasteful, and only marginally competent.	Jan 20, 2013 5:48 PM
13	Excellent in the death penalty cases I have handled.	Jan 17, 2013 6:53 PM
14	The quality of representation is very good. But the motion practice for the omnibus hearing is out of control. Too many motions being filed on issues that either don't need for whatever reason to be decided or have been resolved as a matter of law with no chance of being overruled.	Jan 17, 2013 3:45 PM
15	Usually excellent.	Jan 17, 2013 2:36 PM
16	I believe that over all, we have an excellent death penalty bar. The improvements over the last decade in this area is something that the Office of Public Defense should be very proud of.	Jan 17, 2013 2:21 PM
17	some attorneys are not prepared and rarely file motions	Jan 17, 2013 1:28 PM
18	I have only worked with Steve Gorham and David Kuhns on the one death penalty case assigned to me. They both have done an excellent job. The trial will occur in the next 90 days.	Jan 17, 2013 1:03 PM
19	I think the quality of representation is fairly good. Again, some attorneys are better at managing their cases than others, but I feel that all of the attorneys are competent to handle to very difficult and complex issues presented by such cases.	Jan 17, 2013 12:20 PM

Page 9, Q23. Please provide any comments you have concerning the quality of public defense representation in death penalty cases.

20	Highly variable. There are some attorneys who feel the best wa to practice is by mandamus; there are some who seem not to be able to process the work in a timely and professional way. Having seen DP PCR cases with some of these same lawyers and looked at their performance in hindsight, I can say that there needs to be more consistent high quality performance.	Jan 17, 2013 12:09 PM
21	High quality and competence.	Jan 17, 2013 11:14 AM
22	Legal representation in the limited number of this case type is generally very good. I have no negative comments.	Jan 17, 2013 10:38 AM
23	These are good lawyers for the most part. Most seem to make an honest attempt to create a record that will stand up on post conviction review. I am told there is at least one who has done the opposite IE: tried to build post conviction issues, that could cause reversal, into the record to be used in the event that he was unsuccessful with the jury. May I suggest a good way to review these lawyers performance would be to have an excellent attorney review the appellate and post conviction records made by these attorney's in order to determine if they should stay on the list. I would start with a careful look at Duane McCabe. The other criticism I have heard on a number of occassions is that some of these attorneys travel with an entourage to hearings and court appearances when that kind of support is completely unnecessary. They are in short, wasting public money. I would bet you have tried to address this - I hear it still happens in other counties though I have not observed it here.	Jan 17, 2013 10:37 AM
24	Quality here appears excellent. Problems are with state.	Jan 17, 2013 9:47 AM
25	Generally, counsel on death penalty cases are very experienced -- much more so than the prosecutors handling the cases. Again, there are a maybe one or two individuals who are underperforming.	Jan 17, 2013 9:28 AM
26	High quality.	Jan 17, 2013 8:35 AM
27	Excellent	Jan 17, 2013 8:34 AM
28	Generally it is very good. There was one lawyer that should never have been assigned a death penalty case. Lucky for the defendant he moved out of state. The attorney onthe case now is excellent.	Jan 17, 2013 8:34 AM
29	I am very impressed with the high quality of the death penalty defense lawyers.	Jan 17, 2013 8:25 AM

Attachment 6

**OFFICE OF PUBLIC DEFENSE SERVICES
COMPENSATION PLAN**

Effective: April 1, 2013

CLASSIFICATION TITLE	SR	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10
Accounting Tech	17	2345	2447	2540	2657	2772	2897	3033	3178	3332	3486
Administrative Analyst	24	3163	3320	3487	3669	3852	4038	4237	4446	4668	4905
Assistant Chief Defender	38	7093	7438	7811	8206	8613	9035	9487	9955		
Business Services Manager	31	4446	4668	4905	5150	5404	5671	5956	6247	6564	6886
Chief Defender	40	7093	7438	7811	8206	8613	9035	9487	9955	10457	
Chief Deputy Defender	38	7093	7438	7811	8206	8613	9035	9487	9955		
Compliance Specialist	21	2772	2897	3033	3178	3332	3486	3652	3837	4020	4220
Contract & Business Services Director	39	6564	6886	7222	7582	7968	8364	8771	9211	9665	10142
Deputy Defender 1	29	4858	5110	5365	5630	5909	6209				
Deputy Defender 2	32	5630	5909	6209	6517	6841	7183	7541	7917	8314	
Executive Director	42	7222	7582	7968	8364	8771	9211	9665	10142	10649	11183
General Counsel	37	6564	6886	7222	7582	7968	8364	8771	9211	9665	
Human Resource Analyst	27	3970	4159	4364	4580	4809	5052	5304	5567	5839	
Internal Auditor	30	4618	4849	5092	5345	5615	5897	6188	6495	6818	
Juvenile Appellate Section Senior Attorney	36	6755	7093	7438	7811	8206	8613	9035	9487		
Legal Secretary	18	2459	2578	2701	2837	2976	3123	3286	3447	3623	3801
Legal Secretary Supervisor	22	2828	2968	3112	3274	3426	3591	3780	3968	4166	4374
Office Specialist 1	12	1958	2027	2101	2180	2273	2345	2447	2540	2657	2772
Office Specialist 2	14	2180	2273	2345	2447	2540	2657	2772	2897	3033	3178
Operations Manager	24	3163	3320	3487	3669	3852	4038	4237	4446	4668	4905
Paralegal	21	2772	2897	3033	3178	3332	3486	3652	3837	4020	4220
Public Defense Analyst	30	4185	4394	4614	4844	5087	5341	5607	5889	6184	6494
Senior Deputy Defender	34	6209	6517	6841	7183	7541	7917	8314	8730	9167	

Attachment 7

DIVISION OF CORRECTIONS
CORRESPONDENCE REGULATIONS

- MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM WITH THESE RULES
- No. 1 -- Only 3 letters each week, not to exceed 2 sheets letter-size 8 1/2 x 11" and written on one side only, on ruled paper, do not write between lines. Your complete name must be signed at the close of your letter. Clippings, letters from other people, stationary or cash must not be enclosed in your letters.
- No. 2 -- All letters must be addressed to the complete prison name of the inmate. Cell number, where applicable, and prison number must be placed in lower left corner of envelope.
- No. 3 -- Do not send any packages without a Package Permit. Unauthorized packages will be destroyed.
- No. 4 -- Letters must be written in English only.
- No. 5 -- Books, magazines, pamphlets, and newspapers of reputable character will be delivered only if mailed direct from the publisher.
- No. 6 -- Money must be sent in the form of Postal Money Orders only, in the inmate's complete prison name and prison number.

INSTITUTION _____

NAME _____

In The _____
Clarence _____

vs. _____

H.G. C...
direct...
of corr...
of F...



United States
for a writ
directed
Supreme Court
of Florida.
No. 890 Misc.
COT. TERM 1961
U. S. Supreme Court
en, Chief
States
Clarence
The United States
and appearing
petitions this
at Certiorari
Court of The State
order and Judge
The
Supre
The authori
The Sta
of The Sta
and Jurisdiction to review the final Judge
of The Supreme Court of The Sta
of Florida the highest court of The Sta
344(B) Title 28 U.S.C.A. and
"due process clause" of 7



The Anniversary, the Right and the Reality

Gideon v. Wainwright After 50 Years

• • • •

By *Janine Robben*

“**P**oor people have access to American courts in the same sense that Christians thrown to lions had access to the Coliseum.” — Earl Johnson Jr., retired justice, *California State Court of Appeal*

It’s the stuff of a John Grisham novel, or at least a nonfiction book by a Pulitzer Prize-winning author.

A criminal defendant with an eight-grade education who had the presence of mind to request court-appointed counsel. A petition for review of the trial court’s denial of that request, written in pencil on lined paper in a Florida jail cell. A U.S. Supreme Court poised to reverse itself. And an appellate attorney, selected by that Court to represent that defendant, who shortly thereafter would become an associate justice himself.

The date was March 18, 1963, 50 years ago this month; the case was *Gideon v. Wainwright*, and the issue was whether indigent persons charged with felonies in state courts have an absolute federal constitutional right to court-appointed counsel.

In saying “yes,” the Warren Court (1953-69) made a decision that changed the face of criminal prosecution in the United States, a decision that — unlike some of that Court’s other “landmark” decisions — has withstood the test of time.

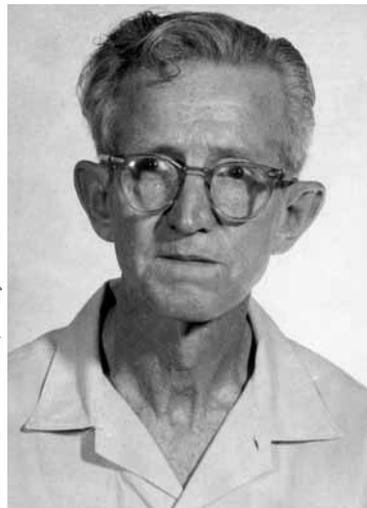
“It’s startling for my students to realize that before *Gideon*, the Sixth Amendment meant that if you were paying for a lawyer, you could bring that lawyer with you to court,” says Prof. Margie Paris, who teaches criminal law and procedure at the University of Oregon School of Law.

There was just one little problem with this new right, the same problem that had caused Clarence Earl Gideon (pictured below) to request court-appointed counsel in the first place:

Money.

“*Gideon* is my favorite opinion,” says Portland lawyer Barnes Ellis, who played an instrumental role in the development of Oregon’s public-defense system and chairs its Public Defense Services Commission. “It is a tectonic-plate shift. It goes for like 40 pages. And nowhere in the opinion is how public defense is going to be paid for even mentioned.”

The Legal Landscape Pre-*Gideon*



State Archives of Florida, Woody Wisner

The concept that an indigent defendant might have a constitutional right to court-appointed counsel was not entirely novel when *Gideon* appeared on the scene.

In 1932, the U.S. Supreme Court had held, in *Powell v. Alabama*, that a state trial court’s failure to provide criminal defendants with effective assistance of counsel was a denial of their 14th Amendment protection against deprivation of “... life, liberty or property ... without due process of law...”

“For the first time” Pulitzer Prize-winning reporter Anthony Lewis said of *Powell* in his 1964 book, *Gideon’s Trumpet*. “the Supreme Court had held that the Constitution could entitle the poor and friendless accused to the lawyer he could not retain himself. It was the first occasion on which the Supreme Court had actually reversed a state criminal conviction because of unfair procedures at trial.”

But, at the same time, the Court made it clear that its holding was limited to the “special circumstances” of that case: nine poor, black teenagers — the so-called “Scottsboro Boys” — who were sentenced to death after hastily appointed and unprepared counsel represented them on charges of raping two white girls.

Six years later, in *Johnson v. Zerbst*, the Court held that the Sixth Amendment, which provides that “... the accused shall enjoy the right ... to have the Assistance of Counsel for his de-

fence” requires the appointment of counsel for indigent defendants in federal criminal cases.

The result of these two decisions was that in *state* courts, the 14th Amendment required appointment in *some* criminal cases, while in *federal* courts, the Sixth Amendment required appointment in *all* such cases.

Because of this disparity, Lewis wrote, “Many informed observers thought it was inevitable that the requirement [that the court appoint counsel] would be extended to the states.”

But then, in 1942, came *Betts v. Brady*.

In *Betts*, the Court — instead of extending *Zerbst* to state court proceedings — expanded *Powell* to noncapital cases in which lack of counsel denied indigent defendants “fundamental fairness” due to “special circumstances.”

In later decisions, “special circumstances” were held to include a defendant’s illiteracy or youth; a prosecutor’s or judge’s conduct and/or the complexity of the charges.

The Stage Is Set

This was the state of the law in 1961, when Clarence Gideon was denied counsel in a case involving petty larceny from a pool hall; received the maximum sentence of five years in prison and petitioned for review.

The defendant, Wainwright, was a prison official in Florida, where Gideon was imprisoned.

The U.S. Supreme Court, which, as author Lewis noted, “has virtually unlimited complete freedom to select the ... cases to which it will give a full hearing each term...” allowed the petition.

Following its practice of personally appointing counsel for unrepresented petitioners, the Court chose Abe Fortas, a prominent Washington, D.C., lawyer who would himself be appointed to the Court several years later, to represent Gideon.

The fact that the Court chose to revisit *Betts*, on Gideon’s seemingly insignificant case, was not as surprising as it may appear: *Betts* and its virtual case-by-case analysis of “special circumstances” had proved cumbersome.

“There were some indications that these issues were coming down the pike,” says Portland attorney Arden Shenker, who worked on the petitioner’s brief on one of three other cases consolidated with *Gideon* for hearing. “So when the Court granted these petitions, I had a clue how big the decisions could be. We were optimistic.”

Shenker was assisting a lawyer from Washington state, Charles “Chuck” Luce, on *Draper v. Washington* (concerning an indigent’s right to free transcript on appeal from state-court conviction) because Luce recently had been named head of the Bonneville Power Administration and was pressed for time. (Ironically, one of their work sessions was cut short when the Columbus Day Storm hit Portland, forcing Luce to respond to BPA storm-related calls and Shenker to shut down their office in the federal courthouse.)

Meanwhile, Oregon’s then-attorney general, Robert Y. Thornton, was filing two amici curiae briefs in *Gideon*, both on

behalf of the criminal *defendant*, not the fellow state of Florida. In one, Oregon was joined with 21 other states and commonwealths; in the other, it was the only state to file a separate amicus curiae seeking reversal of *Gideon's* conviction.

"*Gideon* had the best of the four cases in terms of the fairness of the need," Shenker says. "But in all four cases we were able to demonstrate the need: if you can't afford a transcript on appeal, how will the appellate court know what errors were made?"

In *Gideon*, the Court ruled unanimously that the 14th Amendment requires state courts to appoint counsel for indigent defendants in felony cases, thereby extending the identical requirement made on federal courts by the Sixth Amendment and *Zerbst*.

Shenker never had the opportunity to cite *Draper*: he immediately went into private practice, doing complex commercial litigation. But former Oregon Attorney General Dave Frohnmayer, who later would argue seven cases before the U.S. Supreme Court, winning six of them, says that the impact of *Gideon*, its companion cases and their progeny was felt in other legal circles quickly and powerfully.

"Practically our first day of law school, a professor said, 'There's this wonderful book called *Gideon's Trumpet*,'" says Frohnmayer, who had graduated *magna cum laude* from Harvard University in 1962 and would receive his law degree from the University of California Berkeley School of Law in 1967. "I read it in almost my first week of law school."

"This was very heady, confusing stuff," says Frohnmayer. "Our criminal procedure book immediately was outdated. I remember getting huge supplements on *Escobedo* [*Escobedo v. Illinois*, right to counsel during police interrogations (1964)] and *Miranda* [*Miranda v. Arizona*, advice of rights (1966)]. It was very exciting."

Frohnmayer had the opportunity to help prison inmates exercise their new rights when, as a "rookie lawyer" for a large corporate firm in San Francisco, he did *pro bono* work on habeas corpus cases.

"I was an early part of a group of young, volunteer attorneys, many with large firms, that was building on what the Warren Court had done," he says, referring to that Court's great expansion of the use and scope of the federal writ of habeas corpus by prisoners to bring their cases before courts. "Our [federal] jurisdiction just got a boatload of these cases because San Quentin [State Prison] is in it. I spent more weekends than I can count at San Quentin, seeing my clients."

"People were getting their teeth into this time of constitutional revolution," Frohnmayer says of the immediate post-*Gideon* era. "Your sense of being able to have a personal impact on the development of law was very profound."

Still a Landmark

Fifty years later, "*Gideon* is still a landmark," says Prof. Tung Yin, who teaches criminal procedure at Lewis & Clark Law School.

"If you survey the peak of the Warren Court and what criminal procedure looked like at that time," he explains, "there have been deep cutbacks in some areas, cutbacks in some areas and

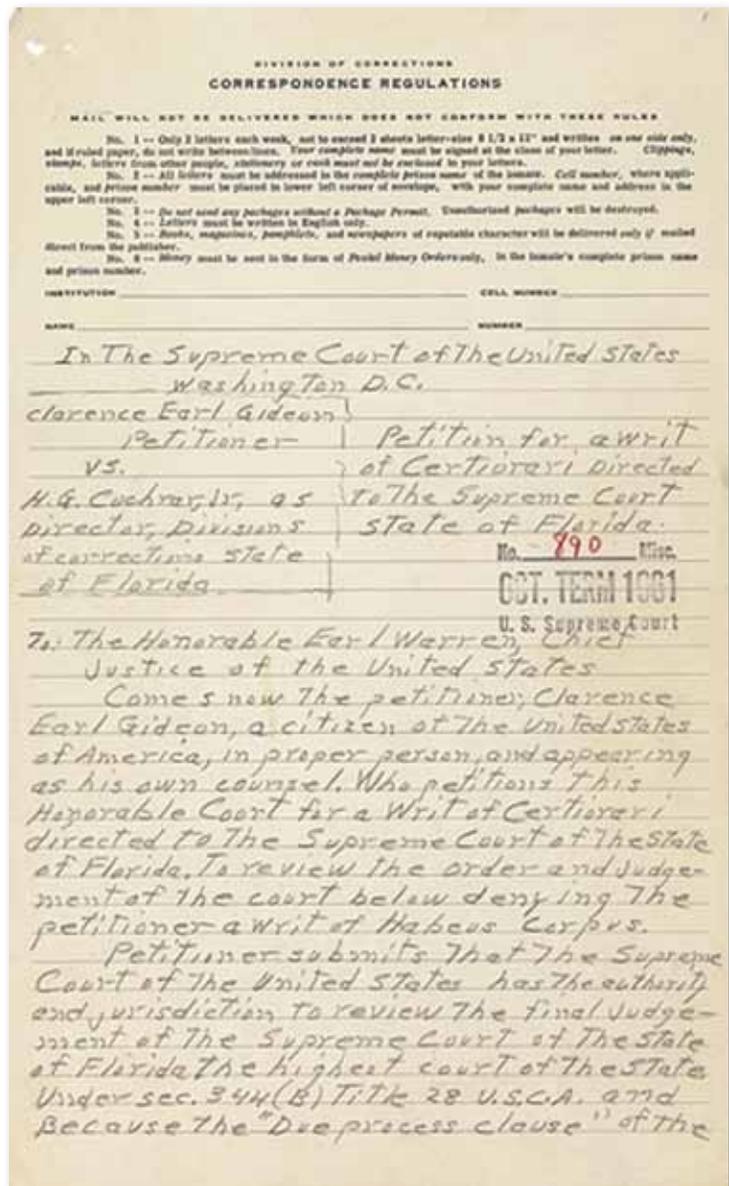
other areas that are essentially untouched. The right to counsel is among the latter."

But, while *Gideon* has survived as a legal principle for 50 years, Yin says that "If you look at the practical terms of what *Gideon* means versus the aspirational right, you're going to see some difference."

"It's not that the court has cut back on the *Gideon* right," he elaborates. "It's a practical issue: how much money is available for public defenders."

The UO law school's Paris, who practiced criminal defense in Chicago before moving to Oregon, agrees.

"I spend almost half of my time, when teaching, on assistance of counsel: what does the right, in reality, provide today?" she asks. "That's a very serious and troubling question. Nowadays,



The U.S. National Archives

the public defense system is very, very seriously underfunded, so that what many defendants get is really not effective assistance of counsel. That lack of funding has had a profound, profound effect on the quality of counsel, and it has affected one population disproportionately: African Americans.”

“In some states, the money for indigent defense comes from the counties, and some counties can’t, and don’t, afford it,” says Paris. “What people are getting, in terms of defense counsel, is ridiculous. Two, three, four hundred cases a year. There’s no way you can effectively assist [someone]; basically, you’re just pleading defendants guilty.”

Other issues, she says, include appointed counsel who “... make so little on these cases that they don’t spend any time on them...” and/or are “not even qualified to handle the cases on which they are appointed.”

“Add to this layer of underfunding a second problem,” Paris continues. “The Supreme Court’s standard for determining whether a defendant has received the effective assistance of counsel is both very, very low and courts have not been very demanding when they apply that standard. Convictions have been upheld where the lawyers were *sleeping*.”

“To make *Gideon* real, to hold up the guarantee it created, we have to fund lawyers and have a meaningful standard to evaluate [appointed counsel] after the fact,” Paris concludes. “We haven’t lived up to the promise that the court gave us in *Gideon*.”

Encouraging Signs

There are encouraging signs, at least in some parts of the country.

“Oregon has one of the better [indigent defense] systems,” says Paris, “[And] the federal system is pretty good.”

In addition, she says, “In the last few years, the Supreme Court has begun to pay attention (to the adequacy of counsel), particularly with guilty pleas.”

This increased attention is not limited to the U.S. Supreme Court or to cases in which defendants pled guilty.

“Within the last two years, a slew of cases have been sent back on post-conviction relief (PCR) proceedings, in Oregon, for ineffective assistance of counsel,” says Corvallis attorney Peter Fahy, who defends death-penalty cases all over the state.

PCR is one of two kinds of inmate-initiated proceedings — the other being habeas corpus — in which judicial review of the adequacy of counsel takes place after direct appeals are exhausted.

“In the 13 months since the governor (John Kitzhaber) placed a moratorium on executions in Oregon,” attorney Jeff Ellis of the Portland-based Oregon Capital Resource Center said in late December, “there have been no new death-penalty cases handed down by Oregon juries. During that same period of time, there have been five reversals in Oregon death-penalty cases, two on direct appeal, three in PCR proceedings.” (The two appellate reversals did not involve inadequate assistance of counsel.)

“It is an unusually high number,” says Ellis, who receives state funding to provide assistance to attorneys representing clients

in death-penalty cases in Oregon. “It had been quite some time since any capital case was reversed on state PCR.”

In order to prevail on an inadequate assistance of counsel claim under the Oregon Constitution, the petitioner/inmate must prove, by a preponderance of the evidence, that his trial counsel failed to exercise necessary professional skill and judgment and that the petitioner/inmate was prejudiced as a result.

Under the federal constitutional standard, he must demonstrate that his counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for such performance, his case would have had a different outcome.

In capital cases, says Ellis, there actually are two outcomes to be considered: that of the trial and that of the penalty phase.

In the three PCR cases to which Ellis refers, judges upheld the petitioners’ convictions — all for aggravated murder and other crimes — but reversed their death-penalty sentences and remanded them for new penalty phases.

“On the one hand, it is discouraging that appointed counsel performed deficiently in death-penalty trials,” says Ellis of these outcomes. “On the other hand, it is encouraging that the post-conviction courts are holding trial counsel to a performance standard designed to guarantee not just that a capital defendant is represented by a warm body with a bar card, but by an attorney who is providing a skillful and vigorous defense.”

Fahy, who represented defendant Samuel Adam Lawson in a case that made headlines in November when the Oregon Supreme Court reversed convictions on aggravated murder and other charges for reasons other than ineffective assistance of counsel, says being a prosecutor taught him the importance of well-qualified defense counsel.

“It’s an adversarial system,” says Fahy, who was a deputy district attorney in Lincoln County, prosecuting noncapital cases, for over 12 years. “If the prosecutor and defense counsel are not closely matched, it can be the difference between life and death.”

Organizing in Oregon

Immediately post-*Gideon*, Oregon had nothing like the state-directed and funded system of trial-level public defense that it has today.

“There were always good ol’ boys, typically older lawyers who were either has-been or never-was, sitting in the back of the courtroom,” recalls Barnes Ellis, a career civil practitioner with a long-term interest in civil liberties who chairs Oregon’s Public Defense Services Commission (PDSC). “The judge who was arraigning a defendant would look in the back and say, ‘I’ll appoint him.’”

Then, in 1970, the Multnomah Bar Association got a \$10,000 grant for a pilot program to provide counsel to indigent defendants in the then-existent Portland Municipal Court.

“We hired a young guy in the Multnomah County District Attorney’s Office, Jim Hennings,” says Ellis of the program that, in 1971, became what is now Metropolitan Public Defender Ser-

ices, Inc. (MPD).

“MPD exists because of *Gideon*,” says Hennings, who would remain the program’s executive director until his retirement in 2008, 37 years later. His former colleague at the DA’s office, Mike Schrunk, who was elected the DA in 1981, remained in that position until December 2012.

“The concept of forming an indigent defense nonprofit with a board was new in the country, as far as I know,” Ellis says. “It turned out to be a wonderful vehicle. Our little pilot program, by the early 1980s, was a very successful concept. Forty to 50 judges in the state got their start at MPD, and two or three law professors at Lewis & Clark Law School. Many other lawyers got their experience there and then moved into private practice. The cream of the defense bar started there.”

But, on a practical level, says Ellis, “All during the ’70s, the cost of public defense was rising rapidly.”

“It was not just *Gideon*,” he says, noting that the right to counsel had been extended to indigent defendants charged with misdemeanors, juveniles in delinquency cases, and parents in juvenile-dependency cases, in which the parents’ conduct, not the child’s, is at issue.

“Indigent defense had become a huge issue for the counties,” says Ellis, “because the cost had become a huge strain on them.”

As a result, in 1983, the state — which had been providing indigent defendants with counsel on appeal and in PCR proceed-

ings since 1963 — created a statewide, trial court-level public-defense system.

“The problem,” says Ellis of this plan, “is that it was totally underfunded. There was still resistance by many legislators. They were asking, ‘Why is the state paying for defense counsel? The state is *prosecuting*.’ ”

Lane Borg, now executive director of the MPD, remembers this time well because of a funding crisis that was unique to Clackamas County, where the MPD was at that time providing public defense.

“I had my first trial, as a third-year certified law student, in March 1984, the day my daughter was born,” says Borg. “In ’83-84, the only misdemeanors being prosecuted in Clackamas County, because of budget issues, were DUIIs (Driving Under the Influence of Intoxicants). I *was* the misdemeanor section. I did 200 DUIIs that year.”

In 2001, after years of experimentation with different systems, Oregon adopted its present system.

Under the current system, the Public Defense Services Commission (PDSC), an independent commission whose seven members are appointed by the chief justice of the Oregon Supreme Court, governs an Office of Public Defense Services (OPDS), a state agency, and appoints its executive director, a state employee.

The OPDS has staff attorneys and also contracts with outside attorneys to represent adult criminal defendants, at trial and on appeal, on misdemeanor and felony cases; juveniles on delinquency cases; parents on juvenile dependency cases; and inmates appealing parole board decisions. The contracts are with community-defender entities made up of full-time public defenders, of which the MPD, which provides defense services in Multnomah and Washington counties, is the largest; consortiums of lawyers in private practice who combine to do public defense, as now occurs in Clackamas County; and single, local firms, as occurs in Wasco County.

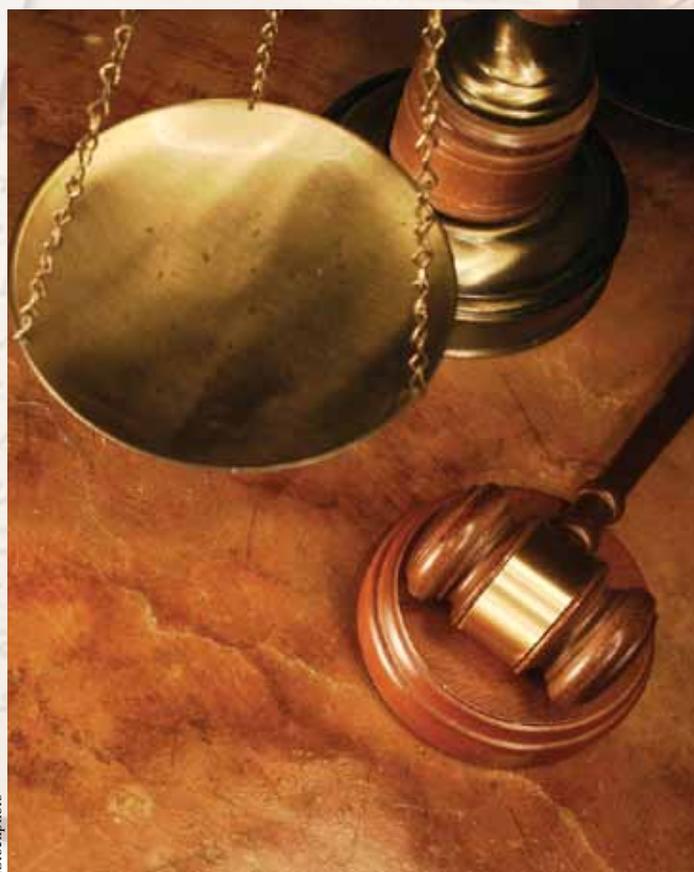
But then, over the course of the 2001-03 biennium, the Public Defense Services Account was reduced by \$27.6 million, or 17 percent, from the budget that the Legislature had adopted to fund the new system.

“Right off the bat,” says Barnes Ellis, “we had multiple special sessions of the Legislature. That led to then-Chief Justice Wally Carson’s decision that funding for defense was so curtailed that the courts were not going to process any misdemeanor cases except DUII.”

“I have the most-vivid memory of a day in Salem,” Ellis says of that biennium. “Police chiefs, sheriffs, district attorneys, all coming to the legislature and saying, ‘The system can’t work if we don’t fund defense.’ ”

Some of the funding subsequently was restored, but not until after Oregon’s district attorneys, including Multnomah County’s Schrunk, had joined in a federal lawsuit to compel appointment of counsel. The suit was dismissed when the restoration of funding after the start of the new biennium rendered it moot.

“Since that time, public defense in Oregon has been a very



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responsible system,” says Ellis. “At this stage, Oregon can properly say that we are regarded as one of the best systems in the country.”

Equivalent But Not Equal

“Things have changed since *Gideon*,” says Borg, who was a judge *pro tem* and attorney in private practice before returning to public defense as the head of the MPD in 2008.

“The biggest thing is whether or not you qualify for a public defender has been refined,” he says. “The state has a more realistic sense of what it costs to retain private counsel. Even 15 years ago, having \$2,500 in the bank meant that you couldn’t get an appointed attorney, even for a Rape I. No decent attorney is going to do a Rape I for \$2,500.”

“If you’re in custody, they’re going to appoint you counsel,” Borg continues. “And most judges don’t want to do felonies without an attorney; they will generally override any decision that the defendant doesn’t qualify for counsel. My guess is that 65 percent of persons in MPD’s jurisdiction charged with misdemeanors have appointed counsel. It’s probably as high as 85, 90 percent for persons charged with felonies.”

Nonetheless, issues remain, of which one is the pay disparity between full-time public defenders and prosecutors who sit at adjacent counsel tables and try the opposite sides of the same criminal cases.

“We have such disparity,” says OPDS Executive Director Nancy Cozine, who notes that according to the Oregon State Bar’s 2012 Economic Survey, the statewide average pay disparity between full-time public defenders and prosecutors is approximately 27 percent.

“My lawyers are making more than lawyers at Legal Aid,” says Borg, “but when you compare it to DAs, it’s way lower. It really gets to them (public defenders).”

For MPD attorney Conor Huseby, it’s not just a matter of equity or morale: it’s the question of whether he’ll be able to continue as a public defender after he marries his fiancée — also a public defender — in August and also own a home and start a family.

“Between my (law-school) loans, my rent, my food, and I am not by any means an extravagant person — I lead a pretty frugal life style — I break even every month,” Huseby told the PDSC in October. “I am not saving any money.”

“I think the problem would be solved if there was some sort of parity between district attorneys and public defenders,” continues Huseby, who became a member of the Oregon State Bar in 2006 and has been a public defender since then, now working exclusively to death-penalty cases.

“I went to law school in California,” he says. “There was parity there. There were substantial salaries there. For example, (at) the San Francisco public defender, it is almost impossible to get a job there, because once people get in ... they stay forever because they can. They can make a career out of it. They can eventually buy a house. They can pay off their loans. They can have a family and all that. In the state of Oregon, that is pretty rare, unless you are lucky enough not to have student loan debt. It is hard to last

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very long in public defense under the current system.”

Huseby’s boss, Borg, says that when he raises the issue of pay parity, one of the responses he receives is, “It would be too much money. It would break us.’”

“I’ve heard that more in the last 10 years,” he says.

Effecting Changes in Culture

Cozine and Borg say that for the right to counsel to truly be meaningful, the “culture” needs to continue to evolve.

For example, says Cozine, “There are high caseloads in [juvenile] dependency,” in which it is the parents’ conduct, not their children’s, that is at issue.

“We’re having parents in Oregon with no attorneys at their first appearance, and the judge is swearing them as witnesses and asking them if they approve of foster care for their children,” says Cozine. “We also have counties where there’s no lawyer at the defendant’s first appearance/arraignment in criminal cases, so the court will appoint a lawyer, schedule the next court appearance and tell the defendant to contact the assigned lawyer.

“Particularly for defendants who are in custody and risk losing jobs or having children placed into foster care — which places additional strains on other state resources — representation at the first appearance is crucial,” says Cozine.

“No one has ill intentions,” she continues. ‘It’s that we haven’t been able to effect changes in culture in every county. You have crowded court dockets and overburden [defense-service] providers who want to do a good job but can’t be in so many places at once. It’s a big systemic problem, not just in Oregon but elsewhere.”

“If the lawyer has the opportunity to meet with the client,” says Cozine, “things can go much more smoothly. If you have a system that doesn’t give people adequate representation, the system loses credibility. I get calls from clients who say, ‘Help me: my lawyer doesn’t have time to see me.’”

“The vast majority of bar complaints are about communication,” says Borg. “I have a murder case where I see the client at least every other week. We’re being paid \$20,000 for that case. If I add up all those hours, it’s about \$35-40 an hour. If we’re going to increase the quality of representation, we’ve got to increase the money. But the only place that I see that kind of analysis is on juvenile-dependency cases. The legislature really loves kids. But you need to do that same analysis with criminal representation if you want to see better results.” **B**

Janine Robben has been a member of the Oregon State Bar since 1980. She is a frequent contributor to the Bulletin.

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