

Members

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



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Thursday, April 22, 2010
10:00 a.m. – 3:00 p.m.
Oregon State Bar
16037 SW Upper Boones Ferry Road
Tigard, Oregon 97281-1935

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's March 4, 2010 Meeting
<i>(Attachment 1)</i> | Barnes Ellis |
| 2. Action Item: Contract Approval
<i>(Attachment 2)</i> | Barnes Ellis
Kathryn Aylward |
| 3. Boards of Directors for Public Defense Contractors – Review of Draft Policies
<i>(Attachment 3)</i> | Barnes Ellis
Commissioners |
| 4. Appellate Division Review <i>(Handout)</i> | Peter Gartlan |
| 5. Attorney Evaluation Models
<i>(Attachment 4)</i> | Paul Levy |
| 6. OPDS Monthly Report
- CBS Internal Audit
- Eligibility Standards – Update
- Delinquency Representation - Update
- Management Review – Recommendation
- Outline of Budget Process | OPDS Management
Team |

Please note: Box lunches will be provided for Commission members at 12:00 p.m.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.

NEXT MEETING: The next meeting of the Commission is scheduled for June 17, 2010 from 9am to 2pm at the Inn at the Mountain in Bend, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION
OFFICIAL MINUTES

Thursday, March 4, 2010
10:00 a.m. – 3:00 p.m.
Room 357
Oregon State Capitol
Salem, Oregon

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
Peter Ozanne
John Potter
Janet Stevens
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Paul Levy
Billy Strehlow
Caroline Meyer
Amy Jackson

Agenda Item No. 1 Approval of the Minutes of PDSC's January 28, 2010 Meeting

MOTION: Hon. Elizabeth Welch moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 2 Boards of Directors for Public Defense Contractors

Chair Ellis summarized the issues previously discussed by the Commission regarding boards of directors for contractors: Should contract offices be required to incorporate or have some other formal business structure? Should they be required to have boards? If boards are required, should the requirement apply to all contractors or only to some types of entities or entities of certain sizes as measured by the number of attorneys or the amount of the contract? Should there be a prescribed number of independent members? Who would qualify as an independent member? How should independent members be selected? Would requiring consortia to have boards cause them to become units for purposes of ethical conflicts?

Paul Levy said that he did not believe consortia would violate the firm unit rule simply because they had a board of directors with oversight capacity. Chair Ellis requested exploration of that issue. Paul Levy suggested that the Commission consider boards in the larger context of how to get providers to embrace their quality

assurance responsibility. It is not clear that boards necessarily accomplish that goal. Chair Ellis said that the most important function of a board is the selection of the manager and the review of the organization's finances. Should they be overseeing quality of representation in individual cases? Paul Levy said that some boards, especially those comprised of members, do handle complaints about members and monitor member performance.

Commissioner Ozanne recommended that law firms be exempt from the board requirement but that the Commission continue to prefer the consortium model over the law firm model. Chair Ellis noted that some of PDSC's best providers are law firms.

Commissioner Welch said that accountability to the public is another factor to keep in mind. If law firms are excluded from the board requirement where is their accountability? Commissioner Ozanne said that advisory boards for law firms had been suggested in the past.

With respect to having independent board members, Chair Ellis said that an independent member would not receive compensation for representation and would be selected by someone other than the provider. Commissioner Ozanne said that an independent member would be the best assurance that the right person would be selected to be the director of the consortium. He said lawyers should not be excluded since some consortia have benefited from having business lawyers on their boards.

Commissioners discussed possible approaches to selecting independent board members including appointment by the state bar, the Chief Justice or presiding judge or by having the board nominate three candidates from which PDSC could select an independent member. Commissioner Ozanne expressed concern about preserving independence from the judiciary in some geographic areas if the judges are involved in the selection process. Commissioner McCrea proposed that the issue of independent board members be postponed. Such a requirement might indicate a lack of confidence in PDSC's providers, and in some cases the independent member might interfere with the board's ability to perform. Commissioner Potter agreed and said it is important for board members to get along. If contractors understand the Commission's goal they will address it without being required to.

Commissioner Lazenby said that he agreed but that it might be appropriate for the Commission to have the ability to place a member on the board if there are problems not being addressed by the provider. That member would act as PDSC's agent. Such a requirement could be included in the contract. Commissioner Ozanne said that allowing PDSC to select from three proposed members would achieve the same goal but would also ensure that the person selected would get along with other board members.

Chair Ellis asked whether, assuming an independent member were required, independent members should comprise any specific percentage of the membership. Commissioner Potter said that a single member might be isolated. There should be a minimum of two. Commissioner Lazenby agreed. Commissioner Welch said it would be useful to set out what the role of the independent member or members would be.

With regard to which contractors would be required to have boards, Commissioner Ozanne said that the dollar amount of the contract should be the determining factor since the real concern is the use of taxpayer funds. Paul Levy noted that the list of contractors being reviewed by Commissioners included only those with five or more attorneys and that the information about whether they had boards of directors came from a variety of sources and that some providers were uncertain about the nature of their own entities. Chair Ellis said that as stewards of public money PDSC should be certain that it is dealing with an entity. A straw poll of commissioners indicated agreement. Chair Ellis then requested a straw poll on whether contractors

with contracts exceeding two million dollars, but not including law firms, should be required to have boards of directors with at least two independent members. An independent member is a member who is not a compensated provider but need not be selected by an outside source. There would be two contractors on the list provided to the Commission that do not currently have boards that would be required to form boards and several contractors that would be required to increase outside participation.

Commissioner Potter inquired whether the two contractors were resistant to having boards. Paul Levy said that they had not been asked. In some communities however providers have made it clear that they do not intend to form boards and there are no alternative providers available for PDSC to select from. He said that it was his understanding that the Commission would develop a proposal on boards and then give providers an opportunity to comment on it before taking final action.

Commissioner Potter suggested that since OPDS has already endorsed a best practice of having a board, PDSC could require contract applicants to indicate whether or not they had a board and, if not, what safeguards they had in place to ensure quality representation. Chair Ellis said he was skeptical that such a requirement would have any real impact. Commissioner Ozanne said that whatever policy PDSC decides on should have near unanimity of support. Commissioner Welch asked what would be accomplished by requiring two contractors to get boards. She also suggested that only one independent member be required because of the difficulty of finding two. Commissioner Stevens said that since public funding is involved, the board requirement should not be limited to larger contractors.

Agenda Item 3

Right to Counsel in Juvenile Delinquency Cases

Ingrid Swenson noted that ORS Chapter 151 sets forth the powers and responsibilities of the Commission and that at this meeting Commissioners would be receiving information about two specific areas in which it is directed to adopt policies, procedures, standards and guidelines – the appointment of counsel in delinquency cases and eligibility for appointed counsel. On the first topic she introduced Jordan Bates who had prepared a paper on the right to counsel and George Yeannakis with Team Child in Washington.

Jordan Bates said that in preparing her paper she surveyed each county regarding the process used by the local juvenile department and the court to accept waivers of counsel by youth in delinquency proceedings. She summarized federal law regarding the recognition of the right to counsel and other due process rights for juveniles. She described the special nature of juvenile court proceedings and the perception among many that it is all for the benefit of the youth. She pointed to recent brain research indicating that the areas of the brain that affect ability to plan, anticipate consequences and control impulses are not fully developed in adolescents and that these functions are directly related to the ability to make a knowing, intelligent decision to waive counsel. She pointed to three Oregon cases that dealt with waiver of counsel by juveniles and said that the practice in some counties of having the youth just check a box on a waiver form does not comply with the law. She said information obtained from the Oregon Judicial Department indicated that between 33 and 39 percent of youth appear without appointed counsel in delinquency cases. In counties where waiver is common there is usually no defense attorney present at the time of the initial appearance and youth may be left with the impression that they will be treated more leniently if they don't invoke the right to counsel. Kentucky and other states require that a youth confer with counsel before deciding whether to waive counsel. In some counties in Oregon it would be difficult to have a lawyer present for each initial appearance. Kentucky also prohibits youth from waiving counsel in certain types of serious cases. Ohio and Louisiana prohibit waiver if certain types of placement are being proposed.

George Yeannakis described the work of Team Child in Washington. One of his roles as special counsel to the team is to ensure that juveniles are represented by

counsel at all critical stages of the proceedings. In 2005 a study in Washington indicated that 20% of youth entering guilty pleas were unrepresented. The number varies from one county to another with nearly 100% of youth in King County being represented. In Washington State public defense is county funded and the quality of representation varies widely. In 2003 a study entitled the “Washington Assessment of Access to Counsel and Quality of Representation in Juvenile Defense Matters,” performed by the American Bar Association and the National Juvenile Defender Center, noted the significant number of youth who waived counsel. Some Washington counties turned the right to counsel on its head by requiring that youth who wished to be represented had to fill out a form and request counsel. In response to the study, the Washington Bar Association created an Indigent Defense Committee with a subgroup focused on juvenile defense. The subgroup sought legislation to limit waiver in 2004 but was not successful. The group then sought adoption of a uniform court rule. He described initial resistance to the proposed rule mainly from judges and prosecutors who feared interference with the efficient operation of the court. Defense advocates worked with prosecutors to address their concerns and, in view of both the direct and collateral consequences of juvenile adjudications, determined that youth should have the advice of counsel before deciding whether to waive counsel. The King County prosecutor was particularly concerned about the impact of invalid waivers on the validity of the adjudications obtained. He drafted the waiver form now used in Washington. The uniform waiver rule was adopted in June of 2008 by the Washington Supreme Court and took effect in September of 2008. In 2009 fewer than two percent of guilty pleas were uncounseled in Washington. The Florida Supreme Court has now passed a similar rule after finding that an earlier rule requiring written waiver was inadequate. Mr. Yeannakis said it is difficult to believe that the almost 40% of youth who are unrepresented in Oregon are making voluntary and knowing waivers of their right to counsel. He pointed to a case in Massachusetts in which after a lengthy discussion about waiver of rights with his attorney a youth assumed he was expected to “wave” his hand in court and thus waive his rights. In Oregon, as in Washington, legislation with any fiscal impact is probably not likely to be successful, but it appears that PDSC could implement its own policy by either requiring contract attorneys to be present for initial appearances or providing that all juveniles should have an opportunity to consult with counsel before waiving any right.

Commissioners inquired about the definition of “knowing” and “intelligent,” and about conditioning the availability of diversion programs on waiver and observed that there appears to be significant pressure on youth to waive in some circumstances. They also inquired about the role of the youth’s parents in the waiver process.

Ingrid Swenson said that circumstances vary from one county to another in Oregon in terms of resources, access to public defenders, availability of judges, detention facilities and the like. She noted that a blanket prohibition on waiver of counsel might interfere with potential informal resolutions that benefit youth. She said that one approach the Commission could take would be to create an informal workgroup chaired by a member of the Commission to bring various system representatives together to discuss the extent of the problem and proposed solutions. She said that the Chief Justice had previously suggested that the Commission prepare a recommendation to be provided to juvenile court judges. She noted that the current PDSC contract required providers to be present for initial appearances but in some counties this is not occurring on a regular basis. She said the cost of implementing a requirement that youth confer with counsel before waiving their rights would not necessarily be significant since PDSC could contract with providers to be present for specific proceedings as needed and is currently doing so in some counties. Another obstacle to access to counsel at initial hearings is the requirement in some counties that the youth and his or her parents first be determined to be financially eligible. For purposes of conferring about whether to waive, it might be less expensive to provide counsel at that stage without an eligibility determination and, if the youth decided not to waive and to seek appointed counsel, eligibility could be determined at that stage.

George Yeannakis said that in Washington having counsel available at initial hearings appears to have resulted in fewer juvenile court filings because prosecutors are screening cases more carefully.

Commissioner Lazenby said that even a limited appearance by counsel would be a billable event and that the cost will have to be determined.

Chair Ellis inquired whether legislation would be more appropriate than a uniform court rule. Ingrid Swenson said that the issue arises in the court setting and that it should probably be addressed there. Commissioner Welch said that an informal advisory group discussion might focus attention on the issue. In many places tradition dictates what these processes look like. She noted that the role of parents is complicated because they are often angry with the youth for his behavior and have had to miss work to meet with the juvenile counselor who tells them what the consequences will be if the youth admits to the allegations and that the entire matter can be taken care of today. In her experience the answers given by youth to questions in the course of making admissions indicated that they often didn't know the meaning of their rights. In Multnomah County counsel was appointed for every youth. Youth are not permitted to enter into contracts until they are 18 but they can get criminal records when they are 12.

Commissioner Potter questioned whether further discussion was needed. He said he would support submission of a court rule requiring youth to have the advice of counsel in order to waive.

Chair Ellis said that the Commission should not act unilaterally but questioned whether this type of substantive issue would be appropriately addressed by court rule. Legislation appears to be the most appropriate approach. Legislation could be drafted while going forward with the stakeholder meeting. Commissioner Lazenby agreed. Commissioner Stevens expressed concern for any legislative proposal that had a cost attached. Chair Ellis said that with such a compelling case, this might be an exception and that costs might actually be reduced as had been the case in Washington State. Commissioner Ozanne said that proposing legislation might foreclose proceeding by rule or policy and that the state is anticipating a two billion dollar deficit in the next biennium. Commissioner Lazenby said that he has frequently seen expediency prevail over the need for counsel in the legislature and recommended that while performing due diligence, PDSC should keep the court rule option open. Chair Ellis said that another route would be for the juvenile appellate lawyers to litigate a case involving this issue. Commissioner Welch said that one of the other complicating factors is related to the eligibility standards and local practices with regard to how they are implemented. Parents whose income makes them ineligible for appointed counsel may not be willing to spend the funds needed to retain an attorney for their child. Chair Ellis suggested that the eligibility standards be included in the discussion with other stakeholders. Commissioner Potter said that he preferred a mechanism other than legislation to address the issue.

Agenda Item No. 4

Eligibility Standards for Court Appointed Counsel

Kathryn Aylward said that the material provided to Commissioners included information about both the Application and Contribution Program (ACP) which relates to the upfront contribution made by applicants for court appointed counsel and to recoupment that is imposed at the end of the case. Money received at these two stages go different recipients. She described the verification process used to determine eligibility for court appointed counsel. The person seeking counsel completes an application and affidavit listing income, assets and expenses. The verifier then completes a worksheet and may follow up with questions. The worksheet includes both a cost of living guideline figure based on the federal poverty level and the actual costs as provided by the applicant and uses only the lower of the two figures. The verifier then enters an amount from the private attorney fee schedule and makes a recommendation to the court. Even though the

applicant's actual cost of living may mean that he does not have liquid resources with which to retain counsel when these policies were developed it was assumed that people should be expected to sell assets or borrow money if needed to obtain counsel. Assets are considered liquid under the policy if they can be liquidated within 30 days. Counsel is denied to those whose income exceeds the federal guideline amount by an amount that is the same as or greater than the cost of retained counsel from the attorney fee schedule. There is a different attorney fee schedule for each county. The fee schedules are based on information provided in 1991 in response to a survey of private attorneys in each county. A flawed methodology was used and the discrepancies between counties are therefore arbitrary.

When the verifier makes a recommendation regarding appointment to the court the court sometimes requires the applicant to find retained counsel. If the applicant returns to court and reports failure after diligent effort to find counsel willing to take the case based on the client's resources, the court makes the appointment anyway. OPDS has not been able to obtain information from the courts regarding the frequency of appointments under these circumstances. Consequently, the fiscal impact of increasing the amounts in the attorney fee schedule is not known. Some counties have urged OPDS to revise the schedule but have not provided information about the specific case types that are creating problems. Included in the information provided to the Commission are statistics regarding the number of cases in which there was no recommendation, an affirmative recommendation and a recommendation of denial. Verifiers in different counties may not be reporting information consistently. It does appear, however, that in many cases the judges are appointing even though the verifier is recommending denial. With such sketchy data it is impossible to predict the cost of increasing the rates in the fee schedule to make them more current. Kathryn Aylward said that she believes there should be a simple system with consistent rates statewide.

Chair Ellis noted that adoption of eligibility standards is a Commission responsibility under ORS Chapter 151. He inquired whether it wouldn't be better to identify a designated amount of liquid assets which would indicate that a person should be required to hire their own counsel.

Commissioners questioned whether the costs of the verification system exceed the amount saved. Kathryn Aylward said that studies performed at the initiation of the verification system indicated that for every dollar spent on verification, two dollars in public defense funds were saved. The savings may be a result of people who don't apply, knowing that the information they provide is subject to verification. She explained that ACP revenue goes to a sub-account of the Public Defense Services Account. It is used to pay for the services of approximately 23 – 26 verifiers in the Judicial Department and staff at OPDS who administer the public defense services system. When recoupment of attorneys fees is required at the end of the case, these funds go to the Criminal Fines and Assessment Account

At the end of the case the court determines the amount of recoupment that will be ordered. Some judges impose a cost per hour based on the number of hours reported by the defendant's attorney. Others impose the rate received by the contractor for the particular case type, if known. Attorneys tend to minimize the number of hours reported and may not know the contract rate for the case type. PDSC is authorized in Chapter 151 to establish a schedule of fees which could be equated to the contract matrix. The amount imposed should probably be consistent. The courts would welcome some guidance. It might be the simplest to impose a single statewide standard but some defense attorneys are opposed to moving away from the hourly rate for recoupment.

With respect to the eligibility standards Kathryn Aylward recommended having a consistent rate statewide and increasing it from the current level by 15 or 20% and seeing what the impact is. Chair Ellis said that identifying the amount of liquid assets that would be required to retain an attorney for different case types would avoid the need for the detailed questionnaires now in use. Kathryn Aylward said that

a lot a work went into the design of the program and a lot of training was provided to the verifiers and it would be a significant burden to redo the manual and retrain them so she would recommend increasing the amounts in the fee schedule and making it uniform statewide. Commissioner Welch expressed concern about expecting people to contribute when they are not really able to do so. She said that something should be done about requiring parents to pay for representation of their children.

Kathryn Aylward recalled the statement in a committee hearing of one legislator who was concerned that his son was provided advice regarding his right to remain silent by a public defender when the father would have been able to retain counsel for the youth.

Commissioner McCrea said that in the federal system a simple one-page affidavit is used and people generally qualify in view of the complexity of federal cases.

Commissioner Potter said that the options appear to be to update the schedules or to simplify the system and establish statewide numbers for each offense.

Commissioners reviewed the data from the Judicial Department and found that the number of denials was relatively small so that the impact of increasing attorney fee schedule amounts might not be great.

Agenda Item No. 5

OPDS Financial Monitoring Systems and Safeguards

Kathryn Aylward said that the two goals of a financial monitoring system are to prevent embezzlement and unintentional errors. The easiest way to prevent embezzlement is to require multiple signatures. The standard requirement in state government is to have two signatures, OPDS requires three on all expenditures. An accounts payable representative examines each invoice to check the math, to confirm that the expenditure is appropriate, that it was preauthorized if required, and that the attorney was actually appointed on the case. Payment must then be approved by the Business Services Manager and by either the accountant or her representative. There are eventually three signatures on everything approved for payment. When the Secretary of State was considering an audit of OPDS they decided not to proceed since the chance of finding anything was so small. Although there is not concern about possible fraud, an internal audit might be useful to look for possible mistakes. The office processes 40,000 documents and people can get tired and not check everything carefully. An internal audit would be preferable because an outside auditor would not have enough information about what is appropriate and what is not. The contract analysts at CBS, however, would have the necessary knowledge to review the work of the Business Services representatives and this would be a good time in the contract cycle for them to assist in such an audit. Such an audit could be a first step in a review of OPDS functions.

Commissioner Ozanne said that he was not concerned with fraud or mistakes within CBS. His concern is with the contracting function. A national organization like the National Association of Public Contracting could evaluate our system and tell us how to improve the way we handle this process. Such a group would have found the eligibility problem, for example. Commission Stevens asked is he was recommending a performance audit and Chair Ellis asked whether he might be proposing that a systems analyst be consulted, someone like the Aldridge firm.

Commissioners agreed that the internal audit should proceed and Chair Ellis noted that a lot of enterprises have outside firms come into to review management practices. Commissioner Lazenby said that such a firm could look at the soundness of OPDS's systems and provide training on how PDSC can do continuing audits for itself. Chair Ellis said that the firm could be asked to look at the systems within OPDS affecting the expenditures of money to see if the right checks and balances are in place. Kathryn Aylward said that we had already received confirmation in a letter from the Secretary of State indicating that we have enough checks and balances. She assumed Commissioner Ozanne was seeking more of a management practices

overview. Chair Ellis said it sounded like a management consultant group that would look at our functions and processes and advise if they saw better ways of organizing ourselves. Commissioner Potter suggested getting a better definition of what was needed by having a conversation between staff, Commissioner Ozanne and Geoff Guilfooy. Ingrid Swenson said that the Commission is the principal overseer of the functions of the office and said that one approach would be to spend a portion of every meeting talking about specific functions and how they are performed. Then Commissioners might say, as they did at this meeting, that action needs to be taken to address specific issues, such as the eligibility standards. With respect to some of these issues, the appropriate response might be to recommend consultation with a management specialist. Commissioner Ozanne repeated his concern about the desirability of having advice from someone with experience in big contracting systems. Commissioner Stevens said that without any indication that there are problems she is not sure money should be spent looking for them but she would support the internal audit. Commissioner Ozanne said that when he served on the PERS board he had approached the Governor about the problem of paying people more after retirement than they made while working but other board members said the system was looking fine. Commissioner Welch said that the issue regarding eligibility, which reflects poorly on the Commission, suggests that there may be other issues that the Commission should be looking at. Commissioner Ozanne said he would attempt to fashion a proposal for discussion at a future meeting.

Agenda Item No. 6

OPDS Monthly Report

Peter Gartlan introduced the Appellate Division's two new chief deputies, Josh Crowther and Ernie Lannet, who are replacing Rebecca Duncan and Bronson James. He also identified new attorneys who would be starting over the course of the next several months and noted that the Division had had four Oregon Supreme Court arguments during the week.

Kathryn Aylward reported on actions taken by the 2010 legislature affecting the PDSC budget. PDSC received authorization to spend up to 8.8 million in revenue from the fee bill if it is forthcoming. PDSC reforecast its expenditure needs and \$1 million was disappropriated and reappropriated elsewhere. The legislature approved a rebalance of \$155,000 between trial and appellate funding in view of a drop in trial level cases and an increase in appellate level increases. A special purpose appropriation of \$3.5 million was made to the Emergency board which included the \$1 million that was disappropriated and some funds that were disappropriated from the Judicial Department. PDSC will be reporting to the Emergency Board and the Interim and session Ways and Means Committees regarding caseload developments and revenue under the fee bill.

She provided the Commission with a revised compensation plan that will move deputy public defenders closer to achieving pay parity with their Department of Justice counterparts as required by statute. These adjustments to the salary scale need to be in place before the report is prepared that will be used for next biennium's budget. These adjustments apply to steps on the scale that currently are not occupied so there is no current cost to implementing the increases. Commissioner Ozanne asked whether these changes violate the salary freeze. Kathryn Aylward said that they do not. Steps have been relabeled but the salary for the individual will not be increased simply because lower steps are dropped. In two more years she hopes to be able to reach parity.

Paul Levy discussed his report on the third annual statewide public defense performance survey which seemed to indicate that progress is being made in the area of juvenile representation. Individual comments received from respondents have been particularly helpful. Judges were the largest category of respondents.

Ingrid Swenson reported that she and three other representatives from Oregon had attended a symposium on indigent defense sponsored by the US Department of Justice in February and was able to meet with colleagues from around the county and

learn about successful strategies used in other jurisdictions to address some of the major challenges faced by indigent defense systems.

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

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION
UNOFFICIAL EDITED TRANSCRIPT

Thursday, March 4, 2010
10:00 a.m. – 3:00 p.m.
Room 357
Oregon State Capitol
Salem

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Chip Lazenby
Peter Ozanne
John Potter
Janet Stevens
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Peter Gartlan
Paul Levy
Billy Strehlow
Caroline Meyer
Amy Jackson

Agenda Item No. 1 Approval of the Minutes of PDSC's January 28, 2010 Meeting

0:00 Chair Ellis This is a departure from past practice but we are going to stay on a strict time table today. It has all been worked out. We have one hour to handle topic number two when we get there. First action item is the minutes of the January 28, 2010 meeting. Are there any additions or corrections? If not, I would entertain a motion to approve.

MOTION: Hon. Elizabeth Welch moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

0:43 Chair Ellis I do want to commend those who prepare these minutes. I thought a lot of good effort went into them, and I thought both the summary minutes and the transcript minutes are just an extremely helpful record to have.

Agenda Item No. 2 Boards of Directors for Public Defense Contractors

1:01 Chair Ellis Item No. 2 is a continuation of the topic that we debated some at the January 28 meeting. This is the question relating to contractors and whether we a) should require them to be incorporated or have some formal business structure; b) if so, should we insist that there be a board; and, c) if so, should we insist that there be outside members. We will have to define all that. If you look at Attachment 2, which Paul prepared, I thought he put a lot of good information in there. There really seemed to be six issues if we go the route of saying we are going to make it a part of our RFP, at least for some, that they have boards and outside members on the boards. The six issues as I saw it show up on about the fourth page of this document. One is do we want to require governing bodies? If so then 1) is there a size cutoff either measured in dollars or number of attorneys that we want to use? 2) Do we

want to require a percentage of voting members to be independent, and 3) if so, who do we view that qualifies as an independent member? Next is, if we want to go this far, how do we think an independent member should be selected? The next issue is do we exempt law firms from this for reasons that we can discuss, and finally, do we want to require a formal business structure? This is obviously addressed at those consortia that are more informal. Those seem to me to be the six subjects. What I was going to suggest we do is not decide first, "Are we going to require it?" but talk first along the lines of, "If we require it, what would that requirement be and to whom would it apply?" Then when we get to the end of that we will see what the pulse of the group is as to whether we will make this a condition of the RFP. Is that procedure satisfactory? I would be very interested in any comments any of you have on those subjects. Maybe just start with the last question, or one of the last questions, should we exempt law firms from what we are talking about? That is obviously a very different structure.

- 4:36 J. Potter How many law firms are under contract right now? I can think of the Jack Morris firm.
- 4:41 Chair Ellis I think if you look on the table you will see the second column entry - Morris and Olson is clearly the largest. Brindle and McCaslin comes a little behind them. Washington County Indigent Defenders - there are a whole bunch of them, about six of them. Let me ask a question. Paul you may be best able to answer this. As I was reading all this it occurred to me that the driving reason that we have consortia is to avoid the ethics unit rule. It is no secret to anybody in this room that that is a big part of why we have done that. Do we run a risk if we insist on more structure, including a board, including a board with outside members, do we run a risk, in your opinion, of bumping up against the unit rule for conflicts? I think if we did, I would really like to know that before going too much further.
- 6:09 P. Levy I haven't thought a great deal about that question. My gut reaction is that you wouldn't necessarily. The entity out of which independently practicing lawyers operate, for purposes of providing public defense services, can have structure and many of them do and still not resemble, in the ways that matter, a law firm. I don't think that simply having a board or more structure...
- 6:59 Chair Ellis That was my belief. If we had that problem we are already pregnant with it because we have many entities this way. I don't think any of the consortia, to my knowledge, attempts to manage the way a PD manages its lawyers. You don't have the level of the supervision. You don't have the common record keeping. You don't have the indicia that I think justify the unit rule applying to a PD, but I want to be sure of the answer to that.
- 7:41 P. Levy I can't tell you today with complete confidence. I don't think having more structure and a board necessarily bumps into the firm unit rule. If I could add another comment or two - I don't want to intrude on the Commission's deliberations on this - I think there are other things that we would like to see consortia do that might implicate the firm unit rule a little bit more, which are the things you have just mentioned. If I can back up, I think the discussion of boards really needs to take place in a larger context, which is, how do you get consortia and other providers to embrace their own responsibilities for quality assurance? The Commission has identified boards as key to that and a number of other objectives, but the larger context for the discussion is really how do we make sure that our contractors police themselves, take on the responsibility for providing quality services, and not just simply operate as an entity to assign cases and pass out checks? Perhaps a board is a way to do that. I am not sure that there is good evidence that they are effective or even key to assuring that. There are other things that we would want consortia, and some do, to perform that do involve oversight and evaluation and monitoring and discipline. I think they can still steer clear of the firm unit rule but perform these functions as well.

9:32 Chair Ellis You have been on both sides of the debate because I know you have been very active in the State Bar Ethics Committee. I don't know if you are still on that.

9:38 P. Levy Not any longer.

9:40 Chair Ellis But you have been on both sides. Do you get any sense that there is a body of opinion within the state bar that questions this?

9:54 P. Levy I haven't been a part of any of those discussions or heard them. I don't think that there has been any concern that there are problems with the consortia model or that people have questioned whether or not these are really law firms. What we run into sometimes with public defense providers it is not the consortia so much as lawyers sharing space without making it clear that they are actually operating as separate law firms. They may not actually be complying with the recommendations of the bar through their formal ethic opinions for how to share space and maintain your individual practices.

10:58 Chair Ellis That is the situation where you might have a common receptionist, common space, two names on the door but it is not clear that they are independent of each other?

11:10 P. Levy There are some communities where most of the consortium members are in the same building. All of their names are on that building and for all the public knows that is one big law firm.

11:25 Chair Ellis I guess I am less worried about what some member of the public might think than I am worried about either what the state bar or some court might think.

11:33 P. Levy The state bar looks at it from the perspective of what would the customer think, the potential client or the public, when they go to that office building.

11:50 Chair Ellis My belief is that most consortia are well aware that the assignment is to an individual. He or she is not to closely associate with others. They are to keep their own records and it is very individual to them. It is not a group assignment.

12:20 P. Levy I think that is how they understand they should be and are operating. I think it is in the context of our quality assurance task force site visits that we find some setups where you really question whether they are distinguishing themselves sufficiently from one another.

12:44 Chair Ellis I have always been of the view that the single most important function of a board in that context is the selection of the manager and the review of the finances to make sure fiscal integrity is maintained. I have not understood the consortia boards to go down to the case level, but you always run into a little bit of tension when we say, "Boards are responsible for quality. We are looking to you to assure quality." Does that get closer to something that we may need to stay away from?

13:38 P. Levy The boards that I am familiar with for consortia do concern themselves - to the extent they concern themselves at all with this and there are some that very much involve themselves - with dealing with complaints about members. They will look at member performance, in some instances, and they do that as a board. Now these are usually boards with members. They don't have outside members on them. They do more than simply hire and supervise the administrator or executive director.

14:24 Chair Ellis But we want them involved on the choice of who comes in. We want them involved if there is someone who shouldn't continue to be active on that. Are you comfortable we are not crossing the unit line?

14:44 P. Levy To the extent that I have thought about it, I am, yes.

14:51 Chair Ellis Anybody else have any thoughts on that subject?

14:58 P. Ozanne The subject of law firms?

15:00 Chair Ellis Well, we are kind of on more than one subject now. Go ahead.

15:09 P. Ozanne I just think that with the law firms we should exempt them from the requirement of a board and continue to indicate, as a matter of policy, that all things being equal we would favor consortia models as opposed to a law firm for the reasons that we have said in our introduction to service delivery plans, but we do business with the existing law firms.

15:33 Chair Ellis It happens to be the case that some of our very best providers are law firms. They seem to govern themselves pretty well. I think I agree with that.

15:43 Hon. Elizabeth
Welch I thought I did too until I thought about the materials that we have for today. I tried to make a list, and they are all very self-evident items on the list, of what this is all about. In other words, what are the goals of this discussion? I have about five or six things on the list and there is one item that has to do with why we are talking about this that wouldn't exempt law firms. This is the only one I could think of and that is the issue of accountability to the public. That is a factor here. I don't know how it weighs in if you were prioritizing my six, or 12, or whatever number it was. To the extent that we are talking about responsiveness to why the public pays for lawyers for people, there is nothing. Law firms have lots of reasons to take care of most of the other things that we would identify for their own internal health and profitability. I don't think that one quite fits. I am not sure about any of this, but that bothers me. At least my own conviction prior to this was that law firms should be off this list. Where does that accountability...

17:29 P. Ozanne That is why in the past we have talked about an advisory board. I still believe a firm in the community would be well advised to have that advisory group, advisory committee, to keep in touch with the community and to help in times of crisis, to advocate the function of public defense. It wouldn't operate like a board as much but it is more that public accountability. I think we have had fairly limited, if any, success with that in terms of getting firms to do that. I can't think of one right off hand that has done that.

18:16 Chair Ellis We can talk about all these subjects without having to segregate them out. What is everybody's sense as to what an independent board member is? Let me start by saying I think it is someone who doesn't receive compensation for representation. In the consortium context it would be someone other than one of the consortia providers. Then the related question in my mind is well, if you go that way, who selects them? I find myself very uncomfortable with the model that says you have a consortium of say 20 providers. Six or seven of those providers are on the board and they pick the so-called independent person. It is just too easy to pick someone you are comfortable with. I don't think you get the sense that there is someone really independent of you who is involved and knows what is happening within that enterprise. My own thought is that "independent" has two characteristics. One, it is a person who is not a provider and two, someone whose selection is not controlled by the providers. Is there a reaction to that?

20:00 P. Ozanne Certainly as you said earlier my concern in the past with boards has been to assure that the consortium be conducted in a businesslike way and be sure that the person who has been self-appointed, usually, traditionally, the director, is the right person. An independent member would be the best assurance of that, although it wouldn't necessarily solve the issue of inside groups. There have been very successful efforts and boards where a business lawyer has joined the board and really helped consortia sort out how to run a business. I not sure I would want to limit it to exclude lawyers from it.

20:58 Chair Ellis We met one last meeting with the Marion PD. I thought she was very impressive. This issue, that someone other than the provider group pick the independent member, that could probably be as controversial as requiring an independent member. I think if we go that route we ought to know where we are challenging some of our providers.

21:30 S. McCrea Who would you propose then makes that determination?

21:33 Chair Ellis A lot of boards among our providers have either the state bar do it, the Chief Justice do it, the presiding judge in the community do it. Those are the ones that come to mind.

21:52 P. Ozanne How about asking the board to nominate three candidates and then we pick one?

22:04 Chair Ellis And that would ratchet up the tension one more notch probably.

22:10 P. Ozanne I really wouldn't be comfortable with the presiding judge, personally, with all due respect.

22:13 Chair Ellis That is where they will go, though.

22:15 P. Ozanne We have cultures in some counties, in smaller counties, that wouldn't ensure that independence. I know your board when you were on it, the Metro board, had actually designated members and various authorities appointed.

22:38 S. McCrea I agree with you about the independent board member not receiving compensation. I am not willing to go so far as to set up requirements at this point on an independent board member. If that is going to be a requirement I would like to wait and see how that goes and then revisit it. I understand your concerns and I don't disagree with them, but for me there are a couple of factors. One is, I think that we are taking away too much independence from our providers and not expressing confidence in their ability to do what we are setting out for them to do. I think they can do it. Number two is, having sat on a lot of boards, small group communication is really important. It can be facilitated when you have a group of people who can communicate. Sometimes when you get a person in there who could potentially be this independent board member, who maybe looks on the surface when they are appointed like they would be a good addition to the group, can actually hamper the ability of that board and that group to perform. I don't want to set up the providers for failure. At this point, I am just not persuaded that we need to go that far.

24:04 Chair Ellis John?

24:06 J. Potter I am also leaning that direction. I think I need to see a problem before we try to address it. I know we can talk about preemptive problem solving, but in this case I am not seeing a problem. I think if contractors understand our goal, as Shaun said, they will address it. We can get an independent board. We can put somebody on an independent board that won't get along with the rest of the board members. Then we have created a problem that we didn't intend to create. You can have the entity itself select all of the people and everybody gets along. You don't have that independent person but they do get along and they get something done. I think there is value in that. I am with Shaun. I don't see that we need to move to an independent selection process controlled by someone outside the provider community. The provider community will understand what we are trying to do, and I think they will respond to it. If it turns out that we are wrong then we can address it.

25:24 C. Lazenby I am sort of in line with these guys. The only thing that I would add is that I think that it would probably be helpful to us to create the ability for us to step in and place somebody on the board if we perceive there are problems. Sort of to act as our agent to sort things out when there are specific incidents that come up. I don't think that we need to go to one-size-fits-all for the entire system that we have around consortia

and their boards. I especially like what Shaun said about some sort of confidence in our providers to be able to manage their own affairs within a certain range. As long as they are providing us with feedback about their quality that shows that they are looking at it, and our staff isn't hearing complaints, then I think the assumption should be that they are doing well. I wouldn't mind seeing us build into the contracts an explicit ability for their permission, if necessary, to appoint somebody to the board and report back to us if there are problems to sort things out.

- 26:41 Chair Ellis That is a radical thought.
- 26:44 P. Ozanne I don't see the concern if we ask them to select three people. They would be people that they presumably would get along with. I think for us that would be quite a crisis before I would want to select somebody that they haven't selected in advance or recommended.
- 27:09 C. Lazenby As you know Peter, I have had a very varied career. I had a brief spate as a franchise lawyer. Franchisees have that step-in ability.
- 27:19 P. Ozanne Barnes has a lot more experience than I do over things we worry about with corporate boards. We get qualified people and ask them to work it out among themselves.
- 27:37 Chair Ellis Let me put one other factor in the mix and see how people are thinking. If we go this route, is there a percentage of a board that we think should be independent, or is one enough?
- 27:52 J. Potter My gut reaction is that one is not enough. That is too lonely a position for someone to be in. I don't have a percentage in mind, but it would seem like you should have two people on the board who are not providers. That would be the minimum.
- 28:20 Chair Ellis You do it as at least two required as opposed to say a 20 percent requirement. Any other thoughts on that?
- 28:44 C. Lazenby I am in accordance with Commissioner Potter.
- 28:45 Hon. Elizabeth
Welch I think it would be nice, assuming that we do that, that some real serious effort be put into the finding of an independent member, what their function might be and some sort of preamble language. I think that might capture some of the other concerns but not control.
- 29:16 Chair Ellis Is there a contract dollar level or size of group level that people think we should, at least in the initial phase if we go this route, make the cutoff? Paul's document, I won't say he suggested it he just put it out there as a number we could consider, is contracts with two million. You can see on the chart that that would take us down through Morris and Olsen. They might be exempt for reasons that we talked about. The other way to approach it if we were to do an incremental program is think of number of FTEs as the line. I could see a criterion that would say, "contracts of two million or more with 10 or more lawyers," would be a rational way to do it. How do you react?
- 30:41 P. Ozanne I think money. I think the real concern, as Judge Welch said, is the use of taxpayer funds. I think it is more finance than internal operations. I guess I would go with the dollar rather than the lawyer.
- 31:01 P. Levy I just wanted to clarify on this chart you have, where it says "number of attorneys," these are not necessarily FTEs and especially with consortia these are almost certainly not FTEs.

- 31:22 Chair Ellis Anyone have a suggestion if we go this route of where you want to draw the line or if you want to draw the line?
- 31:35 J. Potter If money is the criteria and looking at Paul's chart it appears that Jim Arneson's firm is the lowest firm at just under a million dollars. A million dollars is a fair amount of money for the public to be feeling trustworthy about. I guess what I am saying is I wouldn't draw a line. I don't see anybody that would fall below my imaginary comfort level.
- 32:15 Chair Ellis Well, let's take the last three on the list. I don't pretend to know the details but these are pretty small groups. All three are informal entities. Is it your view that we ought to go all the way down to the bottom and require them to incorporate and have a board and include, at least, one independent member even though you are looking at a group of five?
- 33:03 J. Potter I'm sorry, Mr. Chair, I was addressing my comments to law firms and not consortia. Your question is broader. It is saying consortia groups and non-formal entity groups. You have a combination, then, of bodies involved as well as money. I think money is the correct way to gauge this, but in these smaller groups you have got five and six bodies, whether full-time or part-time, that are engaged in the process which makes things a bit more complicated. Having oversight and having a board help with that complication still might be warranted.
- 33:54 Chair Ellis I assume this list is intended to be all providers that practice in a group setting, whether it is a consortium, firm or a PD and it doesn't include individuals.
- 34:11 P. Levy This was a list of providers with five or more attorneys. There is actually an entity that we consider to be a public defender office that is not on this because there are only four lawyers in that office. It is five or more.
- 34:35 Chair Ellis I had a few questions on some of these providers. Take, for example, Lincoln Defense Consortium. Now that looks like a pretty large group of 14 lawyers, \$2.4 million dollar contract, and no formal entity.
- 35:00 S. McCrea But they do have a board.
- 35:00 P. Levy Yeah, a couple of caveats about this. It has been observed any number of times that criminal defense lawyers or former criminal defense lawyers don't necessarily understand business structure and operation terribly well. Actually that is what we have found trying to put this list together is that these providers sometimes don't even understand what their structure is. They would tell us one thing and then say, "We are not that we are this." When it says "no formal entity," I haven't seen what documents, if any, exist for the Lincoln Defense Consortium. As far as we know it is not a corporation. It is not a limited liability company. They may be a partnership.
- 35:55 Chair Ellis When we enter into a contract with them what do we say is the party we are dealing with?
- 36:00 P. Levy That is a good question. That is a separate issue that I think we have begun thinking about more, because with these groups that do not have a formal legal entityship, it is not clear whom we are entering into a contract with.
- 36:21 Chair Ellis I have another anomaly to ask you about.
- 36:25 P. Ozanne Barnes, the Lincoln Consortium, maybe I can speak more freely about it. Maybe things have changed but it was kind of a poster child for why we want structure. There has been a continual problem down there about accountability and management.
- 36:44 P. Levy This is a consortium that is composed of law firms.

36:51 Chair Ellis I guess my own sense is we are stewards of public money. I would like to be sure we are dealing with an entity. I think I would start, when we get to deciding what we are actually going to require, requiring those who want to submit multiple lawyer provider proposals to have a structure that is legally identifiable, which takes me to my next anomaly. I noticed on Linn County it is described as a for profit corporation but then it says it has no board. That seems to me like a contradiction in terms. Maybe it is just a typo. I don't know how that can be.

37:48 P. Levy In Linn County?

37:55 Chair Ellis Yes. It says, "Board, no." I don't see how that can be.

38:19 P. Levy I don't know either. The information was collated from a number of different sources and through a number of different means. I think the overall picture you are getting here is accurate. That one would cause you to question the accuracy of it. I don't know the answer to that one.

38:53 Chair Ellis Let's try to see if we are at a point that we have at least some consensus. These are straw votes. I am not asking for a formal commitment. On a straw vote basis do Commissioners believe we ought to require that any provider responding to an RFP, and that meets whatever criteria we later decide in numbers, be a recognizable business structure entity.

39:41 J. Potter You are talking about a legal entity?

39:43 Chair Ellis Right.

39:41 P. Ozanne Independent of the issue of a board it seems to me ...

39:47 Chair Ellis It all is driven that way. Then, straw vote that that the entity be one that includes a board. Let me point out what I think is an entity that meets the first criteria that may not meet the second. That is Multnomah Juvenile. I am guessing they are a member LLP. Am I right? So they don't have a board. They may or may not have a manager managed LLC, but they are probably a member managed LLP. Am I right?

40:34 P. Levy I don't know. If they are listed here as some form of limited liability entity they are an LLC or an LL something.

40:48 Chair Ellis Right. You can do that as a member managed LLC. So they could correctly answer the question, "No, we don't have a board." I think if the Commission's direction is to require a board they will have to restructure.

41:09 P. Levy I think they could form a board. You would know this better than me. I think they could form a board still within their structure as a limited liability company.

41:18 Chair Ellis I actually don't think so. They could have managers under their operating agreement, but I think what we are striving for, if we go that far, is a board with outside participation. I don't think that can be done under traditional LLC or LLP. On the straw vote basis is there consensus that the entity should have a board?

41:57 C. Lazenby Some sort of accountability structure. On this formation piece there are a number of different business entities that exist that may not ... for instance, voluntary associations. You can be a voluntary association and they won't be ...

42:17 Chair Ellis I am happy if that is what we thought we were dealing with.

42:20 C. Lazenby The way I am going is rather than sort of saying, "Well, generally, we think they ought to have some sort of entity," I think that we ought to say that if you are a consortium you can elect from a range of entities but you need to choose one."

42:41 Chair Ellis I think I am right if you include LLPs and LLCs in the permissible structure, then you are not going to get an outside board participation with real responsibility.

43:00 C. Lazenby I am more concerned with us contracting with a formless entity, a non-legal entity, than I am with whether we have a board or not. That sort of strikes at the heart of our ability to get accountability for the public funds. If there is mismanagement or something like that, we really have entered into a contract with something that doesn't exist legally.

43:27 Chair Ellis I think we are going to be embarrassed.

43:28 C. Lazenby I have more concern with that than I do with whether or not everybody has a board with outside members. I can see that there is utility in that, but I would like to see the formation piece cleaned up.

43:44 Chair Ellis I thought from the earlier straw vote we had consensus on that. Now we are at the next issue and that is should we, with the larger providers, require a board and require that the board include at least two independent members?

44:18 J. Stevens How are you defining independent? I am sorry I am behind.

44:22 Chair Ellis We had two issues on that. One is that they not be a compensated provider. The other that did not get support, but that was put out there, was that the appointing source be other than a compensated provider. The two Lane County Commissioners balked on that one. What about requiring a board and requiring that at least two members of that board be independent?

45:08 S. McCrea Well, Mr. Chair, requiring a board for whom? Your first proposal, if I understood what you were saying, was for all providers. Then you qualified it to our larger providers. That is why I am responding the way I am because I feel like I am being channeled. You're masterful at channeling.

45:40 Chair Ellis Let's assume for the moment, and this is just to keep the discussion moving, that we are addressing this to providers whose contract level is two million and higher.

45:51 S. McCrea Does that include law firms?

45:53 Chair Ellis I think we earlier had a discussion that. I thought I detected consensus that we would exempt law firms.

46:03 S. McCrea Okay.

46:03 J. Potter So in effect we are talking about three contractors that currently don't have board members that would fall into that category?

46:14 Chair Ellis There would be two, Multnomah Juvenile and Linn County Legal.

46:23 J. Potter The Morris and Olsen firm?

46:23 Chair Ellis But we are exempting law firms. There are two that would be pushed to form boards that don't have a board. Then there are several that would be pushed to increase outside participation on the board.

46:43 P. Ozanne I would agree with the two million. Just for discussion you are saying "large."

46:53 J. Potter Mr. Chair may I ask Paul a quick question?

46:55 Chair Ellis Yes.

46:69 J. Potter If we go forward with this notion, and there are two contractors that apparently don't have boards. Have you had conversations with these contractors? Obviously they didn't put a proposal in that included a board, but have you have conversations with them to see if there is significant resistance to them?

47:16 P. Levy No we haven't. We know from some entities what their view is on that question. It would be something along the lines of, "Find somebody else to do the work," and we would be in a bad spot. Some providers have made it clear that they have no desire or intention to form a board, or at least to have one with independent members.

47:52 Chair Ellis They might have that feeling, but if the only way to get the contract was to do it they...

47:58 S. McCrea I think you need to go to the second part.

47:48 P. Levy The second part is there are some communities where those are the only folks there practicing law. I understood from the discussion at the last meeting that the Commission would discuss this further and there would be an opportunity for the provider community to weigh in on this so we would hear from them. I want to quickly clarify two things. Some of these entities that are shown as corporations for profit with no board, I think that is because they are PCs. They have probably have a board and it is one person. It is a one person board but they told us, "We don't have a board," because they know what your interest and understanding of a board is.

49:04 C. Lazenby They are a PC and they have an internal management group, but they don't have a board of directors as a normal for profit corporation would have.

49:13 P. Levy Right. The other thing is the IRS has a definition of an independent member. It includes your notion that you are not receiving compensation as a provider under the contract, but it also says "but doesn't receive other compensation in excess of \$10,000." I am aware of at least one board member, so called independent board member, who receives, not as an attorney, some compensation from the consortium. I don't think we would necessarily want to see this person excluded because he received some compensation from the entity.

50:00 C. Lazenby For management services?

50:04 P. Levy Yes.

50:04 S. McCrea Did you have your question answered, Commissioner Potter?

50:02 J. Potter To go back to the two consortium groups. Either one of those two fall into that category that you had mentioned. They don't want to form a board ...

50:16 P. Levy I'm sorry. Which ones?

50:16 J. Potter I am talking about Linn County Legal Defense Consortium and the Multnomah Juvenile Defense Consortium.

50:25 P. Levy I don't know what their views are. Those are not the ones I was describing.

50:29 S. McCrea Paul, at page five of your materials you talk about some other considerations and that there are other approaches to ensure quality representation. You state, "For instance, the Quality Assurance Task Force is finalizing revisions to its best practices recommendations with a new document." Do we know when that will be revealed?

50:51 P. Levy You have seen the document in its almost complete form a number of times. The Quality Assurance Task force is meeting a week from today. I am fairly confident that that document will be finalized then or soon thereafter. It will then be available on our website. We have a document now that is essentially a one page document

with brief descriptions of best practices. If you have a chance to look at it there is a much more detailed explanation for why these practices are recommended and how they can be achieved. That is the answer.

- 51:48 J. Potter So we could have a policy that says we want boards in large groups and then we encourage everybody else to get boards. We think they are a good idea for a variety of reasons, but we could also require in an RFP that if they don't have a board then they have to tell us what it is they are going to have in place of a board to ensure quality representation.
- 52:16 P. Levy Um-hm.
- 52:15 Chair Ellis I guess I am a little bit skeptical that what we will get has a lot of (inaudible) language, but no structure that really has someone on the ground in place with our interest in mind.
- 52:35 J. Stevens Why would just the presence of an independent board member guarantee that that person would have our interest in mind?
- 52:43 Chair Ellis I would not go so far as to say guarantee.
- 52:48 J. Stevens Or even ensure.
- 52:48 Chair Ellis But I think structurally having someone who is not a compensated provider, on a board that has fiduciary responsibility and who in today's world will recognize these are public monies, and I better be darn well sure they are being spent well, increasing the likelihood that they will be spent well. Let me warn everybody because I told you we are going to cut this off straight at 11:00. We have got five minutes to keep talking. I don't envision this as an action item today, but I would love to get to a point that we could have a proposal that interested providers who want to talk to us about it can react to. I think the deadline, in my mind, is when the RFPs go out which Kathryn would be?
- 53:50 K. Aylward July of 2011.
- 53:55 Chair Ellis We have quite a bit of running room here but I think it is a topic that I want to see us come to ground on.
- 54:07 P. Ozanne Mr. Chair, I certainly do too. I sense this is the kind of the decision where, in my view, we have to have pretty much unanimity. If we have a split vote it is kind of like the Supreme Court sending out a new rule. You have certainly done an artful job so far trying to smoke people out. Before we get a lot of people here wailing and gnashing over this I think I would guess it would be worth it to say how far we collectively want to go. I sense you and I may be in support of a more aggressive approach. I don't want to count votes. I don't sense a lot of consensus here yet.
- 55:07 Chair Ellis These are all open-minded people that might migrate to a position over time if they think about it.
- 55:19 Hon. Elizabeth
Welch Mr. Chair, it seems to me that if we have a two million dollar cutoff on this - you look at the numbers and I didn't count up the number of firms that are two million or larger - but then only two of them don't have boards. Of all of them that have boards maybe half a dozen have outside members already. I am not sure what we are accomplishing by saying to two law firms, "Get a board."
- 55:48 Chair Ellis We are not saying it to law firms.
- 55:51 Hon. Elizabeth
Welch No, I am saying to the two groups providing legal services.

- 55:56 Chair Ellis If the proposal as it develops incorporated Commissioner Ozanne’s view that you need two independents on the board or it is too isolated, there are quite a few of these that have to move.
- 56:17 Hon. Elizabeth Welch I don’t know where the two members would come from. I would go to one.
- 56:21 P. Ozanne I would go to one.
- 56:21 S. McCrea Look at the time. Got to move on.
- 56:24 J. Stevens I don’t understand why we don’t do it for everyone. If the concern is public money, it is still public money at \$480,000.
- 56:39 Chair Ellis I am not sure if you were here when Paul explained this list itself includes a cutoff. It is not every single provider.
- 56:50 J. Stevens I understand that but if the concern is protecting public money, then why it is okay to protect two million and above and not below that?
- 56:59 Chair Ellis Let me suggest that we continue this discussion at our next meeting. This was helpful. I thought it was a good discussion. In the meanwhile, Paul, could you do a little research on the anomalies that we identified and find out for sure what we are dealing with on some of those? On Lincoln it is very clear that the Commission is not about to deal with Lincoln without them having a structure.
- 57:39 P. Levy I will try to clear up the business structure for these organizations. It may require that I go back to law school, though.
- 57:51 P. Ozanne That is why you are general counsel.

Agenda Item 3

Right to Counsel in Juvenile Delinquency Cases

- 57:53 Chair Ellis That being said I would suggest that we move on to item three on the agenda. We have two presenters today. George Yeannakis from Seattle and Jordan Bates who wrote the law review article that was distributed in our materials. I do want to commend staff. I thought the materials on this subject were very, very informative as well as stimulating. It makes you think. Ingrid, do you want to....
- 58:32 I. Swenson Just a brief introduction, Mr. Chair and members. Heretofore your attention has largely been on a limited number of your statutory responsibilities. Certainly creating a structure for the public defense system has taken a good deal of your time and attention, and then quality assurance, which is also part of the statutory mission of this Commission. Next time you look at Chapter 151 you will notice a whole series of other responsibilities. This one technically comes under “appointment of counsel.” The Commission is empowered and charged with the responsibility of creating policies regarding the appointment of counsel. Later on Kathryn is going to be talking to you also about eligibility for appointed counsel, which is yet another of your statutory responsibilities.
- In 2004, you heard an initial presentation on juvenile delinquency representation. We never did follow up on that particular presentation and probably because we were more or less distracted by the dependency representation piece, which has been important as well. It is certainly time to take a closer look at the delinquency aspect. While there are significant quality issues that we have to address at some point, this piece about waiver of counsel appeared to be the most critical one to bring to your attention as soon as we could. Fortunately for all of us, Jordan did a very fine paper as a law student at the University of Oregon. I think it would be helpful to hear from her about what she found in terms of the legal requirements and the constitutional

history of the requirement for representation in these cases. Then Mr. Yeannakis has vast experience, more than 20 years, as a public defender in the Washington court system, but particular leadership on these juvenile representation issues in that state. I'd like you to hear from Jordan first.

1:00:54 Chair Ellis

Thank you for coming.

1:00:54 J. Bates

Again, my name is Jordan Bates. I wrote this paper last year as a law student. I have now been an attorney for five whole months practicing family law. This paper is a little less than a year old but I think it is a pretty good summary for everybody. Basically I wrote the paper working with Leslie Harris who directs the Oregon Child Advocacy Project at U of O. She let me know that this was an issue that needed attention in Oregon. I began to look into it. I basically found out the law in Oregon is very thin on the issue. I did a survey of all the different counties in Oregon to see how each judge, each juvenile department, dealt with waiver of counsel. I am just going to give you a brief summary of the law. I am sure most everybody already knows it. Everybody knows there is a right to counsel. It comes from the constitution, the Sixth Amendment. The reasoning is based on lay people not being able to understand the justice system necessarily, as well as attorneys, to present a defense for themselves versus a skilled prosecution. This is the case for both adults and even more so for juveniles. With the right to counsel comes the right to waive it. Each defendant has the right to conduct his defense in the way that he desires. Federal law recognizes that it needs to be voluntary, knowing, and intelligent if somebody is going to waive their right to counsel. That is pretty much the law in Oregon when it comes to juveniles. A lot of states go above and beyond that. Really what it comes down to is, does the person understand the facts of the case, what is each person's background, in determining whether a waiver was voluntary and intelligent.

The juvenile system was established over 100 years ago as a much more informal system. The due process rights afforded to adults were not necessarily recognized in the juvenile system because it was looked at as something that was going to speak to individual rights, rehabilitation, and treatment. It wasn't as much about punishment and due process rights. Well, in 1967, in *In re Gault*, the Supreme Court basically extended a lot of due process rights to juveniles because the court realized that these kids were oftentimes ending up worse off than they had been previously. Regardless of the fact that many judges and probation officers were looking out for the best interests of the children, in the absence of specific policies and procedures these kids a lot of times would end up without knowledge of the charges, without the right to counsel and it was just a situation that continued to develop. Juveniles have been getting more and more due process rights. The court in *Gault* didn't address waiver specifically. The court recognized that counsel should be appointed wherever coercive action was possible. The court did touch on waiver a little bit but it never made a finding that juveniles shouldn't be able to waive their right to counsel. But one of the things that I think needs to be addressed and one of the reasons that I think that waiver is so common is because people see the judges and the probation officers as working in the child's best interests. What needs to be understood is that the system is really adverse to the juvenile and they do need somebody in their corner.

A lot of the reason that the juvenile system is different has to do with the unique place in society that juveniles hold. There has been brain research and studies done in the last decade or so relating to juvenile development. I know very little about science but a lot of studies have been done about the development of the frontal lobe and the prefrontal cortex, the parts of the brain that affect a juvenile's ability to plan, to anticipate consequences, and to control impulses. The way that that relates to waiver of counsel a lot of the time has to do with the fact that a youth will hear, "If you waive your right to counsel we can get you out of here right away." In a lot of counties in Oregon sometimes a juvenile has to fill out financial forms and an attorney isn't available right there. The youth will be sent back to detention until an attorney becomes available. By giving more weight to the immediate gains, these

juveniles are often waiving counsel before they really have the chance to understand what they are doing.

Oregon law, basically ORS 419C.005, gives youth the right to counsel. That means that they have the right to first be informed of their right to counsel as opposed to having to request it initially. Then when it comes to waiver the waiver needs to be voluntary, knowing, and intelligent. It does need to be through a colloquy on the record or it needs to be a signed and written waiver. There is really very little law in it. *Riggins, Anzaldua* and *Rivas* are three of the main cases dealing with juvenile waiver of counsel. They have found that a voluntary knowing and intelligent waiver has to do with a youth knowing the charges against them, the elements of the crime and the punishment they face. There are some counties where – and I don't know if you guys got this in your materials but it is a single page where the youth gets a single page called "the Constitutional Rights Certificate," check a couple of boxes that say, "I understand my rights and I don't want an attorney." It is really unclear to me what goes into the certificate. How much of a discussion is done with a juvenile? "Do you understand these rights? Do you have any questions? Do you waive your right to an attorney?" The juveniles just check the boxes. That does comply with the law as it is right now because that is a signed, written waiver. Some cases suggest that juveniles need to make a voluntary, knowing and intelligent waiver at each stage of the case., that once they are in the system if they didn't get an attorney initially that doesn't mean they can't have an attorney later. What I did was try to get information from each of the counties in order to determine what was happening in Oregon. There was no state agency, nobody really tracking the data on waiver. It took a little bit of time but I think we tracked down decent and reliable information through the Oregon Judicial Department. So in 2008, what they found were between 33 and 39 percent of youth appeared without appointed counsel. Some of those did appear with retained counsel. That specific data wasn't available but the guesses in the legal community were around two to five percent, perhaps, retained counsel of those 33 to 39 percent.

- 1:09:33 Chair Ellis Do we do have any comparable number in adult cases?
- 1:09:40 J. Bates I don't.
- 1:09:40 Chair Ellis My guess is it is a much smaller number.
- 1:09:48 I. Swenson That is everyone's guess. There may be more data than I am aware of but I am not familiar with any.
- 1:09:54 Chair Ellis I was shocked by the data you had from Marion County.
- 1:09:57 J. Bates Yeah.
- 1:10:03 Chair Ellis That is a big county. Fifty percent waived counsel in delinquency petitions including some felonies and ninety percent of probation violations. My guess is that there is probably a climate at the point that the youth is asked to waive that the youth may construe as, "Oh, if I waive they will think I am a good guy." It probably isn't overt but the implication may be that, "I will curry favor if I do want they seem to want."
- 1:10:44 J. Bates Right. There is a study done in the late nineties that showed that a lot of youth worried that invoking a certain right might result in sanctions. A lot of the times, in counties like Marion, also Wallowa and Jackson where they do allow waiver relatively often on felony cases, no attorney is present initially. There are counties, Multnomah is a great example, and Lane County, where an attorney is present initially that a youth can consult with.
- 1:11:22 Chair Ellis It just seemed to me such an inherent tension between the logic of having a separate system for juveniles which is because they are young, impressionable, they may be more corrigible. It is more of a paternalistic culture to have all that over here and

then say, “Oh, but, even though they probably have never been in trouble before and haven’t gone through the whole process, they can make a knowing and intelligent waiver,” because they are supposed to know all those things that might happen down the road that having a lawyer might be helpful to understanding.

- 1:12:00 J. Bates A lot of states do this and Kentucky is a good example. I know budget is an issue. I don’t know really what the state is capable of doing, but having a youth consult with a defense attorney prior to being able to make a voluntary, knowing, and intelligent waiver I think would give the youth time to understand the charges and it wouldn’t just be the probation officer, the person who arrested them, who is holding them in detention, kind of telling them or suggesting to them what to do.
- 1:12:41 Chair Ellis The other thing that struck me in reading all this was those that are involved in this process probably aren’t driven by budget. It is this Commission that provides the lawyers. It doesn’t come out of any budget they are responsible for. It probably is more likely driven by the desire to not have the interference of a lawyer and be able to process this in a somewhat more paternalistic way.
- 1:13:15 J. Bates Right. I think what is difficult is being able to have an attorney available for the first time that a youth appears in court. I think in some counties it is more difficult to get somebody there on the off chance that a juvenile is going to be coming into court. I think some cases have minor issues where they just don’t have attorneys available.
- 1:13:44 Chair Ellis In your paper at page three, you say there are some states that prohibit waiver altogether in certain cases. Can you spell that out more?
- 1:13:55 J. Bates There are a couple of examples - Kentucky, which is my favorite for a number of reasons. Kentucky does not allow waiver and it is statutory in serious felony cases, sex offense cases, and wherever detention is possible. Ohio is another state where they don’t allow waiver in a lot of cases where placement outside of the home is possible. Louisiana won’t allow waiver if the juvenile might be placed in a mental health facility or a substance abuse facility. In Oregon in some counties, the judges do say, based on the research that I have done, in certain situations, “I won’t let a juvenile waive counsel if there is a felony hearing.” But clearly some counties do allow that. There are a number of states besides those three that I mentioned where if the charges are very serious juveniles are not allowed to waive counsel.
- 1:14:57 P. Ozanne Jordan, in the course of your research did you find any commentary or discussion at the state level of just making a *per se* rule that counsel is not waivable for juvenile delinquency cases?
- 1:15:14 J. Bates Not in Oregon.
- 1:15:14 P. Ozanne The problem I have with the lawyer role, as we have seen in certain jurisdictions, there is a culture where some lawyers don’t think they have an obligation to consult with their clients. Designating a lawyer to be the guardian frankly troubles me. I’m sure there is a cost issue. Has anybody discussed the *per se* rule?
- 1:15:49 J. Bates Not in Oregon.
- 1:15:49 P. Ozanne I meant anywhere during your research. You said some limit the *per se* rule to certain serious offenses. I wondered if anyone has ever said juveniles can’t waive their right to counsel.
- 1:16:02 J. Bates No, there is no state with a blanket rule. Again, I will come back to Kentucky. That is one of the places where it is most difficult, the voluntary, knowing, and intelligent waiver. The court needs to make findings of fact. They need to have a separate hearing on the waiver issue. I think the problem is the defendant has the right to conduct his defense in the way he desires. Even though the juvenile system is different, there is not a single state that doesn’t permit it at all.

1:16:39 Chair Ellis

Maybe what we ought to do is have George make a presentation and then we can open it for discussion.

1:16:43 G. Yeannakis

Good morning, Chairman Ellis, members of the Commission, and Ingrid. Thank you for inviting me to present. Just quickly, Washington does allow waiver. We have just made it so difficult that no one is waiving anymore. I work for a civil legal services firm now called Team Child. It has an office in Seattle and four other offices around the state. We represent juveniles involved in the juvenile justice and child welfare system, but we represent them on their civil issues. We do educational advocacy, housing, public benefits. We don't represent them on their criminal matters. My position at Team Child is funded by the MacArthur Foundation's Models for Change Initiative. It is an initiative that the foundation is purported to use in five different states. Washington is the most recent. My charge, as special counsel at Team Child has two parts. One is to ensure that juveniles are represented by counsel at all critical stages of the proceedings. My second charge, which is turning out to be much more difficult, is ensuring that the advocacy is effective for juveniles at each state of the proceedings. Washington has a statute similar to Oregon, and I think it is in your materials. It says that all juveniles are entitled to counsel at all critical stages of the proceedings. Unless waived, counsel should be provided to a juvenile. Then there are discussions about financial eligibility but it says real clearly in the statute that you have to appoint at the initial stages. As we found, and I am really impressed with Jordan's research, in 2005 we found that in Washington almost 20 percent of the juveniles were waiving counsel. The way we determined that was not through a survey but looking through the data on guilty pleas that were collected by our administrator of the courts and finding out who the attorney for the defense was. We looked and in 20 percent of the guilty pleas there was no attorney for the defense listed. The prosecutor was listed, the judge but no defense. We determined that about 20 percent of the cases were pled without counsel. As Jordan found in her research it varied among our 39 counties. King County – Seattle - 100 percent of the kids that came through had attorneys. No one ever waived. Are they allowed to waive? Well, our prosecutors argue that there is a constitutional right to proceed *pro se*. I think that is what has prevented any state from saying you can't waive counsel. Some of our other counties, and I think Ingrid said that I have been practicing mainly in Seattle and I have for over 30 years, but in the last few years I have been working in Grant County, probably Washington's most infamous county as far as public defense. It is in eastern Washington. It is a relatively small county. They ran into a problem where a judge determined that any defendant appearing in Grant County having a public defender had a reasonable expectation of ineffective assistance of counsel - quite a finding. In Washington we have a different system. We don't have a Public Defense Services Commission or a statewide agency. Each of the 39 counties contracts individually with defense counsel to provide indigent defense. In seven counties we actually have county agencies providing public defense - in Tacoma and Spokane. In Seattle we have four non-profits providing it. In 27 of our counties it is individual contracts from the county commissioners. There is a wide variety of quality of representation. The issue of juvenile waiver first was brought to the attention of the defense community through a report done by the ABA in 2003. It was called the Washington Assessment of Access to Counsel and Quality of Representation in Juvenile Defense Matters. The ABA and the National Juvenile Defender Center have replicated this assessment in, I think, 15 other states. One of the criticisms that the ABA had of the Washington system was the number of children waiving counsel. Our statute is pretty clear. It says you are entitled to counsel unless waived. The question was there was no definition of waiver. It varied from county to county. As in Jordan's research, I noticed, it appears in seven counties, including Union County, a juvenile defendant would actually have to check a box or fill out a form to request an attorney. Now I think that is turning the statute on its head. You don't really have the right to counsel. You have the right to request counsel. In Washington they took it a step further. Our administrative office of the courts actually published a form where a juvenile had to fill it out and request counsel. That was utilized in several

counties including Grant County, but there was no definition of waiver. The bar association created an Indigent Defense Committee after the Supreme Court of our state had determined that our indigent defense system was in a crisis. In 2003, the bar association created the Committee on Public Defense. One of the subgroups of that was focusing on juvenile defense. Out of that group came this attempt to get a court rule that would limit waiver. There had been an attempt to pass a statute in the legislature in 2004 that would have required that all juveniles have the right to have counsel. Before they can waive they would have to have the right to consult with counsel. That never got out of committee hearings. We decided that maybe proposing a court rule would be a better way. We did that. I think you have a copy of our proposed rule. It was reviewed by the Committee on Public Defense and then went to our bar association's Court Rules Committee.

1:23:46 Chair Ellis

Is this the rule that is quoted on page eight?

1:23:51 G. Yeannakis

In your packet you actually have it. It is Juvenile Court Rule 7.15, Waiver of Right to Counsel. In the bar's rules committee there was a lot of opposition, mostly by superior court judges, juvenile court judges, and the prosecutors. Waiver is a very efficient way of running your court. In Grant County in one-third of the 500 juvenile petitions that were filed youth pled guilty without attorneys. That saved them a lot of time and money. There was a marked opposition from the judges' association. We worked closely with prosecutors to come up with a rule that would be acceptable to them. What we included was - we think the critical steps were the written waiver and the right to consult with an attorney before you decide to waive an attorney. Why do you need to talk to an attorney? The sanctions aren't that great, right? You can only stay until 25 in Oregon? Washington is only 21. It is the collateral consequences. I am sure your state legislature has done the same thing ours has. Now with every juvenile crime you have mandatory reporting to your school. You have registration. You lose your license. You lose public housing. You lose some of your public benefits. It was decided that it would be good to have an attorney to talk to a client before they waive counsel. While we were in the rules committee I worked with the King County prosecutor. He liked the idea of juveniles having counsel because in King County everybody was getting counsel anyway, but he had several problems with adults who had waived counsel. He didn't like the fact that two or three years later the Court of Appeals reversed and said that the waiver of counsel wasn't any good. It started costing them money. He wanted to make sure this rule was bullet proof. What he did is he created the form that you see attached. This waiver of counsel rule form is as difficult to fill out as a plea form. If someone is going to take the time to do that they are not going to waive. The attorney is not going to waive. Washington has that determinate sentencing scheme. Someone would have to calculate the standard range based on past criminal history. This is a lot of work to do at a preliminary hearing or initial appearance. The waiver rule did go to the Supreme Court and it was published for comment in 2007. The comment period ended. There was only one negative comment. The Washington Association of Prosecuting Attorneys did not say anything against the rule nor did the Supreme Court judges. You can speculate about why they didn't. The rule was adopted in June of 2008 by the Supreme Court. It took effect in September of 2008. The State Office of Public Defense in Washington, which monitors and gives out the appellate contracts, does monitor each county. They have determined that in 2009, the year after the rule took effect, less than two percent of guilty pleas were uncounseled in Washington. We dropped 18 percent in just two years because of that. Most of that had already been done. Once people realized the rule was coming in there was very little opposition. This is the second year of the rule. We are working with counties to ensure that the quality of representation improves. We haven't had any strong opposition to the rule. It doesn't cost the state anything because it is all county funded in Washington. There was no state fiscal note to this. I think Ingrid also attached the Florida court rule which tracked the Washington court rule on waiver. Florida passed a court rule similar to the Washington rule in 2004. I think this is in the supplemental materials at page ...

- 1:28:54 Chair Ellis At the back of the packet.
- 1:28:56 G. Yeannakis It had been recommended to them that they include the right to have a written waiver and that a juvenile be advised by counsel before waiving. They adopted the written waiver. They also said the juvenile shouldn't waive. They didn't include the right to have an opportunity to consult with a lawyer before a juvenile waives. That was in 2004. The rule came back to them in 2008, partially because the ABA and the National Juvenile Defender Center did an assessment of quality representation in Florida. They sampled eight – in Florida they have judicial districts - they sampled eight judicial districts in Florida and found that the waiver of counsel rule was routinely being flaunted by the judges. There waivers were made by children who obviously didn't understand what was going on. The Florida Supreme Court in 2008 amended their court rule to include the right to consult with an attorney before a child was allowed to waive and to have a written waiver. I understand that the rule has reduced the number of uncounseled pleas in Florida. The first time they tried it it really didn't affect the result at all.
- 1:30:28 P. Ozanne George, excuse me, you said the right to consult a lawyer?
- 1:30:37 G. Yeannakis The rule states you must consult with an attorney before you waive, you must consult. There isn't necessarily an appointment, but you have to consult. Now, if you have a private attorney that is not an issue either under the Washington rule or the Florida rule. You have a private attorney. He might not be there at initial appearance but he has filed his notice of appearance and that settles it. These are for the 99 percent of the kids who don't have private counsel. I think Ingrid's efforts here in finding the data is telling. I am shocked that almost 40 percent of juveniles proceed without attorneys in Oregon. I can't believe that that many kids knowingly and intelligently waive their rights. I have been doing a lot of training around the state. We talk about these waiver issues and we talk about the issues that Jordan is referring to about this adolescent brain development. I was reading a study done recently in Massachusetts about knowing and intelligently waiving your rights. It starts with a little dialogue between a defense attorney and a juvenile about to plead guilty in Boston. In Boston, the juvenile court is a separate court in downtown Boston. The attorney tells the juvenile and he is 13 years old. He tells the juvenile that he has a great deal from the prosecutor and, "I think you should take it. I want to go over the plea form with you. The judge will ask you questions to make sure you understand what you are doing, that you are waiving your rights. He will ask you if you have any drugs or alcohol interfering with this. He will ask you what your level of education is. He will ask you if you have gone over this plea with me, your attorney. I want you to remember that when we go in there when the judge asks you you want to agree that you are waiving your rights." They had about 15 minutes to do this in the hallway outside of the Boston juvenile court. As they walked into the courtroom the attorney looks over at his client who is waving his hand and the attorney leans over and says, "What are you doing?" "I am waving my right." I think that is the level that is dealt with with most of these kids. It is an incredible phenomenon that judges can believe that 30 percent of the kids appearing in front of them are knowingly and intelligently waiving their right to counsel, right to cross-examination, right to a trial. It is hard to believe. I looked at Ingrid's report that she sent to you and I was impressed that there are more options than simply going to the legislature and asking them to pass a statute, which I am sure is probably not much different in Oregon. You probably don't have a lot of money to fund anything. Everything in Washington that isn't revenue neutral gets bounced out on the fiscal note. That is what happened on our bill. We are going to the Supreme Court and asking them to change their court rules. You as a panel have the ability to set a policy. I think you don't have to really change any law. You have the law. All you have to do is require your attorneys to show up at the initial appearances. It seems like it is something you could do either by amending your contracts next time they come up, or by making it a policy of the board to say that all juveniles should have an opportunity to consult with an attorney before they waive any right. That would limit a judge from taking a plea. I was pretty impressed with these options. I have a

lot more information about this if anybody has any questions. I have tried to keep it down.

- 1:34:58 Chair Ellis Why don't we do this? If there are questions for either of our two presenters let's do that now. Then I would recommend a brief recess, the Shaun McCrea recess, and then come back and discuss the material in Ingrid's report at page seven to eight where some of these options are available. Questions for either Jordan or George?
- 1:35:38 J. Stevens I have a question. I am not sure that I understand the difference between knowing and intelligent. I know what I would think the difference is. You can be very bright and still not understand what is going on.
- 1:35:56 J. Bates I can't remember the case, but in my research on Oregon law the "knowing" had to do with knowledge of the charges, the elements of the offense and the punishment, just being aware of that. The "intelligent" had to do more with the age, education, and background.
- 1:36:16 J. Stevens So none of it gets to whether you can understand it or not?
- 1:36:18 J. Bates I don't think so.
- 1:36:18 G. Yeannakis That was a very big issue in the Washington Bar Association's Rules Committee. These are attorneys who like to talk about statutory language. We debated the difference between a knowing, intelligent, and voluntary, and whether we needed all three of them. It is not an easy concept.
- 1:36:43 Chair Ellis Jordan, did you find any counties where the availability of a diversion program was conditioned on waiver?
- 1:36:51 J. Bates It might be the case but I didn't find anything specifically where that was the case.
- 1:36:59 I. Swenson Mr. Chair, formal accountability agreements are a type of diversion program. It is formal in that you have to sign a document and enter into a contract but it prevents the filing of a petition. In responses to our survey we found in 13 counties that as a requirement to participate you had to waive counsel. If you did not waive counsel then a petition was filed. That was the only mechanism they knew for getting the matter before the court to get counsel appointed.
- 1:37:34 Chair Ellis I am just sitting here dealing with how can this be? That is an enormous pressure on a young person to waive counsel.
- 1:37:46 I. Swenson And the person's parents who also have other incentives for not requesting appointed counsel.
- 1:37:51 P. Ozanne Because we are doing it for your own good.
- 1:38:00 Chair Ellis Other questions for Jordan or George?
- 1:38:03 J. Potter George, I think I heard you say that before the Washington Supreme Court adopted the waiver rule, and during your review and comment period prior to that, that all the comments were positive except for one. Where did that come from and what were they commenting about?
- 1:38:16 G. Yeannakis That was one individual prosecutor from Kitsap County, in Bremerton just across from Seattle. It is a relatively large county and they have about 2000 petitions each year. What he would do is he would summon in his out of custody clients to come to court, not to be arraigned, but just summoned them. At that point they had an opportunity, because he filled out all the plea forms, to take a plea before they have looked at discovery or anyone had reviewed anything. If they didn't show up they would issue a bench warrant. Then they would come into detention and then he

would get his plea that way. He was resolving several 100 cases a year. He didn't want to lose that opportunity. I am being very cynical about prosecutors. They worked very closely with me on these rules but in this one case Mr. Dowell really felt that he would be losing a lot of money and time and anyway, it was just kids. They didn't treat them harshly over there.

- 1:39:27 J. Potter Has there been follow up since then to find out if his fears were warranted?
- 1:39:35 G. Yeannakis Prosecutors follow the law and they dropped this out of custody first appearance. Before anyone takes a plea a Kitsap County they are sent to talk to an attorney or they now provide an attorney. So, yeah, the follow up has been good. There are still some counties where attorneys aren't available at first appearance. We are doing a demonstration project in Yakima, another relatively large county. We are going to make an attorney available for their preliminary appearance calendars. Although the judges said they had never taken any pleas off that calendar without counsel, the data showed it to be a little bit different. In fact, we found that talking to the court administrators and talking to the judges about whether waiver ever occurred in their county, they weren't the most accurate reporters, we found, compared to when we have actually sent out observers to the courts and seen how many kids were actually waiving. I think that was a great effort, but I think it probably underestimates the number, which would be really shocking.
- 1:40:57 Chair Ellis Jordan, I had a question. At page six of George's materials there is reference that in Washington before this rule change that many counties would accept a waiver at the request of a parent and there were comments about the potential conflicts there. In Oregon did you find some counties where parents are the ones doing the waiving?
- 1:41:30 J. Bates The law is a little murky on that. I didn't get a lot of information in the responses that I got specifically about whether parents were available. A couple of counties require the youth and the parent to be there together. Oregon, specifically in one case, the court declined to require that a parent be present when the youth waives a right. Then there is another case, not directly on point, that suggests that a third party cannot waive a right. I can't remember what that case was regarding. It was where a parent tried to waive a juvenile's right and the court said no. I didn't get a lot of detail about that in my research.
- 1:42:30 Chair Ellis Other questions for either Jordan or George?
- 1:42:39 C. Lazenby I know in the adult system there are problems with using uncounseled priors to enhance. Does the same thing happen in the juvenile system?
- 1:42:53 Hon. Elizabeth Welch It is a common sense process rather...
- 1:43:08 I. Swenson I would just add that juvenile adjudications are used as priors in the sentencing guidelines. That would be a point at which the issue of an uncounseled prior could be addressed. At the OCDLA juvenile law conference which is scheduled for April, Mr. Yeannakis is going to be there and participate in a panel helping lawyers identify places at which they can attack the waiver in live court cases.
- 1:43:40 Chair Ellis I want to thank you both. You are doing great work and we appreciate you coming here and sharing with us.
- 1:43:51 G. Yeannakis Thank you all for having me down and the opportunity to speak to you about it.
- 1:44:00 Chair Ellis I hope the fog lifts so you can get home. Why don't we take about a five minute recess.
- (Recess)

1:54:27 Chair Ellis Why don't we come back to order. I apologize to those who are not eating but some of the Commissioners will be eating. I thought at this stage we might ask Ingrid to kind of walk through what she sees as the action options that we might have. Then we will see if there is support to do one or more.

1:55:09 I. Swenson I think, Mr. Chair, the more you look at this issue the more you realize that there are complicating factors that are sort of county by county issues in terms of resources, not only of public defense lawyers but detention facilities, juvenile court counselors, availability of juvenile court judges, and so whatever we look at as a way to address it has to take into account the circumstances that exist around the state. I pointed out the example of the informal resolution of probation violations. You don't want to get in the way of those kinds of solutions in appropriate cases by saying "No, we are going to have to stop everything and wait a week until a lawyer can come here and talk about whether washing the dishes is a good sanction for not coming home on time since you are on probation." You have got to draw some lines there that make sense and that are understandable to local authorities. As I thought about the things that I suggested in here, ways of dealing with the issue, it seemed to me that maybe one approach would be to put together an informal group, with someone from this Commission maybe chairing that effort, and bringing in public defense attorneys, juvenile department staff, some of the juvenile court judges, for the purpose of talking about the problem and some of the proposed solutions and what the impact of those would be. There is a state Juvenile Department Director's Association. It is a pretty well organized group. They have chairs of different committees some of whom could assist us, I am sure. They are certainly aware of the issues since they responded to the survey in great detail. It was very useful and helpful information. They know that we are concerned about it and interested in finding some solutions. Each of the things mentioned is a way of addressing at least a part of the problem. But before you decided on a way to go you might want to convene a larger group of people to talk about the ramifications. I had talked with the Chief Justice about this whole issue some time ago, that I think this Commission has the ability to establish policy in this area, and asked for his recommendation about how we might pursue such a policy. His sense was that the appropriate way, or probably the most successful way, would be to look at creating a policy that could be recommended to the juvenile court judges. He certainly offered his assistance in promulgating a recommendation from this Commission as to waiver and how it should occur. We would have to also address some of the obstacles to providing counsel in these cases before it is a realistic option. Our contracts currently require that lawyers be present, public defense contractors be present, for initial appearances in both criminal and juvenile cases. As we conduct site visits and structural reviews, we have certainly encountered many counties where that does not happen. Sometimes it is simply impossible for the lawyers in eastern Oregon, for example, to be in multiple counties at one time. They can't be responsive to short notice of hearings such as within 24 hours. But even in counties where it certainly seems possible it is not necessarily happening the way it should. Fortunately, fewer and fewer youth are actually being detained. Most counties don't maintain a detention facility at all. The large ones, like Multnomah, have successfully reduced their population so that most kids are not in detention. There is more flexibility about sending the child to the lawyer than requiring the lawyer to be where the child is. I think my recommendation would be that you consider such an approach, putting together a group to have a discussion with other interested entities.

1:59:49 Chair Ellis Do you have a handle on what the cost implications would be if Oregon adopted a rule similar to what Washington has now?

2:00:00 I. Swenson It is pure speculation on my part. I think if the only piece you are talking about is requiring that youth consult with counsel before waiving, the cost shouldn't be significantly increased because, assuming we can get lawyers to court on the cases that they are required to appear on, then they can be there for youth who are considering waiving counsel as well. In some counties we do have duty attorneys in juvenile court. Under our contract one of their obligations is to be there to handle

these kinds of issues that arise. In some circumstances, and I think I mentioned this, the eligibility determination itself is a big obstacle to having counsel appointed. Many counties require the parent to complete this and that makes sense. They are the ones who can either afford to hire counsel or not for the juvenile. I think if you looked at a system where you didn't ask for an eligibility determination prior to this initial consultation, it wouldn't cost a great deal of money to provide counsel at that stage, and then, if the youth said, "thanks for the information. I do need to be represented," then to process it for an eligibility determination. I don't know what the number would be. There is a cost involved in determining eligibility and it seems to me that this cost would be so low that it could be less expensive than going through the eligibility determination.

- 2:01:40 Chair Ellis Is the eligibility the juvenile's own assets?
- 2:01:46 I. Swenson It is both. As I will tell you later today I attended a national symposium on indigent defense and the Chief Justice of the Alabama Supreme Court was one of the participants. She indicated that Alabama had recently, at the Supreme Court level, adopted this same rule that juveniles may not waive without the advice of counsel. Her comment essentially was that it was cost neutral to do that.
- 2:02:26 Chair Ellis George.
- 2:02:26 G. Yeannakis Chairman Ellis, one phenomenon that we witnessed in Washington, and the State Office of Public Defense is trying to document this further, is that by having counsel at initial or preliminary appearances, and advising kids not to waive, we have actually seen a decrease in the number of juvenile court filings. The prosecutors are no longer filing those charges. They weren't sure if they really had the case or not but they knew they could get a plea if there wasn't an attorney. They are now screening their cases much more rigorously and in two counties that we have documented, there has been a reduction of almost 20 percent in the number of misdemeanor filings. That saves the county a lot of money because you save the appointment of counsel. There is some trade off of providing counsel versus a reduction in the number of cases being filed. This is something we are watching but they have seen a trend in two counties.
- 2:03:24 C. Lazenby I have to admit that I am looking right at Kathryn as I am saying that I am a little skeptical that if we go to something – I am not arguing with the policy of us moving in direction of having counsel prior to waiving, but I can't believe that it won't turn into another billable event, or at least arguably another billable event from our providers. They are going to ask for greater compensation and see that as a separate service that they are providing. I just can't imagine them sort of giving us this freebie.
- 2:04:04 I. Swenson To the extent we have duty attorneys, which isn't common, those attorneys are there to do that very kind of thing. In drug court, for example, attorneys often get paid to handle all the cases that come through the drug court. They are paid a certain rate to cover the court. The number, unless it gets to be significantly larger, really doesn't matter.
- 2:04:34 C. Lazenby Even if we are doing it as a court rule, we are really going to have to be a lot more solid about increased costs. We are going to need to know what demands will be on the system.
- 2:04:49 J. Stevens Do we still have counties where juveniles go before the Chief of the County Commission?
- 2:05:01 J. Bates Morrow.
- 2:05:02 Chair Ellis I thought Baker was among them.

2:05:02 J. Bates I think it is just Morrow. That waiver ...

2:05:10 I. Swenson Morrow does not have a circuit court juvenile court. Some counties have both.

2:05:19 J. Morris It is also Sherman, Gilliam and Wheeler, I believe.

2:05:25 Chair Ellis Ingrid, if we went the route you are suggesting, I guess I think it is a positive thing if you can actually get consensus including the juvenile court people and the DHS people but I am probably skeptical that that will happen. Can we do that in a way that doesn't lock us in? That if you don't get consensus we, very likely, will make our own legislative proposal?

2:06:02 I. Swenson I think you could certainly structure it as an advisory group to this Commission. They are going to give you information and their input but, yes, the decision would remain yours.

2:06:12 Chair Ellis What is your guess? If you go that route are you going to encounter strong resistance from either DHS or the juvenile groups or prosecutors?

2:06:26 I. Swenson It is only a guess but I think it is the juvenile departments that are impacted the most significantly. They are the ones whose process is so simplified by a high percentage of guilty pleas.

2:06:43 Chair Ellis As George says, it is very efficient.

2:06:47 I. Swenson Yes, but within that organization there are also strong advocates for representation of all juveniles.

2:06:55 Chair Ellis What I thought was interesting is George's observation that these practices were out there across the state of Washington, but when they actually got to holding hearings at the statewide level nobody showed.

2:07:14 G. Yeannakis Who wants to go on the record saying you are against giving counsel to kids? You don't want to put it out there.

2:07:22 Chair Ellis If we go this route of an advisory group and have a few meetings to review this, maybe we will get a positive enough outcome that if we do go forward with our own legislative proposals we will be able to represent that we speak for a broader group. I am certain of this. I think the judiciary would appreciate us making that effort. I think they don't care for lone wolf agencies that come in with something and then they get all the controversy in front of them. What is your sense between legislation on the one hand, or trying to either have us adopt a policy or getting the Chief to adopt a court rule? I guess my own instinct this ought to be legislative if we can do it.

2:08:28 I. Swenson I am not certain about whether legislation is required. I don't think it is. I think the court rule approach has certainly been effective in a lot of places. It is inherent within the court process. The heart of this problem is in the court process and it seems to me the court ought to address it. Just the enormous percentage of waivers is really a bad reflection on how we are handling these cases. If it is so rare that an adult is capable of representing himself or herself through these kinds of proceedings, how can we assume that kids are better able to? One statistic that was interesting was that the referral rate in Oregon for children under 12 is 9.4 percent of the total number of juvenile referrals. In Marion County, where waiver is so high, it is 14 percent. Among the kids who are waiving are eight, nine, 10, 11 year olds. I think if the problem gets enough attention people will want to address it in some manner. I am hoping that is the case.

2:09:54 Hon. Elizabeth

- Welch I absolutely agree with you that the problem is with the judges because they are accepting the waivers. You can't just waive administratively. There has to be some kind of courtroom process involved. My hope is with this informal advisory approach that there will be some consciousness raising because I think that is the problem, frankly. Judges are busy but these practices are ancient in tradition. When I have been traveling about seeing this happen time and again in various counties and try to poke at people a little bit about what is going on and what their thinking is and why is this happening, the best way of describing it is it is mindless. "This is the way we have always done things. This is the way it works." But the people who tell children that they don't need a lawyer are juvenile court counselors. That process is extremely complicated. You can kind of picture a 12 or a 13 year old kid sitting in some counselor's office. The parents are madder than hell at him because he has embarrassed them and they have had to miss work and he has broken the law. They are not supportive. They just want it to be over with and the kid knows that his parents are very upset. There are so many factors that go into it. They tell the kid that, "This is what the judge is going to do." The assumption is the judge is absolutely predictable. "The judge will do what they are told to do by me. There is no risk. You are going to plead guilty. We are going to put you on probation and you can go home," because that is, in fact, what happens most of the time in most cases. The kid has no conception. I don't know how much more to go on. I have been sitting here quietly which is very difficult through all this. One of the things that I do when I take pleas, and I still do some juvenile work, is I ask the kids to tell me what some of their rights are. I don't mean in an openhanded way. If there was any doubt – I wish I would have kept half of the answers I have gotten over the last 10 years doing that. That is when I started, about 10 years ago. One of the things that I ask a kid at the end is, "Tell me what you did that was wrong." The answers to that are just amazing. Plus the answers to things like, "What does it mean that you have the right to remain silent in court?" Most people don't know what that means. In Multnomah County we decided seven years ago to just appoint counsel for every kid against whom a petition is filed. It works so smoothly and well. This concern about the right to waive, if the kid can manage to say to his lawyer that, "I don't want to have you. I don't want a lawyer. I want this over with," the lawyer can come in and tell a judge, "This kid wants out." We don't let people makes contracts to buy a \$750 car until they are 18 years old, but they have the privilege of getting themselves a criminal record when they are 12.
- 2:14:01 C. Lazenby And even after 18 they can return it within 72 hours if they don't like it which they can't do with a guilty plea.
- 2:14:07 Hon. Elizabeth Welch My expectation is that this will not be controversial. It may be expensive. I don't think it will be controversial. The question is how do you get it out? If it is part of this less formal process we will get some judges upset. That decision to go to the legislature ...
- 2:14:34 Chair Ellis If we go the route of us spearheading a group of interested parties to think about it would you be willing to involved? Would you be willing to chair?
- 2:14:45 Hon. Elizabeth Welch Yes, I would love to. Let me ask a timing question. I know if we end up proposing legislation there is a time when you really have to have all your ducks in a row. It has to be drafted in a competent and quality way and given to the right legislator to introduce. What do you see as the time for that that will work our way back?
- 2:15:15 I. Swenson I think agency bills are due by the first of April for drafting.
- 2:15:22 Chair Ellis Of?
- 2:15:22 I. Swenson This year.

2:15:30 Chair Ellis That is sooner than I was thinking. What is the outside time?

2:15:33 I. Swenson There really is none. If you go through a member you can do that at any time. If you submit something as an agency there is a process. There are benefits to participating in that process. You can certainly find a way to introduce legislation.

2:15:52 Chair Ellis To do it in an orderly way how much time do you think it would take to set a meeting, invite the right people, and have a discussion on this?

2:16:09 I. Swenson Well, because the people we would want to participate are going to be busy people we probably can't schedule it sooner than about two months from now is my guess. We can get some preliminary information together and contact people and look for meeting dates. I don't know about Judge Welch's availability either.

2:16:32 Chair Ellis It would probably only work if you have more than one meeting. You would have to have at least two.

2:16:41 C. Lazenby That product that you do in April that is a placeholder, right? It can be a placeholder. It doesn't have to be a final product.

2:16:46 I. Swenson Right.

2:16:46 C. Lazenby If we had an intention of pursuing legislation we could start down that road. We don't have to necessarily complete it if we decide it can be done with a court rule.

2:16:59 Chair Ellis John?

2:17:01 J. Potter It has been pointed out to me before that I like to take these things in increments and steps, consciousness raising and pull people along. I am not of that mind on this issue. I don't see much reason to have meetings to discuss this. If there is a way for us to promulgate a court rule, or however we can do that, I would vote today to say we want to have counsel before you can waive. If there was a way to get around not going through the legislative process I would want to do that as well.

2:17:57 Chair Ellis It seems to me for it to really work it has to be just more than this Commission saying our policy is to have lawyers available at all these opportunities. I think we could bypass that. It also seems to me a little out of character for a court rule in this state. I am thinking of the rules that I am aware of and I not aware of any that is quite like this. This is more substantive than I would have thought. I am just talking aloud. My own sense is legislation is exactly the right thing to have happen here. It is the legislation, after all, that has the rule about unless waived. I am not disagreeing with John. I haven't seen an issue as interesting as the idea of let's at least have a lawyer involved before a waiver can be accepted. I am sort of attracted to Kentucky as I listened to the discussion. With all that said what if we did the following: go ahead and draft a proposed piece of legislation. It is not hard because there probably is a Washington rule. Go ahead and have the meetings with Commissioner Welch as the Commission representative and know that what you are hearing, I think, is that there is very strong support here for at least the Washington rule. Having laid that out does that meet with a nod of heads around the table?

2:20:13 C. Lazenby I agree. We do have some political due diligence to do around this as it goes forward. We can either do that in subcommittee or we can do that with our own individual seismic meters however that works, but I can see we have issues with providers and costs. We have issues with prosecutors and we have issues with the juvenile department folks. All need to be vetted at some point. There is something to be said for having a train coming down the track.

2:20:52 Chair Ellis I think we are the right entity to get this moving. I think I am hearing a pretty strong consensus of support. I would suggest that we go along the lines I have proposed unless somebody feels differently.

2:21:09 J. Stevens I can have a concern that if we go to the legislature with anything that is going to cost a nickel we are going to fail.

2:21:17 Chair Ellis You know I am actually not sure that I think that is true in this field. I think it is such a powerful case and I also think

2:21:32 J. Stevens You are more of an optimist than I am, Barnes.

2:21:36 Chair Ellis I have talked to a couple of them recently. I just feel like we have a very good relationship there. Obviously, part of what Ingrid will be doing is trying to get a handle on what the cost might be including using the argument that George said was supported by what happened in Washington. Reduced filings might be enough to offset what the incremental costs would be. I can't imagine a more compelling case for counsel than what we are talking about. It is just a joke that, as you say, those who can't contract to buy a car can give up critical rights. It just makes no sense.

2:22:25 P. Ozanne I don't have a problem with the process but proposing legislation are you foreclosing the possibility of going either by us or a court rule. I share Janet's concern. I am on a committee for the current governor to look at the two billion dollar deficit. We are talking about three prisons closing or eliminating all community corrections. When you compare the scenarios out there, though I agree with the recognition of importance, it is going to be like a train wreck unless the economy suddenly changes or somebody wants to vote on a tax.

2:23:01 J. Stevens Not only that. It is not just the two billion next year, it is the 1.6 in the next biennium and the 1.7 in the biennium after that. You are talking about six billion total in the next six years. If there is another way to get it accomplished I would feel a lot more comfortable.

2:23:24 C. Lazenby Respectfully, Mr. Chair, in this very room for years I watched prosecutors and crime victims, representatives come in and argue against counsel and in the name of expediency and moving things along to get justice. The fact that it was juveniles was no deterrent. A lot of those things Ingrid was here on and I was here on before. That is what I meant by political due diligence. It may seem like a no brainer to us because we are focused a lot on the provision of defense services to citizens that are accused of crimes, but there is a whole different constituency out there that resonates a lot within this building on both sides of the aisle whether it is through true support or fear. You can really put together some interesting coalitions through common sense proposals. I think we need to keep the court rule option open and sort of decide after we have done our political intelligence which is going to be the most effective.

2:24:21 Chair Ellis The other route is we do have our juvenile appellate lawyers. I have to believe that there is a case out there somewhere that will come their way where this issue is involved. Instead of doing it in this case only, put the effort and to make it much more of a broad appeal.

2:24:55 I. Swenson Right now, Mr. Chair, our appellate lawyers internally are not handling delinquency appeals. Those go outside, but this seminar that I mentioned that OCDLA is doing will have as one of its focuses how trial lawyers, both criminal and juvenile, can undo uncounseled pleas. The impact of that kind of litigation would be very positive.

2:25:26 Hon. Elizabeth Welch Mr. Chairman there is another consideration that I would like to add to this group, this advisory group. One of the complexities of providing counsel to children has to do with eligibility standards. Again, in my travels I have seen that the practices in that regard are as disparate as the other things we are hearing about this practice. Let me explain. A kid is charged with a crime. The parents come in for whatever their

initial time is. Most kids are not in custody. They come in with mama or grandma or somebody to a meeting at which point the issue of counsel comes up for the first time. They are given forms to fill out. The parents need to fill out a form and give their financial information. Then the question is what are the rules and standards? I know we are going to be talking about that soon. It is interesting for me to look at the materials that we have for today that there is no reference to juvenile matters at all there, yet there is a determination of eligibility being made without any kind of guidance. The practice in Multnomah County when we did that very briefly in an experiment five or so years ago was to use exactly the same forms and principles as applied to an adult charged with a crime. If you can picture it, your kid has committed a burglary, allegedly, right? You come in and say what your income and your expenses are. Then somebody looks at that and says, "Okay, according to the way we look at this your kid doesn't get a lawyer." That is the end of it. First of all they probably can't afford it but even if they can they have the absolute option to say, "No, I am still mad at you and I am not going to spend \$5,000. You did this and you are going to live with the consequences and I am not paying for it." What does the judge do with that?

- 2:28:08 P. Ozanne How is the parent's financial situation even relevant? With an adult they wouldn't say ...
- 2:28:17 Hon. Elizabeth Welch Parents are responsible for their children. If a child needs an attorney it is one of the responsibilities that a parent has.
- 2:28:32 P. Ozanne The lawyer isn't representing the parents.
- 2:28:37 Hon. Elizabeth Welch There are counties, not Multnomah or Washington or probably Lane, but I can't speak to anything else where that kid doesn't get a lawyer.
- 2:28:52 P. Ozanne I can understand common sense. Legally I would have thought that parent's wealth would be irrelevant.
- 2:28:56 Hon. Elizabeth Welch That is why I am raising the issue. If we are going to try to deal with this, that issue is not going to go away. It might if everybody gets a lawyer and they can't waive. That term "eligible" is everywhere in the statutes. The issue about eligibility is something that needs to be addressed.
- 2:29:24 Chair Ellis Include that in the discussion at these meetings that we talked about. I see no downside to doing these meetings even if it alerts adversaries and they get organized then so be it. I think it is far more likely that we won't get organized opposition to this because it is not a budget item that comes out of the juvenile departments. Maybe they feel they spend more because there is more lawyer involvement. It is not quite like Washington where it is the county that is going to have to pay. I just know the likelihood of success on the legislation, if that is the route we go, will be much higher if we have done this kind of homework and background than if we just spring it and the opposition shows up early. Any other thoughts on this?
- 2:30:41 J. Potter I remain convinced that if we can do this through a mechanism other than legislation that that should be the first priority, through the Chief Justice or if there is a mechanism to do it by Supreme Court rule. I don't understand where the opposition would come from. Washington has just proven that to us by doing what...
- 2:31:08 Chair Ellis And Florida.
- 2:31:10 J. Potter And they had one DA that complained in Washington.
- 2:31:13 Hon. Elizabeth

Welch I am not disagreeing with George at all. (Inaudible).

2:31:36 Chair Ellis Going this route doesn't preordain that the only solution is legislation. It does seem to me that if we don't do this our chances of ever doing successful legislation are much less.

2:31:50 J. Potter I appreciate the cool level-headedness of the chair.

2:31:58 Chair Ellis Thank you both again. We all really appreciate your help. Several of us have already gone ahead and eaten lunch. If you haven't eaten lunch do it now. I think we ought to plow on and go to Item No. 4.

2:32:30 K. Aylward It is the item right after the 30 minute lunch break, in which I prepare. I could use five minutes maybe.

Agenda Item No. 4 Eligibility Standards for Court Appointed Counsel

2:40:33 Chair Ellis Item No. 4. Eligibility Standards for Court Appointed Counsel.

2:40:40 K. Aylward It is after lunch and I am going to make you look at spreadsheets for nearly an hour. There are toothpicks up front if you need to prop your eyes open.

2:41:02 C. Lazenby Does somebody have a copy of the Eighth Amendment here? The one about cruel and unusual punishment?

2:41:04 S. McCrea You know it by heart.

2:41:06 K. Aylward In your materials behind the pink divider I have included for reference the statutes that pertain to financial eligibility. These are just the chapters that come out of Chapter 151.

2:41:21 Chair Ellis Let me help my colleagues. When she refers to the pink divider she is referring to the January 28 material. It is tab five from the January 28 material. I am proud to say I read the email and I brought mine.

2:41:47 K. Aylward That is partly why I brought the projector too. If you don't have your materials I can flash it up there. There are also statutes in Chapter 151 and in the juvenile statutes that pertain to court appointed counsel, but they all sort of cross reference each other. I included these because I want to make the distinction between the upfront contribution, which is generally referred to the Application Contribution Program, and recoupment that happens at the end of the case. The money goes in different places and different things happen. I just want you to understand that ORS 151.487 is really talking about application and contribution. That is the upfront determination. ORS 151.505 is talking about recoupment at the end of a case. When we get a little further into it we will talk about some problems that there may be with the way the recoupment statute is written and case law following up on that.

I wanted to start out by showing you what the process is for verification. What happens is a person comes in and they fill out an application. It is an affidavit of eligibility that lists income, assets, and expenses. The verifier then has this little worksheet, this calculator, where they just enter the figures. They do follow up with questions. If it is not clear they will interview the person and say, "Why did you put this down?" whatever. It is not just an automatic process, but the result of the calculation on this spreadsheet is the thumbs up or thumbs down recommendation that the verifier provides to the court. What they do is they enter a figure from the privately hired attorney fee schedule. That is really what we are talking about today is whether or not that needs to be adjusted. I am going to explain the whole process first and then we will come back to it. So what that is supposed to represent is the amount of money that the person would need to have to go out and retain counsel for this type of case in this county. That is what you need. There is also a contribution

amount that says, "If you have got \$225 we are going to ask you to contribute it." What they want to do is keep some separation between the privately hired cost and the contribution amount. You don't want someone to contribute too much up front and then find that the court is not going to order that much at recoupment. You want there to be a gap between those. We put in the applicant's household size. You know the statute talks about expenses for the person and their dependents. Then you come down here and see that this person makes \$1,500. They live alone. This income guideline figure, \$904, is based on the federal poverty level for a one person household. It is actually 30 percent above the property level. Then the person lists what it really costs them. Their rent is \$700. Utilities are \$200. They have a credit card payment that is \$40 a month. A car payment. Pretty reasonable. He fills all this in and in fact it adds up to \$1,500 a month. He is paying out what is coming in and a lot of people would look at that and say, "You can't afford an attorney unless you have assets elsewhere." But the worksheet takes whichever is lower. Either the true living cost or what the guideline amount says. When these policies were developed a major contributor to them was a person who was very frugal. When I first started to work here I looked at these things and said, "Wait a minute. Are you telling me that if someone has a big screen TV in their living room they are supposed to go sell it in order to get an attorney?" He looked at me and said, "Would you or I do that? If we had no money and needed an attorney wouldn't we do that?" Sure, if I had to. Then there were questions like, "What if I can get a cash advance on a credit card? Am I supposed to take that cash advance?" Again, he said, "Wouldn't you do it?" Yeah I would. There are a lot of the things in this manual that in the real world may not be practical. For example, one of the assets that is included is home equity, if you have any home equity in your home. Well, how are you going to run out and get a home equity line of credit when you have no job, you have just been arrested, and lenders aren't giving out mortgages? You cannot make that asset liquid in a reasonable amount of time. In fact in this book, which is now your policy, the verification manual volume one - there is another volume and I didn't have the heart to bring it - it defines liquid assets not as a normal person would. Liquid asset is anything that you can liquidate within 30 days. A lot of times you need legal advice right now. You can't wait 30 days until someone buys your 2002 Toyota that you have to sell because you have two cars and they only allow you to keep equity in one car and only up to \$4,600. A lot of this stuff I would find frustrating and people do find frustrating apparently. Then it puts all those numbers on this side and it says you have \$1,500 coming in and you should be able to live on \$904, according to the feds, so you must have \$596 available and, guess what, you only need \$500 to get your attorney so you are denied. That is what this ends up telling us. That word "denied" will change with the spreadsheet. Now this is the exact same person in Polk County with exactly the same charges. Everything else is the same but in Polk County the privately hired attorney fee schedule says it is going to take you \$750 to get an attorney on an A misdemeanor. That makes no sense to me. You put all those numbers in and this person is allowed court appointed counsel - same person, same charge, neighboring counties, so something is not working really well. The next step is where are those privately hired attorney fee schedule numbers coming from? This looks better in your materials because this screen is too small. For every single county, every single charge, there is a number. For example, attempted murder. In Baker it only takes \$2,500 to get an attorney. In Benton you might need \$5,000. So choose your victim. I am not going to attempt to show it on the screen you will get seasick. If you look in your materials it is kind of interesting to pick a column and run your finger down. At the bottom of each page this shows you the maximum and the minimum. There is a huge difference.

2:50:24 C. Lazenby

What is the source of these numbers?

2:50:26 K. Aylward

I am getting there. First of all you look at the worksheet. Where did that number come from? Well, it came from here. So then where did these come from? This is just to show you how far apart they are. If you look at the A misdemeanor column and you go to Marion and Polk and you can see that they are \$500 and \$700. You can see that that is where those numbers come from. So how did we get those

numbers? What we did, with OCDLA's assistance, is they surveyed all non-public defender attorneys in each county saying how much would you charge if someone walked in the door and wanted you to represent them on a Class A misdemeanor, for example. In Jackson County they got 13 surveys returned and this is the range of answers that they got. What they wanted to do is figure out, "We certainly don't want you to get that \$6,000 guy, because we can't afford that. We also don't want to make it too low in case that one cheap guy leaves town or is busy or won't take your case. What we are aiming towards is the bottom 25th percentile." The way they calculated that is they said, "Okay, we have got 13 here. You divide it by four. That gives you 3.25, which rounds down to three. You go one, two, three and that is where you end up." You ended up on the \$750.

- 2:52:59 P. Ozanne You said "they" calculated. Is this still OCDLA?
- 2:53:00 K. Aylward No. OCDLA just put out the survey. Sorry.
- 2:53:05 Chair Ellis John was denying that he has ever heard of anything.
- 2:53:14 K. Aylward Indigent Defense Services in 1991.
- 2:53:24 S. McCrea 1991?
- 2:53:24 K. Aylward Yes. So that is how they ended up at \$750 for Jackson. Now let's look over at Multnomah. In Multnomah they got 28 responses. You divide it by four and you land on number seven. Wow, look at that, a \$1,000 instead of \$750. Well, you know if two guys had not sent that survey in you would have landed on \$750. What have we got here? Sixteen came in divided by four - oh, look at that. You just missed the \$750 mark by one person. You know what I find interesting in each of these is that there is that guy again. There is somebody in each county that would say it is \$6,000 and \$1,000 for expenses in every single county. I thought, "That can't be right." What happened is somebody returned the survey and in the line that said "county" he put all. The data entry person, don't know who, put that stat in for each county. As part of this we promised people that we would destroy their responses within three days of receipt. I haven't dug through the ton of cardboard boxes from 1991 to get into all this methodology and what really happened. I can't lay my hands on the actual responses but there is no way. That is too much of a coincidence for 36 counties.
- 2:55:07 Chair Ellis As you look at this it doesn't even seem close to realistic that private lawyers would have a fixed fee for all these different categories of cases without knowing more about it and how long it is going to take them. Unlike those who do contracts with a large enough number that they can average them out.
- 2:55:35 K. Aylward I apologize. I prepped for the last meeting and then things fly out. I did find a copy of the memo that gave instructions to the attorneys about how to respond to this. It gave them a methodology.
- 2:55:59 Chair Ellis So these are sort of averages?
- 2:56:00 K. Aylward What you would expect to bill in a typical case. I told them what to do and hopefully they all did it consistently.
- 2:56:11 C. Lazenby But have these never been updated in 19 years?
- 2:56:13 K. Aylward No. My point now, at this point in the discussion, I am showing you that the discrepancies are arbitrary because of the unsound methodology. It wasn't a large enough sample to just decide - it doesn't mean that it is \$500 in Marion and \$1,000 in Multnomah. It is not twice as expensive. Wherever the figure should be, whether it should be \$5,000 instead of \$500, it is not going to be twice as expensive in

Multnomah. I just don't believe that you couldn't find an attorney in Multnomah or Marion that would do it for the same.

2:57:00 J. Potter

Is there a punch line here, Kathryn? I am feeling maybe a little bit like Chip is. This is 19 years old. You are showing all this, we got the methodology and we understand that it isn't sound, so now...

2:57:22 K. Aylward

You want me to speed it up, okay, so then what we have – and again, if you don't have your materials this is going to be a little hard to see. The verifier only makes a recommendation. They make their recommendation in an objective way - whatever that spreadsheet spits out. That is the recommendation that they take to the judge. I went to the Judicial Department and said, "Let's get some statistics." If what has happened is that our guidelines says that if you have \$500 you don't get court appointed counsel, and then the person goes out and tries to get court appointed counsel and comes back to the court and says, "I couldn't find counsel. I really tried," and the court decides to appoint anyway, then we are just wasting the court's time, delaying and it is not going to make any difference. He is still going to get court appointed counsel. What I tried to find out from the Judicial Department was how we can figure out what the impact of this is going to be. If we suddenly put these rates up our caseload is going to go up. That is why we have always been reluctant to ask you to make a policy decision that would have an unknown but positive – in other words it would cost us money – financial impact on us. We never have enough to get by with the cases as they are. If we make these adjustments we are going to have more cases than we can pay for. At first a few counties would ask, "When are you going to revise them because it is a problem?" The manual says that, "If there is a specific case type in your county - maybe it is DUII - that is too low, where these people always come back and they get counsel anyway, then tell us." I am happy to change it because it won't cost us anything. They never gave me specifics they just kept saying that they needed to be revised. So then I said let me see exactly how much money we are talking about. Are people just missing it or is it that you either have zero money or you have a lot of money so that any change in this isn't going to make a difference anyway? The only statistics they were able to provide were these, and they are in code, so the number of affidavits received is the first column - "No recommendation," "recommending appointment," and "recommending denial," and then over here these columns, "ORAC," that is an OJIN code for order appointing counsel, and "ORDY" is an order denying counsel. You can see in Jackson, for example, the verifier recommended that 390 be denied, but the court only denied 165. Some of the other interesting things here are it says that Multnomah received 8200 affidavits and made no recommendation on 8100. That is not accurate. They are obviously not using this data system. They do have verifiers and they do make recommendations. With a lot of this data I am not so sure that the verifiers enter things consistently. In any case, it is clear that generally what happens is the verifier's recommendation is for no counsel and the judge appoints anyway. On this sketchy data I don't have a way to predict what it would cost us. So, the question is, do we increase these figures and, if so, how do we do it and how do we time it so that we don't bankrupt ourselves? What I think happens in some cases is somebody who is denied goes out and then they go to their brother-in-law or their grandmother and get some money and come back with a lawyer. Is that the right thing to have happen? No, but is it okay that it does? I don't think it is entirely bad to hold people to finding a way to get themselves counsel if they have other options. That is the end.

3:01:55 Hon. Elizabeth Welch

As far as you know, am I correct in my earlier assertion that this information is used by juvenile courts around the state to make the same type of determination?

3:02:09 K. Aylward

That is correct. You were correct also that the philosophy had always been that if you are responsible for your child's medical care then why not his lawyer's? What happens in juvenile, it's my understanding that they look at the parents' assets unless the parents are the victim in a case and then they don't. If the parents refuse to fill

out the forms they often appoint counsel anyway and then, under the statute that deals with recoupment, what we hope they will do is order the parents to pay the cost of counsel. Maybe it doesn't happen. I personally think we need a really simple system where it is the same statewide. That was so random to say bottom 25th percentile. Why don't we just say we want this to be somewhere in the range of reality. Maybe you are getting the little more expensive guy in this county and the little bit cheaper guy in this county, but the reason the verification manual has to be 500 pages long is because each county has its own approach and they are all slightly different.

3:03:21 Chair Ellis

Let me also point out for the benefit of those who don't have the statute in front of them, this problem is our problem because ORS 151.485 talks about determining financial eligibility. It defines it as a person who is financial eligible for appointed counsel if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family. Then sub 2 put it squarely in our camp. It says, "the commission [us] shall adopt uniform statewide guidelines and procedures that prescribe how to the use the form" – and the form is described a little above there – "and determine financial eligibility for appointed counsel." I know I have put this out of my sense of our responsibility. I always thought that financial responsibility was left with the administrative people who are court people and not our people, so we don't have to worry about that, but the truth is, if you read the statute, it is our burden. Let me ask this, Kathryn. It does seem to me that it is ridiculous to try to get down to, "If you have \$500 or \$499 you don't get it. But if you have \$501 you can." Can't we consider some kind of standard that would be if the individual has - name a number, \$5,000 of liquid assets, and liquid in a form that you and I might recognize - I can see saying to that person, "Go find a lawyer." I can also see saying, "Anybody who doesn't meet that level..." You could argue that they could squeeze it out of the grocery budget and they could squeeze it out of the rent budget. To me the system is better served just going forward and not spending all this energy parsing at such a refined level. One thought I had as I read this stuff was we could pick a level that anybody would say that at that level and above, in any of our cases, and not try to make it as one kind of assault versus another, we would have done our job by setting it as a level of liquid assets. It would be uniform and it wouldn't happen very often. I don't expect that it does.

3:06:37 P. Ozanne

Barnes, when I looked at the research a while ago the available research said we are spending more money to go through this eligibility process than just giving everybody counsel. It is a political issue.

3:06:47 Chair Ellis

I understand. I think we have a statute that says we are supposed to do something. I am trying to find a way to do something that is much more across the board and simple to apply. I cracked up laughing reading these. The laugh is on you because it is your problem.

3:07:15 Hon. Elizabeth Welch

Kathryn, do you know off the top of your head how much money we spend verifying and processing this paperwork?

3:07:28 K. Aylward

They did a study originally to see whether verification paid off or not. For every dollar that they spent on a verifier it allowed them to save two dollars in public defense funds. That was their original finding. I think a lot of it is that it keeps people from applying for court appointed counsel if they know someone is going to check. One hundred and sixty five people in Jackson were denied. If we hadn't made them go through this process and determined that they didn't qualify then there are 165 people who would have had counsel. The money that comes in from application and contribution goes to a sub-account of the Public Defense Services Account. That sub-account is to pay for the cost of verification, which we do because Judicial Department sends us a bill every month for 23 or 26 FTE verifiers that are funded from this account and we pay that. The other thing it goes toward is

the administration of the public defense services system. Basically it is a couple of people in my office. That is where that ACP money goes. One thing that happens when you say someone is denied is that you don't get any contribution from them. Maybe if you say, "Okay, you can have an attorney but you will have to contribute \$499 towards that attorney," in a way, it would cost us more because we would be appointing counsel more, but we would also collect ACP money.

3:09:28 C. Lazenby

You do get money back when the judge says at sentencing you are responsible for court appointed attorneys fees in the amount of X dollars. That goes back to that fund?

3:09:39 K. Aylward

No, at the end the recoupment funds go to the Criminal Fines and Assessment Account. Even though someone says at the end of a case "You are going to pay \$100 toward your attorney fees," it doesn't go anywhere near your attorney. It goes to the Criminal Fines and Assessment account. We want to get as large a contribution amount as possible because that goes to public defense and the Judicial Department. We don't care if there is nothing left at the end. If someone says, "Your attorney fees are \$100," then we are fine. If Ingrid were here she would be saying, "There are lots of good organizations and agencies that rely on the Criminal Fines and Assessment account. We don't want to begrudge them that money," but I am not so polished.

3:10:46 C. Lazenby

She is here by the way.

3:10:45 K. Aylward

Oops. Sorry. It was a compliment. The other thing about recruitment, and this has bothered me for a long time, at the end of a case the judge says to the attorney, "How much time did you spend on this case?" Well, an hourly paid attorney can probably tell you because he has been keeping track. A contract attorney may or may not know, if he is a line attorney in a big organization, what the contract amount is for that case type. Even if he does know he is more inclined to respond, "Oh, no, I only spent a couple of hours." He doesn't want his client to get hit with the \$475 that it is under the contract, especially if that particular case didn't take a lot of time. That \$475 under the contract is really supposed to be some sort of average of your hard and easy cases. If this was an easy case you are not going to say that. Before the statute was amended in 1991, there was a case that said attorney fees are based on a reasonable number of hours at the current guideline rate. "Reasonable number of hours for this case I am saying was 10. I am going to assess you \$400." It was \$40 an hour at that point. On appeal, what is now our Appellate Division, said to the Court of Appeals, "That is not fair because under the contract it is only \$310 so why did you make him pay \$400?" The court determined that that was okay. Part of the problem that comes about when you look at these statutes is that that was a flat rate contract. This case came up in 1994, where we had said to this particular contractor here is \$700,000 do 500 cases. They divided those two numbers and it was \$310 whether it was a Measure 11 or a PV. That is why the judge didn't want to say, "It is \$310 under the contract," because that is not reasonable. Anyway, the statute was changed in 1991 to insert a sentence that said, "For these purposes a court may refer to a schedule of fees." When we separated from judicial, because it said "court" it then got switched to "PDSC can establish a schedule of fees." In my mind the schedule is really now the contract matrix because for that county it now says, "This is an A Measure 11. This is an A felony. This is a PV and it is different amount." A lot of judges actually just have the contract matrix and, "It is a PV - \$200 - because I know that is what it costs under this contract." It seems to me like it ought to be consistent. I don't know in some courts whether they are still asking how many hours.

3:14:03 S. McCrea

They are in Lane County. I see it every day when I am in court.

3:14:08 K. Aylward

Even with the public defenders?

- 3:14:10 S. McCrea Yeah. It is exactly like you say. It is obvious to me they must be minimizing their time because they are put in a conflict position. I find it offensive. I think it is unfair to the lawyer. When I say I find it offensive I think it is unfair to the lawyer to put him or her in that conflict position with our client.
- 3:14:32 K. Aylward I think the courts would welcome some guidance. Over the years I have gotten phone calls from judges asking, “How much did this case cost? I need to know.” “I can’t tell you because any expenses haven’t come in yet. I don’t even have a way to a put a dollar figure on that particular case.” If you are going to do a statewide privately hired attorney fee list you could just say, “Anywhere in the state, \$1,000 bucks for any kind of misdemeanor.” You could do something similar for the schedule of recoupment and just say, “Anywhere in the state X amount for this type of case.” It would make life simple. Last time I brought this up years ago defense attorneys said, “Well, I don’t want to do that because that will be more expensive for my client. I would rather just tell the judge it was an hour.”
- 3:15:46 Chair Ellis Do you have a recommendation?
- 3:15:51 K. Aylward I would recommend simplifying the system first of all. I would recommend it being consistent statewide. I would recommend taking something that we have now and putting it up a little bit, pick a figure, 15 percent or 20 percent. When it says \$500, make it \$600, then stand back and see what happens. I have no way to figure out whether it is going to solve the court’s problem, or whether we are suddenly going to get a flood of cases, or whether it makes no difference at all. You could re-survey people but most people don’t get a lot of retained business in criminal cases. It is difficult for them to know. I don’t really have a recommendation.
- 3:16:41 Chair Ellis Do you think there would be a way to kind of break out the types of cases? I think misdemeanors you would expect to cost you less than felonies and Measure 11s. If we could come up with numbers that have some common sense to them about liquid assets or consistent income. For a misdemeanor if you have \$5,000 in liquid assets or a steady income of X then you are not eligible. Then grade it up higher and when you get up to the aggravated murder, I don’t think it should even be asked. I think if they want court appointed counsel they should get it.
- 3:17:41 K. Aylward Sure. I think if your life is on the line and you have some cash you want to go get your dream team.
- 3:17:48 Chair Ellis At some point then those with the resources can decide, “Do I want a public lawyer or do I want my own.” I find it just ridiculous to get to the level of what these questionnaires do, but I also think we have a responsibility to set a standard that has some resemblance to a rational standard.
- 3:18:16 K. Aylward My recommendation at this point would be – Ingrid said bring this book so you can see what a big program it is. A ton of work went into the training of the verifier. I would be reluctant to change the verification process for now. I would say you can still have your checklist and procedures and ask whether a car counts or not. We are talking about a lot of employees with a lot of years of training. It is going to be a burden on the court to retrain them and redo the manual and answer all those questions. For now, even though it is not really very good, I would keep that the same but I would change the privately hired attorney fee schedule and put it up. Either put it up 25 percent or 50 percent. If you are comfortable with it being the same statewide, keep it the same statewide, and simply change that piece of it and not try to tackle too much at once.
- 3:19:21 Chair Ellis My approach would not make it hard to train people to apply. They would be asking questions designed to get at that number and that income number, but we would be setting the thresholds quite a bit higher than I think this system needs to. It would be very simple to apply. How do others feel?

3:19:50 Hon. Elizabeth Welch

There is eligibility on the one hand and then the cost of counsel. They really are a separate process and calculation. My impression is that people can make quite a bit of money and still be eligible for food stamps right now. It would be interesting to know how high an income you can have and still get money to help you buy your groceries. The relationship between the poverty level – that used to be the term that was used and it isn't anymore – and the legal aid level and so forth. It seems like what you are really looking at is the cost of counsel and making that adjustment to the system and doing away with all the different counties. My sense is that there is really a fundamental justice issue about expecting people to contribute when they can't. The idea is that they are unable to pay yet the system assumes that they are able to pay. In every event they have to pay the way it works right now. Right? Maybe, if not now, soon you would look at what is reasonable on that side. I really hope you can do something with this juvenile thing because it is ridiculous. It is everything plus the parents did not commit the offense. Their kid did. Why should the same principles be applied to me as a parent for the behavior of another person, even if it is my child?

3:21:45 K. Aylward

There was a legislator, and it was probably six years ago, someone on Senate Judiciary, I think, who said, "Well, I can't believe it. My son was arrested and given a court appointed attorney. Can you believe it? My son." He was just furious and incensed and offended that someone thought he wouldn't be able to a) decide for his son whether he needed a lawyer, and, b) pay for it. I think politically we are better off to have a really, really stringent system. People are going to say that everybody is getting counsel and we would say, "Oh, no look how hard we are on them. They would have to sell their big screen TV, if they had one." I think having the policy be really hard and limiting is better because the judge is always going to be reasonable.

3:22:58 Chair Ellis

If we went the route you are suggesting, which is to the address the attorney cost issue, can't we come up with some pretty good data from our database? We have a lot of data on each of these types of cases what we reimbursed for. What if we use those numbers? They are averages.

3:23:46 K. Aylward

They would be lower. If we are looking at what we pay for an A misdemeanor. It is not going to be \$500 bucks. It is not going to be \$750 or \$1,000. It is going to be \$300 or something. That is what we are saying too - it is totally wrong. You can have a public defender because they are cheap but if you have money you can go get a private attorney because they cost more. That is why we have that.

3:24:20 C. Lazenby

We do a lot of volume in our system. That is why the unit price is a lot lower. To go out and hire a private attorney to handle a criminal matter where you can't do contingency fees you have got to come up with a big chunk of change to retain an attorney right away. That is something that even most working class people, people that live paycheck to paycheck, wouldn't be able to come up with, the \$6,000 or \$7,000 it would take to retain a private attorney to help them with a serious criminal matter. It is not about a recoupment of our costs, it is about what the market is. There has to be some sort of market reflection even to that legislator or whoever it was that was appalled that the son was able to get a court appointed attorney.

3:25:12 K. Aylward

In that particular case he didn't actually get a court appointed attorney. There was an attorney staffing the arraignment who told the son to remain silent. Mr. Chair, are you suggesting that we say, "You have to have \$2,000 if you are charged with a misdemeanor because that is what somebody is going to want as a retainer. You have to have \$5,000 if it is a felony." Something like that and just make it a really simple structure with big amounts, not what someone is likely to charge you but what you are going to have put down as a retainer and keep it really simply like that?

3:25:49 Chair Ellis

The simple part is true. I'm not sure I would know enough to know what the market for a retainer fee would be.

3:25:59 K. Aylward So are we back to surveying again?

3:25:59 Chair Ellis What does the federal group do?

3:26:09 S. McCrea What do you mean?

3:26:09 Chair Ellis For eligibility.

3:26:10 S. McCrea For eligibility the person fills out a financial affidavit and it gets filed with the magistrate. The magistrate reviews it. The prosecution does not have access to it. Sometimes pretrial services will look at it if there is a question. If there is an issue then they usually go ahead and appoint counsel. Then if an issue arises counsel is apprised of the question and it is dealt with. Most people in the federal system qualify for court appointed counsel.

3:26:44 Chair Ellis Does this magistrate apply some objective standard?

3:26:47 S. McCrea I don't think so. They just look at the financial affidavit, which is very simple. It is one page and they make an analysis. Because of the complexity of federal cases, generally people qualify. It asks you about your assets, liabilities, and dependents.

3:27:11 J. Stevens So if you have six kids and you make \$50,000, chances are you will get a lawyer.

3:27:28 C. Lazenby That would be a more reasonable query than our costs in our system.

3:27:33 J. Potter I am trying to arrive at a new threshold. If we believe that the one currently being employed is out of date – and nineteen years is fairly out of date - you can go to a simplified system and try to come up with some numbers, or you could take the number that you have which admittedly wasn't well researched or designed, and just define a replacement factor for the last 19 years against all those numbers and even out the numbers from the counties. So you have a better set of numbers for each offense and not for each county. We will certainly end up closer than what we have.

3:28:14 I. Swenson I just wonder if it would be helpful to look at the methodologies that other states use. Kathryn may be familiar with some of them. We could look at what Washington and California and other states do both in terms of the eligibility determination and then the standards for retaining counsel.

3:28:33 Chair Ellis I am a little reluctant to just define a replacement factor. In answer to that, yes, I would be very interested in how other states are doing it. I certainly am interested in finding some way to simplify this system. A good starting point is to try to find a rational baseline by category of case, much more rational than what we have. I am still tempted but I understand the political sensitivity. You set a threshold of \$5,000 or \$10,000 liquid assets. I am sure there are people in the community who would think we were giving money away.

3:29:29 K. Aylward The other concern is, what do we do if a policy change causes an explosion in caseload? That is a timing issue and that is why it has been like this for 19 years. There never was enough money to add a lot more caseload.

3:29:45 Chair Ellis Don't we know the outer dimensions of the explosion? Isn't that the "denied?"

3:29:59 K. Aylward That is true. No, we don't, actually. If we changed the eligibility then I could look at something and know I would never qualify because I make too much. If the standard is higher you might get more people applying.

3:30:20 Chair Ellis That doesn't sound to me like a big number. If we assumed that all of those in the denied column came into the approved column, it looks like at most under 10 percent.

3:30:40 K. Aylward That is about right.

3:30:41 Chair Ellis That approved column has a lot of big numbers in it. The denied column has none - about 313.

3:30:46 S. McCrea Also looking at Attachment 5 and at how our caseload keeps going down.

3:31:01 Chair Ellis Is this enough guidance to get us to the next step?

3:31:08 K. Aylward Yes.

3:31:08 Chair Ellis And thank you for making us look at this. It is part of our process and the statute is pretty clear that we are supposed to do it. Any other thoughts on this issue? This is three really hard problems in a day. Fortunately none of them required action today.

Agenda Item No. 5 OPDS Financial Monitoring Systems and Safeguards

3:31:48 Chair Ellis Kathryn, while we still have you, Item 5. I'll see if I can set the stage. I believe it was Commissioner Ozanne, three or four meetings ago, who expressed concern about financial monitoring. Just so the record is clear we don't forget things like that. When you bring them up, we march.

3:32:22 S. McCrea Two of the commissioners walked right out the room.

3:32:26 Chair Ellis Do you want to introduce this?

3:32:26 K. Aylward I just want to explain a little bit about what our process is now. In my view, there are really two things that you want to prevent. You want to prevent someone embezzling or stealing from you and you want to prevent unintentional errors. That is why you want a system in place where people don't make mistakes and don't rip you off. The easiest way to prevent any embezzlement is the multiple signature thing. One person in an office might turn to the dark side but by the time they have to have an accomplice you have really reduced that possibility. By the time you have a third person in an office it almost an impossibility that those three people would be in cahoots and decide to do something. The standard requirement in the state financial system is two signatures. We have three signatures on everything that we expend. The first level is actually the AP representative. They go through and they check the math. They look at whether something is an appropriate expenditure. If it had to be preauthorized they check that it was preauthorized and everything looks good. They look in OJIN to make sure that the attorney was actually appointed on the case. Then it goes to Lorrie Railey, our Business Services Manager, who signs off on it. Then it goes either to our accountant, Erica Robinson, or Alan Gibson, who used to be an AP rep. We end up with three signatures on everything that is processed. When the Secretary of State's office came to decide whether to do an audit, they looked at our business practices and said, "Wow, we are not even going to do anything more because the chances of us finding anything are so slim." I don't have a concern about embezzlement or fraud or anything. I think it is perfectly reasonable to do a check to see if anybody can find any mistakes in what we are doing. You do 40,000 bills and people are tired. Who knows if people are just signing without really checking carefully? Commissioner Ozanne had said that perhaps it would be good to have somebody from the outside come in and do some kind of audit. My concern with that is that it would be very difficult for them to find a lot of the things that someone in our office might be able to spot. For example, let's say we paid an investigator for two hours on a C felony. An outside auditor would first say, "Does this need to be preauthorized?" So you need to know what has to be preauthorized and what doesn't. That is pretty simple if they knew that. Then they go see if it was preauthorized, see if they billed more than what was authorized, see if they billed at the rate that it was authorized. So, yeah, you could have somebody trained to do this. What if the case is a Hood River case? There shouldn't be an investigator billing on a C felony in Hood River but there should be

in some other county. So how is an auditor going to know this? Or take the example of an attorney submitting a fee statement for 10 hours at the guideline rate for representing grandmother in a dependency. You look in OJIN and they were court appointed. All the numbers add up. "Can I pay this?" "Nope. You can't pay that." What I would like to suggest is that the analysts in my office, who are actually quite separate and don't deal with paying the bills, devise something where there is some fixed number of vouchers that we pull, whether it is a sample size of 50 or 200, and have them go through them and see if they can find any errors and the kinds of errors that they detect, at least do that as a first step to see are we at least accurately paying the bills. This is kind of a slow time for the analysts coming up. Contracts are negotiated. RFPs don't come out for a long time. We are far away from the management conference. Over the next couple of months we could devise at least that as a first step. Then if we find a lot of mistakes – if people are determining that something is reasonable and necessary and the analyst says, "It doesn't seem reasonable to me," then we can pursue it further. That would be my suggestion.

- 3:37:15 Chair Ellis Any thoughts or comments? This was driven by a comment.
- 3:37:20 P. Ozanne It was probably my comment that confused everyone. I probably used the term "audit." There is probably a technical term for what I meant. My concern is with a \$200 million operation. Kathryn and others that I hired know that I have the utmost confidence in their ability, but it is a shock that we have developed – built on what was here before - built this system. I was thinking something like the National Association of Public Contracting. We would think about paying them at some point. Maybe it is not now. I wish we would have done it on my watch when I was director but certainly I would like it done when I am a Commission member. That group comes in and tells us whether there are things that we could improve in the methods we use to handle this process. There aren't many examples in public defense administration. I think we may be the biggest and the most competent.
- 3:38:33 Chair Ellis George just left so it is okay to say that.
- 3:38:34 P. Ozanne I would be confident that if someone came in, and we paid them enough, they would have found this eligibility issue. I have to say this was hidden and I never got around to it on my watch. I am not criticizing these folks. This is goofy. There is a difference here but I didn't appreciate as executive director that I was putting you all in a position where you were saying you were approving contracts but you didn't really have the information to do it. I take responsibility for that. Again, I urge somebody to tell me the right language - someone from the outside that we pay to come in and look at our system.
- 3:39:34 J. Stevens A performance audit in effect.
- 3:39:35 P. Ozanne The Secretary of State does performance audits but they are probably not going to have a clue.
- 3:39:37 Chair Ellis That is probably not the right word, kind of a system analyst. You are thinking of some national group and I always cringe when I hear about them.
- 3:40:03 P. Ozanne Why is that?
- 3:40:03 Chair Ellis Because I think they will come in and do something kind of robotic.
- 3:40:10 P. Ozanne I am open to who that might be.
- 3:40:10 Chair Ellis Do you think the Aldridge firm is appropriate to do what you have in mind? They know us.

3:40:28 P. Ozanne Certainly competent and Geoff is up to speed. I suppose one could question his objectivity if you are from outside because I worked with him. I think that is a good idea.

3:40:41 Chair Ellis It is the fact that he has worked with us that makes me like it.

3:40:44 C. Lazenby That argument sort of weighs against using a true outside auditor to take a look at office stuff. An auditor is somebody who doesn't have any connection with you at all and are independent. They haven't been under contract with you to do things. They are squeaky and objective.

3:41:05 J. Stevens Sort of like independent board members?

3:41:18 P. Ozanne Geoff and I, we missed – obviously it came to my attention painfully as executive director that you missed the boat with the Guilfooy/Ozanne study. There was a lot of the boat that we got right. I guess you could say that this is Phase 2 if you bring Guilfooy back to do it. That is not an unreasonable way to do it.

3:41:44 Chair Ellis What is your reaction to Kathryn's proposal to use internal sources to do a spot check review?

3:41:58 K. Aylward We might do that anyway.

3:41:58 P. Ozanne That wasn't my concern.

3:42:03 Chair Ellis I think she was less concerned with fraud than mistakes.

3:42:05 P. Ozanne That is not my concern either. Are there things about our system that our goofy that we didn't think through?

3:42:14 J. Stevens Wouldn't knowing whether you are making a lot of mistakes down the line be one way of at least starting to decide whether you have a problem?

3:42:27 P. Ozanne My intuition tells me that it is going to be really fine grained and expensive. Not that this wouldn't be. Simply ask for a narrative about how our system works and then start asking questions about it.

3:42:39 Chair Ellis This piece would be free.

3:42:40 P. Ozanne As a separate piece.

3:42:44 Chair Ellis This is a low point in their work cycle.

3:42:49 P. Ozanne I don't have any objection to this but this wasn't what I was raising.

3:42:53 Chair Ellis Is there consensus to at least agree to do the proposal that Kathryn is suggesting? I can see no harm. Then the question beyond that is do we want to do a system review with an outside consultant?

3:43:20 P. Ozanne Maybe now is not the time. I see the downsides in terms of airing our laundry, if there is any to air. I just think we need to do it at some point because we have been operating this system for a long time.

3:43:44 Chair Ellis An awful lot of enterprises have an outside accounting firm to not only audit their financials but to prepare a management letter commenting on just the kind of things you are talking about which is, are your systems set up in the best way to have those checks and balances? We are just talking the management part. I am trying to get a sense. Do people want us to go that direction? If we do, do you want someone totally new or someone you know something about?

3:44:27 C. Lazenby They could come in and do it from two standpoints. One, to kind of audit us to take a look at where we are and look at our systems and see how sound they are, but probably also to give us some sort of training on how we can do continuing audits ourselves. I don't think we have that objectivity. I think there are probably pieces in our system, just like you were saying about the juvenile system, "Well, we have always done it that way." We may not really think that there is a problem but outside eyes would come in and say, "There are better ways of doing this." I don't know whether it is a public contracting context or whether it is just a normal audit function. The fact that we have gone 19 years with this same eligibility piece speaks volumes about how many other uncovered flaws and dysfunctional system pieces there are there.

3:45:25 Chair Ellis Which is more upsetting to you, that one, or the one this morning where we are contracting with non-entities?

3:45:31 C. Lazenby Well, I have got two ears and both of them are going deaf from the noise of all that.

3:45:41 P. Ozanne On the eligibility again, Kathryn has proposed – even when I was there it was a time bomb. We were afraid if we started messing around with this then our caseload is going to skyrocket. It is kind of an inconvenient truth that we were struggling with.

3:45:56 C. Lazenby I think we are better off as a Commission to go into that stuff and figure it out. Then put new systems in place and do corrective measures than to fight it in crisis mode as one thing after another blows up. That makes more sense to me in terms of a management style.

3:46:18 Chair Ellis Let me make a suggestion and see if we can resolve this. Could you, Kathryn, undertake to scout the market for potential systems review consultants and if it is going reasonably well, get bid proposals with dollars attached from two or three? Then we can look at those and decide do we want to spend that money and which do we want to have do it.

3:46:52 K. Aylward Sure.

3:46:52 I. Swenson Mr. Chair, I am just thinking you might have to define the scope of the review we are looking for a little better. I am not sure I am understanding it.

3:47:03 Chair Ellis I think all I am hearing is within the office, so we are not looking at an audit of all contractors or something huge like that, but within the office are our systems affecting the expenditures of money, do they have the right kinds of checks and balances?

3:47:30 K. Aylward That we have from the Secretary of State. We have a letter from them that says, "Yes, you have enough checks and balances." I thought what Commissioner Ozanne was talking about was someone who comes in and says, "What. You are issuing an RFP? That is so old school. There is a better way to do it." Or, "What, you are contracting with entities that aren't entities? You can't do that." I thought that is more what you were talking about.

3:47:54 C. Lazenby More of an operations audit rather than a performance audit.

3:48:01 K. Aylward But I think we have done that already in terms of our checks and balances internally.

3:48:06 P. Ozanne I do too.

3:48:09 Chair Ellis Is this sufficiently defined that we could get some proposals?

3:48:17 P. Ozanne No. I am just trying to state it as best I can. I can live with the fact that others don't share the same concern and we shouldn't go forward with it just on my peculiar perspective on this.

3:48:30 Chair Ellis I actually misunderstood. I thought that you were concerned that we don't have a true audit function.

4:48:42 P. Ozanne That might be true too. That really wasn't my concern. I think Kathryn has built sufficient protection.

3:48:52 Chair Ellis So what you are really looking at is kind of a management consultant group that would look at our functions and our process and advise if they see better ways of organizing ourselves?

3:49:10 P. Ozanne Yeah.

3:49:10 J. Potter You might get some definition by having a three or four way conversation with Ingrid, Kathryn, Peter and Geoff Gilfoy as sort of a consultant that would help us define what it is we are really trying to do and then they might even suggest, since they are sort of in the business, who out there you might be able to find to do it.

3:49:30 P. Ozanne I was going to say that I would probably call Geoff to help him think more about this. He may say. "You are crazy and this is nothing of a concern. You are doing this fine."

3:49:50 I. Swenson I don't know. I'm just kind of thinking out loud. In a sense, you are the body that oversees our office and the work we do. You bring to it all your business and legal and other experience. Maybe one approach would be to spend at least some time at every meeting talking about specific functions and how they are performed, organize it in such a way that it makes sense and you enough have information to get a good idea of how we deal with these issues. Then you might say, as you have today about the eligibility standards, "This is unacceptable and we need to do something about this. Let's start looking at it." There may be occasions when you say, "We need a good management consultant to advise us as to possible approaches." I am fearful that somebody would come in and the scope would be overwhelming. "I don't know what you do. Tell me what you do."

3:50:54 Chair Ellis Or worse they would come in with too many ideas.

3:50:58 I. Swenson I don't know if that would be a way to begin analyzing the scope of the issues that you are concerned about.

3:51:08 P. Ozanne I think I have said what I can. I am just saying again we are using are very formidable internal resources to deal with the problems. I am saying let's get someone from an outside who has experience with contracting systems and is this the way we should be doing it. There are big contracting systems. Oregon Health Care does a contracting system. The federal government.

3:51:45 Chair Ellis Let's go forward with Kathryn's proposal because I think there was good support for that. Then let's hear what comes out of that and we will revisit this after we hear that. Does that sound alright?

3:51:57 Hon. Elizabeth Welch I am just curious if there is or isn't a consensus about Peter's topic?

3:52:07 J. Stevens On my part I don't know. If we don't have an inkling that there is something wrong obviously things could blow up on you. I would think if we were doing things poorly we would have some sense that we were doing things poorly. I don't get that at all. Frankly, I am not sure that I want to spend the money digging around unless we have a sense that we are going to find something. Does that make sense? I do like Kathryn's idea. I think it makes a lot of sense.

3:52:53 Chair Ellis Let's see what comes back from that and keep this potential ...

3:52:56 P. Ozanne I will just cite one other example from my experience. I was an independent board member on the PERS board. Five years before the PERS crisis I went to the Governor and said, "I think we are going to have a problem here. This thing isn't going to work. People are retiring with more money than they are making." Everybody said the same thing. "It is looking fine and there is no problem. We are running a great system." I just want to get out in front of that to make sure we don't have anything lurking here. I haven't adequately defined the scope. It is just a lot of money we are sitting on.

3:53:52 Hon. Elizabeth Welch I don't remember if there was a particular cue for Kathryn bringing this eligibility standard to the Commission. I think 19 years is a long time in between looking and I think it does raise a question of about our ability as not full-time employed people trying to do this job. There may be things out there that we should be looking at. At some intervals I think something like that needs to be done. I think we are all pretty amazed. Some of us know a little bit more about the eligibility stuff than others do. It is really a mess. I think it reflects poorly on us when you find out how it was put together. It looks like there is a problem.

3:55:07 Chair Ellis I am trying to find out how to accommodate the group. Let's go ahead with your proposal and do you want to have ...

3:55:18 P. Ozanne I will try to fashion something on my own that is a better statement.

3:55:21 Chair Ellis Call Geoff and get his input. Okay.

Agenda Item No. 6 OPDS Monthly Report

3:55:43 Chair Ellis We are on Item No. 6, the OPDS Monthly Report, which was scheduled to start at 2:00. I believe we are right on schedule.

3:56:12 P. Gartlan Good afternoon, Mr. Chair and members of the Commission. For the record I am Peter Gartlan with the Appellate Division. I think the first order of business would be to introduce the two new chief deputies that were promoted last month. I am going to ask them to come forward.

3:56:40 P. Ozanne Is this a new dress code too?

3:56:40 P. Gartlan I think they have a formal event to go to later. This is Josh Crowther. Josh's career as a public defender began on the streets of Salt Lake City about 10 years ago. He was ticketed for being an unlicensed musician. This is Ernie Lannet. Josh is a graduate of Lewis & Clark College School of Law. Ernie is a graduate of Willamette University School of Law. Ernie is the attorney who argued *Oregon v. Ice* in 2008.

3:57:15 Chair Ellis I remember. I got to be on your moot court.

3:57:18 E. Lannet Were you going to ask me how that turned out?

3:57:19 Chair Ellis Do I understand that it takes two to fill the shoes of Judge Duncan?

3:57:28 P. Gartlan Well, it actually takes three but we don't have enough money. Judge Duncan and Bronson James, the dearly departed, and these are their replacements.

3:57:43 Chair Ellis As deputy chiefs how do you allocate functions? Who does what?

3:57:59 E. Lannet I am the new Bronson. I deal with operations.

3:57:49 J. Crowther And I am doing personnel.

3:57:55 Chair Ellis Good. Glad to see you. Look forward to seeing you.

3:58:00 J. Crowther Glad to meet you all.

3:58:01 J. Potter Becky came to lots of these meetings. Will one of you becoming to lots of these meetings?

3:58:12 P. Gartlan It depends.

3:58:15 Chair Ellis Are you both no longer handling cases, or will you do this function and handle cases?

3:58:20 E. Lannet And handle cases.

3:58:22 J. Crowther Same.

3:58:22 P. Gartlan Ernie just argued a case in the Oregon Supreme Court on Tuesday and Josh just argued last month. They have caseloads.

3:58:40 Chair Ellis Welcome.

3:58:47 P. Gartlan Next is the new hires. We have extended offers and four applicants have accepted our offer and will be starting over the course of the next several months. I am not sure if I reported on this last time. Morgan Daniels from Intermountain, David Sherbo Huggins who is a third year law student at the University of Oregon, and two clerks currently at the Court of Appeals, Jonah Morningstar and Alice Newell Cushing. The next item I have is that we are in the Supreme Court again. We have four arguments this week in the Oregon Supreme Court, including one by someone for whom it will be his first time in the Oregon Supreme Court. He will be at the University tomorrow. It is Neil Byl. I don't know if the Commission wants to hear about this but it is HB 3508. I think the Commission is aware that the Governor signed into law a bill that suspends portions of HB 3508. There will be no more potential for eligibility for 30 percent earned time. Just to bring you up to date, we have a case that came in in which we may be raising a challenge as to whether that recent legislation is a constitutional violation because it is an ex post facto provision. There is more litigation on the horizon.

4:00:34 Chair Ellis Okay. What else have we got?

4:00:37 I. Swenson Kathryn, do you want to do the budget?

4:00:40 K. Aylward Yes. In the materials after the lavender divider is a copy of the report that we submitted to Joint Ways & Means regarding caseload trends and resentencing costs. That was required as a result of a budget note in our budget bill. The caseload trends, as you can see, are just now all over the place. First up, up, up, and then dropping down was a surprise. There is a little tiny upswing. It is basically flat so we will see how it goes. The last page in the section is a summary. I put together a summary of all the things that have happened to us in terms of our budget. I think we have talked about all of these before. HB 5100 - we moved a chief defender out of CBS, we got an other-fund expenditure limitation of 8.8 million. That is to be allow us to spend the fee bill money if it comes in. That is just permission to spend. It doesn't guarantee that the cash will be there. We had re-forecast our expenditure needs. We are anticipating needing a million less in the account than what we had originally budgeted for. That million was disappropriated and put somewhere else. I will tell you about it in a minute. The \$155,000 is the rebalance between trial caseload which is not as high as expected and the appellate caseload which was much higher. Those two cancel each other out just rebalancing between the account and the appellate division. HB 3696 does what is called "a fund sweep." That is taking \$500,000 out of the balance of the Application and Contribution Program.

There is \$500,000 in there. Finally, I didn't list it here because it is not money coming to us but it is money that is earmarked for us. HB 5100 made a special purpose appropriation to the Emergency Board in the amount of \$3.5 million. A million of that is what they disappropriated because we didn't need it. The rest of it came from some disappropriations made to the Judicial Department. They found some savings. We have to report on current expenditures to every single Emergency Board and Interim Joint Ways and Means and the session Ways and Means between now and next session. I am okay with that. Especially if it is just a two-page paper report.

4:03:55 I. Swenson

I think they are interested in watching our caseload.

4:03:57 K. Aylward

They want to know if it is going up or down. They also have to hear how the collections are going with the fee bill. That is really crucial. If they are actually going to collect the full \$29 million from the fee bill they don't have a problem. If they are only going to collect \$19 million then they have a problem they need to start dealing with even sooner. That is why they need to keep up on that. I want to tell you about something else that involves a spreadsheet. I gave you a handout regarding our attorney compensation. Here is where it is now. I have lined up the – obviously, the assistant AG schedule is not part of our compensation plan, but I inserted them next to the position that they are comparable to. So a Deputy Public Defender I in our office is an entry level attorney position. This is the entry level attorney position for assistant AGs. As you can see, you would have to work in our office three years before you got what you would get if you just walked in the door at the AG's office. Not good. It doesn't help for recruitment. It doesn't help for morale, and by the way there is a statute that requires the Commission to establish a compensation plan commensurate with other state agencies. So, we are not in compliance with the statute. One of the things that I looked at, and we have done this before in past years making adjustments, but the problem is that there isn't any money. We can't actually give people raises if we don't have money to do it. What we wanted to be able to do is figure out a way to change the compensation plan now prior to the snapshot that is taken that prepares next biennium's budget. For example, Deputy I, Step 1, there is no one on that step, no current occupant. If you drop that bottom step off it doesn't have any impact on anyone and doesn't cost anything. Really what you want to be able to do is add another step on top. Normally if you did that it would cost you money this biennium because the person would get their annual step and you would have to fund it and there is no funding. However, this biennium the second step is frozen. We can put a new top step on there. Nobody is going to step into it this biennium so it doesn't cost us anything, but it will be built in as part of our essential budget level for next biennium. We know we need to make this adjustment and we always put it in as a policy option package. It is not optional. We have to do this to comply with the statute. Because it is labeled as a policy option and the legislature always has demands that exceed its needs, it doesn't fly. This way we get it in as part of our essential budget level. It doesn't cost anything. Actually, it costs us a little bit this biennium because it seemed like such a golden opportunity that I didn't want to stop at just dropping one. What this compensation plan does is it drops the two bottom steps off a Defender I position and adds a new higher top step. It drops the two bottom steps off a Defender II and adds two more top steps. It drops one off the bottom of the senior and adds one to the top. Now the chief deputy and chief deputy defender didn't stay in their same neat little groupings. We didn't just drop a step and add a step. That is because this is matching the same scale that the AG's office uses, downshifted by one. If we make this change our entry level positions will still be behind, but only one step. Our second level positions will be behind six steps. I discussed this change in the compensation plan with legislative fiscal office although it is not LFO's role to give permission or say yes or no. LFO certainly understands the necessity of the Commission complying with the statute, or getting closer to it, and the necessity to pay two employees who are employed by the same entity - the State of Oregon – the same amount of money for the same work. The only proviso – warning - was that we would have to be able to answer to the legislature. I would

love to do that. I would be happy to do it. This is so necessary, overdue, and defensible and we are doing it to comply with the statute that the legislature wrote. We didn't bring this forward as an action. The timeline was very tight. However, because the Commission has for years approved and voted for policy option packages to establish parity, I think we take it as a given that parity has been a goal of this Commission. So it is not on here as an action item. It is an informational item.

- 4:09:52 P. Ozanne This is an approach you have used before which will put you in the annals of sainthood for the Appellate Division. You mentioned freeze. Is there any appearance or technical reason why we are violating that?
- 4:10:08 K. Aylward No. What is different this time is that if somebody were on step three, if you are a Defender I on step three, and we drop the two bottom steps you are still going to be making \$4718. We have relabeled the steps. It is not like we are going to pay you more until you reach the end of the line and then you have more steps to go to.
- 4:10:38 P. Ozanne Sort of a do over. If the next Governor would want to perpetuate the freezes we wouldn't be caught up? We wouldn't be implicated by this?
- 4:10:46 K. Aylward It would be yet another two years. If there was a freeze on salaries next biennium as well then instead of getting your next step that miraculously appeared in 2012 you would get it in 2014. At least it is there.
- 4:11:12 J. Potter So you are getting closer to what you were instructed to do by the legislature? You are not quite there yet.
- 4:11:15 K. Aylward Not quite there yet. I need two more years.
- 4:11:22 Chair Ellis What do you need from us?
- 4:11:26 K. Aylward "Thank you, Kathryn, you are wonderful." No, I need nothing. I just wanted to make you aware of this. If you have concerns or questions.
- 4:11:40 Chair Ellis I have no concerns and you are wonderful.
- 4:11:43 K. Aylward Thank you.
- 4:11:51 P. Levy I included behind the tab for this item a report on our third annual statewide public defense performance survey. I don't have much to add to what I described here. If you have had a chance to look at it the survey does seem to indicate that we are making progress in the area of juvenile representation. As I said in the report probably the greatest value to the survey now are the comments that we receive. We will be following up on many of those in the counties or from the people who made those comments.
- 4:12:44 Chair Ellis They are not included in our materials but what kind of comments do you usually get?
- 4:12:51 P. Levy There was one general catchall category - any comments you wished to make. Those comments usually focused on caseloads and professional responsibilities which are often tied to caseload - attorneys not contacting their clients sufficiently, quickly and often enough. Some of them, although many fewer comments than in years past, talk about pay and pay disparity. Most of the comments that we received were in response to the question for each type of representation, "Do you question the competency of any lawyer providing representation in this type of case? If so, please comment." Those comments were really in connection with lawyers or providers about whom there were concerns. Many of them were very specific to particular providers. Some of them mentioned individuals by name. Those really allow us to follow up with the provider or with the judge, whoever made the comments.

4:14:06 Chair Ellis The likely source of the comment is the judge?

4:14:08 P. Levy In a surprising number of these survey responses names were provided. We can attach names to comments and follow up on that. Most were from judges, they were the biggest category of respondents. Juvenile department folks and others are quite concerned about representation and they told us about it.

4:14:39 Chair Ellis I am encouraged that you are getting this out to a reasonably broad respondent group and that you are getting meaningful information back. That is good.

4:14:50 P. Levy I think that people are now coming to expect it and are appreciating it. I got one comment that says, “Paul, this year I don’t have so much to complain about.” I think they would miss it if they didn’t have the opportunity to tell us about it.

4:15:13 I. Swenson We were hoping too that it would allow us from one year to the next to track positive or negative developments.

4:15:26 Chair Ellis And it is all done by email?

4:15:26 P. Levy It is done through this online survey monkey. We are not professional surveyors but we are frequent surveyors. There is a certain amount of survey exhaustion out there.

4:15:46 Chair Ellis Okay. Ingrid, anything you want to add?

4:15:48 I. Swenson The only thing is to report to you very briefly that I was able to attend the symposium on indigent defense that was sponsored by the US Department of Justice. It was two weeks ago in Washington D.C. It was really a tremendous opportunity to meet with people from all over the country involved in indigent defense, to hear from judges and prosecutors and legislators as well as Department of Justice people about things that are happening elsewhere. It was a very, very useful discussion. We had two days of plenary sessions with a panel or three or four people followed by breakout groups. There were four members of our group. Julie McFarlane from Juvenile Rights Project came. Judge Frantz from Multnomah County participated and Alex Gardner the District Attorney from Lane County. Julie and I invited the judge and the district attorney, as we were encouraged to do. It made for a really good team. We would split up and go to different breakout sessions. The presenters were uniformly excellent and they had new and interesting ideas. We all sensed a new commitment by the Department of Justice to begin to see defense as a part of the justice system. They would say that they had been there before and took an eight year hiatus and now they are back. Indeed they have followed up. They appointed Laurence Tribe as the person to guide this defense initiative in the Department of Justice. It is exciting and very encouraging.

4:17:39 Chair Ellis Good. Anything else. Any subjects anyone wants to get to before we go into executive session. If not, I would entertain a motion to adjourn the public session.

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

Meeting adjourned.

Attachment 2

Contract Recommended for Approval by the Public Defense Services Commission at its April 22, 2010 Meeting

	Coverage	Contractor	Workload	Total value	Case types
1	Statewide	Frank E. Stoller	1,650 hours	\$179,000	Death Sentence Appeals and Post-Conviction Relief

Attachment 3

Summary of Proposals Under Consideration Concerning Public Defense Provider Structure and Governance

April 15, 2010

During the course of several meetings, and in documents produced in connection with those meetings, the Public Defense Services Commission and its staff have discussed the perceived benefits that derive from the governance of public defense contractors by boards of directors. The discussions have focused on the role of independent members on a board of directors. At its March 4, 2010 meeting, the Commission discussed the proposals and issues set forth below, with the expectation that the proposals would receive further consideration by the Commission and input from interested members of the public defense provider community.

1. The Commission should direct OPDS to negotiate contracts only with contractors who are governed by a board of directors.

- Should contracts for public defense services between the Commission and law firms be excluded from any requirement for a board of directors?
- Should contractors who are not incorporated, and hence not required or allowed to be governed by a board of directors, nonetheless be required to form an advisory board?
- Should contractors who receive total proceeds from the Commission of less than some specified amount of money be excluded from the requirement to have a board of directors? Or should contractors, regardless of contract proceeds, that utilize the services of fewer than some specified number of attorneys be excluded from any requirements concerning boards of directors?

2. In any circumstance where the Commission directs OPDS to negotiate contracts with entities governed by a board of directors, the Commission will enter contracts only with contractors who have independent members serving on their board of directors.

- Should at least two, but no fewer than 20%, of the members of a board of directors be independent?
- How should an independent board member be defined? If the definition excluded only those who perform services under the provider's contract with the Commission, then individuals who might receive some proceeds from the contract, such as bankers, accountants or other businesspeople, might nonetheless qualify as potential candidates for board service.
- How should independent board members be selected?

3. The Commission should make available to contractors an option, in lieu of meeting a requirement for a board of directors with independent members, which would permit contractors to demonstrate to OPDS staff and the Commission, in responses to a RFP, that the contractor has developed and implemented effective and appropriate financial safeguards and quality assurance mechanisms.

4. Rather than require that some or all contractors have boards of directors with independent members, the Commission should continue to articulate its strong preference for these features, with the understanding that OPDS staff will continue to work with the provider community to advance the Commission's policy preference.

Since the last Commission meeting on March 10, 2010, the OPDS Quality Assurance Task Force has finalized work on a revised set of recommendations for best practices by public defense providers. The recommendations, available on the OPDS website at <http://www.oregon.gov/OPDS/CBS/BestPractices.page?>, include specific recommendations for all providers concerning boards of directors with independent members. OPDS staff has alerted all contractors to the new recommendations, and will continue a variety of efforts to urge the adoption of the recommended practices, including those regarding boards of directors.

Attachment 4

4. List actions you can take to help improve your performance.

5. Are you kept busy at all times, or could your responsibilities be increased?

SATISFACTIONS & EXPECTATIONS

1. Are you satisfied with the type of work you are doing? If no, please explain.

2. What changes, if any, would you like to see made in your job? (e.g., responsibilities, procedures, reports, etc.)

3. Are you interested in additional responsibilities? If so, give examples of types of responsibility which you might be qualified to perform. Indicate any additional skills and training you might need.

ADDITIONAL COMMENTS:

Employee's Signature

Date

PERFORMANCE APPRAISAL FORM

ATTORNEY PERFORMANCE APPRAISAL METROPOLITAN PUBLIC DEFENDERS

Name:

Job Title:

Section:

Manager:

Last Performance
Appraisal Meeting Date:

Appraisal Period:

Date of Appraisal Meeting:

PART 1

The following sections are referenced by applicable sections of the Performance Standards adopted by the Oregon State Bar.

I. WORK MANAGEMENT

A. CASE-LOAD MANAGEMENT – Standard 2.1

Skill in planning, organizing, documenting, and implementing work assignments; Notice of court dates to clients; File organization (log notes, documentation, etc.); Call calendar management; Calendaring; Effective team meetings.

COMMENTS: _____

B. CLIENT RELATIONS – Standard 1.4

Timely client contact; Rapport with clients; Inform clients of the status of their cases; Be available for telephone calls from clients; Willingness to sign in and out; Maintain current contact information for clients.

COMMENTS: _____

PERFORMANCE APPRAISAL FORM

C. USE OF RESOURCES - Knowledge and use of office equipment including but not limited to: Computers, Phones, Voicemail; Relationship with secretarial staff.

COMMENTS: _____

D. ABILITY TO WORK WITHIN TEAM/GROUP - Demonstrates a commitment to meeting and exceeding client's needs; Is responsive to client's concerns; Communicates expectations clearly; Meets on regular basis; Supportive of team efforts; Delegates appropriate tasks; Flexible on job description when necessary; Willing to address problems within team; Tactful in suggestions for improvement; Accepts criticism; Dependable; Copes with stress.

COMMENTS: _____

II. CASE PREPARATION

A. CASE PREPARATION – Standards 1.5, 2.4, 2.5, 2.6

Ability to recognize issues; Development of defenses and case theories; Interviewing techniques with clients and witnesses; Investigation—timely and clear requests and willingness to participate; Use of experts; Development and use of demonstrative evidence; Discovery—ability to get evidence and strategize about turning over evidence; Witness preparation; Use and development of alternatives.

COMMENTS: _____

B. CASE NEGOTIATIONS – Standard 2.8

Use of, and ability in, the plea negotiation process.

COMMENTS: _____

PERFORMANCE APPRAISAL FORM

III. LEGAL ANALYSIS AND PRACTICES

A. MOTION PRACTICE – Standards 2.7, 1.5

Knowledge of procedural and substantive law; Research and writing skills; Effectiveness; Creativity; Availability to others.

Each attorney is expected to submit and discuss some motions that were litigated over the previous year.

COMMENTS: _____

B. TRIAL PRACTICE – Standards 1.5, 2.9

Knowledge of procedural and substantive law; Knowledge and use of the rules of evidence; Courtroom practices; Ability in making a record; Willingness to go to trial; Ability in voir dire, direct examination of witnesses, cross-examination, and opening and closing arguments.

COMMENTS: _____

C. SENTENCING PRACTICE – Standard 2.10

Knowledge of alternatives; Protection from inaccurate or inadmissible sentencing information; Presentation of mitigating and favorable information; Knowledge of applicable law.

COMMENTS: _____

PERFORMANCE APPRAISAL FORM

IV. DEVELOPMENT AND GROWTH

- A. TRAINING** - Involvement with office training, especially concerning the following areas: Attendance Participation; Availability to others and to put on training sessions; Attitude – willingness to learn and listen and motivation to improve.

COMMENTS: _____

B. ETHICS – Standards 2.1, 2.2, 2.3

Awareness of ethical considerations; Zealousness; Availability to discuss issues; Professionalism.

COMMENTS: _____

- C. OFFICE CONTRIBUTION** - Pride in work; Motivation to improve; Willingness and timeliness of evaluation; Supportive of others; Willingness to provide coverage; Contributes ideas for the growth of the office; Positive relationships within the system; Represents office well to the community; Utilizes foreign language skills.

COMMENTS: _____

- D. INITIATIVE & RESOURCEFULNESS**– Volunteers for additional assignments, make suggestions for improving work flow, and is resourceful. Demonstrates drive, creativity, and ability to start and accomplish work with minimal supervision.

COMMENTS: _____

PERFORMANCE APPRAISAL FORM

PART 2

MUTUALLY AGREED-UPON OBJECTIVES FOR NEXT REVIEW PERIOD:

Step	Target Date
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

PART 3

EMPLOYEE'S GOALS AND INTERESTS:

PART 4

MANAGER'S SUMMARY & ADDITIONAL COMMENTS:

PART 5

SIGNATURES: (Note: Employee's signature indicates understanding of contents, not necessarily agreement.)

Appraising Manager

Date

Employee

Date

Next Level of Management

Date

Human Resources Representative

Date

PERFORMANCE APPRAISAL FORM

Name:

Job Title:

Section:

Manager:

Last Performance
Appraisal Meeting Date:

Appraisal Period:

Date of Appraisal Meeting:

PART 1

PERFORMANCE CHARACTERISTICS

1. **ADAPTABILITY** – Extent to which employee is able to perform a variety of assignments within the scope of his or her job duties. Efficiency under stress. Receptiveness to change.

Comments: _____

2. **ATTITUDE & COOPERATION** - Degree to which employee is supportive of organization's objectives, decisions, and policies. Accepts and profits from constructive criticism. Amount of interest and enthusiasm shown in work.

Comments: _____

3. **COMMUNICATION** – Ability to express thoughts and ideas effectively with peers and management. Consider oral, written and listening skills.

Comments: _____

PERFORMANCE APPRAISAL FORM

4. **CLIENT SERVICE** – Demonstrates a commitment to meeting and exceeding client's needs. Is responsive to client's concerns.

Comments: _____

5. **CO-WORKER / CRIMINAL JUSTICE CONTACTS** - Accessibility, cooperation, willingness to cover, sharing of information, timeliness, courtesy and professionalism.

Comments: _____

6. **DEPENDABILITY** – Extent to which employee can be counted upon to carry out assignments to completion. Include comments on attendance if appropriate.

Comments: _____

7. **INITIATIVE & RESOURCEFULNESS**– Volunteers for additional assignments, make suggestions for improving work flow, and is resourceful. Demonstrates drive, creativity, and ability to start and accomplish work with minimal supervision.

Comments: _____

8. **JUDGMENT** – Demonstrates ability to make well-reasoned, objective, and timely decisions that favorably affect our business.

Comments: _____

PERFORMANCE APPRAISAL FORM

9. **ORGANIZATIONAL SKILLS** – Skill in planning, organizing, documenting, and implementing work assignments. Timeliness.

Comments: _____

10. **QUANTITY / QUALITY OF WORK** – Volume of work regularly produced. Speed and consistency of output. Extent to which work produced meets quality requirements of accuracy, thoroughness and effectiveness.

Comments: _____

11. **TEAMWORK** – Establishes and maintains cooperative and productive work relationships with all employees.

Comments: _____

12. **JOB KNOWLEDGE** - Demonstrates the skills needed to perform the job. Understands the work environment and the job requirements.

Comments: _____

13. **USE OF RESOURCES** - Knowledge and use of office equipment including but not limited to: Computers, Phones, Voicemail; Relationship with secretarial staff;

Comments: _____

PERFORMANCE APPRAISAL FORM

PART 2

MUTUALLY AGREED-UPON OBJECTIVES FOR NEXT REVIEW PERIOD:

<i>Step</i>	<i>Target Date</i>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

PART 3

EMPLOYEE'S GOALS AND INTERESTS:

PERFORMANCE APPRAISAL FORM

PART 4

MANAGER'S SUMMARY & ADDITIONAL COMMENTS:

EMPLOYEE'S COMMENTS:

PART 5

SIGNATURES: (Note: Employee's signature indicates understanding of contents, not necessarily agreement.)

Appraising Manager

Date

Employee

Date

Next Level of Management

Date

Human Resources Representative

Date

**[Juvenile Rights Project form
For newer attorneys (less than 5 years experience)]**

**ATTORNEY EVALUATION
[NAME]**

Meeting with Supervisors: [DATE]

Rating Scale:

E – Exceeds Performance Criteria

M – Meets Performance Criteria

N – Needs Improvement

1. File review:

Overall rating:

2. Input from other staff, the Court, and opposing counsel:

Overall rating:

3. Self-evaluation:

Overall rating:

4. Review of written work:

Overall rating:

5. Observation of advocacy:

Overall rating:

Areas of Performance

6. Work Habits:

Overall rating:

7. Teamwork:

Overall rating:

8. Ethics and Professionalism:

Overall rating:

9. Training and Professional Growth:

Overall rating:

10. Attorney-Client Relationships:

Overall rating:

11. Factual Investigation and Client Interview:

Overall rating:

12. Legal Issues:

Overall rating:

13. Case Preparation:

Overall rating:

14. Negotiation:

Overall rating:

15. Trials and Hearings:

Overall rating:

16. Disposition:

Overall rating:

17. Post-disposition and Review:

Overall rating:

18. Additional Activities on behalf of JRP

Overall rating:

Comments of Supervisors:

Comments of Attorney:

Signatures:

_____ Date: _____

_____ Date: _____

_____ Date: _____

**[Juvenile Rights Project form
For experienced attorneys (5 years or more)]**

Juvenile Rights Project, Inc.

Evaluation of Attorney with Five or More Years of Experience

Self Evaluation:

1. What are your areas of greatest strength as an attorney? Be specific, ex. Negotiations on behalf of delinquency clients, legal research, client management, service identification, working with teens, trial practice in dependency cases, etc.

2. In what areas and how would you like to improve your practice in the coming year? Again, be specific.

3. What are your long term (5 to 10 years) professional development goals?

4. How can JRP help you achieve your goal for the coming year and your long term goals?

Supervisor evaluation/comments:

Public Defender of Marion County, Inc
ATTORNEY EVALUATION

For Appraisal Period: _____ - _____ Date of Evaluation: _____

Attorney: _____

All PDMC attorneys will participate in an annual performance evaluation conducted by PDMC's Executive Director. Evaluations will occur within thirty days of the attorney's anniversary date. Evaluations may include: the attorney's self evaluation; observations of the attorney in court; review of files; input from other staff, the court and opposing counsel; and review of written work. The following is the form used to conduct an attorney evaluation.

Certain categories below reference sections of the Performance Standards adopted by the Oregon State Bar.

Areas of Performance

Rating Scale: **O** – Outstanding Performance **E** – Exceeds Performance Criteria **M** – Meets Performance Criteria **N** – Needs Improvement **U** - Unacceptable

Work Habits _____
_____ Overall rating: _____

Compliance with Office Policy/Procedure _____
_____ Overall rating: _____

Teamwork _____
_____ Overall rating: _____

Ethics and Professionalism (Stan. 1.1-1.3, 2.1–2.3) _____
_____ Overall rating: _____

Training and Professional Growth _____
_____ Overall rating: _____

Caseload management (Stan. 2.1) _____
_____ Overall rating: _____

Relationship with Client (Stan. 1.4) _____

Overall rating: _____

Factual Investigation and Client Interview _____

Overall rating: _____

Legal Issues _____

Overall rating: _____

Case Assessment (Stan. 1.5) _____

Overall rating: _____

Case Preparation (Stans. 2.4 – 2.7) _____

Overall rating: _____

Motion practice (Stan. 2.8) _____

Overall rating: _____

Negotiation (Stan. 2.9) _____

Overall rating: _____

Trials and Hearings (Stan. 1.5, 2.10) _____

Overall rating: _____

Sentence/Disposition (Stan. 2.10a, 2.11) _____

Overall rating: _____

Additional Activities on behalf of PDMC _____

Overall rating: _____

SUMMARY

1. Input from other staff, the Court, and opposing counsel _____

_____. Overall rating: _____

2. Self-evaluation _____
_____. Overall rating: _____

3. Review of written work _____
_____. Overall rating: _____

4. Observation of advocacy _____
_____. Overall rating: _____

Meeting with Executive Director

Strengths _____

Improvement since last evaluation _____

Areas needing improvement _____

Professional development goals _____

Comments of Supervisor _____

Comments of Attorney _____

Mutually agreed-upon work plan:

<i>Step</i>	<i>Target Date</i>
-------------	--------------------

Attorney's Goals for Coming Year

SIGNATURES: (Note: Employee's signature indicates understanding of contents, not necessarily agreement.)

Executive Director

Date

Employee

Date

**Public Defender of Marion County, Inc
Attorney Self-Evaluation**

Attorney: _____

Date: _____

Discuss each of the areas of practice below. Explain your strengths or weaknesses in each.

1. Interviewing clients

2. Assessing Case

3. Negotiating Case

4. Motion Practice

5. Trial work:

Voir Dire

Opening Statement

Cross Examination

Knowledge of Evidence and Objections

Expert Witnesses

Closing Argument

6. Use of PDMC Staff and Resources

7. Knowledge of Office Equipment
Telephone/voice mail

Computer-case management program

Computer-research/information resources

Copier/Printer/FAX/ Scanner

8. Conformity with office Procedures

9. Relations with Office Staff

10. Relations with Other Attorneys in Office

11. Contributions to improvement of Office Operations

12. Relations with Judges

13. Relations with Court Staff

14. Relations with prosecutors

15. Relations with Jail Staff/Transport

16. What aspect of your practice of the law are you planning to improve in the next year?

Signed: _____

Dated: _____

To: Member of the Juvenile Court Community

Enclosed are evaluations of the members of Lane Juvenile Lawyers Consortium. I am hoping that you will take the time to complete these evaluations. Your feedback is important in helping us understand the perceptions of our colleagues and to identify areas that we can improve as individuals and as a group.

There is a one-page evaluation on each member of the consortium. The name of the person is on the top right-hand corner. If you have not had adequate experience with an individual lawyer to form an opinion about their work, please indicate so on their form.

If you wish, you may identify yourself by name and/or agency but you do not need to do so. I will keep the evaluations anonymous unless you request that I do otherwise. I will share the results with each lawyer, but not the actual forms. I addressed the envelope to you with a sticky note, which can be removed when returning the envelope so as to protect your identity from me.

Please feel free to include any additional feedback or comments.

Thank you for your time. Please call or email with any questions. You may return the completed evaluations to my box in the courthouse, drop them by my office, or mail them to the address below.

Karen M. Stenard

343-9909

sabsten@aol.com

747 Willamette St

Eugene OR 97401

ATTORNEY BEING EVALUATED: _____

1. This attorney is a zealous and reasonable advocate in the courtroom.
- | | | | | | |
|-----|--------|---------|-----------|--------------|-------|
| N/A | Always | Usually | Sometimes | Infrequently | Never |
|-----|--------|---------|-----------|--------------|-------|
2. This attorney knows the applicable cases, laws, OAR's and local policies which govern juvenile court.
- | | | | | | |
|-----|--------|---------|-----------|--------------|-------|
| N/A | Always | Usually | Sometimes | Infrequently | Never |
|-----|--------|---------|-----------|--------------|-------|
2. This attorney attends to aspects of her/his case between hearings. (For example: attends meetings when appropriate, contacts involved parties for information.)
- | | | | | | |
|-----|--------|---------|-----------|--------------|-------|
| N/A | Always | Usually | Sometimes | Infrequently | Never |
|-----|--------|---------|-----------|--------------|-------|
3. This attorney seems to have good relations with her/his clients.
- | | | | | | |
|-----|--------|---------|-----------|--------------|-------|
| N/A | Always | Usually | Sometimes | Infrequently | Never |
|-----|--------|---------|-----------|--------------|-------|
4. This attorney returns phone calls and is generally accessible.
- | | | | | | |
|-----|--------|---------|-----------|--------------|-------|
| N/A | Always | Usually | Sometimes | Infrequently | Never |
|-----|--------|---------|-----------|--------------|-------|
5. This attorney seems to have good relations with community partners such as DHS, DYS, OYA, Counselors, Therapists
- | | | | | | |
|-----|--------|---------|-----------|--------------|-------|
| N/A | Always | Usually | Sometimes | Infrequently | Never |
|-----|--------|---------|-----------|--------------|-------|
6. This attorney has adequate contact with their child clients.
- | | | | | | |
|-----|--------|---------|-----------|--------------|-------|
| N/A | Always | Usually | Sometimes | Infrequently | Never |
|-----|--------|---------|-----------|--------------|-------|
7. This attorney seems to be committed to her/his job and clients.
- | | | | | | |
|-----|--------|---------|-----------|--------------|-------|
| N/A | Always | Usually | Sometimes | Infrequently | Never |
|-----|--------|---------|-----------|--------------|-------|
8. Overall, this attorney is:
- | | | | | | |
|-----------|-----------|------|----|------|----------|
| Excellent | Very Good | Good | OK | Poor | Horrible |
|-----------|-----------|------|----|------|----------|

Comments:

My attorney was: _____

1. My attorney returned my phone calls in a timely manner.

Always Usually Sometimes Infrequently Never

2. My attorney did a good job representing me at court hearings.

Always Usually Sometimes Infrequently Never

3. My attorney was helpful to me between court hearings.

Always Usually Sometimes Infrequently Never

4. I felt like my attorney listened to me.

Always Usually Sometimes Infrequently Never

5. Generally, I felt my attorney was:

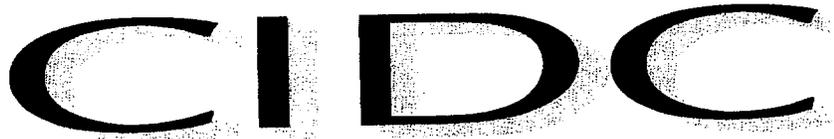
Excellent Very Good Good O.K. Not Very Good Bad Horrible

6. I really wish my attorney would have: _____

7. I really liked it when my attorney: _____

8. If I were to need an attorney again, I would like this attorney to represent me.

Yes No



Clackamas Indigent Defense Corporation

294 Warner Milne
Oregon City, OR 97045
503-722-4000

March 17, 2009

Dear Former CIDC Client

Clackamas Indigent Defense Corporation (CIDC) is composed of local criminal defense attorneys who assist eligible persons charged with crimes in Clackamas County. You were recently prosecuted for a crime(s) in Clackamas County and qualified for a court-appointed attorney. Because it is CIDC's desire to ensure that its attorneys are handling assigned cases in a courteous, timely and professional manner, CIDC would ask that you take a moment from your busy schedule to answer the attached survey and return it in the enclosed, self-addressed and stamped envelope at your earliest convenience.

Your courtesies and assistance are greatly appreciated,

Respectfully,

CIDC Board of Directors.

CIDC Client Survey 03/2009

Your Name: _____

Your lawyer's name: _____

What were you charged with? _____

Please circle your answer -

next
Your court date or other
first court
~~date~~

Did your lawyer contact you before the Case Management date? Yes No

Did you meet to review your case before the Case Management date? Yes No

If you were jailed, did your lawyer visit you before your court hearing? Yes No

Probation violation – did you review your case with lawyer before court? Yes No

Did your lawyer listen to you? Yes No

Was your lawyer helpful? Yes No

Was your lawyer prepared? Yes No

Were you satisfied with your lawyer's advice? Yes No

Were you treated fairly? Yes No

Would you recommend your lawyer to others? Yes No

Comments:

OK!

To: Clackamas County Circuit Court Judges
From: Brad Jonasson, President CIDC Board of Directors

July 22, 2009

Re. Evaluation of CIDC Contractors

Your Honors,

CIDC has never asked the Circuit Court judges for their opinions about the performance of the entire group of CIDC contracting defense attorneys. Hence, Brad Jonasson (Board President) and Ron Gray (CIDC Administrator) are now asking each and every one of you to complete the attached questionnaire to help the CIDC Board to evaluate it's contractors and make improvements where appropriate. Please take the time necessary to do a thoughtful and candid job and feel free to attach comments. The effectiveness of this project requires 100% participation. (Note: it is my intention to keep the identity of the author of each survey confidential.)

Thank you for your assistance.

Very Respectfully,

Brad Jonasson

(Note: I will stop by your office to pick up the completed survey in 5 days.)

Evaluation - CIDC Contracting Defense Attorneys

July, 2009

Rating Scale: High=3, Average=2, Low=1, No Opinion=0

Please rate the named defense attorneys as to their effectiveness in the indicated areas:

	Linda Beloof	Jack Bernstein	Jim Bernstein	Rhett Bernstein	Karen Brisbin
Case Preparedness					
Creative Resolutions					
Motion Practice					
Plea Practice					
Trial Practice					
Sentencing/Disposition					
Post-Trial Issues					
P.V. Practice					
Preserve Issues for Appeal					

Please rate each attorney for the following professional traits:

	Linda Beloof	Jack Bernstein	Jim Bernstein	Rhett Bernstein	Karen Brisbin
General Competency					
Technical Knowledge					
Thoroughness					
Professionalism					
Credibility/Integrity					
Zeal					
Ethics					

Please rate the named defense attorneys as to their effectiveness in the indicated areas:

	Mike Czaiko	Ron Gray	Michael Haines	Bart Herron	Brad Jonasson
Case Preparedness					
Creative Resolutions					
Motion Practice					
Plea Practice					
Trial Practice					
Sentencing/Disposition					
Post-Trial Issues					
P.V. Practice					
Preserve Issues for Appeal					

Please rate each attorney for the following professional traits:

	Mike Czaiko	Ron Gray	Michael Haines	Bart Herron	Brad Jonasson
General Competency					
Technical Knowledge					
Thoroughness					
Professionalism					
Credibility/Integrity					
Zeal					
Ethics					

COMMENTS

Linda Beloof

Jack Bernstein

Jim Bernstein

Rhett Bernstein

Karen Brisbin

Mike Czaiko

Ron Gray

Michael Haines

Bart Herron

Brad Jonasson

Heather Karabeika

WILLIAM J. CONDRON
ATTORNEY AT LAW
311 NW BEAVER STREET
PO BOX 133
PRINEVILLE, OREGON 97754
(541) 447-2959
Fax:(541) 447-7897

April 30, 2007

Dear Community Partner:

The 22nd Circuit Defenders, LLC, is a professional consortium of attorneys who accept court appointed cases in Crook and Jefferson Counties. The attorneys of the consortium are Bill Condron, Jeff Miller, Jennifer Kimble, David Pardo, and Rachel Marshall

We strive to provide professional advocacy on behalf of our clients. In order to ensure our we are providing the best legal representation, we are conducting the enclosed survey.

Please help us improve the quality of our services by completing the attached evaluation form, and return it to the 22nd Circuit Defenders, LLC, in the enclosed stamped envelope by May 25th, 2007.

Your confidential response is important to us. We value your opinion very much. Thank you for helping improve the quality of legal services in Central Oregon.

Very Truly Yours,

William J. Condron
Contract Administrator
22nd Circuit Defenders, LLC

A.	Appear to be proficient in the applicable law?				
Always	Most of the time	Sometimes	Rarely	N/A	
B.	Abide by the Oregon Rules of Professional Conduct and the rules of the Court?				
Always	Most of the time	Sometimes	Rarely	N/A	
C.	Devote adequate time and resources to their cases?				
Always	Most of the time	Sometimes	Rarely	N/A	
D.	Engage in the case preparation necessary for quality representation?				
Always	Most of the time	Sometimes	Rarely	N/A	
E.	Appear to maintain a relationship of trust and open communication with their clients?				
Always	Most of the time	Sometimes	Rarely	N/A	
F.	Return telephone calls within a reasonable period of time?				
Always	Most of the time	Sometimes	Rarely	N/A	
G.	Respond to requests for information from you within a reasonable period of time?				
Always	Most of the time	Sometimes	Rarely	N/A	
H.	Make accommodations when necessary due to a client's special circumstances, such as youth, mental or physical disability or language barrier?				
Always	Most of the time	Sometimes	Rarely	N/A	
I.	Dress appropriately and professionally for court?				
Always	Most of the time	Sometimes	Rarely	N/A	
J.	Treat their clients with dignity and respect?				
Always	Most of the time	Sometimes	Rarely	N/A	
K.	Show appropriate respect to the Court and other parties?				
Always	Most of the time	Sometimes	Rarely	N/A	
L.	Work with others, such as the D.A., CASA, and DHS to seek mutually satisfactory resolutions to problems?				
Always	Most of the time	Sometimes	Rarely	N/A	

Thank you for completing this survey. Please return it in the attached self-addressed stamped envelope to the 22nd Circuit Defenders, LLC, PO Box 133, Prineville, OR 97754.

[The Arneson Group]

Lawyer Evaluation

General Factors

- Reliability
- Relationship with other staff
- Treatment of clients
- Office and Client confidentiality
- Judgment/Decision Making
- Initiative/Creativeness
- Prioritizing Work
- Promptness in completing work

Lawyer

- Advocacy
- Use of Support Staff
- Trial and Courtroom Skills
- Organization and Case Management
- Client Relationships
- Income Generation
- Does the lawyer “lead by example?”

Goals

1. Does lawyer meet income and hourly goals and, if not, why not?
2. What specific skills need the least improvement?
3. What specific skills need the most improvement?
4. On what goals would you like to work in the next year?