



#### Members

Barnes H. Ellis, Chair  
Shaun S. McCrea, Vice-Chair  
James M. Brown  
Henry H. Lazenby, Jr.  
John R. Potter  
Janet C. Stevens  
R. Jon Yunker

#### Ex-Officio Member

Chief Justice Wallace P. Carson, Jr.

#### Executive Director

Peter A. Ozanne

**Public Defense Services Commission Meeting**  
**Monday, April 12, 2004**  
**9:00 a.m. to 12:00 p.m.**  
*(Lunch provided at Noon for Commission members)*

State Capitol Building, Room 50  
Salem, Oregon  
***(Please note the change in location)***

#### Agenda

1. **Action Item:** Approval of Minutes  
*(Attachment 1)* Barnes Ellis
2. OPDS's Monthly Report *(Meeting Handouts)* Peter Ozanne
3. **Action Item:** Application/Contribution  
Program (ACP): Adoption of Guideline  
Contribution Amounts for Marion County  
*(Handout)* Ann Christian
4. **Action Item:** Approval of Legislative Concept  
for the Transfer of the ACP Account *(Handout)* Kathryn Aylward
5. **Action Items:** Adoption of Service Delivery  
Plans for Region 4: Peter Ozanne
  - Lane County *(Attachment 2)*
  - Benton County *(OPDS's Report on Region 4, Part II)*<sup>1</sup>
  - Lincoln County *(OPDS's Report on Region 4, Part II)*
  - Linn County *(OPDS's Report on Region 4, Part II)*
6. Next Steps & New Business Barnes Ellis

**Next PDSC Meeting:** *Thursday, June 17, 2004; OCDLA Annual Conference; Bend, Oregon*

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<sup>1</sup> See "OPDS's Report to the Public Defense Services Commission: The Results of OPDS's Investigations in Service Delivery Region 4; Part II: Benton, Linn & Lincoln Counties," which was distributed with the Commission's Agenda for its March 11, 2004 meeting in Corvallis, Oregon.

PUBLIC DEFENSE SERVICES COMMISSION

March 11, 2004  
Benton County Courthouse, Courtroom 2  
Tapes

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Janet Stevens (by phone)  
John Potter  
James Brown  
Jon Yunker  
Chip Lazenby  
Chief Justice Wallace P. Carson, Jr.

STAFF PRESENT: Peter Ozanne  
Kathryn Aylward  
Peter Gartlan  
Lorrie Railey  
Ingrid Swenson

OTHERS STAFF PRESENT: Ann Christian

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**TAPE 1, SIDE A**

002 Chair Ellis Calls meeting to order at 12:30

**Agenda Item No. 1 Approval of Minutes**

003 Chair Ellis Any additions or corrections? I have three corrections if I can state them. Page 2, line 135 word crime to the word volume; page 4 line 297 the word technical should be the word intentional and page 51 line 234 the word bar should be the word borrowed. Any other changes?

017 J. Potter I have a minor change on page 48 line 34. Where it says I think it is a personality driver. It should read it is personality driven.

020 Chair Ellis **MOTION:** J. Potter so moved; C. Lazenby; 2<sup>nd</sup>.  
**VOTE: 5-0**, hearing no objection, the motion **CARRIES**.

023 Chair Ellis I do want to compliment the minutes. They were extremely helpful. We are going to shift the sequence a little bit because I really would like to have Shaun McCrea here for the discussion on Lane County and I was told she is well on her way and will be here momentarily. Peter can we go to Item No. 4 on the agenda, the monthly report.

**Agenda Item No. 4 OPDS's Monthly Report**

042 P. Ozanne We are first of all I think everyone who comes to our meetings knows the monthly report is really give a status report about the agency which

is the Public Defense Services Commission. The agency is the Office of Public Defense Services which does the work of the Commission and we try to give the Commission some idea of what has happened in the previous month and getting ready for this meeting and talking with folks in Benton County, Linn and Lincoln. There are a couple of other items. For a long time we have been looking for common space. We have Contract and Business Services referred to as CBS that still resides in the office of the State Trial Court Administrator and we also operate an appellate law office called the Legal Services Division that has 28 lawyers. We want them to come together and we have been negotiating with the landlord. The landlord has been in need of a reality check. He had a lot of residential real estate in San Francisco and it took a while for him to understand that his expectations had to be lowered. Kathryn has helped me identify the space. We don't need as much as we thought we did and we are now looking at space in the same building as the Legal Services Division on the main floor. We are looking at about 2,000 square feet, somewhere in that range. We are hopeful to turn it over to our representatives, our agents at the property division of the Department of Administrative Services to do the final negotiations. I am hopeful that we can be moved within the deadline of the next few months. I think I will turn the report over Peter Gartlan and Ingrid Swenson. Peter wants to talk about some of the things I know you are all interested at the Legal Services Division. As the audience is probably aware there is a large backlog of appellate cases that Pete Gartlan and Becky Duncan, his deputy, have been working hard to reduce. I think the numbers are a 29% reduction in the Court of Appeals' backlog over the last few months which is an amazing accomplishment in terms of management. So Pete will be talking about that and Ingrid will be talking about some what we called quality assurance efforts statewide.

083 P. Gartlan

Thank you. For the record my name is Pete Gartlan. I am the Chief Defender for the Legal Services Division. I have three handouts. The top handout, quick discussion, I handed out something like at this at the last meeting. This is the caseload backlog for the Court of Appeals caseload. And as of the end of February the case backlog was 31 cases above 300 days, 74 cases between 210 and 300 for a total of 105 cases in the backlog, which is approaching some historic lows for the last four years and is definitely a low for this biennium. We are headed in the right direction and that is great news for us. I thought I would give a quick death penalty update.

095 Chair Ellis

This is a terrific graph what do you attribute this to.

096 P. Gartlan

A combination of things. If you look at the graph you will see where we spiked back in September and that was because we had five vacancies last summer and that was a large contributor to that spike up. Since then we have filled the vacancies and we have trained people and they have come up to speed pretty quickly. Another is the reversion policy. What we have done is, mostly Becky, Becky has been terrific. She has conceptualized the problem differently than before and we have done more target reversions and given people an opportunity to reach some attainable goals. Last month I spoke about reaching the 250 day goal for the attorneys by the end of February. That means filing a brief in the Court of Appeals within 250 days of record settlement. As of about a year ago we routinely filed, most attorneys

filed up to 350 days. Now, close to half the attorneys are filing within 250 days of record settlement and the others are within reach. Most of this is really due to Becky Duncan. She has conceptualized the problem differently and we have reverted on an institutional basis with the idea of getting everybody, every attorney, to the 250 day goal. Most people have those goals in sight and know they can reach it if they push hard. They have really worked hard to get there. Another contributing factor is the continued reversions. The truth is the reason why we had backlog is that the office took in more cases than it could process. So it is just finally resulting in reversions to get rid of the backlog and the attorneys coming at it from the other direction.

123 Chair Ellis

I am very happy to see it.

124 P. Gartlan

Well so are we, but the next update is going to affect, probably, the backlog and that is the death penalty update. Last month we discussed that there was a meeting with Peter Ozanne, Justice Gillette, Justice DeMuniz and myself and we were discussing the length of time it takes to process death penalty appeals. Since then we decided to expand the pool of attorneys in the office who will be working on death penalty cases. Robin Jones is going to be working on a death penalty case and there is another attorney who is going to be working on a death penalty case, Rankin Johnson. They will be working with the existing death penalty attorneys as kind of mentors. The death penalty cases and briefs will be filed a little bit quicker, but the impact is going to be on the Court of Appeals caseload.

137 Chair Ellis

Is that full-time for that.

138 P. Gartlan

It will be full-time for this one case. What we are going to do is have the current death penalty attorneys assume the caseload for Robin Jones and Rankin Johnson. So it will be a caseload switch. As well as mentoring that will go on between the current death penalty attorney and the new death penalty attorney. The idea is we want to build a pool of attorneys in our office who can work on death penalty cases. I expect we may be moving away from having attorneys that work just solely on death penalty cases one after another. If we have a pool we can spread out the workload but also have people who are fresh working the death penalty cases because anybody who has done death penalty cases knows there is an emotional drain and the emotional drain is cumulative. We are not going to have people doing death penalty after death penalty for three or four years. I think the quality suffers and I think the effectiveness of the attorney suffers over time. If we can establish a pool and have the older attorneys mentoring, we can get the best possible representation for our clients. This is mostly for the Chief's benefit. I have done some checking around and found that in California there are over 600 people on death row. Apparently there are over 200 without attorneys. In California it takes up to five years before an attorney is even appointed following imposition of death penalty in the trial court. One of the attorneys in the California Appellate Project offices said that even after that there is a state habeas corpus proceeding which is kind of like our post-conviction relief in Oregon and it is often another five year wait before an attorney is appointed on that. So conceivably before somebody goes through the California appellate system there could be a 10 year period before they get into federal court. Does that make sense.

- 171 Chief Justice Carson No.
- 172 Chair Ellis We hear what you are saying.
- 173 P. Gartlan So California is in much worse shape than Oregon. We also are getting clerks and externs or at least have feelers out and Willamette has told me that they have an approved externship program. So hopefully we will have a summer clerk from Willamette. We also might try and contact Lewis & Clark to see if they have somebody who could also clerk. We will have hopefully two maybe three clerks this summer and we can have them working on the death penalty cases as well. That would be a benefit because apparently in death penalty cases there is a lot more record gathering as well as a lot of work that could be done by a lower level employee than a senior deputy level attorney. The next handout is called In-house case evaluation. It is a two-page document. What we are attempting to do is value the cases at intake. The reason is you could say that our office takes in about 100 cases a month or assigns 100 cases a month. That is not all that helpful because if it were a 100 guilty pleas that would not be an incredible caseload, but if it were a 100 felony cases that had 3000 page transcripts in each case that would be onerous and burdensome. So the attempt here--and believe me, this is a learning process, this is not a finished product--that the attempt is to value cases for case assignment purposes. The value system is going to be based mostly on transcript length. The problem is at the intake stage when we get the referral and we assign cases to attorneys, we are limited to a couple of sources of information. One is the OJIN printout and the other is whether we have input from the trial attorney. Because we don't yet have a transcript, what we try to do is use the court days from OJIN as a proxy for how long that transcript appears to be. The assumption is that every day in court is going to be about 200 pages. So, if I see on the OJIN printout that a case was in court for four days, I will assume that that transcript will be between 600 and 800 pages and I will assign a value to that case when distributing to the attorneys. So every trial type case is going to be assigned three points, and on page two you can see every non-trial case, which is a guilty plea, no contest or probation violation which would be a lot quicker, is going to have one point. So essentially a guilty plea, no contest or pv is going to be the equivalent of 1/3 third of a one-day trial. I have been doing this informally anyway, but this is kind of a more express way of tracking the caseload. I'm thinking on the range of between 12 to 14 points per attorney per month. That works out to be about 36, if there are 200 or 300 page transcripts, about 36 of those a year plus about eight or so no-contest, guilty plea or pv cases. The ABA Standard is 24 cases a year, so we are well above the 24 standard. We think this will be a manageable workload. It's what we were doing anyway. This is just a way to kind of quantify what we have been doing and get a handle on it. We are also recognizing what the office workload is, identifying it and then outsourcing the excess cases that our office cannot do expeditiously. So we have a way to identify what the workload is. Finally, the last handout is the Appellate Panel Pilot Project and this is definitely a draft and the more I get into it the more I see that there are holes and issues that are going to come up as I have been in contact with several people in other states who have similar programs. The idea of an appellate panel is that we would have

attorneys that are interested in doing appellate work apply and go through a selection process. They are not going to be state employees. And if we decide they are eligible to be put on the list, they could be assigned a case whatever the overflow was for that period of time. Whether it is one month or three months, whatever period of time we select so that we can outsource or assign those cases to attorneys from the list. The selection process would be like I said applying for a position. We survey different parts of the criminal justice system and find out what people's reputation is. We review their work and make a final selection that they would be eligible for the pool. There would be a panel review whenever we decide it should be, whether it is one year or two years, whatever works out. We would review the attorneys that are on the appellate panel to make sure that their work is consistently up to standard. Here is one of the holes that I think is going to arise, that is, case valuation. Coming up with whether it should be an hourly basis for the rate. In other words an attorney does the work and then bills and says "I have done 30 hours in this case," or whether we set up an administrative model. The administrative model is a little bit dense. It is on page two. Some of the factors would be, say, \$40 for a misdemeanor case, \$45 for a felony case, \$50 for a Measure 11 felony case, and \$55 for death penalty cases and then using the transcript as a gauge as to how long it would take an experienced attorney to read the transcript, how many issues we think would be in there for every certain number of pages, how many issues would be brief-able versus issues that have to be researched but not in the brief. Assumptions on how long it would take to research and brief and edit. So that is more the administrative model where the price would be known up front. Attorneys on the panel would see what the case is worth. It would be easier to administer if it were the administrative model, but by no means is this the final draft. This is definitely a work in progress. Just to put in some examples if you look at page two, what the cost might look like. A 100-page appellate case costs \$1,240 for a misdemeanor, \$1,395 for a felony, and \$1,550 for a Measure 11 felony. If we went this way I could see having a graph much like the sentencing guidelines, it would be a chart. We would also build in exceptions, if there was a novel issue that would require a lot more input from the attorney, the cost could be adjusted. (I don't want to take up too much of the time; I know there are other people here who want to testify.) As part of this we would have some requirements by the attorney to serve us so that we can review the work on a regular basis and have the appellate attorney--this is a practice that our offices does--have the attorney write the client and explain the issues that were facially presented on the record and why they were not briefed and also what issues the client wanted raised. The appellate attorney would explain to the client why certain issues were not raised. So that would mean we would have a little more quality control because we have found that when an attorney has to tell a client why they didn't do something they definitely have to go through the thought process. It is an exercise that guarantees that the attorneys put some effort and not just brush aside some issue. Payment schedule, again that is another ultimate question. How the payments would be structured. One is when the attorney took the case, two is when the brief is completed and third would be when the petition is done. That is just the payment schedule.

- 330 C. Lazenby What is your sense of supply and demand that is out there in the private sector to fill this function. Since you folks are really the experts in this area what is your sense of the ability these with qualified attorneys?
- 335 P. Gartlan As it stands now there are a lot of alumni out in the field, and I'm sure they would be interested and we are familiar with their work. We would always have a review process and we envision a committee of people reviewing applications and final work product to make sure that somebody meets the standards. And I also envision that we would accept into the pool a limited number of applicants with no appellate experience, as long as they agree to be closely supervised. So that might be a way to develop attorneys that don't have appellate experience already, this would be a way to develop new talent.
- 354 C. Lazenby The other question I wanted to ask you is as you look at those sort of current case projections that you have, take a lot at what your per case cost is, because it might really be more cost effective to talk about expanding your staff versus going outside and outsourcing.
- 364 P. Gartlan I quickly looked at a comparison without going into too much detail and the way this is set up is we expect more from our attorneys because they have a support system in place, and so right now I think the contract appeals, let's say the model that's in here would cost a little bit more per attorney, model of contract would cost OPDS a little bit more per attorney out in the field, but when you end in overhead, secretarial support, etc. it starts to balance off. But the expectation in the in-house case evaluation is that, right now, we are demanding more from in-house attorneys than contract attorneys, if you just look more at the direct salary comparison.
- 380 C. Lazenby Yes. Thanks
- 381 J. Potter What is the idea of pool size.
- 383 P. Gartlan I don't have an idea. I don't want it to be where anybody can join the pool, we are looking for quality. I would like to be able to give the people a regular feed of cases, and I think if you can do that you can guarantee that you will have a select group of appellate attorneys in the pool. I don't want it to be unlimited.
- 389 Chair Ellis Any other questions? Thank you, Peter.  
  
Jon Yunker arrives at 12:50
- 390 Chair Ellis Peter, you want to pick up the E-Board piece now.
- 392 P. Ozanne That would be fine. Just for the benefit of the audience and this is probably obvious, but what we have is a group of 28 state employees in the appellate office that handle the indigent defense cases that come up from trial level and particularly the criminal cases. They are really counterparts to the Attorney General's Office. For those of you who are here and I know many of you are in law practice and some of you are now in public law practice, we searched for a measure of productivity. In private practice we have that notion of the billable hour and it works pretty well because the client knows what the work is

and how big their bill is and it keeps the lawyer honest and the lawyer records and how do you measure productivity in a public office and that is what this discussion is about here and as well as we can't handle all of the cases as Pete Gartlan made clear and what kind of system are we going to have for the appointment of lawyers. A bit before we go on there is a whole room of distinguished guests. But I want to at least recognize those people that I have met and I would ask some that I haven't met that I know are here to introduce themselves. This puts me in an enviable position asking the Judge to stand but Judge Bennett would you please stand. Judge Bennett came all the way from Lincoln County and he is here on behalf of Judge Huckleberry, presiding judge. We know from our visit to Lincoln County that Judge Bennett runs a excellent juvenile program, a highly respected judge in Lincoln County and I can't get him to comment but you are welcome to. Commissioner, I didn't get a chance to meet you so I will ask that you introduce yourself.

425 Dave Dixon

Benton County Commissioner Dave Dixon.

426 P. Ozanne

Commissioner, welcome. The gentlemen behind I understand you are a candidate for a office here. (response inaudible). Judge Dickerson welcome. Scott Heiser is the District Attorney here. Scott and I have talked at length and I think you will have some comments for us. Welcome to all. As you all know we were in Lane County last month and we are probably going to take those issues up in Lane first and then we will spend the rest of the afternoon with probably Benton, although there may be some issues that people want to raise with Lincoln and Linn Counties. I will explain a little more what we are up to but we have a matter that isn't on our agency but I know for all of you who are interested in indigent defense has to be an emergency issue and in fact indeed it is the Emergency Board process. We have a budget of approximately \$162,000,000 and \$7 million more is in a reserve fund in the Emergency Board for caseload growth and we were instructed by the budget people and by budget note to return in April to demonstrate the extent to which the caseload for this biennium grew above last biennium and to what extent we claim that \$7 million. All of us are interested in maximizing the budget if we can justify it. We have John Potter, head of Oregon Criminal Defense Lawyers Association and their representatives in the legislature urging us to consider to go in in April rather than July and one of the reasons is that the money may not be there even though it is earmarked till July. We are fearful given the circumstances that it may be gone if we don't in April. On the other hand, the people who run the process, the Legislative Fiscal Office, have told us that they really want us to come in in July and that is what the budget notes controls. So that is the issue and of course we have some people on our Commission with vast experience in these areas so we want to bring that up. I think I have framed the issue for the audience and the Commission and maybe John would you like to add some more perspective on the issues before us.

473 J. Potter

I think you have framed the issues pretty well and one of the variables I think we have to consider is how we sense the legislators might be to us going in April instead of July. That is still an unknown and we are trying to find that out. The Speaker of the House we will be meeting with her but it won't be until Tuesday. On the Senate side we have received from Senator Kate Brown an enthusiastic response that we

should go early. There is a school of thought that says even if you are not going to get the money it is a good idea to at least the legislators about what is happening with public defense and take that opportunity. The flip side as Peter eluded to is the staff from budget and fiscal is more reticence about us going and I may be underestimating that. They would prefer us to go when we said, or when they said we should go. What we are saying is the circumstances have changed. Measure 30 has changed the landscape and they need to hear from us early rather than later. The other variable and certainly Jon can speak to this how competition for the dollars that are being held by the E-Board is going to be fierce. What was earmarked for us or earmarked for anybody else my guess will be that the legislature will take a second look at all the earmarks and the cards may be shuffled entirely.

- 506 Chair Ellis When does the E-Board meet.
- 507 P. Ozanne April 8.
- 508 Chair Ellis So it is the same day we are scheduled to meet.
- 509 P. Ozanne Well that is another issue that we have to take up. We are scheduled to be in the E-Board with the judicial department with regard to a joint presentation on the Application Contribution Program. Separate issues and some of us will be there and we may have to reconsider the date of the next meeting for that reason. Just to elaborate Robin LaMonte is our legislative fiscal officer and she has been in my judgment supportive and that is thanks to Ann Christian who is here today and the Commission and others and the direction we are going. She has been very helpful to us and it is important as the reality of how the legislature is run to keep those staff people on our side. I have conferred with Robin to let her know that we might be contemplating going in April just to give her a heads up. Her response was that she appreciated the heads up but she urged us not to appear in April. She felt that if we did then she would have to file a report. I don't know what the answer to this by the way if the legislative leadership said we could go in I don't know how much her report would differ from the legislative leadership. At least at this point she said that she would have to tell the Emergency Board that that the budget note directing us to come in in July really restricts the arguments to caseload growth and in her opinion and we can certainly here from Kathryn who produces our numbers, Robin feels that by April we won't be able to demonstrate sufficiently what our caseload growth is. So she is going to have to tell the E-Board because she feels duty bound to do that so she really urges us to conform to the schedule. On the other hand as John points the money may not be there that is why we are bringing it to you. We have a lot of expertise and experience here on the Commission and it is a judgment call. Kathryn do you want to add anything else?
- 555 K. Aylward Only that my concern was that the legislative fiscal office said that if we do have to limit our arguments strictly to growth that it would be difficult to build a case. Originally when we discussed the possibility of going in April the argument was well now that we lost \$9.9 of course we need \$7 and if Robin is going to exclude that argument from what we present than I think that changes the picture.

- 568 B. Ellis Is there a way to do both. Make a written submission but not seek an audience.
- 569 P. Ozanne Commissioner Yunker is shaking his head and I would defer to his judgment about the process.
- 576 J. Yunker There is a couple of rules in this process and one of them is that you need to respect the process whatever it is. The answer to your specific question is yes you are free at anytime to submit a report to the Legislative Emergency Board. It seeks no action. It is just a report for the record to let them know where we are and what we are doing and what we plan to do. So that is all possible. That might be the middle ground here because I think it is a good idea to go in and make a clear picture of exactly what we need at the April Emergency Board. If we tick somebody off in that process then we are already behind the eight ball. So maybe a report which is less threatening but still responsibly lays out the situation and gets them up to speed I think would be very appropriate. Does that help?
- 606 Chair Ellis Yes.
- 607 C. Lazenby On top of that Jon we don't have the numbers right now to show the growth but we could probably get some sort of a projection of where we think it may end up. The budget note does say come back in July to the July E-Board. The comments made earlier that there is going to be fierce competition for the dollars that are there.
- 624 Chief Justice Carson Peter I think we are going to capture some of the 9.9 as opposed to increase. In other words of the \$7 million transferred to the E-Board we have \$9.9 million in our fund. That is wrong. Many legislators are looking at the bulge, that \$7 million actually became getting rid of the bulge. The bulge is pretty well gone and that is not so much added caseload. As I see that \$7 million in part or in whole is going to replenish our biennium budget or the \$9.9 million they took away from us.
- 647 P. Ozanne Very true Chief and the issue again of course is you talk to people like yourself who are experienced hands around the E-Board, according to Robin that argument is really out of order. She is saying essentially that to talk about the lost of \$9.9 million and the \$7 replenishing which indeed is what we are doing as a practical matter is not really what the budget note restricts us to. So we are wondering as a practical matter whether we would be held to that.
- 661 J. Yunker I strongly recommend that we stick together as the judicial branch as how we are going to deal with our cuts.

**TAPE 1, SIDE B**

- 007 C. Lazenby But they program a special session for themselves I in June for themselves.
- 009 J. Yunker Yes they do.

- 010 Chair Ellis Let me try a suggestion. What I would like to suggest is that we appoint a special committee with John Potter, Jon Yunker and Peter to decide what we ought to do with this issue.
- 016 P. Ozanne One of the things and I can find certainly find this out from staff but I wonder if Jon Yunker knows this, the deadline for submitting materials to the April E-Board is Monday and this report already being in their with the Application/Contribution Program, Jon would your guess be that we could bring the report in as part of our presentation. Would that work.
- 023 J. Yunker Put a letter in saying we are developing a report and we expect to have it for you in another two weeks and share it with staff but you do need to place something in a letter by Monday.
- 026 P. Ozanne So we are asking to be on the agency then for the report.
- 028 K. Aylward I have messages from BAM and some mass mailings that have gone out to agencies that have said do not appear at the April E-Board unless you have a true emergency request. All the undercurrents I am getting are encouraging us not to attend. Whether that is just to keep the dogs at bay or whether they mean it.
- 035 J. Yunker If that is where it is at we can still send a report we just wouldn't be on the agency. We should send an update or where we are and what we plan to do and send a copy of that letter to every member of the Legislative Emergency Board.
- 038 P. Ozanne I accept your recommendation.
- 039 J. Potter I just want to understand that we have to have a letter by Monday in which we state we intend to submit a report or are going to submit a report or we might also appear in the person. What happens if after Monday we decide it is not a good idea to appear and just go in and pull the report.
- 045 J. Yunker You can always withdraw your request to be invited.
- 046 Chair Ellis Is there a motion.  
**MOTION:** J. Brown; so moved; J. Potter: 2<sup>nd</sup>  
**VOTE 5-0**, hearing no objection, the motion **CARRIES**

**Agenda Item 2: Discussion of A Service Delivery Plan for Lane County**

- 048 Chair Ellis I think we ought to move forward to Lane County because I think Shaun is going to arrive pretty soon and I know we have people from Lane County who are here. I have a suggestion that this discussion should be Commission members and staff. My suggestion is that we can do it either two ways. Go around to various Commissioners and get their summary reactions and thoughts or take Kathryn's report that has about eight topics and talk about each of those topics based upon what we heard. Kathryn you know a lot more about this. What is the best way to proceed.
- 063 K. Aylward I think if Commission members were at the meeting or read the minutes from the last meeting, and have read my memo then I like the

approach of taking it topically and then asking the Commissioner members to think about the pros and cons.

- 066 Chair Ellis Let's try it. Let's take Kathryn's report. The first topic is selection of attorneys. Whether we go with the consortium or list group who are the lawyers who would be involved. The second topic is mentoring and training and that is the issue we talked about before. Where do we see new blood coming into the system. Third topic is administrative. Fourth is case assignment so that is after you get lawyers qualified under one system or the other is there an advantage to one system or the other in terms of assigning cases. Number five is accountability. Number six is the preauthorization topic. Number seven is financial overall costs and number eight is the issue of whether we should make a change in the murder case contract that we now have.
- 087 K. Aylward I apologize for my widows and orphans. At the bottom of the first page it says specialization which –
- 090 Chair Ellis What I would suggest is we do is go through each of those topics and just get the reactions that people have based on what they heard and what they believe both pros and cons of two competing strategies. Those sound to be like two competing strategies and if I have oversimplified that between a court-appointed list with some modifications versus essentially us developing a defense consortium. Let's start. Who should be included or whether the selection issue tilts us one way or another. Anybody have a particular reaction? Let me give my own comments and maybe that will get us started. I think it was very clear to me that there are some serious negatives on the system that now exist. The qualifications are minimal. There is literally no screening for competence in the field. There is self-selection that is going on but I don't think from a buyer's standpoint I had any confidence that there was any meaningful focus. In my own mind I do favor concentrating the work so that those who are doing the work have enough of the work that they will both develop special confidences; they will take the CLE courses to maintain that confidence and I think there efficiency just has to be a whole lot better than someone who does it as a relatively small percentage of their practice. I think that is particular true with criminal justice because there is just a whole lot of street smarts that go with the practitioner who is doing a fair amount of them that as well intentioned as a part-time practitioner may be just can't be replicated. So in my mind on the selection issue I do think that the consortium approach if properly administered is more likely to lead to a concentration of lawyers performing the service for whom this is a high percentage of their practice. Criminal justice is a high percentage of their practice I think that our ability to attract, retain and develop a core that could be at least as good as the PD's lawyers are all of whom are full-time. So in my mind on the selection issue the consortium is the best way to go. That is just one person's reaction.
- 139 J. Potter I think we can argue that every time we say consortium we could say court-appointed list and come up with the same argument in that depending on the size of consortium and depending on the size of the court-appointed list. If the consortium is too big or the court-appointed list is big we got a problem. If the consortium is narrowed down to a workable number or the court-appointed list is narrowed down than we address the quality issues in both cases. It is a numbers game in that

sense. I went back and took a look and to one degree or another the bar came down with a position that said we have to keep the private bar involved in criminal defense work. I think that we have that obligation as well. But our overriding obligation is to make sure that the service we give to the client is the highest quality we can provide. So I am a little bit wishy washy. I'm not sure that consortium is necessarily the best answer. I believe what we have in Lane County right now is not the best answer but I think it can be tweaked. I think the quality of the selection process can be strengthened to the point where you can probably get a workable number of people doing quality work and still leave flexibility for new people to come into the process. That is one of the down sides I think of the consortium is that there is less flexibility in allowing new people.

- 161 Chair Ellis I hear what you say John is you are in agreement to concentration of work issue. You are more ambivalent as to whether the consortium approach is a better approach.
- 165 J. Potter That is true. I think that is accurate. What I had to come down to what the concentration should be. Is it eight people in a consortium? Is that the magic number or it is 25. In some degree it depends on how much work is out there. Right now if I understand it the PD is taking better than 70% of the cases. That leaves less than 30% of the cases going out to the private bar.
- 173 Chair Ellis Let's approach this from another direction because this also gets to another subject that Kathryn has broken out. It does seem to me important that the provider be at a sufficient percentage of their practice in criminal justice work to get the benefit of specialization, you get the benefit of CLE's, you get the benefit of what I call the street smarts. If I heard the testimony correctly I think the numbers I heard there is enough caseload to give eight lawyers a 60% practice. That was what I thought I heard and I wouldn't think we would get the benefits of concentration with a group larger than eight.  
1:30 Shaun McCrea arrives.
- 189 J. Potter What I also heard was Brian saying the bulk of his practice is not court-appointed work and yet lawyers that I talked to in Lane County they think he is a very good lawyer providing very good court-appointed work on these court-appointed cases. When I asked him the question why does he take these cases and he said he took the cases because he enjoys being in trial, he enjoys the issues and it gave him exposure to get referrals. Brian Cox might not be in a consortium because it would require him to take more cases than he is now taking and he can't afford to take more cases than he is now taking because he has a private practice. I wouldn't want to eliminate the Brian Cox's and those folks that we believe are good lawyers that are doing it for good reasons.
- 206 Chair Ellis His one comment is he is doing that at his current hourly compensation level. I think the premise of a consortium that the ultimate compensation is hire.
- 211 J. Potter I'm just saying Barnes that it still boils down to a numbers game. How many people are we talking about. I think 25 is too high and eight is too low.

- 222 Chair Ellis Shaun we tried to wait but we just got started on the mechanics. What we have been doing or starting to do is take Kathryn's memo, take each of the topics and go through and Commission members thoughts on each of those headings. Two options we are looking at the modified appointment versus consortium. Anyone else want to comment.
- 232 Chief Justice Carson John has discussed sort of the modified court-appointment, I think Ross had a middle of the road approach. My fear is that is the consortium with administrative head versus court-appointed list with judge or Kathryn as administrative head is unworkable. Steve Gorham and he can be correct me but in Marion County the judges pushed to narrow the number of people on the rolodex so the court started selecting and from that came either narrow the court-appoints and go for quality and because of that the consortium came and the result was we wound up with MCAD and Steve happens to be the administrative of that. The best I can tell is it is working quite well. My fear is that those steps you are taking across there isn't a rock there to jump on and you can land in the drink. John and Ross more than I can see it but just saying okay we are only going to have eight or 10 court-appointed there is not going to be quality. Unless you are going to write in that the judges become quality control and that is a hard thing to work out and judges I think I heard from both Lane County and Marion County they don't want to evaluate. The lynchpin between court-appointment where they are free independent lawyers appointed by the court and a consortium worked out under some administrative model.
- 262 Chair Ellis There is the sentence in Kathryn's report. Once a consortium has been formed the PDSC and the court have very little control on membership. You may have some ability at the front end but once it gets going it may be hard to satisfy some of the participants to effective change.
- 272 K. Aylward That is correct. We have had some specific experiences where there is an attorney with some substance problem or there is some mental health issues something with one of the attorneys and it creates a concern naturally in a consortium out of loyalty or support they will try to work out where as I think our office would tend to be a little more ruthless and say you know, sorry, we have someone else who can do the work and it is difficult for us to get an immediate response historically.
- 284 Chair Ellis One model that we talked about at our retreat was a consortium model that involved an outside directorship. So the model would be you would have a Board of Directors under the bylaws of the consortium. Presumably the majority would be members but not all would be members of the consortium. The model included a board of five and then two outside directors. I can picture them being the county bar, I could picture someone from Lane County Public Defender, I could picture a retired judge. I could picture a lot of people that would be knowledgeable. What I am leading to is we have the ultimate leverage which is the threat of not renewing and I would think if we had a consortium with some outside directorship a combination of our ultimate ability to not renew I think we would have the ability to effect change if we needed it.

311 K. Aylward Could I just make another comment about numbers because at the last meeting people did say what is the appropriate number of attorneys. What is the need. I looked back on fiscal year 2002 and the amount that we were being billed was enough to support 13 full-time attorneys.

316 Chair Ellis With a 26% caseload?

317 K. Aylward I didn't look at it based on caseload. I was just looking at what we were billed for a year for Lane County. I was just looking at what would be billed for private bar attorneys in the beginning of the year.

323 Chair Ellis In Lane County?

324 K. Aylward In Lane County and it was \$40 or sometimes it is \$50 an hour. So \$1.2 million a year is being spent on attorney fees that is approximately 13 full salaried attorneys. I think even if you could squeeze that down to a smaller number you wouldn't want. So if you are talking a consortium between 13 and 20 then it is a reasonably sized consortium with a Board of Directors and outside advisors. I think what you are suggesting might work.

340 P. Ozanne Kathryn just to add to that the numbers, when you are talking 13 or 26, you are including overhead, calculating in secretarial or office support.

346 K. Aylward To the extent that attorneys currently have overhead and support. So whatever we have been paying, what ever they supported out of that payment.

349 Chief Justice Carson That is built into the number.

350 Chair Ellis Any other comments.

351 J. Yunker As I understand a consortium is by county. Can you have a state-wide consortium? Why do you have to have a whole lot of little consortiums?

360 K. Aylward I think it has always been regional because practices do vary county by county and in order to administer and set it up with flat rates it is very difficult to say well in my county the practice is different so I need more money for this case.

375 Chair Ellis Lets go to the mentoring and training part. Anybody have a comment on mentoring or training issue. Let me just start and then you can all just shoot it down. I came away believing that the very best source for new blood in the system is people that have had experience at Lane PD or who have had experience in the DA's office and then entered private practice. I came to the view that I couldn't see either the list or consortium was a very good way to mentor or train younger lawyers. So one sort of small step is the borrowed attorney concept. I have no problem with us encouraging the Lane PD to take on young members of the private bar to mentor. But beyond that I know that in Multnomah County MPD has regularly fed the system and I don't know of a reason why that can't continue in Lane County.

419 P. Ozanne If I can add just a fact and we should probably put it in the report but there has been for the last 20 years a clinic of public defender's office that works in cooperation with the law school and what is the capacity now Ross is about 10 or 15 a semester?

424 Ross Shepard Ten or 15 a year.

425 P. Ozanne A year. But it is still training with a mentor about 10 new lawyers and that is a piece that we didn't account for. They do get a head start in their third year law school training.

437 Chair Ellis Well the model I think I am very uncomfortable with is the open list model and the rookie signs up and gets assigned a case on rotation and I would not want to see a system that did that. I think it is unfair to the client. Any other comment or reaction?

444 C. Lazenby I apologize I am little bit rusty. Recalling my early days of practice, I remember those days and we didn't have much of a training program. The Public Defender organizations can really benefit by having people in the private sector interact in their area of law.

480 Chair Ellis Under either system how do you provide the supervision?

483 C. Lazenby I have always been an advocate for there being progressive standards - observe a trial.

498 Chair Ellis I would have a lot more concern if I thought we wouldn't have lawyers leaving Lane PD to go into private practice. From the testimony we have heard I guess that not much of that has happened.

503 C. Lazenby It is a great place to work.

505 Chair Ellis What kind of handcuffs does he put on people.

507 C. Lazenby What I remember from when I was a student is that it a real laboratory. A lot of people that I remember were there when I was a law student are still there. It is a great place to work.

521 Chair Ellis The Steve Houser's of this world that is where they learn their trade.

522 Jim Hennings I think we need to correct that. That used to be true. It is no longer true. People who are leaving my office are not staying in criminal practice. They become judges, they become teachers, they go into private practice civil practice. In the last five years very, very few of them have left the office and stayed in criminal practice at all. One other thing I think you need to hear from MCAD because I think you can develop a system in which you have a consortium. Have much of their practice do you want to guarantee. If it is 60% you are going to have a very small group. If it is 10% you can have a larger group. Get a large enough group you can bring in new people. You can contract or work with a consortium and say we want 10% of your attorneys to be new attorneys or whatever percentage it is and require that there be new people coming in.

550 Chair Ellis That still doesn't answer the question where does the supervision comes in?

- 552 Jim Hennings The supervision and this is where I think the consortium model is a superior model, the supervision is where it ought to be, not in Salem, not in the judiciary, it is the local people on the scene who are supervising much as MCAD, much as the program in Clackamas County does in which there actually is supervision. There is quality control. I think there is a model for a consortium style which puts responsibility and authority at the very local level and includes the bar. It doesn't mean we divorce ourselves from the bar because criminal defense cannot divorce itself from the bar.
- 570 Steve Gorham If I could throw something in. We do have that in Marion County. We have a mentoring program. The supervision is either through the mentoring or the Administrator, or all the other people in the consortium who are there watching what their fellow attorneys are doing and giving input both to the fellow attorneys but also to the Administrator, in this case, as well as to the judiciary. If the judiciary thinks that something is going wrong with the attorney or they are not getting quality representation I can guarantee I will hear from the judges that same day. I think a consortium can have all of the components that you are talking about. When I hear people excluding consortium from having these components it is just not accurate. At least at MCAD we have most if not all of the components you are talking about and we run relatively well.
- 616 Chair Ellis The consortium model does give a much better mechanism for matching cases to lawyers. Any other thought or comments on mentoring or training? Next one is administration. Anyone have a thought on that. In my mind that heavily weighs for a consortium I think having an administrator is much better than the present list arrangement. I don't think the way things stand now there is any logical way for an administrator. I don't think the court administrator is in a position to do it, I don't people in Salem are in a position to do it so I do think this one does favor a consortium model. The question I had is administrator the right term or is executive director a better term. I really think in my mind whether we want a lawyer leader doing this or do we want somebody who doesn't even have to be a lawyer just a good administrator. Any thoughts on that? Shaun you have been very (end of tape)

**TAPE 2, SIDE A**

- 001 S. McCrea I am just going to back step because there is no way I can give you my feelings or opinion without looking at the whole thing overall. I spent a lot of time thinking about this. I was at the Criminal Justice Conference the weekend before last and I actually wrote out an outline. I guess the idea of having a central administrator for the court-appointed attorneys whatever model we choose to use whether it is a list or a consortium is very appealing because it would centralize things and we would have efficiency and that word was used a lot in our meeting at Lane County. I guess my concern is that we don't sacrifice quality for efficiency and I am not suggesting that any model that has an administrator would necessarily do that but I guess I have a lot of questions about the way that consortiums are administered and I realize Kathryn that I have some really basic questions that I would like to ask you. My understanding is that consortium is essentially we contract

with a discreet group of lawyers for a certain amount of money over a period of time.

- 019 K. Aylward It is not necessarily a discreet a group of lawyers it is perhaps a corporation (inaudible).
- 021 S. McCrea Do we have a contract with them like we do for example the Lane County Public Defender that they will take a certain number of cases?
- 023 K. Aylward It is the same arrangement as Lane County Public Defender's have but we make an estimate of what a caseload will be.
- 025 S. McCrea So there are a certain amount of like Ballot Measure 11 cases, murder cases and misdemeanors. With a consortium do they have the same mechanism for applying for extraordinary expenses?
- 029 K. Aylward Most of the consortia in the state follow the same procedure for requesting expenses. There are two consortia that are different that is MCAD and the Yamhill County Defenders which are modeled on MCAD where they process and pay those requests internally.
- 033 S. McCrea Is there any mechanism in any of the consortia for if in fact, let's say a Ballot Measure 11 case is going to take a lot of time and a lot of attorney work is there any mechanism for additional pay if that case goes to trial.
- 036 K. Aylward There are two mechanisms. One is the general administration fund and also the emergency fund and attorneys who face a situation like that can go to the administrator and say I really need to have more compensation on this case because of these issues and the administrator can make those decisions. The other is to request multiple credits so no cash but at the end of the contract theoretically they could be compensated.
- 048 S. McCrea That decision is made by your office.
- 049 K. Aylward That is correct.
- 050 S. McCrea Is it typically granted when the request is made.
- 051 K. Aylward I would say 85 to 90% of the time.
- 052 S. McCrea Because that is one of the big concerns that I had Barnes is when there is an hourly rate such as it is at least there is a trial incentive and my concern was that if we are going into a situation where there is a certain amount of money allocated for case in a consortium that it might tend to cause triage to be involved and my concern is quality, quality, quality. You want to have the best representation possible. One of the concerns I had was a comment was made by somebody where they were commenting that Lane County Public Defender knows what a case is worth. That was the concern that I had because we are not dealing with what a case is worth, we are dealing with people. We are dealing with individuals and we are dealing with people's lives and it very, very important for the defense attorney to have the time and the staff and access to resources to be able to really look at the individual and the circumstances in that case. I have a federal case with a very

difficult client and I worked with him and worked with him and it was only when I got his school records that I determined that he needed to have a psychological exam and an IQ test because he ended up being borderline mentally retarded. It frankly scared me because if I hadn't been able to spend the time and the energy on that case I would never have discovered that. I worry that in our situation in the state system where we have some many people who are charged with serious offenses and who do generally plead guilty and maybe appropriately but I guess with the case yesterday is that the prosecution is tending to overcharge cases and defendant's are very afraid to go to trial on Ballot Measure 11 cases. The point is that what people pled to in the state system can later affect them both in terms of post-conviction relief and in terms of if they end up getting stuck in the federal system and it is too late for them to get post-conviction relief. It is too late for them to get habeas corpus under the federal law. If for example they have a gun charge in federal court there is nothing anybody can do to challenge that prior conviction unless they claim ineffective assistance of counsel which is going to be pretty tough to show. You helped a lot Kathryn because you answered my questions. I am not happy with the present system in Lane County with the court-appointed list. I am concerned about the quality and that is the most important thing that we are able to provide quality representation to our clients and secondarily we need to be able to do that at a reasonable cost

- 102 P. Ozanne Shawn may I add just a follow-up and this is not an opinion just a reality. You used the word triage and that is what we must do ultimately because we have a fixed budget. Unless I am missing something for example when I was in private practice getting an hourly rate most of my clients put me on a budget so it is fine to crank out all the hours and do all the work but at some point the client has to say, Peter, I don't have anymore money or don't spend anymore time it isn't worth it. I am afraid unless I am missing something here we would have to do that either under an hourly system or contract system. In murder cases, aggravated murder cases, I think is the dark secret. We have a limited budget, we have to take from some place else and move it to another area. At some point we have to put limits –
- 119 S. McCrea Sure in the federal system there are caps on the cases. But if there is a complex case or if there are special circumstances you can ask for payment over the cap and usually that is granted. But yes we have limited resources and I just want to make sure that we create a model that at least supports that quality issue.
- 125 Steve Gorham I can maybe add some things here. First of all whether you call it the Administrator or the Executive Director, I think the head needs to be an attorney for various reasons. One, quality. That is the person that everyone in the consortium can look at to hopefully know how to do a case and get advice about the quality.
- 131 Chair Ellis I take it that person would be paid for that service.
- 132 Steve Gorham Yes. For example I am a part-time executive director but I get paid the hourly rate that I would get if I were doing cases. That was the agreement in the beginning. So yes I think it should be a paid position however you do it. Then having somebody to do the everyday administrative work that person doesn't need to be an attorney that's an

office manager. MCAD is an hourly rate consortium. We have ways to control our costs. If you do an hourly rate consortium in Lane County I think you want a similar way to control those costs and there our ways to control those costs. I disagree, I was there when the Deputy District Attorney said that attorneys off the court-appointed list just do busy work. File motions, just to file motions to increase their pay. There are various ways to control that. I'm sure you will have examples of when that will happen but certainly in a consortium there are various ways to control it. You want your attorneys to be busy so that they are not just doing busy work on a case. I know when I am taking a lot of cases and my attorneys now they make the same deal as anybody. They affect other clients. Listen I am taking out my pocket. If I took this case to trial I would get so many more dollars but it is best for you to take this deal whatever the deal is if that is what they believe. One reason they do that is because they are busy attorneys and they have knowledge of what our good deals and what our bad deals and they know the risks and they explain that to the client. So you want a big or small enough group that people are relatively busy. Any extraordinary expenses I look at and approve.

- 168 Chair Ellis Any other comments on the administrative?
- 169 J. Stevens I have to bow out. Janet leaves at 2:13.
- 172 Chair Ellis The consortium from an administrative side seems to me to be a way to get the management efficiency of a law firm with the conflict free or the ability to handle conflicts. You get a little bit of the best of both. Also seems to me on the court-appointed list mode there is a hidden administrative cost that is going on. Now whether the court administrator is paying it if that is where the appointments are coming from. Whether those practitioners whether they bill for it or not are spending 20% of their time doing administrative work that cost has to be here. It seems to me it would be better to concentrate it to someone who is good at it. A lot of lawyers are not. So I think on the administrative side the consortium has a lot. Any other comments on that. Let me just say I think we will go with this until about 2:30 and then I think we want to get to the folks who came here from Benton County. Number four is case assignment.
- 202 Chief Justice Carson Mr. Chair can I overlap – When we were in Eugene I think it was the presiding Judge Bearden pointed out one of the defects of court-appointment is getting the judge or the presiding judge who is in charge of the list to get rid of a person on the list. They cited a Lane County case. Actually in my memory the Lane County case, the person was struck by the then PJ and sued I think in federal court, but they sued. The person who sued lost and Lane County lost. So it was established in one case, one time that yes there is some control by the presiding judge to remove people for cause from the list. I didn't want the court-appointment to carry that burden that somehow it could not be reviewed and altered. Some time has passed I think it was 10 years or more, but I think the court down there and maybe others were kind of shy because of this. Do you remember the case Ross?
- 219 Ann Christian I remember. Michael Livingstone sued both in state and federal court and he lost at the state court level and agreed as part of a negotiated

settlement not to appeal the state court decision and dismiss the federal case. Then he was invited to reapply and be reinstated on the list.

- 226 K. Aylward That was a condition that he could reapply and get back on the list.
- 228 Chair Ellis Case assignment any comment on that? I think what is being address here is the current list system is on a rotating basis and no matter what the case is I think whoever is up next is going to get the next assignment. That seems to me to have a lot of negatives. It does seem to be on the standpoint of quality that we want people who are qualified instead of who is up next on the list. Lawyers who are qualified to do sex abuse cases ought to be doing more of those not fewer. It just seems to me that all of those factors point to having not just a selection of lawyers in a group but assignment of cases to lawyers within that group and I can see how that would work effectively in a consortium, I don't see how that could work effectively on the court-appointed list.
- 250 S. McCrea I agree with you that it would work more effectively in a consortium. The concern I have is that we avoid sort of the standardization and lose out on the creative abilities of someone who is looking at something for the first time. I think there are two factors. One is that you don't want to burn out the sex abuse case lawyers for example and one of the things about my practice is that I get to do so many different kinds of criminal cases and so while there is an advantage to having somebody who is familiar with the case law, familiar with the procedure it is also important to be able to spread around that knowledge which maybe gets back into the mentoring situation (inaudible) and also be consistent with what we talked one is establish a mechanism where you can get younger lawyers involved in the process and so maybe in terms of case assignments there could be a model to allow there to be a first and second chair in some of these cases and that would depend of course on the model of consortium you are thinking of. I don't know how else to do it because with the list as it stands being on a strictly rotating basis unless we set up particular standards for eligibility and limit the list in a particular way, the way the federal panel does with requirement that the people who are less experienced have a mentor or another lawyer assisting them with those types of cases.
- 275 Chair Ellis The federal model has Steve Wax in the middle and if I understand it correctly he plays a significant role.
- 280 S. McCrea As I understand it the case assignment criteria is a rotating basis unless it is a situation where an attorney is having to withdraw because for example it is a particularly difficult client. Then sometimes they will try and match the client with somebody on the list who would be a good match. But otherwise I believe it is a strict rotation.
- 287 Chair Ellis We will have to find that out. Any other thoughts on the case assignments criteria?
- 290 J. Potter I think Shaun has touched on the notion of not having one lawyer do one kind of case all the time. Whether it is court-appointment or a consortium. Under a consortium we could have an administrative that would know the lawyers and be able to make assignments and juggle the cases around based on personal knowledge. I think that is a strength of a consortium. Under the court-appointed system you could

modify but probably not to the degree you could with a consortium. You could have at least misdemeanor and felony breakdown.

- 304 Chair Ellis Next criteria is accountability. Any thoughts?
- 306 J. Brown I am feeling a little bit of unease I feel like we are mixing the architecture with the color of the walls. The real issue for us is what is most efficient and what is most effective. We have absolutely limited resources as Peter pointed out. There will never be enough money and so what do we do with what we got. What mechanism, what model maintains the maximum amount of accountability at the least expense and has the greatest degree of quality. So far for me the consortium is head and shoulders above the court-appointed process.
- 350 Chair Ellis One of the things I remember is having someone you can go to if there is dissatisfaction someone other than the individual lawyer who was in the courtroom. On that basis I think the consortium has a big edge particularly if you have a consortium with a board that includes some non-members it really does give you a place to go. Of the two, I think the individual lawyer system is so fragmented that administratively it is very hard for us to (inaudible) who is accountable because we are in Salem.
- 372 J. Potter My comments made today does not mean that I support a court-appointed list but the idea that I like as Ross captures in his letter is to have a panel.
- 391 Chair Ellis I do want to wind this part of the meeting up within a couple of minutes. One thought I have about this if we were to go the direction of a consortium or go the other way with a court-appointment list this thought applies to both. I really think what we ought to do is develop a model set of bylaws and include in the RFP that we would send out that we want that (inaudible) –
- 424 P. Ozanne Administrative Model and see if we have any takers.
- 427 Chair Ellis Is there a sense that we ought to at least see what that would look like?
- 431 P. Ozanne Tell me Mr. Chair where we are going.
- 432 Chair Ellis Kind of an organic document when we say consortium this is what we are talking about. If we could have staff prepare what that might look like based on what we have heard and maybe go the other route to what the modified list would look like and what a consortium would look like and I think our next meeting lets look at that and if there is a consensus.
- 450 P. Ozanne One of the elements of the appointment list and I suppose at some point in time and particular another reason why Lane County was interesting place to be even is if we went with a consortium there are going to places in the state where there will be appointment lists.
- 454 K. Aylward It is 6,000 cases a year out of 164,000.

- 457 P. Ozanne But my implication to the extent there is any we need as the Commission has said qualification standards which also leads to qualifications for (inaudible) we need to look at. We have essentially inherited the State Court Administrator rules which are now our rules. I think we can do the architectural outlines, but I don't know how far we can get by the April meeting.
- 470 Chair Ellis We want the foundation and the good studs. Is that an okay approach. Is that a consensus.
- 474 P. Ozanne I think we have the benefit to of those existing consortium to look at. We will try by April.
- 481 Chair. Ellis Let's move to topic No. 3 which is discussion of - let's take about a seven minute break.

**Agenda Item No. 3 Discussion of Public Defense Service Delivery in Benton, Lincoln & Linn Counties**

- 496 Chair Ellis Calls meeting to order at 2:45. We are now on Item 3 of the agenda Public Defense Service Delivery in Benton, Lincoln & Linn Counties. Let me just say that we met last month in Lane County and we had a very similar turnout for which I am very grateful. We are here to listen. You may not have detected that from all the discussion here but that discussion as you can tell was heavily influenced by what we heard from in the community when we met there last month. So we would very much like to have that same process here. We don't have a formal sign-up sheet. We do take input from any of you who wishes to give it and I don't know Peter do you want to give some kind of introduction about the work that you have done and then we will let people talk.
- 519 P. Ozanne Basically (inaudible) Ingrid Swenson will give a review of what we are calling quality assurance - visiting large contractors and try to help them improve how their business is run and they are managing their work but the one we are doing now here in Linn County we are calling structural analysis. Looking at how delivery systems are working and how the components are coming together, delivering quality services, cost efficiently. The discussion in Lane County of course was over the cases that aren't handled by the Public Defender's that became an issue in Lane County was do those other cases get delivered most effectively and that is the discussion you heard. We have three counties here. I wrote letters to all the people via e-mail virtually all of the people we spoke with in the counties. First because they are all distinguished and insightful people I wanted to welcome them to come here today. But on the other hand I kind of discouraged some of them because we are trying to get a sense of what the focus of the Commission would be on. So for example I really appreciate Doug Bennett (name??) from come over the mountain from the coast but I told the judges there and the District Attorney and the defense consortium that the subject in Lincoln County probably wouldn't come up in any detail, of course, the Commission may disagree, but in Lincoln County just to give you a brief summary the system seems to be working. By the way if you haven't seen our report it is part of the package that is in the back of the room, it is an attachment to the agenda. It Attachment 3 of the section of the report. The first is the general process of the structural review that we are doing and what we are looking at and then starting on Page

10 with Benton County that is the subject of today's discussion and now we are on Page 12 with Lincoln County. To give a little demographic snapshot of what each of the counties population is and some of the characteristics but really it is a question of having spent on the average of two days, here in Benton County we spent three some of us, Kathryn Aylward, Ingrid Swenson, John Potter joined us on one of the visits. In fact in Lincoln County we found that to be a close knit legal community. People generally satisfied with public defense services. If you read your report you will see that the delivery structure is kind of unique. It is really not a consortium but a set of individual bidders or contractors who bid on cases and then collectively come together and kind of operate as a consortium so it is a bit unique but it seems to be working. The one area that we observed in Lincoln County we asked first, as we like to do in any county, we wanted the people involved to think about solutions. We see as we do across the state the graying of the public defense bar. When you go to a public defense conference, not like the days when I started, where half or more of the people were under 35. Now it is looking pretty middle-aged and above at these conferences so this becomes a concern all around the state how are we going to provide services in 10 years or so. It looked to us like Lincoln County, respectfully, particularly the consortium first although we would welcome any ideas from the courts and the prosecutors and other interested, certainly the local bar, of what we call succession planning. How can we get new lawyers coming in. I would submit unless the Commission has questions, or if Judge Bennett would like to comment which he is certainly welcome we probably, I would suggest that we will entertain (inaudible) and report to you on their ideas and over this next year or two try to develop some kind of plan that is acceptable to the county and acceptable to the Commission. That is largely what happened in Lincoln County. Linn County which I think is the largest of the three, surprised by the size of Linn County. We have Jason Carlile here, the District Attorney, and welcome Jason. We spoke with Jason and spent some time with him and it was very helpful. He said he is a humble guy and doesn't have anything to say but I would welcome them Jason any observations and we are simply informal discussions here, we won't put you under oath. In any event, in Linn County again, things are working generally to the satisfaction of all the key players. Like anyplace we can always improve but things were working quite well. We did state that the judge in the juvenile area is quite concerned about the growth of his caseload and we are looking at that administratively through our own Office of Public Defense Services whether we have the resources right in the county. In other words we could provide more resources to handle the juvenile caseload. In the criminal area it was an observation and Jason you may want to, I think I got this right but in talking with a number of folks there have been efforts at early disposition programs and you have been involved and others and it seemed like they weren't satisfying the parties involved and at least we are offering our good offices in conjunction with the consortia in Linn County to help you and the courts develop an early disposition.

637 Chair Ellis

How large is the consortium.

638 K. Aylward

In Linn County the criminal consortium and also juvenile consortium has eight.

650 Chair Ellis How is it structured?

653 P. Ozanne Well they have an administrative but the authority has recently passed from Forrest to his father, although Forrest is still active. Kathryn maybe you should respond to this.

658 K. Aylward Forrest has been the administrative as least as long as I have had it which is at least six or eight years. That is the beauty of having a consortium that I don't have to get too involved.

670 P. Ozanne They are a non-profit so they have to have a Board.

685 Chair Ellis How do they handle some of the issues we have been discussing.

690 K. Aylward There was one contractor who handled both juvenile and criminal and then they decided that because the practices lended themselves better to a more dedicated attorney that (tape ends)

**TAPE 2; SIDE B**

002 K. Aylward Other than that there hasn't been a lot of turnover. One left to be a judge. It is the same bunch of attorneys they have had for a long time.

004 Chair Ellis The contract relationship we have with that is on a (inaudible).

005 K. Aylward That is correct.

006 Chair Ellis Do they do 100% of the caseload.

007 K. Aylward That is correct. Well they don't do murder cases. So the murder cases go elsewhere.

009 Chair Ellis Do each of the participants also have private practice of their own.

010 K. Aylward I believe that most of them do have some and if they aren't working full-time under the contract then they aren't working full-time at all. But yes they all have something else besides the contract.

015 P. Ozanne The action item or at least the way you want to do it at the next meeting is we are receiving your authorization for us to work with Jason and others on the early disposition. Again far be it for us to be presume we can figure it out but I think we said that the defense community and the defense lawyer ought to be involved and has a role to play and as I mentioned before a need for standards so that all of our contractors know what their role is in early disposition so it is not an insignificant issue but I think it is one we will handle with your authority administratively.

023 Chair Ellis In Benton County which is also consortium based do you think –

025 P. Ozanne Well if you don't mind I think Jennifer Nash who is the administrator would probably be the best one and some of the other members are here.

026 Chair Ellis You want to come on up.

- 027 Jennifer Nash Benton County has a non-profit corporation. We have eight members of our consortium and we do 100% of the caseload for Benton County other than murder cases and we have a five member Board of Directors that are comprised of members of the consortium. We also have individual subcontractors. Each one of our contractors so that the individual attorneys have a contract with the corporation to provide services in the County.
- 034 Chair Ellis Are those all identical?
- 035 Jennifer Nash They are. We have a case rating system for our internal compensation so that we can control caseloads within the consortia and that also deals with although we don't have the situation now, we have in the past, with certain attorneys who are not qualified to do certain types of cases. So misdemeanor cases are rated less than felony cases and less than Measure 11 cases and it also allows us to balance the workload and also allows us to account for situations where when an attorney is on vacation so another attorney or one of the other seven have prior caseload or one of the others have a more involved caseload the rest of us pick up the difference.
- 046 Chair Ellis What percentage of your caseload is court-appointed?
- 046 Jennifer Nash Well we all have private practices. I also have private practice that is not indigent defense and in terms of administration. I don't do administrative work everyday and for some times of the year I am busier than others depending on whether we are involved in contracts or those sorts of things but I estimate that I spend about 10% of my consortium load doing administrative work.
- 053 Chair Ellis On the administrative side what are the principal components?
- 055 Jennifer Nash My office is the contact office for the court for any appointments that need to be made. Then we assign the cases out to individual attorneys based on – well the first thing we look at is whether or not defendant has had another attorney already and we try to whenever possible to reassign the same defendant to the same attorney. Sometimes that is not possible due to conflicts of interest and other things as well and the attorney represented a victim or the co-defendant or some others. That happens about 90% of the time that the defendant goes back to the same attorney. I deal with all of the payments to each attorney.
- 063 Chair Ellis Stick to assignments. You start by matching clients with attorneys that already know them. What other do you do with the assignment stage?
- 064 Jennifer Nash Sometimes there is a scheduling issue. Sometimes it comes up that a defendant, we also do juvenile cases and we have shelter and other types of hearings that need to be dealt with in a timely manner and it may not be possible to reassign the cases because the attorney is gone. Primarily it is just reassigning and also –
- 074 Chair Ellis Do you try to match the case with lawyers who are experienced in the field?
- 075 Jennifer Nash It is also based on each individual lawyer's caseload at the time. We maintain a constant monitoring of each attorney's caseload and the

person who is the lowest on the caseload without those other two factors being taken into consideration is where the case goes. That is because right now we don't look at matching cases to attorneys because all of our attorneys are qualified to accept appointments in all areas. We are all equally interested in the cases that we handle and there are a variety of cases that we do so we really don't match them that way.

- 084 Chair Ellis How do you develop (inaudible)
- 085 Jennifer Nash We have done it internally. We have actually reviewed that and revised that a couple of times in the last five years based on changes in the law and changes in trial work things like that. It is an internal process that we review how we rate our cases and make decisions whether or not cases need to be adjusted.
- 091 Chair Ellis Does your rating match at all with the contract units?
- 092 Jennifer Nash There is not any one-to-one correlation but it is fair to say for example that probation violation matters which are on the lower end of the compensation get one point and of course Measure 11 cases which are higher on the compensation get four points depending on –
- 095 Chair Ellis We may learn from you.
- 099 Jennifer Nash Yes because what we don't do is we don't pay our attorneys an hourly rate – I'm talking about internally. All of our attorneys get paid the same amount of money per month and so how we manage their caseload is on this rating system which is similar to an hourly rate type situation. We assume and factor in that cases that are more serious are going to take more work and an attorney always has the opportunity to come back to the administrator and say you know I have this case that is going to take a lot of extra time I want extra case weight. We also give credit for outside projects or things like that that individual attorneys are involved with. They may need a reduction in their caseload because for example they are teaching at a high school once a week or something like that. We give credit for those things as well. Similarly we also provide additional case weight for taking a case to trial because we recognize that there should be some incentive in certain cases to deal with the triage that other people talked about. There should be some incentive to take a case to trial and so we give additional points for cases that go to trial for each day of trial.
- 118 Chair Ellis In the staff report there were comments about unprofessionalism. What are you doing to address those comments.
- 122 Jennifer Nash I think that there are many things that we go do to make that a better situation and we intend to do everything that we can do. When this came up one of the things that we did is our members of the consortium reviewed the Oregon State Bar statement on professionalism and looked at what it is the bar is giving us direction for being professionals in this field and that is something that we all are striving to do and will continue to strive to do and sometimes it is difficult. It is sometimes difficult, you get in the heat of the situation and those things don't always happen. But we are committed to doing it and we know that it is an ongoing issue and something that we will continue to address.

- 135 Chair Ellis One question I had reading the report would it make sense to think of a two county operation instead of two separate operations in each county?
- 140 Jennifer Nash Yes and no. I think for the big picture that makes sense but I don't think it is workable and I say that because it would take a great deal of coordination particularly from the bench to do that with tight dockets the way they are I just don't think it is possible. All of us have outside practices and many of us practice domestic relations some of those are in Linn County. Linn County's call date for domestic relations matters is the same time as Benton County's criminal call date and it is difficult to manage that. I know the court here has had to juggle times that attorneys appear here to take into account the times that attorneys have to appear in Linn County. We don't necessarily get the same cooperation from Linn County taking into account the times we have to appear here. It is a very different culture. We do take cases on a retained bases, many of us in Linn County, also in Benton County and it is sometimes difficult to manage those mostly due to the competing scheduling. I suppose it is possible I think it may be very difficult to do.
- 157 Chair Ellis I take it the board decides who is admitted or not?
- 158 Jennifer Nash Well the board as I said is five our members and we have eight consortia members and so really as a practical matter we all decide even if it is just the board. I am not on the board so other than me there are only two people who are not on the board so as a practical matter we all make decisions about that.
- 161 Chair Ellis Have you admitted new members in the last three years?
- 162 Jennifer Nash Yes we have.
- 163 Chair Ellis And how is that process done?
- 164 Jennifer Nash Well in the last three years we have admitted three new members. Two of them are still with the consortium and one is not because she chose to leave on her own. We had two leave and two came in to replace those two and that process was we solicited resumes and information from people who were interested but I wouldn't say we had a sort of normal hiring process. The two people who came into our consortia are both from the Josephine County Public Defender's Office who came up here from Grants Pass and joined our consortium after leaving the Public Defender's Office there. Then the third person who joined the consortium was with us a year and left was an expansive of the consortium. We went from eight members to nine due to our caseload bulging and then of course it shrunk very quickly and she also at that time decided that she didn't really want to do criminal defense work and so she left the consortium.
- 177 C. Lazenby During that same period of time did you have a lot of unsuccessful applicants that wanted to get into the consortium?
- 179 Jennifer Nash Yes. I believe that we had three unsuccessful applicants although I can't remember off the top of my head but that is what I recall.

- 182 Chair Ellis Have you ever since you have been involved had someone leave because you were not satisfied with their work.?
- 184 Jennifer Nash Yes.
- 185 Chair Ellis What are you able to do in the area of quality control so that those of you – you all share a reputation, you all would have an interest I think in each of your colleagues being competent? What do you do or are you able to do to ensure quality?
- 191 Jennifer Nash Well we have had to struggle with that a little bit we have had that issue come up in the last several years and have had a member who was on probation. That person had some specific rules they were supposed to follow while on probation. Was off probation and then still continues to have some issues that we need to deal with. We don't have formal procedure at the time the report was made but we are committed to have a policy in place by April 1 to deal with problems. In our contract with our subcontractors each attorney specifically lists what it is very specifically what it is we expect from each of the contractors what we have been lacking and will no longer be lacking is what happens if that doesn't happen. We have our bylaws that deal with expulsion of a member but we have not had a formal policy of dealing with problems or complaints. The way that complaints from outside or concerns from outside, members of the community, from the bench, from the District Attorney's Office, whoever. The way those are handled now is that those do come to my office. They come to my office and I address them with the individual attorney saying that I have had this phone call and this is what the situation is tell me about this and direct them to remedy the situation. If the situation is not remedied, very, very rarely but for a situation a few years ago I have not had a follow-up situation. I wrote a letter a couple of years ago to a client's mother who was concerned about the attorney not contacting him the way she felt he should be contacting him. The client wasn't complaining it was the client's mother who was complaining and so I dealt with that situation. That is the way problems are dealt with now is that I deal with them on an individual basis with the attorney and if the problems continue happening we talk about it as a group and have directed the individual person to do whatever it is to remedy the problem.
- 232 P. Ozanne I just wanted to say that I have talked several times with Jennifer and I think that you can see and I have expressed my appreciation to Jennifer that she and her colleagues have taken the report as constructive criticism. If I were reading it, it wouldn't be an easy thing to read. There were positives things in there as well and I told Jennifer this would be an opportunity as I'm sure it is to correct any errors because we were only here a couple of days and one of things I want to ask you Jennifer, the question I have obviously the criticisms of the unacceptable emotional outbursts in court – not every consortium member displays that or it is okay not to contact a juvenile client. Not everyone in the consortium expresses that view so then it becomes I think Barnes is asking you how are you as a group manage yourself. My question is and it is kind of alerted by the fact that you said you are not on the board somebody else is. This is a pretty pointed question but do you feel collectively that your consortium has delegated to you enough authority to manage these problems. Or do you get enough support from your colleagues in that consortium to deal with these

outbursts in court, failures to deal with clients. What is your view of how that is working?

- 253 Jennifer Nash I view my role as the first among equals. Meaning that I am not in a position of any kind of superior authority to deal with a lot of these issues that come up. I am the point person for outside people to contact regarding these issues. I am an advisor to the group at large but unlike the Marion County situation or Lane County PD, Ross' position, I am not that person that can call someone into my office and say here is the situation. I am not an employer. I am not anyone's supervisor really in the sense of how you would traditional think of that. I am one of a group of eight and I am in position where I am the point person but really I am advisor to the group more than anything.
- 268 P. Ozanne Sort of a challenge because I wonder if this kind of analogy would work. A lot of law firms now have an administrative law partner that is somebody really runs the business and a managing law partner. In other words somebody who knocks heads. I wonder is there someone else in your group you could look to to knock heads or do both those functions fall upon you?
- 272 Jennifer Nash The both fall upon my shoulders but we really do work very well together as a group and so I will be able to come to the group and I can say we have this issue. This issue needs to be dealt with and it is really a group decision process.
- 279 Chair Ellis You mentioned that two new members came from Josephine County.
- 280 Jennifer Nash Yes.
- 281 Chair Ellis The question I have is did you recruit them or did they know you had openings and how does a young lawyer gain the skills to be a competent defense lawyer.
- 288 Jennifer Nash I had a personal connection with an attorney in the Josephine County PD's office who learned that we were looking for consortium members and she knew that one of their people was looking to move so she connected him with me and then that is how that situation happened and then the second person was the same situation he was looking to change. They happened pretty close together. So that is how that happened it was any kind of recruiting so it was just fortuitous.
- 297 Chair Ellis Is there a path to find a recent law graduate (inaudible)
- 303 Jennifer Nash Well you are kind of describing me. I'll tell you that the answer that I got in law school I went to law school in Eugene and was interested in practicing in Corvallis and the answer when I knocked on some doors and questioned some people about coming up here was that you can't practice law in Corvallis. It is a very closed bar, it is a very small community it will be very difficult for you to do that. When I came up here I did not do criminal defense work, I was here for awhile doing other types of work and still interested in doing criminal defense work and then an opening came in the consortium and I approached the consortium and said I would really like to be involved with your group and came in as a half-time person and then eventually went full-time.

315 Chair Ellis Was there any mentoring?

316 Jennifer Nash Yes.

317 Chair Ellis How did that work?

318 Jennifer Nash Most of the people that we have in consortium have been in the consortium from the beginning. The consortium in Benton County was formed in 1987 and but for two of the original members they are all still in the consortium now. When we take on new people if they aren't qualified in a certain type of case area or aren't qualified to accept certain types of appointments we hook them up with another person who is qualified and have them work on cases.

328 Chair Ellis Do you allocate case points to the individual.

329 Jennifer Nash Yes we can do that.

330 Chair Ellis One thing you kind of heard us talking about is the concept of having non-members and outside directors on the board. How would that work. In your mind do you think that would be positive?

336 Jennifer Nash I am not familiar with how well or not well that works in other counties. I understand the concept and it makes sense on the one hand but on the other hand I would have concerns about who was on the board and what their involvement was. There are practical, ethical difficulties with that because we are lawyers and we have confidential cases, we have confidential situations, conflicts of interests among cases in the consortium.

345 Chair Ellis That's where an outside director might help.

346 Jennifer Nash Perhaps. I frankly don't know enough about how that would look to be able to comment on it.

353 Chair Ellis Are there other questions for Jennifer.

354 J. Brown This is just my totally from my own perspective but to the extent the consortium would have the impression it is really fundamental in the sense of that this mission is (inaudible)

372 Jennifer Nash We took this very seriously. The report that was made as Peter said we really looked at it and saw this as an opportunity to make some improvements that we needed to make. There are a couple of things that I think that haven't been touched on that I need to discuss that may also answer your question and that is that regarding the contact with our clients in juvenile cases which is a concern and I can understand that I wanted to provide some feedback and input about that and also about the office sharing situation which was also brought up which I think is of some concern and I want to address that and correct that as well. That is that we recognize, understand, agree with and have absolutely no quarrel with the fact that we need to contact our clients in all cases but particularly in juvenile cases and I think that without becoming specific about the cases that this was involved with. These were pretty unique situations that were addressed and they are not the norm, they are not how we typically, traditionally, practically believe

that we should be doing our work in juvenile cases. These were very unique situations involving contact with a child and there was some question about the appropriateness of that at all and the advice was given by various people that perhaps that should not happen. This was not a situation where a parent where an attorney was representing a parent and was brought into court and represented things that weren't checked out by a parent or anything like that. So that is not how we run our law practices. That is not how we believe it should be done and that is not in fact what happens so that is one thing. The second thing is regarding the office sharing situation I know how it is that the impression was created that we share case information that was explained in the report but that is actually not accurate. The comment was made during an early meeting that we have a very cordial and collegial relationship with each other. That we use each other to discuss situations with our cases. We do not ever discussion cases with co-defendants with adverse interests or deal with client information, anything like that. What we do is use each other as mentors, as sounding boards when it is appropriate to do that and I think that that is appropriate. I think that is one of the benefits of having an office sharing situation as opposed to having individual lawyers in individual places and we do have safeguards in place to make sure that those conflict issues are dealt with internally in our office. Our consortium actually has, of the eight members, three offices. One person is a solo practitioner, and then we have two people who are in an office together and then five of us who are in an office together. Just to follow-up we absolutely agree with, support 100% the idea that it is imperative for the state and it is imperative for us to provide quality representation to indigent defendants and indigent persons in the state.

- 432 Chair Ellis You have 100% of the court-appointed work.
- 433 Jennifer Nash Of the court-appointed, yes that is correct.
- 437 Chair Ellis Do you do the parental representation on termination rights cases.
- 438 Jennifer Nash Yes.
- 439 Chair Ellis I am going to ask you a question are we making a mistake leaving 100% of the work with your consortium?
- 446 Jennifer Nash No you are not. Because if we have problems where we cannot represent a person within the contract will Kathryn and she fixes it. That happened just yesterday. So we have that option available to us and it is actually pretty rare.
- 454 Chair Ellis I wanted to ask you some questions about your interaction with Kathryn and Peter about your meetings with them. Any observations you want to make. Are we supporting you in ways that are good?
- 461 Jennifer Nash Yes I feel that both Kathryn and Peter have been very supportive in whatever we need to have happen. If I need something I call and it happens. I have had a couple of conversations with Peter over the last week and I don't have any concerns.
- 468 Chair Ellis How about the intersections between you and your colleagues at the trial level.

476 Jennifer Nash I think there could be more communication but I also understand that on a list of priorities at the appellate level contracting the trial attorney on an issue where the trial attorney needs to be contacted probably goes to the bottom of the list. That is understandably. But a lot of it I think is just curiosity and interest in our clients and what happens to their cases up on appeal but most often we find out what happens when everyone else finds out what happens when the Court of Appeals' issues its decision.

487 Chair Ellis Other questions for Jennifer.

488 S. McCrea I'm interested in your board. There are five members of the consortium is that right?

489 Jennifer Nash Yes.

490 S. McCrea And how often do you meet?

491 Jennifer Nash Well that has really changed because it use to be that the consortium itself, all of the members of the consortium, rarely if ever met as a group. At that time the Board of Directors met monthly or bi-monthly to discuss various issues that needed to be discussed. In the last probably three years that has changed a lot and now our group as a whole meets twice a month at a minimum and sometimes more often than that, so in terms of regular Board of Directors meeting we probably only meet once a year and that is because we are all together twice a month discussing various administrative things that need to be dealt with or any other issues that come up so we meet very often.

504 S. McCrea So it is really more the whole consortium meeting instead of just the board?

505 Jennifer Nash That is the way it has developed over the last couple of years.

506 S. McCrea What kinds of issues do you deal with at those meetings can you give me an example?

508 Jennifer Nash It is an opportunity for me to give information on the day-to-day administration and maybe some things that aren't so routine that come up for to tell the members. I meet monthly with the court to talk about various issues that the court is concerned about so it is also a time to give feedback to the members of the group about issues the court is concerned about and vice versus for me to gather information from the members to take back to the court to talk about issues. One meeting we have is really dedicated to business and the second is business if we need it but it is more of a get together to talk about various issues.

524 Chair Ellis What percentage of your group regularly attend criminal CLEs.

525 Jennifer Nash 100%. We all regularly go to the OCDLA conferences. I think there are maybe only two of us that aren't to the DUII conference tomorrow.

536 Chair Ellis In your own practice you said 10% of your consortium practice is administrative. What percentage of your total day is consortium practice.

540 Jennifer Nash Well it depends on the day. That has varied depending on the caseload and the number of members we have had. Right now I would say the consortium is probably 65% of my practice. At times it has been as high as 75% and that has been too much. It has been difficult. I don't like it to be that high and it has been at times. What we think would be the ideal would be between 50 and 60%.

560 Chair Ellis Do you think you get that sometimes?

562 Jennifer Nash As Kathryn can tell you our caseload has varied year by year over the last five years a lot and so it really has depended on what the caseload has been like. So it difficult to say. Now I think we are all about where we want to be. A year and a half ago we weren't. We had way more than we were comfortable with.

564 S. McCrea Why was that. Why the 75%?

566 Jennifer Nash Because part of what makes it viable for us to continue to do consortia work is that we supplement our income with retained cases and we did not take the volume of retained cases that made it possible for us to be able to do that adequately and provide quality representation to our clients.

575 J. Potter Jennifer you have mentioned quite candidly I might add, a contentiousness of practice here and taking on the consortium and all your responsibility but clearly it is not all defense counsel. What is the cause of the contentiousness, I am still not really clear.

587 Jennifer Nash We don't have enough time to talk about that. Generally, there has been a change in the bench and a change in the defense attorney's office and so the long-standing system, we had a district attorney that had been in office for a long time and the deputies also had been there for a long period of time, the consortium members, the same length of time, the judges the same length of time. In the last five to seven years there has been a big mix-up. So what you have is different people, different personalities that are trying to work together and it is always isn't successful.

604 Chair Ellis How do you handle routine expenses?

608 Jennifer Nash We request them through Salem.

609 Chief Justice Carson Can I get back to the professionalism. We need more trial judges on the Professionalism Commission because the trial judges bear the inordinate responsibility, duty, opportunity to bring light to the statement of professionalism. I was heartened by the fact that you said when facing that confrontation issue that you went back and are trying to follow the professionalism statement which the court adopted 15 years ago. Did it help you think or is it going to help?

624 Jennifer Nash I think it is going to help. It is a very good reminder for all of us to sit down and look at it and say this is what we should be doing. This is what we are supposed to be doing and this is what we want to do. That

is immediately what I thought of doing when I got the report was we need to look at this again. I need to look at this again. Something that should be posted in our offices that we can look at and see and never put in a file drawer so that we can always know this is what we should be doing and try to do it every day. I agree with you that having more trial judges involved in that is an excellent idea because when things happen in the courtroom you want the judge to say this isn't okay to everybody.

644 Chief Justice  
Carson They are proposing to add a question to the bar exam on professionalism. I don't think that will past. Thank you Jennifer.

651 Chair Ellis Any other questions for Jennifer. (tape ends)

**TAPE 3: SIDE A**

002 Chair Ellis Thank you very much.

003 Jennifer Nash Thank you for the opportunity.

003 Chief Justice  
Carson I am struck by her professionalism and the way you are working with Peter. I applaud you and your consortium.

004 Jennifer Nash Thank you,

005 Chair Ellis After that I'm sure no one else wishes to come forward but we would be very happy to hear from you.

006 P. Ozanne I asked Scott Heiser to speak and Jason.

009 Scott Heiser Benton County DA. I listened to Jennifer and I agree with her that we have certainly had some issues here in Benton County with professionalism. I believe the report is accurate as it is written based on my experience and (lot is inaudible) that we need to improve professionalism.

014 Chair Ellis It surprised me. I would have guessed in a smaller community that the participants on both sides would have less contentious because you all know you are going to see each other again than in the larger communities. I was surprised to find it and it obviously exists. I am hearing you say from the DA's side you guys are willing to work hard to try to not contribute to that.

025 Scott Heiser Absolutely. It is a huge issue. We have to fix it.

027 Chair Ellis So does it make you give better deals or not.

028 Scott Heiser The other ideas that were suggested and I think the Commission might want to consider. A member on the board from the outside to help with the various contractors I think is a very good idea. I think there is a propensity for the folks in the consortium to have very close friendships and you lose some objectivity about what is going on. Consolidating Linn and Benton counties from my perspective is a very good idea. I

enjoy working with Linn County. If you brought that mix of people in with the Benton people I think that would help diffuse the contentious.

- 041 C. Lazenby Scott one thing that Jennifer was saying was that the consortium has taken steps to improve professionalism. Have you taken similar steps administrative steps in the District Attorney's Office to take ownership for your contribution to that as you review professionalism and try and adopt that in maybe a formal way as is it a work in progress.
- 046 Scott Heiser I haven't done anything formal in the last three months but particularly whenever there has been a huge outburst in court I sit down with my lawyers and say alright what happened and how did you respond when that occurred. When something happens as it relates to the defense bar I sit down with my staff and try to understand the situation and try to decide how to deal with the situation in the future. That seems to work relatively well at least from my perspective. Lawyers in my office, myself included, have lost composure on the record and when it does happen, I chew myself out, and when my deputies lose it, I take disciplinary action when it is appropriate. I have fired one attorney. I don't have an issue or a problem disciplining people. We don't really have the structure of the defense consortium. I share with Peter and his crew that my office owns this problem just as much as the defense. We want to fix this problem.
- 065 Chair Ellis Most of the time your office has problems with the defense side where do you take those complaints?
- 068 Scott Heiser In years past when Judge Gardner was on the bench I would occasionally address those issues with Judge Gardner. When he left that really stopped. On occasion I have mentioned something to Jennifer or one of the more senior members of the consortium. To be honest I wasn't aware of some of the remedial efforts that Jennifer described as being present. Because we have made some complaints in years past about certain members of the bar and hadn't seen any improvement.
- 076 Chair Ellis Case value in the consortium they have eight people and they allocate the cases so everyone owns the same workload. My question and I also ask her questions about assignments and she everyone is qualified to do all kinds of cases. I want to get your perception whether there is uniformity of competence or range of competence within the defense consortium Is everyone competent to do all the work. You don't need to name names.
- 085 Scott Heiser The answer is probably not.
- 088 Chair Ellis Give me a sense is there a wide range.
- 089 Scott Heiser I have one person in mind when I answered that question.
- 090 J. Brown I'm curious. Is there any component in this instance that arises out of policy, practices or demeanor, law enforcement community that contributes to contentious?
- 098 Scott Heiser I'm not seeing that as the issue at all. I would share I know Judge Holcomb is here and Judge Dickerson that the bench needs to address

the behavior right when it happens that is highly desirable from my perspective and for a number of reasons that hasn't happened historically. I hope it will change. We need to address the behavior right when it happens and not wait two or three days.

- 106 Chair Ellis One of things and we encourage some of our major contractors to do is encourage them to be participates in the criminal justice system and to meet with their counterparts and work on system issues. My question is does that happen here?
- 113 Scott Heiser Not as frequently as it did seven or eight years ago but there is some of that that occurs now.
- 119 P. Ozanne Can I follow up on that Barnes. There are two statutory groups that might meet on the need for collaboration, one is the Public Safety Coordinating Counsel and the other is the Criminal Justice Advisory Counsel. Is that a variable? You said seven years ago there was more systematic participation by the defense bar and collaboration. Because I am aware of some counties those groups have disappeared and come back. Is that part of it?
- 126 Scott Heiser Not really. I was thinking when I answered that I was thinking of specifically Judge Gardner and Mike Barker, and he used to manage the local community consortium and there seemed to be a frequent level of contact and communication then there is right now. I meet with Tracey Cordes, the trial court administrator and I know she meets with Jennifer. I have been working in drug court with Judge Holcomb and Ms. Nash. and that actually has from my perspective improved relationships. Our local Public Safety Coordinating Counsel hasn't gotten mired in this issue at all.
- 136 P. Ozanne Scott, I think we all recognize that you all have to work here and we are leaving Dodge. I want to poke a little around this five people in law practice together and Jennifer has appropriately recognized the complexity but has it manifested itself as far as your concerned. Has there have been implications that you can detect that you can think about regarding the consortium.
- 146 Scott Heiser From my perspective having independent contractors sharing office space is probably not the best structure to use. I don't feel confident that somebody in the five member consortium represents co-defendants and I want to make an offer to one of the attorneys and that communication could inadvertently under the present structure be aired. I just don't feel under the present structure that is a viable option.
- 154 Chair Ellis Has it happened that you are aware of?
- 155 Scott Heiser It hasn't happened with the members of that specific five person office. They do all share the same office and have a certain camaraderie so I am concerned about the dynamics. They share the same space, same staff.
- 170 Chair Ellis Other questions for Scott?
- 171 J. Potter Jim when you were the District Attorney for Benton County during the 70's did you look that youthful?

173	Chair Ellis	He still does. Thank you Scott.
177	Jason Carlile	I am the Linn County District Attorney. If Mr. Heiser thinks I am going to let him export his problems to me he has another thing coming. Seriously I do notice that once in a while the defense bar will come over and the Deputy DA on the case will come back and say Jason they were kind of testy or grouchy or something like that. I'll say well be patient, life is a little different in Benton County. So I have noticed that with my limited exposure and Rome is not built in a day. My predecessor and I have worked for a long time and you don't get to that point easily and shortly. I remember being younger and having my boss telling me to just relax a little bit, we will survive this alright and I am doing that now with my younger deputy district attorneys. It has been eluded here to a couple of times but I don't think you can overestimate the benches importance when you have two attorneys battled hard you need a cool head in the courtroom. You need the trial judge to say okay time out just calm down a second. I don't want you imply that we are perfect in Linn County by any stretch of the imagination. I have dealt with some incredible problems with the bench and the bar but we are still here. One thing since I have been listening is that your task is to make sure the folks gets the defense and that we watch over the public's money. I think that is the bottom line. The demographics between Linn and Benton are incredible different. It is a different creature. I read things in the Corvallis newspaper that would never come up in a million years in Linn County. To give you an illustrate Ballot Measure 30 it failed 70 to 30 in Linn County and passed in Benton County. So to try to make the same system work in every place I think that is wrought with danger. Stick to your principles but allow flexibility.
229	Chair Ellis	Any observations you want to share on Linn consortium and how that works?
231	Jason Carlile	We don't have very many new guys or gals. Mainly old ones. Organizational I think they are very loose. I know Forrest isn't here but they are very loose but they do all have separate physical offices. I do know that they do consult if someone has a case and it looks like they are over their head informally they will take care of that. They are a bunch of old hands but of course in a bigger county you can't run that way.
251	P. Ozanne	So what happens in 10 years when the old guys and gals are gone how do you get the continuity to continue ?
252	Jason Carlile	I am 51 now.
253	Chair Ellis	That is not very old.
254	Jason Carlile	Thank you. I know some day I won't be prosecutor and how am I going to communicate for instances these values that I think are very important. I want to see that continue. I have started to work on that by bringing the younger deputies up and teaching them these principles. I think this consortium needs to do that to. I think you need to think about the end-game. I don't know that we are doing that in the consortium or maybe they are and I just don't know it. It is not my

goal to die in office. Some day I won't be in office anymore and I won't be a prosecutor but I would sure like to see some of these principles to survive.

- 266 Chair Ellis Well thank you very much.
- 267 Jason Carlile Thank you. I appreciate your efforts.
- 270 Kathryn Parrish I am the Director of CASA - and I will start by saying that there is significant level of hostility by some of the members of the consortium toward CASA.
- 274 Chair Ellis Can you describe your organization?
- 275 Kathryn Parrish We are special advocates. What we do is recruit and train volunteers that advocate for children who are in the jurisdiction of the state for abuse and neglect. The majority of our cases at this time don't receive attorneys for the children. That is increasing and I think that is a positive thing that attorneys meet the children and get to know the facts of the case. There are members of the consortium that I like and respect. My job is to speak for children in the community and so the issue of representing children is important to me. We have had over the last several months two termination's trial. One termination trial the attorney never met the children. When the attorney was in court he took a position during his questioning that was really opposed to the children's express wishes, the caseworker's assessment of the case and counselor's for the children.
- 311 Chair Ellis What I am trying to understand was it an honest difference of opinion or was it he didn't do his homework and didn't know what was happening.
- 312 Kathryn Parrish I believe that he didn't do his homework and his job. He never met the children and that is who he was representing. These children were old enough to speak up for themselves and say what they wanted and they actually expressed their opinion. The other termination case there were two attorneys involved. One attorney did talk with the children before the termination trial and fairly represented that child in court. The other case the attorney met with the children at lunch on the fifth day of the termination trial. Again these are children that are old enough to say what they thought and the attorney didn't gather those opinions until nearly the end of trial. Just one other issue about the attorneys sharing one roof it just occurred to me when Scott was speaking that information may get inadvertently shared simply because they all share the same fax number so it is all going to the same place. That is all I have to say. Children need to have as good as representation as an attorney can provide.
- 345 P. Ozanne Was it a different attorney in these cases.
- 347 Kathryn Parrish Three different attorneys.
- 348 P. Ozanne All in the consortium?
- 348 Kathryn Parrish Yes.

- 349 Chair Ellis Thank you very much. Who else.
- 353 Jennifer Nash I will come back and respond to some of the things that have been said. Just to specifically address two things. One is the office sharing issue and the other one is representation of children. It is my office that we are talking about and we do not share staff we all have support staff that does not overlap. We have separate filing cabinets for each attorney. We have separate physical space. It is 2000 square feet. It is a very big place and is really almost divided into two separate entire spaces. We have separate phone lines, separate advertising.
- 366 Chair Ellis Separate fax?
- 367 Jennifer Nash We do not have a separate fax, we have one fax machine. Separate computers, separate e-mails but the same computer domain, same e-mail domain but we don't have the ability to get into each other's e-mail. We do share a fax, copier and printer. Frankly fax machines, if it is confidential my position is that when someone sends a fax they can't be sure who is getting the fax or even if it is being sent to the right number and I would hope and anticipate that the district attorney or anyone else would never be sending any kind of confidential information over a fax without calling first and saying I'm sending a fax to you right now go get it out of your fax machine.
- 384 Chair Ellis Shared conference room and library?
- 385 Jennifer Nash Yes. We have different colored file labels for each attorney. So even if somehow some file got somewhere where it wasn't supposed to be it would be obvious to whoever is looking at the file. We don't in fact share information. Mr. Heiser's concern about co-defendant's and that being shared has not ever happened in my office to my knowledge and is not a concern. Regarding representation of children I have a very high respect for CASA. I think there is a fundamental tension between CASA and attorneys for children. We have different roles and does not resonate well with CASA at times. It is our job to represent children it is not our job to represent children's best interests especially when those children reach a certain age. At a termination trial the court is looking at the parent's conduct and not whether it is necessarily in the children's best interest, that is part of it but it is wrapped in the parent's conduct, and whether or not the parents will be able to rehabilitate themselves in a short enough period of time to reunite the children with the parents. That is the focus of termination trials and not, whether or not the attorney for the child has talked to the caseworker and whether or not they are representing what the caseworker's position is or whether or not they are representing what CASA's position is irrelevant.
- 433 Chair Ellis Do you feel you should be in contact with the child?
- 434 Jennifer Nash No I don't not necessarily during a termination case – going back I absolutely agree that you should be meeting with and having contact with the children, I do not necessarily agree that it is appropriate for the children's desire and whether or not their parent's parental rights –
- 438 Chair Ellis Your saying there is a difference between dependency and termination cases?

439 Jennifer Nash Between dependency cases and termination cases yes. Absolutely.

441 J. Brown So why do they have an lawyer in termination cases?

442 Jennifer Nash That is a very good question. There to oversee the case but it is really focused on the parents and the parent's conduct. Usually the parent's interest in a case is to not have their parental rights terminated.

462 Chair Ellis Do all your consortium members do both criminal and termination.

463 Jennifer Nash Yes. Dependency and termination cases are entirely different. You can't even really compare the two. They are not even the same kind of case, the same rules don't apply. It is almost like talking about the difference between a criminal case a juvenile case. They are really two separate types of proceedings entirely. I don't have anything else to add. Thank you.

473 Chair Ellis Anyone else want to share any thoughts. Judge you came all the way over from the coast you sure you don't want to talk.

481 Judge Bennett I don't really have too much to add.

482 Chair Ellis We do appreciate your input. Do you have any comments on the report?

Jon Yunker leaves at 4:15.

490 Judge Bennett I think the report was fairly written. I think we have a very good relationship with the defense bar. (inaudible)

509 B. Ellis Peter, maybe you can explain the consortium in Lincoln County.

517 P. Ozanne The main thing is they submit individual responses to RFP so there is individual contractors.

520 K. Aylward This is a consortium which we tried to create instead of having separate contract with law firms and individuals we thought it would be easier to administration because we like the consortium model so we tried to make them into a consortium. I think they resisted it to the extent that they still continue to submit individual bids. Our office gets the bids –

531 Chair Ellis The compensation per unit is assumed to be similar?

532 K. Aylward It is identical. Once we set a contract the rate is the same for all members and in addition to that we pay an annual portion of the money to one individual to handle the administration but it is a small amount of money and the administration is limited to submitting caseload reports to our office telling us how many cases there are and then distributing funds among the attorney. They submit individual bids but there ends up being one contract and we just call it Lincoln Defense Consortium.

569 Chair Ellis What happens when there are conflicts?

570 Judge Bennett They have designated conflict attorneys and the case is automatically moved to the next firm.

571 Chair Ellis Is that firm a member of this consortium?

574 Judge Bennett Yes.

575 Chair Ellis I think that is an issue. I think they need to have a non-profit entity structure.

577 K. Aylward I'm not absolutely certain that they don't it is just -

584 P. Ozanne You just spotted another issue.

588 Chair Ellis Any other questions for the judge. The juvenile case that is your area. Does the same group do that?

589 Judge Bennett We have attorneys who are part of this consortium and specialize in juvenile cases. They do the bulk. The difficulty we often have in juvenile cases is we have multiple parents. We often have to go outside the county for attorneys who do not have conflicts. That can be a very real problem.

598 Chair Ellis How do you deal with that. Do you go back to Kathryn.

602 Judge Bennett Basically it is one designated individual that we notify and we make arrangements with Salem and Salem assigns somebody to the case.

605 Chair Ellis And that is working okay.

606 Judge Bennett That works well. The only difficulty we have sometimes in getting the appointment made is there is some delay. That has been a problem in the past getting somebody in a timely fashion.

616 Chair Ellis Another other questions?

617 Judge Bennett Thank you very much.

618 P. Ozanne Barnes before I forget in terms of this consortium structure most of them as I understand it are individual lawyers who group together. Then you have some that have law firms. I think our Portland consortium has a law firm. I heard in some circles that that has complications.

636 C. Lazenby I think there are law firms that are individual members of the consortiums and there are also law firms that form an association.

657 Chair Ellis (very inaudible)

661 P. Ozanne My issue for the present purpose is not a issue of conflict it is more management and what do we want out of a consortium. Some of these firms are starting to say give us enough cases or we can't hire or we can't support the lawyers we have. It is creating sort of a second level of dependency on the appointment process. We haven't discussed it and I don't know if we have the energy right now at this point in the day to take it on.

- 694 Chair Ellis It does seem to me in this regional planning process when we come upon something like that that I can think we can be helpful.
- 697 P. Ozanne I'm actually thinking in the context of the model we want for Lane County. I can maybe try to flag the issues. Conflict issues. Questions of both managing the consortium to the extent we can and then this issue of building independency because the model the Commission seems to like is one where the consortium seems to have 50% or so indigent defense practice. (tape ends)

**TAPE 3; SIDE B**

- 001 Chair Ellis Anything else that anyone wants to say at this point on the Lincoln, Linn, Benton issue. I think this was very helpful and I think there are some things coming out of it that we can improve.
- 003 J. Brown Representation of children is concern for me.
- 010 P. Ozanne Fortunately on our staff now we have a true expert in juvenile practice our general counsel Ingrid Swenson. Judge Bennett has a wide reputation as a juvenile law expert and I was going to ask him about this but we will pursue this issue because it is either misperception, somebody is wrong or it is a matter of judgment that we need to get at because as you know one of our themes and one of our missions separate from this is improvement of juvenile law practice across the state and no having practiced juvenile law for 30 years there seem to be some variations in styles. There is some variations in understanding that may or may not be acceptable.
- 021 Chair Ellis Kathryn do you want to address Item No. 5?

**Agenda Item 5: Approval of Amended Compensation Plan**

- 022 K. Aylward Just some house cleaning.
- 023 P. Ozanne Barnes just for the benefit before we start tackling the next issue so we have some closure, I would suggest that we are going to meet in April and further discuss this and if you will give us directions that we sought in the report just for the audience so they know we will probably have our meeting in Salem if they would like to come there to see us and talk further about these issues.
- 030 Chair Ellis Meeting is scheduled for April 8.
- 038 K. Aylward Conflicts with the E-Board and perhaps we won't be appearing but –
- 041 P. Ozanne Barnes I know you didn't want to reschedule but we have this Application/Contribution presentation. I would think perhaps the following week would be my proposal, April 15.
- 046 S. McCrea I am not available. I am available on the 8<sup>th</sup>.
- 047 P. Ozanne The Chief is not available on the 15<sup>th</sup>.
- 051 Chair Ellis Chief what works for you during the week of the 12<sup>th</sup>.

- 052 Chief Justice Carson Monday the 12<sup>th</sup> or the 16<sup>th</sup>.
- 058 Chair Ellis I'm can't remember but let's shoot for the 12<sup>th</sup> in the morning in Salem. Now back to Kathryn.
- 062 K. Aylward With the Commission's approval we would like to add Compliance Specialist on our compensation plan. The other change is just Legal Counsel changing the title from Quality Assurance Coordinator to Legal Counsel. There is one typo. It is Chief Deputy Defender step 6 it says 5, 6 it should be 6,5.
- 080 Chair Ellis With the modification of that last item is there a motion to ratify?  
**MOTION:** S. McCrea; so moved; C. Lazenby: 2<sup>nd</sup>  
**VOTE 4-0**, hearing no objection, the motion **CARRIES**
- 084 Chair Ellis Is there anything else?
- 085 P. Ozanne I would like Ingrid to give an update on the quality assurance work she has been doing in collaboration with our contractors.
- John Potter leaves at 4:30.
- 087 I. Swenson I have written down my comments. I wanted to just update you on a few of the quality initiatives which we are pursuing. First there is the Quality Assurance Task Force. Jim Arneson is the Chair of that task force, Ross Shepard and Jim Hennings serve on the task force as does Ronald Gray. We have met twice and we have a meeting coming up March 16, next week. It is our goal to begin evaluating the larger Public Defender Offices first. We haven't identified our first victim yet but development of the process is well under way. From there we are hoping that our task force will be able to modify the process for purposes of evaluating smaller offices and consortia. When we talk about individual law firms I think the mechanism that the task force will probably use for gauging quality is to upgrade the qualification standards. We have heard a lot about those standards and the need to revise them and to re-certify lawyers under the revised standards. We haven't begun that effort yet. In the juvenile area there are two major initiatives underway: revision of the performance standards and the creation of a juvenile training academy. I frankly feel that the standards at this point are excellent; they simply need to be undated. So that will be happening. In connection with the training academy for new lawyers, there is a concern around the state about the quality of representation being provided to both juveniles and parents in juvenile court. We would like to address that need by offering comprehensive training to the attorneys who work in this area. There have been several meetings of the task for working on revising the performance standards and several meetings of the group working on the creation of a training academy. The next meeting of the latter group is on the 5th of April. Our Chair, Tim Travis, is with the Juvenile Court Improvement Project of the Judicial Department. The Juvenile Academy work group is very broad-based and includes practitioners, judges, district attorneys, representatives of the Department of Human Services, the Oregon Youth Authority, a law professor and others.. Just

briefly in response to what I have heard today, this may not be the time to address it comprehensively, I share your concern that if we are going to have people representing children they better know what their job is. Frankly our standards make it clear what their job is and I'm surprised there would be that much confusion. The whole issue of the proper role of attorneys representing children will be part of the OCDLA Juvenile Law Seminar in April. There will be a panel discussion which includes a practicing juvenile court judge, a professor of law and an attorney representing children who will be discussing "expressed wishes" versus the "best interests" analysis for representing children. I am hoping that people from around the state will participate. As the Commission is aware I think there are serious concerns raised statewide about the quality of representation in this area. There are a number of other quality assurance efforts underway. As you know, OPDS continues to hear very serious complaints about the quality of post-conviction representation. We are currently exploring a number of options for improving quality in this area.

- |     |                      |  |
|-----|----------------------|--|
| 160 | Chief Justice Carson | Ingrid does that include both trial and appellate?   |
| 163 | I. Swenson           | <p>Yes. In addition, we are working on a formal complaint policy. We do receive complaints. Our contractor advisory group is meeting shortly and one of the issues on their agenda will be to finalize the proposed complaint policy. In the death penalty area we have surveyed all the death penalty providers and have identified a group of contractors to serve as a panel for review of non-routine expense requests in those cases to assist us in making decisions about those expenses. The legislature also required that we do a peer review in Measure 11 cases. This is another issue we raised with the contractor advisory group. After consulting with them we decided that we would request all of the larger public defender offices to perform the peer review function in-house, having one or more senior attorneys review all of the requests.</p> <p>In response to the legislature's concerns about expenditures for non-routine expenses we are also putting together a list of experts who have been compensated by our office and their billing rates and asking that public defense attorneys use experts who work at guideline rates if they are qualified and available.</p> |
| 202 | Chair Ellis          | Sort of like a provider discount.  |
| 204 | P. Ozanne            | We have also written our colleagues in the prosecutor's office.  |
| 212 | Chair Ellis          | Any other business?  |
| 213 | P. Ozanne            | I don't know if we thanked Judge Holcomb whose courtroom we are in.  |
| 215 | Chair Ellis          | Thank you judge.   |
| 216 | Judge Holcomb        | Well I appreciate you coming down here and having this forum so that some of these issues could be viewed and appreciate the Commission's help in helping us work on some of the issues of cooperation so that we  |

can have a system here that runs efficiently and effectively. We appreciate your help.

220 Chair Ellis

I would entertain a motion to adjourn.

**MOTION:** J. Brown; so moved: Chief Justice: 2nd.

**VOTE: 4-0**

Meeting is adjourned at 4:50

April 6, 2004

**MEMORANDUM**

TO: The Public Defense Services Commission

FR: Peter Ozanne

RE: A Model Consortium & Model Court-Appointment  
List for Lane County

Introduction

At the Commission's monthly meeting in Corvallis on March 11, 2004, the Commission directed OPDS to develop a model consortium and a model court-appointment list tailored to the needs and circumstances in Lane County, and to present those models to the Commission in a memorandum for consideration at its April 12, 2004 meeting in Salem.

The two proposed models that follow are based upon:

- discussions of the Commission over the past 16 months regarding the structure of public defense delivery systems in Oregon;
- written and oral presentations at the Commission's February 11, 2004 meeting in Eugene;
- the experiences of OPDS and the Indigent Defense Services Division in administering the state's public defense system;
- input from the management staff at OPDS, including OPDS's "Report to the Public Defense Services Commission: The Results of OPDS's Investigations in Service Delivery Region 4" (the "Region 4 Report") and Kathryn's Aylward's March 3 memorandum to the Commission regarding "Public Defense Service Delivery In Lane County" (the "Memo on Lane County");
- literature on best practices in public defense management; and
- a review of this memorandum in draft form by OPDS's Contractors Advisory Group.<sup>1</sup>

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<sup>1</sup> Specific comments of individual contractors in the Advisory Group are referenced in footnotes to this memo, and are set forth in the accompanying Appendices A, B and C.

## A Model Consortium for Lane County

Background. In preparation for the Commission's review of Lane County's public defense delivery system and its February 12, 2004 meeting in Eugene, OPDS submitted the Region 4 Report, which included descriptions of the organizations that deliver public defense services throughout the state, including consortia. In preparation for the Commission's deliberations regarding potential changes in Lane County's court-appointment process at its March 11, 2004 meeting in Corvallis, OPDS submitted the Memo on Lane County, which included an assessment of the pros and cons of a consortium organization. As background to assist the Commission in evaluating the models proposed in this memorandum, relevant portions of the Region 4 Report and the Memo on Lane County are set forth below.

■ OPDS's Region 4 Report described the main features of Oregon's consortia:

A "consortium" refers to a group of attorneys or law firms who agree to submit a proposal to OPDS in response to an RFP and to handle a public defense caseload together if they are awarded a contract with PDSC. The size of consortia in the state varies from a few lawyers or law firms to 30 lawyers or more. The organizational structure of these consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with group practice, without the interdependence and conflicts of interest that arise from membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for membership, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as provisional 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 wish to continue practicing criminal law under contract with PDSC. Many of them received their training and experience in public defender or district attorney offices and larger law firms.

In addition to this access to experienced public defense lawyers, consortia offer OPDS several administrative advantages. If the consortium is reasonably well-organized and managed, OPDS has fewer contractors or attorneys to deal with and, therefore, can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar's "firm unit" rule, conflict cases can be efficiently distributed

internally among consortium members by the consortium's administrator. Otherwise, OPDS is required to conduct a search for individual attorneys in the county who can handle the cases. Finally, if a consortium has a board of directors, particularly with members who possess the independence and expertise of directors on public defender boards, then PDSC can realize the same benefits described above,<sup>2</sup> including more opportunities to communicate with local communities and access to additional management expertise and quality assurance processes.

The participation of law firms in a consortium may make it more difficult for an administrator or members of a consortium to monitor and manage cases and the performance of lawyers in the consortium. This potential difficulty stems from the fact that internal assignments of a portion of a consortium's workload among attorneys in a law firm may not be evident to the consortium or within its ability to influence.<sup>3</sup> Finally, to the extent that a consortium lacks 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 a consortium delivers, such as (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) PDSC's certification process to qualify for court appointments.

- OPDS's Memo on Lane County outlined the pros and cons of a consortium with regard to important aspects of a court-appointment process:

*Selection of attorneys for court appointments:*

Pros: Assuming a consortium is formed that included only well-qualified attorneys, this would eliminate the need for a review panel or judicial selection.

Cons: Once a consortium has been formed, the PDSC and the court have little influence on membership.<sup>4</sup>

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<sup>2</sup> OPDS's Region 4 Report described the benefits of boards of directors as follows:

Boards of directors of public defender offices, with management responsibilities and fiduciary duties required by Oregon law, offer PDSC another effective means to (a) communicate with local communities, (b) enhance the Commission's policy development and administrative processes through access to the expertise on the boards and (c) ensure the quality and cost-efficiency of the services provided by their offices.

(at p. 6)

<sup>3</sup> This observation was not intended to foreclose consortium participation by individual attorneys who happen to be members of law firms, as long as those attorneys assume sole responsibility for handling a consortium's cases.

<sup>4</sup> See Appendix B, point number 1, for a differing view from one member of the Contractors Advisory Group.

*Specialization:*

Pros: If a consortium were formed, the presumption is that the available workload would be handled by a smaller number of attorneys. The attorneys in the consortium would develop and maintain an expertise in public defense and could develop efficient case management procedures due to the volume and predictability of the caseload. . . . [T]he argument that a consortium would inhibit professional development . . . [is offset by the fact] that the ability to assign cases within a consortium would encourage members to develop an expertise with certain types of cases or clients.

Cons: [The Commission heard arguments at its February 11 meeting in Eugene that] the exclusive nature of a consortium would limit the ability of new attorneys to enter the field of public defense, would limit the development of existing providers to gain further experience, and would exclude those attorneys who chose to have a mixed practice. The [proponents of those arguments] thought that the current [court-appointment] system provided better long-range planning.

*Mentoring and training:*

Pros: With a consortium, existing members could be required to provide mentoring and training, and less experienced attorneys joining the consortium would have a formalized access to assistance.

Cons: [By implication, it is unlikely that a consortium will provide mentoring and training without such a requirement.]

*Administration:*

Pros: For [the judges who appeared before the Commission in Eugene], ease of administration was one of the strongest arguments in favor of a consortium. If there is a problem with an attorney at the public defender's office or in the juvenile consortium, one call to the administrator assures that the problem will be resolved.

For OPDS, it is easier to process one payment per month than to review and pay hundreds of individual bills, although this is somewhat offset by the need to review the monthly caseload reports.

Cons: Administration is not free. With an hourly paid consortium, such as the Yamhill County consortium, the cost for administration of the 28-attorney contract is \$107,000 per year.<sup>5</sup>

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<sup>5</sup> See point number 2 in Appendix B for a different view.

*Case assignment:*

Pros: Assuming a consortium does not just hand the court a list, it is easier for the court to simply appoint the consortium. If a substitution is required due to a conflict, the court does not have to be involved. In addition, with unit-based contracts, OPDS only pays for one credit regardless of the number of times a case may be substituted within a consortium rather than having to pay for work duplicated by a subsequent attorney. And although it doesn't happen often, a consortium can match a particular case or client to the attorney best suited for the need.

Cons: There is a potential that the court or OPDS may not agree with case assignments. For example, a consortium may decide that all of its members will be assigned Measure 11 cases; if the court-appointed system is maintained, entry onto the Measure 11 list could be strictly limited to only the most experienced attorneys.

*Accountability:*

[T]he judges [who appeared at the Commission's meeting in Eugene apparently] envisioned a consortium of hourly paid attorneys whose hours would then be reviewed by the consortium administrator. This kind of oversight would add to the cost of administration and would not necessarily produce the desired result.<sup>6</sup> Perhaps the issue of inconsistent billing and review of bills could be resolved by moving to unit-based compensation.

Unit-based pros: For OPDS, the costs are more predictable. Certainly an established monthly payment under a contract is predictable, but even a court-appointed list with established case rates improves predictability.

For attorneys, there is an in-built advantage that encourages and rewards efficiency. The inexperienced attorney who spends ten hours on a \$300 misdemeanor is earning \$30 per hour; the experienced attorney who spends six hours is earning \$50 per hour.

Unit-based cons: The risk with case rates is that there is an incentive to spend as few hours as possible on a case. This increases the need to have some kind of supervision. In addition, because rates are based on averages, an attorney would need to have a significant number of cases to avoid the risk of getting a case that required an unusually large number of hours.

*Financial implications:*

Cons: [T]he consortium model entails additional administrative costs. Some consortia have negotiated an annual amount for administration in addition to the

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<sup>6</sup> But see point number 3 in Appendix B.

case costs. Other consortia hold back a percentage of the case value for administrative costs. Some administrators are only responsible for negotiating the contract and then distributing the monthly payments to members. Other administrators are more heavily involved and are half to nearly full-time administrators.

Depending on the structure of a consortium and the requirements the Commission may establish, administration will be at least \$100,000 per year. In addition to the time spent by the consortium administrator, there would need to be a staff person to track and distribute the cases and payments, and to liaise with the court and our office.

**The Proposed Model Consortium.** Based upon the Commission's discussions over the past 16 months and its deliberations thus far regarding Lane County, OPDS concludes that, if the Commission decided to establish a consortium in the county, it would favor the establishment of a relatively structured consortium with most of the features described in the foregoing excerpt from the Region 4 Report. Therefore, OPDS proposes a model consortium for Lane County with the following elements:

- (1) A consortium of 15 attorneys at the outset, who specialize in criminal law but who do not rely exclusively on court-appointments. Based upon PDSC's many discussions regarding the optimum structure of consortia, it appears that the Commission has arrived at a consensus that larger consortia pose greater challenges to ensuring quality and accountability in the delivery of public defense services. Therefore, OPDS recommends that the initial size of a model consortium for Lane County should be 15 attorneys, particularly at the outset when local circumstances and support in Lane County may pose particular challenges for the establishment and management of a new consortium.

Based upon the Commission's previous discussions, OPDS also recommends that PDSC consider imposing some limit on the extent to which consortium attorneys can rely on court-appointments in their law practices. The Commission has expressed a desire in the past to ensure the flexibility of consortia to adapt to potential fluctuations in the state's public defense caseload or budget by imposing such a limit.<sup>7</sup>

- (2) A not-for-profit corporation with formal by-laws and a set of written operating policies and procedures. The formation of a not-for-profit

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<sup>7</sup> Some, if not most, of the members of OPDS's Contractors Advisory Group believe that it is unrealistic to expect the law practices of consortium attorneys, or any other public defense attorneys, to include any more than a small fraction of retained criminal defense work or other law practice specialties, especially in more populous regions of the state where the practice of law is becoming increasingly specialized.

corporation offers several advantages, including (a) formal requirements for by-laws that establish the structure and operations of the organization, (b) a separate and independent entity with which PDSC can contract and (c) a board of directors with independent membership. To the extent that the organization's by-laws do not address key policies and procedures of the consortium, the board of directors should develop a set of written policies and procedures governing the consortium's operations.

- (3) A board of directors with independent members. As discussed above, a board of directors, with the management responsibilities and fiduciary duties required by Oregon law, offer PDSC an effective means to (a) communicate with the consortium and the local community within which it operates, (b) assist the Commission in the development of public defense policy and the management of the public defense function in that community (c) ensure the quality and cost-efficiency of the consortium's managements of its attorneys and cases and (d) contract with an accountable entity. To ensure objectivity and diversity of perspectives and expertise, a substantial portion of the board's members (e.g., 20 percent of the board's members or two members on a five-member board) should be unaffiliated with the consortium and not engaged in public defense law practice.
- (4) A formal administrator. Perhaps the most important element in a successful consortium is an effective administrator who OPDS and the courts can call upon to resolve problems with the administration of the consortium and the performance and behavior of its lawyers. The administrator will be responsible for the day-to-day operations of the consortium and for the development and management of the programs and processes described below. In particular, the administrator must be capable of holding the consortium's attorneys accountable for lapses in performance and inappropriate behavior, as well as encouraging and coaching the consortium's attorneys. These responsibilities will demand a substantial amount of the administrator's time and require some form of compensation.
- (5) Standards for membership and retention. Subject to written policies and procedures of the board of directors that establish applicable standards, the administrator shall have the authority to select, deploy, retain and discipline the consortium's attorneys. These standards should include a process for assigning cases based on the level of seriousness and complexity.

Membership in the consortium should be limited to individual attorneys, as opposed to law firms, thereby allowing the administrator

to directly manage and monitor the performance of the attorneys and the assignment of cases in the consortium.<sup>8</sup> Law firm membership in a consortium may also reduce its advantages to PDSC in terms of flexibility by creating pressures to maintain particular caseload allocations to support law firm attorneys who may have been hired to handle those caseloads.

- (6) Internal training and mentoring programs. The consortium should provide training programs or provide access to training for all of its attorneys, and require all of its members to successfully complete a specified set of training or continuing legal education programs. The consortium should also establish an internal mentoring program for all of its attorneys, which provides ongoing advice and support to resolve personal or performance problems and to handle particular kinds of cases.
- (7) A quality assurance system. In addition to the set of written policies and procedures and the training and mentoring programs described above, the consortium should develop and maintain a quality assurance system. Overseen by the administrator, this system should include periodic performance evaluations of consortium attorneys and a process for resolving problems with attorneys' professional performance and personal behavior, including the range of appropriate remedial strategies and steps in a process of progressive discipline potentially leading to removal from the consortium.
- (8) Methods to ensure the admission and support of new lawyers. The "graying" of the defense bar and the resulting barriers to entry for new lawyers is a particular problem in Lane County.<sup>9</sup> The consortium must develop methods to ensure the admission of entry-level lawyers on an ongoing basis. Those methods might include mandatory turnover or rotation of the consortium's members on a periodic basis, an apprenticeship or probationary period for new lawyers, specialized training and mentoring programs and coaching in individual cases.

With the assistance of OPDS, the consortium administrator should confer with Public Defense Services of Lane County, Inc. (PDS) and the University of Oregon Law School to coordinate this component of its operations with the Law School's Criminal Defense Clinic.

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<sup>8</sup> Individuals who happen to be members of law firms should not be excluded from participation in the consortium, as long as they agree to be solely responsible for handling the consortium's cases.

<sup>9</sup> See Appendix C, point number 4, for an apparently differing perspective on this problem.

## A Model Court-Appointment List for Lane County

Background: OPDS's Region 4 Report described the court-appointment lists used in Oregon. The Memo on Lane County, although focused primarily on the advantages and disadvantages of a consortium, expressly or by implication addressed some of the pros and cons of the county's existing court-appointment process.

- OPDS's Region 4 Report described the main features of court-appointment lists in Oregon:

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. However, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, closely monitored and administered qualification process for court appointments, which is capable of verifying the attorneys' satisfaction of requirements for relevant training and experience.

- OPDS's Memo on Lane County expressed or implied some of the pros and cons of the county's current court-appointment list with regard to important aspects of the process:

### *Selection of attorneys for court appointments:*

Pros: An appointment list offers the court and OPDS the maximum flexibility to select for court appointments those Lane County attorneys who have established their minimum qualifications by submitting a "Certificate of Attorney Qualification" under the Commission's current "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense" (the "Qualification Standards").

Cons: Concerns were expressed to the Commission regarding the qualifications of a few attorneys who receive court appointments and the competence and effectiveness of a few others. Without a process to select, monitor and remove attorneys on Lane County's court-appointment list, issues of quality are likely to continue.

### *Specialization*

Pros: An appointment list offers greater opportunities for new attorneys to enter the practice of criminal law and determine whether that specialty is right for them.

Cons: The current court-appointment list includes attorneys for whom criminal defense varies from their entire practice to a small portion of their practice.

*Mentoring and training:*

Pros: Due to the collegiality of the local bar and the acknowledged expertise of the PDS, many attorneys feel that there is assistance available. If the court-appointment system were retained, the Commission could add a mentoring component for inclusion on the list; new attorneys seeking to be added to the court-appointed list could be assigned a mentor.

Cons: Presently, there is no structured mentoring or training of attorneys on the court-appointment list.

*Administration:*

Pros: Since administration is minimal and uncompensated, the expense of administering the court-appointment list is relatively small.

Cons: If there is a problem with a court-appointed attorney's behavior or performance, OPDS and the court have no one to contact to resolve the problem and are not themselves in a position to resolve it directly in a timely manner.

*Case assignment:*

Pros: With the current system, cases are assigned by rotation from lists for each case category (major felonies, minor felonies, misdemeanors, etc.). Thus, the seriousness of cases is matched to some degree with the experience levels of court-appointed attorneys.

Cons: With the exception of the foregoing broad categories of cases, the current court appointment process does not match the skills of individual lawyers on the court-appointment list with the difficulty of cases. A small percentage of cases are appointed from the bench without adhering to the rotation either when an attorney has not appeared or when a substitution is necessary.

*Accountability:*

Pros: The hourly-based compensation system underlying Lane County's court-appointment list can ensure that attorneys will spend the time it should actually take to handle any case, rather than "triage" cases as attorneys who are paid on a per case, unit basis may be tempted to do. If hourly billings are subject to meaningful review, that will ensure that attorneys are held accountable for waste and inefficiencies.

Cons: The judges who spoke with the Commission expressed concern over the inconsistency of attorney billings, the potential for padding bills, and the inability of OPDS to be able to determine if the number of hours billed is appropriate.

*Financial implications:*

Pros: Although some attorneys may be billing for too many hours, the aggregate data for Lane County indicates that OPDS is paying less per case than typical case rates provided under consortium contracts.

Cons: Perhaps that is why we now have concerns about quality.

**The Proposed Model Court-Appointment List.** Everyone in Lane County with whom OPDS spoke and who appeared before the Commission in Eugene agreed that the current court-appointment list must be restructured to establish (a) an objective and rational selection process for attorneys, (b) meaningful professional standards for selection, beyond admission to the Bar and self-certification under the Qualification Standards, (c) a rigorous quality assurance process, (d) provision for the participation of new lawyers and (e) formal training requirements and mentoring programs for all participating lawyers. Based upon this input and the discussions and deliberations of the Commission thus far,<sup>10</sup> OPDS concludes that, if the Commission decided to continue with a court-appointment list in Lane County, it would favor the establishment of a highly structured court-appointment list and process in the county, in contrast to its current system. Therefore, OPDS proposes a model court-appointment list for Lane County with the following elements:

- (1) Formal standards for the selection and retention of participating attorneys. These standards would be designed to provide assurance that attorneys on the court-appointment list possessed the necessary professional skills, training and experience to handle the types of cases subject to appointment, and would require the demonstration of proficiencies above and beyond the minimum Qualification Standards. These standards should be developed by OPDS, in collaboration with PDS and interested members of Lane County's criminal defense bar, and approved by the Commission. The final selection of attorneys for participation on the court-appointment list should be subject to the approval of OPDS.
- (2) A three-member supervisory group to administer the court-appointment process. Two members of this group would be members of the Lane County bar, subject to the approval of the Commission. One of those panel members would have prior experience as a public defense attorney, but would not currently be engaged in public

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<sup>10</sup> For additional input from a member of OPDS's Contractors Advisory Group regarding a model court-appointment list, see Appendix C.

defense practice. That member could be nominated by the Lane County Bar Association. The other member would be the Lane County Public Defender or his or her designee at PDS. For the first year of operation, the third member of the supervisory group would be OPDS's Executive Director or his designee.

The supervisory group would be responsible for (a) the administration of the Commission's standards for the selection and retention of participating attorneys on the court-appointment list, including the selection and removal of attorneys, (b) the establishment and oversight of training requirements and a mentoring program for participating attorneys (c) the development, in collaboration with OPDS, and the administration of a formal quality assurance process, including methods to periodically evaluate and resolve complaints about the performance or behavior of participating attorneys, (d) the establishment of methods to ensure the ongoing participation of new attorneys, and (e) the adoption of formal policies and procedures governing all other significant aspects of the court-appointment process.

- (3) Training requirements and a mentoring program for participating attorneys. The supervisory group should establish or provide access to training programs and require all participating attorneys to successfully complete those programs, as well as any other training or continuing legal education programs that the group determines to be essential to effective public defense practice. The supervisory group should also establish an internal mentoring program for all participating attorneys, which provides ongoing advice and support to resolve personal or performance problems and to handle particular kinds of cases.
- (4) A formal quality assurance process. In consultation with OPDS and subject to the approval of PDSC, the supervisory group should develop and maintain a quality assurance process. This process should include periodic performance evaluations of participating attorneys and methods to resolve problems with the professional performance and behavior of those attorneys, including the range of appropriate remedial strategies and steps in a process of progressive discipline potentially leading to removal from the court-appointment list.
- (5) Formal methods to ensure the participation and support of new attorneys. The supervisory group must develop methods to ensure the participation of entry-level lawyers on an ongoing basis. These methods might include mandatory turnover or rotation of attorneys on the court-appointment list on a periodic basis, an apprenticeship or

probationary period, specialized training and mentoring programs and coaching in individual cases.

With the assistance of OPDS, the supervisory group should confer with PDS and the University of Oregon Law School to coordinate this component of its operations with the Law School's Criminal Defense Clinic.

- (6) Written policies and procedures. In consultation with OPDS and subject to the approval of PDSC, the panel should develop a set of written policies and procedures governing all other significant aspects of the court-appointment list.

## APPENDIX A

Jim Hennings favors an approach to forming a consortium that emphasizes its status as an independent contractor and, therefore, defers to the judgments of the consortium's administrator and board of directors regarding most of the details of the model consortium set forth in the accompanying memo. Jim proposes that the Commission direct prospective consortia in Lane County to achieve the following goals and leave the details of implementation to the management of the consortium with which PDSC ultimately contracts:

### GOALS:

1. Local independent oversight for rigorous quality control and development of local processes
2. A local non-judicial administrator with authority to hire, assign, coach and discipline attorneys
3. A local non-judicial administrator to assign cases to attorneys
4. No expectation of specific caseload assignment
5. Availability of attorneys to take additional or fewer cases depending upon system needs
6. A single entity for the OPDS to contract with
7. A process to attract new lawyers into the delivery of indigent defense services
8. Formal training requirements and mentoring programs for all participating lawyers
9. Effective participation in the local Criminal Justice System

In contrast to Jim's approach, I recommend more active involvement by the Commission and OPDS in the design of a consortium's structure, organization and performance standards, while deferring to the professional judgment of the consortium's management with regard to the ongoing administration and operation of the consortium. Therefore, I would not recommend "[l]ocal independent oversight for quality control and development of local processes," unless Goal #1 above contemplates a role for PDSC and OPDS in the development of quality control standards and in the initial design of the consortium's structure and organization. Furthermore, in light of the apparent lack of enthusiasm for a consortium and the apparent lack of interest in developing quality controls under the existing court-appointment process in Lane County, I believe that more direction from the Commission and OPDS regarding

the organization and applicable standards for a consortium will be critical to its success in Lane County.

With regard to Goal #9 above, a consortium's role in the local criminal justice system probably depends on the existence of a full-time public defender's office. In Lane County, the consortium's role would presumably be less active in light of the role that Lane County Public Defenders, Inc. performs in the county's criminal justice system.

## APPENDIX B

The following comments by Steve Gorham regarding the accompanying memorandum and its excerpts from other documents previously submitted to the Commission reflect a different perspective on consortia based on his experience as the administrator of the Marion County Association of Defenders, Ltd. (MCAD). MCAD is a relatively large consortium that pays its attorneys on an hourly basis under an internal set of standards and controls designed by Steve and a colleague.<sup>1</sup> Yamhill County Defenders, Inc. (YCD) modeled its organization, operations, standards and controls after MCAD.

Steve's comments include the following points:

1. PDSC can influence a consortium's membership. Steve disagrees with OPDS's observation that PDSC can have little influence over the membership in a consortium:

[This is not] the historical experience of MCAD and I believe YCD. While the Court and OPDS do not have the same amount of control, both can and do exert substantial influence on the membership of a consortium. As stated when MCAD started, Indigent Defense through its contract procedures in negotiation with MCAD and the Court allowed certain members to be admitted and others to be excluded. If these negotiations are conducted based on quality as well as other set criteria the appropriate qualified members of the interested bar will be admitted and those that are not, either will not be admitted or will be admitted on probation with mentoring to help insure the quality of the members of the organization. It might take a bit more effort to make these determinations but it will be clear that one becomes a member or is excluded from membership on merit rather than personality or prejudice. MCAD primarily accomplished this by the Court dividing the current appointment list into three categories. Those that everyone would object to, those that no one would object to, and those whose quality was not assured. The first group, a very minor number were excluded from membership. The second group was included, and the third group was provisionally allowed membership as long as they completed a mentoring program. Indigent defense included these provisions in the initial contract. At the time, 1993, there were very few formal mentoring programs in existence in Oregon, and I, with the help of others, wrote the one that became MCAD's mentoring program.

The contract between OPDS and the consortium can include either similar or different criteria, qualifications and methods of obtaining membership to ensure that the membership quality remains one of the top goals of the organization. The administrator of the consortium can and should work with the Court to make sure that professionalism and quality issues are paramount. This is a dynamic

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<sup>1</sup> OCDLA's 2003/2004 Membership Directory lists 54 attorneys in MCAD.

relationship. At times Courts do things for non professional reasons and those are the times that the consortium should protect its membership from arbitrary Court action. OPDS should make sure that the consortium does this at the right times and for the right reasons.

2. The cost of administering a consortium is not a con. Steve does not believe that the cost of administering a consortium is a con, as OPDS's previous memorandum to the Commission observes:

[I]t is a cost that someone must bear. Loose administration or no administration and direction may also be one reason that quality is an issue.

[This is really a question of] who pays for the administration and where is it housed. If there is only a court appointed list then the administration is paid for by the judicial system through their employees. Either the judicial employees' other work does not get done while they are administering the court appointed system or additional employees must be hired. If the administration is done under either system (list or consortium) by the OPDS then the same issues occur.

3. OPDS has experience with two hourly-based consortium contracts in which the costs per cases are controlled. Steve notes that MCAD and YCD control costs "through the use of a review system where every bill [with] a standard deviation over the average cost of that type of case (e.g., DUII, PCS II, Assault I, etc.) is reviewed by the administrator under the standard of whether the individual work performed is reasonable and necessary" as follows:

[Based upon] our experience in MCAD and in all likelihood YCD[, e]very case is different and all attorneys are individuals. Costs can be controlled and quality can be maintained while allowing diversity of representation. What one feels is a waste of time in one case, makes the case in another. Different approaches can and do in the end result in our goal; the highest quality effective and adequate representation of a client in the client's best interest. MCAD controls costs by using what is now common computer time billing technology. Data is collected on each type of criminal case based on OPDS's case codes. MCAD pays based on the average per case cost per category after a review of each billing for consistency. (After a few hours of processing the billing of an attorney, a clerk can easily determine the style of billing of every attorney in the consortium. Aberrations to this consistency are questioned. If the billing is consistent and within the average, the bill is paid. If the bill is more than a standard deviation over the average, the attorney is asked to explain why this billing is reasonable and necessary and the administrator decides whether or not the fee is reasonable and necessary. I submit that the history of MCAD proves that this method can control costs. I submit that the cost of this program is equal to or less than the current case counting (unit based) method of payment, even when administrative costs are added. MCAD's administrative costs are under 10

percent of the total case costs and averages between \$15 and \$30 per case. (The word case is really a misnomer in this context. While there are some exceptions, primarily MCAD's case is really an MCAD bill. Primarily an MCAD bill is a defendant cycle and can and most often does include multiple charges and to a lesser extent multiple incident dates so in MCAD one case equals one bill which in unit price terms might be multiple unit payments for one defendant.

The financial incentive in this system is to do the work that is in the client's best interest whether or not that is by negotiated plea, by trial, or by dismissal. MCAD has reviewed its trial rates against other counties and they appear to be consistent, thus the common complaint that an attorney being paid per hour will abuse the system by putting in useless work to pad their bills is not historically accurate, at least under a system like MCAD's.

4. The problem is not "the graying" of the defense bar, but the need for more new attorneys to provide public defense services. Steve disagrees that the issue is "ensuring against the graying of the defense bar" as follows:

The problem in fact is not with the graying of the defense bar because certainly we want experienced criminal defense attorneys in the system but the problem is with insuring that there is some new blood and ideas entering the system. There surely are methods short of kicking qualified and good attorneys out of the system to make sure that this goal is met.

## **APPENDIX C**

Jim Hennings also proposes a set of goals for the Commission to adopt with regard to a model court-appointment list. Once again, these goals would guide the management of the court-appointment list, as well as the development of programs and processes in furtherance of the goals.

### **GOALS:**

1. Creation of a supervisory group to oversee a court-appointment panel
2. An objective and rational selection process for attorneys
3. Meaningful professional standards for selection, beyond admission to the Bar and self-certification under the Qualification Standards
4. A rigorous quality assurance process
5. A process to attract new lawyers into the delivery of indigent defense services
6. Formal training requirements and mentoring programs for all participating lawyers
7. Effective participation in the local Criminal justice System