

Members

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



Ex-Officio Member

Chief Justice Thomas Balmer

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

Thursday, April 17, 2014
9:00 a.m. – 11:00 a.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEETING AGENDA

- | | |
|---|---|
| 1. Action Item: Approval of minutes - PDSC meeting held on March 5, 2014 (<i>Attachment 1</i>) | Chair Ellis |
| 2. US Supreme Court Update: Nonroutine expenses and ineffective assistance of counsel (<i>Attachment 2</i>) | Paul Levy |
| 3. Regional Stabilization Policy Option Package; Draft (<i>Attachment 3</i>) | Nancy Cozine
OPDS Staff
Contractors
Commission |
| 4. OPDS Monthly Report | OPDS Staff |

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

Next meeting: May 15, 2014, at 10:00 a.m. - 2:00 p.m., at the Office of Public Defense Services in Salem. Meeting dates, times, and locations are subject to change; future meetings dates are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, March 20, 2014

9:00 a.m. – 11:00 a.m.

Oregon Gardens

879 W. Main St.

Silverton, OR 97381

MEMBERS PRESENT:

Barnes Ellis
Shaun McCrea
Chip Lazenby
John Potter
Per Ramfjord
Janet Stevens
Hon. Elizabeth Welch
Chief Justice Balmer

STAFF PRESENT:

Nancy Cozine
Peter Gartlan
Paul Levy
Angelique Bowers
Cynthia Gregory
Caroline Meyer
Cecily Warren

The meeting was called to order at 9:00 a.m.

Agenda Item No. 1

Approval of minutes – PDSC meeting held on January 16, 2014

Commissioner Stevens requested one change to the minutes.

MOTION: Vice-Chair McCrea moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 2

Update: Regional Meetings with Contract Providers

Caroline Meyer reminded Commission members that when they met in January, OPDS had completed three of the six regional meetings; she noted that two additional meetings had been planned since then: a seventh meeting with trial and appellate post-conviction relief and habeas corpus contractor providers, and an eighth with death penalty providers. Ms. Meyer

noted that the attachment included a brief summary of priorities that were collected at each meeting, indicating that in many jurisdictions providers mentioned travel costs and the responsibilities of contract administration as costs that requiring additional funding. She also noted that in the Tri-County area, contractors were interested in payment for a specified caseload rather than a per case rate to help minimize the impact of caseload fluctuations. Chair Ellis asked how this would work. Ms. Meyer explained that it would be similar to the way some courtrooms, like drug courts, are funded – a line item for providing services for a certain number of cases. Chair Ellis asked whether this kind of model would be more of a constant, based on personnel, causing the PDSC to bear more of the burden of risk with caseload fluctuation. Ms. Meyer confirmed his understanding. Chair Ellis offered his thought that for public defender offices, where staff are dedicated defenders and it is 100% of their time, this might make some sense, but noted a distinction, at least under the old model, where consortia and private firms fluctuate how much of their practice is public defense. He asked whether such a shift would be made to reflect the fact that consortia, and at least some of the private firms, have become more 100% FTE parallel to the public defenders group. Ms. Meyer confirmed that this is what many consortium groups are saying, and that while there are certainly still some consortia with 75 or 60 percent public defense work, and some consortia actually have a requirement that their members generate a certain portion of private work, many consortia are telling us that they do 90% or more public defense work and that it is very difficult to fit retained work into that mix. Chair Ellis commented upon the risk of such a model, and Ms. Meyer agreed that if this type of model were ever adopted, OPDS would have to spend more time evaluating attorney workload.

Chair Ellis asked whether regional meetings are well attended. Ms. Meyer indicated that every contractor has been represented, and that the meetings have yielded very good information.

Agenda Item No. 3

Update: 2014 Legislative Session PDSC Budget & Key Performance Measures

Nancy Cozine brought the Commission's attention to the KPM report submitted to the legislature during the February session. She noted that the legislature approved a modification to the appellate KPM, reducing the median date to filing the opening brief from a 210 day target to a 180 day target. Chair Ellis asked whether the target measure included *Balfour* filings. Mr. Gartlan explained that at this point the difference between the two is minimal. The median date in 2013, with *Balfour* briefs included, was 224 days; without the *Balfour* briefs it was 220. Mr. Gartlan reviewed the slightly longer process in cases with *Balfour* briefs, but noted that the delay is not significant enough to warrant an entirely separate KPM target. He indicated that this is something OPDS will continue to track internally.

Chair Ellis asked about appellate lawyers' communication with clients and trial lawyers. Mr. Gartlan summarized the typical exchange of letters and information with clients at the start of a case, and with the trial attorney during the case, which includes sending the brief to the trial lawyer after it is filed. Chair Ellis suggested sending the trial lawyer the brief before it is filed. Mr. Gartlan noted that it would make it more difficult to reach the 180 day median filing date target, and that most of the time appellate lawyers don't get feedback after sending the brief, but that they would explore options. Vice-Chair McCrea pointed out that often times the trial attorney doesn't have time to review the brief, but that it might make sense to offer as an option in some cases.

Ms. Cozine concluded the KPM discussion by noting that the Legislature granted the agency's request to provide more time for the selection of a trial level KPM, which will need to be included in the 2015-17 agency budget request. Chair Ellis noted the difficulty of identifying something other than an input measure; a meaningful measure of outputs. Ms. Cozine expressed hope that she would learn more about validated measures at the NLADA's Research and Data Advisory Group on May 19th.

Ms. Cozine summarized the end of session budget bills and expressed significant gratitude to the Legislature for their decision to restore funds to the PDSC. She went on to summarize a few other bills of interest that were passed during the February session. She also noted her appreciation for the Oregon Judicial Department's recent decision to include certain, high volume, public defense providers as entities with document access at the same time as other Designated Governmental Users (DGUs).

Agenda Item No. 4 Statewide Survey

Paul Levy directed the Commission's attention to results of the 2013 annual statewide, noting that more judges offered comments than in previous years. He noted that the value of the survey comes from the comments received, which are reviewed by a group including the analysts, Ms. Cozine, and Mr. Levy, and that the group creates an appropriate follow-up plan for comments that are offered either anonymously or with a name attached.

Chair Ellis expressed concern about the responses on question 8, where almost half the respondents indicate that they do question the competence of a public defense attorney in their jurisdiction. Mr. Levy explained that historically, over half of the respondents have said "yes" on that question, and now it is under half. Ms. Cozine also noted that survey comments revealed a dramatic improvement of representation in Clatsop County, which she attributed to the efforts of the peer review team and Commission review, and the process of following one with the other. She also noted that comments suggested that caseloads are too high. Commissioner Ramfjord suggested that, given the fruitful nature of the comments, perhaps the numerical questions could be reduced, and additional comments could be elicited; perhaps about the strengths and weaknesses of the existing system, or the most significant ways in which the system could be improved. Commissioner Lazenby further suggested that in larger counties, with multiple providers, perhaps there could be a supplemental portion of the survey.

Agenda Item No. 5 Commission approval of changes to OPDS Payment Policy and Procedure

Angelique Bowers summarized a change to the OPDS payment policies and procedures that allows providers to submit electronic receipts rather than paper receipts, and requested the Commission's approval.

MOTION: Commissioner Ramfjord moved to approve the policy change; Vice-Chair McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 6 Executive Director's Annual Report to the PDSC

Ms. Cozine outlined portions of an annual report and invited Commission feedback and requests for modification. Commission members expressed appreciation for the report, and asked that it be circulated to members of the Legislature.

Agenda Item No. 7 OPDS Monthly Report

Commissioner Potter requested a change of the 2014 September meeting date from September 19th to September 18th. All agreed to a tentative date, and Ms. Cozine indicated that she would circulate the date in an email to get final confirmation.

Ms. Cozine provided background regarding the dependency pilot program being launched by OPDS. Commission members asked questions about selection criteria and process. Ms. Cozine responded by indicating that the analysis was still underway, and outlined the various factors that vary widely from county to county. She also talked about the necessity of hiring OPDS Deputy General Counsel, who will administer the pilot program and focus on improving the quality of juvenile representation around the state. She explained that the

person in this position would also relieve some of Mr. Levy's workload, including the review of non-routine expense requests and complaints related to juvenile cases. Commissioner Ramfjord requested information about results achieved through the Washington Parent Representation Program. Ms. Cozine explained that Washington's program started in a few counties, is now up to 25 counties, and that it has reduced the number of child welfare cases in Washington state. Commissioner Welch asked about application of the funds to only child representation; Ms. Cozine expressed concern that the results would not be as good because the parent attorneys would still be burdened with large caseloads, continuing unnecessary delays in the scheduling of court hearings and other critical proceedings. Commission members asked additional questions about pilot counties and expressed an interest in hearing from counties who might be interested in participating.

Cecily Warren, OPDS Research and IT Director, summarized her work in getting the office upgraded to Windows 7, with all employees on the same software versions. She also talked about the initial findings in her analysis of current office systems and potential replacements, including a case management system.

Peter Gartlan provided an update regarding the appellate division, where they just completed another round of evaluations. He also noted that the division would be looking at a pilot program for getting trial attorney feedback before filing the appellate brief.

Agenda Item No. 8

Executive Session

Chair Ellis provided the following information about Executive Session:

The Public Defense Services Commission will now meet in executive session for the purpose of evaluating the executive director. The executive session is held pursuant to ORS 192.660(2)(i), the section relating to personnel evaluation. Representatives of the news media and designated staff shall be allowed to attend the executive session. All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on any of the deliberations during the executive session, except to state the general subject of the session as previously announced. No decision may be made in executive session. At the end of the executive session, we will return to open session and welcome the audience back into the room.

Chair Ellis reconvened the public meeting.

MOTION: Vice-Chair McCrea moved that the Commission provide the executive director with a merit salary increase effective March 1, 2014. Commissioner Ramfjord seconded the motion. **VOTE 7-0.**

MOTION: Commissioner Stevens moved to adjourn the meeting; Vice-Chair McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 7-0**

Meeting adjourned

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, March 20, 2014

9:00 a.m. – 11:00 a.m.

Oregon Gardens

879 W. Main St.

Silverton, OR 97381

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

STAFF PRESENT: Nancy Cozine
Peter Gartlan
Paul Levy
Angelique Bowers
Cynthia Gregory
Caroline Meyer
Cecily Warren

The meeting was called to order at 9:00 a.m.

Agenda Item No. 1 Approval of minutes – PDSC meeting held on January 16, 2014

0:59 Chair Ellis Shall we call the meeting to order. Thank you all for coming. Welcome to this lovely location, which John Potter pointed out we get to spend indoors in a room that doesn't even overlook the gardens. We can all absorb it by osmosis. The first item is the minutes of January 16.

1:27 J. Stevens Bob Frazier's name is spelled wrong. His last name in the 50 year agenda item. It is spelled F-r-a-z-i-e-r. He is the editor that was the editor of the Eugene Registered Guard.

1:48 Chair Ellis Okay. Duly noted. Any other additions or corrections to the minutes? Is there a motion to approve?

MOTION: Shaun McCrea moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**

Agenda Item No. 2

Update: Regional Meetings with Contract Providers

2:06 Chair Ellis

Item No. 2 is Caroline on the regional meetings for contract providers.

2:14 C. Meyer

Yes. Good morning Chair Ellis, members of the Commission. For the record Caroline Meyer, contract manager for OPDS. When we met in January, I told you that we had completed three of our six meetings, which was true. Our contract team, as well as Paul and Nancy and Commissioner Potter, have gone with us to all of the meetings. We actually added in a seventh meeting to include the trial level and appellate PCR and habeas corpus contractors. Then tomorrow we will be meeting with death penalty providers up in Portland. That will complete the eight meetings. So we have been busy. We have had four or more since the January meeting. Those are listed as Attachment 2. We have a summary. We provided the same summary at the January meeting but, of course, we have added a few since then. So starting at Southern Oregon these are the new ones. Southern Oregon, Tri-County, Willamette Valley, and then the Statewide meeting that I just mentioned. Again, we are continuing to see more of the same issues in terms of administration, and travel costs. In the Tri-County, in particular, a great deal of time was spent about the possibility of moving away from a case count model for contracting, to more of a workload or FTE model, which would help with the caseload fluctuations.

3:44 Chair Ellis

Help me understand. I understand the case count method, but how does the FTE method work?

3:56 C. Meyer

The things that were discussed is right now it is almost entirely based on cases – caseloads. So if the caseload fluctuates so does their pay. Some contractors have line items. If you are staffing specialty courts then we have some line items built into contractor, but many of our contracts do not have any line items. Their entire contract value comes from their caseload. So they would envision something more along of a little bit more built into line items. Some of it is still based on caseload. I don't think anyone is envisioning taking caseload entirely out of the picture. If you built more into line items those don't change with fluctuation in caseload.

4:43 Chair Ellis

So it would be more of a constant based on personnel. So we would end up with the risk of case fluctuation?

5:02 C. Meyer

Yes. Nancy can certainly speak to this as well. I think it would have to be the message to the legislature is our funding can't be based solely on caseload. We get the funds that we need and they are stable whether the caseload fluctuates or not.

5:22 Chair Ellis

So I can see a difference between a PD where their staff are dedicated defenders and it is 100% of their time. The old model used to be that the consortia and the private firm could, themselves, fluctuate how much of their practice is defense and how much is other. Is what you are saying is that the consortia, and at least some of the private firms we deal with, have become more 100% FTE parallel to the public defenders group?

6:04 C. Meyer

That is certainly what we are hearing. I think we are likely going to spend a great deal more time this afternoon talking about this whole model. If what we currently has continues to be the best model. But, yes, that is what they are telling us. I think 10 years ago it wasn't the same. There was more ability by the private firms and the consortia to generate private work. That worked well with the public defense caseload. What we continue to hear is more and more – I mean we certainly still have consortia that will say, "We do 75% or 60%." Some consortia have a requirement for their members that they generate a certain portion of private work. That seems to be the standard. A lot of consortia are telling us that they do 90% or

more public defense work. It is very difficult to figure out how to fit retained work into that mix.

- 7:05 Chair Ellis But then I can see the challenge is if you begin to get a chronic underutilization they don't want to reduce their numbers. That kind of puts the onus on us to do that. I can see tension.
- 7:28 C. Meyer Yes. The entire system would have to change considerably. It would put a lot more responsibility on our office to audit and to make sure they have the correct number of attorneys if we are basing it off of a workload as opposed to caseload. I think we would have to spend a lot more time really focusing on whether we have the appropriate number of providers in that county. But I think particularly in the Tri-County area, Multnomah in particular, because of the huge caseload fluctuation mostly a decline in the caseload in Multnomah County for the past several years. I think that is one of the reasons this issue is so relevant to that group. They continue to be plagued with reduced caseloads which means reduced funding. We have three large public defender offices there that have overhead that does not change regardless of the caseload. This is something that we continually hear from those providers. It is definitely a conversation we will be having with all of you.
- 8:38 Chair Ellis What kind of turn out are you getting?
- 8:40 C. Meyer For the
- 8:40 Chair Ellis For the meetings.
- 8:42 C. Meyer Really good turnout. I think every contractor has been represented. If not the contract administrator themselves, then they are sending someone from their staff to be present. I think our largest meeting was maybe 25 individuals. Tomorrows meeting with death penalty providers will be the largest in terms of individual providers. It is being held in conjunction with their death penalty. We expect a good attendance.
- 9:11 Chair Ellis Any notably absences? People you really want to be communicating with and they don't show?
- 9:22 C. Meyer I don't believe so. We have been very pleased with the attendance. We have been very pleased with the collaborative efforts amongst everyone at the meeting. Commission Potter, I don't know if you have anything else that you want to share. He has been at all of our meetings. That has been very helpful.
- 9:37 J. Potter I certainly haven't noticed anybody not in attendance that you would be expect to be in attendance.
- 9:42 Chair Ellis That is what I am asking.
- 9:48 C. Meyer So, yeah, we have been very pleased. We are certainly using this information. We have been having meetings and we will be sharing more with you about that this afternoon in terms of developing a regional stabilization policy option package. This information has been very, very helpful and will continue to be helpful to us.
- 10:07 Chair Ellis Okay. Any other questions for Caroline? That sounds like a really good program. You always worry that there will be kind of this wall and they lob their proposals over and you lob your answers back. I much prefer this lots of contact, lots of communications. I think that is very healthy.
- 10:36 C. Meyer We do too.
- Agenda Item No. 3 Update: 2014 Legislative Session PDSC Budget & Key Performance Measures**

10:42 Chair Ellis Alright. Nancy, 2014 Legislative Session, PDSC Budget, KPMS.

10:52 N. Cozine It has been a very busy February, again. You have in your materials the KPM report that we submitted to the legislature. It requested that the legislature authorize a modification of our appellate KPM. A reduction from the 210 target to a 180 day target. The legislature approved that change. We will be implementing that.

11:22 Chair Ellis Let me just ask on that. There had been talk about changing the equation to take out the *Balfour* filings. Is that part of this?

11:41 N. Cozine Pete may want to speak to that. We will measure that internally because we have an interest in it. I can let Pete articulate the rationale behind the decision.

11:56 P. Gartlan We have discussed this before. This is kind of a rolling discussion. You recommended that we track both filings with and without *Balfours*. So we went back and looked. The difference typically stays within five days of each other. With *Balfours* with were at 224 days as end of last year 2013. Without the *Balfour* briefs we are at 220. When I say that you say there is a disconnect. What is the explanation for that? I think the best way to describe it is say I am doing two briefs. I open case one and it is a case that I am going to file a merit brief on it. So I file it. That is the date. Let's say we are at day 200. I filed it at 200. I pick up my next case and I read it and determine it is a *Balfour*. So let's say I am date 201 or 202 because it took me two days to read it and do other things. I write a *Balfour* letter to the client. I tell the client, because this is part of the *Balfour* process, and I explain why there are no meritorious issues in the brief and I have to give the client at least 30 to 35 days to respond if the client wants to file a *pro se* supplemental brief which is called "Part B" in the *Balfour* procedure. So we cannot file until those 30 days expire. So think about two cases in a row. One we file a brief at 200 days. The other one we are not going to file that brief until 235 to 237.

14:02 Chair Ellis You are leaving out what I think would be a big time eater, which is the legal research and writing on the legal issues.

14:08 P. Gartlan Yeah. A couple of days. What I am saying is there is a built in 35-day period before we can file a *Balfour* brief. That is why the *Balfour* number is a little bit higher. When we include the *Balfour* number it brings up the media filing date range by a few cases. There are going to be a couple of other factors in there because we also - if I have determined this is a *Balfour* brief, our practice is to call the client, talk to the client and explain to the client why it is not a meritorious case. We often get dismissals. The client will dismiss. So we may be get a dismissal at day - my hypothetical might be day 203.

14:58 Chair Ellis Meaning the client says, "I agree. Let's forget it."

15:02 P. Gartlan Right. The client may be more interested in going to post conviction relief or federal habeas. That is why there is really not that much disparity between including and excluding the *Balfours*.

15:23 Chair Ellis In the KPM revision that we have now agreed to still includes the *Balfour*.

15:26 P. Gartlan Yes.

15:27 Chair Ellis Which gives you like a 2% cushion.

15:38 P. Gartlan Because we didn't ask the legislature to exclude the *Balfours*.

15:41 N. Cozine It increases the length of time ever so slightly. We will have a harder time meeting our target with *Balfours* included. We will continue to measure internally the difference in whether that

time difference becomes more significant, more significant than just a few days, and then we probably will ask for separate KPMs targeting each one. Right now it wasn't substantial enough to warrant two separate KPM targets for each.

- 16:13 Chair Ellis What client communication happens in a non-*Balfour*?
- 16:15 P. Gartlan We have standard letters that are sent out at regular points in the life of a case. There are several letters in the beginning. We are receiving letters or communications from clients, so those communications go in the file. The attorney makes notes about what the client is interested in. Then when we file a brief if we are not raising issues that the client was interested in, our practice is to write a cover letter that goes with the brief that identifies what the client was interested in and explains why that issue was not in the brief.
- 17:05 Chair Ellis And what communication occurs with the trial lawyer?
- 17:10 P. Gartlan When the case comes in, and it should come in through our website referral, we ask the trial attorney what are the issues? What does the attorney think are the appellate issues? After we have written the brief we send a copy of the brief of the brief to the trial attorney. That comes from the secretary. After that an email.
- 17:38 Chair Ellis So the trial attorney sees the brief before it is filed.
- 17:38 P. Gartlan No. After it is filed. When it is filed. So we file the brief with the Court of Appeals and send a copy to the trial attorney. It tells the attorney here is the brief. If you are interested in discussing please contact the appellate attorney. A couple of days later the appellate attorney will independently contact the trial attorney and say, "My secretary recently emailed the brief. If you want to discuss anything please contact me."
- 18:09 Chair Ellis It seems a little out of sync to me that that is not done before we file.
- 18:20 P. Gartlan To give the trial attorney some sort of editorial input?
- 18:18 Chair Ellis Well. I am thinking not so much editorial, but the one other person on the face of the planet that is going to have interest in that case and knows something about the specific issues is the trial attorney. It does seem to me if it can be done without screwing the whole system up, letting the trial attorney see the draft before it is filed as opposed to the brief after it is filed.
- 18:56 P. Gartlan I can explain our practice a little bit. We have asked for input from the trial attorney at the beginning. The way we view it is that the trial attorney has the case and makes strategic choices at the trial level. The appellate attorney has an independent obligation to review the transcript.
- 19:15 Chair Ellis I agree with that.
- 19:20 P. Gartlan A PCR attorney has no obligation...
- 19:23 Chair Ellis All I am saying is that 10 days or so before the brief is filed, there is one other person who knows something about the case and might feel strongly why didn't you do this. That is the time when rethinking may or may not occur. It is ultimately the appellate lawyer's decision. I am not trying to change that. It just seems to me out of sync not to give the trial lawyer a look at what we plan to file before it is filed.
- 20:09 P. Gartlan We could start doing that. I don't think it would be 10 days before. The reality is that once the brief has gone through the editing process it is ready to file. The attorneys have this administration on top of them telling them to be more efficient and reach a 180 day median filing. We could do that. We can do that. It would be kind of interesting to see what kind of

feedback we would get. Because most of the time we don't get feedback after we send them the brief.

20:47 Chair Ellis

You may not. It just seems to me if you are ever going to do it you have to give them the brief before and not after.

20:56 N. Cozine

One thought is in the initial communication with the trial attorney that could be an option whether or not they want to read. For some trial attorneys it may feel like an additional obligation and something they don't have time for. If they have a keen interest and they really want to review that brief before, then they could communicate with us about that desire so that we are not doing it as standard practice but upon request.

21:21 Chair Ellis

As a first step I think that makes a lot of sense. Then you tell us later if it helps or is one more irritating...

21:36 P. Gartlan

Yeah. We can do that. I think I find for most trial attorneys, I don't know about all of them and Shaun might have a better idea, but by the time we file a brief it is six or seven months, at least, down the road. They have moved on.

21:57 S. McCrea

Some cases you just don't move on. Mr. Chair, if I may. One of the things that I think is really helpful is your referral form. As a trial attorney that hasn't won every case and has had to refer a number of cases to AD.

22:09 Chair Ellis

There is such a thing as injustice.

22:10 S. McCrea

I know. I think the form is really helpful. It makes a trial attorney sit down and really analyze the things in the case close in time to when there has been an adverse verdict, which helps to memorialize it. I will also say that as a trial lawyer who has referred cases, there have been a number of times when the appellate attorney has contacted with some questions or to discuss particular aspects of the case, which I very much appreciated. One of the problems is that when I get the brief, it may not be so much that I have moved on, it is that I am just overwhelmed with all my other obligations and so it sits on my desk and I got to read that. But if I had that option to elect to have some input before the brief goes in and know that there is a discrete amount of time to do that, I would probably make more of an effort. Because when you know it has already been filed it is like do I want to read this and then bitch at them. I don't really want to do that.

23:14 P. Gartlan

I like Nancy's idea.

23:15 Chair Ellis

Okay. We were on KPMs. We just did appellate. Do you want talk about the others?

23:20 N. Cozine

Yes. So the other part of our request is asking the legislature to grant approval and give us a little bit more time to develop the trial level KPM. They gave us that time. We will be continuing to develop something for a trial level KPM that we will include in our 2015-17 budget request. So more on that to come at future meetings. I am sure we will weave some of that into our retreat conversation this afternoon.

23:49 Chair Ellis

Okay. I think the pressure to augment our KPMs was coming from the legislature. Did you feel our identification of these, but we need more time to develop a database to be effective on these was selling, or were they doing it as a stall?

24:08 N. Cozine

I think they understand that we have a legitimate interest in developing something that will be meaningful. So now that we have a research and IT director on staff and are better able to identify ways that we can capture the relevant data, we can offer them some better feedback through a KPM. I think they were very supportive of the idea of waiting and letting it be something that was a little more believable.

24:42 Chair Ellis I think intuitively all of the lists are ones that you need good baseline data to measure any moment. I understand that. I hope and am confident we will stay right on this and make it happen.

25:06 N. Cozine Yes. We need to. It will have to part of our budget package. We hope to have something concrete for this Commission's review, certainly for all of the final approval for the policy option packages, we would need that no later than June. With that, I think, comes which KPMs will help support our policy option package funding requests. What ties along with measuring performance as we also try to increase compensation?

25:41 Chair Ellis These are all input measures. I take it we are still faced with the conundrum that there is no objective way to measure output.

25:52 N. Cozine Not yet. This conversation is happening at the national level. We are all interested, I think, in trying to come up with a set of data points that yields an output result that is meaningful. I don't think anyone is quite there yet. I have another research and data advisory committee with the NLADA scheduled for May 19. I will have an update about what is happening in the three pilot counties that are being run by the NLADA. Those were looking at pretrial release and the impact of early representation on pretrial release and two other case studies that are not coming to my mind at this exact moment, but after the May meeting I should have more information to report on that. There is also at that level to come up with a discrete set of data points that can be used to come up with different output measures.

26:51 Chair Ellis Okay. Any other comments or questions on the Key Performance Measures piece? Do you want to talk to us about budget?

27:04 N. Cozine So as you will probably all recall, at the end of the 2013 session, there was a 2% holdback imposed upon all state agencies including our budget. In the 2014 session, and leading up to it and during, we were advocating for a return of the full 2%. We, in the end, were given a restoration of 2% to our professional services account. This is the account that funds all of our trial level and conflict cases that can't be handled in our office. It was a significant help in terms of being able to continue our contracts as currently drafted. We shouldn't have to push any costs into next biennium absence unexpected case fluctuations in the positive direction. We received about 1 1/2% for the office, plus a few additional pieces that will help us with operations throughout the end of the biennium. So we feel very grateful to the legislature for their decision in restoring both the operations costs and the PSA funding for our contract providers.

28:14 J. Potter Mr. Chair?

28:14 Chair Ellis Yes.

28:14 J. Potter There was sort of a silence there.

28:22 Chair Ellis It was a semi-colon.

28:22 J. Potter Nancy and her staff need to be given big kudos for getting that 2% back. That was not a done deal going in by any means. They worked closely with key members of Legislative Ways & Means and Legislative Fiscal Office. I say good job.

28:37 N. Cozine Thank you. We were very, very happy with the result at the end of the session. There were other public safety entities who received the restoration. Department of Corrections, Department of Human Services, which is, of course, more on the juvenile side. The Oregon Judicial Department and Department of Justice all received restorations. Not necessarily of the full 2% in every category, but there was a clearly an effort made to make restorations that

would help our public safety systems function more smoothly. I should have mentioned Oregon State Police too. It is nice the legislature recognizing that it is a critical component in the fabric of our state system. There were a few other legislative bills past that I did want to mention on the juvenile side. Two important discussions that arose. One right as the session was about to begin. The other was very much in the middle of the session. One was a bill sponsored by the Oregon Judicial Department, Senate Bill 1536. This is a bill that is access to juvenile records. It is intended to clarify statutes now that juvenile records will be stored in an electronic fashion instead of a paper based fashion. During discussions on this bill we had created in Senate Bill 633, the initial version, provisions to allow our appellate providers access to juvenile records. This revision actually also includes explicit authorization for our trial level providers to have access to confidential juvenile records for the purposes of conflict checks and client representations. The way that the new system is configured is that most lawyers can have access only to the individual client's case to which they have been appointed to represent them on. That creates problems in public defender settings because there is a lot of coverage necessary because of the high caseloads. Additionally, the client populations tend to be rather mobile and you end up as a public defender with clients that have cases in multiple jurisdictions. In order to be an advocate for your client you really need to know what is happening in those other jurisdictions. The workgroup continued to clarify the access provisions in this bill. The Judicial Department, Department of Human Services, and Department of Justice were all very actively involved in negotiating the language here. We feel that it will give our providers access and it will be a critical piece of how our providers can function in this new electronic world. So one good piece of legislation. It is very complicated and there will be, I am sure, more discussion on this electronic access issue as the system rolls out statewide. I will add on that note that there was a court task force meeting just this last week. Paul and Cecily were both able to attend by phone. They confirmed publically what we have been discussing, which is document access for our providers on the same schedule as for designated governmental users. That is something that we have been advocating for ever since they have started developing the eCourt system. We are very pleased to have our providers now included in that category. The judicial department has been piloting the document access portion of their program and will be rolling it out in the next few weeks; it is my understanding, to designated governmental users. For our groups, any provider who carries 50% or more of public defense case will receive that document access for purposes of representation in public defense cases. It is another good piece of information on that electronic access. One more bill, House Bill 5146. I am sorry; I should have asked if there are any more questions before I move on.

32:48 S. McCrea

We are not shy.

32:48 Hon. Elizabeth
Welch

Was there any dispute about any of this?

32:49 N. Cozine

Yes.

32:55 Hon. Elizabeth
Welch

Why?

32:57 N. Cozine

Juvenile records, as you know, are considered confidential and access to those records is a highly sensitive topic. The Department of Human Services and DOJ were concerned that if our providers had access it would threaten federal funding because the access would be too broad. So we had to have quite a bit of discussion around that topic. Ultimately, because I think we agreed to limit the scope of the purpose for which they are accessing those records, we were able to come to agreement. They felt it was necessary to have that kind of limiting language in order to protect our funding. On the designated governmental user conversations, I think there was some similar concern that if there wasn't something legislatively authorizing our providers to have access, it could be hard to get understanding about why they weren't getting access. So we have those pieces in statute now and it should give everyone they

protection that they need. Any other questions on that? We have one more bill to talk about. It is House Bill 5146. This is a bill that was dropped mid-session and it was requested by the Department of Human Services and the Governor's office. It modified, or it addressed, a problem created in a 1975 statute that has not been amended since. It is ORS 9.320. It is entitled, "Necessity for employment of attorney's effective employment." In this statutory provision it says that any actions to a proceeding may be prosecuted or defended by a party in person in person, or by attorney, except that the state or a corporation appears by the attorney in all cases, unless otherwise specifically provided by law. A few judges indicated that they would not be allowing DHS to appear in their courtrooms anymore without an attorney, because ORS 9.320 specifically requires the state to always have lawyers present. For DHS that presents an enormous funding issue. They presented a draft that would have given them relief from that requirement as long as there weren't any contested issues in the case. We weighed in that it is very difficult to find a dependency case in which there isn't a contested issue. It would really create the same problem from a funding perspective and tend to throw the whole system a bit out of balance if we didn't address it in a more step by step way. Again, a bill that had a lot of discussion, very intense discussion, in the middle of session because it wasn't actually dropped until right at the deadline. So a lot of fast action and trying to come to point of resolution. As it is written now the department has an exception from having to appear with an attorney, but this is another workgroup that will now be trying to address the issue of how the Department of Human Services cannot be in violation of 9.320 without necessarily having the expense of DOJ representation statewide at the drop of a hat. The workgroup that I participate in with Judge Welch will probably be addressing this issue at our next meeting. We will tie into that representation of parents and children. So some very interesting legislative discussions this go round. Any questions on that?

37:21 Chair Ellis Any other questions? Well it sounds like you got through the session successfully.

37:29 N. Cozine And in one piece, relatively.

37:29 Chair Ellis Now you can relax until the next one.

37:36 N. Cozine We'll see.

Agenda Item No. 4 Statewide Survey

37:37 Chair Ellis Next item is Paul on the statewide survey.

37:45 P. Levy If it is okay I will just remain seated here. I am sitting here, by the way, because I can't hear if I sit back there. As noted, this is the seventh time we have surveyed statewide on the performance of public defense providers. The sixth time we used the current tool which I will address its shortcomings in a moment. We had our best response this year from judges. I think that is because we have been rather systematic in following up on comments from earlier surveys, so people know that we look at this and we actually respond to comments that we receive.

38:37 Chair Ellis Are they submitted anomalously?

38:40 P. Levy They can be and most often are. There is an option to put your name on the survey and about 60 or 70 people do that from all of the categories that were surveyed. You actually have the number, but through filtering 62 people provided their names. From filtering we can easily determine what county and what type of person is responding the response. The responses to the questions that ask how satisfied are you with the performance, as you can see it hasn't changed much over the years, although you might see some incremental improvement in some areas. The value of this survey really comes from the comments that we receive. Those comments are mostly solicited in connection with questions that do ask people do you question the competence of any lawyer practicing in this particular area. So they are asking

for remarks that could be critical and we get them. We can see that we are getting some very critical remarks from judges and others, who will tell us overall that they are satisfied with how the system is working but they have these particular concerns and criticisms. Those comments are really helpful. We met as a group, the analysts, Nancy, and I. We have everything on a spreadsheet and we go through county by county the comments. Then we have a follow up plan for contacting or not. We determine judges, presiding judges, juvenile department directors, and providers. The comments are helpful both for identifying very specific issues and concerns sometimes with specific names individuals, but also getting a better idea of whether there are some systematic problems in the jurisdiction. We had one comment from a judge who did provide a name saying the survey is useless. That was a Multnomah County judge and the frustration he had, of course, is that we are asking for comments about public defense services without differentiating between providers. Our very first survey did do that and it was huge and cumbersome and really hard to work with it. That is a problem for counties like Multnomah and Washington. The survey generally has marginal utility when it comes to sort of ranking and rating. We are not really sure why people are telling us what they are. We are very aware, and this is very much in line with what we are talking about and working in the agency and will involve you with in a conversation, I'm sure, this afternoon, needing to find better tools that can more accurately measure performance of our providers. This still is very useful in providing the comments that we receive. We haven't provided you with those comments because they are, in some instances, very specific about named individuals and we felt that wouldn't be fair. That is true with death penalty. I provided you the comments with death penalty last year. To illustrate, for the most part, the responders, including prosecutors, are very - rank the services of death penalty cases quite highly. That continues to be the case. Most of the comments are quite praiseful, but there are some specific comments. Across the board there are some very mean and nasty comments and one would expect that. So that is my report on this.

43:20 C. Lazenby

In those specific instances where you have identified practitioners what do we, you intend to do about that?

43:28 P. Levy

Well it is what we do do. In some instances we will follow up with the person who made the comment. We can usually identify or determine who that is and to get more information if insufficient information has been provided. If we do get more information we will follow up with the contract administrator. I can't recall immediately - well, I think it is fair to say, "problem solved" with respect to some comments here. The person is no longer part of the contract. This was not the specificity of the cause, but the problem had been around awhile.

44:25 C. Lazenby

The comment wasn't in isolation?

44:27 P. Levy

No. Not at all. But we do follow up. It is one of a number of avenues in which we receive information, complaints and concerns.

44:47 Chair Ellis

I was troubled by question 8. That had almost half the respondents saying that they do question the competence of a public defense attorney in their jurisdiction. Now I recognize that if it is Multnomah County there may be 100 providers and only one of them is questioned and you still get a yes out of this. That seemed to me a pretty high number.

45:11 P. Levy

The good news is that is actually, I think, if I have given you the history on this question it has typically been over half of the respondents have said, "yes" to that. Now we are under half. That is great. We are patting ourselves on the back. You will see that we got 60 comments in connection with that question. I think this time one of the comments was it would be surprising if there weren't one lawyer about whom there would be questions. This is, in fact, indicative of the challenge that we have had and continue to have. There are lawyers doing public defense who should not be doing it. I am sure there are some communities where that is not true, but it is simply the case. We know it and it is hard to address it. I think we are doing better but it is a challenge.

46:30 N. Cozine If I may, I thought that it was rather striking in this survey the comments about the dramatic improvement of our representation in Clatsop County as a direct result of the Commission and the peer review. I think that actually the combination of the peer review followed by the Commission visit, there was an impetus for the contracting community to change. It did change and all of the comments from both the court, the prosecutor, and even, perhaps, the juvenile department, I may be miss recollecting that, was that the level of representation had increased in a very positive way. So while we do have indicators that there are still questions about the competency of lawyers, generally speaking from reading the comments, what I took away, and I will continue to go through them because we go through them with a fine tooth comb to determine who is going to respond and in what matter and to whom. What I read from it is that we have many competent attorneys. Caseloads are still too high. It is very difficult even for a competent attorney to do a good job when caseloads are too high.

47:47 P. Levy Last year we had a comment on the death penalty that the Commission should be very pleased with the work you have done to improve representation. We certainly had these comments about Clatsop County. We have also had similar comments about Lincoln County specifically expressing appreciation for our efforts and saying there has been a noticeable improvement. It is nice to get feedback that where we concentrate efforts and work on a problem that occasionally we actually help. Somebody says thank you.

48:24 Chair Ellis Any other questions on the survey?

48:24 P. Ramfjord Given the fact that the comments seem to be the most fruitful aspect of the survey, has there been any thoughts to shortening some of the numerical kind of sections of the survey and maybe expanding the comments to include something along the lines of, "What do you perceive are the strengths of the existing system? What are the weaknesses of the existing system? What are the most significant ways in which the system could be improved? " Something along those lines to try to draw out more information through comments. Has there been any consideration about that?

48:55 P. Levy We haven't talked about that. I have certainly questioned the value of continuing to ask these questions where we don't see any moment. I am not sure what we are being told is really that valid. That is an excellent suggestion. We have tended to want to use the same instrument for a variety of reasons for consistency. It is easy. But I think we need to and are, will be, developing more accurate measures where we can change the format of this. I think it is still useful to do an annual survey, but I think that is an excellent thought.

49:45 P. Ramfjord It seems like many of these questions are - I think continuing many of the core questions is a really good idea. You do want to continue the overall impression of the quality of representation and things like that. It may be with 30 questions you could trim it down a little bit and have some more questions that list it...

50:09 Chair Ellis Can we interrupt this discussion for a constant announcement from our vice chair.

50:19 S. McCrea We are now at the vernal equinox. Spring is here. Persephone has ascended from the underworld.

50:32 Chair Ellis Alright. You can return to mundane matters.

50:36 S. McCrea Thank you, Mr. Chair.

50:36 P. Levy I am pretty much done.

50:42 N. Cozine We will look at the survey.

- 50:50 C. Lazenby I agree. I think there is an opportunity to do more forward looking questions. I get the sense that people are kind of dying to kind of tell you what they want to see happen. Whether we want to hear that or not, but to get a list of useful information would be good. The other thing that I want to ask if you would consider, without more thought, is for those multiple service component areas like the Tri-County area and some of others, maybe doing a supplemental portion of this so that they can comment. I think that that might also inform the other conversation that is going on about consortia versus public defender and compensation and how that works. I think the comments from this consumer segment could be really helpful for us in sorting out those issues too.
- 51:45 P. Levy Thank you. That is helpful too. We think we need to drill down a little bit more in these big counties. The comments that were most consistently concerned and critical about a practice in a jurisdiction concerned Washington County, and that is where we are going next with our peer review. It just confirmed that that is where we need to be. The Commission will follow up on that peer review with a meeting at some point.
- 52:34 Chair Ellis Any other questions on the survey? Thanks.
- Agenda Item No. 5 Commission approval of changes to OPDS Payment Policy and Procedure**
- 52:42 Chair Ellis Angelique. Commission approval of changes to OPDS payment policy and procedures, Attachment 5.
- 52:56 A. Bowers Good morning. We went through our payment policy and there was a section where we were requiring providers to submit paper receipts whenever a receipt was needed to be backup to an invoice. That was an area that I was hoping that we could improve and make easier for everyone. So I got ahold of the Deputy Director of Secretary of State's Audit Division. She clarified that for audit purposes we didn't need to have an actual paper copy, it could be electronic. So we are updated our policy.
- 53:32 Chair Ellis So when you say that is that like a PDF copy or is that just an electronic communication from the vendor?
- 53:43 A. Bowers An actual PDF copy. So either through fax or email.
- 53:49 Chair Ellis Okay.
- 53:49 A. Bowers So what we did is just in our policy was to clarify what an original receipt can be. That can either be electronic or a hard copy. Today that is what I am requesting that you guys approve. The policy change went into effect on February 18.
- 54:05 Chair Ellis Is there a motion to approve:
MOTION: P. Ramfjord moved to approve the policy change; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 7-0.**
- 54:11 C. Lazenby Just a quick question. Is the new language that an original receipt may be electronic, scanned, or submitted by email or fax? It would be helpful if the new stuff was highlighted like a piece of legislation.
- 54:30 Chair Ellis We are moving into the 21st Century.
- 54:34 N. Cozine Yes. The truth is that many entities now issue electronic receipts instead of paper receipts. Angelique did a great job preparing everything for LFO as we headed into this short session. So she gets a lot of thanks in terms of preparing us for session.
- Agenda Item No. 6 Executive Director's Annual Report to the PDSC**

55:04 Chair Ellis Now, Nancy, the Executive Director's Annual Report.

55:04 N. Cozine Yes. The annual report is included in your materials as Attachment 6. It outlines the changes that the agency has improved in the last year. As you know, they are significant in some ways. We have had quite a change in terms of the way we are structured and the way that we are sharing information. You see today that we have many more staff members present because we have divided responsibilities out among more people. The team is working well together. We are still settling into our new structure, but thus far we seem to be in a position where we have at least two people who know the answer to every question. That has been helpful. I think that everyone is really enjoying being able to work together in teams. In some instances it creates a slower process, but I think our results have been fairly good so far as we combine our knowledge. You know the work that you have done. You met nine times this year and we have completed service delivery reviews and made it through two legislative cycles. We changed leadership roles. Those are outlined in the report. Our appellate division continues to do excellent work in much more difficult appellate landscape. I am not going to go into specific details. If you have any questions or desires to see changes or additional information, I can still make edits. This is a draft for your approval.

57:16 Chair Ellis Any comments or questions?

57:23 P. Ramfjord I thought it was an excellent report and very well done. I thought it reflected a positive year. I commend you for the work.

57:37 N. Cozine Thank you.

57:37 Chair Ellis I had exactly that reaction. It had a ring of confidence and a ring of objectivity. It wasn't just a puff piece. It was a good, solid piece of writing. Nicely done.

57:54 N. Cozine Thank you. It was a team effort.

58:02 Chair Ellis Any other questions or comments?

58:02 J. Potter Only a comment. Maybe I just missed it. We were potentially going to talk about the meeting schedule for the Commission and the September 19 meeting, I believe it was, which was conflicting with a conference that OCDLA was doing. Is that to be discussed at some point?

58:20 N. Cozine We do need to discuss that at some point. I intended to send an email out and I didn't do that. I don't know if people have calendars. We do need to change the September 19th meeting date because it conflicts with an OCDLA event. I didn't put that in the annual report.

58:47 J. Potter September 19th is a Friday meeting that we had scheduled. I can't recall how we got to a Friday meeting, but it is on top of a search and seizure seminar that we are doing at the coast on that Friday and Saturday.

59:05 Chair Ellis Can the two of you work out an alternate?

59:05 N. Cozine Yes. I would say the 18th. I am worried that we picked the 19th because it didn't work for folks. I will send out an email.

59:24 Chair Ellis What is the distribution of the annual report?

59:27 N. Cozine This packet.

59:27 Chair Ellis But who gets it?

59:32 N. Cozine All of you get it. I can send it to the legislators. I send it out internally in the office once you have seen it and approved it.

59:42 Chair Ellis I would send it to the legislature.

59:42 N. Cozine I shall. I do have the biennial report which is specifically designed to go to the legislature. What is interesting is that at the close of the biennia much of this had not yet occurred. The majority of this all happened in the last six months of the year.

1:00:07 Chair Ellis I think it does us no harm to send a document of this quality to our legislators.

1:00:11 N. Cozine Thank you. I will send it.

1:00:12 C. Lazenby Barnes, do you think contract administrators should get a copy of that as well?

1:00:16 Chair Ellis Sure.

1:00:16 N. Cozine They do because they get all of these materials. I could send it in a separate email too. I really am preparing to send quite a lengthy email to our contract providers with all of the eCourt information and other things, so I can just include that as well.

Agenda Item No. 7 OPDS Monthly Report

1:00:39 Chair Ellis Okay. Now we are up to the OPDS monthly report.

1:00:48 N. Cozine Thank you. Since I am sitting here I will start with the dependency program. You will recall that in the 13 session we were given \$2.4 million dollars to reduce dependency caseloads. What we had promised to do in our policy option package if we were given funding was we would measure the results of the reduced caseloads. Because we did not get full funding of the policy option package, \$2.4 million spread out statewide makes it very difficult to have a meaningful impact on any one community such that you would be able to provide measurable results. Consequently we decided to try to use those funds as part of a pilot project where we could deliver measureable results. What I have provided to you is a draft charter for that type of pilot. It should be on the table. It is not in your materials. We have been working on this. The four components would be use of a OPDS provided case management system so that providers have a way of tracking the kind of data that we are talking about as being important. I should say that it is based off the Washington pilot program. Caseload, time spent meeting with clients, time spent preparing for cases, and in Washington their pilot program ultimately resulted in a reduction of statewide dependency caseloads. We don't expect that anything like that would be available for four to six years. That is how long it took in Washington State. It also relied on an expansion of their program, but we wanted to explore the possibility of creating a pilot program here in Oregon. Since we had limited funding and an opportunity to use that in a way that really could have a dramatic effect in one or two regions, as opposed to spreading it out statewide where it would have less dramatic effect. I wanted to talk with you a little bit about what we are learning as pull together the data that helps support the decision making process around what counties should be targeted. We are finding that there is a lot of difference, many, many differences from county to county in all regards. Caseloads, attorney compensation, staffing compensation, number of children in foster care, length of time the case is in the court system. It is really remarkable to take our caseloads and look at them in this new way. What is revealing to us is that we have an opportunity here to create something that is very different than our current contracting model. So I wanted the Commission's feedback on an idea that arose as I walked through discussion about DOJ representation for DHS. We have a few jurisdictions where DOJ does provide representation. We have been working closely with DHS, DOJ, and OJD on discussions around this pilot. One concept is to actually pick a county where we fund our lawyers at the same level that DOJ funds their lawyers, and we require that they have a reduced caseloads of no more than 80 cases per

lawyer. In the discussions that I have had with providers so far, it seems very clear that as much as our providers are primarily dependent upon court appointed case work, they don't want to let go of their ability, in consortia, to actually do private work. Some of those cases are cases where it is a dependency client who actually doesn't qualify for court appointed counsel. Our public defense lawyers are the ones who are most qualified to handle those in the county. In some cases they are domestic relations cases that have a link to the dependency case. So it really may be important that our private providers, if they want to take part in the pilot, have that flexibility but that they also be willing then to take a limited amount of retained cases. So some cap level of dependency cases plus some cap level of retained cases. It allows us to shift our pilot program to a caseload model much as they did Washington. We say we are funding for the caseload instead of individual cases. The other components that are important, of course, are training. There is multi-disciplinary training that is done with the courts, DHS, DOJ, CASA, and all of our system partners are willing to engage in those trainings and they are interested in it. It is an expensive approach but it could result in some very meaningful change in a few counties that we could then replicate in coming biennia with new funding. So I am hoping for some Commission thoughts on this approach.

- 1:06:21 P. Ramfjord How would you go about selecting the counties that you want to operate the pilot program in?
- 1:06:24 N. Cozine Well right now what we are doing is pulling together data and looking at which counties have the biggest challenges. One of the things that we have really been focusing on are counties where we don't have lawyers at the initial shelter hearings. So we have 11 jurisdictions still in Oregon where we do not have lawyers at the shelter hearings. That was sort of the first cut for us was where we have that dynamic.
- 1:06:57 P. Levy Most of the select criteria (inaudible).
- 1:07:02 J. Potter So you need one, a high number of children in care. So do you have counties that have a high numbers of children in care?
- 1:07:17 N. Cozine Yes we do. Sometimes it is a high number of children in care with a higher rate of return to parent, but they are in care for almost two years. In other jurisdictions you have a high rate of terminations. Again, some counties have a 46% reunification rate. Other counties have more like a 72% reunification rate. So as we look at the data there isn't any one county that necessarily stands out as a county that has all of the factors. We really have to limit it to a county that has some of the factors.
- 1:07:59 J. Potter But you need a baseline that is large enough for you to make a difference. When we were in Clatsop County, for example, we heard from their juvenile folks and there were some issues there that tensely could be addressed with a pilot project like that. It strikes me that the numbers aren't big enough to warrant choosing that county as one of the counties. Is that right?
- 1:08:24 N. Cozine That is correct. As we have worked through the development of this pilot, the other thing that we have realized in addition to small counties have not a lot of providers and not a lot of caseload, the challenge of getting providers there quickly to do the kind of caseload reduction that needs to happen would be very challenging. Some counties have come out as places where we would really like to be able to do some work are like Linn County where we were and we know that their lawyers aren't at shelter. Douglas County has a very high termination rate. Clackamas County has very high caseloads. They all have high caseloads. That is one where it is a little bit more dramatic. All three of those counties have qualified providers and we think that if we could actually reduce their caseloads. They could actually have an impact and they would have a big enough pool to drawn from that they could get new lawyers in their jurisdictions who are interested in starting to do dependency work.

- 1:09:40 J. Potter So reversely are you not looking at counties that have too big of client base. Does Marion County or Lane County get eliminated or Multnomah County get eliminated?
- 1:09:49 N. Cozine All of the large counties are eliminated due to their limitation on resources. It will take a significant amount of money to add lawyers in jurisdictions. It is amazing. As I look more closely at the costs associated with establishing an office, or even bringing on an associate, they are significant under any model. In order to make the pilot effective, we have to be able to have a reduced caseload for all providers in that jurisdiction. The idea is that if everyone has a reduced caseload the lawyers have time to get to next court appearance. They have time to meet with their clients. They have time to schedule an extended hearing when necessary. If half the providers have a reduced caseload and half of them don't, the system is still going (inaudible).
- 1:10:57 J. Potter So I think you are honing in on a limited number of counties. You told us three. Is there anybody else? Is Deschutes County out of the picture? Is Klamath County out of the picture? Jackson County out of the picture?
- 1:11:09 N. Cozine Not necessarily. We are also looking at distance. Distance makes it much more challenging. Some other counties that come up are Polk; it is close by. Douglas is pretty far away even though it would be a good place to be. We have four separate providers so we would need to get all of them on board. It is hard.
- 1:11:41 J. Potter So now you are down to Linn and Clackamas.
- 1:11:40 Chair Ellis Linn was the one that seemed to meet every criteria that we had.
- 1:11:47 N. Cozine So we are continuing to work on this.
- 1:11:47 J. Potter So what decision do you need from us?
- 1:11:49 N. Cozine Well I want to make sure that you are aware of the direction that we are moving in. The other piece that we decided that we needed, and I talked about this before, but as we looked at how we can make an effect in the juvenile arena more efficiently and effectively, especially if we are going to launch something like a pilot program. After visiting Washington to look at their program, we decided that we really needed a deputy general counsel who would focus on juvenile matters. Not because Paul isn't amazing at getting up to speed on juvenile matters, but because he doesn't have time. The limitation on our internal resources in terms of administration is significant. Having a position available to focus on juvenile representation would help us tremendously. Not just for the pilot program. We have non-routine expense requests that come in on juvenile cases. Having one person who is really specialized in reviewing them especially the complex ones. Complaints that come in on our juvenile providers. It allows Paul to share some of his workload. For us it also creates a dynamic where Paul is starting to share some of his knowledge base with another lawyer so that we, again, create that knowledge sharing and the backup that we need in that arena. So we have posted a position. It was drafted as a limited duration position because we don't have permanent financing for it. We would like to ask the legislature for permanent financing in the 15-17 biennia. I will send the link to that posting. I know I sent it to Judge Welch and I don't know if you have any comments. That is a big update. We have been working through this piece by piece. It is now finally in a format where I think there is enough shape to it that I can share it. I am interested in your feedback and I did want you to know that this underway.
- 1:13:54 P. Ramfjord Can you tell us a little bit more about the trajectory in timelines in the Washington program and how it evolved over time?
- 1:13:58 N. Cozine The Washington program was launched in, I believe, the year 2000. I believe it started in two counties. They are now up to 25 counties. They have just been systematically adding

counties. They fund it as a flat rate for no more than 80 cases. They require the participation of a social worker, which is something else that we want to do. They had in Washington I believe it was 40% - no, it was a 25% reduction in the statewide dependency caseload. They attributed about 45% of that to their parent representation program. In Washington the program only applies to parents because their children are not appointed lawyers. They are given guardians ad litem. So they have a very different system up there. Judge Welch heard information presented by their parent representation program attorney when they gave their presentation to both the dependency workgroup that we are on and the judiciary committees. Our system is very different than Washington. We have to make some adjustments. This Commission has been very clear that our providers need to have an office. They need to have an office with a staff so that people can get in touch with them. That drives up the cost a little bit for us in the consortium groups. You can't have two consortia members sharing staff. It creates conflict problems that we are trying to avoid. The only real difference is in the way that we structure it. They met with the lawyers quarterly. In our situation because we have contract administrators that is who we would meet with quarterly. They would have the obligation of managing their group. We would meeting with them to make sure that everything is going along as outlined in the pilot program.

- 1:15:59 P Ramfjord Was that program then used to generate additional funding for expansion of the program at the legislative level?
- 1:16:05 N. Cozine Correct. They have advocated for additional funding based upon the reduction in dependency caseload. When I met with DHS and OJD representatives, I met with both Lois Day and Neil (inaudible). I think they feel like in Oregon that type of result may not be as clearly identifiable. They are rolling out right now the differential response model at DHS, which should reduce the number of filings because they are doing more work with families before filing any petition. It will mean that the petitions that do get filed will have a huge case history by the time they arrive. So our lawyers will still have lots of work to do but it may make it more difficult for us to make that kind of assessment. We are trying to stay away from an assumption that it will definitely reduce caseloads. We will want to look at it, but we may not be able to make that type of claim.
- 1:17:12 Chair Ellis In the draft that you handed there is reference to \$2.4 million.
- 1:17:17 N. Cozine Right.
- 1:17:17 Chair Ellis I assume that is assigned to some agency?
- 1:17:19 N. Cozine That is us.
- 1:17:20 Chair Ellis That is us. That is all us.
- 1:17:28 N. Cozine Theoretically we could build into every single contract, but it would be very difficult to make any kind of measurably difference.
- 1:17:42 P. Ramfjord Do you feel like you have baseline data to potentially look at other metrics of system like termination rate or length of stay?
- 1:17:46 N. Cozine Yes. We are collaboratively with both the Judicial Department and Department of Human Services to collect that information. They have been very helpful in sharing that. We are starting to meet with them monthly so that we can continue develop collaborative efforts about not just data sharing. We started our meetings as data sharing meetings. We have progressed to the point where we are also talking about the multi-disciplinary training components and other aspects.

1:18:18 Hon. Elizabeth Welch
I have a couple of questions. I want to raise some question about the shelter hearing standard as a basis for inclusion or exclusion of a jurisdiction. That is kind of like an acid test about where things are administratively in a county. It is not really an attorney question as much as it is (inaudible). Judges can make that happen by saying that that is going to happen. I know it is kind of an article of faith now that that is an important standard. I don't disagree that it is important, but I don't think it is that important. Attorneys can be involved at shelter hearings and do nothing. I just think that if you have a jurisdiction that looks good in other respects, I don't see why that should be an exclusionary consideration.

1:19:25 N. Cozine
That is actually why we listed it as met at least three of the criteria. Nothing is necessarily exclusionary, but it is one of the factors that we were looking at.

1:19:36 Hon. Elizabeth Welch
The other thing is I am wondering given how much time it has taking to get where you need to get, and I don't mean that as anything other than a statement of fact. What about using this money to have limited caseloads for attorneys for children?

1:19:59 N. Cozine
We were applying it to both.

1:20:00 Hon. Elizabeth Welch
I am not saying - do you have to? Are the required to? What about just doing kids? A good attorney for a kid is very outcome determinative in a dependency case. Depending on what is going on with the parents and the ties between the client and the parent, they can be an advocate for reunification just as well as they can for the other direction. I am just wondering if we could have more impact by focusing on attorneys for kids. The horse may be out of the barn and if it is, it is. I would think that might be worth considering.

1:20:42 N. Cozine
Paul says the horse is out of the barn. It is our funding and the Commission has a voice in how that funding is used. I think what the challenge would be if you only applied it to children is then the parent still have these huge caseloads. The scheduling of court hearings is going to get stalled out because the parent attorney can't be there. I think that is what we hear when we go to these counties. The lawyers have a very difficult time being at CRB and court hearings and family decision meetings and team decision meetings. I am concerned that unless we reduce the caseloads for both parents and children, we won't resolve that piece of the problem. I hear what you are saying about inclusion of children and whether or not that could be independently helpful study. I don't know whether we could get the results that we need. In other words, if we are saying we want to demonstrate results.

1:21:52 C. Lazenby
Would it be worthwhile to double back with the folks in Washington. I am assuming that they considered both sides of that too and decided go parents, or is their system so different?

1:22:05 N. Cozine
So different. They just use guardians ad litem, except for a very limited number of cases. It is really just GALs unless there is some significant issue and then they will appoint a lawyer. It is so rare. It sounds to me like it wasn't really a consideration.

1:22:25 Chair Ellis
Any other questions or comments on the pilot?

1:22:29 J. Potter
So where are we left? Where are we going?

1:22:35 N. Cozine
Maybe that is a question for the Commission and not for me. I do want feedback because I think we still have flexibility. We have said to the legislature that this is how we want to use the money. We have heard from Washington and the legislature has heard from Washington about what their results are. We would like to be able to do something that provides some measurably improvement. The way that Washington started demonstrating their success was

actually through response. They didn't have the bigger statistics available at the outset of the program.

- 1:23:25 J. Potter You have talked to people in Linn County or Clackamas County providers?
- 1:23:25 N. Cozine I have talked significantly with Linn County. I have had some email exchanges with Clackamas. Clackamas may be too large.
- 1:23:39 J. Potter So what are the Linn County folks telling you?
- 1:23:43 N. Cozine They are still have discussions. I think that is part of how we are looking at what might work and what might not work with the program. I think we are at a discussion point in terms of just clarifying what the expectations would be. You know can they take private cases? Can they not? My understanding is that there is a range of level of interest among the providers. I don't think it would be fair to say that they are all on board. I don't think it would be fair to say that they are all opposed, but it is a change. It is a very different model of funding for a caseload instead of on a case rate basis.
- 1:24:28 J. Potter So is there concern that the funding model won't be as advantageous to them as the current model?
- 1:24:30 N. Cozine I don't think that concern exists if we create a model that would put them at parity with the Department of Justice lawyers against whom they are arguing. I think that would be a fair approach. I think that the concern there, though, would be if we stepped towards that and we were actually able to achieve parity for them for the purposes of the pilot, if pilot funding were not continued what would mean for that contract? Would they then be sort of grandfathered in at this higher level while we get the other contractors up to where they are? Or would they get a big pay cut. It is a valid concern and clearly our hope is that the pilot funding continues, and not only continues but we are able to expand it, and we can work with the Department of Justice as they are expanding their representation. We are reducing our caseloads and increasing our compensation levels.
- 1:25:41 J. Potter So if it is successful and there are measurable goals and you end the pilot project with success. You have raised the pay. You have raised the standards. Now you can go back to the legislature and say, "In order to continue this we are going to need more money. Here are the outcomes that make it cost effective." I am assuming that would be the argument. Is Linn County people saying that the hesitancy is just what you outlined? That after a year and a half or two years they are back down to some lower level? Or are they saying that we just don't want to give up the possibility of having private retained case that could supplement our income as it is now?
- 1:26:23 N. Cozine I can say that it is both. I think the answer is building in expectations for what that private caseload would look like so that we are not in a situation where we are funding for what we think is 80% of the caseload and it turns out that is actually 60% of the caseload. I think there is a way to resolve that concern. I suspect that we could also resolve the other concern. Typically with policy option funding, and we have talked about, the top funding is rolled into your budget for the next biennium. It stays there and remains stable and would remain available for us to continue even if there weren't an expansion. My understanding is that if a program is being cut, the legislature typically does it in a phase out kind of manor. I think we would be in a position to do no harm, but, of course, they are always unexpected cuts. I shouldn't say always. There can be unexpected cuts.
- 1:27:37 J. Potter You are in a sort of unusual situation. There is a pot of money sitting here that needs to be spent. The clock is ticking on it a bit.
- 1:27:48 N. Cozine Right.

1:27:46 J. Potter It seems like we have to pull the trigger here and make this happen. That is a general comment.

1:27:58 Chair Ellis Does the pilot consume the full \$2.4 million?

1:28:03 N. Cozine It will. It would take it up with the acquisition of the case management system that we would provide to the pilot county, and through the funding of lawyers and the reduction of caseload. All of those components would be funded by that \$2.4.

1:28:22 J. Potter Including the deputy director position?

1:28:22 N. Cozine No. The deputy director position is funded out of our agency budget. That is why it is limited duration.

1:28:33 P. Ramfjord It does seem like it is important to make sure that you figure out what the methods are that you expect to have an impact on, so that you can demonstrate that down the road. If you don't think the reduction in dependency caseload is going to be that metric that is fine. There are other metrics, obviously, that could make a meaningful difference. I think for the success of the program down the road being able to demonstrate that will be critical.

1:29:04 N. Cozine My hope is that the length of stay is a metric that is an important one.

1:29:16 Chair Ellis Well, I think we ought to do it.

1:29:16 S. McCrea Yay. Go Nancy.

1:29:26 N. Cozine Okay. I will keep negotiating with our providers and our contract team is helping. This is an office project. We are all involved.

1:29:35 Chair Ellis I think it is a better concept than trying to spread the \$2.4 million. You will never have enough impact to measure anything.

1:29:50 N. Cozine That was our concern.

1:29:51 J. Potter So what is reasonable here? I am pushing a little bit here. Coming to the next Commission meeting with a report that says we have talked more with Linn County. Here is the potential plan so that we have something concrete. Maybe having people from Linn County here talking to us a bit and weighing the pros and cons and what their fears are?

1:30:12 N. Cozine I think that would be reasonable. I was hoping to get launched by July, even if we didn't have a case management system yet but get the in county pieces rolling. So that may still be too ambitious. I agree, though, that time is of the essence. We are trying to push forward as fast as we can. We had to start with the internal pieces in our office following the close of session. We got those pieces in place as quickly as possible and now it is the rolling out.

1:30:47 Chair Ellis Okay. We are ready for an AD update.

1:30:41 N. Cozine This is my fault. The IT update might follow nicely. Case management is one of the pieces that Cecily is working on.

1:31:05 C. Warren Chair Ellis, members of the Commission, my name is Cecily Warren. I am the research and IT director for the Office of Public Defense.

1:31:19 Chair Ellis The long awaited.

1:31:19 C. Warren Well I hope I meet the expectations. Thank you for this opportunity.

1:31:24 J. Potter The Miracle Worker. That is what we are calling you.

1:31:24 C. Warren No pressure. We will see what we can do. This morning I would like to provide you with just a quick update of what I have learned so far in my almost three months now with the office. I have been working very closely with the Oregon Judicial Department who provides are infrastructure. We had the opportunity to purchase new computers for many of the employees and also do so upgrades of software. We are moving from XP over to Windows 7 and our office suite as well, up to 2010. Really looking forward to doing that and actively working on doing that in the very near future. We are also working on updating our servers to provide more capacity. Because we are a paperless office storage is always an issue. Making sure that we have the appropriate storage to keep all the documents necessary to manage cases and all of the information that we need to have. With that we also have four core applications that the office runs. All of them are in-house built. They are starting to degrade as information is increasing just because of the amount of data that is being stored. I am looking what our solutions are out there to help manage the caseloads and the work.

1:33:24 J. Potter These are commercial solutions?

1:33:24 C. Warren Right now, yes.

1:33:25 J. Potter Rather than rebuilding the in-house system?

1:33:28 C. Warren Yes.

1:33:30 Chair Ellis So is there such a thing as an off the shelf software for defense offices?

1:33:42 C. Warren Absolutely. I am researching and we have scheduled two demonstrations of products. Both are defender based, public defender based. The first one is "Defender Data" by Justice Works. They are based in Utah. The other produce is "Defender" by Justware. They are also based in Utah. I am not sure what Utah has but they seem to be very active in providing government solutions. Both of those are case management solutions that can be housed in the Cloud as a software service and we can pay them to manage that infrastructure for us. Then we have access to them whether it be our providers that have access to the case management solution, or internally as the office has a case management solution as well. So we are investigating those two. It was just an initial suite of requirements. I felt that the software as a service would be the best solution for the office at this point in time. After we do upgrades of hardware and get everything running on the same platform, working on a case management solution, we do have then several projects as I walked in. Of course the swarm of suggestions came. We are looking at updating our website and providing more information to our providers through our website. More information to staff through an intranet. We will be working on that as well as video conferencing services, so that we can work with those remote areas with our regional partners and have better communication with them. I am looking at all these little small pieces in parts within our office as office does. In contracts and tracking and looking at some other solutions that might do that and working on policy and procedures.

1:35:57 Chair Ellis And that is all you have been doing?

1:35:57 C. Warren A little bit. Just a small part of it. As I learn the office and I learn the business, I definitely would like to make sure that whatever applications and tools that the office has really meets the needs of the business that we are doing, rather than trying to fit the tool into the business.

1:36:19 Chair Ellis So most organizations that have someone come in like yourself. Now we have an IT central person. There will be a range of outcry of protests by anyone over 50 and a few pockets of users who like what they have always had. What resistance are you encountering so far?

1:36:40 C. Warren I actually haven't encountered too much resistance. They are actually very anxious to have better tools, new tools that will help them do their jobs more effectively. They have large workloads, large caseloads, and the younger generation sees the tools that are out there and capable and says, "why can't we bring them in." They are very excited about that. Maybe some of the longer standing employees have...

1:37:13 Chair Ellis That is a nice way of saying over 50.

1:37:13 C. Warren The longer standing employees are also anxious to embrace what can come and help them be more efficient to help reduce that caseload.

1:37:23 Chair Ellis If you can continue that climate more power to you.

1:37:29 C. Warren We will keep trying to work towards that, absolutely. As long as we show that we can meet their needs and help them do their work, they are very excited about the change. We will do lots of training and communication.

1:37:42 Chair Ellis That all sounds very encouraging.

1:37:43 N. Cozine I will add that Cecily arrived in mid-January with the judicial department telling us that we had to have this upgrade completed by April 1. She has really worked very diligently to create a plan so that we get the upgrades completed. We will finally be in a position where none of our servers or computes our out of warranty. That is actually a huge help and should help our lawyers produce work more quickly. Help them meet that 180 day target.

1:38:25 Chair Ellis This is very encouraging. Thank you.

1:38:33 N. Cozine Now Pete can give you feedback on his version.

1:38:35 P. Gartlan He looks suspiciously over 50 to me. We will see what he has to say.

1:38:38 C. Lazenby How you agreed to give up you abacus?

1:38:48 P. Gartlan I use a pen pad. I actually only have two items to inform the Commission of. We completed another round of evaluations recently. That was time consuming but hopefully productive, informative, and helpful. As part of the evaluation we also get feedback from the attorneys on how to improve the office. So we have a list of ideas and we will be going through them and implementing some. I will report on them at the next meeting.

1:39:45 Chair Ellis Who does the evaluating? I am sure you are in on this. One or two others with you?

1:39:53 P. Gartlan Yes. It is kind of an evolved process. There are three stages. There is a self-evaluation by the attorney. That self-evaluation goes to the team leader. The team leader meets with the attorney. The team leader writes an evaluation of the attorney. Then they meet. Those two documents go to me and a chief deputy who is on that team. Every team has a chief deputy on it. After that we write a management evaluation and that management evaluation is given to the attorney the day before. Then we have a meeting with that attorney.

1:40:49 Chair Ellis Is there a written record of the results of the evaluation?

1:40:55 P. Gartlan The self-evaluation is written. The team leader evaluation is written. The management evaluation is written and they all go into their personnel file.

1:41:07 Chair Ellis Good. I assume, Cynthia, that meets good practice?

1:41:12 C. Gregory That meets good practice.

1:41:15 Chair Ellis Okay.

1:41:15 P. Gartlan The other item is we are trying to tweak our process and kind of incorporate sending a draft to the trial attorney of every brief before it is filed and getting input from the trial attorney, but without negatively impacting our median brief filing date. So we have plans to incorporate that

1:41:40 Chair Ellis That is what I call responsiveness.

1:41:42 P. Gartlan We interviewed for several promotions of deputy I. Deputy I is the entry level position into a Deputy II. We have had those interviews and we will announcing promotions tomorrow.

1:42:14 Chair Ellis Okay. I think we are ready to move to the ED review.

1:42:24 N. Cozine I am sorry the first agenda items took so much time.

1:42:24 Chair Ellis That is okay. Am I not supposed to read something now?

1:42:33 P. Levy You are. I forgot to bring it. I looked it up. It might be useful to read this script and then take a break.

1:42:47 S. McCrea Okay. You know the Chair is just ready to barrel onward.

1:42:55 P. Levy You know the purpose and then there is the statutory provision for that.

1:43:02 Chair Ellis Alright. The Public Defense Services Commission will now meet in executive session for the purpose of evaluating the executive director. The executive session is held pursuant to ORS 192.660, the section relating to personnel evaluation. Representatives of the news media and designated staff shall be allowed to attend the executive session. All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on any of the deliberations during the executive session, except to state the general subject of the session as previously announced. No decision may be made in executive session. At the end of the executive session, we will return to open session and welcome the audience back into the room. Anybody who is not described here. Cynthia, if you would come forward. The way that I thought we would do this is we would start with the Commission meeting separately with each of executive directors direct reports to get input. Cynthia is going to coordinate that. Then after that I wanted the Commission to have a chance to talk among themselves as to their thoughts. Then we will welcome the executive director in and we will have a discussion and evaluation. Cynthia is also very helpfully generated a number of written materials that she will explain. Now we will have a break

Agenda Item No. 8 Executive Session

0:03 Chair Ellis For a brief period we will reconvene the public meeting and then we will adjourn the public meeting and go into retreat mode. Let the record show that the Commission has been executive session. We are now resuming the public meeting. Is there any motion or business anyone wants to take up?

0:43 S. McCrea Yes, Mr. Chair.

0:43 Chair Ellis Recognize the vice chair. **MOTION:** I move that the Commission provide our executive director with a merit salary increase and that we provide that effective on March 1, 2014, instead of when it would be scheduled which would be September 7, 2014, which will result in a cost to the agency budget of \$4,899.02.

1:15 P. Ramfjord

The motion is seconded.

1:20 Chair Ellis

Is there any discussion? **VOTE 7-0.**

1:27 Chair Ellis

Any other business for the good of the order: If not, I would entertain a motion to adjourn.

MOTION: Janet Stevens moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 7-0**

Meeting adjourned

Attachment 2

Per Curiam

SUPREME COURT OF THE UNITED STATESANTHONY RAY HINTON *v.* ALABAMAON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

No. 13–6440 Decided February 24, 2014

PER CURIAM.

In *Strickland v. Washington*, 466 U. S. 668 (1984), we held that a criminal defendant’s Sixth Amendment right to counsel is violated if his trial attorney’s performance falls below an objective standard of reasonableness and if there is a reasonable probability that the result of the trial would have been different absent the deficient act or omission. *Id.*, at 687–688, 694. Anthony Ray Hinton, an inmate on Alabama’s death row, asks us to decide whether the Alabama courts correctly applied *Strickland* to his case. We conclude that they did not and hold that Hinton’s trial attorney rendered constitutionally deficient performance. We vacate the lower court’s judgment and remand the case for reconsideration of whether the attorney’s deficient performance was prejudicial.

I
A

In February 1985, a restaurant manager in Birmingham was shot to death in the course of an after-hours robbery of his restaurant. A second manager was murdered during a very similar robbery of another restaurant in July. Then, later in July, a restaurant manager named Smotherman survived another similar robbery-shooting. During each crime, the robber fired two .38 caliber bullets; all six bullets were recovered by police investigators. Smotherman described his assailant to the police, and when the police showed him a photographic array, he picked out Hinton’s picture.

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The police arrested Hinton and recovered from his house a .38 caliber revolver belonging to his mother, who shared the house with him. After analyzing the six bullets fired during the three crimes and test-firing the revolver, examiners at the State's Department of Forensic Sciences concluded that the six bullets had all been fired from the same gun: the revolver found at Hinton's house. Hinton was charged with two counts of capital murder for the killings during the first two robberies. He was not charged in connection with the third robbery (that is, the Smotherman robbery).

At trial, the State's strategy was to link Hinton to the Smotherman robbery through eyewitness testimony and forensic evidence about the bullets fired at Smotherman and then to persuade the jury that, in light of the similarity of the three crimes and forensic analysis of the bullets and the Hinton revolver, Hinton must also have committed the two murders. Smotherman identified Hinton as the man who robbed his restaurant and tried to kill him, and two other witnesses provided testimony that tended to link Hinton to the Smotherman robbery. Hinton maintained that he was innocent and that Smotherman had misidentified him. In support of that defense, Hinton presented witnesses who testified in support of his alibi that he was at work at a warehouse at the time of the Smotherman robbery. See 548 So. 2d 562, 568–569 (Ala. 1989) (summarizing the evidence on each side of the case).

The six bullets and the revolver were the only physical evidence. Besides those items, the police found no evidence at the crime scenes that could be used to identify the perpetrator (such as fingerprints) and no incriminating evidence at Hinton's home or in his car. The State's case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver. According to the Alabama Supreme Court, "the only evidence linking Hin-

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ton to the two murders were forensic comparisons of the bullets recovered from those crime scenes to the Hinton revolver.” 2008 WL 4603723, *2 (Oct. 17, 2008).

The category of forensic evidence at issue in this case is “firearms and toolmark” evidence. Toolmark examiners attempt to determine whether a bullet recovered from a crime scene was fired from a particular gun by comparing microscopic markings (toolmarks) on the recovered bullet to the markings on a bullet known to have been fired from that gun. The theory is that minor differences even between guns of the same model will leave discernible traces on bullets that are unique enough for an examiner to conclude that the recovered bullet was or was not fired from a given weapon. See generally National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 150–155 (2009).

Recognizing that Hinton’s defense called for an effective rebuttal of the State’s expert witnesses, Hinton’s attorney filed a motion for funding to hire an expert witness of his own. In response, the trial judge granted \$1,000 with this statement:

“I don’t know as to what my limitations are as for how much I can grant, but I can grant up to \$500.00 in each case [that is, for each of the two murder charges, which were tried together] as far as I know right now and I’m granting up to \$500.00 in each of these two cases for this. So if you need additional experts I would go ahead and file on a separate form and I’ll have to see if I can grant additional experts, but I am granting up to \$500.00, which is the statutory maximum as far as I know on this and if it’s necessary that we go beyond that then I may check to see if we can, but this one’s granted.” 2006 WL 1125605, *59 (Ala. Crim. App., Apr. 28, 2006) (Cobb, J., dissenting) (quoting Tr. 10).

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Hinton's attorney did not take the judge up on his invitation to file a request for more funding.

In fact, \$500 per case (\$1,000 total) was *not* the statutory maximum at the time of Hinton's trial. An earlier version of the statute had limited state reimbursement of expenses to one half of the \$1,000 statutory cap on attorney's fees, which explains why the judge believed that Hinton was entitled to up to \$500 for each of the two murder charges. See *Smelley v. State*, 564 So. 2d 74, 88 (Ala. Crim. App. 1990). But the relevant statute had been amended to provide: "Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court." See *Dubose v. State*, 662 So. 2d 1156, 1177, n. 5 (Ala. Crim. App. 1993) (quoting Ala. Code §15-12-21(d) (1984)), *aff'd* 662 So. 2d 1189 (Ala. 1995). That amendment went into effect on June 13, 1984, *Dubose, supra*, at 1177, n. 5, which was over a year before Hinton was arrested, so Hinton's trial attorney could have corrected the trial judge's mistaken belief that a \$1,000 limit applied and accepted his invitation to file a motion for additional funds.

The attorney failed to do so because he was himself unaware that Alabama law no longer imposed a specific limit and instead allowed reimbursement for "any expenses reasonably incurred." At an evidentiary hearing held on Hinton's postconviction petition, the following conversation occurred between a state attorney and Hinton's trial attorney:

"Q. You did an awful lot of work to try and find what you believed to be a qualified expert in this case, didn't you?

"A. Yes, sir, I did.

"Q. Would you characterize it that you did everything that you knew to do?

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“A. Yes, sir, I think so.

“Q. And this case, did it come down to an unwillingness of experts to work for the price that you were able to pay?

“A. Yes, sir, I think it did.

“Q. So your failure to get an expert that you would have been let’s say a hundred percent satisfied with was not a failure on your part to go out and do some act, it was a failure of the court to approve what you believed would have been sufficient funds?

“A. Well, putting it a little differently, yes, sir, it was a failure—*it was my failure, my inability under the statute to obtain any more funding for the purpose of hiring qualified experts.*” Reporter’s Official Tr. 206–207 (emphasis added).

Operating under the mistaken belief that he could pay no more than \$1,000, Hinton’s attorney went looking for an expert witness. According to his postconviction testimony, he made an extensive search for a well-regarded expert, but found only one person who was willing to take the case for the pay he could offer: Andrew Payne. Hinton’s attorney “testified that Payne did not have the expertise he thought he needed and that he did not consider Payne’s testimony to be effective.” 2006 WL 1125605, *27. As he told the trial judge during a pretrial hearing:

“I made an effort to get somebody that I thought would be useable. And I’ll have to tell you what I did [about] Payne. I called a couple of other lawyers in town . . . to ask if they knew of anybody. One of them knew him; one of them knew him. The reason I didn’t contact him was because he wasn’t recommended by the lawyer. So now I’m stuck that he’s the only guy I could possibly produce.” *Id.*, at *30 (internal quotation marks omitted).

At trial, Payne testified that the toolmarks in the barrel

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of the Hinton revolver had been corroded away so that it would be impossible to say with certainty whether a particular bullet had been fired from that gun. He also testified that the bullets from the three crime scenes did not match one another. The State's two experts, by contrast, maintained that all six bullets had indeed been fired from the Hinton revolver.

On cross-examination, the prosecutor badly discredited Payne. Payne admitted that he'd testified as an expert on firearms and toolmark identification just twice in the preceding eight years and that one of the two cases involved a shotgun rather than a handgun. Payne also conceded that he had had difficulty operating the microscope at the state forensic laboratory and had asked for help from one of the state experts. The prosecutor ended the cross-examination with this colloquy:

“Q. Mr. Payne, do you have some problem with your vision?”

“A. Why, yes.”

“Q. How many eyes do you have?”

“A. One.” Tr. 1667.

The prosecutor's closing argument highlighted the fact that Payne's expertise was in military ordnance, not firearms and toolmark identification, and that Payne had graduated in 1933 (more than half a century before the trial) with a degree in civil engineering, whereas the State's experts had years of training and experience in the field of firearms and toolmark examination. The prosecutor said:

“I ask you to reject [Payne's] testimony and you have that option because you are the judges of the facts and whose testimony, Mr. Yates' or Mr. Payne's, you will give credence to, and I submit to you that as between these two men there is no match between them. There is no comparison. One man just doesn't have it

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and the other does it day in and day out, month in and month out, year in and year out, and is recognized across the state as an expert.” 2006 WL 1125605, *64 (Cobb, J., dissenting) (quoting Tr. 1733–1734).

The jury convicted Hinton and recommended by a 10-to-2 vote that he be sentenced to death. The trial judge accepted that recommendation and imposed a death sentence.

B

In his state postconviction petition, Hinton contended that his trial attorney was “‘ineffective to not seek additional funds when it became obvious that the individual willing to examine the evidence in the case for the \$1,000 allotted by the court was incompetent and unqualified. Indeed, this failure to seek additional, sufficient funds is rendered all the more inexplicable by the trial court’s express invitation to counsel to seek more funds if such funds were necessary.’” 2006 WL 1125605, *28.

To show that he had been prejudiced by Payne’s ineffective testimony, Hinton produced three new experts on toolmark evidence. One of the three, a forensic consultant named John Dillon, had worked on toolmark identification at the Federal Bureau of Investigation’s forensics laboratory and, from 1988 until he retired in 1994, had served as chief of the firearms and toolmark unit at the FBI’s headquarters. The other two postconviction experts had worked for many years as firearms and toolmark examiners at the Dallas County Crime Laboratory and had each testified as toolmark experts in several hundred cases.

All three experts examined the physical evidence and testified that they could not conclude that any of the six bullets had been fired from the Hinton revolver. The State did not submit rebuttal evidence during the postconviction hearing, and one of Hinton’s experts testified that, pursuant to the ethics code of his trade organization, the Associ-

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ation of Firearm and Tool Mark Examiners, he had asked the State's expert, Yates, to show him how he had determined that the recovered bullets had been fired from the Hinton revolver. Yates refused to cooperate.

C

The circuit court denied Hinton's postconviction petition on the ground that Hinton had not been prejudiced by Payne's allegedly poor performance because Payne's testimony did not depart from what Hinton's postconviction experts had said: The bullets could not be affirmatively matched either to one another or to the Hinton revolver.

The Alabama Court of Criminal Appeals affirmed by a 3-to-2 vote. 2006 WL 1125605. The court agreed with the circuit court that Hinton had not been prejudiced because Payne's testimony, if believed by the jury, strongly supported the inference that Hinton was innocent. *Id.*, at *31. Then-Judge Cobb (who later became chief justice of the Alabama Supreme Court) dissented. In her view, Hinton's attorney had been ineffective in failing to seek additional funds to hire a better expert and Hinton had been prejudiced by that failure, meaning that he was entitled to a new trial. Then-Judge Shaw (who is now a justice of the Alabama Supreme Court) also dissented. He would have remanded the case to the circuit court to make a finding as to whether or not Payne was qualified to act as an expert on toolmark evidence. He stated that "[i]t goes without saying that, with knowledge that sufficient funds were available to have a qualified firearms and toolmarks expert, no reasonable criminal defense lawyer would seek out and hire an unqualified firearms witness." *Id.*, at *73.

The Supreme Court of Alabama reversed and remanded. 2008 WL 4603723. After quoting at length from Judge Shaw's dissent, the Court stated, "We agree with Judge Shaw that 'the dispositive issue is whether Payne was a qualified firearms and toolmarks expert' and that in deny-

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ing Hinton’s [postconviction] petition the trial court did not directly rule on ‘the issue whether Payne was qualified to be testifying in the first place.’” *Id.*, at *4 (quoting 2006 WL 1125605, *70, *72 (Shaw, J., dissenting)). The Supreme Court was thus focused on Payne’s own qualifications, rather than on whether a better expert—one who could have been hired had the attorney learned that there was no funding cap and requested additional funds—would have made a more compelling case for Hinton.

On remand, the circuit court held that Payne was indeed qualified to testify as a firearms and toolmark expert witness under the Alabama evidentiary standard in place at the time of the trial, which required only that Payne have had “knowledge of firearms and toolmarks examination beyond that of an average layperson.” 2008 WL 5517591, *5 (Ala. Crim. App., Dec. 19, 2008); see also *Charles v. State*, 350 So. 2d 730, 733 (Ala. Crim. App. 1977) (“An ‘expert witness’ is one who can enlighten a jury more than the average man in the street. . . . An expert witness, by definition, is any person whose opportunity or means of knowledge in a specialized art or science is to some degree better than that found in the average juror or witness”). The appellate court affirmed the circuit court’s ruling that Payne was qualified under the applicable standard. 2013 WL 598122 (Ala. Crim. App., Feb. 15, 2013). The Alabama Supreme Court denied review by a 4-to-3 vote, with two justices recused. Hinton then filed this petition for a writ of certiorari.

II

This case calls for a straightforward application of our ineffective-assistance-of-counsel precedents, beginning with *Strickland v. Washington*, 466 U. S. 668. *Strickland* recognized that the Sixth Amendment’s guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence”

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entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence. *Id.*, at 685–687. “Under *Strickland*, we first determine whether counsel’s representation ‘fell below an objective standard of reasonableness.’ Then we ask whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Padilla v. Kentucky*, 559 U. S. 356, 366 (2010) (quoting *Strickland, supra*, at 688, 694).

A

“The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Padilla, supra*, at 366 (quoting *Strickland, supra*, at 688). “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Strickland, supra*, at 688. Under that standard, it was unreasonable for Hinton’s lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at \$1,000.

“Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.” *Harrington v. Richter*, 562 U. S. ___, ___ (2011) (slip op., at 16). This was such a case. As Hinton’s trial attorney recognized, the core of the prosecution’s case was the state experts’ conclusion that the six bullets had been fired from the Hinton revolver, and effectively rebutting that case required a competent expert on the defense side. Hinton’s attorney also recognized that Payne was not a good expert, at least with respect to toolmark evidence. Nonetheless,

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he felt he was “stuck” with Payne because he could not find a better expert willing to work for \$1,000 and he believed that he was unable to obtain more than \$1,000 to cover expert fees.

As discussed above, that belief was wrong: Alabama law in effect beginning more than a year before Hinton was arrested provided for state reimbursement of “any expenses reasonably incurred in such defense to be approved in advance by the trial court.” Ala. Code §15–12–21(d). And the trial judge expressly invited Hinton’s attorney to file a request for further funds if he felt that more funding was necessary. Yet the attorney did not seek further funding.

The trial attorney’s failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance. Under *Strickland*, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U. S., at 690–691. Hinton’s attorney knew that he needed more funding to present an effective defense, yet he failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for \$1,000 but for “any expenses reasonably incurred.” An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*. See, e.g., *Williams v. Taylor*, 529 U. S. 362,

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395 (2000) (finding deficient performance where counsel “failed to conduct an investigation that would have uncovered extensive records [that could be used for death penalty mitigation purposes], not because of any strategic calculation but because they incorrectly thought that state law barred access to such records”); *Kimmelman v. Morrison*, 477 U. S. 365, 385 (1986) (finding deficient performance where counsel failed to conduct pretrial discovery and that failure “was not based on ‘strategy,’ but on counsel’s mistaken belie[f] that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense”).

We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of “strategic choic[e]” that, when made “after thorough investigation of [the] law and facts,” is “virtually unchallengeable.” *Strickland*, 466 U. S., at 690. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that *he himself* deemed inadequate.

B

Having established deficient performance, Hinton must also “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, at 694. “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would

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have had a reasonable doubt respecting guilt.” *Id.*, at 695.

The Court of Criminal Appeals held, and the State contends in its brief in opposition to certiorari, that Hinton could not have been prejudiced by his attorney’s use of Payne rather than a more qualified expert because Payne said all that Hinton could have hoped for from a toolmark expert: that the bullets used in the crimes could not have been fired from the Hinton revolver. See 2006 WL 1125605, *31 (“[E]ven assuming that counsel’s apparent ignorance that the cap on expert expenses had been lifted constituted deficient performance . . . , the appellant has not shown that he was prejudiced by that deficient performance”). It is true that Payne’s testimony would have done Hinton a lot of good *if the jury had believed it*. But the jury did not believe Payne. And if there is a reasonable probability that Hinton’s attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton’s guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer’s deficient performance and is entitled to a new trial.

That the State presented testimony from two experienced expert witnesses that tended to inculcate Hinton does not, taken alone, demonstrate that Hinton is guilty. Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that “[s]erious deficiencies have been found in the forensic evidence used in criminal trials. . . . One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases.” *Melendez-Diaz v. Massachusetts*, 557 U. S. 305, 319 (2009) (citing Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14

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(2009)). This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Because no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case, we remand the case for reconsideration of whether Hinton's attorney's deficient performance was prejudicial under *Strickland*.

* * *

The petition for certiorari and Hinton's motion for leave to proceed *in forma pauperis* are granted, the judgment of the Court of Criminal Appeals of Alabama is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Attachment 3

The Changing Landscape of Public Defense

April 2014

Nancy Cozine, Executive Director
Office of Public Defense Services

Introduction

The Oregon Public Defense Services Commission began oversight of statewide trial level services in July 2003. When the Commission assumed this responsibility it inherited a statewide contracting model, originally established within the Oregon Judicial Department. During the first ten years of the Commission's oversight, it made significant improvements in the contracting process; all contracts began being negotiated and implemented at the same time, rather than separately throughout the year; rates were made more consistent; and the Commission made efforts to visit every region of the state to perform Service Delivery Reviews, which are designed to evaluate and make recommendations for change in the delivery of public defense services within each jurisdiction.

The Public Defense Services Commission has received praise for bringing transparency, consistency and efficiencies to the provision of public defense services in the state. Nationally, the Commission has been cited as a model for a statewide system.¹ Yet, increasingly, the Commission and the Oregon legislators are hearing that changes are necessary in order to prevent significant erosion in the availability and quality of public defense across Oregon. This report presents recent information provided to the Office of Public Defense Services (OPDS) concerning fundamental problems with the existing contracting model, and recommendations to begin addressing those challenges.

Background

Oregon's public defense system is characterized by at least three distinct elements. First, unlike some states, Oregon relies upon private entities to provide trial court representation, including a broad range of provider types – from large firms dedicated exclusively to public defense clients, to solo practitioners who may only occasionally handle a public defense case. The majority of cases are handled by attorneys who belong to consortium groups, where there are business agreements between lawyers, and each individual lawyer can determine what percent of their work will be dedicated to public

¹ *Cf.*, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, Report of the National Right to Counsel Committee, at 166 (April 2009), available at: www.constitutionproject.org.

defense clients. Second, most of the private entities providing public defense services enter into contracts under which payment is made for handling a specified number of cases at an identified “flat” rate. If the prosecutor files fewer cases than expected, the contract payment is typically reduced accordingly. Third, case rates are significantly lower than what is charged by private Oregon attorneys, and these rates generally yield compensation amounts far below what is earned by other publicly funded criminal and juvenile practitioners in district attorney offices and the state’s Department of Justice.

The challenges of Oregon’s case rate contracting system have been noted over the years. Large offices, dedicated exclusively to public defense work, must fund all operations from case rates. When caseloads dip, fixed costs, such as rent and other infrastructure needs, cannot easily fluctuate with the peaks and valleys of changing case levels. The Commission has historically looked to these offices for leadership in local public safety systems, expertise in training new attorneys, and reliably handling a high volume workload. Instability within this group of providers can have larger systemic impacts when funding drops unexpectedly; unable to generate additional revenue through private cases or other work, individual attorney caseloads increase and senior lawyers are not able to serve in the way described above; as a leader, trainer, and stable resource for all case types. Smaller firms and solo practitioners, whether contracting individually or as part of a consortium, have often agreed to handle unreasonably large caseloads in order to make public defense work viable. When cases are scarce, they have sought to underwrite public defense work with privately retained clients, but these providers have increasingly indicated that mixing privately retained and public defense work is becoming harder. As providers increase the number of public defense cases they agree to take as part of their contract in order to ensure stability through the contracting cycle, their capacity for handling private cases is reduced. When private cases are not part of their structure, and caseloads are variable, public defense work can be a losing proposition.

Despite longstanding frustration with Oregon’s contracting model, a dedicated corps of lawyers across the state has served public defense clients for many years. Some have done so based, in part, on the Commission’s sincere commitment, demonstrated throughout the past decade, to improve the financial standing and stability of Oregon’s public defense system. And, indeed, there have been periods of incremental improvement, although they have been countered by periods of austerity. Increasingly, though, public defense providers of all types - institutional defender offices, consortia, small firms and solo practitioners - have said that the current system is not sustainable.

Over the last several years, many providers have testified to the Commission about challenges in the local administration of public defense contracts. The challenges described were slightly different depending upon the provider’s area of practice, geographic region, and system dynamics within the county. In order to gather specific, detailed information,

the Office of Public Defense Services scheduled meetings in each region of the state. These regional meetings were held between December 7, 2013, and February 4, 2014:

- December 7, 2013: **Eastern** (Baker, Grant, Harney, Malheur, Morrow, Umatilla, Union, Wallowa)
- January 10, 2014: **Central** (Crook, Deschutes, Gilliam, Hood River, Jefferson, Sherman, Wasco, Wheeler)
- January 14, 2014: **North Coast** (Clatsop, Columbia, Lincoln, Tillamook)
- January 28, 2014: **Southern Oregon** (Coos, Curry, Douglas, Jackson, Josephine, Klamath, Lake)
- January 30, 2014: **Tri-County** (Clackamas, Multnomah, Washington)
- February 4, 2014: **Willamette Valley** (Benton, Lane, Linn, Marion, Polk, Yamhill)

Two additional meetings were held with providers handling specialized contracts:

- **March 5, 2014: Post-Conviction Relief and Habeas Corpus** (trial and appeals)
- **March 21, 2014: Capital Providers**

While there were many challenges that were consistent in every region, there were also issues that were unique to specific areas. This report will explore the challenges specific to regions, practice areas, and also the challenges that exist for all providers, statewide.

Regional Challenges

Eastern Oregon

The Eastern Region meeting included the contract administrator, or a representative, for every public defense provider in the following counties: Baker, Grant, Harney, Malheur, Morrow, Umatilla, Union, and Wallowa. Without a doubt, the biggest challenges in this region are created by the vast distances that providers must travel in order to perform their work. Jail facilities, courthouses, provider offices, foster care placements, and other professional services are often more than 60 miles apart. When clients are in a state placement, lawyers must visit clients in order to fulfill their ethical obligations. A state placement could be a jail or juvenile detention facility, a foster care placement, or a hospital (most frequently in civil commitment cases). Lawyers must pay for their travel expenses out of their contract rates.

Contracts rates vary, but most providers in the Eastern Region receive between \$343 to \$406 for a misdemeanor case, and \$541 - \$1,144 for C through A felony cases. Initial appointments in dependency cases range from \$832-\$884, but these cases can span years

of time, and the provider will receive additional compensation only if there is a court review or Citizen Review Board hearing, and that compensation will be at a rate of \$333-\$416. Even when there are not review hearings scheduled, lawyers are obligated to visit child clients, check in with case workers and service providers, meet with parent clients, and file motions with the court when and if necessary to advocate for their clients.

Travel costs are always high for providers, but they increase during the winter months, when four wheel drive vehicles may be required to get over mountain passes. When providers are covering 140 miles for one client visit, the provider can use the entire contract rate to cover transportation costs. Additionally, providers are unable to bill other, private clients during these days of travel, creating another disincentive for lawyers to visit their court appointed clients.

The remote distances in this region create additional challenges. It is often difficult for providers to attract and retain new lawyers, and to attend continuing legal education (CLE) courses, most of which are held in the Western side of the state. While CLE credits can be earned through on-line courses, there is a benefit to being personally present for trainings, where learning often happens during informal communications among lawyers. Finally, it can be difficult to get experts to come to remote regions, which can extend the length of time required to resolve cases.

Providers here noted that some of the challenges created by great distances between locations could be addressed through increased use of technology such as web-based services and improved case management tools. They also expressed a need for assistance with recruitment and retention efforts.

Central Oregon

The Central Region meeting included the contract administrator, or a representative, for every public defense provider in the following counties: Crook, Deschutes, Gilliam, Hood River, Jefferson, Sherman, Wasco, and Wheeler.

The distance challenges described above also exist for providers in Central Oregon. Attracting and retaining lawyers who are qualified to represent clients in serious felony and child welfare cases can be very difficult with the low rates of pay and high caseloads. While Deschutes County does hold some attraction for lawyers, the low compensation and high caseloads make it difficult for providers here to keep lawyers from leaving. They have lost several lawyers to the District Attorney's office, which offers better compensation, health, retirement, and other benefits. Public defender salaries are 10% or more below salaries at the District Attorney's office, and it may be that this difference would be more significant if the providers didn't have caseloads that include, arguably, more cases than they can reasonably handle. These high caseloads make it difficult for lawyers to appear

and appropriately represent clients when multiple clients are scheduled for court matters on the same day,² and to provide the kind of training that is necessary for newer attorneys. The low rates also make it difficult for providers to cover professional costs, such as Oregon State Bar dues, Professional Liability Fund dues, CLE costs, and professional memberships.

North Coast

The North Coast Regional meeting included the contract administrator, or a representative, for every public defense provider in the following counties: Clatsop, Columbia, Lincoln, and Tillamook.

The biggest concern here was the low rate of pay in dependency cases, which does not adequately compensate lawyers for the time they spend visiting children, attending family and team decision meetings, meeting with adult clients, and reviewing reports from and communicating with case workers and service providers. As described previously, remote foster care placements can result in providers using a significant portion of the contract rate to cover the time and transportation costs for visiting child clients. The low rates of pay also make it difficult for providers to obtain the technology necessary for managing their cases efficiently, and to modify their systems as needed in order to process electronic notices and other information from system partners.

Another concern was the relative isolation of these communities, which makes it difficult to recruit new lawyers, obtain CLE credits, and get qualified experts to evaluate clients within acceptable timeframes. Providers here also noted the challenges of funding professional expenses, such as Oregon State Bar dues, Professional Liability Fund dues, CLE costs, and professional memberships

Southern Oregon

The Southern Region meeting included the contract administrator, or a representative, for every public defense provider in the following counties: Coos, Curry, Douglas, Jackson, Josephine, Klamath, and Lake.

Similar to providers in the North Coast region, many providers were concerned about low rates in dependency cases, and the lack of time available to attend important events, such as the initial shelter hearing, and team and family decision meetings. They also suffer from

² The Office of Public Defense Services is working with providers in Deschutes County in an effort to address some of these challenges outside of the budget process; if those efforts are not successful, additional funding could be necessary to increase lawyer availability in this county.

a lack of social service providers and experts for mental health evaluations due to their remote locations.

Attorneys in this region also noted the significant expense of acquiring hardware and software necessary for maintaining technology, as well as ensuring attendance at continuing legal education courses, and providing adequate training for new lawyers. As in other larger jurisdictions, lawyers in Jackson County expressed significant concern about low rates of compensation, and the negative impact on families of lawyers and staff. Here, not only is the compensation below what is offered in the District Attorney's office, the public defender employers cannot afford to offer health insurance to family members under the employee's medical plan.

Tri-County

The Tri-County Region meeting included the contract administrator, or a representative, for every public defense provider in the following counties: Clackamas, Multnomah, and Washington.

Without a doubt, the biggest issue for providers here is the low rate of pay, especially when compared to what attorneys are paid in district attorney offices in this region. In these counties, public defense provider salaries remain approximately 35% or more below district attorney salaries. Providers explained that in order to provide sufficient compensation for lawyers, they must accept more cases than they should. These providers also noted the high travel and time costs associated with visiting dependency clients, and commuting between the juvenile and downtown court facilities. The high caseloads make it very difficult for these lawyers to meet performance expectations, including standards for regular visits with child clients, prompt scheduling of court matters, and adequate time for client communication.

Lawyers here also noted the need for increased compensation for support staff and staff investigators, and expressed support for the notion of compensation based on a caseload size that is not excessive; one that would allow lawyers to spend more time with clients and on case preparation, and increase lawyers' availability for court proceedings. They also emphasized the need for compensation that recognizes the experience level and skill of the practitioner.

Finally, similar to other regions, providers in the Tri-County area expressed a need for assistance with technology costs, and concerns about inefficiencies as a result of the lack of uniformity in technology and case management systems.

Willamette Valley

The Willamette Valley Region meeting included the contract administrator, or a representative, for every public defense provider in the following counties: Benton, Lane, Linn, Marion, Polk, and Yamhill.

Lane County providers have experienced a significant decline in case filings, which has highlighted the impact of a contracting system that pays providers for cases filed without any provision for overhead costs. The dramatic changes have resulted in significant layoffs, while the public defender office remains obligated to the larger office space and associated overhead costs. Providers recognize that there is a need to reduce size when filings decrease, but indicate that it would be helpful to have some financial recognition of the realities of running a business. For public defense providers, who don't have significant if any mechanism for generating other income, the lack of funding for overhead results in significant economic hardship. Lawyers here indicate that while the case numbers have declined, case complexity has increased, as have their technology costs. The staff time and expertise, as well as software expenses, required to manage electronic discovery has created yet another burden for these lawyers.

All provider types here indicated that contract administrators are spending significant time managing contractor operations, including performance oversight, and expressed a desire for funding that recognized and valued the many administrative responsibilities expected by the Public Defense Services Commission.

As in other jurisdictions, lawyers here indicate that their high caseloads make it difficult to schedule court hearings in a timely fashion, attend citizen review board hearings, and other important case events. They also expressed a need for improved technology.

Finally, like lawyers in the Washington, Multnomah, Clackamas, Deschutes and Jackson Counties, lawyers in many of these counties note the difficulty of attracting and retaining lawyers when district attorney offices offer much higher salaries, as well as generous retirement, health, and other benefits.

Specialized Provider Challenges

Post-Conviction Relief (PCR) & Habeas Corpus

Statewide providers handling PCR and habeas cases cited contract administration costs as being one of the most significant burdens of their practices. Not only are qualified attorneys difficult to recruit at the available rates of pay, there are very few attorneys who

are qualified to do this work. This means that contract administrators must spend a significant amount of their time training and mentoring lawyers who are new to the practice, even if those lawyers have experience in a related field. These providers also have significant costs associated with document management – this includes collection of documents from previous proceedings in the case (because these providers handles cases statewide, they encounter different document sharing practices in each jurisdiction; conversion of extensive records, that include paper and electronic documents into an organized electronic file system, and efficient storage of electronic documents in an appropriate case management system, is a time consuming endeavor).

Capital Representation

Lawyers handling capital cases expressed a need for uniform case management requirements and funding to acquire hardware and software necessary to achieve uniformity. Providers are often purchasing multiple software programs to open discovery (which can come multiple sources from each locality across the state), document storage, and case management systems that support a team work environment. They also noted the low rate of pay as a significant challenge. Providers in the federal system are paid at a rate of \$178 per hour, while Oregon providers receive \$98 per hour if they are working under a contract, but often only \$60 per hour if they are not contract providers.

Statewide Challenges

Providers in every region of the state expressed concern about lack of predictability in funding for public defender work. The Public Defense Services Commission requires providers to have offices where clients can meet with their lawyer, that consortium groups have active boards (or another mechanism to build in a mechanism for oversight and transparency) to make financial and operational decisions, and consistent staffing to ensure that clients can get information when the lawyer is in court. When fixed costs, such as rent, technology, professional expenses, etc. continue to increase, compensation based exclusively on case rates becomes a bigger challenge.

Providers also expressed frustration with managing the costs associated with running private businesses when they rely upon contract rates that are much lower than what most private sector lawyers are able to earn. They expressed an interest in capturing savings through bulk rate purchases agreements, including procurement of case management systems and software at reduced rates.

Additional Information

Each year, OPDS sends a survey to every Oregon jurisdiction to assess the quality of representation in public defense cases. This year, as in past years, survey comments suggest that large caseload sizes are one of the biggest challenges for public defense providers. In most jurisdictions, judges indicate that public defenders' caseloads impede efficient scheduling of court appearances, decrease lawyers' ability to timely appear in court, and negatively impact necessary lawyer-client communications in advance of court appearances.

Conclusion & Recommendation

While the Office of Public Defense Services would like to resolve all of these challenges in a single contracting cycle, such a shift would require a substantial increase in funding and a radical change in the current contracting model. Given the significant need for system improvements statewide and the extensive work that would be required to achieve a complete change in the contracting model, OPDS recommends that the Commission pursue funding through a policy option package that will achieve improved services in each region of the state.

Before OPDS builds a final policy option package, it is important that contractors review the priorities as summarized above and listed below, and that they have a chance to provide feedback. If the listed priorities do not sufficiently address providers' needs, that information should be shared with the Public Defense Services Commission at its meeting on April 17, 2014.

Recommended funding priorities identified through regional meetings are as follows:

1. Consistent case rates within each county (and among similarly situated counties)
2. Increased compensation and decreased caseload sizes in the following counties¹: Clackamas, Coos, Deschutes, Douglas, Jackson, Josephine, Lane, Marion, Multnomah, and Washington
3. Mileage expenses necessary to enhance providers' ability to meet performance standards related to client contact in the following regions: Eastern, North Coast, Central, Southern Oregon, and the Willamette Valley
4. Compensation for administration and quality assurance oversight for all providers, including statewide contract providers (Post-Conviction Relief and Habeas Corpus)
5. Increased hourly rates for contract and non-contract capital providers,
6. Funding to purchase an OPDS-approved case management system

7. Professional expenses including Oregon State Bar and Professional Liability Fund dues (provided at a percentage equal to the portion of attorney time dedicated to public defense cases)

Once the priorities have been discussed, and are further refined and prioritized, OPDS will develop a final recommendation for a policy option package.

ⁱ The Office of Public Defense Services is current analyzing case rate ranges, population statistics, and district attorneys salaries in all Oregon counties. If there are counties where provider rates are below other similarly situated counties, those will be added to the list of counties in need of compensation increases.

DRAFT
2015-17 BUDGET DEVELOPMENT
REGIONAL STABILIZATION POLICY OPTION PACKAGE

Revenue Neutral Adjustments:

Step 1: Update 2014-15 contract rates to reflect 2013 legislative actions

- 5% services and supplies reduction
- POP funding

Step 2: Remove investigation from contract rates¹

Budget Enhancements:

Step 3: Adjust case rates to achieve consistency between provider types within each county (and among similarly situated counties).

Step 4: Increase rates to reduce (to greatest extent possible) salary disparity between providers and district attorney offices in areas where the average disparity is greater than five percent.²

Step 5: Add funding amounts to address selected priorities: transportation costs, caseload reduction, professional development/dues, improved technology, contract administration and quality assurance.

¹ Contract providers who currently offer additional case services including, but not limited to, investigation, mitigation, etc., as a part of their existing contract rates will receive an amount equal to current funding plus the appropriate CSL (current service level) adjustment, which will be included as a percentage increase in a special term of the 2016 contract.

² While OPDS is starting with a goal of increasing provider rates to allow salary increases that are not more than 5% below district attorney salaries, it is possible that OPDS will recommend adjusting the goal once final budget numbers become available.