

**Members**

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



**Ex-Officio Member**

Chief Justice Thomas Balmer

**Executive Director**

Nancy Cozine

**PUBLIC DEFENSE SERVICES COMMISSION**

Thursday, May 15, 2014  
10:00 a.m. – 2:00 p.m.  
Office of Public Defense Services  
1175 Court St. NE  
Salem, Oregon 97301

**MEETING AGENDA**

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|--|-------------------------------|
| 1. <b>Action Item:</b> Approval of minutes - PDSC meeting held on April 17, 2014 ( <i>Attachment 1</i> ) | Chair Ellis                   |
| 2. Justice Reinvestment and Reported Crime Update ( <i>Handout</i> )                                     | Craig Prins                   |
| 3. Charging Practices Following <i>Benoit</i> and Implementation of HB 3194                              | Rod Underhill<br>Walt Beglau  |
| 4. Capital Costs and Non-Capital Caseload Trends ( <i>Attachment 2</i> )                                 | Billy Strehlow                |
| 5. Appellate Case Filings, Opinions, and Backlog Trends ( <i>Handout</i> )                               | Peter Gartlan<br>Ernie Lannet |
| 6. OCDLA Pay Parity Committee ( <i>Attachment 3</i> )  | Lynne Dickison<br>Lane Borg   |
| 7. Regional Stabilization Policy Option Package; Draft ( <i>Attachment 4</i> )                           | Caroline Meyer                |
| 8. OPDS Monthly Report   | OPDS Staff                    |

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

***Next meeting: June 19, 2014, Mt. Bachelor Village, Bend, Oregon. Meeting dates, times, and locations are subject to change; future meetings dates are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>***

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

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

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

STAFF PRESENT: Nancy Cozine  
Peter Gartlan  
Paul Levy  
Angelique Bowers  
Caroline Meyer  
Amy Jackson  
Cecily Warren

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

**Agenda Item No. 1 Approval of minutes – PDSC meeting held on March 5, 2014**

**MOTION:** Commissioner Potter moved to approve the minutes; Vice-Chair McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

**Agenda Item No. 2 US Supreme Court Update: Nonroutine expenses and ineffective assistance of counsel**

Paul Levy summarized the recent US Supreme Court case in which the court ordered reconsideration of the denial of post-conviction in a capital case. He explained that the case suggests that when a lawyer is ignorant of or misunderstands the law, and makes a decision based on that mistake of law, it can be grounds for ineffective assistance of counsel. Mr. Levy went on to explain that the case explores the intersection of legal practice and expert testimony, and the importance of expert testimony and selection of experts in criminal defense cases, and that the opinion recognizes that, in some cases, the only reasonable and available defense requires experts.

Chair Ellis asked Mr. Levy whether this case will impact how OPDS evaluates requests for non-routine expenses. Mr. Levy indicated that while it does not change the analysis, it does emphasize the need for continued education of public defense lawyers regarding how to make adequate, sufficient requests for non-routine expenses. Chair Ellis asked whether this case impacts the agency's willingness to approve the use of out-of-state experts. Mr. Levy explained that ORS Chapter 151 limits approval of out of state experts to those instances when a suitable in-state expert is not available, or the out of state expert is less expensive. Chair Ellis asked whether OPDS will be in the position of having to evaluate whether an expert is competent as a result of the Supreme Court opinion. Mr. Levy indicated that the agency largely defers to the attorney's statements regarding the qualifications of the expert, but also noted that there are experts OPDS will no longer approve due to past problems with their services. Chair Ellis asked whether this case will provide support for the agency's decision to expend resources on expert witnesses. Mr. Levy explained that OPDS still denies requests unless the lawyer demonstrates that the expense is reasonable and necessary. Chair Ellis commended Mr. Levy for exercising caution in the review of expenses. Vice-Chair McCrea asked whether it would be possible to publish on the OPDS website more information about what is required to get a non-routine expense request approved. Mr. Levy indicated that if such documents were not already on the website he would ensure that they were added.

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

#### **Regional Stabilization Policy Option Package**

Nancy Cozine directed Commission members' attention to the report regarding provider needs and funding priorities, which were developed using information learned at regional and provider-specific meetings held throughout the state. She explained that today's Commission meeting was intended to get provider feedback regarding the listed priorities to ensure that the Commission has an accurate understanding of providers' needs. Ms. Cozine indicated that once the funding priorities have been established, the agency will work to determine the cost of funding each of those priorities.

Mark McKechnie, Executive Director at Youths, Rights & Justice, stated that while there was certainly appreciation for the additional funds allocated for salaries, caseload sizes must be reduced. He explained that the cases have become more complex, and lawyers in his office are experiencing some level of fatigue due to the high caseloads. His attorneys are working in the evenings to read discovery and prepare for the next day's hearings, and on the weekend nearly every week or most weeks, rather than an ebb and flow where weekend work is necessary when preparing for a particular trial. He concluded by indicating that caseload reduction in the juvenile arena needs to be part of any proposal.

Lane Borg, Executive Director at the Metropolitan Public Defender, also expressed appreciation for the funding to increase lawyer salaries, but indicated that it created some internal dissention because it couldn't be used for the support staff. He emphasized the need for continued analysis of caseload sizes in light of the *Wilbur v. City of Mt. Vernon* case, and of quality, as the agency also examines appropriate compensation.

Jon Martz, Board Chair and lawyer with the Portland Defense Consortium, expressed appreciation for the discussions at regional meetings, and concern for whether there will be a next generation of public defense lawyers. He noted that overhead costs continue to increase, younger lawyers have better opportunities elsewhere, and that people who have been doing this work for a long time are looking for an exit strategy. Like other providers, he noted increasing case complexity and work stress for public defense lawyers. Mr. Martz shared a recent incident in which he declined a private case because he was too busy with his public defense caseload. Vice-chair McCrea asked whether a reduced public defense caseload would have allowed him to take the retained case; Mr. Martz acknowledged that was possible, but that the solution is a combination of reduced caseloads and increased compensation.

Commissioner Potter asked whether the PDC had figured out what it would take to get to fair compensation. Mr. Martz said that he would need to gather the figures and data before guessing, and suggested that it would be helpful to have specific funding for overhead expenses, and that those costs could be outlined in the RFP process. Vice-Chair McCrea cited a 2005 study in the federal system which indicated that hourly attorneys were dedicating \$64 per hour to overhead costs, and asked whether Mr. Martz had done a calculation of overhead costs. Mr. Martz offered a rough estimate of \$20,000 to \$25,000 for each member of his firm, but noted that they have made significant efforts to reduce overhead costs to the greatest extent possible over the last several years.

Dan Bouck, Executive Director at Umpqua Valley Public Defender in Douglas County, indicated that the highest priority should be increased compensation and decreased caseloads. He said that last week Douglas County DAs received an across the board pay raise and COLAs for the next two years of about 2% or 3%, so that despite POP funding, they are now farther behind. He also noted an increase in case complexity.

Jennifer Nash, Benton County consortium administrator, provided information highlighting Benton County as a demonstration of the problems with the consortia model compensation structure. Her consortium has eight lawyers; one was recently added to reduce caseloads. The lawyers in her consortium paid the expenses for the new lawyer, and consequently they are receiving less money than in the previous contract cycle. Each lawyer has a caseload with between 70% and 95% public defense cases, and have private work to subsidize the public defense work. After overhead, which she estimated as being very similar to what was cited in the federal study - \$64 per hour - each lawyer has about \$4,000 a month. She said that if their lawyers want to make more than \$48,000 a year, they must take privately retained cases. Lawyers in their consortium work under contracts requiring them to make public defense cases the priority, and they are not allowed to consider taking private cases if it will compromise their ability to provide adequate assistance of counsel in public defense cases. Ms. Nash pointed out that, as in other counties, the district attorney's office stopped filing less serious cases during the recession, so that even misdemeanor cases are more complex, and often involve mental issues or drug and alcohol issues. She says that in Measure 11 cases that settle, the lawyer ends up making about \$10 an hour; even less if the cases go to trial.

Ms. Nash explained that she is currently on the Pay Parity Committee, which is grappling with what "parity" really means. She says it is very difficult due to the lack of standardized caseloads, different divisions of contract funds, and other inconsistencies between providers. She emphasized the need to increase compensation and decrease caseloads for all lawyers, and suggested that it is absolutely critical to reach parity for all lawyers before specifically addressing pay increases for staff. Chair Ellis asked Ms. Nash whether she agrees with similar funding for lawyers within communities; she indicated that all providers wish to receive the same amount that the DAs receive, and suggested that consortium groups should receive more than public defender offices because the overhead costs are greater for consortia. Chair Ellis countered that public defender offices have some increased costs for training and supervision. Ms. Nash disagreed strongly, acknowledging that while public defender offices might have more robust training and supervision programs, consortia providers must also invest in training and supervising. She shared that her consortium has two lawyers who, though not new to practice, are not yet qualified to take all case types, and that only two of their eight lawyers came from public defender offices, and those lawyers joined twelve years ago. In her experience, lawyers who leave public defender offices for private practice are not going to public defense consortia, requiring consortia to train their new lawyers. Chair Ellis asked Ms. Nash about the purpose of providing Benton County statistics, and asked her whether she believes OPDS should look at relative cost of living county by county. Ms. Nash explained that OPDS should look at the relative cost of living to determine the appropriate contracts rates for non-PD counties, as without that analysis, there is no way to determine whether there is parity with the district attorney office.

Vice-Chair McCrea asked Ms. Nash about increasing case complexity in the wake of budget cuts for law enforcement and prosecution, and whether there was any corresponding issue of reliability in law enforcement investigations. Ms. Nash explained that in many cases, law enforcement isn't doing basic investigation. She described a recent case where defense investigation will likely result in the court granting a motion for judgment of acquittal. This dynamic makes defense investigation that much more important. Mr. Bouck indicated that in Douglas County they are seeing the same trend, and it requires defense lawyers to do much more investigation.

Jon Weiner, interim Executive Director at the Marion County Association of Defenders (MCAD) and a member of the OCDLA Pay Parity Committee, offered his insights, acknowledging that he is new to the world of contract administration. He described MCAD as Oregon's largest public defense consortium, with about 35 attorneys, and explained that thus far his analysis of MCAD is largely based upon the criteria set in the *Wilbur* case, from Washington, which suggests some standards with respect to the provision of services. In looking at the list of POP funding priorities, Mr. Weiner expressed support for an effective case management system, but also for increased compensation and decreased caseloads. He shared his concern that if case payments don't keep stride with the management of caseloads, many people won't be able to afford this kind of work. Mr. Weiner shared his rough calculations regarding overhead costs, case rates, and caseload caps established in the *Wilbur* case to demonstrate that lawyers have a hard time making a living when their practice is exclusively public defense work and they are adhering to federal caseload caps. He shared his belief that throughout consortia, the business model of people who primarily do these kinds of cases is to exceed and probably sometimes abuse the case standards forth in *Wilbur*. He says that he is trying to keep MCAD members at 200 to 300 cases, but it is always a mix, and can be difficult to gauge.

Bruce Liebowitz, contract administrator for the Portland Defense Consortium (PDC) and for Lebowitz and Associates, told the Commission that he was also speaking on behalf of a group of defense consortia and private law firms with 161 attorneys in Multnomah, Clackamas, Washington, Marion, Linn, Jefferson, Deschutes, and Josephine Counties. He began by stating the importance of equalizing case rates within counties. Mr. Liebowitz explained his view that the higher rates paid to public defender offices don't necessarily reflect investigation costs. He used his law firm as an example, stating that his law firm has a contract for probation violation cases at a rate that is more than \$20 below public defender rates in his county. He went on to explain that, while the rate difference is meant to cover the cost of investigation, "there are no investigative costs in PV cases," stating that in 30 years he has had one contested PV hearing with an investigator. He emphasized his view that all providers in the same county should get the same rate. Commissioner Potter pointed out that the OCDLA Pay Parity committee determined that, overall, the PDC is getting a higher rate than public defenders in his county when the costs of investigation are removed from the public defender contract rate.

Chair Ellis noted the written testimony provided by Robert Harris of the Harris law firm and invited further testimony.

Greg Hazarabedian, Public Defender Services of Lane County, spoke in support of the regional stabilization POP as proposed by OPDS staff. Mr. Hazarabedian did indicate that any request should provide enough flexibility to allow pay increases for attorneys and staff, if that is what is needed by a particular provider. Mr. Hazarabedian also commented upon the difference in practice between counties, noting that in his county there are numerous contested PV hearings, and that they do occasionally need investigation.

Amy Jackson shared that Bill Condron, Administrator for the Twenty-Second Circuit Defenders, requested that Crook and Jefferson counties be added to the list of counties that need increased rates and reduced caseloads. She added that Dan Stevens, the administrator of

the Blue Mountain Defenders Group, had expressed his support for including funding to cover mileage expenses.

**Agenda Item No. 4**

**OPDS Monthly report**

Nancy Cozine provided an update regarding the juvenile dependency pilot program, which included the recent hire of a Deputy General Counsel to act as managing attorney of the dependency pilot. Amy Miller was a law clerk and staff attorney at YRJ, where she represented primarily children, and where she served as a legislative advocate. She was then a staff attorney at Multnomah Defenders Inc., where she represented primarily parents. After leaving MDI she started her own practice and has been providing representation in dependency matters before the Grand Ronde tribal court. Her pre-law career included eight years as an engineer where she focused on data analysis and system reform.

Pete Gartlan shared information about the Appellate Division's efforts to reduce the time to filing of opening brief (pursuant to the new KPM target of 180 days). The division has added a new team (creating six smaller teams rather than five larger teams) in hopes that this will relieve pressure on the current team leaders, who must edit briefs for all team members, and speed up the process by producing quicker turn around for edited briefs. The recent addition of a fourth panel at the Court of Appeals increased office argument days to four days per month, 20 cases an argument date, which created a significant increase in work. He also shared plans to offer additional training and oversight to people who are promoted from a deputy I to a deputy II position. Finally, Brian Garner, an expert in legal writing, will give a presentation to OPDS lawyers with the goal of improving the quality of briefing. Mr. Gartlan concluded by summarizing cases scheduled for argument before the Oregon Supreme Court.

Nancy Cozine and Caroline Meyer provided a few more updates regarding developments at OPDS. Ms. Cozine concluded by saying that the office would continue to work with LFO and legislators on creating a final policy option package. Chair Ellis expressed support for the way OPDS has approached development of policy option package priorities.

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

**Meeting adjourned**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

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

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

STAFF PRESENT: Nancy Cozine  
Peter Gartlan  
Paul Levy  
Angelique Bowers  
Caroline Meyer  
Amy Jackson  
Cecily Warren

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

**Agenda Item No. 1 Approval of minutes – PDSC meeting held on March 5, 2014**

0:13 Chair Ellis Shall we call the meeting to order. The first item is the minutes from the meeting of March 5, 2014. Are there any other additions or corrections to the minutes? If not, I would entertain a motion to approve.

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

**Agenda Item No. 2 US Supreme Court Update: Nonroutine expenses and ineffective assistance of counsel**

0:35 Chair Ellis Okay. Item 2, Paul, the Supreme Court case.

0:44 P. Levy We are at me already. Okay. We thought this case would be interesting to the Commission for a number of reasons, primarily because it implicates, in some ways, one of the most

important functions that we perform here, which is reviewing requests for non-routine expenses and expert expenses in cases. This is a pretty remarkable case for a number of reasons, not less of which is the fact that the Supreme Court, which is not known – it is not considered especially friendly to persons convicted of capital cases offenses. It orders reconsideration of the denial of post-conviction in a capital case without briefing or argument. They granted cert and remanded for reconsideration. On the one hand the opinion could be read narrowly, and it sort of suggests it should be, which is that the issue here is a lawyer who was ignorant of or misunderstood the law, making a decision based on that mistake of law. When a choice is made as a result of that ignorance or mistake, that is not reasonable, and can give rise to ineffective assistance of counsel. But it is really much more than that. I don't know if anybody needs or wants me to cite the facts of this case.

2:37 S. McCrea

I read it. It is a great case.

2:42 Chair Ellis

I read it.

2:42 S. McCrea

For an expert witness being cross-examined. How many eyes do you have?

2:47 P. Levy

It is a fairly shocking performance by the lawyer. It is shocking that Alabama use to have a system like this, but that is not terribly surprising. The lawyer is paid \$1,000 for a capital case and the most he or she could get for experts is half of that, \$500, but that law changed before this case came along. Neither the lawyer nor the judge knew that. The judge did say, "Well, come and ask me for more money if you need it." The lawyer never did that. This conduct probably would have met the mockery and farce standard for ineffective assistance of counsel. The case is really more significant than simply a lawyer making a mistake of law. It is about the intersection of legal practice and expert testimony and the importance of expert testimony and selection of experts in criminal defense cases. The opinion recognizes and says that in some cases, and this being one, the only reasonable and available defense requires experts. That is simply the reality of many cases. The other thing that the case says, which is fairly remarkable because it is quoting from a paper written by the co-founder of The Innocence Project, is that there is a potential for incompetence and fraudulent prosecution experts. According to the piece that cited it in this case half of the exonerations that The Innocence Project has documented have been as a result of flawed forensic work. In fact in this case which involves firearms and tool mark evidence, the court cites and it says *see generally* and it cites the 2009 National Academy of Sciences report that condemned virtually all so called forensic sciences except for DNA and especially called out the type of ballistics analysis that was done in this case as being not scientifically validated and the methods really don't stand up to scientific rigors. The case really recognizes the importance of making intelligent and informed selection of experts, which, of course, did not happen here.

5:56 Chair Ellis

But the court was trying so hard not to make that the issue.

6:02 P. Levy

Absolutely.

6:02 Chair Ellis

And I will bet hard money that there will be flood of attempts to say that this case stands for the notion that an inadequate expert is reversible.

6:17 P. Levy

Well it will be cited for that and properly so. If that inadequate expert was selected without, as the opinion says, thorough investigation of the facts and laws. In fact last week in the Federal District Court in Portland, Judge Marsh issued an 81-page opinion on a federal habeas case vacating what was a homicide conviction. The woman plead guilty having been charged with murder in state court for ineffective assistance of trial counsel, and got there by way of ineffective assistance of PCR counsel. The decision rested on the failure of the lawyers to utilize an expert in that case. Just as a side the judge got past all sorts of procedural default problems by also saying that there was a colorable claim of innocence in this case.

- 7:31 Chair Ellis I think one of the, maybe amusing isn't the write word, but ironic passage is the prosecutor in his closing argument is attacking the competence of the other side's expert and that turns out to be what causes the conviction he gets reversed.
- 7:53 P. Levy Yes. That is the type of thing that a PCR lawyer would point to, to establish prejudice. But the result here is that they remand it back to Alabama and I can see this case coming back again because no court has passed on whether it was prejudicial.
- 8:15 Chair Ellis Does this change at all, in your mind, how we handle extraordinary expenses?
- 8:21 P. Levy Well it doesn't change how – I think it hasn't changed how we exercise our function. What it does emphasize is the need for us to continue our efforts educating our lawyer community about how to make adequate, sufficient requests for non-routine expenses. We deny a fair number because lawyers don't know how to do it. We are not going to do it for them. That is not our job. If they don't give us the information from which we can determine whether an expert is needed, we can't allow funds for them to get an expert. It also requires that they understand how to appeal denials. A lawyer with a pending post-conviction case where an expense was denied and the lawyer thought there was nothing he could do about it. That is approaching the mistake that was made in this case.
- 9:33 Chair Ellis I remember a few years ago there was a big push to limit experts, to the best one could, to in state experts, not out of state experts. Remind me where that is and do you think that may be an issue?
- 9:55 P. Levy Well it is actually part of our statute, your statute, Chapter 151, that we have a method for only approving out of state experts when a suitable in state expert is not available, or the out of state expert is less expensive. We have incorporated that into our payment policies and procedures. When we are asked to approve out of state experts we inquire if we are not told as we should be, what efforts were made to locate an in state expert.
- 10:38 Chair Ellis So does this put you in the position of having to evaluate whether an expert is competent or not?
- 10:49 P. Levy We largely defer to what the attorneys are asking when it comes to the qualifications of the expert that they are seeking. However, when we have learned about problems with an expert we try to share those to the extent that we can. Sometimes there are confidentiality issues.
- 11:20 Chair Ellis With the requesting lawyer.
- 11:24 P. Levy Yes and certainly there are so called experts whom we no longer will approve because we have learned about problems with their services.
- 11:37 Chair Ellis I am guessing that this case will trigger in the minds of some PCR lawyers that past actions we have taken approving or not approving experts are fair game.
- 11:52 P. Levy Yes. It is something that is certainly something to examine in post-conviction. I mentioned that the federal habeas and state PCR last year a conviction and sentence in a death penalty case was set aside largely because the experts selected by the original trial team. That expert and the defense that that expert was selected to advance was said to be – have no reasoned – there was not a good reason to select that expert and advance that defense. There were different ways in which the case should have been developed. As this case says, the choice was not made after thorough investigation of the facts and the law.
- 12:54 Chair Ellis I would assume this case gives us much stronger political cover if Josh Marquis, or someone of his persuasion, wants to attack us as being wasteful spenders.

13:10 P. Levy I think we still have to exercise our function as it is intended. We should only be approving expenses that are shown to us to be reasonable and necessary, but I think a lot has changed since 2003, when there were hearings on predecessors and the agency's function in reviewing these expenses. I think the reason this case is really interesting and important is recognizing both the importance of expert testimony in criminal cases and the possibility that the government's experts are either not using good science or have gotten it wrong. I think there has been quite a development of that understanding since 2003.

14:14 Chair Ellis I would commend you. You have gone a long number of years, and this has always been to me an issue that could come back to subject us to criticism, and I don't think you have drawn that.

14:30 P. Levy We are criticized from time to time. It hasn't boiled up to that level. In fact, many of our non-routine expenses are prosecution generated in the sense that we spend a great deal of money on psychological evaluations in sex cases especially. On psycho-sexual evaluations and these are largely requested because the prosecution will not engage in plea negotiations without them. So we are performing psych-evaluations for the prosecution in many cases.

15:08 Chair Ellis Do you still have a panel of experienced defense lawyers you consult on these issues?

15:15 P. Levy We still have a capital peer panel with whom we consult occasionally. There are instances with some expenses that we do seek outside input on the appropriateness of the expert or the expense in the type of case.

15:43 Chair Ellis Other questions or comments?

15:43 S. McCrea Paul, I understand it is not reasonable to tell a lawyer whose non-routine expense request has been denied. Okay you need to do A, B, C, and D to bring it up to the standard. What I am wondering is there a way to post maybe more information on the OPDS website? Like maybe this case should be referred to at least decimate. This came out in February so it is pretty recent.

16:17 P. Levy A couple of things. Quite a few years I wrote a paper for an OCDLA conference about requesting non-routine expenses. I have talked about that subject at a number of conferences. The most recent time was at last year's management conference. That one included an exhibit annotating a good and a bad request. It has been out there and we have regularly talked about it and publish updates about it for OCDLA. There are some people that you just can't reach for various reasons. The other thing is that if we get a non-routine expense request in a case and it isn't sufficient, but it appears that the expense could be necessary. When we have the time and this isn't always the case, we will email the lawyer. Rather than deny it we will ask questions, sort of guided questions, to see if there is more information that can be provided.

17:47 Chair Ellis You made a comment early on that it is not your job to help lawyers who aren't following the right process for requesting an expert.

17:59 P. Levy I hope I didn't say that. What I hope I said was that if we have a request that doesn't provide us the information that we need to allow the expense, we can't read between the lines and guess.

18:20 Chair Ellis But you are saying now is you do go back to elicit the information.

18:24 P. Levy When we have the time and when it appears that there is information that would be helpful, yes.

18:31 Chair Ellis I am just trying to think this through what is in the best interest of the funds we have for this Commission. Somehow it troubles me if you see a lawyer who could make a proper request,

is not making a proper request, you deny it and then you go through a whole process that leads to a decision like this one. That is very wasteful.

- 18:48 P. Levy True. That is why we do follow up when we are able to. We have many roles and interests and functions here. One is that we are working with lawyers who know what they are doing and how to do their job. We want them to serve the clients well. We are trusted with this function of reviewing requests for money and only allowing it when the proper showing has been made for it. They all intersect. If certainly come to know when certain lawyers aren't getting it and you see it over and over again. We follow up either with them or their administrators when we are able to. We are not just sort of blindly saying, "Denied, denied, denied," heedless of the impact on the client, either the client whose case is at issue or other clients that the lawyer may be representing.
- 20:08 S. McCrea So, Paul, my suggestion because I started out with could we put maybe your paper on the OPDS website or if you aren't comfortable with that...
- 20:17 P. Levy No I am comfortable with that.
- 20:17 S. McCrea And if not we could put it on the OCDLA library defense. Because somebody like me who doesn't do court appointed cases, but every once in a while I need to ask for a non-routine expense, it would be helpful to be able to have a point of reference. I think I am experienced enough since I do the federal cases that I know to put a lot into my request to try to make it easy for you guys, besides the fact that being a commissioner I want to make your lives easier. It would be helpful for a practitioner to have a place to go to be able to double check that. I think that would facilitate your workload as well.
- 20:55 P. Levy I agree. We will see. Again, we have put a great deal of information out there is many different ways and it still will not reach some people. We have on our website a fairly old document. We may even have my paper on their now that is meant to guide lawyers in preparing these requests. It is a very good suggestion that we put this paper on there.
- 21:27 S. McCrea And maybe the case too, or at least a reference to the case. I can incorporate it into my paper now.
- 21:40 P. Levy Consider it done.
- 21:45 S. McCrea Excellent.
- Agenda Item No. 3 Regional Stabilization Policy Option Package**
- 21:51 Chair Ellis The next item is the regional stabilization policy option package. Nancy, do you want to take us through this?
- 22:01 N. Cozine Yes. Good morning, Chair Ellis, members of the Commission. I hope you have had opportunity to review the report which attempts to take the information that we learned from our six different regional, and two provider specific, meetings and condense it into something of a summary for each of those meetings, but also attempts to take all of the priorities and list them out in the conclusion and recommendations so that we can have a discussion about what themes were generated during these conversations and what ought to be built into a final policy option package. In terms of timing, we are in the process of being able to start plugging numbers into the statewide system that will help us determine the current service level amounts. We have to do that before we can start the next step of building, on top of that, the policy option packages. That will be done for both this office and for the professional services account. I am very pleased to see that we have a lot of providers in the room today who I hope are here to give you their thoughts on whether or not these conclusions and recommendations capture their sentiments and their needs. We also are joined today by our

legislative fiscal office analyst, which is wonderful. He can hear some of the feedback directly. We look forward to building a policy option package that will reflect the needs of our providers. At the next meeting we intend to take the information we learned today and have a more concise list of priorities. The intent for today was really to give you time to hear from providers. If you have any questions of me about the report, I did catch two typos that are corrected already, but not in your version. I know we have had some feedback from providers that was provided to us electronically. We gave a handout for one of those. That was from Rob Harris in Washington County. I believe some of our analysts have information from providers who weren't able to come today. We can save that feedback until the end since we do have providers who took the time to come here in person.

24:39 Chair Ellis

We will take all that this morning. I wanted to ask have we attempted to put a dollar sign on any of this.

24:50 N. Cozine

You know we really do need to build current service level first to see where that puts us. Then we will build dollar signs on top once we do that. We were granted policy option package funding during this last session. We need an opportunity to build that into our ongoing budget. Once we have done that and established current service level we can put dollar figures into this. I hope to be able to have that for you at our May 15 meeting.

25:19 Chair Ellis

I think the grant of the POP in this last session is a rare event. It has only happened, I think, twice in the history of the – at least my awareness in the history. I think the fact that they did it is an encouraging sign. They do pay attention to these POPs.

25:41 N. Cozine

Yes. We really want to make this one a very strong and compelling package. I think that the information we learned was compelling in and of itself. We will continue to work on it. We will continue to gather information. One of the questions that I think is before us is we have this list of six, seven actually, priorities and we could take different approaches. You could take all seven and make some headway on each of them, or we could pick out the top three and make bigger headway on just those three, in terms of how we structure our package. I am hoping that providers who are present will give us their thoughts on what our top priorities of these listed seven, and did we miss one. I want to take the time to make this into a package that really does speak to the needs that are out there in the community so that our clients get the service that they need and representation that will avoid situations where cases are reversed, or people who are actually innocent are convicted.

26:57 Chair Ellis

We would be happy to take testimony from anyone who cares to give it. Mark, are you volunteering. Everybody else is looking at the floor. It feels like a law school class.

27:18 M. McKechnie

Good morning. Mark McKechnie from Youths, Rights & Justice. I will be brief. I hadn't prepared anything formal. I would comment that we certainly appreciated the additional funds that were allocated for salaries, but I would say that the excitement dropped after about five minutes when the realization was that there was no assistance with caseloads. I wouldn't say that we shouldn't try to continue to increase salaries because that certainly helps us recruit and retain qualified people. There is a lot of fatigue in practice around the caseload sizes. Then have been consistently higher than we would like. As we have made this point many times here and in the legislature and to anyone who will listen, the cases have become more complex. I think there has been a funneling or cases over the last decade where every part of the system has had their resources reduced. That may mean that DHS only files petitions on more extreme and complicated cases and cases where they have attempted to work with a family voluntarily for a while until they finally file a petition. It may mean that DA's are not filing on the less serious offenses that they were before. When we are paid on a volume basis, a number of cases, that means we are doing more work even if we get the same number of cases because they are that much harder and that much more time consuming. I would say that the greatest stress on our practice is the consistently high caseloads and the fact that those cases are more and more complicated and time consuming. I think attorneys understand that

it is not a 9 to 5 job and that it takes work in the evenings and weekends especially to prepare for trial. But what I am hearing is it becoming the norm rather than the exception. They are working in the evenings to read discovery and prepare for the next day's hearings. They are working on the weekend nearly every week or most weeks, rather than an ebb and flow where they get busy preparing for a particular trial. Now it is standard that they do that most of the time. As you can imagine it is hard to keep up that pace for years and years and years. Those are my comments. I think caseload reduction, at least, in the juvenile arena needs to be part of any proposal.

30:25 Chair Ellis

Okay. Any other input.

30:34 L. Borg

First of all, Lane Borg, Metropolitan Public Defenders. Thank you for this opportunity to comment. What occurs to me in the process of this, and we are still in the middle of the process of this and I don't have any criticism or comments on OPDS progress so far in terms of this post. I am not making a comment on the policy option package. My office benefitted greatly from that and it was greatly appreciated by the attorneys, but it created some internal dissention because it couldn't be used for the support staff. That was something that was very divisive among the union. On that I would carry the message that we do need more but we need it for our support staff. We need it for our investigators and to retain quality investigators and to retain quality support staff. Especially in the specialty courts where you need experienced legal assistants that have that kind of continuity. It is not really an entry level job to be the legal assistance for STOP courts for the drug courts. But the thing I really want to comment on is that I think what I hope we don't lose regardless of the outcome, I am hopeful and will work hard for good outcome in the legislature on this regional policy option package that Nancy is developing, but the byproduct that I think is really critical keep is that it is an open analysis of what we do and how we look at this. So when you pair that with Wilbur out of the State of Washington and looking at caseloads and looking quality and looking at the whole package, what we are seeing is that all those things intersect when you start having a conversation about what is appropriate compensation. It begs the question of what is appropriate compensation for what? What are you buying? What services are you buying? What do we need out there? How does that work together? I am very pleased with the progress so far. The conversations that we are having internally within indigent defense, or public defense, is about that. It is about what fair compensation is and what is needed for that, but also what are we buying? How are we really making sure that we are getting the money? That they are doing the work? That they are doing a reasonable amount of work and that they have the resources in which to do that. There is a lot of interesting byproduct information and hope we keep that up. I hope the Commission is really able to see that in the process. Thank you.

33:14 Chair Ellis

Thank you. Good morning.

33:23 J. Martz

Good morning, Chair Ellis, members of the Commission. I am Jon Martz from the Portland Defense Consortium. I have just a couple of just general comments. It is deeply appreciated by our group, the regional meetings, and a chance to really sit down with the people that matter, the providers and with OPDS, especially Director Cozine who listened. We had a lot to say. There were a lot issues. It was very productive. We were very pleased to see in the agenda item that those concerns were reflected. A lot of times all we can talk about is the view from our foxhole. This process is brought a lot of the providers together so we talk amongst ourselves and try and figure out what our common needs are. It has been echoed by people who have spoken before. The cases have gotten more complex. Our group does mostly Measure 11 cases. I look around our group and I see people in their late 50's to mid-60's who have been doing this 25, 30, 35 years. I look around saying where are the young guys? Where are the young people coming in to do this work? Our group has been able to bring in a couple of people at great sacrifice. We had one lawyer in our group dip into her personal savings to pay the guy's health insurance. We look at this fellow and we see a star in the making. This fellow is going to be good. We want to do everything we can to bring him

in and make sure quality services are provided. It takes money. That is the bottom line. Our overhead keeps increasing. We have heard talk that consortiums make money on the side. Our group has been drawn in so deep into indigent defense work that it is what we do. We take that seriously. I had a phone call the other day from a fellow that was referred to me by a law school classmate on a very serious sex charge. He was looking to retain me. I talked to him and I started thinking about it. I wound up very gently steering him to somebody in the private sector that could handle it. I was hearing from this fellow and I heard from the lawyer that this fellow may be innocence. Whether or not that is the case, I had to sit down and think did I have the time and energy to this case that it would deserve. Do I look this guy in the eye and say, "I am going to give you 100%?" The more I thought about it could I drag my partner into this. I talked to him and we just came to the conclusion that we can't do this. It is not fair to him. It is not fair to us. It is not fair to our court appointed clients. Sorry I can't deal with you because I am making money on this end. It just wasn't fair. So we had to let it go. I will live with that decision. That is fine. But it is becoming a strain. Even a routine drug case now with Measure 57 is not easy. Dealing with the prosecutors now and everything is by committee. Everything is policy. We take STOP court cases. Whenever possible we will get them into STOP court. They go to the public defender, but there are conflicts. I was just told the other day, I have a fellow and we get him into STOP court and we can't take him. We have the co-defendant. Fine. I am riding that client now for a year. This is a situation where God Bless him he keeps missing court. I will get a call. You have to be in court tomorrow. Your guy missed court. We picked him up last night. Drop everything and run to this STOP hearing. I get no notice about that. I am happy to do it. I want to see this guy graduation. I will ride him out for a year, but how many of those can I do and still look the Measure 11 clients in the eye and say, "I am working on your case. I'm on it." So at some point it just starts to grind you down. Yes. It is weekends. It is evenings. It is what we do. It is like my wife tells me, "Hey, it is what you signed up for." I just wish they would have showed me the movie before I signed up. I am happy to do it. I think all my colleagues are devoted to this, but it is getting increasingly hard and it is getting hard as somebody trying to operate a business to make this work. I am hearing that from more and more colleagues. Most of the people that have been doing it for a long time are looking for the exits. They feel they are working too hard. It is a constant grind. They are having a hard time making ends meet. Unfortunately, the bottom line is it takes money. We are very appreciative that we are being listened to. We are appreciative that OCDLA has set up a pay parity committee. There have been numerous meetings on that. I think there is progress being made, but, quite frankly, most of the consortiums we are hanging on by the fingernails. We have got things coming up. We have eCourt coming up. We have to get up to speed on that. There is just more things being layered on top of us. We are worried that it is going to get between us and delivering good service to the clients.

39:37 S. McCrea

So, Jon, what I hear you saying, and let me see if I have got this right, really what I am hearing you say is the primary thing – I know there is all these other things too, but when you say in terms of money you are really talking about caseload. Is that fair? What I am hearing you say is I had potential retained case come in and I didn't feel like I could take it even though it would be presumably a chunk of money. Unless you were going to do it on a reduced fee basis, because I have got so many Ballot Measure 11 cases as a member of the consortium that I just didn't have any extra time to be able to take on this retained case.

40:17 J. Martz

Yes.

40:17 S. McCrea

Okay. I just wanted to make sure that I had it right. So in terms of money there would be more money if there was less caseload?

40:26 J. Martz

Possibly.

40:28 S. McCrea

I am not trying to put you into an either or, I just want to make sure that I got the message. I understand what you are saying. Overhead keeps going up. You keep running as fast as you

can to stay in the same position. The cases are more complex. We get that. I am just trying to get a sense from you in terms of what Nancy was talking about with seven recommendations versus trying to prioritize. So what I think I am hearing you say is one of the key things for you, not the only thing certainly, would be reduced caseload.

- 41:06 J. Martz I think it is a combination. We would all like more time to work our cases. That has been a given since I started practicing. But, quite frankly, it is also a matter of compensation. The compensation is not keeping up.
- 41:24 S. McCrea Absolutely. I totally agree with you.
- 41:25 J. Martz I think that is across the board. It is not us. It is the public defenders. It is private bar. There are people who think private consortiums are just out for themselves. They are looking to get whatever they can get. I suppose that is fair argument. What we are really looking for, and what I have particularly always been interested in, is and across the board everybody being adequately compensated from the lawyers to the trial assistants to the investigators. This is not just a problem with the lawyers. It is a systematic problem. My worry is that in the future that when this generation, for one of a better term, fades out that there is not going to be a core of people coming in that can deliver this kind of service. I think the service that is being delivered is pretty darn good. Just to follow up on something that Paul mentioned. I have found dealing on a day to day basis with OPDS for indigent requests they have been the best I have seen in my 25 years. They don't demand a lot. They demand information. I think I have had one request turned down in 25 years and I was kind of shocked. I talked to my partner and he said, "Call Paul Levy." So I called Paul. They turned down my request. He did not give me here is what you do. He looked at the request and said that they needed more information. When I went back and looked at my original request that is fair. I redid it and it was approved. It is not rocket science. You just need to justify what you are doing, but I have found them more than helpful if you have a question you can call them. You can call your analyst. They are easy to work with. They are very user friendly. I just wanted to get that out there. I appreciate the attention that the Commission has given this. I really appreciate the attention that John Potter and OCDLA have given this issue. I am cautiously optimistic that we can get through this. Thank you for your time.
- 43:43 Chair Ellis I was interested in your description of the younger lawyer coming into your consortium. Can you tell us a little more about that lawyer? Where that lawyer got trained and enough experience that he could handle the kind of cases that your group does.
- 44:03 J. Martz He is not doing Measure 11 cases. He is a young fellow, married, small children. I believe he practiced out of our jurisdiction for a little while. He came in and he is being started on low level stuff, pvs, misdemeanors, some C felonies.
- 44:26 Chair Ellis He is a solo?
- 44:28 J. Martz Well he joined one of our member firms, but it is basically the main firm member and this association. We have all been impressed with him. We would like to see him stay. We think he has a bright future. The firm owner is doing everything she can to hang on to him. We encourage him. He is just down the hall from my office. I have run into him. We talk about things. That is the one thing I like about our consortium. There is always somebody you can talk to and bounce things off of. I am just very impressed with the fellow. I keep encouraging him to hang in there. He has taken it with a lot of grace and he works hard. I want to see him succeed. I think if he succeeds we all benefit. I want to see more like him and I am not seeing it. I am not seeing that many people that want to get involved in this because they look at the work, they look at the compensation, and they say, "Are you kidding?" I have had public defenders say it is a symbiotic relationship. We get these young folks in and we train them and then they move on. I was thinking why in the heck would some public defender come to our consortium and say you are going to get paid less, you are

going to work harder, and are you kidding. That is all we can offer you. We can't do any more. This is what it is. We don't like being in that position.

- 46:13 Chair Ellis Do you have any comment on the seven recommended funding priorities. I don't expect that the seven will all find their way into the same package, so I am interested in how you rate them out.
- 46:28 J. Martz I think they are well thought out. I think they are essential. My preference would be they are all critical. If I had to pick and choose then I think my top two would be dealing with caseloads and equalizing compensation.
- 46:50 Chair Ellis Equalizing between defense providers or equalizing between defense and prosecution providers?
- 47:00 J. Martz Eventually we would like to get even with the prosecutors.
- 47:06 Chair Ellis You want to rephrase that?
- 47:09 J. Martz Right now, though, because of the way things are right now, and I am not here to criticize how things went in the past. The past is the past. What is done is done. I also understand or are becoming aware of the realities of dealing with the legislature and everybody doing the best that they can. Right now it has become unequal amongst providers. We need to stabilization that. That is why I liked the fact they called stabilization policy. Then you will have to try to unify trying to equalize things or get some kind of parity with the prosecutors. But right now it is out of balance even among providers. That really has to be addressed. Again, I am not speaking about just consortia and private bar. I want to see a better deal for staff, for investigators, for private bar, for down state defenders, folks from Eastern Oregon. People would look at well if we raise everybody up in Eastern Oregon they have different issues. Yeah getting people up to Eastern Oregon would be one. The only way you are going to get them out there is to say you are going to make a living doing it. I understand the differences between different jurisdictions, but I think there is a way to come at it. I think OPDS is on the right track. We stand ready to work with anybody and use any resources we have to try and push this thing forward.
- 48:48 Chair Ellis Thank you.
- 48:48 J. Potter Mr. Chair - John you talked about the dollars and how tough it is right now and you have heard Nancy say that they haven't hung dollars on this POP yet. Have you sat down and tried to figure out what it would take to make it work? What rates would they have to be in order to make it work?
- 49:13 J. Martz One of our members is on the pay parity committee. We are aware of what the POP was that was dedicated to public defense the last go round. Kind of ballpark I think it is kind of going to take somewhere, and this is my kind of view of things and I am not a numbers guy, ask my wife, but I think you are talking somewhere in the neighborhood of probably \$20 - \$25 million, with a dedicated chunk of that going to equalize providers. I would say that is probably \$15 or \$16 million of that. The balance going to - because I know even amongst public defenders there is not totally parity. To bring the down state defenders up and to bring their staffs up. I don't want to see union problems. It is like my old boss told me. I am really sorry but a good legal secretary and a good trial assistant are worth more than a lawyer. I want to see a continuation and inflow of talented people in those positions. It is going to take a chunk of change.
- 50:41 J. Potter But for your consortium specifically numbers?

50:43 J. Martz Well, Mr. Liebowitz, our administrator is here. Maybe he can break that down. Like I said I am not a numbers guy. I think just again speaking for me and my partner and some of the people that I deal with every day, if we can at least get to the point where our overhead is taken care of. If we are doing 100% public defense and I'm not sure but I think the capital defenders they get enough money to compensate themselves and to run an office. God Bless them they deserve it. If we are doing the same thing and we have far more clients and overhead is just as great, we would like that factored in.

51:32 S. McCrea Do you have a sense of your hourly overhead? I am just asking because there was a study done a few years ago that the feds looked at. The average overhead was about \$64 an hour.

51:45 J. Martz You know I can't break it down by the hour. I know that out of my overall compensation under the contract about \$20,000 to \$25,000 a year walks out the door that I don't see in overhead. That is rent, utilities, PLF, bar dues. My partner and I we are kind of like this low flying plane. We are hovering over the waves and we keep throwing stuff off the plane to get it to sail. We are worried that at some point we are going to have to throw something pretty important off.

52:22 S. McCrea Like one of the two of you.

52:22 J. Martz Yeah. We would be looking at each other like that is a meal over there. We want to make this work. We are worried just the stress on the lawyers. I have seen some lawyers just completely flame out. They are almost like walking wounded. Most of you know you practice that a study diet of some of just the worse stuff that you can imagine, after awhile it is going to start taking its toll. If you have to start worrying about the other stuff on top of that then at some point you hit the tipping point. We have seen lawyers hit the wall. We don't want to see that.

53:07 Chair Ellis Your consortium sends them all to the bench.

53:15 J. Martz That is the smart ones. We want to keep those coming in. We are proud of the fact that we have sent our members to the bench. We think they are the best and the brightest. We are usually sorry to see them go, but we are slapping them on the back. We want to keep that going. We have also seen public defenders hit the bench. We think they are the best and the brightest. I am very proud of the judiciary that we have in Multnomah County. I have been to many counties around the state. Not so much anymore and I am very proud of our jurisdiction. I am very proud when I read cases like that Supreme Court case. I heard people criticize public defenders. You are under paid. Just plead them out. Maybe you are talking about Alabama. You are not talking about Oregon. I know that within the limits of the resources that if you make a reasonable request it will be granted. I did capital cases for a while and I was stunned at the amount of resources that were available if you would just ask. Compared to other states where you have to scrap to get \$1,000 for a capital case. Are you kidding? I think Oregon should be held out as model of how you do this. I would just like to see that keep going. It just takes money.

54:51 J. Potter I want to talk about the equalization issue. I have different thesis. I am not sure we should be looking at equalization because I don't think things are equal. You do have a representative on the pay parity committee. They have looked at all these numbers and it would appear that your consortium gets paid more than any other consortium in the state and gets paid more than the public defender for the case types. Now your case mix is serious and we have to factor that in, but you are getting paid more after you figure in the investigation costs. You can either buy into that or not, but that is what the initial data shows. I am not troubled by that because I think that the value of the consortia is what should be argued. That is where I think you should be going. What you do is provide a service that can't be provided by other lawyers. You take cases from the public defender's office that they can't take. They have conflicted out of them and we need a system that allows that to happen. In your particular

case your consortium has experienced lawyers throughout. You are trying to get new lawyers in and I understand the graying of the bar. We have faced this all the time but I am not sure that equalization serves you and your consortium very well. I think the argument should be from consortia is different. You provide a valuable service and it is worth in. You are handling cases that can't be handled by other people and you have to pay for it. That is sort of one thesis. Let me run this other thesis by you because people have challenged me on it. I want to see what your thought is. I believe that it is necessarily more expensive for consortia that are doing 100% of the work like you are doing that have 17 members in the consortia. Those members are spread out between six or seven different offices. That is necessarily more expensive to support the overhead of that kind of a plan as opposed to a centralized office. If that is a given and we give that the consortia is a critical part of the system, why aren't we arguing that we should pay you more?

57:12 J. Martz

Quite frankly, Mr. Potter, I agree. Maybe it is just years of going through this it has kind of worn on me a little bit. We have been so use to taking whatever we can get and maybe not being as assertive. Again, all I can tell you is the view from my foxhole and the foxholes on the left and the right, but my partner and I broke it down. After overhead we make less than a misdemeanor defender with maybe five or six years of experience. Our take home pay is less. My partner even looked at me and said, "What in the hell am I doing?"

58:02 J. Potter

I agree it is not right. When I was asking you earlier what is the number to make it right. Forget equalization. What is the number that makes this right? That is what I would suggest needs to be developed. It may be different for each consortia members. You have got two people in your office. Some of the consortia members have one person in the office. Others may have more than two or three.

58:33 J. Martz

That is correct. We have been trying to work that out amongst ourselves. We feel we owe it to you to try to give you as accurate information as we can and not make it look like we are just out for some bucks here just because. We have stated this before. If you want data then we will get you data. That is what we are trying to organize. Do I have a number off the top of my head right now? Sort of. Maybe. I would feel more comfortable coming to you and saying this is what we need and here is the data that backs it up.

59:12 J. Potter

I think that is information that the OPDS staff would certainly find helpful. In a sense you are doing it in the RFP, but what you are telling me at the same time is you have been told take the crumbs. You can put a budget request in there but you are only going to get this much.

59:34 J. Martz

That is pretty much how it has been and I don't blame OPDS for that. They have a certain chunk of money that they have allocate and they have to do it the best we can. We do think that a line item RFP would be more efficient in getting the information out. Usually it is we will take this amount of cases for this much money. I think if we could break it down a little further, I think that would give both OPDS and the Commission a little bit better idea of why we are asking for this. We are talking public dollars here and we take that seriously. You have to envision that if somebody wants to scrutinize this how do you justify this? Here is how. This is what it costs.

1:00:18 J. Potter

So we would be going full circle from the old days where we use to have line items for all the contractors. There were some contractors that complained that line item budgeting was kind of a pain the butt. So we went to this other system. What you are suggesting now maybe there is some value in making your case if you were to spell this stuff out line item.

1:00:40 J. Martz

I think so. We don't have to get down to every paper clip and pencil. There are just certain general areas where we could, I think, have everything in common with public defense, consortia, private bar, and we all have these items. I think it is helpful to the public. I think it is helpful to the legislature. I think it is helpful for OPDS. Yes it is more work for everybody. I think overall you have to have an eye on people are looking at this and

wondering where is all this money going. I would like to be able to say that here it is and you are still getting one heck of a bang for the buck. I don't want to get into it but I think everybody in this room knows that the public is well served. They are getting a heck of a bang for their buck for the money they invest and the service that they get.

1:01:34 J. Potter I agree and I don't think that message is getting through to legislators as well as it should. We certainly work on. If the overall average cost for all cases going through the system is \$500, and it is plus or minus, but it is about right outside of death penalty. It is in the \$500 range. Go see Ms. McCrea in private practice and have her do something for you for \$500.

1:02:02 J. Martz Mr. Potter, I do Measure 11 cases for what I did in the past. I got a guy into diversion on a DUII for it. I did his administrative hearing and if he qualifies we got him into diversion. I charged maybe \$1,500 a few years ago. Your average Measure 11 is \$1,800. I have had people call me and ask what it would cost if I hired you to do this case. I will pay you. You can do some more for me, can't you? You would be looking at about \$25,000 or \$30,000. That is not including the experts. Not including the investigator. That is what it costs. You look at that versus \$1,800 bucks on a multiple credit case, maybe a grand total of about \$8,000. You are looking at doing murders for \$18,000. When I was working capital cases the experts made that much. So, again, maybe it is partly our fault that we don't get that message out to the public. You are getting very good service and you are getting it at a rate that would floor most people if you knew the amount of work that went into it.

1:03:36 Chair Ellis Thank you.

1:03:46 D. Bouck Dan Bouck, public defender for Douglas County. Of the options I would chose the second option which is more money and caseload assignments. Last week Douglas County granted the DA's across the board pay raise and COLAs for the next two years of I think was about 2 or 3%. So what gains I made last year now I am farther behind than I was. So I need more money to get qualified attorneys and to keep them. The cases are complex. I can't just bring in newbies to do this stuff that cost less money. To do the more complex cases it takes money to retain them. I lost two attorneys last year.

1:04:30 Chair Ellis Remind me how large your office is?

1:04:32 D. Bouck I am at 12 now. I lost one attorney to the bench. The other attorney who is really an up and coming and would be a great attorney went to civil practice. We talked about it and there is no way I could match the amount of money she is going to make there, given she wants to start a family and so forth. There was just no comparison.

1:04:54 Chair Ellis Have you lost any to the DA?

1:04:54 D. Bouck No. We have tried to poach a few from them.

1:04:57 Chair Ellis Any success?

1:04:58 D. Bouck Almost. There are some we don't want. We are in the process of hiring right now. We just had an attorney retire as of two weeks ago. We already looked at few. The ones that we wanted they would take a pay cut to come work for us. That didn't work. We need more money for pay just to keep my people. The other is the quantity of cases. It is not so much the quantity because we know how many cases we can take. Dependency cases have gotten a lot more complex and we don't get paid for a lot of the hearings that they want us to go. They want us to go to FDM hearings; all these touchy, feeling hearings and meetings that have expanded the amount of time those cases take. We don't get credited for those times. If we could just get credit for all these extra appearances we have, continuing to take the same number of overall case credits, but we can't keep doing the cases as they expand at that same value amount. Cases are getting more complex. Our misdemeanors are many times more

complicated than the felonies just because of all the mental health issues that we are dealing with on most of our misdemeanors. As the report mentioned there is pretty much no mental health services south of Lane County, so it real expensive and we have to bring people in. I handle our drug court and I am working on the numbers now. The amount of time I spend on drug court now as opposed to when it was created, we have had one for 17 years, but even from for the last few years it is almost a half time job for me now in just handling drug court. We are being asked to do the same number of cases but the cases take way more time than they use. One solution for me is give credit for what I have to do on these dependency cases and I will keep the same 300 cases a month. A little bit more money on the other stuff would help.

1:07:05 Chair Ellis

I assume your office did benefit from the POP in the last session?

1:07:11 D. Bouck

Yes.

1:07:12 Chair Ellis

Are you able to comment on the comparison between comp and your office relative to providers who are not in the PD?

1:07:22 D. Bouck

We have a brand new consortium that has only been going now for three months. I don't know how they are handling it. It is a younger consortium. It is a nice situation. The graying part we have lost a lot of the graying part has gone away. I am one of the older people now. It is hard to say. I think in another year you will be able to get an idea of how they are doing, but it is too soon for even them to tell you.

1:07:59 Chair Ellis

It must be attractive enough that they would form the consortium, though?

1:08:09 D. Bouck

Most of them were already living down in Douglas County. It was a perfect time for them to go out and practice on their own. They are getting by on a practice of their own and we were funneling a lot of cases to them, our conflicts, because we didn't really have consortium. By de facto they were becoming consortium because we were constantly calling them up and they were taking cases. This last cycle they were approached to create consortium which makes it a lot easier for us. Now we call one person instead of calling six different firms and asking who would take it.

1:08:40 Chair Ellis

Did this have anything to do with the issue where you were moving to not have a particular judge? I remember this whole episode.

1:08:53 D. Bouck

No. No one still likes that judge. Unfortunately I have been so busy dealing with other things that I didn't get a chance to work with the legislature to amend the statute and correct the problem. We have sort of created a fix that our presiding court judge has agreed to. We have all just sort of agreed that it wouldn't hold up if anyone really wanted to challenge it. We have just sort of solved the problems in that way. We have been told we are on the short list now for getting a sixth judge. That would help some. Getting a new court administrator and getting the judge to sit down and work out some dysfunction amongst them would really help the system. One of the problems we are running into is the system in Douglas County is not very efficient including the DA's. Things just aren't getting done. When I started out I could get a trial in 90 days. Unless you are in custody, I might get luck and get something in nine months. In most cases you are a year away before you will get into court. You will get bumped two or three times and no one really cares. The judges don't trade cases. It is a series of problems that is just slowing the system down. We are carrying cases longer. As long as we have them open there is constant maintenance on those cases. It hurts me. It is not as bad as it was. We have got a system that is working, but it is not an ideal system.

1:10:26 Chair Ellis

Okay.

1:10:27 J. Potter Let's talk about the defense consortium. I don't think there is anybody here from the consortium. It is a new consortium. They have a little over a 1,000 cases and you have over 3,700 cases a year?

1:10:44 D. Bouck Yes.

1:10:44 J. Potter Why would somebody want to be in a consortia? If they looked at these numbers and they see what the state pays. Why do you think somebody would want to be in a consortia?

1:10:55 D. Bouck To get some paying clients. I don't think we have that many people in Douglas County that can retain a private attorney. They want to do criminal defense work. You have to be doing some criminal defense work to get those paying ones in. If you just do the paying ones if wouldn't keep their business running. They don't want to do divorces and some of the other stuff. The ones I know of are doing it as a supplement. Some of them are also trying to then work as the city prosecutor. They usually hold multiple titles.

1:11:33 J. Potter I will ask other consortia. It is a business model to take these contracts. It gives you a base, even though the base is pretty damn low.

1:11:48 D. Bouck The group got together and wanted that base of money. The ones I have spoken to and the one that I helped create his bid. You figure out what the money will be and whether or not it is enough to make a profit. They are not going to get rich but they know what they are getting.

1:12:10 Chair Ellis Any other questions? Thanks. Good to see you.

1:12:20 J. Nash I have a handout. Good morning. I am Jennifer Nash. I am the Benton County consortia administrator. I am here to talk generally about the POP. I did provide you with case rates specific to many counties, but really highlighting Benton County as an example of the problems with the consortia model and compensation that I see. Just by way of background. Our consortium has eight lawyers. We added a lawyer this time around. We paid for that lawyer out of our own pockets. Our case rate for this biennium was essentially the same, even though on paper we got a raise. We made just about the same amount of money, so when we added a lawyer we all just divided up the pie with one more share. We actually are receiving less money. We did that as a way to reduce caseloads. Our consortia, depending on the provider, has somewhere between 70% and 95% of the work that we do. We all do some retained work but that really varies by attorney how much work they are able to do or want to do in terms of retained caseload. Basically we have to take private work to subsidize the public defense work. Ms. McCrea you were asking about overhead. I was doing a quick calculation of my office's overhead. It comes out to right about \$64 an hour as you said. So \$64 an hour overhead with the amount of money that our office in particular receives. My office is actually paid administration, which is not the way for many consortia, but mine is. So my office after overhead we have about \$4,000 a month and that does not include the attorney's salaries. So \$4,000 a month for each lawyer. I'm sorry. There is \$8,000 a month. So each lawyer has \$4,000 a month for salary, benefits, etc., so if we want to make more than \$48,000 a year gross we need to take privately retained cases. That is the way it is with all of the attorneys in our group.

1:14:59 Chair Ellis Is your group able to do that?

1:14:59 J. Nash It depends. That is part of the issue. The fluctuation in case volume dictates whether or not we can take other cases and how many of those cases we can take and how many of those cases. It ultimately comes down to quality of life. How many hours do you want to sleep and how many hours do you want to spend with your kids and all of those other things. Some of our providers take very few cases and have very low overhead. Some of them take more retained cases and have a little bit higher overhead or little bit higher income. That is really a

personal choice. Our group doesn't dictate how many cases you can take. We do have contracts with each of our lawyers and the contracts make our public defense work a priority. You have to be able to do all of your public defense work in the manner to provide adequate assistance of counsel before you are even allowed to consider taking other cases. We have not really had an issue with that. But as everyone else has said the cases are more difficult now. With the reduction in resources, district attorney offices, police departments, DHS, all of those folks aren't filing on the lower level cases only on the higher cases. Even misdemeanor cases with mental issues and drug and alcohol issues are extremely difficult. One of the things that made me very, very happy with the Affordable Care Act was that now people are going to have mental health and drug and alcohol treatment. I think things will get better because one of the issues, of course, that we have had is we haven't had any resources either. So hopefully that will help in that regard, but the cases are extremely to resolve. Measure 11 cases, ultimately when you are done with a Measure 11 case if you haven't gone to trial you are going to pay somewhere in the neighborhood of \$10 an hour by the time you are done, if you are lucky, with how much work that you have put into them, and trial cases we don't even need to talk about that. I am currently on the Pay Parity Committee. That committee through OCDLA is really grappling with the issue of what "parity" really means. It is a very difficult concept. Do we count case rate? Do we count compensation? We look at lots and lots of different issues. We have had many meetings and we have gone round and round and we are still not there yet. My anticipation is that in May at the May Commission meeting, there will be a presentation by the Pay Parity Committee where the question about numbers and what we think that means really will get fleshed out to the best of our ability, but that even is a very difficult thing to figure out. I very much support the framework of the POP that has been put forward by OPDS with an emphasis and priority on Step 3. Step 1 and 2 are really just to normalize what has already been done. The issue regarding parity and stabilization and I would really advocate, although I do recognize that there are issues with staff and I could absolutely not function without my staff, we really need to address this issue of pay parity with lawyers before we address the issue of pay parity with staff. I think that there is some serious discontentment among providers and if there was a POP that was put forward that paid public defender's staff first, there would perhaps be an all out rebellion with lawyers. We are all struggling and I think that will be an almost difficult, if not impossible, pill to swallow. The parity issue with compensation really is just a universal.....

- 1:18:49 Chair Ellis Let me just pause, that is on the assumption that we go some kind of line item type of contracting as opposed to case unit.
- 1:19:04 J. Nash Not necessarily.
- 1:19:04 Chair Ellis Because case unit leaves to the provider how to divide it up between the lawyer and the staff.
- 1:19:12 J. Nash I agree. Except that the last POP didn't do that because it gave money specifically for lawyers. So what I am saying is we can't be in that position again where there is a POP that is put forward where there is money specifically for staff before lawyers. This is a really universal concern. I have heard some rumblings around that this issue is really a Multnomah and Washington County issue. This is not a Multnomah and Washington County issue. This is an issue that is really with the providers throughout the state that I have talked to, the consortia providers, and hourly providers as well.
- 1:19:58 Chair Ellis Do you see the greater issue on parity being providers within a community, or one community versus another community?
- 1:20:05 J. Nash Well we all want to be paid the same amount that the DAs are. Essentially what we are saying is we want to be paid equally for the work that is done. We want to be paid the same amount or more as public defenders. I agree with Commissioner Potter that the consortia model by itself, standing by itself, costs more. It does.

1:20:40 Chair Ellis Because of the multiple overhead.

1:20:40 J. Nash Exactly. You have a duplication of the overhead. But it is also an essential function of the system.

1:20:49 Chair Ellis But just to be devil's advocate, it costs less in some sense because you don't have the training, supervision costs like the PDs have.

1:20:52 J. Nash I completely disagree with you there. You and I have discussed this before. I realize that public defenders maybe have a more robust system in place, but to say that consortia lawyers are not supervising or training, I don't think is accurate. We have two new lawyers in our consortium, and by new they are not new to practice, but they are not qualified at this point to take all case types. So we are training lawyers. How we are doing that is we are mentoring those lawyers. We are explaining them - we are training them. This is how you do these things. This is how you do that thing so that we can get those people up to a level where they are able to take all cases types, which is what the expectation in our consortium is that we take all case types. So we also train lawyers. Our consortium has eight lawyers. Two of those lawyers came from public defender offices 12 years ago at this point. We are not a consortium that has lawyers that are being trained by public defender and then they come over to our consortium. I don't think that is actually the norm because of the pay issue. So when you leave a public defender's office you are going into private practice. You are not going into a public defense consortia. If we want newer lawyers we have to train those lawyers as well.

1:22:31 Chair Ellis How are we supposed to deal with data of the kind you have here.

1:22:38 J. Nash Yes. This is just an example.

1:22:38 Chair Ellis I am not trying to challenge your data. You emphasis that Benton County has the highest cost of living outside of Portland. Then you say it has the highest poverty rate of the included counties, which I am sure there is a way to reconcile why that would be. Do you envision that OPDS should look at relative cost of living county by county?

1:23:13 J. Nash Yes and here is why. Our county is unique because when I look at the POP and I see stabilization among providers and geographic regions and among county with other providers, we are it. There is no one else at Benton County. There is no one to compare us to. We don't have a public defender's office. You can't compare us to Linn County, which I didn't include here, because the median value for owner occupied homes in Linn County is \$176,000. You go across the river and it is a completely different makeup of folks over there and what it costs to live over there. I had a house in Lane County that I lived in for 18 years. I didn't want to commute anymore so I sold it and moved to Benton County. I cannot buy a house yet because I can't afford it. There is a strong urban growth boundary and a very bad, depending on how you look at it, development code in Benton County that doesn't allow any real building. You have an existing group of homes and that is where you live and that is it. I had a neighbor who literally had their house burn down so that they could build another house they wanted on their same piece of property. You can't go buy comparable property at a reasonable, affordable rate. It is extremely expensive to live in Benton County. One of the new lawyers that we have commutes from Eugene.

1:24:45 Chair Ellis You are going to find an ally with Jack Morris. Hood River is a very expensive place to live too.

1:24:52 J. Nash Yes it is. I didn't include his county because I didn't include counties that had public defenders or law firms. This is just consortia information. I do think when OPDS looks at regional stabilization is one of the things they need to look at is how much does it cost to live

in that community, and do you need to compensate providers with that the understanding. I used Benton County as an example because everyone who lives in Benton County knows this.

- 1:25:21 Chair Ellis      So in your mind parity isn't just same dollars. Parity is same dollars relative to cost of living.
- 1:25:30 J. Nash      Yes. My understand is that is the framework that the POP was analyzed for the last go around. So there was a pot of money that was given to public defenders and that was not divided up evenly. That was divided up by relative pay with district attorney offices in that county, which is relative to the cost of living in that county, so, yes, I agree that is the way it should be done.
- 1:25:59 Chair Ellis      Other questions?
- 1:25:59 J. Potter      Jennifer you have eight lawyers. What is the FTE for the contract work?
- 1:26:02 J. Nash      Somewhere between 75% and 95% and it depends on the lawyer.
- 1:26:10 J. Potter      So really six or close to seven FTE to do the work?
- 1:26:15 J. Nash      Yes.
- 1:26:15 J. Potter      You touched on the DA thing. Do you have happen to know, we had it in the pay parity committee and I don't have it with me, the DA salaries?
- 1:26:28 J. Nash      I walked out this morning and forgot to look at that. I have it but did not look at it. I remember when I looked at it I thought I can't believe how much that is. We actually had a DA who just left the DA's office and went to the AG's office. She told me last week she got a \$30,000 a year raise. It is low even on that end. It is very high. I know our elected DA is paid part by the county and part by the state. He has got a supplement. I don't remember. I won't say. I know he is dual paid.
- 1:27:07 J. Potter      Lots of the elected DA's are. I guess once in a while county commissioners decide to hold back.
- 1:27:17 S. McCrea      So, Jennifer, let's talk about increasing case complexity for a minute. Of course Ballot Measure 11 cases, by definition, they are mandatory minimums. That is always really difficult. Then we as defenders have to respond to the charging decisions by the district attorney, so we don't even have control over that. When you have multiple charges you always have to be looking to see if in terms of negotiation or a sentence where the person may end up getting consecutive time. There are all kinds of issues. My question for you is one thing that I have been seeing lately, and I am wondering if you are seeing it also, is that the investigation being done on the part of the prosecution has become less - how do I say - less intensive which is making it incumbent upon the defense to do more investigation.
- 1:28:18 J. Nash      Yes. For example, I have a case that I got a couple of weeks ago where my client somehow got charged with invasion of personal privacy. Essentially the allegation is he looked in the window of his neighbor's residence and the window was her bedroom window while she was talking on the phone. She was very upset about that because she thought he was kind of a creepy guy and had been bugging him for a little while and she was uncomfortable. I thought are you kidding me. They didn't go look at her apartment. They didn't do anything like that. They just went and talked to him and arrested him. So I sent my investigator, because he got evicted immediately, before he had to leave to go look at the apartment and as soon as he stepped out on to his back patio where he smoked the apartments were staggered and you could see in all the windows of the neighbor's house. What you would expect to be the most basic amount of investigation to determine whether or not a person would be able to help looking in someone else's window if they are standing on their back patio. In that case the

DA is just unwilling to do anything with the case and it is set for trial. I will have to try that case and probably win a motion for judgment of acquittal.

- 1:29:38 Chair Ellis            Sounds like a jury view.
- 1:29:43 J. Nash                Yes. I am seeing that very often.
- 1:29:54 S. McCrea            So that is more work for you and your investigator.
- 1:29:54 J. Nash                They have to get set for trial because that is what happens; the state isn't necessarily going to believe what my investigator has to say. They may or may not depending on the DA. This DA no. The case will have to get set for trial.
- 1:30:05 S. McCrea            I see Mr. Bouck nodding as well about Douglas County.
- 1:30:08 D. Bouck              Same problem. They just don't put the effort into the cases so we have to do a lot more investigation and the work that they should have checked out.
- 1:30:20 Chair Ellis            Other questions for Jennifer? Thank you very much. Can I get a show of hands how many others we have? Okay. Why don't we take about a 10 minute break.
- (Break)
- 1:41:41 Chair Ellis            Before we recessed there were two hands raised when I asked if there were others that wanted to share thoughts with us. Do you want to step forward? Thanks.
- 1:41:50 J. Weiner              Jon Weiner from MCAD. I have been serving as the interim executive director since January and I am on the Pay Parity Committee as well. OCDLA has been very generous in allowing me to participate in that as well as the interview process for the lobbyist that will be forthcoming shortly.
- 1:42:14 Chair Ellis            So you have succeeded Judge Lipscomb.
- 1:42:18 J. Weiner              Yes. So I have been fortunate that way. I am a real neophyte. I think arguably I know less about any of this than anybody in the room, but as part of MCAD, which I believe is the largest consortium. We probably have about 35 attorneys. I thought it would be important to just speak briefly about some of the issues that I have already seen in these three or four months. I have viewed my duties primarily through the lenses of *Wilbur*, when I look at what is best for MCAD, because when MCAD does well with respect to the provisions of services, then MCAD can continue to exist and prosper and these kinds of things. I also think *Wilbur* is important with respect to the pay parity. With respect to MCAD, I believe that of all of the objectives set forth in the list of objectives set forth in the POP, I think case management is obviously very important. But I am concerned that if the case payments don't keep stride with the management of caseloads that many people won't be able to afford this kind of work. For instance if you take the federal, and this is the same sort of thing she touched on, \$64 an hour times 2,000 is \$128,000 a year for overhead if that \$64 an hour is that federal figure. We get \$300 and some odd dollars for a misdemeanor. So if you take somebody who does 400 misdemeanors, which is the cap for the national standard, and we get say \$325 to \$350 dollars that person won't be making minimum wage. You are sticking with the current payment for a misdemeanor and you are sticking to the caseload cap that is set forth under *Wilbur*. That is a problem for MCAD. One of the things that I have tried to do is to figure out how badly any of our attorneys may have been exceeding. My belief is throughout the consortia the business model of people who primarily do these kinds of cases is to exceed and probably sometimes abuse the case standards set forth in *Wilbur*. That is how you make money doing this. The guy who is going to just misdemeanors can't make a living if that person is sticking to the case count. I am in kind of a tough spot already. What I have been trying to figure out is I know

that most of our members probably do 200 to 300 cases. I haven't figured out yet because it is always a mix, but I have been trying to ride herd on the caseloads. I can tell who always has lots of cases and might be a little over. Members have been pretty understanding with that when I am trying to keep people under - to me maybe it looks like you can handle about 50 cases of the mix for felonies. The tough thing is, "how am I supposed to make ends meet, Jon, we are not getting paid enough." If you want us to be anywhere close to that standard we are not going to be able to keep our offices open. I do about half employment law with respect to your question what is the market model and why does this make sense for me to do it. I spend about half of my time doing post conviction and a couple of murders. I do retained employment. That is how I do it. I subsidize. I like doing criminal. I like being in court but I couldn't do it all the time. It wouldn't work. That is how I make that work.

1:46:04 Chair Ellis

How do you get paid on the administrative piece that you are doing?

1:46:05 J. Weiner

As the executive director?

1:46:08 Chair Ellis

For MCAD.

1:46:08 J. Weiner

I get what they were paying to Judge Lipscomb, which is \$50,000 a year. With respect to MCAD that is a real challenge. If there isn't extra money per case, it is going to be very hard. People won't be able to afford to do this if you are really going to enforce anything close to these caseloads. The interesting thing, and I know in the pay parity, John and I, Ann Christian and Eric Dietrich have been kind of trying - Ann Christian is incredible in coming up with numbers and data. She sent us these things and we played with them. John and I have gone back and forth so much. One interesting question is you have 56% of the cases are handled by consortium members. We are trying to figure out to what degree might there be a real *Wilbur* problem in your consortia members. There is no way to figure that out. I have an email about this long that I still haven't digested completely. The gist of it is, with the best numbers that I could see, it looked like the consortia were generally about 1.8 of what you would expect under the federal standard. Which isn't *Wilbur* but it is close. I think *Wilbur* was about twice or something. People were handling like a 1,000. The data is shaky, and John pointed that out. We all knew that. Ann Christian pointed that out. The scarier thing is that number could be high. It could be low. We don't really know. There are 56% of the cases that are handled by consortia members. The only FTE data that we have is what people do in their RFPs. For me that is me trying figure out spending 20 minutes how much employment I am doing. I am doing so much of this. It is an eyeball sort of thing. Maybe with eCourt then OPDS will have the ability to track the cases. I don't know. Right now there could be a huge *Wilbur* problem in the consortium. We just don't know. We were trying to figure it out and I think the answer that John has talked me in to is that we can't figure that out right now. We don't know. I think that when we scratch the surface of that there may be a real problem. Maybe that is the shoe horn to use. I don't know. I believe *Wilbur* is really important to me in my function. That was really the main thing that I wanted share.

1:48:33 Chair Ellis

Thank you. Any other questions?

1:48:33 J. Weiner

One last thing, I have had to ask for hundreds of NREs. I have been turned down several times and every single time I have been able to speak with Paul on the phone, an email, whatever I needed and just engage sometimes in a lengthy discourse and understand the basis for what I needed to ask for or whether it was appropriate or not. So I have had always, every time, gotten without exception the ability to interact with him really quickly and effectively and understand where my NRE request fell short. I am just a satisfied customer and wanted to throw that in there too.

1:49:14 Chair Ellis

We don't mind. That is alright. Okay.

1:49:18 B. Liebowitz Good morning, Chair Ellis, Commissioners, Bruce Liebowitz here wear multiple hats. I am the administrator for the Portland Defense Consortium. I also have a contract with the state for specialty courts. I will get to that. I am also here talking on behalf of the group of Oregon defense consortia and private law firms that are comprised by 161 attorneys around the state. I can tell you they are spread over Multnomah, Clackamas, Washington, Marion, Linn, Jefferson, Deschutes, and Josephine Counties. If you may have heard that there is some dissatisfaction by just two law firms in Portland then I would submit that is not correct.

1:50:05 Chair Ellis Meaning it is broader.

1:50:10 B. Liebowitz Well, yes. A big chunk of the state's population is in those counties. We have also had discussions with Ms. Nash's group and we share a lot of similar concerns. Is that correct?

1:50:28 J. Nash Sure.

1:50:31 B. Liebowitz In any event, the draft budget stabilization package has a lot of very positive notes to it. Of greatest concern to our groups to our number three, chief consistency and funding. Again, the pay parity group grappled with that. We have a working definition that is within counties where there are multiple providers, where there is a PD, a contract law firm doing overflow, or consortia, those are equivalencies. As Ms. Nash said in her county the cost of a house might be \$400,000 average and the county next to it \$150,000. But as much as possible in places that do have equivalent groups, people should be paid the same for work. Commissioner Potter talked about PDC. We have a higher average case rates per unit, correct?

1:51:34 J. Potter Correct.

1:51:40 B. Liebowitz As you are aware in our county 75% of the murder cases and 66% of the Measure 11 cases. The case mix is important as well and the parity group grappled with that also. Somebody doing a Measure 11 for \$1,800 for much rather do for C felony possession cases at \$500 each or so. You just can't compare the amount of work that goes into those. There are places in the contracts that currently exist where there are discrepancies that make no particular sense to me. I will talk about my small contract. We have PV rates that are less by \$20 plus dollars a unit than Metro and MDI. Metropolitan Public Defender does a lot of those PVs and they are trailing PVs to felony cases that they have. They are globally dealt with as part of a larger resolution.

1:52:50 Chair Ellis In the comparison you just made do you factor in and out the investigative costs?

1:53:01 B. Liebowitz And there is a difference in that. There are no investigative costs in PV cases. That is the whole point.

1:53:09 Chair Ellis I wouldn't know that.

1:53:10 B. Liebowitz I have never had one. I think in 30 years I think on one sex case that was actually contested we had an investigator. But, by and large, there are no investigative costs. The PVs are all misdemeanor PVs. I'm not sure why, but we are doing PVs now that are downward departures from prison sentences left and right. All the original cases that were originally granted probation on the different repo categories, so I think that OPDS needs to look at case mixes, complexity of categories, and also the specialty courts. I can also say under my contract we do a fast track, early resolution drug court. We are paid appropriately. Something you will probably never hear again.

1:54:15 Chair Ellis This is two positive statements in a row.

1:54:17 B. Liebowitz We are paid appropriately for that because it is very efficient. It saved the state millions of dollars on jail days. It saved the district attorney's office because on many of those there aren't indictments. I run a small business so I know the value to the state of that. Ms. Keller in my office just co-authored the OSB section on probation violation defense. It is something we are very specialized at and we can be efficient. Other than the discrepancy in apples and apples, I am not really complaining. But when at look at my consortium, Portland Defense Consortium, to do a Measure 11 for \$1,800 that is what I charge for a misdemeanor case, if I am going to charge that little. I had a national case where an airline pilot buried a gun at Portland Airport and got national and international attention. That was a \$2,500 retainer. I just want to get the message across that on the most serious cases there is an imbalance. I think the parity group is trying to grapple with that and address that. But geographic differences also have to be accounted for. There are places where there are apples and apples and I think they should be treated that way. If you say PDC is paid more that is not a county for POP money, correct?

1:55:59 J. Potter No. Even with the POP money you are paid more. So even though Metro got some money you are still paid more. Measure 11 is a very good example, actually, and we talked about this. I think that is what we have to stress to the legislators because \$1,800 for a Measure 11 cases is absolutely ludicrous and it being paid that way across the board. You are not the only people who are getting \$1,800. Some people are getting \$1,662 and Metro PD is getting paid \$1,800 as well. It is not true that you are being paid less than Metro PD on that. We went through this before. We backed out all the investigative costs. We showed the actual cost of investigation on Measure 11 cases and you are paid more. I think that is fine. I have no qualm with that. My qualm is that when you say it is not true. That gets my hair up. But in this case I think you guys should be paid more.

1:56:54 B. Liebowitz Well if you are using the back out of the investigative costs.

1:57:02 J. Potter Of course.

1:57:02 B. Liebowitz But who would want to do a proportion of Measure 11s at 66% of their caseload. That is it right there.

1:57:18 J. Potter You are contracting to do that. I understand. It needs to be more. It is not because you are less.

1:57:27 B. Liebowitz I would like to see the numbers that support that. It must have to do with investigative expenses.

1:57:35 J. Potter It absolutely does..

1:57:35 B. Liebowitz So backing out investigation expenses is something we agree on.

1:57:43 J. Potter I think what I saw in these notes here is that OPDS is going to do that for all case types. Is that right?

1:57:47 N. Cozine Correct.

1:57:47 B. Liebowitz Because if you back out investigative expenses we are getting \$1,800 for a Measure 11 and the others are getting \$2,000.

1:57:56 J. Potter No. You are getting \$1,800 and they are getting less, or you are getting \$1,800 plus more investigative costs than other people. We have got the charts. The committee has got that. It is a good example. I am saying to you that you have to be careful. If you go to the legislature and start saying that you will get pushed back because it ain't true.

1:58:31 Chair Ellis            Anything else. Thank you. The record should show that we have received a letter from Robert Harris of the Harris law firm and treat that as additional testimony. Anyone else want to be heard on the stabilization issue?

1:59:03 G. Hazarabedian    Greg Hazarabedian of Public Defender Services of Lane County. First of all I would like to say how much we found the process that OPDS staff, presumably through your direction, is going through this time in putting together the POP. I was unfortunately home with the fever at our regional meeting, but I am told that Shelley Winn our analyst with Nancy Cozine's assistance, ran a very good meeting where a lot of points of view were expressed and heard and noted and are indeed reflected in the resulting synopsis of what took place at that meeting. We feel good about that. I am speaking in support of the regional stabilization POP as proposed by OPDS staff to you today. I think it addresses a number of issues not just for my office but for the discord, if that is the right word that seems to exist between different types of organizations funding by OPDS. I think the POP as proposed has something for everybody and I think that is appropriate. I will say that the one request I would make and I don't see it outlined in this POP as written necessarily, but I would say that another POP piece that is dedicated just to lawyer's salary is problematic for people who run public defender offices. I don't want to say that that money was not appreciated, was not needed and was not correctly applied to retain good lawyers doing public defense work. I did not have any money out of that to give raises to staff. That can create the kind of morale issues you might well respect in an office. I would like to sort of have that be a one-time occurrence if I have anything to say about how dedicated the money needs to be. Having said that there is still a great discrepancy between public defenders and district attorneys in Lane County in terms of salaries. . You know that. You have those numbers. I think that in Lane County, as opposed to what I hear from other places, there is relative parity between what we and the Lane County Defense Consortium receive on a case type basis. I think it is also interesting for me to note what a radical difference there must be in the way law is practiced in the various counties. I just heard my friend Bruce Liebowitz talk. He talked about having only one contested PV hearing in 30 years and never needing an investigator. Certainly in Lane County that has not been the experience. We have numerous contested PV hearings and occasionally they do need some investigation. I think the Commission and OPDS staff focus on parity within an area region, breaking it down by regional practices or county practices, in fact, does make a lot of sense because things are different when you go to different geographical locations in the state. I think that is an appropriate focus.

2:02:50 J. Stevens            I don't believe he said there were no contested PVs. I think he said he had only hired one investigator, but he did not say there were no contested PVs.

2:02:59 G. Hazarabedian    I apologize. I misheard.

2:03:00 B. Liebowitz        If I can just chime in. We have zillions of contested PVs.

2:03:06 G. Hazarabedian    I misheard. Certainly the amount of PVs that need investigation as well. I would not disagree with that statement. Unless there are questions that is all I wanted to say.

2:03:18 Chair Ellis            Any questions for Greg? Thank you.

2:03:20 G. Hazarabedian    Thank you.

2:03:24 Chair Ellis            I believe that includes the testimony on Item 3.

2:03:32 N. Cozine            I am sorry. We have one more bit of information available.

2:03:33 Chair Ellis            Caroline, come forward.

2:03:36 N. Cozine            Amy.

2:03:37 A. Jackson Hi, Mr. Chair, I received a call from Bill Condron the 22<sup>nd</sup> Circuit Administrator. He requested to be added to No. 2. Increased compensation and decreased caseloads. He requested that we add both Crook and Jefferson counties to that list. I actually did talk to Dan Stevens, the administrator of the Blue Mountain Defenders Group. Again, he would like to reiterate the mileage expenses.

2:04:31 Chair Ellis Okay. Thank you.

2:04:36 Hon. Elizabeth Welch Mr. Chair, it is my impression from reading the materials in this report that we got from Nancy, that in some situations in Eastern Oregon and perhaps other parts of the state, that the lawyers basically aren't getting paid anything by the time they burn up the mileage and the loss of work. They are literally working for nothing. Is that close at least?

2:05:05 N. Cozine Chair Ellis, Judge Welch, members of the Commission, when we met our eastern county providers there are instances where if they visit their client four times it can eat the entire case rate just in mileage expenses. So there is a built in disincentive, unfortunately to do visitation that might be necessary. It can be in any case type because you have different places, not only in juvenile, but there custody situation sometimes requires them to travel great distances. It is possible especially in the lower case types that don't have a higher rate of compensation and in ongoing dependency cases.

2:05:49 Chair Ellis Okay. Why don't you stay there, Nancy.

**Agenda Item No. 4 OPDS Monthly report**

2:05:56 Chair Ellis The monthly report of OPDS.

2:05:57 N. Cozine Thank you, Chair Ellis. As always what is going on is we are continuing to move forward with the dependency pilot program. We have extended an offer and received an acceptance for Deputy General Counsel. Amy Miller worked with YRJ. She has done both lawyering and legislative advocacy work. After YRJ she went to MDI. She worked there for a period of time practicing and representing primarily parents. After that she left and started her own practice. So she has done several different types of practices and most recently her private practice work has been in tribal dependency court. She has a wealth of knowledge and I think will bring a great deal of energy to this project. Her pre-law career was eight years as an engineer and she has incredible data analysis skills from that period of her life. She has done a lot of work already in terms of looking at system analysis and system reform. I think we will be very lucky to have her. We are still talking about a start date. That is the last piece to nail down. We are very excited that she will be joining us. Pete, did you want to share anything?

2:07:27 Chair Ellis Bon Jour.

2:07:35 P. Gartlan We have an ongoing offense of the KPM trying to get our median brief filing due date down to 180 days. As part of the evaluation process that we underwent recently, we got some feedback. In response to some of the feedback, what we have done is added a new team to the office. All the attorneys are on a team. The teams meet regularly on Wednesday. Right now there are five teams and we are adding a sixth team. We have promoted Dan Bennett to be a senior deputy to lead that team. What we hope that will do is relieve a lot of pressure on the current team leaders who have to do a lot of editing for the team members. We have essentially reduced the team size from eight to seven. That will hopefully speed up the process of producing quicker turn around for edited briefs. There is a lot of stress right now on the teams because the Court of Appeals went to a four argument per month format beginning in January. So our cases are argued four days per month, 20 cases an argument

date, so that is a lot more than the office generally had before the Court of Appeals on a monthly basis. Typically it was around 40, sometimes 50, but typically around 40. It has increased significantly. Again, as part of the feedback we are giving training to people who are promoted from the entry level to Deputy II. I will go back a step. When people come into the office we give six months of one on one training. We noticed that when we promote people from Deputy I to Deputy II that tends to be a lag because the Deputy IIs are unfamiliar with the more complex caseload that is presented by a Deputy II position. They are doing more felonies. We are going to give some training and oversight to people who are promoted and hopefully that will get them up to speed faster. Another result of the evaluations is we have been thinking as part of improving quality would be to send senior deputies to a seminar training with Brian Garner, who is a renowned writer, practitioner, and we thought well maybe what we would do is bring Brian Garner to us. With the office support all of the attorneys in the office agreed to dedicate half of their discretionary CLE fund to Brian Garner here. We are now in discussions with Brian Garner's office to bring him here in October and present an all-day seminar on brief writing to the whole group. We think will be dramatic and hopefully improve the quality of the briefing.

- 2:10:59 S. McCrea I think that is a great idea. Maybe you should get some of the private bar coming too on a paying basis. I would come. I would love to hear him.
- 2:11:07 P. Gartlan The Garner firm has a lot of regulations and restrictions on what we can do. I looked and asked. Unfortunately it is pretty much limited to our office.
- 2:11:25 J. Potter Can you record it?
- 2:11:32 P. Gartlan I want to emphasize that was an office buy in.
- 2:11:38 S. McCrea That is great.
- 2:11:44 P. Gartlan I think that is all I had. I can talk about the Supreme Court cases that we are briefing and that will be argued if the Commission is interested in that. Hopefully I can influence at least one member of the court.
- 2:12:05 Chair Ellis Do it but in a non-argumentative way.
- 2:12:08 P. Gartlan We have three arguments upcoming in May. Two of the arguments are by attorneys who it will be their first time before the Supreme Court. One argument has to do with whether or not the emergency aid exception to Article I, section 9 of the Fourth Amendment applies to rendering aid to animals. A second case involves whether the crime of endangering the welfare of a minor applies to – I have to be careful, to someone who possesses drugs in their purse while with their children in a car. The third an interesting issue and it has to do with whether the existence of an arrest warrant for somebody excuses an illegal stop. There was an illegal stop and the stop was prolonged in order to identify who these people were. Once that occurred it was determined that one person had an arrest warrant out for that person. So the question is well does the arrest warrant kind of purge the taint of the prior illegal stop. We currently have three cases being briefed.
- 2:13:31 Chair Ellis Briefed to the Supreme Court?
- 2:13:32 P. Gartlan Yes. To the Supreme Court, sorry. One is a parole case and that question is what must a board action form issued by the Parole Board, what must be contained in that BAF, Board Action Form, in order to satisfy statutory requirements that apply to the board. Another case, and I just found out that there is actually another case that the court just allowed review, it is going to be somewhat related, but anyway the second case is currently being briefed involves the definition of a victim for purposes of the sentencing guidelines. The guidelines were enacted in 1989. The question is has any subsequent legislation that has been passed affected

the definition of the term “victim” for purposes of guidelines. A third case being briefed is a very, very important case for evidence law. I will not be an advocate.

2:14:43 Chair Ellis

You are getting there.

2:14:44 P. Gartlan

It is a really incredibly important case. I think you are going to hear groans from the trial practitioners, but in this case the state is arguing that I think we are all familiar with the character rule, the bad acts. People are not supposed to be tried based upon their character. The goal is to see whether or not somebody committed a particular act and if they did what kind of mental state. That is the centuries old rule. The state is arguing in this instance that the enactment of OEC 404(4) several years ago kind of does away with that rule. Whether or not now evidence of somebody’s character, or the bad acts that they did, whether or not that kind of evidence can come in because it is relevant to the question of whether or not they committed this act. So it is a very, very important case.

2:15:48 Chair Ellis

Okay.

2:15:51 P. Gartlan

That’s it.

2:15:51 Chair Ellis

Thank you.

2:15:51 N. Cozine

Two other quick things. When we last met our office was on the verge of a necessary upgrade to Windows 7 and Office 10. I just want you to know that under Cecily’s leadership working with Alan Gibson and Laura Kepford. It was to update all of our databases so that everything actually is still functioning. It was relatively seamless. I will also say while the Chief Justice is in the room that the staff at the ETSD department at OJD, who helps with our infrastructure, was invaluable. They had a team of, I think, eight staff that came over and helped us during the two days. There were two solid days of transition time. One for the appellate division and one for the business side. It really was tremendous. I have written thank you notes to the CIO and Deputy CIO over at the judicial department thanking them for all of the staff time. It really was tremendously successful. Additionally, we had a meeting of our Public Defense Advisory Group. That group was very helpful in reviewing some of the POP information that we have discussed today. They also were able to give us some feedback on how document access in the new Odyssey system has impacted their practice. The feedback was favorable. Now that they have document access they can complete conflict checks and they are also better able to prepare for court proceedings in advance of the court proceeding. That is another positive development in our electronic court environment. Paul did you have any updates that you wanted to give? Caroline?

2:17:42 C. Meyer

Very briefly we recently completed interviews for a part-time staff position to help with contracts. We have Rachel Woods joining us next week. We offered her the position and she accepted it. She is a recent Willamette grad. We are very excited about that. It is a half-time position. I think we have plenty of work to keep her busy full-time, but we have funding for a half-time position. For now we are very excited about that.

2:18:13 N. Cozine

That is a temporary position and it going to help us enable one of our analysts to reduce to 80% time so that she can accomplish some of her other objectives in life. We are very pleased to be able to make that happen.

2:18:29 Chair Ellis

I wanted to compliment both of you on the process that has led to the report and the testimony today. I really think we did not do an adequate job on policy option packages in the last couple of years. This is a much more meaningful way of coming up with a package that really hopefully is the right one. Thank you.

2:18:59 J. Potter

Could I add one thing, Mr. Chair? On the draft of the regional stabilization policy option package, remove investigation from contracts. We were just talking about that. It may also

be helpful to have at least noted any idiosyncratic issues in the contracts themselves when we were just talking to Bruce here on the Measure 11. There is an idiosyncratic thing there in which that consortium group gets up to five credits for a Measure 11 case, but Metro PD does not. They only get one. So when you look at the numbers it looks unbalanced. What we don't know is how many multiple credits the consortium is getting. That just skews the numbers even more. If there are other sort of idiosyncratic – my understanding of that only applies in the Metro and MDI's contract that they only get one and other public defenders do get multiple credits for Measure 11 cases. But if there are other kinds of issue in contracts around the state that sort of set it apart, just having those identified would be helpful.

2:20:16 N. Cozine

Okay. Very good.

2:20:17 Chair Ellis

Any other questions or comments.

2:20:20 N. Cozine

I do want to comment that we are continuing to work with LFO and with legislators about how this package ultimately should be titled and described. In an email that I sent out to our providers inviting them to come and speak to all of you today, I explained that that is an ongoing process and I do think it will be important to legislators that whatever title we end up choosing, or however we end up structuring this, there is clarity about what it includes. The seven priorities that listed that would be funding points; the objective of all seven of them is to create some stabilization within each region. We will continue to explore how we might best title the package so that it is apparent on its face what its objective is.

2:21:15 Chair Ellis

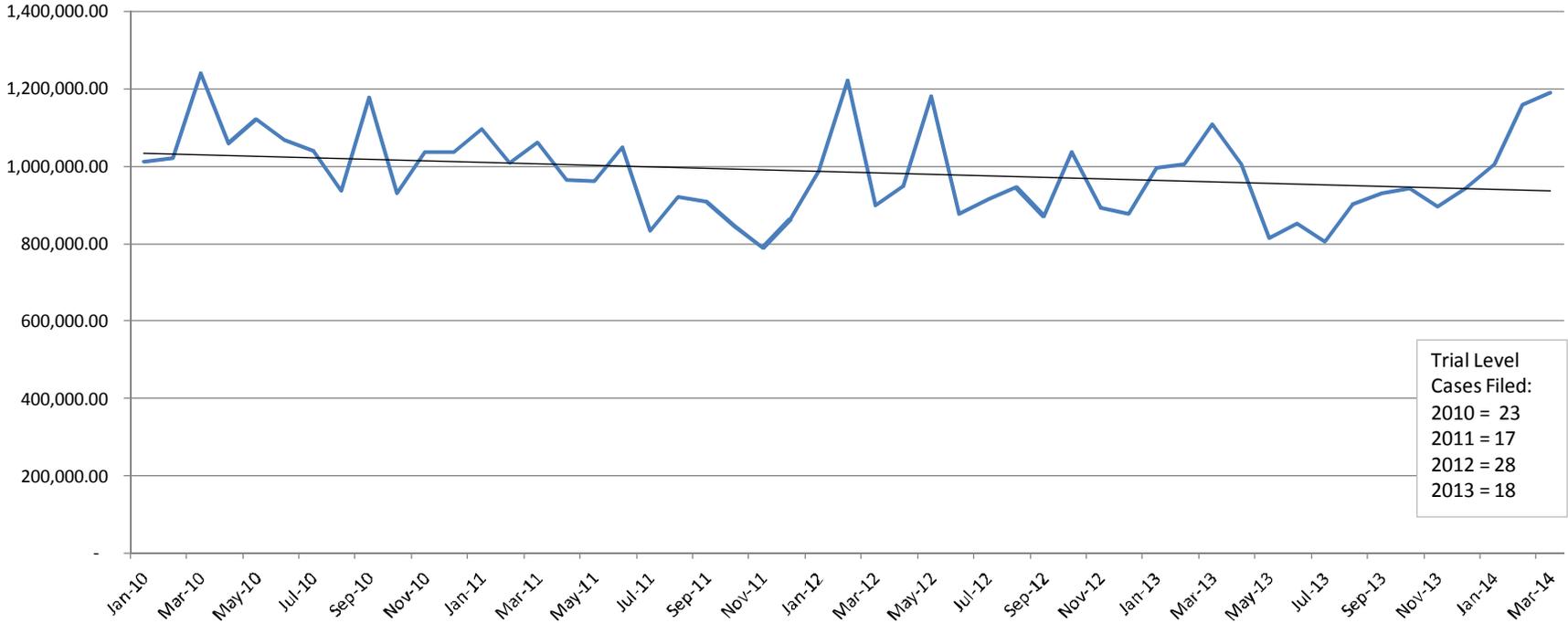
Okay. Thanks. I would entertain a motion to adjourn.

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

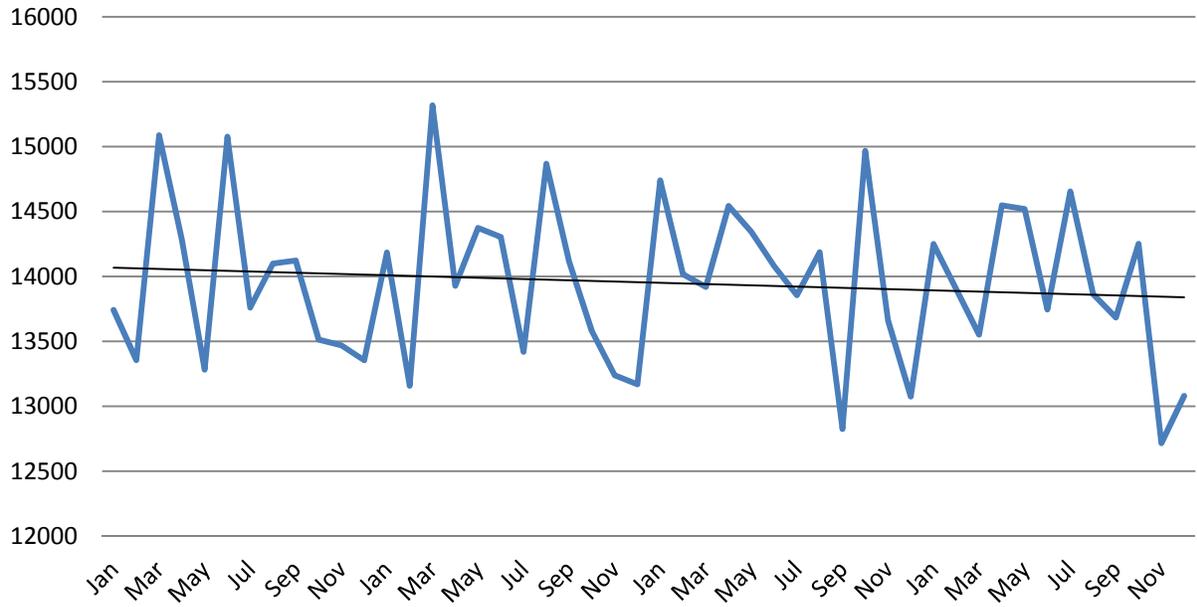
**Meeting adjourned**

# Attachment 2

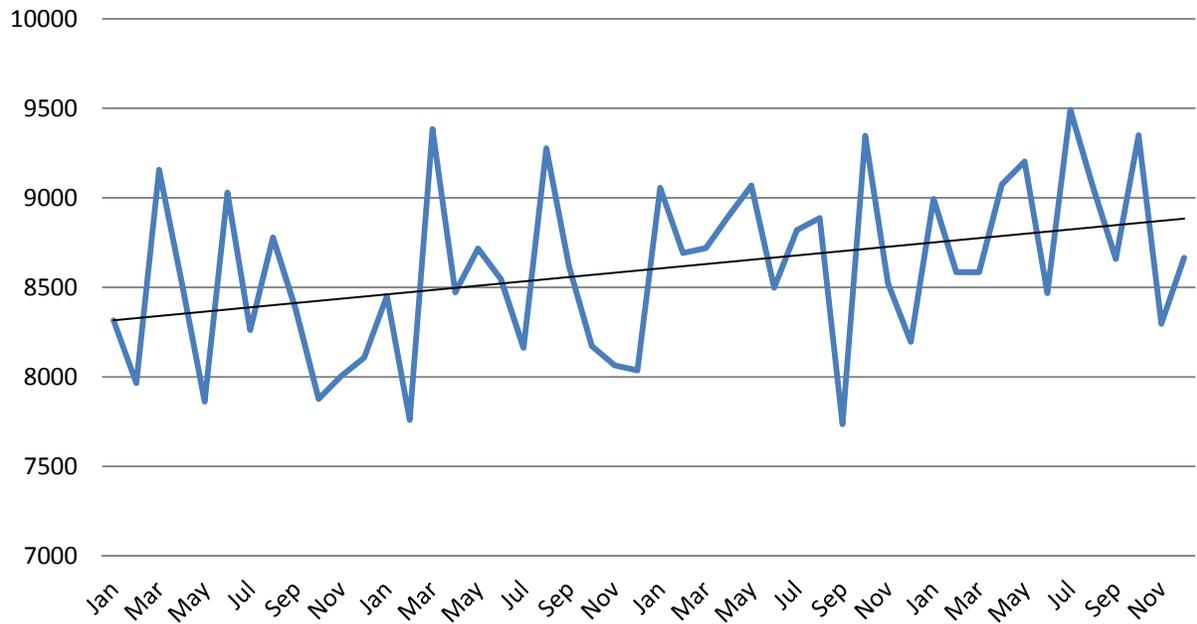
# TRIAL LEVEL CAPITAL EXPENDITURES January 2010 to March 2014



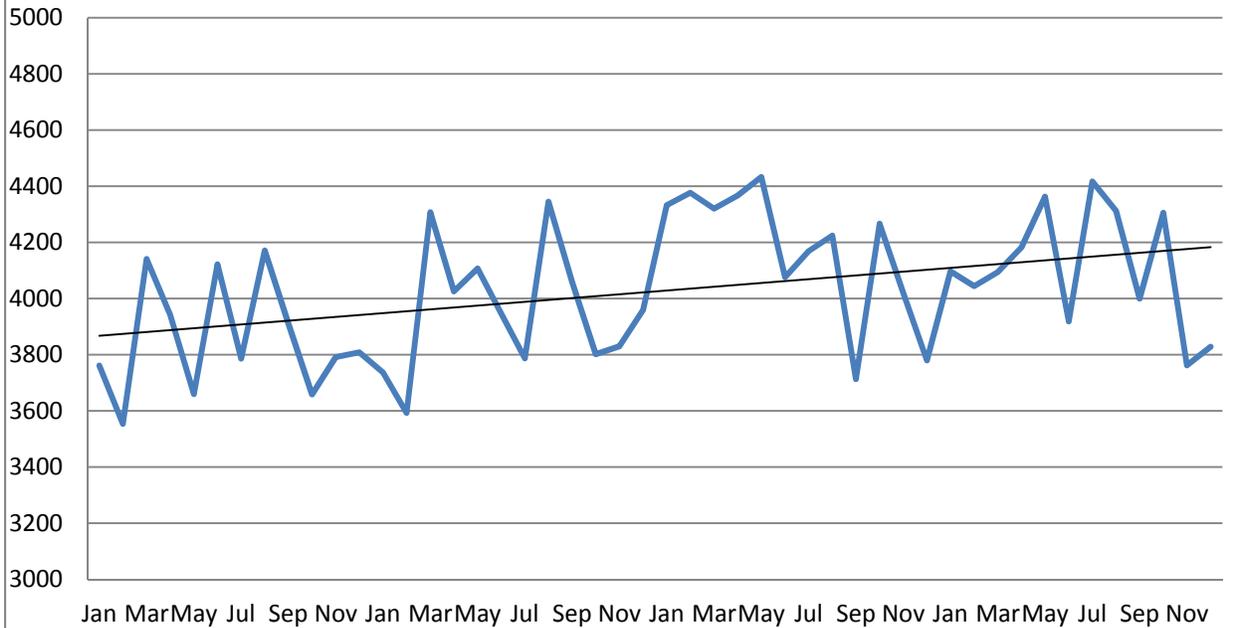
## Statewide Non-Capital Contract Caseload for January 2010 through December 2013



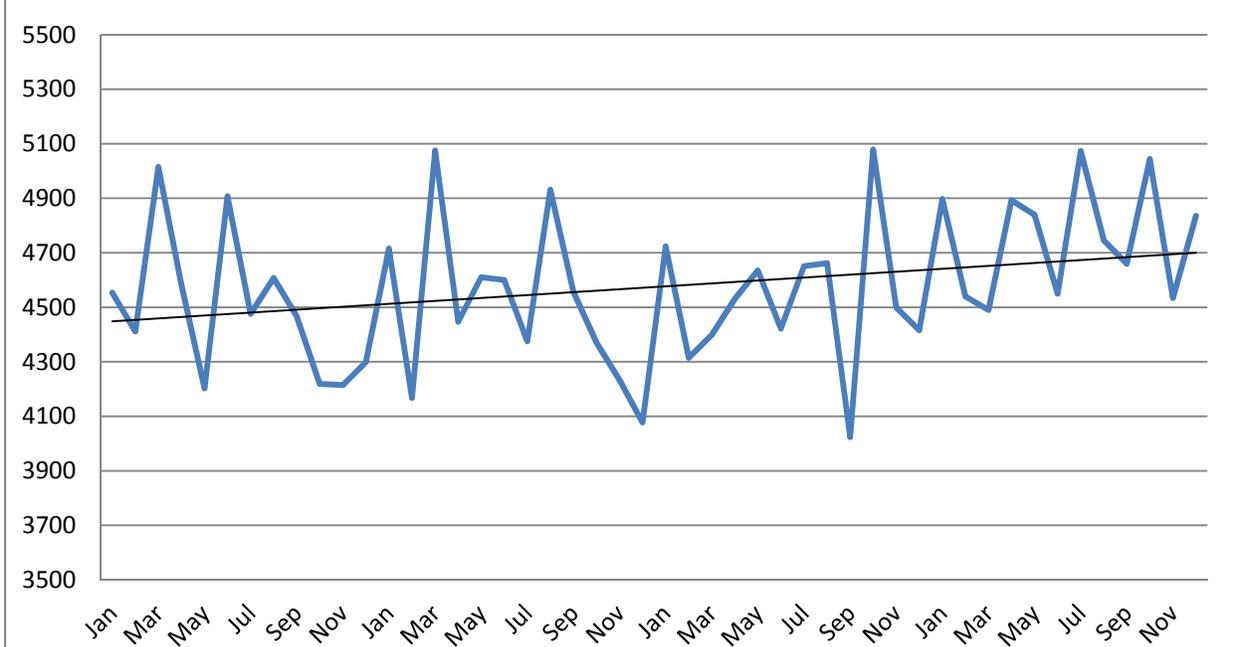
## Statewide Adult Criminal Contract Caseload for January 2010 through December 2013



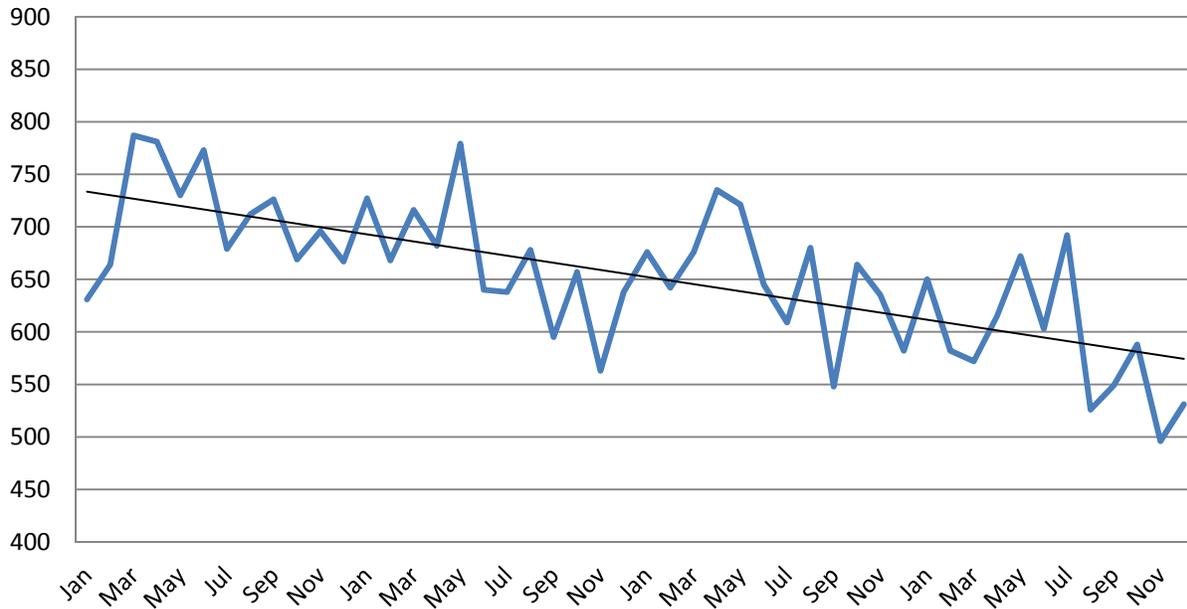
## Statewide Felony Contract Caseload for January 2010 through December 2013



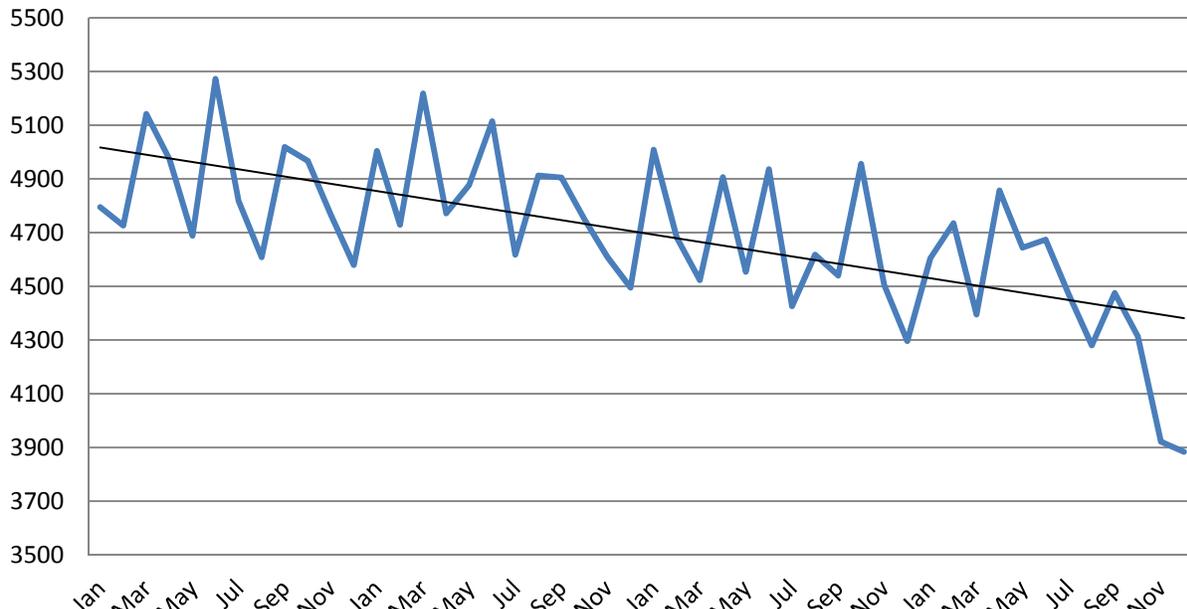
## Statewide Misdemeanor Contract Caseload for January 2010 through December 2013



### Statewide Delinquency Contract Caseload for January 2010 through December 2013



### Statewide Dependency Contract Caseload for January 2010 through December 2013



# Attachment 3

# The OCDLA Pay Parity Committee's Findings, Conclusions and Recommendations As Adopted by the OCDLA Board of Directors, May 2, 2014

The following findings, conclusions and recommendations are supported by the work of OCDLA's Pay Parity Advisory Committee and the attached exhibits.

## Findings

1. **Funding Oregon's Public Defense System.** Lack of adequate funding is not a unique complaint. But, there simply is not sufficient funding available to ensure pay equity, by any definition, for defense providers. There is a growing unwillingness by providers to continue subsidizing the public defense system. The current situation seriously threatens the State's constitutional mandate to provide an effective and efficient public defense system.
2. **Oregon's Public Defense Model of Contracted Professional Services.** Oregon contracts out the vast majority of its workload to a diverse mixture of private entities that include non-profits, law firms, and consortia of attorneys. In other words, **local small businesses** perform this critical government function; not county or state employees. In the past, Oregon was recognized nationally for its contract model.<sup>1</sup> **Funding** of the contract system, however, **has been criticized for decades**. Contractors routinely must accept more and more workload (if available), and more and more serious cases, to generate revenue to cover salary adjustments and increasing overhead expenses.<sup>2</sup> The criticism is well-founded. **The system is at a breaking point.**
3. **Public Defense Attorney / District Attorney Salary Disparity.** The disparity between prosecutor pay and defense provider pay remains significant. Notwithstanding efforts by the 2013 Legislative Assembly, the disparity continues to grow. Non-profit public defender salaries are less than district attorney salaries in almost every county. Available data suggests consortia, law firm and private provider compensation is less than district attorneys in almost every county.

<b>2012 Oregon State Bar Economic Survey</b>		
<b>Practice Type</b>	<b>Average Salary</b>	<b>Median Salary</b>
<b>Prosecutor</b>	<b>\$91,694</b>	<b>\$83,000</b>
<b>Public Defender</b>	<b>\$68,246</b>	<b>\$60,000</b>
<b>Government Lawyer</b>	<b>\$91,576</b>	<b>\$90,000</b>
<b>Private Practice</b>	<b>\$135,328</b>	<b>\$94,500</b>

4. **Student Loan Debt.** Student loan debt has changed the landscape in public defense. For more than a decade, law school graduates considering a career or even a few years' experience in public defense are forced to work elsewhere. The average level of student loan debt is daunting. Recruiting and retaining attorneys with such debt loads is increasingly challenging.

<sup>1</sup> *Contracting for Indigent Defense Services A Special Report*, U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Assistance*, 2000, p. 16. <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>

<sup>2</sup> *Final Report of the Oregon State Bar Indigent Defense Task Force* ("Task Force I"), 1994, p. 16.

The average law school debt nationally is over \$100,000. The average law school loan debt is \$105,000, \$119,000 and \$120,000 for the University of Oregon, Lewis and Clark, and Willamette University, respectively.<sup>3</sup>

5. **Disparities Between Contractors.** Public defense contracts are a product of ongoing evolution, rather than a top-down homogenous plan. As the contracts and individual contractors have evolved, the payments from the State have evolved in the same non-homogenous manner.

Under the state contract terms, law firm and consortia contractors are permitted to take on additional private clients in addition to their public defense caseload. Non-profit public defenders are not. However, the ability of law firm and consortia contract attorneys to take on private clients has been significantly diminished or eliminated by high public defense caseloads and the seriousness of those caseloads. Many of the attorneys at these private law firms and consortia view themselves as full-time public defenders because their caseload makes it impractical to take on any additional work. At the same time, those attorneys who are still able to accept private retained cases may be subsidizing the state mandate with their private earnings.

In some instances, contractors are paid different rates for the same type of case. Some differences are clearly justified. Some are not easily understood. The variables in the amounts paid for the same type of case include the type of contractor (small Eastern Oregon law firm), the market in which the contract is serviced, the extent to which additional services such as investigation, interpretation, drug court coverage are included within a contract, the extent to which substantial travel between counties is required, and negotiations between the business and the State.

In some situations the case rates for non-profit public defenders are more than consortia, even after subtracting staff investigator costs. In other situations, consortia receive higher case rates than non-profit public defenders. The same can be said of private law firms. While additional study is necessary to take into account the mixture of high-cost and low-cost case types, overall average per case rates are less for consortia contractors than private law firm or non-profit contractors.

- ✓ To eliminate case rate disparities by adjusting rates to the highest amount in each category for all contractors would cost the state **\$16 million a year**, but would still not ensure parity with district attorneys in every county.
6. **Flat Fee-Based Contracts.** The use of flat fee values by case types (for example, \$1,664 for a Measure 11 case) is advantageous to the State because the cost of the contracted work is known. The only potential for variation is the number and mix of the various types of cases actually received. With hourly-rate services, the cost is not known until the services are complete and the State receives the bill.

Flat fee payments work best for contractors:

- with large caseloads (economies of scale);
- where the total amount paid by the State is sufficient to provides salary, benefit, support staff and overhead levels comparable to opposing counsel (prosecutors and deputy attorneys general); and

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<sup>3</sup> See <http://grad-school.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings>

- where caseload standards/limitations for Full-Time Equivalent (FTE) attorneys are established and enforced, **but** only if ‘per case’ compensation rates allow attorneys to earn a living wage and pay the attorneys’ overhead and support staff.

A hybrid system of compensation of contractors using flat fees and FTE needs to be examined.

7. **Excessive Caseloads.** The State’s contracts include an estimated 468 Full-Time Equivalent (FTE) contract attorneys. These attorneys are required to provide legal representation in 158,862 trial-level, non-death penalty cases per year. Roughly, one-third of these cases are contracted to non-profit public defenders, with the other two-thirds contracted with private law firms and consortia. A very small percentage of cases are handled by non-contract hourly-paid lawyers (the “private bar”).

Applying *national* adult and juvenile criminal case standards, 767 FTE attorneys are necessary to cover the 2013 State caseload of 156,243 cases. See attached Exhibits 1 and 2. The State currently only funds 60 percent of the needed attorney FTE. An additional 300 attorney FTEs are necessary to meet maximum caseload standards.

- ✓ Providing sufficient FTE attorneys to meet caseload standards is estimated to cost **at least an additional \$30 million a year.**

Fourteen years after the Oregon State Bar’s third Indigent Defense Task Force, the issue of excessive caseloads remains a critical issue.

“Perhaps **most importantly**, based on the responses we received from participants [including judges and prosecutors] across the criminal justice spectrum, **sufficient funding must be available to adequately staff provider organizations so that caseloads do not overwhelm the ability of individual attorneys to perform necessary services. This last factor was stressed so consistently that we conclude that high caseloads have become a serious problem in the state and are the most frequent cause of inadequate representation.**”<sup>4</sup> Emphasis added.

Risk management, if nothing else, tells us that inadequate and disparate compensation levels, coupled with excessive caseloads, are a risk to the clients of public defense attorneys, as well as a risk to the attorneys and their staff, families and communities. All public defense contractors are critical small businesses in each community in Oregon. As importantly, inadequate and disparate compensation levels, coupled with excessive caseloads, are a risk to the government and its fisc.

As United States District Court Judge Robert S. Lasnik, Western District of Washington, recently concluded after finding two Washington state municipalities liable under 42 U.S.C. Section 1983 for the systemic violation of criminal defendants’ Sixth Amendment right to counsel due to excessive caseloads:

“It has been fifty years since the United States Supreme Court first recognized that the accused has a right to the assistance of counsel for his defense in all criminal prosecutions and that the state courts must appoint counsel for indigent defendants who cannot afford to retain their own lawyer. The notes of freedom and liberty that emerged from Gideon’s trumpet a half century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right.”<sup>5</sup>

<sup>4</sup> *Oregon State Bar Indigent Defense Task Force III Report*, May 22, 2000, p.3. [https://www.osbar.org/\\_docs/idthf/idthf3.pdf](https://www.osbar.org/_docs/idthf/idthf3.pdf)

<sup>5</sup> *Joseph Jerome Wilbur, et al v. City of Mount Vernon, et al.*, No. C11-1100RSL, Memorandum of Decision, December 4, 2013, at page 23. [https://aclu-wa.org/sites/default/files/attachments/2013-12-04--Dkt%20325--Memorandum%20of%20Decision\\_0.pdf](https://aclu-wa.org/sites/default/files/attachments/2013-12-04--Dkt%20325--Memorandum%20of%20Decision_0.pdf)

Of note: (1) The United States Department of Justice joined with the Plaintiff's in filing an *amicus* brief; (2) The defendant cities have decided not to appeal the District Court judgment and injunctive relief; (3) The court awarded almost \$2.5 million for attorney fees and expenses to plaintiffs' lawyers April 16, 2014.

8. ***The Cost of Adjusting Hourly-Rate Paid Attorneys and Investigators for Inflation.*** A small portion of Oregon's total public defense caseload is handled by individual, "private bar", attorneys, who are paid on an hourly-rate basis. The rate for attorneys in death penalty cases rose from \$55 per hour in 1991 to \$61 per hour today and the rate for attorneys in all other cases rose from \$40 per hour in 1991 to \$46 per hour today. Had those rates merely kept up with inflation, the rates would be \$95 and \$69 per hour, respectively. Private investigator hourly rates have fared the same: \$25 per hour in 1991 and \$29 per hour today for non-death penalty cases. The hourly rate for investigators would be \$43 per hour today, when adjusted only for inflation.

✓ The cost to increase the hourly rates to adjust for inflation totals \$3.8 million per year.

### **Conclusions**

Additional funding is critically needed to equalize the amounts paid by the State for the same work for ALL contractors. Contractors, regardless of the type of contractor, and private bar hourly-paid attorneys must be paid the same amounts for the same work – equal pay for equal work.

Substantial additional funding is needed to (1) provide front-line public defense attorneys and their support staff a living wage, regardless of the type of contract entity for which they work and (2) bring public defense caseloads to acceptable levels.

### **Recommendations**

The only way to remedy the public defense disparities – disparity among contract providers and disparity with prosecuting attorneys – is to obtain additional State funding for public defense to provide internal and external PARITY and to comply with constitutional mandates for the provision of effective public defense.

To accomplish that end, OCDLA must lobby the State in a unified manner regarding the objective need for significant additional public defense funding; i.e., advocate for one Policy Option Package (POP) -- versus multiple POPs for different providers or case types -- be submitted by the Public Defense Services Commission to the 2015 Legislative Assembly. That POP must address the gaps in funding and resources, identified by this committee, between contractors and private bar attorneys, as well as compliance by the State with workload standards.

OCDLA must advocate that the PDSC submit one Policy Option Package that addresses the needs of all public defense providers with specific emphasis on parity among public defense providers; i.e., equal pay for equal work.

The methodology for the lobbying effort should be grounded in financial and caseload data for FTE attorneys, along with adequate support staff, technology and travel funding.

2013 Trial Level Public Defense Caseload Number of Attorney Full Time Equivalents (FTE) Required Using Caseload Per FTE Standards					
NAC* Case Standards Per Attorney FTE Where Available MPD** Case Standards Per Attorney FTE If No NAC Standard Available					
Caseload Category	Case Type	Case Type # of Cases	Annual Caseload Per FTE	# Attorney FTEs	Source
<b>FELONY</b>	Murder	95	6	16	MPD
	M11	2,680	40	67	MPD
	A, B, C, etc	32,411	150	216	NAC
	PV	11,102	150	74	NAC
<b>MISDEMEANOR</b>	DUI, etc	37,166	400	93	NAC
	PV	10,745	400	27	NAC
<b>DELINQUENCY</b>	M11	71	40	2	MPD
	JUDF/M/O	3,992	200	20	NAC
	PV	2,839	200	14	NAC
<b>DEPENDENCY</b>	JJTP/C	1,373	16	86	MPD
	JDEP/JDEC	7,589	100	76	MPD
	JPDP/JPDC	44,259	600	74	MPD
<b>CIVIL COMMITMENT</b>	MHMI	1,921	600	3	MPD
<b>TOTAL CASES &amp; NUMBER OF ATTORNEY FTEs</b>		<b>156,243</b>		<b>767</b>	

'NAC' = National Advisory Commission on Criminal Justice Standards and Goals.

'MPD' = Metropolitan Public Defender Services FTE Standards. Chapter 5, Oregon State Bar Indigent Defense Task Force II Report, September 1996. Exhibit 2 to Pay Parity Report to OCDLA Board.

## Maximum Caseload Standards For Defense Counsel

### Background

The Indigent Defense Task Force recognizes that there have been, and will continue to be, a variety of providers of indigent defense in the State of Oregon. Because of that variety, it is not possible to determine an appropriate weighted caseload for all providers. The Task Force determined that the Metropolitan Public Defender (MPD) offers the model that is most efficient in terms of scale. The MPD is the largest office by volume of cases in the state, and is the most experienced in managing caseloads. The MPD has a high level of staff support and clerical support. These levels of staff and clerical support are not available in other settings and substantially increase the ability of counsel to handle cases. As a result, adjustments to factor in the lack of available resources are necessary in determining maximum caseloads in other settings.

In 1993, the MPD established a unit valuation system to determine the number of cases each attorney in the office could handle each year. The MPD system gave cases a unit value based on the anticipated time demands. Unit values range from 100 to 1. The MPD assumed in the valuation that a 'mythical competent attorney' could effectively handle 600 units per year. The MPD, in its contract proposal of October, 1993, proposed these unit values and has worked with them under the contract that was awarded.

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### Established Unit Values

The first step in the process of determining a weighted caseload is to determine the *average* time demand expected of a particular type of case. This analysis assumes that some cases will take more time and other cases will take less and seeks to determine what the average time is only in relation to other cases. In other words, a minimum unit value is determined and unit values are attributed to each type of case. In essence, unit values are a comparison of the expected time commitment for handling certain types of cases in relation to other types of cases. Obviously substantial felonies are expected to take more time than misdemeanors. The unit value analysis put forth by the MPD proposal seeks to compare time anticipated for relative types of cases.

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### Maximum Caseload Per Attorney Per Year

The second step in the analysis is to determine the maximum number of units that a criminal defense attorney working a full load, i.e. a full time equivalent (FTE) attorney, could handle over the course of a year. The MPD proposal assumed that the 'mythical competent defense attorney' could handle 600 units per year. This meant that in applying the unit valuation tables, a full caseload for an attorney would be 6 felony level 11 cases in one year or at the other end of the spectrum, 600 drug diversion cases in one year.

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## Assumptions

As stated in the introductory paragraph of this Chapter, the MPD has a high level of staff support. This reaches the level of one investigator and one trial assistant per attorney for felony and juvenile cases and .5 investigator and .5 trial assistant per attorney for misdemeanor cases. Where office support staff is less, corresponding adjustments would have to be made in determining the maximum caseload of a public defender office. Because the private bar does not handle the volume that would create the efficiencies derived through the MPD system, the maximum caseload values have little relevancy to private bar providers.

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## Additional Reasons for Adjustments

The MPD has unique circumstances that do not exist outside Multnomah County. The physical proximity of jail, courthouse, District Attorney and defender office, combined with the physical proximity of crime scenes and witnesses, virtually eliminate travel.

The concentration of volume allows for specialization within the office. This reduces the need for legal research. It also reduces time committed to plea bargaining, as the volume of similar cases that have gone before establish the likely results and penalties.

All counties other than Multnomah County have less case volume and greater travel time. Inefficiencies increase as either volume decreases or travel increases. As a result, the maximum caseload standards in this report would be impossible to approach outside of Multnomah County.

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## Conclusion

The Committee believes that the MPD proposal is a reasonable one to adopt as a *maximum* caseload standard in that the MPD office proposal was developed in Oregon by the largest and best staffed public defender office, which is believed to have maximum caseload-handling capability. It is anticipated that adjustments would be appropriate for defender offices that do not have the same amount of support staff per lawyer or the same volume of cases. Further adjustments would have to be made for less than full-time attorneys and private attorneys who are taking conflict cases as a part of their practice. The adoption of a unit valuation system and a maximum caseload per FTE defense attorney is meant to be a guide, subject to review.

## Table Of Unit Values And Corresponding Maximum Caseload Per Attorney Per Year For Large Volume Defense Practice (MPD) In Multnomah County

TYPE OF CASE	UNIT VALUATION	@600 ATTY/YR
<b>Felonies</b>		
Felony Level 11 .....	100	6
Felony Level 10 .....	15	40

Felony Level 9	15	40
Felony Level 8	4	150
Felony Level 7	2.5	240
	2.5	240
Felony Level 6	2	300
Felony Levels 1-5 (inc. contempt)	1	600
	1	600
Fugitive 1		
Felony PV		
	1.5	400

**Misdemeanors**

Msd ( inc. misdemeanor traffic cases)		
	1	600
Msd PV 1	6	100
	7.5	80

**Juvenile**

Delinquency Level 11-100	1.25	480
	0.75	800
Delinquency Level 8-10	.60	10
	0.5	1,200
Delinquency Level 1-7	.60	10
	.30	20
Misdemeanor	7.5	80
Remand	.5	120
PV	0.75	800
	0.75	800

Adult Termination of Parental Rights		
	65	9
Child Termination of Parental Rights	32	19
	8	75
Adult Dependency	5.5	109
Child Dependency	1	600
Review Hearings		

Citizen's Review Board Hearings		
	1	600
	1	600

*Indian Child Welfare Act Cases*

Adult Termination of Parental Rights		
Child Termination of Parental Rights		
Adult Dependency		
Child Dependency		
Review Hearings		

*Citizen's Review Board Hearings*

Civil Commitment		
Drug Diversion (STOF)		

# Attachment 4

## Public Defense Services Commission

### 2015-17 POLICY OPTION PACKAGE OPTIONS

The Policy Option Package recommendations listed below are intended to enhance funding for the Professional Services Account (PSA). The Regional Stabilization package was designed to address specific problems identified during eight meetings held with public defense providers across the state between December 2013 and March 2014.

#### Regional Stabilization Package

1	Consistent Case Rates in Each County	\$ 7,386,495
2	Increased Case Rates and Reduced Caseloads <sup>1</sup>	\$21,574,168
3	Mileage <sup>2</sup>	\$ 161,700
4	Compensation for Contract Administration/Quality Assurance	\$ 3,727,040
5	Increased hourly rates	\$ 9,561,682
	a. Capital Contract Attorneys; \$98 to \$125	\$2,586,240
	b. Capital Contract Mitigation Services; \$62 to \$70	\$ 325,056
	c. Hourly Attorneys, Capital Lead Counsel; \$61 to \$95; Capital Co-Counsel; \$46 to \$70	\$1,172,021
	d. Capital Hourly Investigators; \$40 to \$45	\$ 445,768
	e. Non-Capital Hourly Attorneys; \$46 to \$70	\$3,675,134
	f. Non-Capital Hourly Investigators; \$29 to \$35	\$1,357,463
6	Case Management System Funding	\$ 898,900
7	Professional Expenses (OSB Dues/PLF)	\$ 2,261,777
	<b>TOTAL</b>	<b>\$45,571,762</b>

#### Dependency Pilot Program Expansion Package

Marion	\$ 3,048,551
Polk	\$ 468,697
Clackamas	\$ 1,992,406
Multnomah	\$ 3,654,141
<b>TOTAL</b>	<b>\$9,163,795</b>

#### PSA Policy Option Package Summary

Policy Option Package	Dollar Amt.	Percent Above LAB
Target (to conform to Executive Branch)	\$46,307,171	20%
Regional Stabilization & Dependency Pilot	\$54,735,557	24%
Difference	\$8,428,386	

<sup>1</sup> This funding will reduce disparity between public defense provider and district attorney salaries and reduce caseloads that are above Oregon and National standards. Contract entities in the following counties may not have met criteria demonstrating significant need: Baker, Crook, Gilliam, Grant, Harney, Hood River, Lincoln, Malheur, Sherman, Union, Wallowa, and Wasco.

<sup>2</sup> Funding for mileage was included for the following regions: Eastern, North Coast, Central, Southern Oregon, and the Willamette Valley.

Policy Option Packages for the Office of Public Defense Services operations will be presented at the June 2014 PDSC meeting. The two packages will include funding for the priorities listed below.

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|---|
| 1. Compensation increases to bring agency into compliance with ORS 151.216(e) and to provide permanent funding for temporary or limited duration positions. |
| 2. Additional space to address current constraints, including office-sharing and conversion of file rooms and client conference rooms into offices.         |