

**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 Thomas Balmer

**Executive Director**

Nancy Cozine

**PUBLIC DEFENSE SERVICES COMMISSION**

**PUBLIC DEFENSE SERVICES COMMISSION MEETING**

Thursday, May 10, 2012

9:00 a.m. – 2:00 p.m.

Roseburg City Council Chambers, City Hall,  
900 SE Douglas Avenue, Roseburg, OR 97470

**AGENDA**

- |  |                                |
|--|--------------------------------|
| 1. <b>Action Item:</b> Approval of minutes - PDSC meeting on March 20, 2012<br><i>(Attachment 1)</i>   | Chair Ellis                    |
| 2. Waiver of Counsel in Juvenile Delinquency Cases; PDSC authority to Adopt Policies, Rules, Procedures and Guidelines for Juvenile Delinquency Cases<br><i>(Attachment 2)</i>                                   | Paul Levy<br>Nancy Cozine      |
| 3. <b>Action Item:</b> Approval Adjustment to ACP Contribution Amounts<br><i>(Attachment 3)</i>  | Kathryn Aylward                |
| 4. <b>Action Item:</b> Approval of Strategic Plan<br><i>(Attachment 4)</i>   | Chair Ellis                    |
| 5. Lincoln County Service Delivery Update<br><i>(Attachment 5)</i>   | Amy Jackson<br>Guy Greco       |
| 6. Introduction of Preliminary Report Regarding Service Delivery in Douglas County<br><i>(Attachment 6)</i>  | Nancy Cozine                   |
| 7. Presentations and Discussion Regarding Service Delivery In Douglas County   | Barnes Ellis<br>Invited Guests |
| 8. OPDS Monthly Report <ul style="list-style-type: none"> <li>• NLADA Defender Research, Data and Analysis Advisory Committee<br/><i>(Attachment 7)</i></li> <li>• AD Update</li> <li>• Budget Update</li> </ul> |                                |

***Please note: Lunch 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 14, 2012, 9:00 a.m. – 12:30 p.m. at the Seventh Mountain Resort, 18575 SW Century Drive, Bend, Oregon, 97702. Please note that meeting dates, times, and locations are subject to change. Notice of future meetings are posted online at: <http://www.oregon.gov/OPDS/PDSCagendas.page>***

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION  
OFFICIAL MINUTES

Tuesday, March 20, 2012  
10:00 a.m. – 2:00 p.m.  
Office of Public Defense Services  
1175 Court St. NE  
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
Peter Ozanne  
John Potter  
Janet Stevens (by phone)  
Hon. Elizabeth Welch  
Chief Justice Paul De Muniz  
Justice Thomas Balmer

STAFF PRESENT: Nancy Cozine  
Kathryn Aylward  
Peter Gartlan  
Paul Levy  
Shawn Wiley  
Amy Jackson  
Caroline Meyer  
Billy Strehlow  
Shelley Winn

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

**Agenda Item No. 1 Welcome Justice Balmer**

Chair Ellis welcomed Justice Balmer. Chief Justice De Muniz explained that this is the first time in 150 years in the history of the court that there has been a transition process, which has allowed the current Chief to include the new Chief in various legislative processes and in meetings with leadership. He described Justice Balmer as someone who will be a wonderful supporter of indigent defense, a person with a breadth of knowledge about public defense issues, and an individual who will provide the kind of leadership and guidance that PDSC has come to expect.

**Agenda Item No. 2 Approval of the Minutes of PDSC's January 26, 2012, meeting**

Chair Ellis requested additions or corrections to the minutes; hearing none, the Chair entertained a motion. **MOTION:** John Potter moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Chair Ellis requested additions or corrections to the minutes from the retreat on January 26, 2012; hearing none, he entertained another motion. **MOTION:** John Potter moved to approve the retreat minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

### **Agenda Item No. 3**

### **Approval of Structural Adjustment to ACP Contribution Amounts**

Ms. Aylward described to the Commission the Application Contribution Program, through which courts may impose upon those who apply for court appointed counsel a \$20 application fee and a contribution amount, at the time the person applies for counsel. She distinguished this contribution amount from “Guideline Recoupment Amounts,” which are imposed by the court at the end of a case.

Ms. Aylward explained that the contribution amount schedule was probably first developed at least 18 years ago. She pointed out that the structure of the contribution amount schedule is broken down into smaller categories than the guideline recoupment amount schedule. The more complex contribution amount schedule no longer reflects the way that public defense contracts are structured, as contracts do not differentiate between different types of Class A felonies, B felonies, etc. There is just one amount for all A felonies. The theory is that everything evens out in the end.

The Judicial Department (OJD) is now in the process of building the system that will replace the Oregon Judicial Information Network (OJIN), the court case register system used for over 20 years. The new system, Odyssey, will be installed in Yamhill County this June. In order to make the programming less complicated, OJD asked whether the contribution amounts could be assessed at the front end of the case, which would allow the OJD to eliminate the recoupment amounts. OPDS staff explained that the Commission had the authority to make those kinds of decisions, and offered to put the issue on the PDSC agenda. OPDS staff has not had enough time to develop a recommendation to the Commission about what the contribution amounts should be, but is hoping that the Commission will approve the new structure, and hopes that at the next meeting there will be more time to discuss appropriate contribution amounts. Ms. Aylward explained that this discussion would take more time, because the money collected as contribution amounts goes to the “ACP” account, and those funds are then made available to PDSC and OJD. Recoupment amounts go to what used to be called the Criminal Fine and Assessment Account (CFAA); now called the Criminal Fine Account. Those monies go to police standards and training, Oregon State Police, crime victims, drug and alcohol abuse treatment, and other good and helpful things.

Ms. Aylward suggested that PDSC must be careful when deciding how to structure the contribution and recoupment amounts. If PDSC creates a structure that authorizes the court to impose all financial obligations for court appointed counsel as contribution amounts, PDSC is basically jumping in line in front of other programs. Ms. Aylward indicated that OPDS would further study the issue, and would probably recommend to PDSC a simple increase of contribution amounts to account for inflation.

Chair Ellis clarified, and Ms. Aylward confirmed, that contribution amounts are imposed upon defendants who are sufficiently indigent that they qualify for appointed counsel, but not so completely indigent that they can’t make a contribution.

Chair Ellis asked about collection of judgments, and speculated that a very small percent ever gets collected. Chief Justice De Muniz acknowledged that contribution amounts are assessed against a segment of the population from whom it is very difficult to collect, and described OJD efforts to collect upon those debts.

Commissioner Welch asked about contribution and recoupment in juvenile cases. Ms. Aylward explained that application contribution collects about \$69,000 a year. Ms. Aylward could not say what the recoupment amount is because it goes to a different entity. Chair Ellis asked when the legislature last looked at these funding streams, and commented that he is very opposed to dedicated funding sources because they tend to get embedded, and nobody ever looks at it again. Ms. Aylward

explained that the legislature looked at fees extensively over the interim and during the last session, with the fee bills that were meant to reorganize things.

Ms. Aylward clarified that, for today, the Commission is being asked to simply approve the new, simplified structure of the contribution schedule, and there would be further conversation about amounts later.

**MOTION:** Judge Welch moved to approve the new contribution schedule; Commissioner Potter seconded, and the motion passed unanimously. **VOTE 6-0.**

**Agenda Item. No. 4**

**Waiver of Counsel in Juvenile Delinquency Cases**

Chair Ellis invited Nancy Cozine and Kathryn Aylward to present information regarding waiver of counsel in juvenile delinquency cases. Ms. Cozine started with a summary of the Commission's previous conversations on this topic, including an overview of the presentation to the Commission in March 2010, which included information from George Yeannakis, with Team Child in Washington, and Jordan Bates who studied appointment practices in different Oregon counties. The information focused on the importance of counsel, the difference that counsel makes in delinquency cases, the complexity of those cases, and discussion about the brain development of teens who are typically charged and their ability to navigate the juvenile delinquency system without aid of counsel. Chair Ellis mentioned the concern that youth are sometimes encouraged to waive counsel. Ms. Cozine confirmed that some of the information indicated that youth waive counsel because they get the idea that they will be treated more leniently if they do, or because their parents don't want to be responsible for the costs of court appointed counsel.

Ms. Cozine and Ms. Aylward explained that an examination of OJIN data, though not conclusive, indicated an uptick in the percentage of appointments in 2010, but noted that there were still wide variations from county to county.

Chair Ellis asked about the letter sent by Chief Justice De Muniz, with the model colloquy. Ms. Cozine noted that the letter describes the PDSC hearing held in March 2010, and encourages the use of the model colloquy any time there is going to be a waiver of counsel. Follow up information regarding the use of the colloquy was not available. Ms. Cozine noted that the Commission had previously discussed addressing the issue through other approaches, including a Chief Justice Order or legislation requiring appointment of counsel, pursuit of an appeal, and possibly changes to the ACP process.

Chair Ellis asked whether there was a way to structure it so that if there is going to be a waiver, it is going to be with advice of a lawyer. Ms. Cozine explained her understanding that the Commission did discuss that type of model, and it would not necessarily be a significant cost, and that one of the things noted by Jordan Bates was that in many situations where there was a waiver of counsel, there was no attorney present in the room. Ms. Cozine noted that contracts could include funding for someone to be in the courtroom giving advice regarding waiver of counsel.

Commissioner Welch explained the Washington approach, as described by Mr. Yeannakis with the Commission in March 2010 - a rule which required advice of counsel before waiver - and further explained that her understanding was that the result of the rule was pretty much across the board appointments. Judge Welch noted that the rule acted as a consciousness raising tool, which is what the Commission was hoping for with the Chief Justice's letter. Judge Welch also mentioned that youth, often young kids, are commonly entering into Formal Accountability Agreements without the assistance of counsel, and without ever seeing a judge. Judge Welch questioned the degree to which kids are aware of the risks and consequences, and whether they understand the whole idea of plea bargaining.

Chief Justice De Muniz suggested that this topic would be very appropriate for the judicial conference education program. He noted that his son routinely represents children who are 12 years old charged with sex offenses, and that the pressure brought to bear in handling those cases, and what it means for a child's future, are immense. He also noted that though the Governor is going to reconvene the Commission on Public Safety, it will not be possible to cover this topic in that group's work. He questioned whether there would be another way to get the issue before the legislature.

Commissioner Potter raised the Commission's authority to do something, and Commissioner Ozanne suggested dispensing with ACP, especially if court administration has no objection. Commissioner Welch expressed support for this approach, and wondered how much of the verification work done in juvenile cases is recovered through ACP collections. She also noted that as long as recoupment exists, elimination of ACP might result in no effective change.

Chair Ellis again brought focus to the legislative path as an obviously right place to go, and wondered whether the Oregon State Bar Juvenile Law Committee might get interested and sponsor a bill during the next session.

Commissioner Ozanne wondered why the Commission would not want to take more immediate action through changes to ACP. Chair Ellis explained that he does not view these as inconsistent approaches. Commissioner Ozanne made a motion to eliminate ACP in juvenile cases, which was seconded by Judge Welch. Commissioner Lazenby suggested that it would be prudent to have further investigation into the Commission's authority in this area, and to do some consensus building with stakeholders. The motion was revised to direct OPDS staff, in consultant with the Judicial Department, to report back regarding the Commission's authority to remove juvenile from the ACP requirement.

The motion carried **VOTE 7-0**.

Chair Ellis requested that staff also explore whether any system partners, perhaps the OSB's juvenile law section, would be interested in initiating a legislative change, emphasizing that OPDS could play a supportive role. He also suggested that OPDS explore an appellate test case. Commissioner Potter requested further information on the possibility of a court rule or order. The Chief noted that Oregon courts do not have as much administrative authority as in other states, but that the courts could look at this option.

## **Agenda Item. No. 5**

### **Public Meetings Laws – PDSC Training**

Chair Ellis invited Paul Levy to provide the PDSC with training on Oregon's Public Meetings Laws. General Counsel Levy noted that this training helps fulfill the requirement under PDSC's performance measures to meet the best practices for boards and commissions, and proceeded to give a thorough overview of public meetings laws and recent developments. He summarized portions of the outline provided to Commission members, specified public bodies to which the law applies, defined what constitutes a meeting, and analyzed the *Dumdi* case, which generated a trial court opinion, but not an appellate opinion (because the case settled). Mr. Levy cautioned the Commission to be aware of factors considered in the *Dumdi* case, but also explained that the case included a rare set of circumstances (and a boastful city commissioner), and that it was not likely a situation that would arise for the PDSC or its members. Mr. Levy provided an overview of the rules regarding executive sessions and applicable notice requirements, and public meetings law enforcement provisions. He then concluded with a final summary of the details of the *Dumdi* case, and efforts during the 2012 session to pass legislation to clarify public meetings laws as applied to electronic communications. The proposed statutory amendments did not pass due to Oregon media's concerns. Mr. Levy noted that there will be an interim work group on the topic, and that OPDS has offered to participate.

**Agenda Item. No. 6      Report on Statewide Public Defense Survey**

Mr. Levy provided an overview of the survey that is launched every year in early January, for which the Chief Justice has been very helpful, sending messages to judges requesting their cooperation. Mr. Levy explained that year after year, although there has been some improvement, respondents say that public defense providers are doing a good job generally. Mr. Levy specifically noted the comments on the death penalty, and explained that he met with the analysts, Kathryn, and Nancy to go over the comments, and that OPDS is following up with the respondents and providers.

Mr. Levy explained that in analyzing the results, OPDS is able to filter the responses by particular counties and types of responders.

**Agenda Item. No. 7      Update on Clackamas County**

Caroline Meyer explained that she has been the analyst for Clackamas County since January of 2012, and that in preparation for today's meeting, she reviewed previous Commission minutes discussing Clackamas County, which included four or five meetings in 2009, and two or three in 2010. She also mentioned that Amy Jackson, the previously assigned analyst, and Kathryn Aylward, were available to provide historical information if necessary, and that she intended to address the concerns in the October 2010 report. Ms. Meyer met with the new presiding judge, Robert Herndon, the new trial court administrator, Debbie Slagle, and their staff, as well as Judge Darling, who handles juvenile matters. She noted that by and large, their feedback was very favorable.

The criminal provider is Clackamas Indigent Defense Corporation, CIDC; IDI is the juvenile provider. Ms. Meyer met with Ron Gray, with CIDC, and Marty Cohen, with IDI.

Ms. Meyer noted that in the 2012 annual statewide survey Clackamas County judges responded very favorably, but that there were concerns about one attorney with CIDC with a low trial rate, and another comment about inadequacy; Ms. Meyer is following up on those comments.

During Ms. Meyer's meeting with Judge Darling, Judge Darling noted that previous problems with scheduling conflicts have improved, and that they have started a pilot project, appointing two attorneys exclusively to child clients, which she believes is working well and has improved representation for child clients. Her assessment was that juvenile lawyers treat their clients as if they are being paid thousands of dollars to represent them.

Ms. Meyer went on to address the Commission's specific concerns related to CIDC, the adult consortium. They have redone the bylaws, eliminated the permanent positions and replaced them with rotating three year terms for their attorney positions, and they are in the process of adding two members. Ron Gray said they have an agreement from the Clackamas bar to sit down in April to discuss what the appointment process would look like. Chair Ellis noted that this process has been like a glacier moving; it was promised two years ago - promised that a retired judge was going to be added. Ms. Meyer confirmed that Judge Bagley was the judge Ron Gray had in mind, but that he needed the Clackamas bar to be involved in the process.

Chair Ellis noted that the rate of progress is not acceptable. All Commission members noted the long history of requests that Mr. Gray take specific steps, and his failure to follow through. They also noted their concerns about the Clackamas County model in which there is only one criminal public defense provider.

Ms. Meyer went on to explain that the board now has 11 members; nine rotating attorney positions with three year terms, and two public members with two year terms. Mr. Gray expects that by the end of April, Raymond Bagley will be part of their board.

Chair Ellis asked whether CIDC alleged that they were in compliance with PDSC's board requirements when they submitted a bid for 2012. Ms. Meyer read Mr. Gray's response: "We have modified our bylaws to add two non-member people to our board of directors selected by the Clackamas County bar officers. We are also doing away with permanent board members." Chair Ellis expressed concern that Mr. Gray did not attend today's Commission meeting, and suggested that the transcript needed to be sent to him.

Chair Ellis asked about succession planning. Ms. Meyer indicated that Mike Czaiko, an attorney since 1992 and with CIDC for many years, is a board member who has already started shadowing Mr. Gray. Mr. Czaiko is viewed by the board as a favorable replacement for Mr. Gray. Mr. Gray has not given a retirement date.

CIDC has an apprenticeship program with two positions; one is assigned one misdemeanor a week for six months; the second is assigned one misdemeanor a week and then one C Felony every other week for six months. They may or may not get a permanent position depending on whether there is a need, and the six months can be extended up to one year.

Commissioner Lazenby asked whether CIDC is actually adding new attorneys, as their lack of new attorneys has been a concern. Amy Jackson indicated that there were three recent additions: Andrew Elliott, with a 2009 bar number, John Gutbezahl, with a 1994 bar number, and Squire Bozorth, with a 1996 bar number. CIDC just recently provided OPDS with a copy of their revised attorney evaluation form, which seems to be a survey of judges and of clients. They have developed a client survey with a random sampling of clients. One attorney about whom concerns were expressed is no longer with CIDC.

Ms. Meyer continued to note a few specific concerns regarding IDI, the juvenile consortium. One was the evaluation process. They created an online survey to solicit input from all of the system participants. IDI had been asked to add outside board members, and did add two outside board members: Warren Oster, a former juvenile counselor, and Joe Bradway, a CASA special advocate in their county. IDI is a group of about 10 lawyers versus about 27 lawyers with CIDC.

Finally, Ms. Meyer explained that CIDC is providing representation for a new treatment court, HOPE Court, which is a grant-funded program that includes funding for defense representation in the program. The grant is also paying for Mike Czaiko, the same attorney mentioned earlier as the person who would succeed Mr. Gray, to go to Hawaii for the training.

Chair Ellis and other Commission members expressed a desire to continue monitoring progress in Clackamas County.

**Agenda Item No. 8**

**Strategic Plan Discussion**

Nancy Cozine reviewed the revised strategic plan. Chair Ellis asked Commission members to send any comments to Ms. Cozine before the next meeting, at which time the strategic plan will be on the agenda as an action item for the Commission's approval.

**Agenda Item No. 9**

**Executive Director's Annual Report**

Ms. Cozine summarized the contents of the annual report, noting the great work of the Commission and OPDS during 2011, and also noting the slight uptick in the time

to filing of the opening brief within the appellate division. She noted that this will be monitored to ensure that the decision to hold positions vacant within the appellate division does not increase caseloads and times to filing of the opening brief to an unacceptable point. Mr. Gartlan noted that DOJ has a filing date that is about 12 to 14 days less than OPDS. Ms. Cozine shared that the defense of criminal convictions unit at the Department of Justice was granted a special purpose appropriation during the February session, which OPDS will also monitor during the biennium.

**Agenda Item No. 10 February Session Update**

Nancy Cozine and Kathryn Aylward provided an overview of Senate Bill 5701, the budget bill, and Senate Bill 1579, the program change bill.

SB 5701 was the bill that took 3.5% from most state agency budgets, including the PDSC budget. The Office of Public Defense Services intends to manage to the 3.5% reduction through vacancy savings. The funds available for funding contracts and other expenses received some relief: a \$1.4 million increase in Other Fund expenditure limitation, and a \$3.5 million dollar special purpose appropriation (SPA). The SPA can only be accessed through an emergency board request, which might not happen until the December emergency board, once we have more accurate numbers.

SB 1579 does three things. First, it restructured the PDSC's budget such that the Public Defense Services Account, which was known as "the account," is now only a fund for ACP monies. All of PDSC's other appropriations are now included in a General Fund appropriation without a specific title in statute. The statutes that referenced the Public Defense Services Account were all amended. This should not have a negative impact, but will be an adjustment. Second, SB 1579 included language allowing the legislative and judicial branches to keep General Fund monies that remain at the end of the biennium, rather than having those dollars revert back to the General Fund. This provision "is effective for appropriations made for the biennium ending June 30, 2011." Finally, SB 1579 included a mandate that "before making any change to a compensation plan an administrative division of the agency must submit the proposed change to the Joint Committee on Ways & Means, or an Emergency Board or an Interim Committee." The bill specifically notes that it does apply to the Public Defense Services Commission. OPDS understands that PDSC must submit a report, but will not need legislative approval to make the compensation plan changes.

**Agenda Item No. 11 OPDS Monthly Report**

Ms. Cozine provided the Commission with an update regarding NLADA's desire to form an advisory committee to study the use of evidence-based practices within public defense, and noted that OPDS might be asked to be on the advisory committee. Nancy Gist, the former Director of the Bureau of Justice Assistance, and the former director of a public defender office, will lead the effort. NLADA is also creating "learning networks," which will be relied upon less frequently than the advisory committee. The learning network will be comprised of local providers who can give feedback through surveys about the different approaches to evaluating representation. Ms. Cozine expressed an interest in having OPDS and Oregon be a part of this effort.

Ms. Cozine followed up on Chair Ellis's suggestion, at the January retreat, to reach out to Oregon district attorneys. To that end, Ms. Cozine met with Eric Nisley, the current ODAA president, to discuss the importance of preserving the lessons of 2003. Ms. Cozine also met with Bill Taylor, Counsel to the Judicial Committee, and they had a similar discussion.

Ms. Cozine summarized a recent trial court opinion centered on application of *Brown v. Multnomah County*, which involved 22 occupy Portland protestors who were

charged with misdemeanor crimes. The DA's office reduced the charges to violations, and the defendants successfully asserted that under *Brown v. Multnomah County*, they had a right to a jury trial and to court appointed counsel. There may be two cases in which OPDS will be asked to provide court appointed counsel, but the ODAA, along with courts and OPDS, worked on a statutory change that will reduce the likelihood of the court reaching a similar conclusion if additional cases arise. It is reported that no other judges in Multnomah County have adopted a similar analysis, but OPDS is watching the issue.

Mr. Levy provided a quick update on the death penalty review process, noting that Dennis Balske has agreed to serve as a consultant. Mr. Balske is widely respected in the capital community, is not a contractor, is an expert on death penalty defense, and testifies as an expert on standards of practice in capital cases in Oregon and around the country. Mr. Levy followed up with a letter to Mr. Gorham and then subsequent emails to each of the contractors under review. There are still some issues and things to be resolved, but the process is moving forward.

Mr. Gartlan provided information regarding recent promotions and a retirement within the appellate division. He also noted that the juvenile appellate section had its first argument in the Supreme Court in January, and that in February the Supreme Court issued a favorable decision. He noted that AD is now briefing three cases for the Supreme Court, and gave a brief, neutral overview of the issues in those cases.

Mr. Gartlan also explained that, in response to the Chair's request at the January retreat, the appellate division attorneys have settled upon a practice for AD attorney communication with trial attorneys. AD attorneys will send an email to the trial attorney together with a copy of the brief, which they do already, but it will be a personal email from the attorney inviting the trial attorney to contact the AD attorney if the trial attorney wants to discuss anything about the case or the brief. The AD attorney will forward a copy of the transcript if the trial attorney is interested in reviewing the transcript. Commissioner Ozanne expressed a preference for communication with the trial lawyer before the brief is filed, but noted that he appreciates the challenges associated with such an approach. Commissioner McCrea offered that she has had very good communication with the appellate division attorneys when she has referred cases to OPDS. All noted the change as a step in the right direction.

Ms. Cozine briefly reiterated Chief Justice De Muniz's earlier mention of the Commission on Public Safety, which will soon be reconstituted by executive order, and noted that OPDS will work with OCDLA to ensure that policy and budget considerations are communicated. Commissioner Potter also emphasized the need for OCDLA to provide a historical, pre-guidelines perspective. Finally, Ms. Cozine told Commission members that, at this point, it sounds like the Legislature will not be addressing the death penalty conversation. Ms. Cozine noted that she will provide updates to the Commission if anything changes.

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

**Meeting adjourned.**

PUBLIC DEFENSE SERVICES COMMISSION  
UNOFFICIAL EDITED TRANSCRIPT

Tuesday, March 20, 2012  
10:00 a.m. – 2:00 p.m.  
Office of Public Defense Services  
1175 Court St. NE  
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
Peter Ozanne  
John Potter  
Janet Stevens (by phone)  
Hon. Elizabeth Welch  
Chief Justice Paul De Muniz  
Justice Thomas Balmer

STAFF PRESENT: Nancy Cozine  
Kathryn Aylward  
Peter Gartlan  
Paul Levy  
Shawn Wiley  
Amy Jackson  
Caroline Meyer  
Billy Strehlow  
Shelley Winn

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

**Agenda Item No. 1**

**Welcome Justice Balmer**

0:07 Chair Ellis

I think it is May 1 that you succeed as Chief Justice. It is like when you do a relay race. You have to pick the baton up and just keep on going. We want a seamless transition.

0:21 Chief Justice  
De Muniz

Can I say something when you are finished?

0:22 Chair Ellis

I was just about to ask if you wanted to say something.

0:25 Chief Justice  
De Muniz

I do. I wanted to make sure that everybody here knows that Tom will become Chief Justice on May 1st. This is the first time in the history of the court in 150 years that we have actually had a transition process where the Chief Justice didn't just wake up one morning and, "Oh, I am chief." We actually elected Tom some time ago and he was with me in the various legislative processes and the meeting with leadership. This was at my encouraging that he wouldn't be able to accuse me of fraud in what he was required to do. But I want everyone to know that Tom will be a really wonderful supporter of indigent defense. He has a breadth of knowledge about all of

these issues. He has been a great colleague. Really a wonderful member of the Supreme Court and he will provide the kind of leadership and guidance that you have come to expect.

1:48 Chair Ellis                    Alright, Tom, you will be the third Chief Justice since the Commission was enacted by the legislature back in 2001. I would have to say that I think all three have been terrific. We are looking forward to working with you, and Paul you have been a wonderful support and, of course, Wally Carson was great. There were a lot of fears, I think, by the provider community that if we went the Commission route and separated the budget for defense from courts that the chief would not be as strong a spokesperson for defense as had been the case. That has just simply not been true. We have had so far two that have been very strong advocates for defense and we are looking forward to working with you. Anything you want to add?

2:48 J. Balmer                    I am in the listening phase.

**Agenda Item No. 2                    Approval of the Minutes of PDSC’s January 26, 2012, meeting**

0:10 Chair Ellis                    The first action item is the approval of the minutes from the January 26, 2012 meeting. Are there any additions or corrections? If not, I would entertain a motion to approve the minutes.

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

3:13 Chair Ellis                    The second is approval of the minutes from the retreat that we had on January 26, 2012. Are there any additions or corrections to those? If not, I would entertain a motion.

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

**Agenda Item No. 3                    Approval of Structural Adjustment to ACP Contribution Amounts**

3:39 Chair Ellis                    Kathryn, walk us through the ACP contribution amount issue.

3:48 K. Aylward                    I would be happy to. Behind the yellow divider in your materials are two tables. The second one you may recognize because we asked the Commission to approve what we refer to as “Guideline Recoupment Amounts.” So recoupment is at the end of the case when the court can order the defendant to repay the costs of representation. We decided to provide the court with a list that represents typical contract rates. Historically what would happen is the judge would call our office and say, “Okay. I am in court. How much did you spend on this particular case?” We would say, “We don’t have any way of knowing because we haven’t even received all the bills yet.” We thought that this was a better way to provide the court a handy guideline. They can go up or down and deviate from that, but at least this gives them a ballpark of what to do. We changed that in October of 2010. Now the contribution amount. This schedule was probably first developed – I don’t know at least 18 years ago. You can see it is quite different; it talks about the contribution amount, the amount that a person is asked to contribute up front when they are first found eligible for court appointed counsel. You can see that the Class A felony, for example, and the B’s and C’s are broken down into person, property and drug, because when this was first developed we still had a lot of our caseload being paid hourly. An estimate of what a case might end up costing then of course a person felony is more than a drug felony. But realistically now 96 – 97% of our caseload is handled by contracts and under our contracts we do not differentiate different types of Class A felonies. We just say an A felony is X amount of money. We figure that it all sort of averages out. So the reason we are bringing this to you now is that the Judicial Department, and I am so excited about it, is about to roll out a replacement for OJIN, which is the Oregon Judicial Information Network — basically the case management system that judicial department for had for 20 years or more, a long time. It is now being replaced and they are referring to it as Odyssey. They are going to do the first

installation of Odyssey in June in Yamhill County. Part of what this new system is going to do – I haven't seen very much of it. One of the things it will do is, obviously, facilitate entering these kinds of judgments and it will record financial obligations. They were looking at this and in order to make the programming less complicated for Odyssey, Judicial was saying, "You know what, this is just thrown out there as a possible idea, instead of having one judgment that is a contribution and another judgment that is recoupment, what if we took this second list and this is how much you would have to pay in the end, so why don't I order you once to pay it now upfront." At that point we said, "You know, these are decisions that really the Commission has the responsibility of making, so we will take it to the Commission." Hopefully next meeting we will have more time to talk about what the amounts should actually be, but to start with I think what we are asking for today is your approval that maybe it is appropriate to use the same breakdown for contribution amounts as we do for recoupment at the end. That will allow them to proceed with any programming they have to do for Yamhill's installation. Then we can come back later and say, "Okay, now we think the actual dollar amount for a contribution should be X or Y." We can change that later. One of the issues that you will be discussing, when we talk about amounts, is where these monies go. The way it works now is that amounts that are contributed up front go into ACP, a sub-account of the PDSC account.

8:36 Chair Ellis

And ACP stands for?

8:39 K. Aylward

Application Contribution Program. So the \$20 application and this contribution amount you have been ordered to pay goes into a pot of money that belongs to the Commission and is used to pay the expenses of the verification staff in the Judicial Department. That is where that money goes. At the end of the case recoupment money goes to what used to be called the Criminal Fine and Assessment Account. It got a name change and now it is just the Criminal Fine Account. Those amounts of money go to police standards and training, Oregon State Police, they go to crime victims, drug and alcohol abuse treatment - they go to a lot of good and helpful things. The total amount is the same. If your case costs us \$1,000 and we ask you to contribute \$300, we get that \$300. The \$700 recoupment amount goes to the Criminal Fine Account, but if we say, "You know what, we really think we should get \$700 up front," then there is only \$300 left for the Criminal Fine Account. We have to be careful of the fact that we are basically jumping in line in front of other programs. Really what I am probably going to recommend to you at the next meeting is that we do something that basically doesn't change what we are doing now; it simply increases it in effect for inflation. Because our contracts went up over 20 years, then the contribution amount should likewise go up so that we are not impacting our other system players.

10:20 Chair Ellis

Help me understand. You have the judicial qualifiers and they review someone's financial condition to see that they qualify for public defense. Why are we charging amounts up front, and how much of that actually gets collected?

10:41 K. Aylward

I may not have the number off the top of my head. It is a lot, actually. The application amount is the \$20. The contribution, this is the maximum, where you say, "You know, if you have got \$300 and it is a Class A drug felony, we know you can contribute that amount." We will appoint counsel and then you contribute \$300. We collect about between \$150,000 and \$200,000 a month.

11:13 Chair Ellis

So these are defendants who are sufficiently indigent that they qualify for appointed counsel, but not so completely indigent that they can't make a contribution?

11:21 K. Aylward

Exactly. The third sort of table that you have seen before is what we call the privately hired attorney fee schedule, which you looked at a lot probably a year and a half ago and we increased those. It basically is, what is the amount of money you would need to have to go hire your own attorney? If you went to get an attorney on a DUI you might need \$1,000 or \$2,000. We say, "Okay, you don't have \$2,000, so

you can't get your own attorney, therefore you qualify, but you have \$1,000." We will take that \$1,000 and give you counsel. Those are the three sorts of scales that work together.

12:12 Chief Justice  
De Muniz

Just to follow up on Chair Ellis' question, when that money is collected where does it go?

12:20 K. Aylward

The money for up front contribution?

12:22 Chief Justice  
De Muniz

Yes.

12:24 K. Aylward

It goes into what is called a sub account of the Public Defense Services Account. The money in that account then the Judicial Department sends us a bill every month for the personal services and supplies of verification staff. So basically Judicial collects \$150,000 and gives it to us. Then they send us a bill for \$120,000 and we have to pay the bill. Then we have \$30,000 left over, which does fund two positions in my division.

12:55 Chief Justice  
De Muniz

So it is something of a self-funding mechanism. Maybe not the whole thing but ...

12:59 K. Aylward

Originally the intent and the hope was that this would generate enough money to cover all of the verification costs in the Judicial Department.

13:12 Chair Ellis

So at the conclusion of a case how many of them end up with a judgment against the defendant for the balance of the costs?

13:25 K. Aylward

I would say nearly everybody. I don't know. I haven't read any stats because it is money that goes to somebody else, but you always see that. It may be low down on the priority of payments. When someone makes a payment there is an order where the money goes first. The attorney fees are a little lower down the scale than some of the other things.

13:52 Chair Ellis

Then out of all those judgments a very small percent probably ever gets collected?

13:58 K. Aylward

I think that is probably the case. I think it takes many, many years to collect.

14:06 Chair Ellis

The other question I had is looking at the second table and let's take a Jessica Laws case, is that \$5,250 the bench mark that the verification people look at to see whether the person has assets sufficient to defend themselves?

14:26 K. Aylward

No - that would be that third table, which I didn't include here, which is the privately hired attorney fee schedule. That is the one that would say, "Wow, if you are charged with murder you better have \$50,000." There was discussion about if somebody walked in my office I wouldn't touch that case. I would tell them up front it is going to be \$50,000. That schedule is separate.

14:49 Chair Ellis

Okay.

14:52 Hon. Elizabeth  
Welch

Kathryn, I have a question like the one before. Talk about juvenile for a minute. I don't need the details or any of the philosophical stuff. I know we will get to that sometime soon. How much money is collected in recoupment ....

15:12 K. Aylward

The contribution?

15:15 Hon. Elizabeth  
Welch

The contribution and recoupment in juvenile cases.

- 15:17 K. Aylward Application contribution collects about \$69,000 a year. Just short of \$70,000 a year. Recoupment I don't know because we don't get it. I have never paid attention to it because it goes somewhere else and we are not involved in that so I don't know what it is.
- 15:35 Chair Ellis When was the last time the legislature looked at where these funds go? I am frankly very anti-dedicated fund sources because they tend to get embedded and then nobody ever looks at it again.
- 15:58 K. Aylward They looked at it extensively over the interim and during the last session with the fee bills that were meant to sort of reorganize things. We all agreed. You can look at this and think why do we have this special account? The money from this account goes here. Why don't we just make general fund appropriations to all these and then the money that is collected just goes to the general fund.
- 16:25 Chair Ellis That is exactly my question.
- 16:27 K. Aylward If you are one of those little agencies whose name is in there I get that money from there. You are going to feel threatened that suddenly you are not named as a recipient of the Criminal Fine Account funds.
- 16:43 Chair Ellis Like punitive damages going to victims.
- 16:47 K. Aylward Right. Exactly. The attempt was to say don't worry. You will still get what you got before. We are not trying to change anything. We are just trying to simplify it and make it logical. They got a lot of pushback from all of the counties and all of the entities that were part of the fee structure. The unitary assessment is a dollar and it goes to you. Now we are changing that, and if you are the "you," where is my dollar? I didn't follow very closely where that ended up. The statutes still say the Criminal Fine Account pays for - it lists the things that the money goes to. Then it says that after that first tier - I think some of it goes to the court facilities. It is listed in there.
- 17:40 Chief Justice  
De Muniz If Mr. Borden is here he would really be the architect of that and could answer all of those questions if you were to ask him, but basically what were all these little - if you think of it as a spine, the money would come in, and then it all went to these little things. A great majority of that was changed to make those general fund appropriations. Use legal aid for example. They determined that legal aid had received, in the past, \$12 million a biennium. They appropriated something in that neighborhood. You go down from there. It affects facilitation and conciliation services in the counties - all of these things if they are general fund appropriations. Isn't that right, John? I am pretty close about that. They are general fund appropriations and a lot of that changed. To just answer your question about what happens to these judgments - they become judicial debt and we try to collect judicial debt. There is a billion dollars worth of judicial debt. We have collectors. We hire outside collectors. We refer collections to the Department of Revenue - a variety of undertakings. There is also something I have worked on now for four years. A bill in Congress to permit the interception of federal tax returns for judicial debt. We have worked really hard on that. The conference of Chief Justices - our lobbyist - has worked hard on that, but so far we have not be able to get that passed. Oregon was the first state, at my request, the Senate and House passed a joint resolution urging Congress to pass this law to allow the interception of judicial debt like they do for child support and a variety of other things. We never asked to get in line ahead of anybody. We asked to get at the end. Our estimate was, and I think Mr. Borden remembers this, probably four or five years ago our estimate was that if we could have got this passed, even in a small state like ours, we could have collected about \$42 million a biennium in judicial debt.

20:18 C. Lazenby Do you have a really low success rate with the private collection agencies?

20:22 Chief Justice De Muniz Well our clients here are some of the most difficult – hard to collect when you are in prison for 25 years. Someone could win the lottery. I don't know. There are a variety of things and you can renew judgments, I think, up to 50 years. We are actually having a good bit of success with our outside collectors. Mr. Borden remembers that was an issue we had to work out during the session, about how we would continue to fund that given that we weren't other funding our positions – our collection thing is now a general funded position. Those are all good things. It is just a matter of working them all out.

21:10 Chair Ellis So, my next question is under the statute, we are charged with passing on these numbers?

21:20 K. Aylward No. Not the numbers. Just the notion that the granularity of the guideline contribution amount should mimic the granularity of the recoupment guideline amount. That is something I think you can just say, "Sure. Makes sense," and not necessarily have to vote on it. We just need to give Judicial an answer so that they can move ahead. Then as far as any determination about what the contribution amounts should actually be, maybe that needs a bigger discussion.

21:56 Chair Ellis Although this is identified as an action item.

21:59 K. Aylward Oh it is. I beg your pardon then please vote.

22:04 Chair Ellis Before we do that these numbers compared to what? In other words was there an alternative schedule? Were there issues to derive these numbers, or are they just straight average costs?

22:23 K. Aylward Take your pen and scribble out those numbers. I am not asking you to make any comment on those numbers. They are just there because I am showing you the existing chart. All I am asking you to do is to agree that it no longer makes sense to divide Class A felony, for example, into person/property/drug, when we pay the same for all Class A felonies under our contracts. The recoupment amount we are recommending that the judges order is the same for all types of A felonies, so shouldn't this contribution amount also be?

23:08 C. Lazenby So you are asking us to roll what in the first chart is "A" person the \$700, the \$350 and \$300 for drug charges, to roll all that up to \$700 for all A felonies.

23:18 K. Aylward No. I am asking you to say, "Whatever the dollar amounts may be", and you will decide those at a future meeting after we have had more time. This just came to our attention just last week. We didn't quite realize it was coming. All we are asking you now is to say, "Yes we agree it makes sense to only have one amount for Class A felony. We don't know whether it should be \$700, \$350, or \$300." We haven't told you that. We just think there should be one amount.

23:53 J. Potter So it matches up with recoupment.

23:58 K. Aylward Exactly. In speaking to verification staff at Judicial, the program manager said, "Oh that would be wonderful. It is too confusing and who can remember. We have all these tables and everything is different. Keep it simple."

24:10 S. McCrea So we would be doing that for Class A felonies, and also for Class B, and Class C felonies?

24:15 K. Aylward That is correct and anything else down this line. So the separation between juvenile termination of parental rights parent and child, we pay the same so why would the contribution amounts be different. So basically all of the categories on the second

page that are the recoupment categories are the same categories we are going to use for a contribution amount, the amount of which we will decide later.

24:47 Chair Ellis So is that clear to the Commission? We are only passing on the concept of parallel granularity. Correct?

24:58 Hon. Elizabeth Welch So moved. Or do I have to say it back. I move that we agree that the categories for these purposes be the same for contribution and recoupment. The crime categories be parallel.

25:27 Chair Ellis Does that satisfy?

25:27 K. Aylward Perfect.

25:27 Chair Ellis Is there a second to that motion?

25:32 J. Potter I will second that motion.

25:33 Chair Ellis Is there any discussion? All those in favor say aye. **VOTE 6-0.**

**Agenda Item No. 4 Waiver of Counsel in Juvenile Delinquency Cases**

25:45 Chair Ellis Now Nancy do you want to come forward with Kathryn on waiver of counsel in juvenile cases, which is a subject we have discussed in the past and shown great concern about.

26:10 N. Cozine I noted that this had been a topic of discussion and I thought it might be helpful to create a very scant summary of our history on this topic.

26:20 Chair Ellis Is that you, Janet?

26:22 J. Stevens Yes it is. I am sorry to be such a pain in the rear.

26:25 Chair Ellis You are not. You are welcome.

26:39 N. Cozine So what you have is a packet of information with a summary of the Commission's discussions on this topic. When I went back through the minutes of the Commission and it seems that the issue first arose as a Commission discussion in September of 2009. The attempt at that point to collect solid data proved to be very challenging, as it still does. The Commission discussed the issue again in March of 2010, when there was a presentation from George Yeannakis, who is with the Team Child organization in Washington, Jordan Bates who went around and visited different Oregon counties and looked at the way that they were appointing counsel in juvenile cases, and from Ingrid Swenson. During that discussion there was a lot of conversation about the importance of counsel, the difference that counsel makes in delinquency cases, the complexity of those cases, and discussion about the brain development of teens who are typically charged and their ability to navigate the juvenile delinquency system without the aid of counsel.

27:54 Chair Ellis And the other piece of it is a knowing waiver when you are dealing with a juvenile who is being encouraged to waive by DHS and the judicial department.

28:13 N. Cozine One of the pieces that came out in the visit to counties that Jordan Bates found - some youth had the impression that if they waived counsel they would be treated more favorably, or their parents were discouraging them from asking for counsel because the parent didn't want to be financially responsible under the ACP program for payment of attorney's fees. Because parents can, by statute, be held accountable for those amounts. Juvenile ACP is a part of this conversation and application of juvenile ACP in delinquency cases is complex because you look at the financial

eligibility of the youth and the mother and the father. The Commission then took the step of having Ingrid Swenson contact juvenile directors. She worked with juvenile directors to try to get their involvement. The Chief Justice sent a letter out to the judges and trial court administrators encouraging the use of a model colloquy that had been developed. That is also in your packet. That was in February of 2011. When we visited Umatilla County in October of 2011, we again heard the anecdotal information of youth waiving counsel because the parents didn't want to pay. There we were in January again talking about waiver of counsel, and where are we now. Kathryn and I went back to the data to see if we could at least identify trends. We know we cannot get accurate numbers. There are too many inconsistencies in the way the information is entered from county to county. But the second or third page shows a chart, and Kathryn will talk a little bit about what this information really tells us.

30:09 K. Aylward

As Nancy said it would be nice to be able to just run a query from the OJIN data and have it give us the answer. Hopefully with new OJIN we will be able to do that, but one of the things we ran into – and it isn't even a data entry problem or anything – is that the way OJIN is structured that there is a case, a new case, and underneath that case the petitions are stored. So you could have petition one might be a delinquency felony and petition two might be a misdemeanor. Then counsel is appointed on those petitions, but let's say the petition is disposed and the youth is on probation and then three months later there is a probation violation. That gets entered as an event in that case, that petition, just another event. And if then counsel is appointed, they are being appointed on the probation matter. Even if there were perfect data entry and everyone always entered exactly the same, the right event, you would have to go further and say, "Well, wait a minute. I am only going to assume counsel was appointed if it was appointed prior to disposition" because that is what I am interested in, not, was counsel ever appointed? We knew this was going to be sort of a complicated exercise. I thought about this. This will give us a rough idea. We know how many petitions were filed. We can get that – it is pretty straight forward. Out of OJIN we have those stats. So if we know there were let's say 5,000 delinquency petitions filed in a given year. Then let's take a look at how many case credits our contractors reported. That can give us some idea. If they are only telling us they were appointed on 1,000 we have a problem. If they are telling us they were appointed 4,990 then maybe we have it all covered. The difference is that the information we get from OJIN is petitions. When we are counting case credits there might be duplicates if the case went to a PD office and then later they discovered a conflict and it went to a consortium. Each of those contractors would be reporting that case so we would see that twice, whereas the statistics would only show it once. We also give additional case credit based on the charges, the allegations, on different incident dates. So in other words you could have one petition filed for a juvenile felony and under that could be three allegations. You did this on Monday, this on Tuesday, and this on Wednesday. Under our case counting rules if it is a separate incident date with separate allegation that would count as three credits under the contract. So, of course, I looked at counties and well, this county had 500 petitions filed and we claimed 580 credits. How can that be? That is why we know that our credits are actually overstating. I don't know by how much yet.

33:27 Chair Ellis

But the inconsistency is consistent. So if you start doing comparisons there will be meaningful trends.

33:36 K. Aylward

Exactly and that is what this chart is attempting to show.

33:43 C. Lazenby

Isn't the concern about the front end of the process. It is initially when they are there. You started out by saying that these case credits if they end up getting appointed later on.

33:53 K. Aylward

No, no, no. They would show up in an OJIN query as an order appointing counsel. That is why it wasn't sufficient just to query it, but our contractors would have reported that as a different code, a PV code, because they are not getting full credit

for the felony if they got appointed later. We were just looking at original felony and misdemeanor credits.

34:13 C. Lazenby

So you were catching the front end pieces.

34:13 K. Aylward

That is right. In this chart looking at 2010, the black line says 99%. One would think that 99% of the felonies had court appointed counsel. That is not what this is saying. What it is saying is the total number of felonies that we gave credit for is 99 compared to every 100 petitions that were filed. You can't assume that it is 99%. It means that we had 99 case credits for every 100 petitions. Some of the 99 might be duplicates. Some of them might be additional credits for additional incident dates. So it won't be as high as 99, but what we are hoping to show is look how things have changed between 2005 and 2010. We are certainly, relative to the number of petitions filed - we are seeing many more credits for court appointed counsel. I had another chart but it was getting too busy looking. But in that same time frame in 2000 - oh, I might have a number for you. Anyway it was like a big number. It was like 14,000 petitions filed and then by 2005 it was 8,000 petitions filed. Then by 2010 it was 5,000. It was huge how it dropped off. So not only are the number of petitions being filed dropping off, but the appointments are coming up to meet them. We are seeing a huge improvement. Now what we plan to do and I personally looked up 3,000 cases in OJIN over the weekend and then decided I was insane. What we are going to do before the next Commission meeting is to take not all three sample years but just 2010. There are 5,374 cases - petitions filed in that year and we are going to look them all up. We are going to look them all up and find out what actually happened because now I crazily want to know. You would see weird things like counsel was denied presumably for financial reasons. Then there would be a waiver of counsel was entered. I am thinking they were denied and then the judge said, "Well, you have money. Go get an attorney." Then the kid or parents couldn't find one. Then there would be a waiver in terms of are you sure. You are sure you don't want counsel because you are going to need it. Then you would finally see an order appointing counsel. In order to decide what category that particular petition falls in you really have to look at the events in the case and the time spans and figure out what is happening. I want to look it up because I want to know what is happening. Frankly, you have a convert Judge Welch because I was looking at these and thinking wait a minute. This is five felony petitions filed and the next day it is admit and the next day it is jurisdiction and then it is disposition and boom. It wasn't until two months later when there is a little misdemeanor and now there are five felony PV's that suddenly the kid is looking at serious trouble. I am thinking that is not right. Sorry. I soap boxed. It was quite disturbing.

37:49 Chair Ellis

Remind me what was in the chief's letter. I remember that was the procedure we had fastened on as consistent with our role and court administration role.

38:04 N. Cozine

I thought you might ask that so I did attach the letter to the packet. It is the last page. It describes that the PDSC conducted a hearing in March 2010 and encourages the use of the model colloquy any time there is going to be a waiver of counsel.

38:42 Chair Ellis

Chief, any sense how current this reminder is and is it being followed.

38:48 Chief Justice  
De Muniz

I don't know the answer to that, Barnes. I hope it is but I don't know for sure.

38:59 N. Cozine

If I may, I think when we looked at the data the sense that we got was - when you look at the State of Oregon overall there is this increasing trend of appointment of counsel. When we looked at individual counties is where we saw some of these, what I would call "outliers." You had counties where, when you looked at that percentage ratio, you had counties where the percentage ratio was 160%. Those are counties where you can pretty much bet that counsel is being appointed every time. In misdemeanors or felonies counsel is being appointed. On the other side of the spectrum you had counties where their percentage ratio was 50%. You can rest

assured in those counties that the opposite is happening and that there are quite a few waivers. When we talk about going into the 2010 perhaps 2011, it is a little early because not everything is entered for 2011, but when we talk about going into those cases we want to take a look at some of the counties that are in those outlying positions so that we can get a better sense of what is happening county by county. We tried a few different methodologies when we were trying to collect the data. We tried things like let's assume that if someone didn't have counsel appointed within the first two months that was an uncounseled case. But then you would find a case where that didn't match up because different counties have different practices. You would find a county where there were 10 petitions filed all in the same day, but the order appointing counsel was entered on only one of those cases. But really all 10 had representation. The court just didn't enter it in a way that was consistent with other counties. We really have to look at each county's practices, and I think we can do some of that, and draw some more conclusions. In terms of the next steps we have tried a blanket approach. The Commission has discussed various approaches as this conversation has unfolded. The idea of a CJO, legislation that would require appointment of counsel, these ideas were discussed. I think it was disfavored because there are times when you can achieve a favorable result for a youth in special programs county to county. That was one of the conversations that this Commission had.

41:24 Hon. Elizabeth  
Welch

When was that?

41:24 N. Cozine

That was in one ....

41:32 Hon. Elizabeth  
Welch

I don't think it happened.

41:36 N. Cozine

I certainly wasn't here at the time but I gleaned that from the minutes. This Commission may well decide that it is time to pursue something like that. The other possible next steps, that I wrote down on the back side of the summary of where the Commission has been, would be a follow up statewide survey to judges regarding the use of the colloquy and further efforts to collect reliable data. Pursuit of an appeal, and there was discussion - it came up again in May of 2011, Youth Rights and Justice was going to try to appeal a case where counsel had been denied. But they couldn't find a case where the issue had been preserved in the underlying case so that didn't come to fruition.

42:15 Chair Ellis

Sounds like Gideon against Wainright all over again.

42:20 N. Cozine

I think another avenue that I think we would like to pursue and the Commission would need to approve this, but - I should mention that Norma Alexander is here. She is the administrative analyst for the ACP program with the Judicial Department. We met with her on the 9th when we started exploring some of these questions. ACP generates \$70,000 a year from juvenile delinquency cases. It requires a lot of work because you are checking on the financial eligibility of youth, mom, and dad. You could theoretically exempt out all juvenile delinquency cases from ACP and then when we are looking at the contribution amounts that we want to adjust to reflect inflation on adult cases, you could actually imagine that you would recoup more than \$70, 000 by raising some of those fees in cases where the defendant is eligible for counsel but has money to contribute toward their court appointed attorney fees. So that would be another possible next step and something that we will probably come back to the Commission with at our next meeting requesting approval. It was such a short time frame we didn't have time to work through the numbers, but we think that it would at least eliminate one barrier that exists for appointment of counsel on delinquency cases.

43:38 Chair Ellis

This issue has always been troubling. You have got a vulnerable population being asked to make a really important decision. The odds of many of them really

understanding the significance of what they are being asked are not high. Is there some way to structure it that if there is going to be a waiver it is going to be with advice of a lawyer standing next to you to discuss the waiver.

44:11 N. Cozine

Chair Ellis and members of the Commission, when I read the minutes it is my understanding that the Commission did discuss that type of model and it would not necessarily be a significant cost. One of the things noted by Jordan Bates was that in many situations where there was a waiver of counsel there was no attorney present in the room. If we could build into our contracts at the next contracting cycle, a provision where we would fund someone to be in the courtroom giving that advice on waiver of counsel, it could potentially be done at a lower cost than what it would cost to pay for the full case. Whether or not the Commission wants to go in that direction is a conversation for you. It did come up as a discussion item.

45:11 Chair Ellis

Commissioner Welch is our expert on juvenile. I am an amateur at it, but I picture a lot of courts where the paternalistic view of juvenile justice is still how they think of it. I am not trying to say that anybody is being a bad person here. There is a whole tradition in juvenile law of paternalisms, and I can easily see the impression being given to a young person play ball with us and it will all work out. It just bothers me a lot.

45:49 Hon. Elizabeth Welch

Actually the guy from Washington, if you remember when we first started talking about this, Washington had just adopted – I think it was a Supreme Court rule rather than a statute, although there were statutes I think at least prepared to go to the legislature there that said you can't waive counsel without advice of counsel. That is what they actually did in Washington. My understanding is and it would be interesting to connect with Mr. Yeannakis, but my understanding at least initially was that the result of that rule was pretty much across the board appointments rather than using that. It is still a consciousness raising thing which is what we were hoping for with the Chief Justice's letter. To make people think about this again. Whether they would actually follow the waiver, or maybe decide when they saw it, that great big long list of things – there is a lot of work put in on that colloquy. That is a lot of questions. There are so many issues here. You don't want me to do a diatribe. One of the issues that Ingrid and I talked about a fair amount was in Portland. I shouldn't say that because immediately half the people turn their ears off. In Portland one of the issues is there is a thing called a formal accountability agreement in juvenile court. A kid is arrested and cited for an offense. They can be felonies; Class C felonies are susceptible to these. What used to be, in the good old days, informal probation, is now called a formal accountability agreement and you sign things. You don't plead guilty. But sometimes it takes a lawyer to get there. There are no petitions necessarily filed in these cases unless the kid was taken into custody. So there is another whole category of kids that are being processed that don't appear before a judge. If they don't follow it, it is sort of like being on probation. If you don't follow it then a petition is filed and then you are adjudicated on the charge. There are multiple, multiple layers. The big problem is with Measure 11 what has happened to the juvenile courts is that all the old kids are gone. They have moved to adult court for good or for ill, obviously for ill, but they have gone to adult court. Now the focus moves to these littler kids. So the average age of a kid in juvenile court is probably 13 rather than 16 the way it was before. I think it is important for people to think about this. We are not talking about middle-aged teenagers. We are talking about young teenagers or kids charged with modest crimes that are over 15. They are not Measure 11 offenses. And the whole idea of plea bargaining. How many kids or parents understand what plea bargaining is. Is there a DA's office in the state that doesn't charge four things for every arrest? That is the way it looks. These kids have four charges pending and they have decided because the pressure from parents that will not pay for you to have a lawyer. I am mad at you. You screwed up and we are not going to compound this by having to pay thousands of dollars for a lawyer, so you just fess up to this and get on. There you have got it. There are so many parts of this.

50:09 Chief Justice  
De Muniz

I think Betsy is correct. I think there are multiple parts to this and one thing I would say - have you approached us about judicial education? I think you should be doing that because we could see about getting that on - Justice Balmer will handle all this. That could certainly go through our education committee to become a judicial conference education program. I would certainly support it and I think Tom would support it, hearing what we heard today. I also agree with Judge Welch particularly about these are the kinds of things that we who are involved in the administration of justice have to be thinking about, about how courts have to change to meet the needs of those people that are there. My youngest son is a small portion of the juvenile consortium here in Marion County. He routinely represents children who are 12 years old charged with sex offenses. The pressure brought to bear in handling those cases, and what it means for a child's future, are immense. I think we have to start facing up to this also. I have to tell you that I don't think this is going to be part of the Commission on Public Safety's work. I was just explaining that I recently met with the Governor's staff who are getting ready to issue an executive order, the Governor is, continuing the work of the Commission on Public Safety. But what we have identified doesn't really get to this because there just isn't - again we are going to be talking about doing our work in six to seven months before the legislature gets here. There just isn't enough time to get to that. I think this is something that ought to become a matter of some importance and could be an issue for the legislature using another method to get there. But certainly Justice Balmer and I, if you want to approach us about trying to see what the education committee can do about this, I think this is a matter, at least from our side, a matter of judicial education. It is a policy question. Probably, typically a legislative policy question about going to a position like Judge Welch is talking about that you have a standby counsel in the courtroom that you funded to have someone there that meets with the child. I have certainly noticed every summer sitting just as a trial judge in adult court, the importance of what judges say to people about counsel. I think those are crucial.

53:20 Chair Ellis

Seems to me there are three ways that I can see and it is really not this Commission's role, but we are the intersection of this issue and I think we can play a very useful role by elevating its visibility. One the Chief mentioned which is legislation. I think that is certainly one way to approach it. Another, and Mr. Gartlan is here and he might be able to help us on this, do it here the same way it was done in adult criminal cases. Get the right case and get it in front of the Supreme Court and they write an opinion that lays out the standards, or third, have one Chief or the another do more than just write a precatory letter. I think they have the power to say this is a rule that as Chief is going to be enforced in the trial courts. I would like to try to go to one of those three and not just education and precatory letters. I guess I am not as optimistic that those will change behavior by what I believe to be, and Judge Welch can tell me whether I am right or not, a continuing threat of mind set of paternalism in juvenile proceedings. My guess is those outlier counties that have very different data than this aggregate data that is probably what is happening there. I don't know. How do others react?

55:14 J. Potter

We have tilled this ground before and the discussion I recall was in March of 2010 in the judiciary committee room and we had the guy from Washington talk to us about it. We had a presentation by Ingrid and Paul can refresh the memory how she got to option 4, which was this Commission has the authority to do something. We talked about this Commission, the Legislature, and the Chief Justice.

55:47 P. Ozanne

On the list here in the memo are our four strategies including dispensing with the ACP, especially if the court administration has no objection.

55:53 Hon. Elizabeth  
Welch

Yeah. I wanted to bring that up again. I think that would make a lot of difference. In some of the conversations that Ingrid and I had with judges and juvenile departments when we were fussing around with this, this is a big issue because I

think a lot of judges, not most, but a lot of judges have taken the position that there is this process and that means that they are supposed to make decisions about counsel based on these financial considerations. If could get some data, Kathryn, about the cost effect. That is why I asked that question earlier and I know I was kind of out of line because we weren't there yet, but how much money gets collected and how much does it cost to do all that paperwork. The people that put this together - is it even cost effective to do this?

- 57:01 P. Ozanne Do we have the numbers here with \$70,000 per year and then the earlier comments that 80% of it goes to the court.
- 57:06 K. Aylward No. The \$70,000 per year is what goes to us and then we use that money to reimburse the court. That is the amount that is contributed up front. That is not any of the recoupment.
- 57:21 P. Ozanne So how much is net to us and how much goes to the court of that \$70,000.
- 57:27 K. Aylward Probably 90% goes to the court.
- 57:28 P. Ozanne I assume from the discussion that the court administration may not object to this change. How much study do we need?
- 57:40 Hon. Elizabeth Welch The question is what does the verification in juvenile court cost? That would be the first question. Maybe there are others along that line. Is this a process that makes any sense? There is a problem in dependency cases too. When you are talking about an adult it is their act that they are being asked to pay for. They are charged with commission of a crime. Their resources should go toward their representation. Here a parent is being asked to pay for the act of their child. Parents are responsible for their children. But is that a principle that really makes sense in this context and that is something that has never gotten any attention. Before we ever started with this I can tell you from the years of dealing with Ann and other people trying to figure out how to do this that is an issue that was just too complicated so we just sort of motored past it. How fair is that?
- 58:59 P. Ozanne So, Judge Welch, I am trying to sort out and you said verification versus ACP. There are some cases in which inquiries are made about the lack of indigency of the kid or the parents?
- 59:11 Hon. Elizabeth Welch It is the filling out of the forms. That is when the contribution part comes in. It is sort of automatic. Everybody except really super, super poor people have to pay the contribution. At least that is the why it was when I knew what was going on. I don't anymore.
- 59:29 P. Ozanne It is \$20 per kid.
- 59:33 K. Aylward That is the application portion. So \$20 just to find out. Even if you don't qualify I keep your \$20. If you then qualify I then decide how much contribution you make in addition to that \$20.
- 59:46 P. Ozanne So what is No. 4? Remove juvenile delinquency cases from ACP? What is the consequence? I thought it meant wipe away any indigency inquiries or function.
- 1:00:00 N. Cozine It does and it would eliminate that \$70,000 in fees and contribution amounts, but there is also the recoupment option at the end of the case. If the Commission was to authorize, and I think it is within the Commission's authority, to eliminate to ACP in juvenile delinquency cases. The Commission under Chapter 151 is charged with adopting the policies and procedures that we use in ACP. So if were to exempt juvenile delinquency you would lose that \$70,000 a year into the ACP fund. If it

were ordered at the end of a case as recoupment, then it would go into what is now the Criminal Fines Account. It would go to a different place. It wouldn't go into the ACP fund. That is what the change would be. Parents can still be ordered by statute to pay recoupment. That is something that again changes from county to county whether or not they actually impose a judgment.

1:01:09 Hon. Elizabeth  
Welch

That is the next issue though. As long as I was working regularly no one had yet figured out statewide how to do that. In other words to get the recoupment; it's a judgment. We worked on it very hard in Portland but we never figured out how to do it. There wasn't anything happening in Salem that was helping with that. I don't know if that has changed or not. I doubt it has but I don't know. If it hasn't and the lady in back who knows is making all the right faces that means that this whole enterprise is a complete waste of time and money. In some courts there are people out there helping them fill out forms or they are just giving them forms without having verified. But the whole process is pointless because nobody has ever figured out how to get a judgment much less collect one. That would be next question, Kathryn, for me is how much recoupment goes on? Is that \$69,000 a year recoupment and contribution or just contribution?

1:02:20 K. Aylward

Just application contribution.

1:02:26 P. Ozanne

Judge as long as there is the spectrum of recoupment even if the reality isn't there, doesn't that still chill the parents' worry about exposure?

1:02:36 Hon. Elizabeth  
Welch

Yes. Of course.

1:02:36 Chair Ellis

It does seem to me that one path that we could stimulate is the legislative path. That does seem to me an obviously right place to go. I am wondering Paul if we couldn't stimulate the Oregon State Bar Juvenile Law Committee to get interested in this and we give them what support we can. We have them at the next session sponsor a bill on this.

1:03:12 P. Levy

I think we could stimulate them. I am not involved in that particular body. We have been historically.

1:03:20 P. Ozanne

Why wouldn't we, Barnes, break out and take action on the ACP ourselves.

1:03:27 Chair Ellis

They are not inconsistent. I am just trying to think of the ways we can try to push this issue forward. It does really trouble me to realize that there are just a lot of waivers going on that I just don't have any confidence are valid.

1:03:51 Hon. Elizabeth  
Welch

Can I stoke the fire a little bit more? I think there are two ways this really happens. This is a judicial issue. It is a 100% judicial issue. Judges are either with it on this subject or not. There are a group of judges that responded – remember before we had the meeting with department heads, we sent out a survey. Some people got their hair scorched. There is one judge in the mid-Willamette valley that did all the talking. Everyone else just kind of signed on. The whole response is that I know what I am doing. I have been doing this for a long time and I'm really good at it and I am a good guy. Go away and leave us alone because there isn't a problem. The other category are judges who float into juvenile court, have no background, and sometimes they stay for years or do it for years, but they are completely controlled by the juvenile department personnel. They tell them how to do it. I just recently read *Gault* again for the first time in decades. I mean actually sat down and read the very long... and it is full of good stuff. The issue is a juvenile court counselor says to a kid, "Listen, you are in trouble. What I am going to do is put you on probation. The judge will do what I tell you and you don't need a lawyer. Let's get this over with." The only thing that kids care about is when do I get to go home? That is

absolutely the furthest out that kids in this younger age range can think about. So we have people sitting in juvenile court who don't understand what the laws. Then there are others, probably a larger number, it is just – I don't understand why anybody wants to be the Chief Justice of anything. It is this issue about getting people to change the way they do anything.

1:06:10 Chief Justice  
De Muniz

Betsy, I think there are a number of layers to these things. I think certainly nationally and I don't know exactly here, but nationally in the area of family and juvenile law as you know more and more judges... the attitude toward juvenile court is changing. At least on a national basis there are judges who wish to be there and who feel like they make a big difference in juvenile court. It is not like you are being banished anymore to juvenile court. One of the problems, and you didn't use these words, and I thought you chose your words carefully. The people who are sitting there, many of the people who are sitting there, are not elected judges. Because of our budget constraints many of them are referees who are hired for these purposes. I don't mean anything by that except to say that it is not the same. Not the same as the Judge Felton that I remember from my misspent youth. So there are a lot of dynamics to this. I think there are some policy choices about ACP that you could make, but there is an overriding statutory policy here the legislature has set out about the responsibility of parents. I think you have to take that on at some point to figure out how this would really work.

1:08:01 Hon. Elizabeth  
Welch

You know before ACP started, whenever that was - 10 years ago approximately, that statute was there and it was sort of like isn't that interesting. There is a statute that says this and there was nothing happening. It is this program that ....

1:08:17 Chief Justice  
De Muniz

I am against dormancy.

1:08:22 Hon. Elizabeth  
Welch

Maybe we should just put it back to sleep.

1:08:27 Chair Ellis

I thought I detected the desire to make a motion on the ACP.

1:08:32 P. Ozanne

So moved.

1:08:36 Chair Ellis

State your motion.

1:08:36 P. Ozanne

I move that we – are you entertaining a motion that we actually take the action to remove juvenile delinquency from ACP?

1:08:52 Chair Ellis

I can see us either doing that or if the Commission felt we ought to be give it one more meeting and time to have a more complete report on it.

1:09:04 P. Ozanne

**MOTION:** I move to remove juvenile delinquency cases from ACP. Hon. Elizabeth Welch seconded the motion.

1:09:12 Chair Ellis

Is there discussion?

1:09:13 C. Lazenby

I would actually like to – I am probably going to end up supporting the motion but if we could have some sort of delay. I would like a little more clarity about exactly what our authority is and what the extent of authority is relative to the legislative pieces that are out there. I think it would be terrible for us to take precipitous action and then have what authority we have curtailed or eliminated by the legislature reacting to what we have done. I would really like to have more clarity about what the extent of our authority is. Especially if as Commissioner Welch has indicated there are members of the judiciary who are intent upon remaining independent from

us. Should we go ahead and declare war without knowing what our supply lines look like legally unless you guys all feel comfortable about it.

- 1:10:07 P. Ozanne                    That is a good point, Chip. I think our staff can correct me if I am wrong. I think our authority is clear. I think what I hear you saying is that even if we had the authority is it a battle that we don't want to take on?
- 1:10:23 C. Lazenby                    The numbers out here suggest some contradictory things to me. One hand you can look at it, and looks like there is more lawyers getting involved in these cases, at the same time as the decline of petitions over that period of time. It seems to me to say that there is a lot of informal stuff that doesn't show up on the books that is getting kind of wiped away by these informal structures that are out there. Judge Welch has another convert here. I think this is a very important issue. I think it is important enough for us not to let it get away from us. If we act precipitously we could end up being put in a position where we're shut out of any ability to do anything about it.
- 1:11:09 Chair Ellis                    I think I agree with Commissioner Lazenby. I would be more comfortable if between now and our next meeting we had a memorandum from staff laying out our authority to do that.
- 1:11:25 P. Ozanne                    Sure. If the person who seconded the motion – I will withdraw the motion and change it to in effect say the Commission requests that our staff explore removal of juvenile delinquency cases from ACP and report to us at the next meeting.
- 1:11:44 Chief Justice  
De Muniz                                I was just going to add that I think if you are going to do that it would be really helpful to involve the Judicial Department in terms of how this all works.
- 1:12:00 Chair Ellis                    Did the second agree to that?
- 1:12:00 Hon. Elizabeth  
Welch                                      Absolutely.
- 1:12:09 Chair Ellis                    With the revised motion is there any further discussion on that?
- 1:12:16 J. Stevens                    Would you please tell me again what the revised motion is? I lost a little bit there.
- 1:12:19 Chair Ellis                    The revised motion is between now and our next meeting to ask staff, in consultant with the Judicial Department, to report to us on our authority to remove juvenile from the ACP requirement.
- 1:12:39 J. Stevens                    Okay.
- 1:12:44 Chair Ellis                    Any further discussion? The motion carried **VOTE 7-0**. I would like to ask Paul or Nancy or a combination of the two, but I think the way to get a legislative piece rolling is the way I suggested. I don't think that requires a motion. Does anyone on the Commission agree or disagree with that approach?
- 1:13:09 P. Ozanne                    Are you saying both as the ACP and recoupment?
- 1:13:15 Chair Ellis                    Well ACP I think we are going to find that we have the authority. What I am talking about is get the juvenile law section of the state bar stimulated to take on this issue of no waiver without a lawyer being involved in the decision to waive. I think it is ripe for legislation. I recognize that it could go a range of directions if presented, but I think that is the right way to do it and this is the right time to do it. They have got between now and whenever the next session starts to put something together.
- 1:14:01 C. Lazenby                    Mr. Chair, are you suggesting that staff in addition to reporting back to us about the ACP that they also report back on the willingness of other entities to participate in a

- possible legislative solution. Not to initiate one but the willingness of people to do that.
- 1:14:19 Chair Ellis Correct.
- 1:14:20 J. Potter Is this envisioned to be a strategic session between the Oregon State Bar and staff and the courts?
- 1:14:30 Chair Ellis You need a lead agency to do this. We tend not to initiate substantive legislation. I would be very comfortable with us playing a support role to the state bar. If the state bar shows no interest we can revisit that. If there are other interested groups – OCDLA could easily be one – that would support this that would be great.
- 1:15:02 J. Potter And I wasn't suggesting that. I was asking really is the court going to be invited to sit down and have these strategic discussions that are going to go on about legislation. Chip is right. You don't want to do something that you get attacked for by the legislators. On the other hand, if you view this correctly, what is the attack? I am a legislator who doesn't think kids should have appointed counsel?
- 1:15:32 C. Lazenby Oh I can imagine a variety of different attacks on this. I think just the base one - the first thing in everyone's mind - is cost. We don't have a sense of what the cost of providing an attorney, or a series of attorneys, in every juvenile court all throughout the state to advise every juvenile about their rights before they waive counsel what that amounts to. I can imagine someone with the best of intentions saying that we are drumming up work for ourselves. There are a lot of things that that can work around in the legislature. I just think we need to be deliberate and act as if we have a Derringer instead of a machine gun.
- 1:16:17 P. Ozanne I think the Chief, more diplomatically than I can say this, is one of the powerful ways is the notion of keeping the hook on the parents who are responsible. That is what I would run on if I were opposed to this. What do you mean, the parents are responsible for these kids and why should we let them off the hook?
- 1:16:37 C. Lazenby We could sit here all day and kind of come up with great theories why they can shoot us down on this. That is why I am urging that we be a lot more deliberate about it. I think it is an important issue and we shouldn't let it get away.
- 1:16:52 Hon. Elizabeth Welch I think it would be absolutely wonderful to find out why, in all these years since this has started, that no one has been able to figure out how to recoup the money from the parents.
- 1:17:07 Chair Ellis We are migrating from the topic.
- 1:17:09 Hon. Elizabeth Welch No. I don't think so. The point is, is there money being collected? If there isn't money being collected in the first place, the issue is why not? I can tell you that nobody could figure out what the process would look like. Where is a jurisdiction, in a delinquency case, who orders the parents to pay, to enter a judgment? I think that is the answer. Of course maybe we don't want to talk about it because they will then pass a statute.
- 1:17:48 Chair Ellis Does somebody want to make a motion that we ask staff to do this? Is there consensus to do it? Then the third technique is judicial order. Since we have the current and the soon to be Chief Justice in the room, I am sure they have been listening attentively. If they conclude that judicial order is the right way to go, I think we have done everything in our power to inform them. The fourth route – Pete what is the prospect of a test case?

- 1:18:34 P. Gartlan Just to go back in history, AD had offered to do that. Then at the time JRP said it was their bailiwick so we deferred to them. It kind of fell off of our agency.
- 1:18:52 Hon. Elizabeth Welch But not from neglect.
- 1:18:54 Chair Ellis Can you revisit that with them? That does seem to me a very logical way to get a statewide rule is through judicial opinion.
- 1:19:06 P. Gartlan We can start up that process.
- 1:19:11 Chair Ellis Any other thoughts on ....
- 1:19:12 J. Potter Can we go back just one moment on judicial order. It seems that is an effective and efficient way to do business here to move this thing along if it gets challenged from the outside. What I would like to have discussion, and maybe this takes place at the next meeting, is to have the court come back and talk about what they think is the pluses and minuses of doing judicial order. I have heard discussion over the years but to actually sort of pinpoint. Maybe we could have a strategic session just about that particular option.
- 1:19:48 Chief Justice De Muniz I think it is a great idea. I think you need it. I certainly think Justice Balmer and I can arrange to have that accomplished. The histories of CJO's in Oregon is not exactly the same as it is in many other states because we don't have as much traditional authority. The legislature has garnered for itself, for example, the Oregon Rules of Civil Procedure. In many, many, other states the Supreme Court is responsible for the rules of civil procedure. That is not so here in Oregon. We don't have any CJO's having to deal with administrative rules and those sorts of things. But it is certainly something we could look at; happy to do so.
- 1:20:40 Chair Ellis Anything else on this subject?
- 1:20:44 N. Cozine Two brief mentions. One is that the Chief Justice is speaking at the next OCDLA conference in April on the issue of waiver of counsel, which again brings more light to the issue of waiver of counsel. I also wanted to let the Commission know that the National Institute of Justice recently distributed a grant application that is focused in one part on waiver of counsel. It won't fund actual representation costs. It will only fund the research of the difference between when counsel is appointed and when it isn't.
- 1:21:18 Chair Ellis In juvenile?
- 1:21:18 N. Cozine In juvenile. I have reached out to MPD who is exploring the option of working with PSU. I have reached out to Leslie Harris, at University of Oregon, and to Youth Rights and Justice, with this grant application to see if we can generate any interest from the research standpoint.
- 1:21:35 Chair Ellis Anything else on Item 4? My friend to my left has not been kicking me under the table as she usually does. Why don't we take a 10 minute break and we will resume at 11:45 sharp.
- (Recess)
- Agenda Item. No. 5 Public Meetings Laws – PDSC Training**
- 1:26:22 Chair Ellis The next item is no. 5 on the agenda. Public Meetings Laws – PDSC Training. General Counsel Levy is here to make us better.

1:26:46 P. Levy

Thank you, Chair. This is actually not just a fascinating topic and a good idea and timely topic to talk about, it also helps fulfill the requirement under our performance measures to meet the best practices for boards and commissions. It is also talking about an issue that is timely for a number of reasons that I will get to. What I want to do is give a really fast overview of public meetings law, and then touch on the issues that have enjoyed some recent development and attention. You have an outline of the major points of public meetings laws that might concern the Commission. I just want to touch on a few of the things that I have put in my outline. First of all, the policy of the law is to have an informed citizenry. The law gives the public the opportunity to attend meetings but not to participate in them necessarily. The presiding officer of the meeting can control the meeting and invite participation or not as he or she chooses. The public meetings law applies to the governing bodies of public bodies, and we have known and operated under the assumption for long time that the Commission is required to comply with the public meetings law. It does not apply generally to staff and it doesn't apply to agency heads. As you know we have advisory groups. We have the Quality Assurance Task Force. We have the Contractor Advisory Group. We have not considered those bodies to be subject to the public meetings law because they are advisory bodies to the executive director who appoints them. Who will take their good ideas and do with them what she pleases and they make recommendations to the Commission on the basis of their advice to her, but they are not directly advising the Commission about policies and procedures. Were that the case then they likely would be subject to the public meetings law.

What is a meeting? We are going to come back to this in a moment when I talk about *Dumdi v. Handy*. I will want to say the name of the case over and over again because it is interesting. Often, when we are talking about cases that have been in litigation we give members of the judiciary an opportunity to leave. This one, spoiler alert, settled after trial, so there will be no appeal of this one - unfortunately. We will get to that in a moment. The law says that a public meeting is a convening of the governing body for which a quorum is required in order to make a decision or deliberate towards a decision. You would think as I have written here that the gathering of less than a quorum would not be a meeting under the law, and that is generally what is understood to be the case. The *Dumdi* case seems to go contrary to that simple assertion. Retreats and planning sessions - we have known for a long time that those are governed by the public meetings law, and they are open to the public. Electronic meetings - again, this is something that came up in a big way in the *Dumdi* case. Generally, the Commission has had meetings over the telephone and those have to comply with the public meetings law. We give the public a place to listen to what is going on. It doesn't have to be where any of the commissioners are. If the meetings are taking place through real time, electronic connection, this is what the statutes say, then that is also a public meeting and the public needs to somehow be able to hook into that real time meeting. Email communication between members of the Commission one to one, one would think are not - the chair emails Commissioner Lazenby about a subject that is either on or going to be on the agenda of a meeting and talks about it. Then the chair emails Commissioner McCrea and so on and so forth individually. That has been understood to not come within the public meetings law. Again, the *Dumdi* case, aptly named, seems to say otherwise. The real concern, and this isn't addressed by the *Dumdi* case, is if the chair sends an email to the entire Commission and there is a reply all, that may be getting close to what a meeting is, a convening, and a quorum of the group. That has not been answered by any statute or case law.

1:32:57 Chair Ellis

I think you recently cut me off on one of those.

1:33:01 P. Levy

Out of an abundance of caution, yes. We will talk about how a counsel to another body sort of got them in trouble by cautioning them. I am cautious with cautions. Moving right along on this sort of treetop overview of the law, so we can complete the first part of our training. Notice requirement. There is sort of a general and an actual notice requirement. People who we know have an interest in the

Commission's work, we need to make sure they actually know when the meetings are, and the principal subjects of the meetings. You are not bound to just what is on the printed agenda. You can touch on other subjects. Minutes we are use to... we have got belts and suspenders on the minutes here, because the law said you are required to have either a sound or video or digital recording, or written minutes, and we do both. We are not required to do both. We could just provide the Commission with minutes and not record the meetings, but we record the meetings, you get a transcript, and you get minutes that are based on that. We are doubly satisfying the requirements there. Location of the meeting; two things about this. Generally you have to meet within your jurisdiction of the state. However, we are in the process of scheduling the next training session in Baja because that is one of the purposes for which you can meet outside of the state. The most important and fascinating thing that I found in preparing this outline is that there is \$10 fine for smoking at the meeting.

1:35:13 Chair Ellis

So let me ask a practical question. I hope we are not in trouble on this, but we, as you know, went through a lot of meetings on the executive director selection issue, including at least twice we met by teleconference.

1:35:28 P. Levy

Yes.

1:35:28 Chair Ellis

I don't recall that we invited the press to join.

1:35:35 P. Levy

We did. We noticed those meetings, I believe, I think we did. There are provisions for emergency meetings. I know that for several of those meetings we had a listening post here. We did notice it and people were able to come here and listen to the Commission say we are going to go into executive session and we will be back. I think we sought to comply with our obligations there. Fortunately I will just jump ahead. There is a 60 day statute of limitations for cause of action involving the violation.

1:36:30 Chair Ellis

So our selection is not void?

1:36:33 P. Levy

We will get to that in a moment.

1:36:35 Chair Ellis

But in the future I am concerned about this because the Commission is geographically dispersed. These meetings had to happen kind of rapidly. It would be horrible if we couldn't do that.

1:36:56 P. Levy

We can do it. You can meet by telephone. If it is a true emergency you can meet with 24 hours notice. We have done this for other meetings where the Commission wanted to follow up before they could get together again. We say there will be a telephone meeting. We notice it. We say if you want to listen to it come here. We will get it on our telecom, or fancy equipment that is not working yet. We should not have trouble accommodating that.

1:37:41 C. Lazenby

Isn't it true that we comply simply by giving notice of an executive session in the same way that we give it in the other meeting. The rules for that are that media members may choose to attend, but they may not report on anything that happens in that executive session unless the members confirm or comment on something that happened at the meeting outside of that meeting.

1:38:04 P. Levy

Yes and executive session is the next and almost last part of my outline. Let me just talk about a couple of subjects there. You are used to being in executive session because there are a couple of purposes set out by statute that concern Commission business. We are required to notice an executive session and to provide the statutory authority for the executive session. Executive sessions begin with a statement from the presiding officer that reiterates the statutory authority. They invite everybody to leave except for the media, which can stay, and the chair then reads a pronouncement at the beginning of the meeting that instructs the media not to report on these

matters. If you don't give that instruction then they are free to report on it. It is important. Some of the purposes for which you have met, and that the law accommodates, are concerning personnel evaluations, hiring, discipline and the like. To consult with legal counsel regarding current or likely litigation - that hasn't come up yet, or maybe it has before my time. The one that we have relied on for the meetings that involve Commission review of responses to our request for proposals as part of the contracting process, is the provision that allows executive session for the consideration of information and records that are exempt by law from public disclosure or inspection either by the public records law or some other provision of law. The public records law has a provision for confidentiality of information provided to us under the assurance of confidentiality that is not otherwise required to be disclosed to us. That does include a response to an RFP. But the state contracting law also says that responses to an RFP can be kept confidential by a state agency until a decision is made to award the contract. So there are a couple of sources of the law that allow the Commission to then meet in executive session to talk about that. You are also familiar with the requirement of executive session that you cannot make any final decisions. I have quoted from the AG's manual on the public meetings law that says, we know you are going to come as close as you can to making a final decision. You are going to have a consensus. You know what you want to decide. You just have to come back and convene in public session and announce your decision there. Real quickly on enforcement - unlike the public records law where the attorney general has an enforcement rule, they have no enforcement rule. Local prosecutors have no role in the public meetings law. The remedies are either through declaratory and injunctive relief action for which attorney's fees can also be awarded. As I said, there is a 60 day statute of limitations from when the decision becomes a matter of public record in order to file suit. Generally decisions that are found not to comply with the law are not void. They are not void unless there is willful disregard or misconduct. If there has been willful disregard or misconduct, then not only is the public body responsible for the attorney's fees of the plaintiff, but the members of the Commission are individually liable to the public body jointly and severally for that.

- 1:42:53 P. Ozanne I hope we can join legal counsel – cross complaint against our legal counsel.
- 1:43:00 P. Levy Interestingly the role of legal counsel figures in prominently in the other way enforcement occurs. The Ethics Commission has a specific enforcement authority for the executive session laws or provisions, for which they can assess a \$1,000 fine. However, to quote the statute, “[a] civil penalty may not be imposed... if the violation occurred as a result of the governing body acting upon the advice of the public body's counsel.”
- 1:43:39 P. Ozanne Paul, I was surprised to hear, and many others probably heard that Oregon ranked 14th in disclosure to the public. It was kind of surprising because we process everything to death in Oregon. Going through this law because it is on your mind now, do you have any sense of what it is that puts us down to 14th?
- 1:43:57 P. Levy I think that was based largely on campaign financing.
- 1:44:07 P. Ozanne So it really wasn't related to the public meetings law.
- 1:44:10 P. Levy Yes.
- 1:44:10 J. Stevens It is also true that the legislature cuts out new pieces that are not public record every single time they meet.
- 1:44:20 P. Levy Yes. That is true. There was an effort in the last big session to completely redo the public records law that affected so many state agencies, and so many interests, that it collapsed. It is true, even with the public meetings law, that when we really grow up and become a powerful agency like the Landscape Architecture Board, we could have our own exception too, maybe, to the public meetings law. So let me talk

quickly about this *Dumdi* case. If you have noted a slight tone of contempt I apologize. I think every lawyer that I have read about who has looked at this, and I have attached Dexter Johnson, Legislative Counsel's opinion, has come to the same conclusion - that it is wrong. Unfortunately we don't have the benefit of an appellate court saying that, because they settled after trial for \$350,000. Lane County was going to pay the plaintiffs, and several of the commissioners were obligated to pay the county \$20,000 each. It is a fascinating 44 page opinion, well over half of which is a gripping and very well told story of how the Lane County Commissioners approved 1.7 FTE so they could each have a little legislative aide. What three of the five commissioners did, which is a quorum, was they formed a group to talk about their joint interests in having the legislative aide approved. They did everything they could to make it look as nefarious as possible. It was called a Budget Interest Group, BIG, but then they really called it the Book Club. What they did was they made sure that only two commissioners attended these meetings at any one time so they never had a quorum. In response to a public records request from The Register Guard, county counsel started looking at the emails among the three commissioners and told them that what they were doing may not have been a technical violation of what she called the quorum laws, but it seemed to violate the spirit. Maybe it is not in my current role but as a past defense attorney, I thought that was the whole idea - that you find out where the line is, and you don't cross it, so that you are not technically violating the law but everything up to that line is okay.

1:47:40 C. Lazenby

Tie goes to the runner; a simple baseball analogy.

1:47:43 P. Levy

As far as I can tell the only thing that was ever violated in this case was the spirit. There was no technical violation, ever, but the spirit was really violated in big ways. Clearly, what they were trying to do was avoid public scrutiny, especially, and they confirmed all of this in boastful emails – avoiding the scrutiny of The Register Guard. It was in the context of a political debate - over do we fund aides for commissioners or jail beds? It was very contentious. There were all of these non-public meetings. Never with a quorum and they kind of got their ducks in order for the passing of the general budget. Then after the meeting where they actually did not approve their aides, they had subsequent meetings where there were these types of communications. One commissioner would email you and you and you, separately, or go from your door to your door to your door, and have serial one-on-one conversations. Judge Gillespie, from Coos County, who wrote this really gripping story about how all of this unfolded, concluded as a matter of law that in fact this was a meeting of some sort. Going from door to door to door was, especially, a meeting. The emails really were just sort of the evidence of what they had done. All the stuff with the book group, and the passing of the budget in the first place, was barred by the statute of limitations, but he found that they violated, and he voided the decision of this supplementary budget. He said that it becomes a deliberation when the matter is finally noticed on their agenda. As Dexter Johnson says in the letter I have attached here, it doesn't make any sense why something that is legal suddenly becomes illegal when it is on the agenda of a public body. He termed the judge's ruling as unique, and it doesn't rely on authority. I want to wrap this up by saying if you read his opinion, which is interesting, he said let's wait and see how the appellate process plays out here. And then there was no appellate process, so for the special session Senator Prozanski introduced a bill that would deal with this case. The public records law does not have the definition for deliberation. So this bill would add to the public records law all of the things that a deliberation is not. It still doesn't define deliberation. It is not communications by email among members of the public body, so long as you are not all connected by real time. It is not multiple or related dialogues or other communications between members of a governing body in which the subject is a matter pending before the public body. No single dialogue or other communication on the subject is a quorum of the governing body. All of these things that this bill tried to set forth are what everybody thought the law said anyway. It had a public hearing, and maybe even a work session, and got no further because there was a lot of concern from the newspaper association. There will be a workgroup over the interim to look at this again. We have asked to be a part of that

workgroup. The end of the training – I would still be very cautious with the use of reply all emails about a matter that is a decision or an issue that the Commission needs to decide upon. Conversations among yourselves about matters of Commission business have always been understood to be okay. I don't know any reason why that shouldn't be the case.

1:52:57 J. Stevens

Paul?

1:52:57 P. Levy

Yes.

1:52:57 J. Stevens

Aren't those emails considered public records, however?

1:53:01 P. Levy

Yes.

1:53:03 J. Stevens

So a newspaper could get them anyway.

1:53:07 P. Levy

Yes. That is absolutely true. And the newspaper did get them. I would love to take more time and quote this one email. This incredibly boastful commissioner was so proud of his booming voice and his overpowering personality, and he just knocked everybody over with his presence. It is just flabbergasting to me.

1:53:41 C. Lazenby

But don't you think, Paul, that the tenor of the *Dumdi* decision was really in response to the boastfulness of the commissioner. Their emails showed that they were willfully and intentionally trying to violate the intent of the law, which is that the public be informed when they are deliberating towards a final decision.

1:54:07 P. Levy

I wouldn't agree with exactly the way you have worded it, but the record was clear and Dexter Johnson says there was no question they were willfully and intentionally trying to avoid public scrutiny of their activities. What they were doing was strategizing and plotting and planning for how they will get this budget item passed. Whether they were plotting and planning to violate the law, no. They were being very careful to come within the constraints of the law, but they wanted to be able to talk and plot and plan for this public session. Whether that was a violation of the spirit of the law, I don't know. I think it is okay to have a certain amount – if there are interest groups within a public body that try to lobby one another and get their ducks in row, that, I think, goes on. I'm not sure that that is a bad thing.

1:55:21 J. Stevens

Go to work for a newspaper sometime.

1:55:24 P. Levy

Well, yes. This is one perspective and there will be a workgroup on this, Janet, as you know. The newspapers are going to be a major part of that. I am just reporting.

1:55:43 J. Stevens

I know.

1:55:43 Chair Ellis

Any other questions for Paul on Item 5. Thank you, Paul. I feel better educated.

**Agenda Item. No. 6**

**Report on Statewide Public Defense Survey**

1:55:56 Chair Ellis

I think the next item is yours also.

1:56:01 P. Levy

Yes. This is a report that I have given four times before I think. The survey that we now launch every year in early January and for all of these efforts the Chief Justice has been very helpful in sending messages to judges around the state telling them it is coming and we would appreciate your cooperation. We do get responses from judges. We have what you might think is a kind of strange data set of people we ask for responses from. The reason we have worked with these particular people is because that is how we did it from the beginning. We have wanted to have surveys that we could then look at each other, one year to next. It is not terribly remarkable except for its consistency. We are told year after year, although there has been some improvement, that we are doing a good job generally. You will see that with

criminal consistently over half of the respondents say that there is some lawyer whose competence they questioned. I don't find that too surprising at all. It is somewhat surprising when you ask about the context of juvenile representation. The vast majority say we don't question the competency. So one might say, "Wow, they are doing a great job," or expectations are different. It could quite possibly be the latter which is a concern. As I said in my report, what really is now year after year turning out to be the biggest value of this is we got over 200 comments in response to the questions on do you question anybody's competency. At the end of the survey asking just telling us what you think and on the death penalty question. I included the comments on the death penalty. The analysts, Kathryn, Nancy and I have met to go over the comments and are following up with the respondents to the survey and providers to get more information about some of the comments. It is really helpful. I did include the comments on the death penalty because there weren't that many of them, and what I wanted you to see was that for the most part they are highly complimentary of representation. They really show for us the improvement in reception for our services. There are some comments in there that are concerning and not unlike others that we have gotten in previous years about expenses. I would be happy to answer any questions about this if you have any.

- 1:59:35 J. Potter Can you go back and talk about seven and eight again? Number seven you asked the question whether or not you think the service is satisfactory. You are getting a pretty high response rate. Then on the competency in the criminal cases you are getting over 50% - it is about 50/50. On one hand they are saying we are satisfied, but then on the other hand they are questioning competency. Has that been broken down by county? Are these numbers skewed because a number of people are questioning the competency of a few individuals?
- 2:00:13 P. Levy We can and we do look at these by filtering the responses. We look at responses for particular counties. We look at responses from particular types of responders. All you need is to question the competency of one lawyer. Now I had a conversation with a judge to follow up on a remark, which absolutely questioned the competency of two lawyers, but overall said that the job that these providers are doing in criminal cases is excellent.
- 2:00:56 J. Potter I suspected from this question that you would have to have very few folks that are being identified as incompetent. Otherwise you would have had a much lower satisfactory rating.
- 2:01:15 P. Levy The comments are really helpful. We can identify the judicial district they come from and we have the opportunity to provide your name at the end of the survey so we can link the name to comments. Sometimes they name individuals or they talk about a problem. We can follow up and get more information and then try to do something about it. It is not a scientific survey, but it is a survey that we do.
- 2:01:52 Chair Ellis Other questions or comments on that? Thanks.
- Agenda Item. No. 7 Update on Clackamas County**
- 2:02:03 Chair Ellis Okay. Clackamas County update. Nancy, I don't know whether lunch is sitting outside.
- 2:02:12 N. Cozine It is.
- 2:02:14 Chair Ellis I am happy to eat and chew gum at the same time if that is alright. Caroline may get hungry watching us.
- 2:02:30 C. Meyer That is what I was going to suggest is get lunch and eat. I guess it is afternoon. Good afternoon Chair Ellis and members of the Commission. I feel like I have to give a little bit of a disclaimer. I am the analyst for Clackamas County, but I took over in January of this year. So it feels a little strange to be giving an update on a

county that you have only had for about two months. I have gone through the minutes extensively. I think there must have been four or five meetings in 2009 where Clackamas County was discussed.

2:02:58 Chair Ellis

We had two onsite that I remember. Then I think maybe two follow up after that.

2:03:07 C. Meyer

Right. Then again in 2010, I think I saw two or three different entries at least where it was discussed. It if wasn't actually meetings there and getting information, it was discussing the findings. So some of you may be better experts on Clackamas County than I am. We do have Amy Jackson and Kathryn here as my backup for historical knowledge. What I intend to do is go through – I want to tell you a little bit about the recent visit that I did out in Clackamas County and who I met with. Then I would like to just go through the concerns that the Commission had. Some of the information will be new. The majority you will have touched on. I intend to address issues that came out in the report in October 2010. Feel free to stop me at any time if you have questions. I should also mention that Amy Jackson was the previous analyst for Clackamas County. We did some reshuffling of contracts. I think Kathryn may have mentioned that earlier. I am also the analyst for Washington and Multnomah County, so it made sense for me to take on Clackamas. That is what happened in January of this year. In February I went out and met with the new presiding judge, who is new since you all discussed the county. Robert Herndon is now the presiding judge in Clackamas County.

2:04:48 Chair Ellis

That was a change.

2:04:49 C. Meyer

Judge Maurer was presiding during that time. They also have a new trial court administrator, Debbie Slagle, and she replaced Mari Miller. So I met with both of them and their staff. By and large the feedback that I received from both was very favorable. They seem to be very happy with our providers. The criminal provider is Clackamas Indigent Defense Corporation, CIDC, so for purposes of this I will be referring to them as CIDC and then IDI is the juvenile provider. I met separately with Judge Darling in juvenile court. She is now handling only delinquencies. I didn't get any specific feedback from the dependency judges, but at this point – the day that I went out I met with criminal court, juvenile court, and I also met with our providers. It ended up being a full day but I was able to at least meet with both courts.

2:05:54 Chair Ellis

Did you meet with Ron Gray?

2:05:56 C. Meyer

I did. I met with Ron Gray and his staff and then I met with Marty Cohen and his staff. Part of my comments as I go through the different areas of concern that the Commission had, it will be a combination of information that I got from those meetings and then in follow up conversations either with the court or the providers. I am just going to start going through. Paul was talking about the 2012 annual statewide survey and I did take a look at that for Clackamas County. As he mentioned overall the judges responded very favorably. There were also responses from CRB and a few of the other service providers, but overall the response was favorable. They did have concerns about one attorney with CIDC in terms of trial rate. There was another reference that sort of alluded to inadequacy, so I have a call in to that judge to try to determine who the attorney is.

2:06:58 S. McCrea

Too many trials?

2:07:00 C. Meyer

No. Not enough. A concern that they should be trying more cases. I am certainly looking into that. With regard to criminal court – let's see Judge Herndon did mention that he was pleased that CIDC had added a few new attorneys in the last couple of years. That was one of the Commission's concerns. The caseload was rising and they maybe didn't have enough attorneys to handle the caseload. He was pleased with the additions. He also said that he was pleased that they weren't growing just for the sake of growing. He felt they were maintaining quality by not

just adding folks and then not providing adequate training and mentoring. In juvenile court I met with Judge Darling. I believe she ....

- 2:08:07 Chair Ellis Are you moving past Clackamas Defenders?
- 2:08:13 C. Meyer Well I am not talking specifically about a provider at this point. I am just talking about my conversations with the court.
- 2:08:19 Chair Ellis You are going to talk about how far they have come our way on having outside board members?
- 2:08:24 C. Meyer Yes. I am going to go through those specific points once I get past my comments about my two visits with the court. Feel free to ask if it is not clear. One of the concerns that the court had, Judge Darling specifically, was scheduling conflicts. You may or may not recall that, but the concern was that some of our providers have attorneys that work both for the adult consortium and the juvenile consortium. IDI has reduced that number. It used to be five attorneys and now it is three attorneys. She definitely acknowledged that scheduling conflicts have improved. They have also started a pilot project where they were appointing two attorneys exclusively to child clients. I know that this is a bit of a difference from Multnomah. Again, her response was that it is working well. She believes it has improved representation for child clients. I am not sure how long the pilot project was, but they have continued it. She actually had what I thought was a very nice compliment. You know we do, of course, hear about the inadequate services that are provided, but she said that for the most part she feels the IDI lawyers, so the juvenile lawyers, treat their clients as if they are being paid thousands of dollars to represent them. I thought that was a nice compliment coming from a judge. Again, she is dealing with delinquency but has the history of dependency cases. I have a list of the specific concerns that I am going to go through. This would be directly related to CIDC, the adult consortium. You had concerns about updated bylaws and they have redone the bylaws and I think it had been like 20 years. They had never redone them so whenever they first came up with them they had never been revised. I know I had provided copies to several of my providers in Multnomah and Washington County. So they were sort of being held out as the model bylaws to some extent. Those have now been updated and they have provided us with a copy. If you are interested in seeing them, that is certainly something we can send you electronically.
- 2:10:53 Chair Ellis I would like to see it. Within that have they broadened the board?
- 2:11:02 C. Meyer Yes. You are getting ahead of me. That is the next one. They have eliminated their permanent positions. That was one of the concerns that the Commission had about the board. They have completely eliminated permanent positions. They now have rotating three year terms for their attorney positions. Then they have added two public – they are in the process of adding two public members. Part of that process is they have invited and gotten response now from the local Clackamas bar to be involved in the nominating and appointing of outside board members. There has apparently been some shuffling of attorneys on the Clackamas bar, and so in a conversation this week with Ron Gray, he said they finally have an agreement from the Clackamas bar to sit down in April and meet with him about what that process would look like.
- 2:12:05 Chair Ellis This is like a glacier moving. We were out there two years ago and we could not have been more insistent that they have got to move beyond the cliquy, self-protective structure that they have had ever since they kicked MPD out which was 30 years ago. We were told they accepted that. They were going to do that. In fact they had a retired judge that was going to be one.
- 2:12:33 C. Meyer Yes, Judge Bagley, and I thought he was already on the board, and he said, “No.” What Ron is saying is their board can’t just appoint him and tell him to start coming to meetings. We need the Clackamas bar, this outside entity, to be involved in the

process. What I said to him was that in October of 2010, the report said they had this retired judge in agreement to be on the board. He said that is true, but he isn't on the board yet.

- 2:13:04 Chair Ellis This is not acceptable. This is two years later, after we have been assured that they agreed with this and are making all these moves. They have got to know that we are not happy with this. They have got to know that they are unique in the state as a large county single provider. I have said it every time we have met with them that I really am not sure that's in the public interest. They keep coming back and telling us what we want to hear and then they go back into their corner and do what they want. This is not encouraging.
- 2:13:45 C. Meyer That was pretty much the message I gave to him this week when I spoke to him. Now again, I am just starting a relationship with these providers.
- 2:13:57 P. Ozanne We told them, so you don't need to.
- 2:13:57 C. Meyer Right, and you have a history with them.
- 2:14:00 P. Ozanne Starting with my arrival and the administrator of that consortium being on our Contractor Advisory Board and knowing all the things that we wanted to do. He encouraged all of the things we wanted to do. Anyway, we are not shooting the messenger, Caroline.
- 2:14:24 C. Meyer No I know, and Kathryn and I just talked about this. This is a long time to not have taken that step. I do feel like in a lot of ways they have responded well with some of the other issues in terms of updating – they have made some real improvements, but I would agree that is the one area that is really not okay.
- 2:14:41 P. Ozanne I don't want to get ahead of you, but they have been doing evaluations of attorneys?
- 2:14:45 C. Meyer Yes they have. I'm going to get to that next, but I want to make sure that was it on board composition. They now have 11 total members. Nine rotating attorney positions with three year terms. Two public members each with two year terms once they have them on board. I did ask Ron if they have identified the second member and they have not, so that's another piece of this. What I was trying to get from him in the conversation this week is so that by April you will have this process set up with the local bar. So how soon can we expect that you'll have...
- 2:15:17 Chair Ellis So the bar is going to be an appointing authority for at least one of these positions?
- 2:15:21 C. Meyer Right. He expects by the end of April that Raymond Bagley will be part of their board. So that would be the first outside member. But I think we can go back to them and say that we expect by a certain day, and feel free to tell me what that date should be, or we can come up with the date, but I think that is probably what we need at this point, to be more prescriptive.
- 2:15:50 Chair Ellis Help me out. We adopted a formal policy on this subject, particularly consortia that size having outside board members, and I thought we made it a condition of renewal of their contract to do it.
- 2:16:05 C. Meyer I will defer to Kathryn.
- 2:16:06 K. Aylward I think what it was is either they have a board with outside members or they demonstrate to OPDS's satisfaction that they have sufficient administrative and financial safeguards in place. There was some drop out language.
- 2:16:26 Chair Ellis Do they think they have satisfied that?

- 2:16:31 K. Aylward I think they would say that they have put everything in place except for the outside member requirement of the board, but everything they have put in place has been put in place to provide those protections and oversight. I cannot speak for Ron Gray but I suspect that they would see the outside board member as a sort of less important or less urgent... it's much more important to get your bylaws in place, your authority in place, your mentoring program, your financial agreements, and all of those things. I think they would say that they are nearly there.
- 2:17:23 C. Meyer I have their bid right here and if you want me to, I can read the provision and their response. It says, "Beginning in January, 2012, every contractor for Public Defense Legal Services shall be governed by a board of directors that includes at least two independent members who do not provide services under the entity's contract and are not elected by those who do. In lieu of a board of directors, a contractor shall demonstrate to OPDS staff and the Commission effective and appropriate financial safeguards and quality assurance mechanisms. Describe either the composition of your board of directors, or the financial safeguards and quality assurance mechanisms you have in place." Ron's response was, "We have modified our bylaws to add two non-member people to our board of directors selected by the Clackamas County bar officers. We are also doing away with permanent board members."
- 2:18:19 Chair Ellis Were they informed that we were going to have this discussion today?
- 2:18:21 C. Meyer They were. I did talk with both providers and they both had court dates.
- 2:18:27 Chair Ellis But nobody came.
- 2:18:29 C. Meyer No one came.
- 2:18:29 Chair Ellis It's a bad sign. I really worry about Clackamas. I happen to live there so I am a little more aware of it.
- 2:18:43 C. Meyer I guess the response that I would make, Mr. Chair, is I guess in talking to them they didn't necessarily say, "should we be there?", but my understanding of the purpose of this meeting was and what I said to them was that I didn't think that it was to take any new testimony from providers or other participants, but more of an update by our office. So between the visit that I did out there and then some follow up conversations, I guess that was my purpose was to try to give you as much information as possible. But I did say to them that I may come back to you with action items – so, again, yes they could have been here. They were told when it was.
- 2:19:27 Chair Ellis I know another issue that we had talked to them about is Ron is getting a little long in the tooth. Have they talked about succession planning?
- 2:19:37 C. Meyer Yes. That is next on my list. That is a good segue into that. Mike Czaiko is apparently one of their board members. I know his name appeared in the reports. I think he was listed in the October of 2010 report as already shadowing Ron on his administrative duties. But I did ask Ron because I know that one of the concerns the Commission had was that it not just be someone that Ron would hand pick. It wouldn't be his protégée. It would be a replacement that was acceptable to the board. Someone that they supported and he assured me that – I think he said that Mike had stepped up and said he would interested and the board said they would be very much in favor of that.
- 2:20:39 Chair Ellis I don't know him, but that is the single most important function a board has. To select and continue with an ED.
- 2:20:54 C. Meyer I don't know, and I don't think Amy knows. I don't think Ron has indicated when he intends to retire...

2:20:58 A. Jackson He has not.

2:20:58 C. Meyer And he certainly did not give me any indication but just that they had taken that step. Bringing someone on board to trail him. It sounds like Mike has been an attorney since 1992 and with CIDC for many years. I am not sure for exactly how long and he is currently on their board. One of the other concerns was about training and mentoring attorneys. I think this may have been covered so this may just be more of a reminder about their apprenticeship program. They have an apprenticeship one and apprenticeship two. The one is just assigned one misdemeanor a week for six months. The two is assigned one misdemeanor a week and then one C Felony every other week for six months. They may or may not get a permanent position depending on whether there is a need for that. They currently have two attorneys in this program. The six months can also be extended if they determine that maybe this is somebody we want to keep around but we are not sure we are there yet. They can extend the trial period to make it a one year.

2:22:33 C. Lazenby Do we have any indication of how long that has been in place and how many attorneys have gone through that?

2:22:39 C. Meyer My understanding is that it has been in place for awhile. This wasn't a response to the Commission's concerns, but more of a reminder that this is a way that they are bringing in new folks. One of the individuals that was listed as having gone through this program is now an attorney with the juvenile consortium. So it looks like it is also possibly an avenue for the other consortium. They may be training them up but if they are not giving them permanent positions, the juvenile consortium may be taking those attorneys on.

2:23:13 C. Lazenby My recollection is that we were on this graying of the bar issue. That was specifically something that we asked them to address in a meaningful way that they are actually starting to bring in new younger attorneys to fill the ranks. But if they have got this program where they are giving people one or two cases but nobody is sticking in Clackamas County, that is kind of contrary to the direction that we said we wanted to go.

2:23:40 C. Meyer I don't think they have hired many lawyers in the past. Rhett Bernstein I believe might be their newest member.

2:23:50 A. Jackson There were three recent people hired. Andrew Elliott who has a 2009 bar number. John Gutbezahl with a 1994 bar number, and Squire Bozorth with a 96 bar number. Those are the most recent three positions.

2:24:10 C. Meyer And I don't think they have indicated whether they went through the apprentice program or not.

2:24:21 C. Lazenby Thanks.

2:24:21 C. Meyer I think those were the specific concerns regarding CIDC. Unless you had other questions or concerns about any of the other things that we have touched on. There were a few specific concerns regarding IDI, the juvenile consortium. One was the evaluation process. I'm sorry, I think I skipped over the attorney evaluation for CIDC. It was an issue for both consortia. CIDC just recently provided us with a copy of their revised evaluation form. It sounds like they are doing a survey of judges and of clients. They have developed a client survey with a random sampling of clients. He has provided that to us. I would be happy to provide that to you as well if you are interested in seeing that.

2:25:23 Chair Ellis I would.

2:25:28 C. Meyer

I believe it was in 2010 was the last full evaluation that they did of all of their lawyers. It was a result of the 2009 discussions. They identified some lawyers with areas of concern. Then they assigned others, essentially board members from CIDC that are attorneys to follow up specifically with those lawyers and sort of track if they were making improvements in those areas. They did and Commissioner Ozanne if he were here might recall who the attorney was, but there was one attorney that there was some pretty strong comments in the Commission minutes about the attorney and I believe the comment from Commissioner Ozanne was that he should not be practicing law. There wasn't a name in those minutes so I am not entirely sure that it is the same attorney, but in talking with Ron he did tell me the attorney that he thinks was the subject of that particular complaint did leave in 2010. They essentially talked to him and said here is what you would need to do to make this better, and after some pretty thorough discussions he chose to leave the consortium. I believe a comment from a judge regarding that same attorney was that he was an accident waiting to happen. So I believe we are talking about the same attorney.

2:26:58 Chair Ellis

These are not high praise comments.

2:27:03 C. Meyer

Certainly not. So that was the evaluation piece for CIDC. Then going back to the Commission's concerns regarding IDI. Again, on the evaluation process. They were also asked to create one or improve upon what they had. They created an online survey to solicit input from all of the system participants - judges, DA's, probably similar to what our survey covers. I believe Marty told me that they did that in 2010, but they are not doing it annually so they didn't have one for 2011. I think it was possibly every two years they are doing that. They were also asked to add outside board members. They did in fact add two outside board members. Warren Oster who is a former juvenile counselor. He is apparently also a non-practicing lawyer and then Joe Bradway who is a CASA, court-appointed special advocate in their county. I don't think this particular element was something the Commission was concerned about, but they themselves wanted to find a board member that had educational and medical background, which from what I understand in the juvenile arena is a very, very good combination to have but apparently difficult to find. They are still searching for that individual. In the meantime they do have two members. Their hope is that one of those would be someone with that expertise. In terms of numbers of lawyers I think IDI is a group of about 10 lawyers versus about 27 with CIDC. Marty's concerns were that even though I believe Judge Darling may have mentioned interestingly that they could use more lawyers, the delinquency caseload has declined out there. Their dependency caseload has increased. Overall they were over in the contract considerably. I think possibly 17% this last contract period. I will speed it up. So Marty is concerned that the current caseload does not support adding any additional lawyers at this point. I think I would agree with that. He did mention that he has a meeting with the court this week about that particular topic. I think that was it. The only other thing I wanted to mention real briefly and this is a new thing, Hope Court. That was new to me. Apparently the Clackamas County DA applied for a grant for this and it is called, "Hope Court," and it's modeled after something that they have done in Hawaii. It is a probation court where you take a group of individuals on probation, so it would be adults on probation, and you track them over time. You take part of your group and you send them through this Hope Court, this probation court, where they are checking back in with a judge on a regular basis. The other half of the group, sort of the control group, they keep going on the regular probation track. Over time you look at the statistics to see what is the recidivism? Is there a difference? Apparently there was a significant difference in Hawaii. They saw a huge decrease in the recidivism rate. Ron did say that if you are facing five years in Hawaii as opposed to six months here, the incentive to go into the court may not be the same. He is not entirely convinced that it is going to have the same impact here that it did there. He is cautiously optimistic. CIDC has signed on to provide the defense function. Our experience has been with most of these sorts of specialty courts that these grants provide for the prosecution function. They don't provide any funds for the defense function. They are paying for Mike Czaiko, the

same attorney we were talking about taking over for Ron, to go to Hawaii for the training.

- 2:31:56 Chair Ellis No wonder he is volunteering.
- 2:31:59 C. Meyer I don't know if he volunteered before he knew that that was part of it or not.
- 2:32:05 Chair Ellis Will you be sure that the transcript of this segment of our meeting gets to both of the PDs? I think you can detect from our questions, Clackamas is one that we really want to stay very close to. I am not trying to say they aren't doing a competent job. When we were last out there we were getting pretty positive feedback, but they tend to be a very cliquish group. They protect themselves, and that is a recipe for some poor performers will be protected by peers instead of an attitude of public service. The combination of that, the fact that it is the only large population county with this single adult provider and Ron's own aging, it is one of our providers that I think we want to stay very close to. I am glad you are doing this and stick with it. There is a tendency for them to sort of tell us what we want to hear and then we go away. Then they go back to where they were. I am hoping you will stay right with them.
- 2:33:34 Hon. Elizabeth Welch Can I ask you a question? That whole discussion and I may be remembering it wrong and that is why it is a question and not just criticism, but the decision that we made saying add two independent or demonstrate in my recollection followed our rather specific direction to this particular county to add outside members to the board.
- 2:34:14 Chair Ellis If that is the question my memory is they committed to do this. That carve out was designed for small counties where it didn't make a whole lot of sense to have two outside directors when you only have three board member kind of structure. It was never my expectation that Clackamas, big as it is, would come under that prong. I am very disappointed at the pace that we are now being told has happened out there. That is not the pace that we were told before.
- 2:34:51 C. Meyer Yes and I certainly don't get the impression they think they are going to fall under the "in lieu of" carve out. I think they know that they have to do this, it is just a matter of getting it done.
- 2:35:04 Chair Ellis It is not like Socrates drinking hemlock. It is actually a good thing and they should want to do it. They should see the whole point of it.
- 2:35:16 C. Meyer I think that is all that I have unless there are further questions or Kathryn or anyone else wants to add anything.
- 2:35:19 Chair Ellis Caroline, thank you. A good report.
- 2:35:24 C. Meyer You're welcome. Thank you for letting me report.
- 2:35:25 J. Potter Not directly related to your report but is there a new sheet of the analysts and who they are assigned to?
- 2:35:36 K. Aylward I actually just prepared the analysts and the backup analysts information, which I have sent to the analysts to confirm. By tomorrow or the next day we will have it updated.
- Agenda Item. No. 8 Strategic Plan Discussion**
- 2:35:53 Chair Ellis Okay, Nancy, strategic plan.
- 2:35:59 N. Cozine Yes. Back to the strategic plan. The strategic plan that you are now holding is the one that was circulated following our January retreat and that I sent again last night.

It incorporates the changes that we had discussed. When we saw it in January it had four goals. That is now down to three, with the quality piece being included under the first goal: ensure the provision of high quality public defense services. Goal 2 is: assure continued availability of qualified and culturally competent public defense providers in every judicial district. Goal 3 is: continue to strengthen the efficiency and management at OPDS and the contracting system. Following the January retreat, I made the changes and sent the summary of changes. I don't know if you want me to review that again. I printed it off.

2:37:22 Chair Ellis

I think we are okay. Just focus us on anything that you think we need to revisit.

2:37:29 N. Cozine

I am not sure that we need to revisit anything unless there are questions that you have, or things you want added. The management team sat down last week and went over each strategy and assigned specific tasks to each division of the office to ensure that we remain on task throughout the biennium. I didn't put it on as an action item because we were still in the review process. It did change rather significantly from the 09-11 draft to this draft. I wanted to gather any additional feedback. If there isn't anything that jumps out at Commission members, I would proceed with an action item on next agenda to adopt it, and go ahead and post it to the website.

2:38:16 Chair Ellis

And if anyone has thoughts between now and then they shouldn't send them to the group they should send them directly to you.

2:38:23 N. Cozine

They can send them directly to me. Then we will circulate them prior to the meeting.

2:38:30 Chair Ellis

Okay. Any comments at this point? I like the format. It is a lot punchier. Feels like bullet points are coming along here.

2:38:45 N. Cozine

Thank you. Our goal is to create something that would spring us to action. It is a work in progress. I think we will continue to look at it about once a month to make sure that we are on track, and to modify if we need to and I will bring it back to the Commission if that happens.

2:38:59 Chair Ellis

Okay.

**Agenda Item No. 9**

**Executive Director's Annual Report**

2:39:02 Chair Ellis

The Executive Director's Annual Report.

2:39:07 N. Cozine

Yes. That is in your materials following the blue divider. Writing this report was actually a very nice exercise for me. I went through all of the Commission's meeting minutes, and all of the agendas for the year, because I joined on September 7. It was a nice opportunity for me to get an idea of what had happened, and how busy the Commission was.

Section one outlines the activities of the Commission during the year, including eight meetings and many executive sessions. Section two talks about CBS's advancements and accomplishments. Section three talks about the appellate division, and their work. One thing that I wanted to note in that portion - really everything is very positive - but the one thing that I wanted you to know is our minimum days to filing within the appellate division, which is one of our key performance measures, did increase very slightly. So our goal, our target is 210. In 2010 we were at 226. Now we are at 232. I believe that is a function of several things.

2:40:30 Chair Ellis

This is from date of transcript settlement?

2:40:33 N. Cozine

Yes, it is. We have Mr. Gartlan here, who might wish to speak to it more than I do, but I mention it only because it is a slight increase and I do think we need to pay

close attention to it. One of the ways that we are saving money this biennium is through a vacancy savings plan in the appellate division. We do want to monitor it closely, and make sure that it doesn't slip. So, that being said, as you have all heard, the feedback that we get about the work of the appellate division is very high. I don't think it is cause for any concern at this point, but I do think it is something that we want to watch.

- 2:41:09 Chair Ellis      What is the trend by our counterpart over at the AG's office. Is their filing responsive briefs static, declining time, increasing?
- 2:41:21 P. Gartlan      They have been declining over the past couple of years.
- 2:41:25 Chair Ellis      Meaning they are doing better?
- 2:41:29 P. Gartlan      They are filing briefs before we are. I think they are about 220. I am guessing it is in that range. I know they are about 12 to 14 days faster than we are.
- 2:41:45 N. Cozine      Also interesting to note is that the defense of criminal convictions unit at the Department of Justice was granted a special purpose appropriation during this last February session, that they can access if they need it to fund the defense of convictions unit. We are going to be watching this closely and we will work with our LFO analyst. If a need arises in this biennium to speed up our production then we will work with LFO and with the Commission to try to make those changes. Overall it is very positive. The last section outlines the activity of the executive director. The majority of that was done by Ms. Swenson; the latter part was by myself. It talks a little bit about the challenges for 2012. As you might expect, that focuses on budget. We have a February update next on the agenda. We will talk a little bit more about where we landed.
- 2:42:46 Chair Ellis      Why don't you go ahead and do that.

**Agenda Item No. 10      February session Update**

- 2:42:49 N. Cozine      Alright. Kathryn might want to join me. There were two budget bills that passed. One was a budget bill and one was a program bill. Bill 5701 was the budget bill. 5701 was the bill that took 3.5% from most state agencies. The 3.5% was taken from the PDSC budget. That is what is referred to as the account that funds all of our trial court level work and our other contract work. The 3.5% was also taken from our appellate division and CBS. Internally, within the Office of Public Defense Services, we intend to manage to the 3.5% reduction through vacancy savings. We think we can do this, but as I said, this is something that we will monitor closely throughout the session. Within the account side we have a little relief. Two things happened - a \$1.4 million increase in our other fund expenditure limitation. This is the money that comes from that ACP account that is used to fund defense services. We also received a \$3.5 million special purpose appropriation which is available for funding trial court representation and other contract services throughout the biennium. We have to go to an emergency board if we need to access those funds. Likely that wouldn't be until the December E-Board because we have that fall off the cliff model where we need to reach the point where we are about to expend to the last of our dollars before we can go to E-Board. From a budget prospective that is where we landed. There was also program change bill 1579.
- 2:44:42 K. Aylward      Let me just explain another sort of quirk to Senate Bill 5701. Our other fund limitation, as Nancy said, the \$1.4 expenditure limitation was an increase of \$1.4 million, basically there is a balance accumulating in the Application Contribution Program and we are now permitted to spend an additional \$1.4 out of that. Our original budget allowed us \$750,000 to be spent out of that, which of course we get day one so it went. So we have another \$1.4, but in addition to that the payments that we have been sending to Judicial were characterized as revenue transfers. I don't understand budgeting or accounting, but revenue transfers sort of don't impact

your budget. It is, here I owe you and you owe him and you owe her, whatever. But now, as of the second year of the biennium, as of July 1, 2012, the payments that we are sending back and forth will not be revenue transfers they will be special payments. Special payments are, we need authority to expend that money, so we got an additional 1.2 of other fund expenditure authority which is basically half the amount that we intended to send to Judicial through transfers. Well, the first year we did the transfers and now we don't do transfers, we do special payments. Then I need the other second year's limitation to make those payments. So if anybody looks at these bills and says, "Wait a minute you said 1.4. It looks like 2.6." That additional amount is just for the money we have already been sending to Judicial. As Nancy said, the program change bill is Senate Bill 1579. It does three things. The first one is so hard to explain that I can see your eyes rolling up already.

2:46:40 S. McCrea

Is it good or is it bad?

2:46:41 K. Aylward

It is just weird. Sorry John. Our budget basically was three separate allocations. Appellate Division, Contract and Business Services Division, and then the sack of cash which was to pay all the contracts. Now in your budget bills those three things get names. When we were created the name for the Appellate Division was Legal Services Division or it was Appellate Services or just something like that. For CBS it was Administrative and blah, blah, blah program. For the account it was trial level representation. So they were just sort of descriptions. They didn't jibe with how we think of our three units. The next time the budget bill came around I asked to change those words. It would just be easier for us to know what these things mean if we say it is this division that division and it's the sack of cash. The sack of cash in statute had always been called the Public Defense Services Account. That is what it was. There is created in the general fund the Public Defense Services Account. The executive director spends out of that for services. We didn't think that trial level representation was really totally an accurate description because we were doing appeals. We were doing juvenile appeals. We were doing civil commitment appeals, whatever.

2:48:13 Chair Ellis

And PCR.

2:48:15 K. Aylward

PCR, sure. Then we were going along fine with that sort of split and we always talked about the account. But also in statute was, as we have talked before about, the application contribution amounts. Those are Other Funds. It is money that is collected and it is deposited into a sub-account of the Public Defense Services Account. We knew what it was. We had a little separate place in the system like a little separate bank balance, but because it was described as a sub-account of a General Fund account, and yet it was Other Funds - it was just weird. Plus we also used to do this weird thing with the Public Defense Services Account that was given to us in General Fund. The problem is that the statute said it was continuously appropriated. But if you have a General Fund account then on December 31st, six months after the last biennium ended, if there is a dime in there it disappears. We would say, "Look, thanks for the General Fund. We know this is continuously appropriated. We get to keep spending." December 31st comes, we don't care, we are going to keep spending it. So in order to prevent the system from evaporating that amount that was left, we are just going to move it into what is called a non-budgeted Other Funds account. We are just going to put it somewhere where it won't have that little accident happen to it. Apparently we were the only agency in state government that did this. This came from Judicial, and we just followed their practice. Then there was a lot of, "you can't put a General Fund into Other Fund." It was just weird. So the beginning of this biennium we said we are not going to do that anymore. I don't care if December 31st comes because there is never a dime left by then anyway, so what do I care about the whole evaporating thing. So fine, we don't want to be weird. We will just leave this money in a General Fund account. That was fine. Now this bill, this structural change, is that the term the Public Defense Services Account, henceforth only means that ACP Other Fund portion. They have pulled it out and now when we say "the account" we just mean that little

dregs and drags of a few hundred thousand collected Other Funds. The sack of cash now has no name. It is like a thing. It is an appropriation; an allocation. It is an amount you can spend for that stuff, but we can't call it the account anymore because it is not. So part of what this bill did was to change everywhere in statute that it said – for example the CASA. If a CASA is represented by counsel, counsel shall not be paid from the Public Defense Services Account or Judicial Department funds. That had to be changed to now say not from the Public Defense Services Account, but also not from the sack of cash. That language had to be incorporated so it was a lot of little changes in places. Fortunately, the way the statutes were written is that in most cases where it talks about where you can spend money it says to be paid by the executive director from funds appropriated for the purpose. None of that stuff needed to be changed.

- 2:51:41 P. Ozanne            So there is no definitional term for sack of cash?
- 2:51:46 K. Aylward            No. It will just be the non-operating allocation. Like in the old days in the budget bill, it just said for stuff you have to buy. I don't know what it will be. So that was a big change and we will have to get used to not calling it the account. The other things that changed: there are a few little sentences and I will read it to you. It is so interesting. It refers to the Judicial Department but means us too, so the judicial branch and legislative branch. It says, "Any difference between the amount appropriated for a biennium to us and the amount of the appropriation actually expended on or before the end of the biennium, is continuously appropriated to the agency for payment of expenses in the next biennium." It was about General Fund money carrying over a biennium. That has not ever happened before.
- 2:53:08 C. Lazenby            You get to keep what you don't spend.
- 2:53:11 K. Aylward            It is great public policy. What it means, in theory, if they don't then just give you less and less because you had some leftover, the theory is you could then say, "You know what. Instead of saying it's June 30th and I have \$2,000 and I can buy five iPads," you can say, "You know what, I am banking that." I want to build up enough of a kitty so that I can fix the salaries of the attorneys. I can do something that takes more than a biennium of scrimping. This is fabulous news. Because it is new, I don't know what is going to happen in terms of how it actually works. The other nice thing it says is, "This is effective for appropriations made for the biennium ending June 30, 2011." That means the little bits of money that I was unfortunately unable to spend. Somebody gave me a credit on June 30, I had ...
- 2:54:04 Chair Ellis            The old use it or lose it.
- 2:54:05 K. Aylward            I had some little losing going on here, that I couldn't use in time. I can now go back and say, "Excuse me." Hopefully I can get some money back. It is really exciting. We will have to talk to LFO and BAM about how that is really going to play out.
- 2:54:25 P. Ozanne            We could maybe ask Mr. Borden at another meeting, but you don't know the policy reasons behind any of these changes?
- 2:54:34 K. Aylward            No. I don't.
- 2:54:37 P. Ozanne            There is probably, hopefully, some efficiency here.
- 2:54:40 K. Aylward            Like I said it is great public policy. I think it is wonderful.
- 2:54:45 C. Lazenby            I can't wait to hear how LFO and BAM tell you how to spend the money.
- 2:54:51 K. Aylward            There was some discussion about – well surely where you saved it from is where you can use it. We will see.

- 2:55:01 N. Cozine There is a distinct possibility that the next biennium appropriation would simply not include that amount. There is a bit of a conversation.
- 2:55:10 C. Lazenby LFO – I recognize and actually understand this. It took a long, painful process to get there. I know how this goes.
- 2:55:24 K. Aylward It is exciting if you are a budget geek. This is big movement. The third significant change in this program change bill that relates to us specifically and also the Judicial Department is it says, “Before making any change to a compensation plan an administrative division of the agency must submit the proposed change to the Joint Committee on Ways & Means, blah, blah, blah, or an Emergency Board or an Interim Committee.” This means you, Public Defense Services Commission – literally, it says it applies to us. So they don’t have authority to approve or deny or anything, but this is to bring the judicial branch kind of in compliance with what DAS does. You maybe have seen the head of DAS show up and sit there and say, “Okay. Here is what happened with union negotiations. Here is what is going to happen with executive branch pay.” I thought they had to do it because they were such a big piece of the pie that it was significant, and us, who cares, but they do want us also to come forward and say, “We don’t have a union and we didn’t negotiate, but we decided as an agency to follow what executive branch did. Or we decided as an agency to have more furloughs, fewer furloughs, pay this pay that.” My understanding is that it will just be a sort of report that we will submit and hopefully there won’t be a lot of discussion about it.
- 2:57:09 P. Ozanne The next budget round they could hurt us if they didn’t like it.
- 2:57:17 K. Aylward But I also think we have nothing to hide. I sat there thinking I am going to show up every single E-Board and be in their face about how we have a compensation issue that needs addressing. You have our government lawyers and the executive branch government lawyers doing the same job. These guys are getting 34% more money. That is ridiculous. So I am happy to go all the time with a comp plan change. It is going to cost a lot. It is going to be half a million or two. I don’t care. You have to do it and we have decided to do it. Remind them of what is not appropriate in our compensation plan.
- 2:58:04 C. Lazenby Vaya con dios.
- 2:58:07 K. Aylward You have to do it before which means we can’t suddenly realize that oh my gosh I just found executive branch did this. We should do ours and make it effective the first of the month and the Commission will say yes after the fact. We have to give ourselves more lead time so that we can go to a E-Board or joint interim committee.
- 2:58:30 Chair Ellis Okay. Anything else?
- Agenda Item No. 11 OPDS Monthly Report**
- 2:58:34 Chair Ellis The OPDS monthly report.
- 2:58:45 N. Cozine Yes. We will go in order. The evidence-based practices in public defense and the NLADA priority. I spoke at the retreat a little bit about the concept. We have had a few more discussions with the NLADA. They have hired a woman named Nancy Gist. She used to head up the Bureau of Justice Assistance. She was a former head of a public defender office. She has great experience and she is going to take from what was done in North Carolina, it was a concept they did there called SEP, System Evaluation Program, where they looked into discreet data points that could help them assess the quality of indigent defense services in North Carolina. That project ran out of funding and the NLADA has decided that this is a critical mission, and that it should be shared around the nation. They would like to see public defense in the United States adopt more of an evidence-based practices approach. It has not been undertaken to the full extent in any state. North Carolina is the only one who has

dabbled in it, at this point. So the NLADA is creating an advisory committee and there is a significant chance that OPDS would be asked to participate in that advisory committee. We are also creating what they are calling learning networks. The learning networks will be relied upon less frequently than the advisory committee. They will, hopefully, be on the ground providers who can give feedback through surveys about the different approaches to evaluating representation. If OPDS is selected to be on the advisory committee, I would like to participate and would like to have contractors participating in a learning network. That would allow us to be on the front lines of what NLADA is exploring in this area and would also allow us to help structure whatever happens in this arena. I have spoken with Lane Borg at MPD. He is interested. We also intend to reach out to other contractors in both small and large counties, whether it is consortiums, law firms, or PDs. We need to have a variety of participants if we are going to go down this avenue, but the way the NLADA is structuring it is very nice because it allows for a broad range of participation. So I wanted to let all of you know that this was a possibility that is floating out there; hopefully we will know in the next month about where the NLADA is going to land.

3:01:32 Chair Ellis

Okay.

3:01:32 N. Cozine

Following our January retreat, Chair Ellis, you had suggested that it would behoove us to continue to have a dialog with the ODAA on the lessons of 2003. I met with Eric Nisley, their current president, to talk about what that could look like. We thought it might be good to actually have an annual meeting, really focused on preserving the lessons of 2003. He was going to go back and meet with his ODAA Executive Committee, and will continue that conversation. I think everyone agrees that it is an important topic to be revisited. I met with Bill Taylor last week. I certainly think he agrees as well. His comment was, "I am very glad that you don't have to be a priority on our agendas during the interim." I think his perception is that things are going well and we will continue to try to keep that message alive.

The recent analysis of *Brown v. Multnomah County*. This was a case that was heard by Judge Albrecht. It involved 22 occupy Portland protestors who were charged with misdemeanors. The DA's office charged those cases as misdemeanors and once they got into the system they were reduced, as authorized by statute, to a violation. The defendants challenged the reduction – well they didn't challenge the reduction. They were happy with the reduction, but what they wanted was their constitutional rights. Under *Brown v. Multnomah County*, they argued that there were still enough criminal factors that gave it an indicia of criminality, and that they had the right to a jury trial and to court appointed counsel. We have requests in, I think, two cases, to appoint counsel on violations because we have a court order finding that in these particular cases it rose to the level of constitutional protection of court appointed counsel. This opinion actually issued during the February session. We had a conversation with ODAA and with the courts. There was a strangulation bill that was sponsored by the ODAA that got a very quick amendment to change the statutory provision in the reduction statute so that the fine amount could only be a violation fine amount. When the statute was drafted it authorized the imposition of a misdemeanor fine amount, which is part of what raised the court's concerns. So we have changed that statutory provision. If there is another challenge we will have to see how the court analyzes this. This issue has been floating around for a long time, and we just have to see how it plays out. I think that no other judges in Multnomah County have adopted the analysis, following the issuance of her opinion, but we are watching the issue and it may well rise again.

3:04:20 Chair Ellis

And the judge who wrote the opinion you told me?

3:04:25 N. Cozine

Judge Albrecht.

3:04:31 C. Lazenby

Back to the report you are bringing back to us on the juvenile waiver of counsel matters. The whole time we have been having this discussion I have been thinking

about the *Brown* case. You look at the list of implications for those juveniles in terms of future punishment and things that can happen. Amazing that a case from 1977 is still that much alive. Coming back to this, how do we avoid having lawyers represent people? And the answer here is, you can't. If you could also add that to the things when you report back to us on these juvenile matters of what the implications are in *Brown* for waiver of counsel. I recognize that juvenile is different from adults, but I think there is still something there.

- 3:05:16 Chair Ellis            Okay. Death penalty review, Paul?
- 3:05:20 P. Levy                Just real quickly since the Commission's last meeting, I think I finally got the message from the Commission that you wanted someone other than me to be conducting this process.
- 3:05:40 Chair Ellis            In addition to you.
- 3:05:43 P. Levy                Right. We now have an arrangement with Dennis Balske to serve as a consultant. I am very pleased that he has agreed to do this. I had attempted, frankly, to assemble a panel and that was just not happening. I maybe took too much time trying to put a panel together. Dennis is widely respected in our capital community. He is not a contractor. He is an expert on death penalty defense and testifies as an expert on standards of practice in capital cases in Oregon and around the country. I followed up with the letter from Steve, and then subsequent emails to each of the contractors under review. There are still some issues and things to be resolved, but I think we are at the process where everybody is moving forward with their review.
- 3:07:02 Chair Ellis            Great.
- 3:07:04 P. Gartlan            This is the report that you have been waiting for. We have had three promotions during the past few weeks, from Deputy I to Deputy II. Lindsey Detweiler, Erik Blumenthal and Morgen Daniels. Lindsey has been with OPDS for about two and half years to three; Erik about four to four and half years; and Morgen for about two years. Next item - you may know it as Wednesday, but it is Lou Miles' day around here. Lou is retiring so we are going to have a little celebration in honor of Lou. He has been with us for about 21 years now. We are going to start the day with festivities, then Justice Kistler is coming over for PD coffee, pastry, and chitchat early in the morning. Then the Lou Miles events will be in the afternoon. I reported last time that the juvenile appellate section had its first argument in the Supreme Court in January. In February the Supreme Court issued a favorable decision. The JAS unit won its first appearance in the Supreme Court.
- 3:08:29 Chair Ellis            Congratulations.
- 3:08:29 P. Gartlan            Thank you. We are now briefing three cases in Supreme Court. I think I won't describe them right now. I can do them neutrally. The state is taking outrageous positions.
- 3:08:52 C. Lazenby            This could be your one shot, Pete.
- 3:08:55 P. Gartlan            I will do these neutrally. They are interesting. I think you will like them.
- 3:09:03 Chair Ellis            Tom you can leave the room.
- 3:09:03 J. Balmer              That is fine. I am not worried about it.
- 3:09:14 P. Gartlan            There is a case called *Pipkin*, which is really interesting. Burglary is defined as entering or remaining in a building. The question is under a *State v. Boots* rationale - to convict, must the jury agree upon entering or remaining? So could you have five jurors thinking legal entry and five jurors thinking illegally remaining? That is a really interesting case. *Mullens* is a very technical case. It has to do with

supplemental judgments that are entered pursuant to a particular statute, and when does the statute run for us to file a notice of appeal from an amended supplemental judgment. I can tell from your eyes that that is the end of that discussion. And *Sarich* is a state's appeal in a criminal case. It is an aggravated murder case and the state is appealing two pretrial rulings by the trial court. One of them has to do with the competency of a teenager who is autistic. The trial court held that the teenager is not competent to testify. Then there is another issue about whether or not if drawings by that particular person are admissible in evidence. So the second issue is a little bit more technical. Finally, this is a report on – Mr. Chair you had raised what the level of communication between AD attorneys and trial level attorneys. This is in addition to the CLE's that we put on, and the attorney regional contact program and the telephone calls and the emails that we get from the trial attorneys. We have discussed this on several occasions. What we are going to do is – I think I have to set this up a little bit. I think there is a misconception that our AD attorneys read a transcript relatively quickly after trial has been completed and that is not true. Typically it is six months later.

3:11:48 Chair Ellis

Because of the delay in the transcript?

3:11:50 P. Gartlan

No; transcript, and the case goes in line, and our attorneys are filing 230 days after the transcript settles. We discussed how we would do this. A telephone call to trial counsel at the time that the attorney is about to draft the brief? A telephone call after the brief is drafted? Just when would we do it? There were concerns. We had a really weird experience a couple of years ago where one of our attorneys contacted the trial attorney and the trial attorney ended up contacting the judge who ended up contacting the AG. It actually ended up in a complaint to the Judicial Ethics Committee with respect to this judge. There are occasions when it is going to put the AD attorney in a potentially interesting position with respect to client. If client has had bad relations with the trial attorney, is the client going to be a little concerned that the AD attorney is having a cozy relationship with the trial attorney whom the client believes was not acting in the client's best interest? That is not a major concern for us, but what we did is we settled upon a practice of our attorney will send an email to the trial attorney together with a copy of the brief, which we do already, but it will be a personal email from our attorney inviting the trial attorney to contact the AD attorney if the trial attorney wants to discuss anything about the case or the brief. We will forward a copy of the transcript if the trial attorney is interested in reviewing the transcript. We can do that electronically. In response to your concern, Mr. Chair, that is the practice and policy that we kind of settled on.

3:14:15 P. Ozanne

Is communication with the trial lawyer before the brief is filed or after?

3:14:19 P. Gartlan

After.

3:14:19 P. Ozanne

So you are losing what any office that has got trial lawyers and appellate lawyers together, the conferring, because that is how I always did it in my practice - talk to the trial lawyer.

3:14:34 P. Gartlan

Our referral form asks the trial attorney to please list the issues that you are most concerned about that you think are present in the case. It also asks the trial attorney should there be follow up contact immediately. We are soliciting that information on the front end.

3:14:54 P. Ozanne

I certainly don't want to substitute my judgment for yours or your colleagues, but the downsides, which I think even that episode with the judge was when I was with OPDS quite awhile ago, or at least something similar, but it seems to be the prospects – I am so very sympathetic with the workload issues. You have an opportunity before it is filed to get the input. It troubles me that you can't do that but there are probably good reasons.

- 3:15:26 S. McCrea I think that on an individual case that does happen. I have had to refer some cases that I lost to the AD. I fill out my form very extensively in terms of issues that I think are important. In one particular case recently I have had contact with the assigned attorney only from the standpoint that I gave her permission to continue contact with the client regarding client stuff. I am basically hand holding. Trying to keep him from bugging her, but I let her know that if there was anything at all that I can do to assist. If there are any questions that come up when she gets to the transcript then I am more than happy to provide her email responses or talk to her on the phone, but I am not trying to insinuate myself. I just had really good contact with the people from AD on my cases when I have had questions or anything.
- 3:16:24 P. Ozanne I am probably bringing my experience, when you have the appellate lawyer and the trial lawyer in the same firm. Some would argue it is almost a conflict of interest. When I was drafting briefs it is really helpful to have the trial attorney read the brief and say, "No, this is not the way it went."
- 3:16:40 S. McCrea Sometimes it is better not to do that. You have a different pair of eyes to look at the issue. It can go both ways.
- 3:16:50 Chair Ellis I think it is the best of both worlds.
- 3:16:53 P. Gartlan Mr. Chair, your major was concern was kind of an educational one.
- 3:17:01 Chair Ellis It goes both ways. I think the trial lawyer can benefit a lot from an appellate lawyer who has read the transcript and is thinking about the issues. We all can learn. The flip side of that is the one that Peter is talking about. The trial lawyer has gone through the case and gave it thought. They probably have a lot of ideas as to why it went awry and can share those. That doesn't mean the appellate lawyer has to take them. There is obviously a different skill set between one and the other. I am just a big advocate that one of the potential opportunities from the integrated defense structure that we now have is that communication. Anything you can do to facilitate that.
- 3:17:59 P. Ozanne A step in the right direction. I commend you. I just wish we could wring out that extra benefit.
- 3:18:07 Chair Ellis Okay. Any other issues for the good of the order.
- 3:18:11 N. Cozine Nothing from CBS. I wanted to mention two other things very quickly. Chief Justice De Muniz mentioned the Commission on Public Safety and that will be reconstituted by executive order.
- 3:18:27 Chair Ellis Will you be on it?
- 3:18:27 N. Cozine I don't know. It is unlikely. The Governor's office is trying to really limit the participation to the people who are on it, and, this is what I understand right now - a defense practitioner, someone from community corrections, a district attorney, and a law enforcement representative. I think the sense is the more you continue expanding, the harder it gets.
- 3:19:00 C. Lazenby It gets too busy.
- 3:19:01 P. Ozanne What about OPDS participation? Do you think they are entertaining that?
- 3:19:07 N. Cozine I think they are working closely with OCDLA, and I have had some conversation with Gail Meyer. We have talked a little bit about how we could work together to make sure that if there is only one defense representative, that we are in close communication and we have a structure set up so that budget information is shared. There are differences in perceptiveness. The practitioner has one viewpoint and the

budget viewpoint can be different. We want to make sure that we have both of those viewpoints represented.

3:19:38 P. Ozanne

My concern is that there is a difference between practitioner perception and policy making; someone who has both.

3:19:48 J. Potter

That is the trick. We have submitted some names and beyond the policy perspective and the practical perspective, you want somebody that has perspective prior to sentencing guidelines. They have a historical perspective of the big sentencing picture.

3:20:06 P. Ozanne

Now you are talking old.

3:20:07 Chair Ellis

So is Hennings available to do this? Okay. Anything else?

3:20:16 N. Cozine

So those conversations will continue and I will keep you updated. The other one that I just wanted to share with the Commission was about the death penalty conversation. There had been some thought that perhaps the legislature would undertake a conversation following the Governor's reprieve. It is sounding, at this point, that there actually won't be a legislative conversation on this topic. This will be something that exists for the Governor's term. If anything changes on that front I will let you know.

3:20:44 Chair Ellis

So much for that proposal. Okay. Is there is a motion to adjourn.

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

**Meeting adjourned.**

# Attachment 2



# Oregon

## Public Defense Services Commission

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### MEMORANDUM

To: Public Defense Services Commission

From: Paul Levy, General Counsel

Re: Commission Authority Regarding Appointment of Counsel in Delinquency Proceedings

Date: May 10, 2012

#### Introduction

The Public Defense Services Commission (PDSC) has received testimony and reports during several meetings regarding the importance of competent and diligent representation by counsel in juvenile delinquency proceedings. The Commission has also learned of inconsistent practices among Oregon's counties with respect to the appointment of counsel in delinquency cases, with counsel appointed almost always in some counties and in fewer than 50% of the delinquency cases in other counties. The Commission has heard that several factors may contribute to low appointment rates in some counties, including how financial eligibility for appointment of counsel is determined, how the right to counsel is explained to a youth prior to any court proceedings, and the role of the court in determining whether a youth knowingly, intelligently and voluntarily waives the right to counsel.

At its meeting on March 20, 2012, the Commission requested additional information regarding its authority to remedy the inconsistent appointment practices in delinquency cases among Oregon's counties. This memorandum addresses that issue.

#### Commission Authority to Direct Practices in Oregon Courts

The PDSC is granted broad authority to direct practices in Oregon's courts with respect to the appointment and performance of counsel through the adoption of "policies, procedures, standards and guideline." ORS 151.216(1)(f). The legislation establishing the PDSC specifically transferred "duties, functions and powers" of the court to the Commission for the purpose of achieving its statutory mandate. ORS 151.216(2). The Commission is directed to adopt policies and procedures regarding "[t]he appointment of counsel," and "the determination of financial eligibility of persons entitled to be represented by appointed counsel at state expense." ORS 151.216(1)(f)(A)&(B). More

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generally, the Commission may adopt policies and procedures concerning “[a]ny other matters necessary to carry out the duties of the commission.” ORS 151.216(1)(f)(J).

The overarching duty of the PDSC is to “[e]stablish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.” ORS 151.216(1)(a). The Oregon Supreme Court recently acknowledged the Commission’s authority to establish policies to achieve this mandate through specific directives concerning the manner in which courts appoint counsel in death penalty cases. In *State v. Langley*, 351 Or 652, \_\_\_ P.3d \_\_\_ (2012), the court recognized that the PDSC adopted its “Legal Representation Plan for Death Penalty Cases” in reliance on national standards from the American Bar Association’s guidelines for the appointment and performance of counsel in death penalty cases. The Commission’s assumption of responsibility, under its Plan, for the designation of a specific lead counsel and co-counsel in death penalty cases was cited by the court in its description of how counsel in death penalty cases should ordinarily be provided. In another context, the Court of Appeals recently cited the Commission’s authority to adopt policies and procedures with respect to the appointment of counsel in connection with a trial court’s denial of a request by a post-conviction petitioner for new counsel. *Knox v. Nooth*, 244 Or App 57, 260 P.3d 562 (2011).

### Appointment of Counsel in Delinquency Cases

Long before *In re Gault*, 386 U.S. 1, 87 S.Ct. 1428 (1967), recognized a federal due process right to counsel in juvenile delinquency cases, Oregon provided that “if the child, his parent or guardian requests an attorney but is without sufficient financial means to employ an attorney, the court shall appoint an attorney to represent him.” *Former* ORS 419.498(2). The current statutory provision for the appointment of counsel in delinquency cases is substantially the same as the one originally enacted in Oregon in 1959, except that it now provides for the appointment of counsel “if the youth is determined to be financially eligible under the policies, procedures, standards and guidelines of the Public Defense Services Commission.” ORS 419C.200.

When courts appoint counsel in a variety of cases, courts are authorized by statute to order certain payments at the time counsel is provided for the administrative costs of determining eligibility and for the provision of legal services if the person subject to the order is able to make such payments. ORS 151.487. In criminal cases, the person subject to such an order is the defendant. ORS 135.050. In delinquency cases, “[w]hen the court appoints counsel to represent a youth, it *may* order the youth, if able, parent, if able, or guardian of the estate, if able,” to pay the costs. ORS 419C.203(1) (emphasis added). In both criminal and delinquency cases, the PDSC is responsible for establishing the manner in which a person is determined to be subject to an order of payment at the commencement of a case and the amounts of such payment. ORS 151.487(4); ORS 419C.203(2).

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Courts are also permitted (but not required) to order the repayment of costs related to the provision of appointed counsel as part of a judgment at the conclusion of a case. ORS 151.505. In so doing, courts are directed to consult a schedule of compensation established by the PDSC. ORS 151.505(2). There is specific statutory authority for courts to make repayment of such costs a part of the sentence in criminal cases. ORS 161.665. There is no analogous procedure for judgments in delinquency cases.

### Waiver of counsel

As a legal matter, a delinquency case in Oregon may proceed against an unrepresented youth only upon a showing that the youth has made a knowing, intelligent and voluntary waiver of the right to counsel. *State v. Riggins*, 180 Or App 525, 44 P.3d 615 (2002). No Oregon statute, court rule or PDSC policy or procedure specifically prohibits or specifies the prerequisites for a valid waiver of counsel by youth. Nationally, however, standards of justice seek to limit or prohibit the waiver of counsel. For instance, the Institute of Judicial Administration and American Bar Association *Juvenile Justice Standards* state simply that “[a] juvenile’s right to counsel may not be waived.”<sup>1</sup> Likewise, the National Juvenile Defender Center and National Legal Aid and Defender Association’s *Ten Core Principles For Providing Quality Delinquency Representation Through Public Defense Delivery Systems* direct that a public defense system should “ensure[] that children do not waive appointment of counsel and that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.”<sup>2</sup>

Through statute or court rule, nearly half of the states prohibit or limit the circumstances in which a youth may waive counsel, according to a survey by the National Juvenile Defender Center.<sup>3</sup> The PDSC has previously been informed that the State of Washington recently adopted, by order of their Supreme Court, a rule allowing waiver of counsel only after the youth has been advised regarding the right to counsel by a lawyer who has been retained or appointed by the court. Similarly, in 2008 the Florida Supreme Court amended their court rules to provide that waiver of counsel can occur only after the youth has had a meaningful opportunity to confer with counsel regarding the right to counsel and the consequences of waiving it. The Ohio Supreme Court is currently considering a similar rule.

### PDSC Policy and Procedure

The Commission’s policies and procedures regarding the determination of financial eligibility and appointment of counsel are contained in the *Application Contribution Program (ACP)/Verification Desk Manual*, which is compiled and administered by the

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<sup>1</sup> Institute of Judicial Administration/American Bar Association, “Juvenile Justice Standards Relating to Pretrial Court Proceedings,” Standard 6.1 (1979). <http://www.ncjrs.gov/pdffiles1/ojdp/166773.pdf>.

<sup>2</sup> National Juvenile Defender Center (NJDC) and National Legal Aid and Defender Association, “Ten Core Principles For Providing Quality Delinquency Representation Through Public Defense Delivery Systems,” Principle 1 (2<sup>nd</sup> Edition, July 2008). [http://www.njdc.info/pdf/10\\_Core\\_Principles\\_2008.pdf](http://www.njdc.info/pdf/10_Core_Principles_2008.pdf).

<sup>3</sup> NJDC, “Juvenile Waiver of Counsel Policy Summary,” (2005). <http://www.njdc.info/pdf/CPAWaiver.pdf>.

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Oregon Judicial Department. The portions relevant to juvenile delinquency cases are appended to this memorandum. These provisions reflect a policy to ordinarily require that courts look at parental financial status when determining eligibility for appointment of counsel to youth, when determining whether a \$20 application fee will be assessed, when determining what portion of the administrative costs of determining the right to appointment of counsel and the cost of providing legal services should be assessed at the time of appointment of counsel, and in determining what additional costs should be assessed at the conclusion of a delinquency case. Nonetheless, the policies and procedures also recognize that court practices in all of these areas vary around the state, and that courts may appoint an attorney for a youth prior to or without the completion of an affidavit of eligibility. The policy also provides that a court may, at its discretion, order appointment of an attorney for a youth if the parents are the alleged victim of the charged offense, if the parents refuse to cooperate in determining financial eligibility, if the court has reason to believe that financially ineligible parents will not retain counsel for the youth, or the court has "serious concerns about the youth's ability to proceed without an attorney in any kind of case."<sup>4</sup>

To the extent that the Commission concludes that its existing policies and procedures either interfere with the appointment of counsel to youth or encourage waivers of the right to counsel in delinquency cases, the Commission may wish to consider changes to the current version of the *ACP/Verification Manual*. Because the Commission's policies and procedures in this area are implemented by Oregon Judicial Department staff and by judges in each county, major changes to the ACP Manual should be undertaken in consultation with the Judicial Department. Office of Public Defense Services staff have begun such consultations and will continue to do so as directed by the PDSC. For the purposes of PDSC discussion of possible changes, we have highlighted portions of the attached policies and procedures to direct Commission attention to material that it may wish to change.

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<sup>4</sup> ACP/Verification Manual, Chapter 8, page 5 (Revised August 2008).



# CHAPTER 8

JUVENILE ACP

## **What forms must be completed?**

Each parent or guardian requesting an attorney for him/her **must complete** an *Affidavit of Eligibility and Request for Court-Appointed Counsel* [Form IDEF-200], and sign the *Releases to Obtain Information for Verification* [Form IDEF-100]. If an applicant refuses to sign Section 2 of the release form, which allows the court to verify income by calling an employer, the VS should give the applicant a week to provide a paystub or other document showing current wage information.

**Local policies vary for appointing an attorney for a child. Some courts immediately appoint an attorney, while others wait until a party makes a request.** Regardless of local court policy, **each parent or guardian must complete** a *Juvenile Uniform Application Contribution Affidavit* [Form IDEF-500] and sign the release form when the court appoints an attorney for the child. If a court has notice that the child has income or assets, the child, or a representative for the child (e.g., parent) must also complete the form and sign the release. Provide a copy of the Advice of Rights [Form IDEF-212] to each person that completes Form IDEF-200 or Form IDEF-500.

**Note:** Local courts may use Form IDEF-200 in place of Form IDEF-500.

Any time the court has reason to believe the party's financial situation has changed significantly, the court may require the party to meet with the VS to update an *Affidavit of Eligibility* or to complete a new affidavit. If more than 60 days have passed since the completion of a previous affidavit, the court may impose a new \$20 Application Fee.

If a new (not an amended) petition is filed, but no new affidavit is completed (because less than 60 days have passed), **do not** recommend an additional Application Fee. Do perform calculations to determine whether to recommend a Contribution Amount on the new petition based on information provided in the previously submitted Affidavit of Eligibility.

If an attorney is withdrawn from a case and a parent/guardian or youth requests that the court re-appoint an attorney, the court may require the applicant to repeat the application process.

If a party refuses to complete the *Affidavit of Eligibility* or the *Juvenile Uniform Application Contribution Affidavit*, sign the *Releases to Obtain Information for Verification*, or otherwise cooperate, the **VS should advise the party that failure to cooperate would prevent appointment of an attorney.**

### **Evaluating the Affidavit of Eligibility**

The VS will evaluate the *Affidavit of Eligibility* or *Juvenile Uniform Application Contribution Affidavit* and make a recommendation to the court regarding the financial eligibility of the applicant for appointment of an attorney at state expense.

### **Verification Recommendation/Order Appointing or Denying Counsel**

The VS will make a recommendation to the court with regard to each applicant's ability to pay a \$20 Application Fee and to pay a Contribution Amount.

The court will sign the *Order Appointing or Denying Counsel and Ordering Payment* with regard to each applicant for appointed attorney.

Pursuant to ORS 135.050 and 419C.203, at its discretion, the court may appoint an attorney for a child or youth regardless of parental cooperation, and may enter a judgment against the parent(s) for contribution and/or the cost of an appointed attorney.

The court will order or waive the \$20 Application Fee, designate the party or parties responsible for payment of the cost of an appointed attorney, and enter a Limited/Supplemental Judgment as to each judgment debtor.

### **Limited or Supplemental Judgment**

If a financial obligation is imposed, e.g., an Application Fee and a Contribution Amount, the VS or court clerk shall prepare a *Limited Judgment*, or in a probation violation case, a *Supplemental Judgment* [form IDEF-501] for the amounts ordered. Prepare a separate judgment for each judgment debtor for the judge's signature. Prepare an *Amended or Corrected Limited/Supplemental Judgment* to make any changes to amend or correct a Limited or Supplemental Judgment.

### **Notice of Right to Seek Review by the Trial Court and Advice of Right to Appeal**

Entry of a *Limited Judgment* or a *Supplemental Judgment* requires the court provide *Notice of Right to Seek Review by the Trial Court and Advice of Right to Appeal* [Form IDEF-402] to each judgment debtor. Each judgment debtor should sign and retain a copy of this notice. File the original judgment in the legal file. Local courts may have the form signed at the time parties complete the *Affidavit of Eligibility* or *Juvenile Uniform Application Contribution Affidavit*.

**Note:** It is permissible to duplicate the *Notice of Right to Seek Review by the Trial Court and Advice of Right to Appeal* [form IDEF-402] on the backside of the Limited/Supplemental Judgment [form IDEF 501].

## **Recoupment/Attorney Fees at Disposition**

At disposition, the court may order the parent(s)/guardian(s) and/or the child/youth to pay recoupment or attorney fees.

At the disposition hearing, the appointed attorney should be prepared to provide the court with the total cost of representation. Pursuant to ORS 151.505(2), presume a reasonable attorney fee to be a reasonable number of hours at the hourly rate authorized by the Public Defense Services Commission (PDSC) under ORS 151.216. In those courts where contract attorneys are not required to keep track of their hours, the attorney may represent this cost as the flat fee rate of their contract with PDSC. Regardless of the method used, the represented amount should reflect the total cost of representation (attorney fees), including any extraordinary expenses to be recouped. (ORS 419B.198, ORS 419B.201 and ORS 419C.203)

If the court previously ordered the parent(s)/guardian(s) and/or youth to pay a Contribution Amount and the court orders a recoupment amount at disposition, reduce the recoupment amount [or offset] by the Contribution Amount previously ordered in the current action.

When the court orders the parent(s)/guardian(s) to pay recoupment, prepare a *Limited Judgment* or a *Supplemental Judgment* if the case is a probation violation, and enter the judgment for the recoupment amount in the parent(s)/guardian(s)'s juvenile administrative case.

When the court orders the youth to pay recoupment, enter the recoupment balance in the Money Award section of the Judgment of Disposition on the juvenile's case.

## **Dismissal of the Petition**

Any Judgment filed that dismisses the petition should include the language:

*“This dismissal does not affect any previously entered judgment or money award to pay money by any party in this case.”*

The court may take into consideration any benefit of attorney received and reduce the Contribution Amount previously ordered by amending the *Limited/Supplemental Judgment* previously entered.

The court may waive any Contribution Amount previously ordered, and order a refund of any amount already paid, by amending the *Limited/Supplemental Judgment* previously entered.

## **JUVENILE DELINQUENCY**

### **Appointment of Attorney for the Youth**

Allegations are against the youth in a juvenile delinquency case. The parent(s)/legal guardian(s) and youth will be required to complete the *Juvenile Uniform Application Contribution Affidavit* [Form IDEF-500] to determine their collective ability to pay an Application Fee and a Contribution Amount.

Pursuant to ORS 419C.200, whenever requested to do so, the court shall appoint an attorney to represent the youth in every case filed pursuant to ORS 419C.005 in which the youth would be entitled to appointment of an attorney if the youth were an adult charged with the same offense. The court may assess the cost of representation of the youth against the parent(s)/guardian(s).

In a delinquency matter the court may, at its discretion, appoint an attorney for the youth at the preliminary hearing prior to the completion of an *Affidavit of Eligibility*, upon making a finding that the nature and complexity of the proceeding required appointment of an attorney, and that the parent(s)/guardian(s) were otherwise eligible under the standard in ORS 135.050.

**Note:** Pursuant to ORS 419C.285(1), at the dispositional stage of a delinquency proceeding, the parent(s) and/or legal guardian(s) of the youth are parties to the proceeding, and, as such, have the right to appear with an attorney and to have an attorney appointed.

### **Who must complete a Juvenile Uniform Application Contribution Affidavit?**

The parent(s)/legal guardian(s) and youth, if the youth is required by the court, shall collectively complete one *Juvenile Uniform Application Contribution Affidavit* [Form IDEF-500] that includes the parent(s)/legal guardian(s)/youth's financial resources. Parent(s)/legal guardian(s) who are not living together may complete separate affidavits in order to protect their privacy. In the case of unmarried parents where there is no custody or paternity order on file, or where the whereabouts of one parent is unknown, the parent with physical custody of the youth would complete the Affidavit.

The court may, at its discretion, order appointment of an attorney for the youth and imposition of ACP fees against the parent(s) if:

- ❖ The parent(s)/guardian(s) refuses to complete the *Juvenile Uniform Application Contribution Affidavit* [Form IDEF-500], the court will appoint an attorney to represent the youth and the parent(s)/guardian(s) will be required to reimburse the state for the Application Fee and Contribution Amount at the Maximum Contribution Amount indicated for the offense. (ORS 419C.203)

- ❖ The parent(s)/guardian(s) do not qualify to have an attorney appointed for the youth, but the court has reason to believe that the parent(s) will not insure adequate representation for the youth, the court, at its discretion, may appoint an attorney for the youth pursuant to ORS 135.050.

The court may require the parent(s)/guardian(s) to complete a *Juvenile Uniform Application Contribution Affidavit* [Form IDEF-500] in order to determine what portion, if any, of the ACP fees the parent(s)/ guardian(s) may be liable.

Pursuant to ORS 419C.203, if the parent(s)/guardian(s) refuse to cooperate, the court may order the parent(s)/guardian(s) to reimburse the state for the Application Fee and Contribution Amount and to pay recoupment at the Maximum Contribution Amount indicated for the offense.

If the court believes the youth may have an independent source of income, the court may require the youth to complete the *Juvenile Uniform Application Contribution Affidavit* [Form IDEF-500]. If the youth refuses to complete the forms, the court may appoint an attorney and impose payment of the Application Fee and Contribution Amount against the youth.

At any time, the court may review default judgments for ACP fees subject to ORS 151.487 and ORS 151.505. Upon entry of a default judgment, provide the debtor with a copy of the *Notice of Right to Seek Review by the Trial Court and Advice of Right to Appeal* [Form IDEF-402]. This form advises the debtor of their right to request, in writing, a review by the local trial court.

The court, at its discretion, may appoint an attorney for the youth without completion of an Affidavit of Eligibility and without parental agreement or cooperation, when:

- ❖ The parent or a member of the parent's immediate household is an alleged victim.

**Note:** If tracking multiple petitions together and the parent or family member is a victim in one of the petitions, treat the parent as a victim in all petitions tracking together, and do not assess ACP fees against the parent.

- ❖ The parent has stated an unwillingness to support his/her child in the proceedings and/or refuses to cooperate.
- ❖ The court has serious concerns about the youth's ability to proceed without an attorney in any kind of case.

Applicants are required to complete a new affidavit upon the filing of a new petition if 60 days have passed since completion of a previous affidavit.

### **Who may be ordered to pay a \$20 Application Fee?**

The VS will evaluate the completed *Juvenile Uniform Application Contribution Affidavit* to determine the collective ability of the youth/parent(s)/guardian(s) to pay **one** \$20 Application Fee and make a recommendation to the court with regard to the party or parties' ability to pay for the cost of an appointed attorney. (ORS 419C.203)

### **Who may be ordered to pay a Contribution Amount?**

The VS will evaluate the completed *Juvenile Uniform Application Contribution Affidavit* to determine the collective ability of the youth/parent(s)/guardian(s) to pay a Contribution Amount.

Court to consider any equities involved, e.g.

- ❖ Parent is victim.
- ❖ Sibling is victim.
- ❖ Youth has personal income/assets.
- ❖ Court to make a determination as to whether stepparents' income/assets should be included in the determination of ability to pay (ORS 108.045).

Any Contribution Amount recommended to be paid for the youth's appointed attorney, and ordered to be paid by the parent(s)/guardian(s) and/or youth, shall be imposed based on each party's ability to pay.

Prepare a *Juvenile Verification Recommendation Re: Ability to Pay Application Fee and Contribution Amount; Order Appointing or Denying Counsel and Ordering Payment* [Form IDEF-510] as to the youth in a juvenile delinquency case.

### **Who may be ordered to pay Recoupment/Attorney Fees?**

At disposition the court may look to the parent(s)/legal guardian(s) and/or youth, to recoup, in full or in part the administrative costs of determining the ability of the parent(s)/legal guardian(s) or youth to pay for legal services and the costs of the legal and other services that are related to the provision of an appointed attorney. (ORS 419C.203, ORS 151.487 and ORS 151.505)

The court should offset any recoupment amount ordered by any Contribution Amount previously ordered.

PRIVATE ATTORNEY FEE SCHEDULE Effective January 1, 2011	STATEWIDE
<b>Homicides</b>	
Aggravated Murder	\$100,000
Intentional, Felony Murder	\$50,000
Manslaughter I or II (Class A or B Felony)	\$25,000
Criminally Negligent Homicide (Class C Felony)	\$12,000
<b>Assault/Kidnap/Robbery/Menacing/Harassment</b>	
Attempted Murder	\$12,000
Assault I or II, Kidnap I or II, Robbery I or II (Class A or B Felony)	\$12,000
Assault III or IV, Assaulting a Public Safety Officer, Robbery III (Class C Felony)	\$6,000
Resisting Arrest (Misdemeanor)	\$3,000
Assault IV, Menacing, Recklessly Endangering, Harassment (Misdemeanor)	\$2,500
<b>Sexual Offenses</b>	
Rape I or II, Sodomy I or II, Unlawful Sexual Penetration I or II, Sex Abuse I (Class A or B Felony)	\$15,000
Rape III, Sodomy III, Sex Abuse II (Class C Felony)	\$8,000
Sexual Abuse III (Misdemeanor)	\$6,000
<b>Drug Offenses</b>	
Manufacture/Delivery Controlled Substance Schedule I, II, or III (Class A, B, or C Felony)	\$7,000
Possession Controlled Substance Schedule I or II (Class B or C Felony)	\$5,000
<b>DUII and Driving While Suspended/Revoked (DWS/R)</b>	
Felony DWS/R	\$2,500
Misdemeanor DWS	\$2,000
Felony DUII	\$5,000
Misdemeanor DUII	\$2,500
DUII (Diversion Eligible)	\$1,500
<b>Probation Violations, Contempt and VRO</b>	
Probation Violation	\$1,500
Contempt / Violation of a Restraining Order (VRO)	\$1,500
<b>Other Offenses Not Listed Above</b>	
Class A Felony	\$10,000
Class B Felony	\$7,000
Class C Felony	\$5,000
Misdemeanor	\$2,000
Extradition	\$2,000
<b>Attempt or Solicitation to Commit "X" Crime:</b> To determine the fee for an "attempt" to commit a crime, use the attorney fee for the next less serious underlying offense; e.g. for Attempted Assault I or II, use the Assault III attorney fee schedule.	
<b>Fees for Conspiracy to Commit "X" Crime:</b> Use the attorney fee for the underlying offense when determining the fee for conspiracy to commit a crime; e.g. for conspiracy to commit murder, use the intentional murder fee.	
<b>Jessica's Law cases:</b> Use the same fee as for intentional murder fee.	
<b>If Interpreter Required</b> (If an interpreter is required, add \$150 to the relevant Privately-Hired Attorney Fee Schedule amount.)	
<b>Privately-Hired Attorney Fee Schedule – For Non-Criminal Indigent Defense Case Types:</b>	
<b>Juvenile Delinquency</b> (Use the amount from the Privately-Hired Attorney Fee Schedule for the highest offense alleged.)	
<b>Juvenile Dependency</b> ( <b>Parent or Child Representation</b> )	\$4,000
<b>Termination of Parental Rights</b> ( <b>Parent or Child Representation</b> )	\$10,000
<b>Civil Commitment</b>	\$1,500
<b>Habeas Corpus</b> - Use one-half the amount from the Privately-Hired Attorney Fee Schedule for the offense on which the incarcerated person is filing the Habeas Corpus petition.	
<b>Post Conviction Relief</b> - Use the amount from the Privately-Hired Attorney Fee Schedule for the most serious conviction being challenged.	

**PDSC Schedule of Compensation for Purposes of Recoupment  
Pursuant to ORS 151.505(2) - Effective October 22, 2010**

<b>Offense Type</b>	<b>Typical Contract Rate</b>	<b>Average Expenses (rounded)</b>	<b>Total Cost</b>
<b>Murder</b>	\$20,000	\$16,000	\$36,000
<b>Measure 11 Felony</b>	\$1,600	\$1,900	\$3,500
<b>Non-Measure 11 Class A Felony</b>	\$980	\$320	\$1,300
<b>Non-Measure 11 Class B Felony</b>	\$820	\$180	\$1,000
<b>Class C or U Felony</b>	\$600	\$150	\$750
<b>Misdemeanor/Contempt/Extradition</b>	\$310	\$40	\$350
<b>FAPA &amp; Support</b>	\$600	\$0	\$600
<b>Probation Violation</b>	\$200	\$0	\$200
<b>Habeas Corpus</b>	\$1,500	\$100	\$1,600
<b>Post Conviction Relief</b>	\$2,300	\$1,100	\$3,400
<b>Civil Commitment</b>	\$310	\$40	\$350
<b>Juvenile Felony</b>	\$600	\$400	\$1,000
<b>Juvenile Misdemeanor</b>	\$310	\$40	\$350
<b>Juvenile Probation Violation</b>	\$200	\$0	\$200
<b>Juvenile Dependency</b>	\$700	\$100	\$800
<b>Termination of Parental Rights</b>	\$2,300	\$300	\$2,600

**GUIDELINE MAXIMUM CONTRIBUTION AMOUNTS SCHEDULE**

<b>CHARGE</b>	<b>GUIDELINE MAXIMUM CONTRIBUTION AMOUNT</b>
Aggravated Murder	\$15,000
Murder and Jessica's Law Cases	\$5,250
Class A Felony - Person	\$700
Class A Felony - Property	\$350
Class A Felony - Drug	\$300
Class B Felony - Person	\$550
Class B Felony - Property	\$275
Class B Felony - Drug	\$250
Class C Felony - Person	\$350
Class C Felony - Property	\$250
Class C Felony - Drug	\$225
Class C Felony - Attempt to Elude	\$350
Class U Felony and Extradition	\$250
Felony DWS/R and Felony FTA	\$175
Misdemeanor DWS/R and Misdemeanor FTA	\$100
DUII	\$350
Order to Show Cause - DUII Diversion	\$50
Other Misdemeanor	\$225
Contempt of Court / Violation of Restraining Order (VRO)	\$225
Juvenile - Termination of Parental Rights - Representation of Parent	\$1,500
Juvenile - Termination of Parental Rights - Representation of Child	\$1,125
Juvenile Dependency - Representation of Parent	\$330
Juvenile Dependency - Representation of Child	\$330
Juvenile Delinquency - Felony	\$290
Juvenile Delinquency - Misdemeanor	\$200
Probation Violations	\$50
Civil Commitment	\$0
Habeas Corpus	\$150
Post-Conviction Relief	Use the amount listed above for the most serious conviction on which the petitioner seeks relief.

OREGON REVISED STATUTES REGARDING APPOINTMENT OF  
COURT-APPOINTED COUNSEL

**419C.200 Court-appointed counsel for youth.** (1) If the youth, the parent or guardian requests counsel for the youth but is without sufficient financial means to employ suitable counsel possessing skills and experience commensurate with the nature of the petition and the complexity of the case, the court may appoint suitable counsel to represent the youth at state expense if the youth is determined to be financially eligible under the policies, procedures, standards and guidelines of the Public Defense Services Commission. Whenever requested to do so, the court shall appoint counsel to represent the youth in every case filed pursuant to ORS 419C.005 in which the youth would be entitled to appointed counsel if the youth were an adult charged with the same offense. The court may not substitute one appointed counsel for another except pursuant to the policies, procedures, standards and guidelines of the Public Defense Services Commission.

(2) Upon presentation of the order of appointment under this section by the attorney for the youth, any agency, hospital, school organization, division or department of the state, doctor, nurse or other health care provider, psychologist, psychiatrist, police department or mental health clinic shall permit the attorney to inspect and copy any records of the youth or youths involved in the case, without the consent of the youth or youths or parents. This subsection does not apply to records of a police agency relating to an ongoing investigation prior to charging. [1993 c.33 §182; 1993 c.234 §2; 1993 c.546 §68; 2001 c.962 §49; 2003 c.449 §§12,48]

**419C.203 Payment for compensation of counsel.** (1) When the court appoints counsel to represent a youth, it may order the youth, if able, parent, if able, or guardian of the estate, if the estate is able, to pay to the Public Defense Services Account in the General Fund, through the clerk of the court, in full or in part the administrative costs of determining the ability of the youth, parents or estate to pay for legal services and the costs of the legal and other services that are related to the provision of appointed counsel.

(2) The test of the youth's, parent's or estate's ability to pay costs under subsection (1) of this section is the same test as applied to appointment of counsel for defendants under ORS 135.050 or under the policies, procedures, standards and guidelines adopted under ORS 151.216. If counsel is provided at state expense, the court shall apply this test in accordance with the guidelines adopted by the Public Defense Services Commission under ORS 151.485.

(3) If counsel is provided at state expense, the court shall determine the amount the youth, parents or estate is required to pay for the costs of administrative, legal and other services related to the provision of appointed counsel in the same manner as this amount is determined under ORS 151.487.

(4) In determining whether to order the youth to pay costs under subsection (1) of this section, the court shall also consider the reformatory effect of having the youth pay. The court may order that a portion of any moneys earned by the youth in juvenile work projects be used to pay costs ordered under subsection (1) of this section.

(5) The court's order of payment is enforceable in the same manner as an order of support under ORS 419C.600. [1993 c.33 §183; 1997 c.761 §§7,7a; 2001 c.962 §50; 2003 c.449 §13]

**419C.206 Compensation for counsel when youth, parent or guardian cannot pay.** When the court appoints counsel for the youth and the youth is determined to be entitled to, and

financially eligible for, appointment of counsel at state expense and the parent or guardian is without sufficient financial means to employ counsel, the compensation for counsel and reasonable fees and expenses of investigation, preparation and presentation paid or incurred shall be determined and paid as provided in ORS 135.055. [1993 c.33 §184; 2001 c.962 §51; 2003 c.449 §31]

**419C.209 Applicability of other laws.** Appointment of counsel for the youth or parent is subject to ORS 135.055, 151.216 and 151.219. [1993 c.33 §186; 2001 c.962 §52]

**135.055 Compensation and expenses of appointed counsel.** (1) Counsel appointed pursuant to ORS 135.045 or 135.050 shall be paid fair compensation for representation in the case:

(a) By the county, subject to the approval of the governing body of the county, in a proceeding in a county or justice court.

(b) By the public defense services executive director from funds available for the purpose, in a proceeding in a circuit court.

(2) Except for counsel appointed pursuant to contracts or counsel employed by the public defense services executive director, compensation payable to appointed counsel under subsection (1) of this section:

(a) In a proceeding in a county or justice court may not be less than \$30 per hour.

(b) In a proceeding in a circuit court is subject to the applicable compensation established under ORS 151.216.

(3)(a) A person determined to be eligible for appointed counsel is entitled to necessary and reasonable fees and expenses for investigation, preparation and presentation of the case for trial, negotiation and sentencing. The person or the counsel for the person shall upon written request secure preauthorization to incur fees and expenses that are not routine to representation but are necessary and reasonable in the investigation, preparation and presentation of the case, including but not limited to nonroutine travel, photocopying or other reproduction of nonroutine documents, necessary costs associated with obtaining the attendance of witnesses for the defense, investigator fees and expenses, expert witness fees and expenses and fees for interpreters and assistive communication devices necessary for the purpose of communication between counsel and a client or witness in the case. Preauthorization to incur a fee or expense does not guarantee that a fee or expense incurred pursuant to the preauthorization will be determined to be necessary or reasonable when the fee or expense is submitted for payment.

(b) In a county or justice court, the request must be in the form of a motion to the court. The motion must be accompanied by a supporting affidavit that sets out in detail the purpose of the requested expenditure, the name of the service provider or other recipient of the funds, the dollar amount of the requested expenditure that may not be exceeded without additional authorization and the date or dates during which the service will be rendered or events will occur for which the expenditure is requested.

(c) In a circuit court, the request must be in the form and contain the information that is required by the policies, procedures, standards and guidelines of the Public Defense Services Commission. If the public defense services executive director denies a request for

preauthorization to incur nonroutine fees and expenses, the person making the request may appeal the decision to the presiding judge of the circuit court. The presiding judge has final authority to preauthorize incurring nonroutine fees and expenses under this paragraph.

(d) Entitlement under subsection (7) of this section to payment for fees and expenses in circuit court is subject to the policies, procedures, standards and guidelines adopted under ORS 151.216. Entitlement to payment of nonroutine fees and expenses is dependent upon obtaining preauthorization from the court, if the case is in county or justice court, or from the public defense services executive director, if the case is in circuit court, except as otherwise provided in paragraph (c) of this subsection and in the policies, procedures, standards and guidelines adopted under ORS 151.216. Fees and expenses shall be paid:

(A) By the county, in respect to a proceeding in a county or justice court.

(B) By the public defense services executive director from funds available for the purpose, in respect to a proceeding in a circuit court.

(C) By the city, in respect to a proceeding in municipal court.

(4) Upon completion of all services by the counsel of a person determined to be eligible for appointed counsel, the counsel shall submit a statement of all necessary and reasonable fees and expenses of investigation, preparation and presentation and, if counsel was appointed by the court, a statement of all necessary and reasonable fees and expenses for legal representation, supported by appropriate receipts or vouchers and certified by the counsel to be true and accurate.

(5) In a county or justice court, the total fees and expenses payable under this section must be submitted to the court by counsel or other providers and are subject to the review of the court. The court shall certify that such amount is fair reimbursement for fees and expenses for representation in the case as provided in subsection (6) of this section. Upon certification and any verification as provided under subsection (6) of this section, the amount of the fees and expenses approved by the court and not already paid shall be paid by the county.

(6) In a county or justice court, the court shall certify to the administrative authority responsible for paying fees and expenses under this section that the amount for payment is reasonable and that the amount is properly payable out of public funds.

(7) In a circuit court, the total fees and expenses payable under this section must be submitted to and are subject to review by the public defense services executive director. The public defense services executive director shall determine whether the amount is necessary, reasonable and properly payable from public funds for fees and expenses for representation in the case as provided by the policies, procedures, standards and guidelines of the Public Defense Services Commission. The public defense services executive director shall pay the amount of the fees and expenses determined necessary, reasonable and properly payable out of public funds. The court shall provide any information identified and requested by the public defense services executive director as needed for audit, statistical or any other purpose pertinent to ensure the proper disbursement of state funds or pertinent to the provision of appointed counsel compensated at state expense.

(8) If the public defense services executive director denies, in whole or in part, fees and expenses submitted for review and payment, the person who submitted the payment request may appeal the decision to the presiding judge of the circuit court. The presiding judge or the designee of the presiding judge shall review the public defense services executive director's decision for abuse of discretion. The decision of the presiding judge or the designee of the presiding judge is final.

(9) The following may not be disclosed to the district attorney prior to the conclusion of a case:

(a) Requests and administrative or court orders for preauthorization to incur nonroutine fees and expenses in the investigation, preparation and presentation of the case; and

(b) Billings for such fees and expenses submitted by counsel or other providers.

(10) Notwithstanding subsection (9) of this section, the total amount of moneys determined to be necessary and reasonable for nonroutine fees and expenses may be disclosed to the district attorney at the conclusion of the trial in the circuit court.

(11) As used in this section unless the context requires otherwise, "counsel" includes a legal advisor appointed under ORS 135.045. [Formerly 135.330; 1979 c.867 §1; 1981 s.s. c.3 §§122,123; 1985 c.502 §19; 1985 c.710 §2; 1987 c.606 §4; 1987 c.803 §§14,14a; 1989 c.1053 §2; 1991 c.724 §25; 1991 c.750 §8; 1993 c.33 §297; 1995 c.677 §1; 1995 c.781 §39; 1997 c.761 §9; 1999 c.163 §8; 1999 c.583 §1; 2001 c.962 §§26,107; 2003 c.449 §§5,43]

**151.213 Public Defense Services Commission; membership; terms.** (1) The Public Defense Services Commission is established in the judicial branch of state government. Except for the appointment or removal of commission members, the commission and employees of the commission are not subject to the exercise of administrative authority and supervision by the Chief Justice of the Supreme Court as the administrative head of the Judicial Department.

(2) The commission consists of seven members appointed by order of the Chief Justice. In addition to the seven appointed members, the Chief Justice serves as a nonvoting, ex officio member. The Chief Justice shall appoint at least two persons who are not bar members, at least one person who is a bar member and who is engaged in criminal defense representation and at least one person who is a former Oregon state prosecutor. Except for the Chief Justice or a senior judge under ORS 1.300, a member may not serve concurrently as a judge, a prosecuting attorney or an employee of a law enforcement agency. A person who is primarily engaged in providing public defense services may not serve as a member of the commission.

(3) The term of a member is four years beginning on the effective date of the order of the Chief Justice appointing the member. A member is eligible for reappointment if qualified for membership at the time of reappointment. A member may be removed from the commission by order of the Chief Justice. If a vacancy occurs for any cause before the expiration of the term of a member, the Chief Justice shall make an appointment to become immediately effective for the unexpired term.

(4) A chairperson and a vice chairperson shall be appointed by order of the Chief Justice every two years with such functions as the commission may determine. A member is eligible for reappointment as chairperson or vice chairperson.

(5) A majority of the voting members constitutes a quorum for the transaction of business.

(6) A member of the commission is not entitled to compensation for services as a member, but is entitled to expenses as provided in ORS 292.495 (2). [2001 c.962 §2; 2003 c.449 §15]

**Note:** See note under 151.211.

**151.216 Duties.**(1) The Public Defense Services Commission shall:

(a) Establish and maintain a public defense system that ensures the provision of public

defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.

(b) Establish an office of public defense services and appoint a public defense services executive director who serves at the pleasure of the commission.

(c) Submit the budget of the commission and the office of public defense services to the Legislative Assembly after the budget is submitted to the commission by the director and approved by the commission. The Chief Justice of the Supreme Court and the chairperson of the commission shall present the budget to the Legislative Assembly.

(d) Review and approve any public defense services contract negotiated by the director before the contract can become effective.

(e) Adopt a compensation plan, classification system and personnel plan for the office of public defense services that are commensurate with other state agencies.

(f) Adopt policies, procedures, standards and guidelines regarding:

(A) The determination of financial eligibility of persons entitled to be represented by appointed counsel at state expense;

(B) The appointment of counsel;

(C) The fair compensation of counsel appointed to represent a person financially eligible for appointed counsel at state expense;

(D) Appointed counsel compensation disputes;

(E) Any other costs associated with the representation of a person by appointed counsel in the state courts that are required to be paid by the state under ORS 34.355, 135.055, 138.500, 138.590, 161.346, 161.348, 161.365, 419A.211, 419B.201, 419B.208, 419B.518, 419B.908, 419C.206, 419C.209, 419C.408, 419C.535, 426.100, 426.135, 426.250, 426.307, 427.265, 427.295, 436.265 or 436.315 or any other provision of law that expressly provides for payment of such compensation, costs or expenses by the commission;

(F) Professional qualifications for counsel appointed to represent public defense clients;

(G) Performance for legal representation;

(H) The contracting of public defense services;

(I) Contracting with expert witnesses to allow contracting with out-of-state expert witnesses only if in-state expert witnesses are not available or are more expensive than out-of-state expert witnesses; and

(J) Any other matters necessary to carry out the duties of the commission.

(g) Establish a peer review system for the approval of nonroutine fees and expenses incurred in cases involving aggravated murder and the crimes listed in ORS 137.700 and 137.707. The review shall be conducted by a panel of attorneys who practice in the area of criminal defense.

(h) Establish a complaint process that allows district attorneys, criminal defense counsel and the public to file complaints concerning the payment from public funds of nonroutine fees and expenses incurred in cases.

(i) Reimburse the State Court Administrator from funds deposited in the subaccount established under ORS 151.225 for the costs of personnel and other costs associated with location of eligibility verification and screening personnel pursuant to ORS 151.489 by the State Court Administrator.

(2) Policies, procedures, standards and guidelines adopted by the commission supersede any conflicting rules, policies or procedures of the Public Defender Committee, State Court Administrator, circuit courts, the Court of Appeals, the Supreme Court, the Psychiatric Security Review Board and the Oregon Health Authority related to the exercise of the commission's

administrative responsibilities under this section and transferred duties, functions and powers as they occur.

(3) The commission may accept gifts, grants or contributions from any source, whether public or private. However, the commission may not accept a gift, grant or contribution if acceptance would create a conflict of interest. Moneys accepted under this subsection shall be deposited in the Public Defense Services Account created in ORS 151.225 and expended for the purposes for which given or granted.

(4) The commission may not:

(a) Make any decision regarding the handling of any individual case;

(b) Have access to any case file; or

(c) Interfere with the director or any member of the staff of the director in carrying out professional duties involving the legal representation of public defense clients. [2001 c.962 §§3,106; 2003 c.449 §§1,2,42; 2005 c.843 §23; 2011 c.708 §20]

# Attachment 3

**Public Defense Services Commission  
Guideline Maximum Contribution Amount Schedule**

<b>Highest Charge</b>	<b>Guideline Maximum Contribution Amount</b>
Aggravated Murder, Murder and Jessica's Law Cases	\$18,000
Measure 11 felony	\$1,750
Non-M11 A felony	\$650
Non-M11 B felony	\$500
C/U felony	\$375
Misdemeanor, contempt, extradition	\$175
FAPA & Support	\$300
Probation violation	\$100
Habeas corpus	\$800
Post Conviction Relief	\$1,700
Civil commitment	\$175
Juvenile felony	\$500
Juvenile misdemeanor	\$175
Juvenile probation violation	\$100
Juvenile dependency	\$400
Termination of parental rights	\$1,300

Effective June 1, 2012

**Public Defense Services Commission  
Schedule of Compensation  
For Purposes of Recoupment Pursuant to ORS 151.505(2)**

	<b>Typical contract rate</b>	<b>Average expenses (rounded)</b>	<b>Total cost</b>
Murder	\$20,000	\$16,000	\$36,000
Measure 11 felony	\$1,600	\$1,900	\$3,500
Non-M11 A felony	\$980	\$320	\$1,300
Non-M11 B felony	\$820	\$180	\$1,000
C/U felony	\$600	\$150	\$750
Misdemeanor, contempt, extradition	\$310	\$40	\$350
FAPA & Support	\$600	\$0	\$600
Probation violation	\$200	\$0	\$200
Habeas corpus	\$1,500	\$100	\$1,600
PCR	\$2,300	\$1,100	\$3,400
Civil commitment	\$310	\$40	\$350
Juvenile felony	\$600	\$400	\$1,000
Juvenile misdemeanor	\$310	\$40	\$350
Juvenile probation violation	\$200	\$0	\$200
Juvenile dependency	\$700	\$100	\$800
Termination of parental rights	\$2,300	\$300	\$2,600

Effective October 22, 2010

**GUIDELINE MAXIMUM CONTRIBUTION AMOUNTS SCHEDULE**

<b>CHARGE</b>	<b>GUIDELINE MAXIMUM CONTRIBUTION AMOUNT</b>
Aggravated Murder	\$15,000
Murder and Jessica's Law Cases	\$5,250
Class A Felony - Person	\$700
Class A Felony - Property	\$350
Class A Felony - Drug	\$300
Class B Felony - Person	\$550
Class B Felony - Property	\$275
Class B Felony - Drug	\$250
Class C Felony - Person	\$350
Class C Felony - Property	\$250
Class C Felony - Drug	\$225
Class C Felony - Attempt to Elude	\$350
Class U Felony and Extradition	\$250
Felony DWS/R and Felony FTA	\$175
Misdemeanor DWS/R and Misdemeanor FTA	\$100
DUII	\$350
Order to Show Cause - DUII Diversion	\$50
Other Misdemeanor	\$225
Contempt of Court / Violation of Restraining Order (VRO)	\$225
Juvenile - Termination of Parental Rights - Representation of Parent	\$1,500
Juvenile - Termination of Parental Rights - Representation of Child	\$1,125
Juvenile Dependency - Representation of Parent	\$330
Juvenile Dependency - Representation of Child	\$330
Juvenile Delinquency - Felony	\$290
Juvenile Delinquency - Misdemeanor	\$200
Probation Violations	\$50
Civil Commitment	\$0
Habeas Corpus	\$150
Post-Conviction Relief	Use the amount listed above for the most serious conviction on which the petitioner seeks relief.

# Attachment 4

## DRAFT (Proposed)

### Public Defense Services Commission

#### Strategic Plan 2011 – 2013

#### **Background**

The Public Defense Services Commission's strategic plan for the 2011-2013 biennium reflects the Commission's statutory responsibilities, and its vision, mission, values, policies, and standards.

#### **Vision**

The Public Defense Services Commission (PDSC) is responsible for creating a state public defense system that provides quality representation to eligible clients in trial and appellate court proceedings. The Commission is a leader in the delivery of a quality, cost-efficient legal services system that ensures the continuing availability of competent and dedicated public defense counsel. To that end, the PDSC is a

- visionary planner for the effective delivery of public defense services and administration of justice.
- responsive and cooperative policy maker in the state's justice system.
- responsible steward of taxpayer dollars devoted to public defense.
- vigilant guardian of the legal rights and interests of public defense clients and the public's interest in equal justice and due process of law.

Further, the PDSC ensures that the Office of Public Defense Services remains a model for other Oregon state agencies in terms of

- efficiency in the delivery of quality public services.
- effectiveness of financial management standards and practices.
- responsiveness to clients, customers and stakeholders.
- accountability to itself, PDSC, the Oregon Legislature, and the public through innovations in performance measurement and evaluation.

#### **Mission**

It is the mission of the PDSC to administer a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice. See ORS 151.216.

## Values & Policies

- **Quality** – PDSC is committed to providing quality public defense services consistent with the state and federal constitutions and with Oregon and national standards of justice, while seeking opportunities for its capable and diverse employees and contractors to experience fulfilling careers in public defense service.
- **Cost-Efficiency** - PDSC is a responsible steward of taxpayer dollars and constantly seeks the most cost-efficient methods of delivering and administering public defense services. PDSC’s commitment to providing quality public defense services also promotes cost-efficiency by reducing the chances of legal error and the need for appeals, post-conviction proceedings, retrials, and other costly remedial actions.
- **Leadership** – PDSC is a responsible leader and cooperative partner with other state and local agencies in the development of justice policy and the administration of justice in Oregon. PDSC is a vigorous advocate for adequate public funding to support Oregon’s public defense system. PDSC and the Office of Public Defense Services (OPDS) are credible sources of information and expertise about public defense and justice policies, practices and their implications, for the benefit of the public, the Oregon Legislature, the media and other justice agencies and professionals.
- **Accountability** – PDSC is a results-based organization with employees and managers who hold themselves accountable by establishing performance standards and outcome-based benchmarks and who implement those measures through regular performance evaluations and day-to-day best practices. PDSC and OPDS award and administer public defense services contracts in an open, even-handed and business-like manner ensuring fair and rational treatment of all affected parties and interests.
- **Legislative Advocacy** – PDSC views its role in appearing before the Oregon Legislative Assembly and committees of the Assembly to be limited to:
  - providing information in response to requests from legislators or legislative staff;
  - advocating for a state budget sufficient to ensure (a) the delivery of quality public defense services in a manner consistent with the state and federal constitutions and state and national standards of justice, and (b) the continuing availability of competent and dedicated public defense counsel; and
  - informing legislators of (a) the fiscal impact on the public defense system of proposed legislation or existing laws relevant to public defense, and (b) any potential constitutional or other problems that might occur as the result of the enactment, implementation, or amendment of legislation.

As a general matter, PDSC does not view its role before the Legislative Assembly to include advocacy for changes in criminal, juvenile, mental health or other areas of substantive law or procedure. The Commission may decide to take a position before the Legislative Assembly with regard to particular legislation proposing changes in substantive law or procedure only if such legislation is likely to substantially affect the quality of public defense services in the state, the cost-efficient operation of the state's public defense system, the continuing availability of competent and dedicated public defense counsel, or the fundamental fairness of Oregon's justice system.

PDSC does not intend this policy to affect the ability of OPDS's Appellate Division (AD) or its attorneys to advocate positions before the Legislative Assembly that are designed to protect or promote the legal rights and interests of AD's clients.

### **Organization and Decision Making**

PDSC serves as a governing body for the administration of Oregon's public defense system, providing policy direction, guidance, and oversight to its operating agency, OPDS. As chief executive officer of OPDS, its Executive Director reports to PDSC and serves at its pleasure.

OPDS is comprised of two divisions:

- (1) the Contract and Business Services Division (CBS), which administers the state's public defense contracting and payment systems and manages the operations of OPDS; and
- (2) the Appellate Division (AD), which provides (a) appellate legal services to financially eligible individuals on direct criminal appeal and parole and post prison supervision appeals, (b) appellate legal services in juvenile dependency and termination appeals, and (c) training and support to public defense attorneys at the trial level in criminal and juvenile matters.

Each division is headed by a chief operating officer – the Division Director within CBS, and the Chief Defender within AD – both of whom report to the Executive Director.

ORS 151.216 sets forth the policy and decision-making responsibilities of PDSC, including the responsibilities to:

- establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the state and federal constitutions and state and national standards of justice;
- establish OPDS and appoint its Executive Director, who serves at the pleasure of the PDSC;

- review and approve the Executive Director’s budget proposals, and submit the final budget proposal to the Legislature, with budget presentations by the Chief Justice and PDSC’s Chair;
- review and approve any public defense services contract negotiated by the Executive Director;
- adopt compensation and personnel plans and an employee classification system for OPDS that are commensurate with other state agencies; and
- adopt policies, procedures, standards, and guidelines regarding
  - determination of financial eligibility for public defense services,
  - appointment of legal counsel,
  - fair compensation for appointed counsel,
  - disputes over compensation for appointed counsel,
  - any other costs associated with public defense representation,
  - professional qualifications for appointed counsel,
  - performance of appointed counsel,
  - contracting of public defense services, and
  - any other matters necessary to carry out the duties of PDSC.

PDSC has approved the Executive Director’s delegation of authority to negotiate contracts to OPDS’s Director of Contract and Business Services. PDSC has delegated to the Executive Director its authority to execute public defense services contracts that it has reviewed and approved.

PDSC will continue to devote most of its time and energy to developing policies that will guide the shape and direction of the state’s public defense system and will improve the overall quality and cost-effectiveness of public defense services in Oregon, and to overseeing implementation of the strategies set forth in its Strategic Plan.

ORS 151.216 directs PDSC **not** to:

- make any decision regarding the handling of an individual public defense case;
- have access to any case file; or
- interfere with the Executive Director or staff in carrying out professional duties involving the legal representation of public defense clients.

Accordingly, public defense contractors under contract with PDSC act as independent contractors in the operation of their law offices and practices and in the representation of their public defense clients. However, contractors are subject to the terms and conditions of their contracts with PDSC, which include provisions regarding overall management, performance and quality assurance requirements, and standards designed to ensure the provision of high quality, cost-efficient public defense services.

PDSC has approved the Executive Director's delegation of authority to the Chief Defender to directly manage AD and directly supervise attorneys and staff.

### **Standards of Service**

The statute establishing PDSC (ORS 151.216) and the state and federal constitutions require PDSC to serve the interests of public defense clients by ensuring the provision of constitutionally mandated legal services. In addition to public defense clients, PDSC serves

- the community of public defense contractors, attorneys, and allied professionals through its professional and contracting services, legislative advocacy, and policy making.
- the public and Oregon taxpayers, primarily through their elected representatives in the Oregon Legislature, and secondarily by responding to direct inquiries from the public and the media.
- criminal justice agencies and other justice stakeholders through interagency collaboration, planning, and policy making.

All of OPDS's employees will:

- deliver directly or contract for professional services in a manner that meets the highest applicable legal and ethical standards;
- conduct all legal, contracting, and business services in a rational and fair manner;
- address all requests for information and inquiries in a timely, professional, and courteous manner;
- implement policies and best practices that serve as models for the cost-efficient delivery of public services and the effective administration of government;
- utilize results-based standards and performance measures that promote quality, cost-efficiency, and accountability.

### **Accomplishments Since 2003**

Stabilization of public defense services in Oregon through a service delivery system that has become a national model for excellence.

PDSC oversight of the contracting process, including review and approval of the statewide service delivery plan for the state of Oregon, with a summary review and approval of each proposed contract.

Increased understanding within the public safety community, and with the Legislative Assembly and staff, regarding the increased costs and other risks associated with underfunding public defense services.

Advancement in compensation for public defense lawyers, with significant room left for continued improvement.

Service Delivery Reviews in every region of the state and in over half of the judicial districts, with additional reviews in three substantive areas of practice.

Peer reviews of 39 providers who handle a majority of public defense services across the state, with a review of death penalty providers underway.

Annual co-sponsorship of a Management Conference for public defense providers, at which contractors learn about effective business management, OPDS policies and procedures, legal ethics, and sharing of information about successful business strategies.

Creation and use of a secure and reliable method for sending non-routine expense authorizations and denials by email.

Adoption of PDSC policy governing the release of public records and recoupment of production costs.

PDSC review, revision, and adoption of standards and processes for determining the eligibility of attorneys for court-appointments.

Creation of policies, procedures, standards and guidelines that guide the Commission, courts, and providers in the provision of public defense services:

- “Best Practices” for public defense boards and commissions to use as a guide for establishing and maintaining a public defense practice;
- a “minimum qualifications” document outlining the experience an attorney must have before providing representation in various case types;
- “Performance Standards,” created and revised through continued collaboration with the Oregon State Bar, that incorporate Oregon and national standards of representation as well as lessons learned through the peer review process, and
- “Drug Court Guidelines” created after extensive informational hearings and final review by the Commission, and provided to contractors who have drug court responsibilities.

Creation of a formalized complaint policy and procedure, with a database specifically designed to store and search complaints related to a particular provider. OPDS works closely with the Oregon State Bar to ensure that the complaint process operates fairly and effectively, avoids duplication with the Bar’s processes, and protects confidential and privileged information from disclosure.

Annual survey sent to judges, district attorneys, and other juvenile and criminal justice system representatives to assess the quality of representation provided by public defense contractors and hourly rate attorneys. The Chief Justice has assisted OPDS by sending a letter urging judges to respond, which has generated a high response rate.

Biennial survey of public defense providers regarding their satisfaction with OPDS business practices and delivery of services, with consistently high levels of satisfaction reported, and annual opportunities for contractors to testify to the Commission regarding any concerns or issues they have regarding public defense services in Oregon.

Annual survey of OPDS staff to ensure that employees' needs are met and the office continues to improve the quality of its services and work environment.

Creation of an extensive training curriculum for Appellate Division attorneys, and annual review of an Appellate Division practice and procedures manual that sets forth detailed expectations for employees in that Division.

Annual performance reviews of all Appellate Division attorneys and management team members.

Reduction of the Appellate Division's median number of days to filing of the opening brief, from 330 days to 236 days.

Creation of a program connecting Appellate Division attorneys with particular regions across the state to provide guidance on substantive legal issues upon request, and regular advancement of legal issues through attorney participation in continuing legal education seminars and submission of articles for publication.

Creation of the Juvenile Attorney Section (JAS) within OPDS; the attorneys in this section have pursued cases that further develop and clarify juvenile law in Oregon, and are frequent presenters at continuing legal education seminars focusing on juvenile law.

Extensive review of District Attorney charging practices in the state of Oregon, and the costs associated with those charging decisions; development of information for legislators regarding the impact of decriminalization/charge reduction on costs of public defense.

Creation and circulation of a waiver of counsel colloquy to reduce the number of youth found within the jurisdiction of the juvenile court without having had the benefit of counsel, and without understanding the risks of proceeding without counsel.

Conversion to a paperless office model that includes electronic case files and an electronic business processes model, with electronic filing and receipt of case and business documents, and electronic signature capabilities.

## **2011-2013 Goals and Strategies**

### **Goal I: Ensure the Provision of High Quality Public Defense Services**

**Challenges Addressed by Achieving this Goal:** The PDSC has a statutory obligation to ensure the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice. In order to fulfill its obligation, the PDSC must routinely examine Oregon's public defense system and the structure within each judicial district, and pursue quality improvement standards and measures that conform to standards adopted at state and national levels. By providing high quality public defense services, the PDSC serves as a prudent manager of state resources, ensuring that state funds are not spent on inferior providers. Quality representation at the trial court level reduces other costs to the public safety system, such as legal challenges and wrongful convictions in criminal cases, foster care costs in juvenile dependency cases, and unnecessary commitment of allegedly mentally ill individuals through the civil commitment process.

The PDSC faces many challenges in its efforts to provide quality public defense services, but the issue of under-compensation remains one of the largest hurdles. Public defense providers struggle to attract and retain quality candidates due to comparatively low pay for public defense work. This is particularly true in light of increasing student debt upon graduation.<sup>1</sup> Low rates of pay also make it difficult for providers to maintain manageable workloads that permit attorneys to discharge their ethical and constitutional obligations to clients. New graduates often take positions with public defense providers, but move on once they have gained some experience in order to avoid low pay and high caseloads. This leaves the provider in a constant cycle of hiring and training, without sufficient internal resources for recruitment and mentoring.

Adequate funding for the public defense system is also a critical component of the public safety system. In 2003, Oregon's public defense system was underfunded, and the state was unable to appoint attorneys during the last four months of the biennium. Cases had to be dismissed or deferred to the following biennium, and the entire public safety system suffered. Crime rates increased and repeat property offenders could not be held. Fox Butterfield reported in the June 7, 2003, edition of the *New York Times* that "[b]ecause [there is] little money for public defenders, Mark Kroeker, the Portland police chief, said officers

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<sup>1</sup> "A legal education can cost upwards of \$150,000, and students, on average, graduate from law school with \$93,359 in debt..." Hopkins, Katy, *10 Law Degrees With Most Financial Value at Graduation*, U.S. News & World Report, March 29, 2011.

were now giving a new version of the Miranda warning when they arrested a suspect in a nonviolent crime. They effectively have to say, 'If you can't afford a lawyer, you will be set free. Enjoy.' Chief Kroeker said. Noting a significant increase in shoplifts, car break ins, and other crimes, Kroeker said, 'The scary thing is that the worst results are still six months down the road, as the bad guys realize nothing is going to happen to them....'"

*Strategy 1: Build legislative support for adequate funding of public defense in a time of significant revenue shortfalls.*

*Strategy 2: Continue to pursue policy option packages to fund reduced caseloads and increased compensation for lawyers providing public defense services.*

*Strategy 3: Continue to work toward fair compensation for all public lawyers practicing in the area of criminal law.*

*Strategy 4: Continue OPDS tradition of planning and coordinating legal education seminars, participating in committees and ad hoc work groups, and co-sponsoring an annual public defense management conference to promote good business practices that will assist public defense contractors in their efforts to provide quality representation.*

*Strategy 5: Continue to focus on quality improvements within juvenile dependency and delinquency representation, and begin assigning juvenile delinquency appeals to OPDS attorneys.*

*Strategy 6: Continue to develop quality assurance standards – including minimum attorney qualifications, standards of representation, and best practices - and programs to improve public defense services across the state.*

*Strategy 7: Continue to administer PDSC's formal complaint process fairly and effectively without duplicating processes of the Oregon State Bar*

*Strategy 8: Continue annual surveys of judges, district attorneys, and other juvenile and criminal justice system representatives regarding the quality of representation provided by public defense contractors and hourly rate attorneys.*

*Strategy 9: Encourage the adoption of best practices for public defense contract providers as identified by the Quality Assurance Task Force, including the regular evaluation of attorneys, a plan for recruiting new attorneys, and a system*

*for training and mentoring new attorneys and experienced attorneys found to be in need of such training or mentoring.*

*Strategy 10: Expand AD's capacity to offer training and support for public defense contract and hourly attorneys.*

*Strategy 11: Continue efforts to improve the quality of AD's legal services and reduce the median number of days to file the opening brief.*

## **Goal II: Assure Continued Availability of Qualified and Culturally Competent Public Defense Providers in Every Judicial District**

**Challenges Addressed by Achieving this Goal:** As described above, public defense providers, particularly those in rural areas, struggle to attract and retain lawyers. The challenge is increasing as experienced lawyers, who were drawn to public defense by a desire to perform public service, retire, and new lawyers, burdened with significant law school debt, are unable to meet their financial obligations while working as public defenders. New attorneys often leave once they have enough experience to be successful in the private sector, and the number of experienced public defense attorneys who are prepared and interested in becoming the next generation of public defense providers remains inadequate. Additionally, Oregon public defense lawyers provide representation to an increasingly diverse client population, and need to have a strong understanding of different cultures and the challenges faced by individuals in culturally diverse communities. Ensuring diversity within the public defense bar contributes to positive communication and increased trust in attorney-client relationships, and with the culturally diverse populations in Oregon's jurisdictions.

*Strategy 1: Continue recruitment efforts by fostering positive relationships with law schools in Oregon and by participating in job fairs and recruitment programs.*

*Strategy 2: Promote the diversity and cultural competence of Oregon's public defense provider community through recruitment efforts and by offering regular diversity training for OPDS employees and the public defense community.*

*Strategy 3: Continue the role of PDSC in oversight of the contracting process.*

*Strategy 4: Continue to encourage the creation and existence of boards of directors or advisory boards for public defenders and consortia that include outside members in order to (a) broaden the support and understanding of public defense in local communities, (b) strengthen the management of contractors, (c) ensure that adequate quality assurance and monitoring systems are in place, (d)*

*facilitate communication with PDSC and OPDS, and (e) increase the number of advocates for adequate state funding for public defense.*

*Strategy 5: Refine and continue PDSC's service delivery planning and peer review processes to ensure availability of qualified providers in every judicial district in the state and in all substantive areas of public defense practice.*

### **Goal III: Continue to Strengthen the Efficiency and Management of OPDS and the Contracting System**

**Challenges Addressed by Achieving this Goal:** OPDS manages over 100 contracts within Oregon's 27 judicial districts. In order for the public defense system to operate smoothly, OPDS must be able to execute contracts and reimburse providers through a predictable, reliable, systematic, and efficient process.

*Strategy 1: Maintain positive working relationships with public defense contractors.*

*Strategy 2: Continue to improve the effectiveness and cost-efficiency of OPDS's administration of the contracting system.*

*Strategy 3: Create centralized documentation of management roles and responsibilities.*

*Strategy 4: Ensure that PDSC and OPDS adhere to strategic plan goals and objectives.*

# Attachment 5

**BYLAWS OF**  
**LINCOLN COUNTY DEFENDERS and JUVENILE ADVOCATES**

**ARTICLE I:**  
**Name**

The name of this entity is Lincoln County Defenders and Juvenile Advocates (hereinafter referred to as “LCDJA”).

**ARTICLE II:**  
**Purpose**

The purpose of LCDJA has been and will continue to be to:

1. To provide representation to indigent defendants charged with criminal offenses in Lincoln County, Oregon.

2. To provide representation to indigent children and parents in juvenile proceedings in Lincoln County, Oregon;

3. To provide representation for indigent individuals who are the subject of extradition, contempt of court or mental commitment proceedings;

4. To advocate for children and parents in other forums;

5. To educate the public and professionals about criminal and juvenile justice issues;

6. To acknowledge and develop common interests with other agencies, organizations, institutions and individuals concerned with criminal justice issues and youth and their welfare in the community;

7. To serve as a consortium or group of attorneys formed for the purpose of submitting proposals to the Oregon Public Defense Services Commission in response to the Commission’s request for proposals and to collectively administer the public defense and juvenile case load assigned by the Commission.

8. To fulfill our mission statement that the paramount purpose of this organization is to ensure zealous, high quality representation for each client represented by Contractors of LCDJA.

**ARTICLE III:  
Offices**

LCDJA shall conduct business with the State of Oregon, by and through the law office of the currently elected Administrator, as time to time designated by the Board of Directors and more fully described in the organizational minutes for LCDJA.

**ARTICLE IV:  
Contractors of the Consortium**

**Section 1. Contractors.** Contractors of the LCDJA shall be members of the corporation who are attorneys who meet the following requirements:

1. Are active attorneys and in good standing with the Oregon State Bar;
2. Concentrate their practice in criminal defense and/or juvenile law, or have extensive experience in those practices;
3. Have office facilities, staff, equipment and access to legal research materials conducive to the practice of criminal defense and/or juvenile law within Lincoln County, Oregon;
4. Carry liability (malpractice) insurance through the Oregon State Bar Professional Liability Fund of at least the minimum limits required by said organization;
5. Have been approved by the Board of Directors of LCDJA to receive case assignments from the LCDJA.

The Board may organize and authorize one or more committees to identify and select proposed Contractors for approval by the Board.

**Section 2. Senior Contractors.** Senior Contractors of LCDJA shall be those attorneys who meet all of the requirements described in Section 1 above, and who meet the time, duration and technical requirements that will be specified by the board and any committee appointed by the board of directors. The board of directors will identify existing senior Contractors in LCDJA's organizational minutes and modify the list of senior Contractors from time to time thereafter.

**Section 3. Training of Contractors.** The board of directors shall set all policies for the training of Contractors and the evaluation of Contractors' performance. The board shall also establish regular meetings of Contractors.

**ARTICLE V:  
Board of Directors**

**Section 1. Duties.** The affairs of LCDJA shall be managed by its board of directors. The board of directors shall be the governing body of LCDJA and will have the authority to manage all business, financial, professional, and other affairs of LCDJA, and to form

committees for any purpose that the board deems appropriate, including but not limited to the training of Contractors, quality assurance, evaluation of Contractor's performance, recruiting, liaison functions, and all other LCDJA affairs.

**Section 2. Number.** The number of board members will ultimately be eight (8). The initial six (6) members of the board shall be:

1. Jeffrey Pridgeon;
2. Jeffrey Hollen;
3. Kathryn Benfield;
4. Richard Scholl;
5. Alan Reynoldson;
6. Daniel Taylor

No later than December 31, 2011, two board members who are not affiliated with nor practice law for the Consortium shall be appointed by the Lincoln County Bar Association.

**Section 3. Term.** A board member shall serve until one of the following occurs:

1. The board member resigns from the board;
2. The board member no longer qualifies as a senior Contractor of LCDJA; or
3. The board member is removed from the board by a majority of the voting board members.

**Section 4. Removal.** Any board member may be removed, with or without cause, at a meeting called for that purpose, by a majority vote of the voting board members then in office.

**Section 5. Vacancies.** Vacancies of senior Contractors on the board of directors shall be filled by a majority vote of the number of voting board members then on the board of directors. Such vacancies must be filled by another senior Contractor of LCDJA. Vacancies of a non-contractor board position must be appointed by the Lincoln County Bar Association.

**Section 6. Quorum and Action.** A quorum at a board meeting shall be a majority of all board members in office. If a quorum is present, action is taken by a majority vote of the directors present.

**Section 7. Regular Meetings.** The board of directors shall hold meetings every other month, except during the months of June, July, and August. Additional meetings may be scheduled as needed.

**Section 8. Annual Meeting.** The annual meeting of the board of directors shall take

place during the first two weeks of May of each year, at a time and place designated by the board. All qualified Contractors will be notified and invited at least two (2) weeks in advance.

**Section 9. Meetings by Telecommunication.** Any meeting of the board of directors may be held by telephone or telecommunications, as long as all board members can hear and communicate with one another.

**Section 10. No Salary.** Board members shall not receive any salaries for their board services, but may be reimbursed for expenses related to board services.

**Section 11. Action by Consent.** Any action required by law to be taken at a meeting of the board, or any action which may be taken at a board meeting, may be taken without a meeting if a consent in writing, setting forth the action to be taken or so taken, shall be signed by all board members.

## **ARTICLE VI: Officers**

**Section 1. Titles.** The officers of LCDJA shall be the Administrator and the Secretary. These officers shall be elected at the LCDJA's annual meeting in May, or at such other time as the board may determine. The officers shall take office in the month following their election and will serve a two (2) year term, or until their successors are elected. An officers may be re-elected without limitation on the number of terms they may serve. Nominations for officers will be made by the nominating committee. The current Administrator and Secretary shall serve as non-voting members of the nominating committee.

The chair of the nominating committee shall notify the board of directors two (2) months prior to the scheduled election that the nominating committee is accepting nominations for officers. Only senior Contractors will qualify to serve as an officer of the LCDJA. Those who qualify as senior Contractors will be identified by the board and recorded in the minutes for the LCDJA.

**Section 2. Vacancy.** A vacancy of the office of Administrator or Secretary shall be filled not later than the first regular meeting of the board of directors following the notice of the upcoming vacancy.

### **Section 3. Other Officers.**

3.1 The board of directors may elect or appoint other officers or agents as it shall deem necessary and desirable. Such officers shall hold their offices for such terms and have such authority and perform such duties as shall be determined by the board of directors.

3.2 Committee chairs shall be appointed annually by the board of directors. Committee chairs may be reappointed without limitation on the number of terms they may serve.

**Section 4. Administrator.** The Administrator shall see that all orders and resolutions of the board are carried into effect. The Administrator shall have any and all powers and duties as may be prescribed by the board of directors. The Administrator shall be responsible for all record keeping and financial responsibilities required by the Oregon Public Defense Services contract between LCDJA and the State of Oregon.

**Section 5. Secretary.** The Secretary shall have overall responsibility for all record keeping of the actions of the Board of Directors and, if the Administrator is unavailable, all LCDJA funds.

## **ARTICLE VII: Committees**

**Section 1. Nomination Committee.** The nomination committee shall be a standing committee. The purpose of the committee shall be to recruit and receive nominations for positions on the board of directors and officers of the Consortium. The board shall designate how many members are to serve on this committee and the committee shall report to the Administrator.

**Section 2. Standing Committees.** The board of directors may establish, by resolution, standing committees. The chairpersons and members of such committees shall be appointed by the board.

**ARTICLE VIII:  
Indemnity**

To the extent it is able, LCDJA shall indemnify any director or officer, or former director or officer of LCDJA, against expenses and liabilities actually and necessarily incurred by them in connection with the defense of any action, suit or proceeding in which they are made a party by reason of being or having been such director or officer, except in relation to matters as to which they shall be adjudged in such action, suit or proceeding to be liable for gross negligence or misconduct in the performance of a duty.



# LINCOLN COUNTY DEFENDERS and JUVENILE ADVOCATES

## CONTRACTOR AGREEMENT

This agreement is between the Lincoln County Defenders and Juvenile Advocates (hereinafter LCDJA) and \_\_\_\_\_, (hereinafter "Contractor").

As of January 1, 2012 and until December 31, 2013, LCDJA will be under contract with the State of Oregon (PDSC) to handle indigent criminal, juvenile, extradition, contempt of court and civil commitment matters in Lincoln County Circuit Courts. LCDJA agrees to assign cases to the contractor subject to the following terms and conditions:

### 1. ASSIGNMENT OF CASES

A. LCDJA shall assign cases to contractor based on an individual agreed upon number of cases with a fixed dollar amount. Your agreed upon caseload is attached as Appendix A. Most contractor's caseloads within the group are a mix of criminal, juvenile, extradition, contempt of court and civil commitment cases. While LCDJA will make every effort to keep a balance within the assignment of cases, sometimes due to return clients monthly numbers may vary. The caseload value of this annual contract is \_\_\_\_\_ dollars, (\_\_\_\_\_). The caseload mix is established to achieve this goal. As necessary, caseload will be adjusted over the course of the contract to achieve the contract value.

It is a goal of LCDJA to distribute cases in a fair and equitable manner between individual contractors. LCDJA shall periodically review the case disbursement to determine if, in LCDJA's discretion, the disbursement of cases complies with the stated goal. Ultimately, the assignment of cases is at the discretion of LCDJA.

B. Contractor shall disclose to LCDJA each court appointed case credit setting forth the date of appointment, name of client, case name, case and/or petition number, incident date, if applicable, statutory citation and case type code on a monthly basis in a format acceptable to LCDJA. Each month's case credit information shall be delivered to the LCDJA administrator no later than the 10<sup>th</sup> day of the month following appointment.

C. By signing this contract, contractor agrees that they accept the caseload to be assigned under this contract as not excessive given their other professional responsibilities.

In considering whether contractors caseload would be excessive, contractor is to consider OSB Formal Ethics Opinion No. 2007-178, National Advisory Council Standards, ABA Formal Ethics Opinion 06-441, Oregon State Bar Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases, and other applicable standards of practice.

D. Contractor shall notify LCDJA if at such time their caseload gets to the point that they cannot accept additional cases for a period of time. The appropriate adjustments would then be made to their subcontracts to account for reduced caseload assignment.

## **2. COMPENSATION**

A. Each contractor will be paid their set monthly amount between the 26<sup>th</sup> and the 1<sup>st</sup> of the following month.

B. Contractors shall be responsible for administrative overhead costs for operations of the LCDJA. A fixed amount shall be deducted from the monthly amount to cover these costs. This amount shall be set at the beginning of this contract and be \$\_\_\_\_\_.

C. Compensation will be paid one twenty fourth (1/24) of the value of this contract on a monthly basis.

D. From time to time the Board of Directors of LCDJA may approve a reduction in compensation which amount shall be held in trust by LCDJA to cover contract short falls, in the event LCDJA shall have to repay amounts to the State of Oregon under the contract. This amount can also be used, upon notice to contractors, in the event that administrative overhead costs exceed original estimates. Such use shall be determined by LCDJA Board of Directors and only applied at the end of the contract, when contract overage or shortfalls are determined. Amounts remaining in trust after reconciliation is completed with PDSC will be distributed to contractor in accordance with the proportion of contract work performed by each contractor.

## **3. EXTRAORDINARY EXPENSES**

Each contractor is required to request funds for all experts, interpreters and investigators

through PDSC. LCDJA is not responsible for said costs.

#### **4. INSURANCE**

A. Contractor shall remain a member in good standing of the Oregon State and the Lincoln County Bars and shall maintain professional liability insurance coverage insurance through the Oregon State Bar Professional Liability Fund of at least the minimum limits required by said organization and list the State of Oregon as “also insured” as required by the State’s contract.

B. Contractor shall provide premises liability insurance on contractor’s law office in an amount required by PDSC and list the State of Oregon as “also insured” as required by the State’s contract.

#### **5. PROVISION OF SERVICES**

A. Contractor shall provide legal services for each appointed client by providing legal advice and assistance on all matters related to each pending case through judgment on each case. Contractor shall appear at all court hearings in person and not through an associate unless otherwise provided in this agreement. Contractor shall provide said service with due diligence and professionalism and shall not allow unrelated work to cause a deterioration in the quality of services rendered to each defendant.

B. If contractor has a direct conflict of interest with a particular case, contractor shall proceed in accordance with the conflict protocol attached to this agreement. The case will be assigned to another contractor. If the contractor has had the case for over one (1) week, contractor will arrange for a substitution of attorney, get the new attorney’s name and prepare and file the appropriate forms with the court.

C. “Credit-Allocation - When an attorney withdraws or is forced to resign from a case before completion or closure and the case is reassigned to a new attorney, the credit will be reassigned to the new attorney. The new attorney shall be responsible for notifying LCDJA of the change of credit in a format acceptable to LCDJA. This information shall be provided to the administrator with contractor’s monthly report of new case credits.

D. Value of the case is earned on assignment. In the event that contractor must withdraw, and case is reassigned within the LCDJA, the value of that case is reassigned to the substituted contractor.

E. In the event a case is extraordinarily complex and involved excessive attorney time and resources, the contractor shall submit their hours to the administrator of LCDJA with documentation of complexity (i.e.: meetings with client/witnesses/DA, motions/briefs filed, phone contacts, time in court, research etc.). The administrator shall apply to PDSC for extra credits as to that case. In the event extra credits are awarded, the value of those credits shall be added to the contractor's contract value, or if agreed by both the contractor and LCDJA administrator, substituted for current case assignment obligations pursuant to this contract.

F. LCDJA shall monitor case assignment and the performance of the contractor. If in the discretion of the LCDJA, contractor fails to provide services according to the requirements herein, LCDJA may modify or terminate this contract.

G. As provided by this section, contractor's services are to be provided in person, and not subcontracted to attorneys not signatories to this contract, but may be delegated to another LCDJA contractor under the following circumstances:

(1) If the contractor is on vacation, ill or otherwise unavailable, for a period of seven (7) consecutive days, contractor may designate another LCDJA contractor to carry out contractor's duties required by this contract for the purposes of receiving cases, unless objected to by the client, including the coverage of arraignments, pretrial conferences, release and or motion to modify release hearings. Another contractor may not be designated to cover trials, substantive motions, or any contested hearings unless a formal order of substitution or association of counsel is approved by the court.

(2) The contractor will provide the name of the attorney covering cases assignments to the administrator's office not less than (5) days prior to the first day of any absence. If a contractor's absence shall exceed fourteen (14) consecutive days, the contractor must meet with the director to discuss coverage and case assignments.

(3) Contractor shall continue representation of appointed clients until final determination of the court or removal by court order. Contractor may not suspend representation pending potential withdrawal of court appointment if defendant is later determined ineligible. This includes setting office appointments attending court appearances and/or other necessary services. If a defendant declares intent to retain private counsel, contractor shall continue representation until receipt of confirmation from retained counsel.

H. Contractor shall maintain the appropriate staffing level for their case load.

I. Contractors shall be familiar with and engage in practices consistent with Oregon State Bar Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases, incorporated by reference, Rules of Ethics {RPC's/etc.}, and other applicable practice standards.

K. Client Contact per model contract.

1. In Custody Clients. Contractor shall, whenever possible, speak to and conduct initial interviews in person with in-custody clients:

(a) within 24 hours of appointment; or

(b) by the next working day if court appoints contractor on a Friday, weekend, or holiday.

2. Out of Custody Clients.

(a) Within 72 hours of the appointment, contractor shall arrange for contact with out of custody clients, including notification of a scheduled interview time or what client must do to schedule an interview time.

## **6. PERSONAL ATTENDANCE AT INITIAL HEARINGS**

A. Contractor shall be assigned as the on call attorney in Circuit Court according to a schedule provided to contractor by the administrator. Contractor is expected to be available for court on scheduled on call days. Contractor is required to attend all initial hearings on each appointment, including but not limited to, initial arraignments, shelter hearings or other first court appearances.

## **7. MEETINGS**

A. On the first Tuesday of every month, a meeting of all contractors shall be held at the a location chosen by the Board of Directors. Unless otherwise agreed upon by LCDJA, all meetings are mandatory.

## **8. CONTINUING LEGAL EDUCATION**

A. All contractors are required to complete a minimum of 9 MCLE credits per year in the area of criminal law, juvenile law, evidence or trial practice. If contractor has been engaged in the practice of law for five years or less, contractor shall attend an annual New Lawyers Seminar presented by the Oregon Criminal Defense Lawyers Association (OCDLA) or a similar program.

B. Contract shall be required to submit proof of completion to the administrator of the aforementioned MCLE credits no later than the 15<sup>th</sup> of December of each year.

## **9. COMPLAINTS OR CLAIMS**

If the contractor receives notification that a complaint or malpractice claim has been filed against contractor with the Oregon State Bar or Professional Liability Fund, the contractor shall immediately notify LCDJA, in writing, of the existence and substance of said complaint or claim. If LCDJA receives a complaint concerning the services of a specific contractor, the contractor shall be notified and given an opportunity to respond. LCDJA will follow the complaint policies and procedure attached hereto and incorporated by reference.

## **10. TERMINATION**

A. Termination for Cause. The LCDJA Board of Directors shall have the right to terminate the agreement at any time, without notice and without payment of compensation in lieu of notice, under the following conditions:

1. For cause, including, but not limited to, (i) any form of dishonesty, criminal conduct, or conduct involving moral turpitude connected with this agreement or which otherwise reflects adversely on LCDJA's reputation or operations in the community including violation of the Professional Rules of Ethics and the rules imposed by the State of Oregon and the PDSC for indigent defense work; (ii) the refusal of contractor to comply with LCDJA's policies, customs, or rules; (iii) continuing or repeated problems with contractor's performance, appearance at court or conduct or contractor's inattention to duties; (iv) contractor's refusal to accept cases assigned by LCDJA; (v) contractor's inability or refusal to adequately represent clients at a level to be expected in the profession in Lincoln County; (vi) contractor becoming disbarred or suspended by the Oregon State Bar for any reason including non-payment of insurance or dues and non-compliance with mandatory Continuing Legal Education requirements; (vii) the abandonment by contractor of this Agreement; (ix) the violation by contractor of any

state or federal criminal laws or the laws and regulations of the Oregon Department of Revenue or the Internal Revenue Service; (x) any activity which brings disgrace to LCDJA or places LCDJA in disfavor with the Courts, the Oregon State Bar, or PDSC; (xi) any activity by contractor which would or could jeopardize the LCDJA contract with the State of Oregon; (xii) any material breach of contractor's obligations under this Agreement; or

2. Contractor has suffered a disability as a result of illness, accident, or other cause and is unable to perform a substantial portion of Contractor's usual duties for a total of 30 days consecutively or 90 days cumulatively in any 12-month period after the date the disability commenced.

B. Any cause of termination set out in the contract between PDSC and LCDJA shall constitute grounds to terminate this contract.

C. This contract is subject to the conditions set forth in LCDJA's contract with the PDSC. If LCDJA's contract with the PDSC is terminated, this contract shall likewise terminate.

D. Voluntary Termination- Notice This contract may be terminated by contractor upon 30 days written notice to the LCDJA administrator. Any cases that have been assigned to contractor when such notice is given shall remain the responsibility of contractor without additional compensation.

E. Death. This agreement and contractor's association with LCDJA shall terminate automatically on contractor's death.

F. Effect of Termination. On the termination of this agreement, contractor (or contractor's estate in the event of contractor's death) shall receive contractor's base compensation prorated through the effective date of termination of this agreement and any other payments. Any termination of this agreement shall automatically terminate contractor's right to any additional compensation or other benefits paid by LCDJA.

G. Contractor shall complete all cases which are assigned to contractor in due course. Contractor shall arrange with other qualified counsel at contractor's own expense for completion of any case assigned under this contract which is not fully completed; in the alternative, if such failure occurs during the term of this contract, contractor may arrange for placement of the case through LCDJA and pay LCDJA its reasonable costs in completing the case, at a rate not less than the statutory rate for indigent defense then in force.

## **11. INDEPENDENT CONTRACTOR STATUS**

A. For purposes of this contract, contractor is an independent contractor and has so certified under Oregon laws. Neither contractor nor any of its employees is an employee of LCDJA by reason of this contract alone.

B. Contractor shall pay any compensation, wages, benefits, and federal, state, and local taxes to be paid under or as a result of the payments made to contractor under this contract.

C. As an independent contractor, contractor shall provide workers' compensation coverage for all subject workers performing work under this contract, including contractor if self-employed or a business partner, to the extent required by all applicable workers' compensation laws and for the entire contract term. Contractor, its subcontractors, if any, and all other employers working under this contract are "subject employers." As such, they shall provide coverage for workers' compensation benefits for any and all of their subject workers as required by ORS chapter 659A for the entire term of this contract

## **12. CONTRACT WITH THE STATE OF OREGON**

Contractor shall be bound by the terms of the agreement between LCDJA and the State, a copy of which is attached to this contract and incorporated by reference. In the event the terms of this contract are inconsistent with said agreement, the terms of said agreement are controlling. Contractor shall cooperate with and assist LCDJA in complying with the terms, conditions and obligations of the State contract. Further, contractor shall not in any manner, hinder, frustrate or interfere with the effective performance of the terms, conditions and obligations of the State contract. Conflicts of interest are to be resolved in accordance with and subject to the contract with the State.

## **13. ASSIGNMENT**

Due to the unique skills and abilities of the contractor, and the requirement that contractor give personal attention to each client appointed hereunder, this agreement is not assignable by the contractor except as authorized by the Board of Directors in writing.

**14. FUNDING RESTRICTIONS**

This agreement shall be subject to funding being received from the State of Oregon and LCDJA continually being under contract with the State of Oregon to provide counsel for indigent persons. Should funding become unavailable, then this agreement, at LCDJA's option, shall become immediately terminated. This provision may apply should LCDJA have a revenue shortfall imposed by PDSC or otherwise, which would result in a prorated reduction in attorney compensation. All reductions in compensation and termination of this Agreement shall be at the sole option and pleasure of the board of directors of LCDJA.

**15. MERGER.**

This agreement contains the entire agreement between the parties and supersedes all prior agreements written or oral.

Date \_\_\_\_\_ Date \_\_\_\_\_  
LCDJA: CONTRACTOR:  
by:  
\_\_\_\_\_

# Attachment 6

**Public Defense Services Commission  
Service Delivery Plan for Douglas County  
Preliminary Report  
(May 2, 2012)**

**Introduction**

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

The service delivery planning process is a multi-step endeavor, which begins with an investigation of the jurisdiction selected by the PDSC. The investigation is completed by the Office of Public Defense Services (OPDS). The primary objectives of OPDS's investigations of local public defense delivery systems throughout the state are to (1) provide PDSC with an assessment of the strengths and weaknesses of those systems for the purpose of assisting the Commission in its determination of the need to change a system's structure or operation and (2) identify the kinds of changes that may be needed and the challenges the Commission might confront in implementing those changes. PDSC's assessment of the strengths and weaknesses of a local public defense system begins with a review of an OPDS report regarding the initial findings within a particular area.

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

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

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

conditions of the public defense system in Douglas County.

### PDSC's service delivery planning process

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

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

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

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

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

## Background and context to the service delivery planning process

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

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

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and lawyers have visited contractors in Benton, Clackamas, Columbia, Crook, Deschutes, Douglas, Jackson, Jefferson, Klamath, Lake, Lane, Lincoln, Linn, Multnomah, Umatilla, Washington and Yamhill Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have highlighted the

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

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

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

#### "Structure" versus "performance" in the delivery of public defense services

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

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

defense delivery systems in Oregon.

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

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

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

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

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

On the other hand, PDSC is responsible for the wise expenditure of taxpayer dollars available for public defense services in Oregon. Accordingly, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to those proposals. As the largest purchaser and administrator of legal services in the state, the

Commission is committed to ensuring that both PDSC and the state's taxpayers are getting quality legal services at a fair price. Therefore, the Commission does not see its role as simply continuing to invest public funds in whatever local public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide quality services in each region of the state.

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

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

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

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in ten counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.<sup>2</sup> Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing

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<sup>2</sup> Spangenberg and Beeman, *supra* note 2, at 36.

in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of

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<sup>3</sup> Id.

cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

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

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

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

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

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

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

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

This type of contractor offers an important though limited capacity to

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

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

### **PDSC’s Preliminary Investigation in Douglas County**

In April 2012 Public Defense Services Commissioner, John Potter, OPDS Executive Director, Nancy Cozine, and OPDS Analyst, Billy Strehlow, visited Douglas County and met with the following stakeholders:

- Presiding Judge Garrison, Judge Ambrosini, Judge Burge, Judge Marshall, Judge Poole, and Pro Tem Referee Zuver
- Jessie Larner, Trial Court Administrator
- Rick Wesenberg, District Attorney
- Allen Boice, Adult Parole and Probation Department Director
- Aric Fromdahl, Juvenile Department Director, Robert Solerno, Juvenile Department Manager
- Susan Knight, CASA Director, and Katherine Elisar, CASA Program Manager
- Darline D’Angelo, DHS Office Director for Douglas County, and Lisa Lewis, DHS District Manager for Douglas County
- Jim Arneson, James A. Arneson P.C.
- Dan Bouck, Director, and Carrie Thomson, Office Manager, Umpqua Valley Public Defender (UVPD)

In addition, Nancy Cozine and Billy Strehlow later met in person or over the telephone with:

- Walt Gullett, CRB Coordinator
- Richard Cremer, Richard Cremer P.C.

## **OPDS's Initial Findings in Douglas County**

### **The Circuit Court**

There are five judges in Douglas County: Presiding Judge Garrison, Judge Ambrosini, Judge Burge, Judge Marshall, and Judge Poole. The court also has a Pro Tem Referee, Julie Zuver, who presides over the majority of juvenile delinquency and dependency proceedings, among other matters.

The judges hear a mix of cases, with Judges Burge, Ambrosini, Poole, and Marshall handling the majority of criminal cases. Judge Garrison presides over primarily civil matters. Judge Ambrosini presides over the county's two specialty courts, Drug Court and Domestic Violence Court.

The court does not use a centralized docketing system; each judge's calendar is individually maintained. At the time of the preliminary visit, the county's primary contract provider was filing affidavits in all proceedings assigned to one particular judge. The blanket affidavit is impacting the court system in this small community, which is already stretched due to serious budget constraints. It seems that the parties involved and affected are engaged in a productive discussion, and are open to finding a resolution. The presiding judge and the contract administrator are taking leadership roles in this process.

Douglas County Circuit Court will be transitioning to the new Tyler Odyssey eCourt system at some point in the next few years; they should have a firm installation date by the end of 2012. This system will allow for electronic transfer of court documents, and all system partners will be able to view case files electronically. New physical court files will not be created once the Odyssey program is installed; old files are already being scanned so that they can be stored in the new system. The court will be sharing Tyler Odyssey demonstration videos with court staff and system partners in preparation for the conversion.

### **County Challenges**

Like many Oregon timber counties, Douglas County is struggling to cover its many responsibilities without the resources it once possessed. Everyone interviewed in preparation for the Commission's visit noted the possibility of further cuts to county services, including potential cuts to the district attorney's budget. County representatives noted the dramatic reduction and resulting lack of services available in Douglas County. There are two drug and alcohol treatment providers with long waiting lists, particularly for in-patient treatment beds (clients accepted into drug court are able to enroll immediately). Some in the community expressed concern that the lack of options creates a dynamic where people don't have options, and are required to stay with a provider even if the provider isn't able to help the person make progress (or when a provider

perceives that the person isn't making progress and the person wants the opportunity to achieve success with a different provider). Douglas County does not have a mental health provider for those needing in-patient services, and there are no local treatment providers available to serve individuals with co-occurring disorders.

The county is also challenged by recent turnover in all areas of the justice system. Over the course of the last several years, the county has adapted to a new presiding judge, three new judges, a new pro tem judge, a new district attorney (with a contested race for the position in the May election), a new juvenile director (though the new director was with the agency prior to assuming the director position), and a new adult parole and probation department director. The system also has many new attorneys, both in the District Attorney's office and within public defense. It is reported that everyone is adjusting well, and that the new attorneys are learning, but it is a process.

There was a change in contract providers with the start of 2012. One consortium provider no longer has a contract with OPDS. During interviews, several individuals commented that the Douglas County system would function more smoothly if there were more providers, and noted that there is a shortage of attorneys who have significant experience (specifically felony qualified attorneys, and attorneys with experience handling dependency and delinquency cases). Some system partners were very clear about their desire to have an additional, primary contract provider in Douglas County in order to diversify the work through a broader base of attorneys and to decrease the likelihood of conflicts. OPDS is in the process of building its provider base in Douglas County, and has several new attorneys providing services on an individual case basis.

### Collaborative Efforts in Criminal and Juvenile Justice

Douglas County does not have a Criminal Justice Advisory Committee (CJAC), but there is a Local Public Safety Coordinating Council (LPSCC). The LPSCC meets at the call of the chair, which all report to be very infrequent (perhaps once a year) and only when there is a specific matter that requires a meeting. Issues within the criminal justice system tend to be addressed as they arise through individual conversations between those impacted or affected, and everyone reports a general satisfaction with this approach. System partners uniformly describe each other as approachable and open to proposed solutions when problems arise. Pro Tem Referee Julie Zuber does convene regular policy and procedure meetings for stakeholders in the juvenile delinquency and dependency systems; these meetings are generally reported to be helpful and productive.

The drug court in Douglas County is reported to be a tremendous success, and is reported to be a model program that enjoys participation and support from local families and the broader community. Graduation events are celebrated with

pizza (provided by Abby's Pizza) for graduates and their families, and the drug court team. County Commissioners, judges, and other important community figures usually attend graduation ceremonies. The drug court remains open to those who initially fail if they return with a commitment to engage, as the drug court team acknowledges that part of the process is failure, followed by a readiness to engage in services. This policy has yielded tremendously positive results, with wonderful success stories. There have been over 400 graduates, with 50 to 60 participants in the program at any given time. The program is available to those charged with drug offenses, as well as property offenders who are eligible as part of the Measure 57 drug court funding. The success of the program is, in very large part, due to the strong partnerships between the court, District Attorney, defense providers, Adult Corrections and the Department of Corrections, and child welfare.

### Procedure in Criminal Cases

Arraignments are held each day; out-of-custody arraignments at 8:30 a.m., and in-custody arraignments (by video) at 1:05 p.m. UVPD has an attorney present in the courtroom at the time of arraignment, and runs a conflict check before court when possible. The defendant is not given the name of the attorney who will handle the case, but is provided with written instructions to contact UVPD to find out which attorney has been assigned to the case. UVPD will then assign a UVPD attorney unless there is a conflict, in which case the client will be provided with an attorney from Arneson, P.C., Cremer, P.C., or an independent provider paid on an hourly basis.

At the time of arraignment, the court sets a status check hearing two to five weeks after the arraignment date. The status check date was originally intended to be the time at which a trial date was selected, but some judges now set a pretrial conference before setting a firm trial date.

When UVPD has a conflict and must assign the case to a different provider, UVPD contacts that provider on the day of arraignment, and that provider initiates contact with the client. For those clients assigned a UVPD lawyer, the office generates a letter, and sends it to the client at the address the client provided on the form submitted to the court requesting court appointed counsel. If the client does not contact UVPD as instructed, no further attempt is made by UVPD to contact the client. When clients call UVPD, an office visit is scheduled two or three weeks after arraignment. Discovery is usually received within two weeks, but sometimes takes up to five weeks, after arraignment. All contract providers indicate that they meet with in-custody clients within 24 hours of arraignment.

Most providers report that attorney caseloads have been high in 2012. This is a result of several factors, including a lack of felony qualified lawyers in the area,

and Douglas County's unknown budget future. If the District Attorney's office must absorb a cut and reduce its staffing, UVPD anticipates fewer cases being filed, and does not want to hire an additional attorney until they have some assurance that case filings will remain consistent. It is also a consequence of not having the MASH Consortium as a contract provider. There are attorneys available for appointment on a case-by-case basis, and these attorneys are reported to be doing good work. It is hoped that the caseload and provider challenges will be resolved over the course of the year.

Defendants convicted of felony crimes are placed on formal probation; defendants convicted of misdemeanor crimes are placed on bench probation. Douglas County Community Corrections is operated by the Department of Corrections, and is entirely state funded. The Adult Parole and Probation Department oversees 1,180 probationers, with 325 in "case bank." Low risk probationers are placed in case bank status based upon a risk determination made by the probation department. The department is currently using the Level of Service/Case Management Inventory (LS/CMI) and the Oregon Case Management System (OCMS) risk assessment tools. The probation department plans to start using the "public safety checklist," a risk analysis tool created by the Oregon Department of Corrections and the Oregon Criminal Justice Commission. Unlike the OCMS, no training is required in order to use the public safety checklist - it is automatically generated through an internet-based system that makes an analysis based upon specific static risk factors (rather than additional dynamic risk factors). The public safety checklist is reported to determine risk of reconviction with a 78% rate of accuracy.<sup>4</sup>

Each probation officer manages approximately 63 active probation cases, which this is reported to be a manageable caseload. The probation officers are experienced – the least senior probation officer has been there for six years. The department uses administrative sanctions and probation violation proceedings depending upon the seriousness of the alleged violation, and reports a recidivism rate that is better than the statewide average. Funding for jail beds is limited and the probation department plans to further reduce spending on jail beds. Grant funds are used to supplement funding for treatment beds, but the county no longer receives subsidies that were used to provide mental health treatment and drug and alcohol outpatient treatment. Treatment options remain very scarce. The probation department does offer a cognitive restructuring program.

The district attorney's office and probation department report that they have a good working relationship with the defense bar, and that probation officers work well with all of the PDSC contract providers.

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<sup>4</sup> See *Community Corrections Service Request Implementation of the Public Safety Checklist*, available at: [http://www.oregon.gov/DOC/TRANS/CC/popularity\\_boxes/PSC\\_Service\\_Request.pdf](http://www.oregon.gov/DOC/TRANS/CC/popularity_boxes/PSC_Service_Request.pdf)

## Procedure in Juvenile Cases

### Delinquency Cases

When law enforcement officers come into contact with a youth in need of placement, they call the court to get the case scheduled on the court's docket within thirty-six hours. There is a shelter facility with sixteen beds, as well as a thirty-two bed detention facility, which is currently running at a maximum capacity of twenty-four beds. The detention facility is also used to house detained youth from Coos and Curry counties. The Juvenile Department reports that kids are not usually held through disposition; that they use conditional release agreements. They also report that "most cases resolve at the first detention review" hearing.

In-custody shelter hearings are scheduled each day at 1:15 p.m.; out-of-custody hearings are held at 2:00 p.m. each Monday. UVPD is present at the hearings, and attorneys are appointed in most juvenile delinquency cases. Some youth hire attorneys, and others waive their right to counsel. The court reports that it does engage in a colloquy with the youth before accepting the waiver of counsel. The District Attorney has one deputy assigned to represent the state in all juvenile delinquency cases. Formal Accountability Agreements are used in Douglas County, but alternative dispositions are not familiar to juvenile system partners in Douglas County. There has been a significant decline (by almost 50 percent) in juvenile delinquency cases in Douglas County. Shackling is used in Douglas County on a case-by-case basis. The Juvenile Department is reported to assess each case individually, and must articulate to the court a substantial reason for safety concerns. Defense attorneys may contest the court's decision.

Drug and property crimes are reported to be the primary issues for juveniles in Douglas County. There is a residential juvenile treatment program available through ADAPT, as well as a thirty-day detention treatment program. The county also has a sex offender treatment program available through mental health services.

The District Attorney's Office and the Juvenile Department report a positive working relationship with the defense bar and PDSC providers.

### Dependency Cases

Dependency shelter hearings are scheduled each day at 1:30 p.m. Attorneys are present to provide representation for parents and children at shelter hearings, but the attorneys do not always have an opportunity to meet with their clients before court. Shelter hearings are usually summary proceedings, but attorneys do sometimes request a contested hearing.

The District Attorney has one deputy district attorney (DDA) assigned to provide representation at the first shelter hearing and at uncontested jurisdictional and permanency hearings. Due to recent budget cuts, the DDA does not participate in dependency review hearings. Most involved in the system report that this has a negative impact on cases, but there seem to be very few options available given the budget situation in Douglas County.

Discovery in dependency cases is provided to attorneys and the state on a disc. DHS is developing a system that will allow discovery to be shared by email. The move to electronic dissemination has allowed discovery to be shared more quickly.

Douglas County DHS and system partners report that Douglas County has the highest number of children in care per capita than any other Oregon county, and that their children are in foster care longer than in other jurisdictions. DHS reports that this is starting to shift, but they also have very low re-abuse rates, and don't want that rate to increase.

DHS reports that primary triggers for DHS involvement are poverty problems and opiate addictions; many newborns are addicted to opiates. Most stakeholders report that today's cases present much more serious situations that are harder to address than those in past years. The county has significant problems getting treatment services for addicted parents. There are no opiate detoxification facilities for adults in Douglas County. Caseworkers try to be creative when locating services for parents, but there are significant limitations.

CASAs are appointed for approximately 55% of the children in the county's dependency system. This is an increase from past years, and is especially notable because the number of children in care has increased dramatically over the last few years.

CRB hearings are used regularly in Douglas County. There are three review boards. Though parties usually have someone from their lawyer's office present, it is rarely the lawyer, though there are a few exceptions.

Finding court docket time for dependency cases can also be a challenge. Strict statutory timelines for criminal cases are reported to cause delays in scheduling of dependency reviews.

### Civil Commitment Cases

UVPD provides representation in civil commitment cases. This has become a larger challenge in recent months, as clients are sometimes being sent to facilities in Medford or Portland. There is a new investigator working on civil commitments; it is reported that he is very thorough, and that his work is resulting in an increased number of dismissals.

## Public Defense Providers in Douglas County

PDSC contracts with three providers for non-death penalty cases in Douglas County: Umpqua Valley Public Defender, James A. Arneson P.C., and Richard Cremer, P.C. PDSC does not have a provider in Douglas County to provide representation in capital cases.

Umpqua Valley Public Defender is the primary contractor in Douglas County. A private non-profit since the mid-1980's, UVPD was founded in 1972. UVPD has an active board of directors, and a relatively new director, Dan Bouck, who serves at the pleasure of the board. There are ten attorneys handling a mixed caseload, though there are attorneys who specialize in the dependency area. The current contract includes 3,119 cases per year of all case types other than murder. Mr. Bouck hosts a monthly meeting for Douglas County public defense providers.

James A. Arneson, P.C., is a small firm including Mr. Arneson and three associates. Their current contract includes a mixed caseload with a total of 1,008 cases per year.

Richard Cremer, P.C. is also a small firm, with Mr. Cremer and one associate. This firm has a contract for 607 cases per year.

### Comments from Douglas County Stakeholders Regarding Providers

#### Criminal Cases

Contract provider attorneys are described by their system partners as providing zealous representation in criminal cases. Some suggested that the representation provided in Douglas County is superior to what is provided in surrounding counties. Stakeholders report that they have a very positive working relationship with most public defense providers, and that while there are not differences in the quality of representation that are discernable based upon the law firm where the lawyer practices, there is a significant variation in the representation provided by each individual lawyer. Some attorneys are reported to work harder and fight harder for their clients, but no lawyers are described as providing inadequate representation. Attorneys are reported to file more motions in criminal cases than in other case types.

#### Representation of Parents

Attorneys providing representation to parents are described as providing very strong representation. They usually have someone from their office attend

Family Decision Meetings, Safety Team Meetings, and other events outside of court and CRB hearings. Some attorneys personally attend these meetings.

The DHS office reports frequent attorney contact, almost daily, with questions regarding cases and clients. They report a positive working relationship with PDSC providers. DHS often contacts attorneys by phone, and they usually receive a prompt reply call. While DHS caseworkers and client's attorneys do not always agree, the disagreement is reported to be "valuable" and important to the process.

Attorneys are pursuing contested hearings in dependency cases. Several attorneys, from both UVPD and the Arneson firm, were noted as "leaders" in this area. Cases are also settled, with positive results, out of court. An Assistant Attorney General (AAG) from the Attorney General's Eugene Office represents the state in contested hearings. System partners report that motions are rarely filed in dependency cases, and that attorneys are rarely asking the court to make "no reasonable efforts" findings despite the fact that appropriate services are often not available for parents.

#### Representation of Children

Children in Douglas County are reported to receive zealous representation, with the attorney or a representative from the attorney's office present at most if not all Family Decision Meetings and Safety Team Meetings. Attorneys are described as taking their "responsibilities very seriously." Not only are attorneys held to a high standard by the court, but also by their peers. Tom Bernier, of James A. Arneson, P.C., is described as providing excellent representation and serving as a mentor for newer attorneys in the Roseburg area. Some expressed concern that many attorneys didn't seem to be visiting children in their homes. It was noted that those attorneys who do visit children in their substitute care environment are better able to advocate for the needs of their clients. It was also noted that attorneys who appear at CRB hearings (rather than sending someone from the office) tend to provide better advocacy for their clients. Some attorneys appear at CRB hearings by phone, which is better than not appearing, but is not as effective as appearing in person.

#### Delinquency Cases

Providers are reported to provide quality representation in juvenile delinquency cases. Attorneys do occasionally file motions in juvenile delinquency cases, but not often. Douglas County does not have experience with motions for alternative disposition in delinquency cases.

## OPDS's recommendations for further inquiry at the PDSC Meeting on May 10, 2012

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

### Structure

Douglas County's current structure no longer includes a consortium provider. Cases with multiple parties needing representation do present a challenge, and though OPDS has worked to build a pool of attorneys who are available for appointment in these situations, it is sometimes necessary to use out-of-county providers. It is anticipated that over time, new conflict attorneys will become regular providers, but the county is still in a transition period. The Commission may wish to ask system participants for their thoughts regarding the current structure, and developments they would like to see in Douglas County's provider base. As part of this conversation, Commission members may wish to ask current providers about attorney caseloads and plans to manage those caseloads through the remainder of the biennium.

Douglas County also struggles with a lack of lawyers who are qualified to handle felony cases, and lawyers with significant experience practicing juvenile law. There are newer attorneys in the county who are developing, but it may be necessary to recruit additional lawyers. The Commission might want to ask providers for their thoughts regarding the need for targeted recruitment efforts.

The system of having UVPD present at arraignments and later assigning specific lawyers is reported to work well, but the Commission may wish to explore whether communication efforts with out-of-custody clients in Douglas County meet contract requirements:

#### **7.1.4.2 Out-of-Custody Interviews**

Within 72 hours of the appointment, Contractor shall arrange for contact with out-of-custody clients, including notification of a scheduled interview time or what client must do to schedule an interview time.

It is possible that both the client and the system would benefit from a greater effort on the part of the attorney to make contact with the client, but demands on public defense lawyers' time are already great, and the Commission will want to consider reports that the current system is working. The failure to appear rate in Douglas County is not known at this time.

### Juvenile Delinquency Cases

Douglas County is a leader in its commitment to appointing counsel for youth in juvenile delinquency cases, and seems to have a strong commitment to rehabilitation and reduction of recidivism. The Commission may wish to explore the degree to which public defense providers are investigating cases, and pursuing motions challenging the shackling of youth, motions for alternative disposition, and trials in juvenile delinquency cases.

#### Collaborative Efforts

Douglas County has some very strong collaborative efforts exemplified by its drug court, regular meetings with system partners in juvenile dependency and delinquency proceedings, and regular meetings among members of the defense bar. The Commission might want to explore with Douglas County participants whether they believe there would be value in establishing some form of regular and consistent communication between all system partners in the criminal justice system. Such collaborative conversations could become more critical as Douglas County continues to manage the shrinking budget and resulting lack of resources.

#### **A Service Delivery Plan for Douglas County**

[This portion of the report will be completed after the PDSC has developed its service delivery plan for Douglas County.]

# Attachment 7



National Legal Aid & Defender Association

March 30, 2012

Nancy Cozine  
Oregon Office of Public Defense Services  
1175 Court Street, NE  
Salem, OR 97301

Re: Defender Research, Data and Analysis Advisory Committee

Dear Nancy,

The Defender Legal Services Division of NLADA established the National Indigent Defense Infrastructure Initiative (NIDII) to support the indigent defense community's ability to expand and improve the delivery of legal representation to low income individuals. Beginning this year, one of the overarching NIDII objectives is to empower the defender community to lead indigent defense system and criminal justice policy reform through the effective use of research, assessment, data and analysis. NIDII was formed in response to a capacity gap in the infrastructure of many indigent defense systems, which typically results from inadequate funding. The result is that indigent defense is decades behind other sectors of the criminal justice system in using data and research to develop policy. NIDII will address this gap through leadership, training, demonstration, technical assistance and other resources.

As part of NIDII's broader mandate to increase capacity within indigent defense systems, we are constituting a Research, Data and Analysis Advisory Committee. As a leader who understands the importance of having access to objective, verifiable data to inform policy and support resource development, we are writing to invite you to join us as a member of the Committee. In addition to helping broaden the concept of competent leadership to include an embrace and use of data and research, the Committee will participate in the design of curricula to train current and next-generation defender leaders. It will contribute to a national scan of systems successfully using data, research and analysis and identify best practices, and will work with research partners to build models for replication. An affirmative research agenda will be developed and promoted with appropriate agencies, as well as a national indigent defense data agenda under which indigent defense agencies would develop core descriptive data using similar methodologies and definitions. Developments in research, and implications for defender practice, will be identified for a National Defender Research Clearinghouse.

A primary responsibility of the Committee will be to advise on NLADA's partnership with the North Carolina Indigent Defense System (IDS) and its Systems Evaluations Project (SEP), a model for data analysis and evidence-based advocacy. SEP embodies a comprehensive set of goals, objectives and indicators that can be used to support ongoing assessment of indigent

defense, the criminal justice system, and the quality of representation. Beyond measuring simple inputs, such as cost per case or attorney workload, SEP aims to measure outcomes – the extent to which systems are achieving substantive goals. These same indicators and research approaches can be used to drive arguments for policy reform in the broader criminal justice system. The Advisory Committee will work with them to develop tools, trainings and technical assistance to replicate the SEP, or parts of it, in other jurisdictions, beginning with two demonstration pilots.

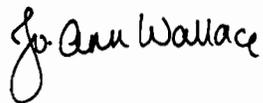
The Committee has a substantial mandate, and its work will extend over a two-year period. We expect that the full Committee will meet approximately quarterly, in person in Washington DC for full-day meetings twice a year, with conference call meetings in-between. We will always be respectful of your time, so before convening the first in-person meeting on May 22, we will hold a conference call meeting on **Wednesday, April 11, 3:30-5:00 Eastern**, to discuss the Committee's charge and to plan the in-person meeting.

We very much hope that you will agree to join in this critical undertaking. The Advisory Committee will play an important role in helping strengthen defender leadership and system capacities, driving research-based efforts and improving the quality of representation provided to our clients.

We are excited to be joined in this endeavor by consultant Nancy Gist, who is working with us to establish the Advisory Committee. As many of you know, Nancy is the former Director of the USDOJ Bureau of Justice Assistance, as well as a former leader in Massachusetts' statewide indigent defense program. Please confirm your participation on the Committee and your availability for the April 11<sup>th</sup> call with Nancy by contacting her at 202-544-0639, or [nancy.gist@gmail.com](mailto:nancy.gist@gmail.com), by April 6th.

Thank you for your consideration. We look forward to working with you!

Sincerely,



Jo-Ann Wallace  
President and CEO



Edwin Burnette  
Vice President, Defender Legal Services