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Peter A. Ozanne

PUBLIC DEFENSE SERVICES COMMISSION

Thursday, June 15, 2006 Meeting*
9:00 a.m. to 1:00 p.m.

Inn of the Seventh Mountain
Mt. Jefferson Room
18575 S.W. Century Dr, Bend, Oregon
(541) 382-8711

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's May 11, 2006 Meeting (<i>Attachment 1</i>) | Barnes Ellis |
| 2. OPDS's Monthly Report (<i>Attachment 2</i>) | OPDS's Management Team |
| 3. Discussion of OPDS's Response to the Enactment of "Jessica's Law" in the April 2006 Special Session of the Legislature (<i>Attachment 3</i>) | Kathryn Aylward |
| 4. Report of OPDS's Quality Assurance Task Force on the Contractors' Site Visits (<i>Attachment 4</i>) | Peter Ozanne
Ingrid Swenson
Jim Arneson |
| 5. Status Report from the Lane County Public Defense Panel (<i>Attachment 5</i>) | Marc Friedman |
| 6. Discussion of Delivery of Public Defense Services in Juvenile Dependency Appeals (<i>Attachment 6</i>) | Peter Ozanne
Kathryn Aylward |
| 7. Executive Session:** Discussion of Agency Personnel Matters | Barnes Ellis |

NOTES

**PDSC's July 13, 2006 meeting is canceled. PDSC's next meeting is scheduled for Thursday, August 10, 2006, from 9:00 a.m. to 1:00 p.m. in Salem, Oregon.*

***The Commission will meet in executive session at approximately 12:00 p.m. for the purpose of discussing agency employment and personnel matters pursuant to ORS 192.660(2)(a).*

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MEETING MINUTES

May 11, 2006 Meeting

Multnomah County Juvenile Justice Complex
(Donald E. Long Center)
Courtroom No. 2
1401 N.E. 68th Avenue
Portland, Oregon

MEMBERS PRESENT: Barnes Ellis
Jim Brown
Mike Greenfield
Chip Lazenby
Janet Stevens (by phone)

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Ingrid Swenson
Laura Anson

[Tape 1, Side A]

The meeting was called to order at 9:12 a.m. The Chair took Agenda Item No. 5 out of order to accommodate the schedules of the Commission's guest witnesses.

Agenda Item No. 5: An Assessment of the Delivery of Public Defense Services in Juvenile Dependency Cases

008-

[Tape 2, Side B]-213

Commission received the comments from and discussed the unique features and challenges of juvenile dependency practice with Multnomah County Circuit Court Judge Elizabeth Welch, Angela Sherbo, a senior attorney at the Juvenile Rights Project in Portland, Professor Leslie Harris from the University of Oregon Law School, Lindsay Partridge, a member of Marion County's Juvenile Advocacy Consortium and State Senator Kate Brown, who is currently working as an attorney for the Juvenile Rights Project.

Agenda Item No. 2: OPDS's Monthly Report

222-360

OPDS's Monthly Report was devoted to a discussion of OPDS's report to the Commission on Judicial District No. 7 with Jack Morris, a senior partner with Morris Olson Smith & Starns, P.C. and review and approval of the report.

Motion: Mike Greenfield moved for approval of Judicial District No. 7 report with the minor edits discussed and approved by the Commission; Jim Brown seconded the motion; hearing no objection the motion carried: **VOTE 5-0.**

Agenda Item No. 3: Review and Approval of Proposed Contracts

377-395

The Commission reviewed and approved a preliminary agreement with attorney Frank Stoller, thereby authorizing OPDS to enter into a contract with Mr. Stoller on PDSC's behalf in accordance with the terms of the preliminary agreement.

Motion: Mike Greenfield moved to approve the preliminary agreement; Jim Brown seconded the motion; hearing no objection the motion carried: **VOTE 5-0.**

Agenda Item No. 4: Approval of Change of Compensation Plan

396-443

The Commission reviewed and approved the attached compensation plan for OPDS employees.

Motion: Mike Greenfield moved to approve the compensation plan; Jim Brown seconded the motion; hearing no objection the motion carried: **VOTE 5-0.**

Agenda Item No. 6: Impact of House Bill 3511

452-[Tape 3, Side A]
-318

The Commission discussed approaches to addressing the impact of the enactment of House Bill 3511 (also known as "Jessica's Law") and directed OPDS to prepare a proposal for the Commission's consideration at its June meeting, which would include options for amending PDSC's contracts to account for the law's new and more serious crimes and for presenting the impact on PDSC's budget at an upcoming meeting of the Legislative Emergency Board.

Motion: Mike Greenfield moved to adjourn the meeting; Jim Brown seconded the motion; hearing no objection, the motion carried: **Vote 5-0**

[The meeting was adjourned at 12:30 p.m.]

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL MEETING TRANSCRIPT

May 11, 2006 Meeting

Multnomah County Juvenile Justice Complex
(Donald E. Long Center)
Courtroom No. 2
1401 N.E. 68th Avenue
Portland, Oregon

MEMBERS PRESENT: Barnes Ellis
Jim Brown
Mike Greenfield
Chip Lazenby
Janet Stevens (by phone)

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Peter Gartlan
Ingrid Swenson
Laura Anson

[Tape 1, Side A]

06 Chair Ellis [The meeting was called to order at 9:12 a.m.] We are going to take the agenda out of order because Judge Welch is here and has a 10:00 appointment. So why don't we start with you, Judge?

Agenda Item No. 5 An Assessment of the Delivery of Public Defense Services in Juvenile Dependency Cases

008 I. Swenson Mr. Chair, if I could: Angela Sherbo is also here, and Leslie Harris is going to be part of this too, if you would like to call them up all at once.

010 Chair Ellis That would be fine.

011 I. Swenson I would like to make a very brief introduction before Judge Welch makes her comments. I wanted to mention that this is the first of two meetings that the Commission is going to devote to a discussion on juvenile court practice. There are a lot of good reasons why the Commission might want to focus its attention on the juvenile court practice, one of which is the importance and gravity of the work that juvenile court practitioners are involved in by representing children. Another is that this practice represents, at the trial court level, approximately 25 percent of public defense practice.

There have been a number of studies conducted by different bodies, the State Bar for one and the Juvenile Court Improvement Project for another, which have found deficiencies in the quality of representation for public defense clients across the state. For all those reasons, we wanted to spend some time talking about what the practice is about. Today, the focus is on dependency cases. In June, we will talk a little bit more about dependency but also about delinquency. The goal of the presentation this morning is to let you know more about the practice, how the court works and some of the important elements involved in the practice.

Also, we are going to talk about some of the challenges that are faced by the practitioners. We have a panel of experts, and I'm sure you have met them all by now, but I will make a brief introduction of them. Judge Elizabeth Welch has been a family court judge in Multnomah County since 1989. She has been the Chief Judge since 1993. She serves on many boards, commissions and task forces. I think the most remarkable thing that practitioners say about her is that she has been able to bring together the entire juvenile court community, and not to just process the cases but to improve the practice. Leslie Harris is a professor at the University of Oregon Law School. She is the co-author of two books and has published numerous articles on juvenile law. She currently serves on a number of task forces relating to improvement of juvenile court practice. She recently chaired the site team evaluation here in Multnomah County to evaluate juvenile public defense contractors. She has also taught many of the practitioners who are here. Angela Sherbo has been a legal aid and public defense attorney for almost 30 years. She has been with the Juvenile Rights Project for more than 20 years and currently serves as the senior supervising attorney in that office. She has briefed and argued many of the key cases in the juvenile jurisprudence in Oregon. Lindsay Partridge is also here and will join us. Lindsay is in private practice in Marion County and is a member of the Juvenile Advocacy Consortium there. As you will recall, we reviewed the work of that consortium last year when we were in Marion County. He is the past president of the Marion County Bar Association and has served on many committees. So now I would like to start with Judge Welch.

066 Judge Welch

I took Ingrid at her word and I put together the ABC's of a juvenile dependency case. Some of this is kind of basic, but it won't take very long. I wanted to make sure that everybody understands what a dependency case is and what we do with a dependency case. Of course, the theme of it is to highlight for you the demands that the process makes on lawyers who represent children and parents. First of all, just to know what a dependency case looks like now, and that has changed a lot over the years: I think the general public probably thinks that dependency, if they think of it at all, as meaning child abuse. We actually have few child abuse cases. It is mainly neglect. We are talking about a population here that would be very familiar to anybody who is involved with the justice system; that is, to a great extent, the children of people who are otherwise engaged, or have been, or will be in the criminal justice system. The profile of a typical parent in a juvenile court case – of the cases we see, we continue to estimate that 80 percent of them have at least one parent that has either a drug or an alcohol problem. The prevalence of mental illness and developmental delay among these people is very high. The prevalence of domestic violence is very high. Those are the primary characteristics of the families that we see. They are poor people. There are a few middle class people, but very, very few. Anybody who has done this kind of work, as those of us sitting at this table have done, know that drug use is, to a great degree, a matter of people medicating themselves because they have significant mental health problems. That is certainly my view. In a typical case – one common form that it takes is a parent or parents are arrested for operating a meth operation, or for leaving their children longer than they should with a babysitter or a relative because they are busy pursuing their addiction. We do get some cases where people are in jail or in prison. Some other general matters covered by the facts on the front page: our practice is, and has been for many years, that everybody gets a lawyer in juvenile dependency cases. One of the things that I suppose is controversial – not necessarily around here but maybe elsewhere in Oregon – is whether parents actually need to have separate counsel.

113 Chair Ellis

Separate from each other?

113 Judge Welch

Yes. In other words, it is absolutely unheard of in Multnomah County that two parents have the same attorney. It is a complicated issue. We appoint attorneys for children in dependency cases automatically. You have to understand that there has already been a fair amount of screening before a petition is filed in a case, at least now. That has changed a lot over the years. DHS does a lot of work with families. So, if the situation is not severe, they will have perhaps worked with the family already. When the petition is filed, it is not usually the first

time there has been contact between the parties. As I mentioned, common features of a case are domestic violence and mental illness. A formal case never has just one issue. The parents have multiple problems: criminality, mental health, domestic violence and, almost always, drug and alcohol abuse. Another really basic thing that permeates the problems that we have in administering this system is the Adoption and Safe Families Act, which was passed in about '96. The Feds got involved and the basic theme is that kids should not be in foster care for very long. I am not going to go into a lot of detail about this. You may or may not want to know more about it, but what it has done is basically set a period of one-year as being the guideline for how long a child should be waiting for their parents to deal with their issues. Of course, when you see what the underlying problems that these families have, they aren't exactly solvable issues in the first place. Whether it is mental health or drug and alcohol addiction, those things usually don't get addressed successfully, and certainly not quickly.

- 146 Chair Ellis Were those standards and mandates tied to some federal money?
- 148 Judge Welch Oh no!
- 149 Chair Ellis Regarding interstate commerce? What is the theory?
- 149 Judge Welch I think most of us pretty much agree with the goals of the Act. We might argue a little bit about how long the time frame should be and how flexible the administration of that time frame should be. What would happen in the past before the Act is that the parent would enter treatment, succeed, relapse, enter treatment, succeed and relapse. That is kind of the history of my career. I have been doing this for a long time.
- 157 Chair Ellis What is the federal hook, if they are not giving you money?
- 158 Leslie Harris It is federal foster care money.
- 158 Chair Ellis So it is tied to money?
- 158 L. Harris There is tons of money tied to it. You don't get more. It is just, if you don't do it, you don't get any.
- 161 Chair Ellis So they conditioned the money they were already granting to comply?
- 163 Judge Welch Basically, what we tell people, what their lawyers tell them, what their caseworkers tell them, is, "You have got a year to show that you are making significant progress. You don't necessarily have to be all the way to being a full-time parent; but we would like to see significant improvement. The court has to be satisfied and the state has to be satisfied that you are serious about being a parent or the state is obliged to initiate a concurrent plan, which is an alternative permanent plan for a child." That presumes under the plan that every case involves an attorney hearing. It is very rare in this county, at least, that this isn't initially the plan – that the parent is a candidate for having the child returned to them. But the state is also obliged by state law to identify what other plan we can follow, if that doesn't happen. That is almost always the kind of case that we are talking about with adoption – not necessarily stranger adoption, adoption by a foster parent, adoption by a relative. You should know, for instance, that I just discussed this with child welfare for the state. Approximately 70 percent of the kids who are going through the process will be adopted by their current caregiver.
- 184 Chair Ellis What is the predominant age you are looking at.
- 183 Judge Welch Of the parent?
- 184 Chair Ellis No, of the children.

- 184 Judge Welch In this context, we are talking about pretty young children. They are usually up to 10, 11, 12 years of age. Maybe the eldest child in the family might be a little bit older. We are talking about pretty young children. From birth we sometimes take these children away the day they are born, right out of the hospital. The parent either already has children in the system or the children are born with drug dependencies. I don't have a number of the average age, but many, many are little tiny kids.
- 194 Angela Sherbo From zero to six is the fastest growing age group in foster care. It is zero to six, six to twelve and twelve and up pretty much divided equally.
- 198 Judge Welch What I have tried to do on the beginning of the second page of my handout is to identify the things that the law requires, in terms of parents represented by lawyers. A dependency petition is filed and the hearing has to be held within 24 hours from the removal of a child from parental custody. Those are called shelter hearings and they are held here every day in the afternoon. The practice here is to appoint, or at least tentatively appoint, counsel for all parents prior to the actual appearance. The reason for that is so that those lawyers will have an opportunity to review whatever material there is prior to the shelter hearing. They are not just walking in there with a client that they have never met and a case that they have never had any information about. That is a first step.
- 216 Chair Ellis In the shelter hearing, each parent has counsel and each child has counsel?
- 217 Judge Welch No. Children won't have separate counsel, generally speaking,
- 218 Chair Ellis So a sibling group would have one counsel?
- 219 Judge Welch There are exceptions to that, but usually not separate counsel at the beginning of a case. But maybe later. There may be issues that arise that require separate counsel for children. The issue at a shelter hearing is not so much whether there is a case – that the state has a case or not – but whether the children need to be removed from the parent.
- 228 Chair Ellis Let me get a sense of this. The shelter hearing is only when DHS wants to remove the child immediately?
- 231 Judge Welch And has.
- 232 Chair Ellis What is the frequency here of shelter hearings?
- 233 Judge Welch We have shelter hearings involving around 100 kids a month – an average of about 60 cases. The average case has about one and a half kids.
- 239 Chair Ellis So you may have three or four a day.
- 239 M. Greenfield Of the 100 or so, how many of those are the first time the court has seen this particular person?
- 241 Judge Welch I don't know how long it has been since you were involved in the day-to-day workings of the juvenile system, but the cases are much worse than they used to be. One of the reasons for that is because DHS is doing a very good job.
- 249 Chair Ellis From our point of view, this is a real challenge because you are looking at as many as three lawyers per case or more, three to four times a day, with a 24-hour rule and the hope that the lawyer gets identified to the client soon enough to at least read the case workup and maybe meet the clients, within that 24-hour period.

- 256 Judge Welch Well, it is less than 24 hours. It is more like an hour or two between knowing they are representing somebody and the actual shelter hearing.
- 259 Chair Ellis I assume, and it must be true, that it is deemed a conflict between the children and the parents, so you can't have lawyers from the same source representing both.
- 262 Judge Welch That is why the Juvenile Rights Projects is so important.
- 262 Chair Ellis We'll get back to that.
- 263 Judge Welch My comment about multiple dads is not unusual. It is not uncommon to have a family with four or five children, with one mother and with four or five fathers. The next step in the adjudication process from a statutory standpoint is a rule that you are supposed to do that within 60 days. I think somebody snuck that out of the statute, but it is still the standard.
- 265 Chair Ellis You still apply it anyway?
- 265 Judge Welch The adjudication process, generally speaking in Portland, does not involve an actual trial. Most of the cases are resolved and I'll get back to some of our best practices issues. But that is the next step. It is supposed to happen within 60 days of the petition being filed. After adjudication, the law requires that cases be reviewed by the Citizen's Review Board. I don't know if you have had much exposure to that in the context of your work. The Citizen's Review Board has been around now for about 30 years. It is operated out of the State Court Administrator's Office. They are supposed to review every six months all children who are in substitute care. The court also reviews cases. There is kind of an ongoing dialogue about when the CRB should be involved and when the court should be involved, in terms of local practices. I want you to understand that this is not an insignificant issue from the point of the lawyers. One of the issues, of course, is how many of these different things do you have to do, and what are the minimum standards for effective, zealous representation of your client – that is, assuming we are talking about the parent's attorney because they probably have the most demanding assignment. If the court is regularly reviewing a case, and our court does, then we often cancel the Citizen Review Board hearing. The judge has already reviewed the case. You will find in different counties that this practice varies dramatically. We probably are the least reliant on the Citizen's Review Board of any county in the state. Another kind of hearing is a permanency hearing. That is required within one year of the finding of jurisdiction. The court is to hold a hearing for the purposes of determining whether the permanent plan should be changed to the concurrent plan. When this system went into effect we were terrified that we were going to have hundreds of hotly contested permanency hearings about whether adoption should be the plan or should the parent get some time to try to address their issues. The fact is that we just don't have a lot of contested permanency hearings. I don't know how true that is elsewhere. I think it has to do with the communication with the bar. It has also to do with how the district attorney's office does its job, or whoever is prosecuting that termination of parental of rights. We are blessed with an extremely good contingent from the district attorney's office that does this.
- 336 Chair Ellis The termination of parental rights is separate?
- 338 Judge Welch It is the next step. In order to initiate termination, a new petition is filed by the state alleging under the termination statute that this case should have that happen. We have fairly elaborate system to do this that I won't try to describe to you now. In any event, the state has the option to file one of these petitions whenever they deem that they have a case and wish to move forward.
- 349 J. Brown Judge, at some point, does the responsibility shift from the District Attorney to the Attorney General?

350 Judge Welch

Not in this county. But it does on paper because so many of the counties have relied on the Attorney General's Office to do this kind of work. The state actually pays the lawyers in the district attorney's office to do these cases. They are county employees, but they are actually funded by the state. When a termination petition is filed and the matter is set for trial, those are the things that happen in virtually every case. I would like to go back and tell you a little bit more about some things that we are doing that are a little bit different. Going back to the shelter hearing, one of the things we initiated several years ago is a second shelter hearing, which is held for a variety of purposes and not in every case. It is a decision that is made by the presiding judge at the time of the first shelter hearing – whether there are issues that need to be quickly addressed. A typical time between the first and second shelter hearing is two weeks. It is often done because there are no parents present at the time of the first shelter hearing because they are in jail and will be out fairly soon. Sometimes we will have second shelter hearings because the state's case is kind of skinny and there is a pretty good chance that the kids can go home and the judge wants to monitor that. We started this, as I said, several years ago. At this point, we are holding these second shelter hearings in about 25 percent of the cases. Another thing that we started doing many, many years before was a pretrial settlement conference in every dependency case. So at a shelter hearing on day one the judge makes a decision about whether or not the children are to remain in protective custody or are being returned to a parent. We also decide whether there is a shelter hearing, and, if so, setting it on a specific judge's calendar at a specific time so everybody leaves the courtroom knowing the next date. The other thing that happens is the pretrial settlement conference in each case, which is also scheduled with a specific judicial officer with a specific date and time 42 days in advance. What happens is everybody meets outside the presence of the court for about an hour conference – what we affectionately refer to as plea bargaining over language and over whether the proof is adequate or strong enough in certain subject areas. Frequently, a very, very large percentage of the cases is resolved as a result of that pretrial conference. They come in to see the judge and announce their decision about how they are going to handle their case. Sometimes the judge won't agree with what is being done, so we send them back to the drawing board. But the overwhelming majority of our cases are resolved by this warm up settlement hearing. If it is not settled at that point, subsequent judicial settlement conferences may be held. For instance, the lawyers have not had the opportunity to fully consult with their client about their options, their choices and the likely outcome. Then they say "Judge, I think if we had another settlement conference, we will probably be able to settle this. But I just need a little more time with my client." You can understand that if you have had to tell a criminal defendant what the likely outcome is. Telling a parent, particularly a young and not very functional one, that they may or may not get their children back, this is heavy stuff. It is hard work to represent these parents and explain to them how this whole process works and what the consequences may be. We do set subsequent judicial settlement conferences when the first one doesn't work, and sometimes we don't. We set the matters for trial and we try to set them within the 60 days. But we are not particularly successful in doing that because of the nature of the system. It is a very busy system and lots of lawyers, relatively speaking, are scheduled up to their ears for all of the reasons that I am laying out for you. So finding time when five lawyers and a judge can mesh their schedules is very frustrating, hard work. The family decision meetings and team decision meetings are internal, problematic meetings that case workers and facilitators run in most cases. The judge is involved, though it is not a judicial proceeding. Whether lawyers go to these gatherings is not based on a pattern or set of principles that I have been able to discern. I am a little bit too far removed from it to know. It is a lawyer-by-lawyer thing. It is a professional judgment about whether the meeting is necessary or not because major decisions are made in these meetings.

461 Chair Ellis

This is something set up by DHS?

461 Judge Welch

They tend to involve extended families. The parents are there, the case worker is there, and service providers are there. They ask, "How is momma doing. Is she doing well enough to make this step in the process, which is returning the child?" Placing the child with her in a

residential drug treatment program – lots of very important decisions such as the level of parenting time and who will supervise it – a lot of very, very important decisions are made. Again, you have with the CRBs and all these hearing processes, a lot of demands on lawyers. Now, what a lot of lawyers do – and there are people here who are in a position to tell you the details of this – is that they maybe don't go themselves, but they will send a paralegal from their offices or a social worker who works in their firm to at least be there to speak for the parent or help the parent navigate this. There are a lot of demands. I want to talk a little bit about our termination process.

- 482 Chair Ellis Let me just see, the process you described by my account involves, typically, nine appearances by lawyers.
- 489 Judge Welch There can be multiple reviews.
- 490 Chair Ellis I understand that, but just to get a sense of the scope of the problem of lawyers trying to do what they are being asked to do: a single case typically involves at least nine, and could be quite a bit more, appearances?
- 497 Judge Welch I think “Byzantine” is probably a pretty good word to describe these processes. A termination petition is filed by the state, the parents are served, and they are ordered to appear. If they appear, we set trial dates. If they don't appear we default them and terminate their parental rights. We have a changing process for how these cases are managed through the trial stage. I can tell you about best-interest hearings real quickly. One of the things we do here in Portland, which we have been doing now for about 15 years and we are very proud of and think is very important, is that, whatever judge adjudicates the case, the judge keeps the case for all subsequent hearings. The parents have appeared and they have asked for a trial, or at least they have indicated they are contesting the process. We set trial dates about four, five or six months out from the appearance only because of the volume that we run. In the interim between the initial appearance and the actual trial, we set what is called a best interest hearing, and that is set with the original judge in the case. The real purpose of that best interest hearing is to talk very frankly with the parent about the probable outcome of the case. In other words, what we do in these hearings is we say to the lawyer, “Run down your case, what does your case look like?” We want a quick summary of the strength of the case and who some of the witnesses are. Then we have the attorney for the child or children add comments to that. Then we ask the parents' attorneys to do that. What happens, practically speaking, is that most cases go away by default, or the parent agrees to terminate their parental rights. That is also a time-consuming process for attorneys, particularly the attorney who is representing the parents. We have to have legal advisors to tell the parties what the choices are and what the implications are. We have a lot of openness now with adoptions, particularly when kids are being adopted by their grandparents, which is not unusual. One of the biological parents is connected to these people, so they obviously have some prospect of having a future relationship with the child. These are the people that are most likely to be agreeable to terminating their parental rights. Openness is becoming the rule rather than the exception. Thirty years ago, that was considered absolutely contemptible – that there would be any knowledge of who the adopting parent was and vice-versus. As you can see, we keep these lawyers pretty busy and, added to that, we operate out of two courthouses. There is a nice long chunk of the interstate in between. We worry about that. The judges have had some lengthy discussions about what we could do to minimize these demands, but we haven't come up with anything. These hearings are held at all sorts of different locations. We certainly don't do this to drive lawyers crazy. I have attached to the handout, just so you know what you have, a description of the best interests hearing. I have also given you our juvenile court procedure manual, though it hasn't been updated now for several years.
- 633 Chair Ellis You are on a 10:00 schedule. Are the rest of you able to stay longer? Why don't we address questions to Judge Welch while she still has time?

641 Judge Welch I told Ingrid that I would be able to come back at 11:00.

644 I. Swenson We planned a panel discussion.

646 Chair Ellis What would be the best from your point of view?

648 Judge Welch I have a few minutes.

649 Chair Ellis Obviously, we are interested in how the assignment of lawyers is being handled and what your observations are, just make it a broad topic, with regard to the quality of lawyering and the availability of lawyers.

658 Judge Welch Generally speaking, my response is very, very positive. Because I have been doing this for a long time, one of the things that happens on the DA's side, and on the side of representation of children, is that juvenile court has ceased to be a dumping ground for lawyers. This is a place where people come who really care about this work. The judges in this jurisdiction are all doing family law voluntarily, all nine of us. We have lawyers who fit that description as well such as the lawyers in the Public Defender's office, MDI and JRP. The people who are doing this are experts. They are excellent, they are very committed and they work very hard. Overwhelmingly, with all these firms, we are very, very happy. There is frustration because they are not on time because they are driving back and forth or they are overcommitted. We are hoping this consortium that you have set up can help out a little bit. The single biggest problem we have, and I think the consortium is probably going to make it worse, is the appointment list where there is a conflict or where we just run out of lawyers. You can imagine the conflicts when you start out with three or four lawyers, and three of the clients have criminal histories and have lawyers from the Public Defender's Office. It is just a rat's nest. But we fall back on a list of lawyers who are willing to be appointed at \$40 an hour and, guess what: the ones who are willing to do this aren't very good. We need to have more lawyers available when there are conflicts.

720 Chair Ellis Some of our contractors combine criminal defense lawyers with juvenile lawyers. Some are specialist juvenile lawyers. I am interested in if you see either any synergies or any disadvantages?

728 Judge Welch Yes I do.

[Tape 1; Side B]

010 Judge Welch We have a program going, for instance, where Day 1 we identify before the shelter hearing the criminal history of all the adults who are involved. We know what their status is – if they are on probation, if they are in prison, or whatever. We started doing this several years ago. It changes the whole synergy of how things work. You know what is going on and who you are dealing with. What we moved to is that, if a parent is on active probation in Multnomah County, the probation of that parent is moved to the judge handling the juvenile dependency. So, if I have this case and daddy is on probation for domestic violence or a neglect charge, I become the probation judge for that dad. I think I had mentioned this process to you the other time I appeared. What goes on in those hearings is absolutely breathtaking because the whole system comes together. We work with the Public Defender's Office at that time to do this in a way that really works. In other words, the lawyer on the probation revocation would, generally speaking, be somebody who didn't know about the dependency case. If we have the combined hearings where we are reviewing dependency case and daddy's probation, it is very effective joinder of issues.

036 Chair Ellis The PD lawyer that was handling the criminal case will also migrate there?

037 Judge Welch It would probably go the other way around.

- 039 J. Connors I think the expectation in our office is that the juvenile lawyer would handle everything.
- 040 Judge Welch Those kind of integrated systems, we are really big on here. It is helpful. I don't see any particular detriment.
- 045 Chair Ellis Let me suggest one. I would think the risk of conflict would be much higher. The question I have is, in the criminal defense area, if conflicts are out there, they are not identified right at the beginning. The lawyer gets part way through the case and the conflict becomes apparent. Then the lawyer has to withdraw and the public funds that we administer end up being paid twice for the same case. I would think, based on your description of the process, that there would be a huge risk of conflicts. The question I have for you is how often does a conflict happen partway into the process, when you have to reappoint and start over?
- 057 Judge Welch I would say it is getting better with regard to how far into the process we are when conflicts are recognized. The firms are doing a better job of trying to nail that down. I wish I could give you a definitive answer. We sign substitute orders every day because of conflict issues.
- 064 Chair Ellis Do you see any way to improve on that? I don't know what data sources are available at the inception, but obviously that would be a big help.
- 067 Judge Welch I frankly hadn't thought that much about it. If MPD and MDI weren't here –
- 068 Chair Ellis Or if they broke up between the juvenile group and the criminal defense group.
- 070 Judge Welch I think from a selfish prospective that is not as big an issue for the court. It is probably more important to the law firms than us.
- 075 Chair Ellis It may complicate the contracts that we have, which tend to be on a case basis, as opposed to a smaller granular basis. On a particular case, you get two out of five appearances and then the conflict is recognized. Then someone is brought in and counting twice is the problem.
- 080 A. Sherbo I think there is something inherent in the dependency process that causes conflicts to arise later. Partially it is discovering a conflict that preexisted the appointment, but there is something unique about the dependency process where the lawyers are continued from hearing to hearing. There is really no cessation of the case for quite some time, so conflicts arise. You will end up representing two clients –
- 087 C. Lazenby Give us a little more detail.
- 088 A. Sherbo We had a case yesterday where we have two dependent young men in the same foster home that assaulted each other. We were representing both of them and now we have a conflict. It wasn't something that could have been identified. By the very nature of the system, we have a number of children with multiple, emotional or behavioral disturbances who are placed close together in the same location and bad things happen. These are bad things between two clients of the same firm. So that is something that is unique to children and their lawyers.
- 100 Chair Ellis There is a tension that we have to sort out. On the one hand, there are lots of economies of scale by dealing with larger contracting groups. They support each other, their training is better. But to the extent we deal with larger, integrated groups, the more we run the risk of these conflicts. What I am trying to get a sense of is, from your perspective, do you think we should be trying to break up into smaller contractors, or are we okay at the concentration levels that we have currently?
- 109 A. Sherbo Someone else can answer that question. You have identified the ups and downs. Our firm has a number of lawyers who have a lot experience in a lot of different areas. We train and

mentor younger lawyers and the advantage that we have, in response to one of the other issues that was raised, is scheduling. If we were a two-person office, we could not tell the judge that we can cover all the hearings. I have a hearing before another judge at 10:00 on Tuesday, and I am supposed to be downtown before another judge. If we didn't have someone to help cover cases, things would grind much more slowly, I think. It is not ideal, obviously.

- 122 Chair Ellis Do you have a suggestion for us, or are we alright with our current number of providers and their concentration? Should we be moving in one direction or another?
- 126 A. Sherbo I feel put on the spot.
- 127 L. Harris You should say you need to think about this.
- 127 A. Sherbo I can really only speak for my office. I feel like the quality of the work that we perform, under the constraints of the system as a whole, is excellent. I wouldn't want to see us much bigger or much smaller. I think we do have a problem in the community that Judge Welch mentioned because we just don't have enough people when we have three fathers, a mother, and children, and they have prior representation. We don't have enough lawyers to cover all that.
- 137 Chair Ellis Tell me a little bit about your organization.
- 139 Judge Welch I think I need to go.
- 140 I. Swenson Mr. Chair, if I can say a couple of things. First of all, I think the juvenile lawyers in those firms have the benefit of training, but the fact that they are part of one firm creates conflicts.
- 149 A. Sherbo They bring an awfully good perspective from my point of view. I work for the Juvenile Rights Project. We exclusively represent children and young people up to, say, 25. I would say about 70 percent of our work is dependency, and most of that work is representing children and teenagers. We are expanding our representation, at the request of the community, and by my desire as well, into representation of parents.
- 155 Chair Ellis It is not like labor work, for example, where you either do employees or employers?
- 156 A. Sherbo It is more like divorce work, where you do husbands and wives. We don't have a very large volume of delinquency cases and we don't do any adult cases, with the exception of a few Measure 11s that we have contracted for in the last contracting session. The expertise in criminal law that the firms that do both bring to delinquency work I think is very high.
- 164 Chair Ellis How many lawyers in the JRP?
- 164 A. Sherbo I think we have 18.
- 166 Chair Ellis They all do juvenile work exclusively?
- 166 A. Sherbo Well, they don't do adult criminal work. Our office is somewhat of a hybrid between a public defender office and a specialty legal aid office. We have a number of lawyers who are funded from other sources, who are representing children in other courts. We have a project where we represent children in special education. That is funded entirely from another source. We have, among the 18 people that I mentioned, several people who are exclusively doing that.
- 174 Chair Ellis You are organized as a non-profit corporation?
- 174 A. Sherbo Yes, that is correct.

- 175 Chair Ellis Tell me a little bit about the structure. Do you have a board?
- 176 A. Sherbo We have a board.
- 177 Chair Ellis Are they providers or outsiders?
- 177 A. Sherbo They are community members. They are not providers. It is a relatively recent board and it is growing. It is made up of people who have a particular interest in children and youth issues. We have a pediatric nurse practitioner, who we developed a relationship with over the years.
- 186 Chair Ellis You mentioned you are funded by multiple sources. Are we talking three or four sources besides OPDS?
- 187 A. Sherbo I think OPDS is probably by far the largest provider. We have employed several people to do the school education through grants, and then we have smaller pieces of funding. The work that we do which is funded by you is defense work, that is where we started –
- 198 Chair Ellis That is 90 percent plus of your budget?
- 200 A. Sherbo I don't know. I am a supervising attorney, not the director. I am not very good with numbers. My guess is that well over half is from OPDS funding. What we have found is the defense work informs the other work. For example, a child's expulsion from school has a direct impact on a juvenile court case. A dependent child who has finally found a foster home, which is a good match, but they are about to be expelled from school, might lose his placement. The child, by the terms of their probation, is required to attend school and has special education needs that aren't being met. So there is such an interrelationship between those pieces of a child's life. I think I was originally asked to talk a little bit about how difficult and complex the work is. Here is what I understood you wanted to hear, both about the quality and the challenges. I felt, when I talked to Ingrid, what I needed to walk is a fine line between bragging about ourselves and whining to you about our needs. I will do my best to walk that line. If you see me going too far in one direction let me know. We provide excellent work, but it is at the expense of family time and leisure time. We have too much work to continue to do the high quality that we expect from ourselves and our staff. Particularly with people like myself and Ingrid and others who have done this for a long time, we started, in my opinion, when the caseloads were lower. So I have expectations of my staff about how they are going to handle a case that are somewhat based on how I was able to handle that case when I had less cases. The amount of research I was able to do, the amount of collateral issues I was able to address, the amount of times I was able to advise someone – all of those things we are just not able to do in the same way now. I think Judge Welch gave you an excellent view of what happens here in this building, step-by-step-by-step, and she told you a little bit about what happens outside of this building. I want to talk to you a little bit about the things that we do, those areas of law that intersect with what we are trying to do and what you all see as the key events: the shelter hearing, the settlement conference or the trial. Dependency law is really statutory, where we have the juvenile code that tells you what the bases for jurisdiction are and what you must prove for the state to intervene into a family. The code tells you that and it tells you the stages of the proceeding. But there are so many other areas for the law, including federal statutes that we need to incorporate every single day, which fund foster care and set requirements on the court. It has multiple meanings and connotations that you have to know about if you are practicing in this area. For example, in this state, if you are related to the child who is placed up for foster care, you may or may not be able to receive funds, and that is based on federal statute. If you are a juvenile court lawyer, you need to know what that says. If you have a client in drug or alcohol treatment, you need to know the law under Title 19 of the Social Security Act. Even if you understand them, you probably aren't going to get that client in drug or alcohol treatment in the time set by the federal statutes. We also have federal statutes that regulate how we do business when an Indian child is involved. We were talking about the possible parties. You have mom, you

have dad, you have the children, you have the tribe; and there are CASAs or special advocates and other family members who might intervene. So you have a hearing where you might have eight different representatives that are governed by not only the juvenile code, which is relatively manageable, but multiple federal statutes in areas that are related, but not specific to child welfare. We also have the relationship between juvenile dependency work and domestic relations law. You have the Interstate Compact and Placement of Children laws. You would think that if you were appearing in front of Judge Welch with two parents who are in jail, and the child needed placement with an aunt in Vancouver, you are home free. Not so; not so at all. It is far more complicated. There is a vast amount of information that each of us needs to know. If we don't know it, we at least need to know that it is out there to look for. When I was talking about trying to present the complexity of this to you, I have done this for 30 years nearly every week, with every single one of those issues. But someone can still come up with a fact pattern or a legal issue that we don't know.

300 Chair Ellis How is some poor law-trained person on the appointment list possibly going to know all this?

303 A. Sherbo I wouldn't know, in this county at least, if there are poor people on that list who only do one or two cases a year. I would say that is a bad system to have somebody who only does one or two cases. My guess is the people here do more. It is sort of a problem where you have an area of law you are proud of and you feel it is so complex that nobody else can do it. I don't mean to be making that statement.

309 Chair Ellis You have me persuaded.

310 A. Sherbo There are general practitioners who do a lot of good work in a lot of different areas. I think this is really complicated work, which has been perceived as simple. So the difference between its difficulty and the perception of it is really a problem as well. The other difficulties of the work have to do with communication with the client. For us, it is primarily children. You have a full set of skills to learn in order to communicate with someone who is 13. There are really important issues, like: "What do you expect your placement to be?" "What do you want it to be?" "Well, I can't achieve that for you;" "There's only a 30 percent chance of achieving that for you, but I might go this other route." These are very difficult communication issues – kids being influenced; being careful not to influence them, but to counsel them. It is time consuming.

325 Chair Ellis You mentioned you have been doing this a long time and your colleagues have been doing it for a long time. Of the 18 lawyers in your group, what is the turnover, what is the average experience level and the age of attorneys?

331 A. Sherbo We have a good number of people with a seven or more years of experience. We feel like, despite the poor pay and the long hours and the emotional drain of the work, that our firm provides support. There is a lot of collegiality and a lot of people who really love the work. I will tell you, we have a lot of people who have spouses that have what I will call a real job. They are able to make the sacrifice to work for us long-term. We have just lost a very capable young attorney to go into private practice. We have been unable to hire a number of people who couldn't afford to come to work for us.

343 Chair Ellis How hard is it to recruit when you do have an opening?

344 A. Sherbo We have a number of applicants every time we have an opening. We have really tried to emphasize major felony qualified work because we do have Measure 11 cases. We did just hire a qualified attorney.

352 Chair Ellis In the criminal defense practice there was, and I think there still is, a model to hire a lot of young lawyers who want to get trial experience. It sounds to me like your field is one that lends itself more to a long-term commitment and career.

- 361 A. Sherbo I think that is correct for a couple reasons. Number one, it is kind of a calling. It is very interesting legal work. The number of issues that come up on a given day is rewarding, intermittently at least, when you have success. Also, as Judge Welch said, there is not nearly as much trial work.
- 372 Chair Ellis What are you finding in attracting new entry-level attorneys, in terms of those who have law school debt? Is that a big issue?
- 375 A. Sherbo That is huge. That is one of the most recent revelations we have had. The young man who just left us could not afford to pay his school loans and work for us. We have a great relationship with Professor Harris, who teaches juvenile law. She sends us wonderful students every summer, and we hire a lot those.
- 392 L. Harris You might be interested to know that the federal legislation provides for forgiveness of debt for prosecutors and not defenders.
- 393 Chair Ellis I know that. The current bill only provides it for criminal defenders not juvenile lawyers.
- 398 A. Sherbo I think there might be some national organizations who have recommended similar loan forgiveness for juvenile court practitioners.
- 402 Chair Ellis We are migrating that way.
- 406 L. Partridge I agree with Angela. Do you have any questions?
- 407 Chair Ellis I was interested, from the law school point-of-view, are you finding a lot of interested students?
- 411 L. Harris Yes. I am trying to figure out how to put this into perspective for you. Let me tell you just a little bit about where I am coming from and frame what I am doing. I have been teaching at the University of Oregon since 1982. I teach children and the law, and have since I came there. Before that I was public defender in Washington D.C., where I did a lot of juvenile court work. I have been working with juvenile court since I came here. I have been on the Juvenile Court Improvement Project Advisory Board since it began. I have been part of Ingrid's work group, which she doesn't claim ownership of – the Juvenile Law Training Academy – since it began. I was the head of your contractor site team that did the evaluation of the Multnomah County juvenile contractors in December. To some extent, I can answer questions about other parts of the state. I would tell you that your best functioning juvenile court and your best set of lawyers is in Multnomah County. The rest of the state doesn't necessarily look like this county.
- 431 L. Partridge I might not necessarily agree with Professor Harris.
- 433 L. Harris I just said “not necessarily.”
- 434 Chair Ellis We had two meetings in Marion County and we heard some very positive things.
- 435 L. Harris I also head a project at the law school, which is a child advocacy project. It was set up with money from a donor, but it is really for the students who come in and say they want to do child advocacy work. Besides children and the law, I teach family law. So I rarely run into people coming into law school saying, “My heart is on fire to do divorces.” They all want to represent children. So, yes, there is a lot interest. I will tell you that part of the reason Angela can recruit is that JRP is regarded as the place to go in this state if you want to represent children. There are other lawyers with these skills, but they don't have the reputation of JRP. There are wonderful students, who come with great backgrounds and want to do this kind of

work. As it happens, I was just meeting the day before yesterday with three students who were awarded fellowships for this child advocacy project. They get money. Part of what I am doing with the money that the donor gave us is to give, in essence, scholarships to some students to try to reduce their loans. This one woman, who is fabulous, worked in juvenile corrections before she came to law school and she is about 30. She is going to work for JRP this summer and got out of college with very little debt. She said after her first year in law school that she had \$30,000 in debt already. So the debt issue is huge even in public law schools, essentially because of the de-funding of higher education. Seventeen percent of the costs of higher education are paid by the state now. The public schools are basically private law schools in the sense that they rely on tuition; so it's totally different from when we went to law school. When I went to law school, I came out with no debt because I saved money and I worked. It is completely different now, and that is a big problem. It does mean that more and more people can't do this kind of work. What Peter asked me to do was to talk about, from a more national perspective, representation of juveniles and emerging challenges. I don't know which way you want to go?

482 Chair Ellis

I think the latter, but let me put a question out there in the course of your response, if you can work this in. The biggest growth component in a public defense office is juvenile representation. Criminal defense is obviously a big part of what we do but, in terms of growth in incremental expenses, it is less of a challenge. I would like to understand better what is happening in the juvenile area.

497 L. Harris

I would guess that the biggest contributor to increasing costs is the dependency cases, not the delinquency caseload. I was all prepared to tell you all the reasons why I think it is harder to be a lawyer in a dependency case than to be a lawyer in an adult criminal case or a delinquency case. I think that you have to master more subject matters. You have to master greater area of laws and related materials, and I think you have to do more work. One of the reasons is because, as you all know I'm sure, in adult criminal court, by and large, once the case is tried and you have a conviction rather than an acquittal, the lawyer's work is basically done. There is so little discretion with regard to sentencing anymore, and once someone is sentenced if they are sent to some kind of facility, the court loses jurisdiction and they go away. On the juvenile side with delinquency, there is more discretion on the sentencing but, once again, in Oregon now, once a kid is committed to the Youth Authority, the case is over. In dependency cases, as Judge Welch was telling you, these dependency cases go on constantly. That is where the bulk of the work is in dependency cases. After the adjudication, they literally last for years.

529 Chair Ellis

Which raises a question that I will be interested in. I believe our contracts with both of you are on a case unit basis. The definition of "case" I think I am hearing is a very elastic concept which, in terms of fairness of how we deal with other contractors, is an issue. When we get back to you, I would like to hear your thoughts on that.

538 L. Harris

The other thing that I think is important for you to know is that the quality of representation – the quality of the work that lawyers do – in juvenile cases continues to be a big issue in this state and nationwide. The Oregon juvenile courts in the last 15 years have had at least four major episodes of being studied. Every one of those studies has come back identifying as a major problem the adequacy of representation of private parties. You have got the Juvenile Court Improvement Project assessment materials, but that is just the latest of a string of studies. The Juvenile Court Improvement Project has done a lot of good in this state on many issues, including that they try to do a lot of special training so everyone, including lawyers, will get up to speed and improve the quality of work that they do. But they have had mixed success. I have to tell you that the work that has been done in the last couple of years headed by you – that is to say, by Ingrid – has made a huge difference. I think it is very clearly because you all are the ones who pay these lawyers and you all are the ones that these lawyers listen to. I do want to take this chance to give the maximum praise I possibly can, first of all, to Peter Ozanne for making this a priority, and for having incredible wisdom and good luck to

hire Ingrid. She is remarkable. She is so respected; and she has provided so much leadership. She has created this Juvenile Training Academy, even though she won't own it. She is initiating this site visit review process, and it is making a big difference. I think it is really important. I know it costs money to do all this stuff, but I want you know it is really important. On top of all of the stuff about why juvenile law is already complex, I am supposed to tell you how it is going to get worse. You already know about the more complex hearings. That was already talked about adequately. You know about the push timeline under the federal law.

592 Chair Ellis

The 24 hours –

593 L. Harris

No. Basically, at the national level, it is called the 15-22 months rule.

595 Chair Ellis

The one year thing.

595 L. Harris

What that means is the lawyer for the kid and the parent who is doing a good job simply has got to step it up and can't let things slide. The lawyer has to be on top of things at all times, and it has made things go faster. The push for permanency, which is what this is related to, is creating some important issues. As Judge Welch said, here in Oregon, adoption is the one-size-fits-all solution to the case when the kids can't go home. Across the country, it is increasingly recognized that this is not the best outcome for many children. But there is a lot of resistance, institutionally and structurally, to say maybe we shouldn't be doing adoption. Maybe we should be doing some other permanent plan for this child that doesn't involve completely terminated the child's relationship with the parents. For the lawyers representing the kids, as well as the parents, first of all, they have to keep figuring this out. And then they have a lot of difficulty dealing with the institutional resistance. At a philosophical level, they have a lot of educating to do when they want to do this, and then the case actually becomes more complex. You have to figure out what is that alternative permanent plan. Oregon has got the proper statutes for this. But my observation is that adoption is still so dominant, and these other things are used less, or are not used as much as they ought to be. Another problem is related to what Judge Welch was saying about complex families. In the not very distant past, probably when you when you were in juvenile court, Mr. Greenfield, you just didn't see fathers. The fact that these children had fathers was sort of completely ignored, which I always love, because the very first case in front of the Supreme Court of the United States about father's rights is about a juvenile court case. But everybody totally ignored fathers until recently. Now you are really trying to figure out father's issues for a variety of reasons. It is complicated: practically speaking, not only because one family may have several fathers, but because you might not actually know who the father is. The last legislative term, I worked on legislation when Senator Brown was actually the chair of the overall group about trying to deal with fathers in juvenile cases. Because of some of the complexities of the law, it is not at all uncommon in juvenile court for there to be a couple guys who are presumed to be the father of a child. You have to choose. Figuring out how you sort that out legally -

655 Chair Ellis

You are talking not just about multiple fathers where you have a sibling?

656 L. Harris

No, I am talking about one kid with several father.

[Tape 2; Side A]

002 L. Harris

You might think, "Well, that is simple, just do an DNA test." But it is not that simple because there are legal complexities. It is not simple because it assumes that all you care about is biological parenthood, which isn't necessarily the case. It is hard to resolve these issues, not only because our laws are not all that straightened out, but also because there are different constituencies. You have got the child support people coming in and pushing one way. You have the fathers' advocacy groups coming in and pushing another way. In a very complex area, this stuff needs to be sorted out quickly. There are trends occurring in other states where

it is going to be increasingly important for people, especially who are advocates for kids, to know about various ways to deal with de facto parents, who are not biological parents.

- 012 Chair Ellis Let me ask, and I am sure this will sound naïve in this room, but if I am a lawyer appointed to represent a two-year-old, where do I get my direction?
- 013 L. Harris Make it up yourself.
- 014 Chair Ellis What?
- 015 L. Harris You make it up yourself.
- 015 Chair Ellis Help me out. How do you decide what is in the best interest of the child?
- 017 L. Harris It is easier to tell you what happens for a two-year-old than a seven-year-old. One of the things with a two-year-old is you have to do what Angela is talking about. You have to figure out how to talk to a very little child. But if you have a very little child, they really aren't going to direct you. They aren't going to instruct you. So you are going to get information from other sources, such as therapists and so forth, to figure out what is going on. But you are put in an odd position as a lawyer.
- 021 Chair Ellis You are like a subjective parent, almost.
- 025 L. Harris You make your own choices. Some people try to structure that by saying, for example, "I am going to have a presumption in favor of keeping the child with the parent," or something like that. You just make it up yourself. The reason I said a seven-year-old is harder because there is a lot of debate about what age a child becomes old enough that they really should be directing the lawyer. JRP's position and the new standards say "7," but there are lots of other people who disagree. If Judge Welch was here, she would say, "I wouldn't even listen to a lawyer that says that." I have heard her say that, but I don't know if she would tell you that now. It is very complicated when you get to children who are a little bit older. How much do you take direction from them, as opposed to, again, making it up yourself? The standards call for the appointments of guardians, but that isn't something that is common in most cases. It could have happened that CASAs would have been developed to fit that mold, but they aren't in this state. In this state, CASAs are separate, independent parties, so they are not the one who directs the attorney for the child. For a little child, you have got the two best interests speakers, the CASA and the defense lawyer.
- 043 A. Sherbo I think the impression is that why couldn't the state's lawyer represent the child, couldn't the parent's lawyer represent the child, or why do we need a lawyer for a two-year-old?
- 045 Chair Ellis We haven't gone that far.
- 046 A. Sherbo What is the value added of having a lawyer for a two-year-old?
- 046 Chair Ellis How does the system work?
- 047 L. Partridge One of the things that I would like to tell you about: if I am representing a two-year-old and why you need a attorney for that child. An attorney general or district attorney deals with DHS and liability issues. I don't mean that in a critical way because what happens is that, if you have a two-year-old, and let's say they are not going to be returned home under a permanent plan, then you have to look and see where is this child going to go to be raised for that 16 years plus. DHS may look at other relatives and rule them out because they can't certify them. They have a whole process they have to go through, which is somewhat mandated by federal law as to who they can certify as a caretaker for that child and who they can't. I just recently had a case – and I hate to tell war stories – to illustrate, where the child

had been with the grandmother from birth because the mother was fairly absent and the father was not in the picture. The child got removed because there was a search warrant served next door to the apartment she was in and, while they were there, the police saw what we would call a “dirty house case,” which usually means there was some drug component involved. The child comes into the foster care system, the system takes protective custody of that child, and then you say, “Well, where does this child go?” Obviously, if I was representing the child and sending him to the grandmother seemed to be the best idea, the problem is DHS wouldn’t certify her because she had a criminal history. It was, I think, seven or eight years old for a prior drug offense. That, coupled with the condition the apartment was in – there were drugs in that apartment – they wouldn’t certify her as a placement resource. So, as the child’s attorney, I was really having to push DHS to say, “Hey, let’s get around your certification process and see if there is another way we can do this.” Ultimately, while they weren’t willing to do that, I was able to approach the juvenile court judge and say, “Let’s get DHS out of this case and let’s talk about guardianship for this grandmother.” So, if you don’t have a child’s attorney, I don’t know how that ever happens for a two-year-old. Otherwise, what would have happened with this child is that the child would have been in foster care. They would have gone through a termination process with the parents, and then they would have had to look for an adoptive home, which never would have been that grandmother. It would have been some stranger adoption and, 15 years from now, I’ll tell you whether that was a good or bad decision. At least by having a child’s attorney, we have that option to go to the juvenile court judge.

079 L. Harris

Another reason why it is important to have the children’s attorney, I would say the agency has their own agency. They have their own institutional structures and, very often, what the lawyer for the child is doing is pushing against them. One of the things that is happening, there are studies coming out, including studies based on Oregon’s population, that show what a bad prognosis kids who are in long-term foster care have. They are set up to have so many life failures; and they come in damaged. But, traditionally, the system hasn’t paid that much attention to them. The whole structure, as it has been explained to you, is really focused on the parent – trying to identify what is the issue with the parents. Can we fix them up so the kid can go back or not? Very often, the kid who is coming in damaged and has issues hasn’t had things done for them – anything as simple as getting medical care or their educational needs attended to and so forth. There is now increasing attention to the idea that lawyers for the kids need to be pushing for services for the kids independently of this question of whether they go back to their parents or not. This last year, the Juvenile Rights Project got some legislation passed that will really help some kids. It requires that kids in foster care be able to stay in the school they came from, if that is in their educational best interests, which wasn’t possible before. This is great legislation, but there are implementation issues. Lawyers have to know about it. Lawyers have to push it. It is going to be another one of those things where lawyers are having to do things. There is a case that I worked on with Angela involving a child who had moved 12 times in 18 months. She had her issues, obviously. But the core of that was a problem with the agency not taking care of her adequately. Juvenile Rights Project was working on that in representing that child. It is really important to have lawyers for kids, and not all counties appoint lawyers for kids, certainly, not in every case. I can’t tell you that lawyers always do a very good job, which is regrettable. But that goes back to the quality issue. Lots of studies show that, if you want to get good outcomes in juvenile court, it turns on the quality of the lawyers. That is incredible important.

112 Chair Ellis

So, when the legislature asks us if we are funding too many lawyers and why do you have to have lawyers for all these children and parents, etc., you are comfortable with the way the system is working now?

116 L. Harris

No. I think sometimes this is a problem of implementation and not theory. I think there are times when lawyers who are appointed for kids don’t provide adequate representation.

- 120 C. Lazenby Another aspect of that: I understand in felony cases, where you ended up having represented the co-defendant, there is a conflict. But, overall, in the juvenile law area, are the conflicts really more sort of technical? If we could wave a magic wand and, let's say, we could get 31 votes in one house and 16 votes in another to change the law about conflicts for lawyers practicing in the area, is it possible to get rid of the sort of standard view of conflicts? Could you see a way that could actually help, because the system does a lot more social management as opposed to strict legal representation? I am not diminishing the legal representation aspect. I am actually acknowledging that you do much more than just pure legal representation. If it is possible, if not, just say, "Chip you are crazy." You have said that before, Angela.
- 133 A. Sherbo Not for decades.
- 133 C. Lazenby Is it possible that some of those conflicts are really more apparent than real? You talked about the case where you were representing two kids, and now you have assault charge with one of them. There is going to be a legal disposition of the assault case, but continuing treatment and placement in the dependency case.
- 139 L. Harris Could you keep representing the victim?
- 140 A. Sherbo I don't think we can keep representing either of them. I think it is a tragedy that we can't because, in this particular instance, we have had a very long-term relationship with one of them and have provided him with really superb services. I don't know the answer to your question, Chip. All I can tell you is that we take every one of those potential conflicts to a group in our office. The individual attorney doesn't make that decision. It is always evaluated by supervisors and several other people. We are doing what we can internally, and then there is real reluctance to stop representing somebody who you have formed a relationship with. I don't believe we have conflicted off of any cases where we should not have.
- 158 L. Partridge I can tell you, in Marion County, we have a consortium system and I don't think it is an issue. In Multnomah County, it seems to be a much bigger issue with its system. But in our system it is not really an issue. If we have an apparent conflict at the beginning, someone else just takes the case. I don't believe it is any additional cost to indigent defense. It may be a minimal cost to the court in having to reschedule a court appearance. I know there has been a big debate statewide about what is the best system to provide the best services, but clearly I think one benefit of a consortium is the handling of conflicts.
- 173 A. Sherbo So you are starting with criminal defense, where that people were being appointed counsel regularly in accordance with constitutional court rulings. In juvenile cases, people were not being appointed counsel. In *State ex rel Juvenile Department v. Grannis* the Court of Appeals first recognized a constitutional right to counsel on a case-by-case basis for parents in Oregon dependency cases. That case was decided in 1983 or 84, so it has just been since then that counsel has been appointed for parents in juvenile dependency cases. The statute has also been changed. So counsel has been appointed in dependency cases for a considerable period of time, but it is obviously not nearly as long as in criminal cases.
- 186 L. Harris The other thing is, it is my understanding that the number of criminal cases is fairly stable, at least nationwide. That is not true in dependency cases.
- 189 C. Lazenby People who are younger are having children. Caseloads for dependency are going to get larger.
- 191 L. Harris Everybody always says it is drugs. I am not convinced about the drug arguments because meth has been around a long time, but I haven't seen any studies on the subject.

- 194 L. Partridge Part of it is, and I'm not a policy person and I don't really know about stats, but from my perspective, every time you fund a dollar for law enforcement, and I am not saying that is a bad decision, one of the things that happened in our county is that the police and the District Attorney's Office got a grant for a Child Endangered Services Project. So the police were much more involved in going out on DHS hotline referrals and taking a look at the situation, which led to a lot more criminal mistreatment charges, which led to a lot more juvenile dependency petitions and which created a huge spike in the caseload. When I did criminal work for about nine years before I did juvenile work, very rarely did we ever have a criminal mistreatment case. Now, there are some folks in the back of the room that do this in Marion County probably six or seven a day. That is a direct result of that grant in Marion County, and I'm not saying that was a bad thing for the community to do. But people have to understand that this has a commensurate impact on the juvenile justice system.
- 220 L. Harris The other area of growth in cases is due to this whole idea that a family and a home in which there is domestic violence should be regarded as a potential dependency case, even where the child is not the victim of domestic violence. That is something that is new within the last ten years. The whole idea that a child being exposed to domestic violence can itself be child maltreatment causes more interventions. In Lane County, people tell me that the number of cases involving domestic violence is over half of the caseload. You get those kinds of spill-overs.
- 222 Chair Ellis I have a question and I would be interested in your thoughts. What has been the reaction of DHS case workers to this increase in legal representation? Do they fight it?
- 229 L. Partridge Are you talking about appointing attorneys for children?
- 230 Chair Ellis Right.
- 230 L. Partridge My perception is that they like it. In my county, very rarely are the case workers represented. There is not an attorney, there is no DA, there is not an attorney general present. It is very problematic as an attorney when you are trying to negotiate a case. Essentially, what I am doing, as a parent's attorney and sometimes as the child's attorney as well, is negotiating with the DHS worker over the language in the petition. I have real concerns about the ethics of that on the part of DHS and the Attorney General's Office and the District Attorney's Office, but that is another subject. But what you find as a child's attorney is that a lot of times, if you have a younger case worker who doesn't have a lot of experience, they will be ready to give away the farm to one of the parent's attorneys. As the child's attorney, you say, "Wait a minute. Hold off here. Let me get the DA on the phone." We will call the DA and basically say, "Okay, what do you have that is going to substantiate this?" If the child's attorney wasn't there, that would be negotiated in a way that would be much more beneficial for the parent.
- 247 A. Sherbo We tend to disagree with them fairly frequently and not necessarily with respect to a simple issue of jurisdiction versus no jurisdiction. Once a child is in the custody of DHS, I look at that as I continue to represent the child. I recognize the duty of ensuring that the child's parent, who is now the state instead of the parent, provides adequate care for that child. Often times, that is just not the case. I represented a 21-year-old developmentally disabled mother who gave birth on April 14, and her baby will be in his third placement next week. There is serious damage done by an under-funded, poorly trained, public child welfare agency. The role of the children's attorney and the role of the parent's attorney, I think, in addition to all the other roles, is holding these people accountable. Ingrid and I both sit on a work group chaired by Hardy Myers that is addressing the issue of representation of DHS case workers. There was quite a push, last session, to basically fund more agency staff. I think the work group that Ingrid and I sit on is basically taking a step back and saying "What would a model system look like that had everyone represented – the state, the child, the parent?"

- 278 Chair Ellis Normally, my vice-chair, Shaun McCrea, kicks me about now. We have been going two hours, so why don't we take about a ten minute recess.
- [Break at 11:10 to 11:16 a.m.]
- 304 Chair Ellis Let me just say to the Commissioners that I need ten minutes notice if anybody is going to have to leave early so that we can get a couple of votes.
- 307 M. Greenfield Define "early."
- 307 Chair Ellis 1:00 p.m. is what the agenda says. I want to welcome Senate Majority Leader Brown, who is here.
- 311 Senator Brown Thank you.
- 311 Chair Ellis By way of background, this Commission is the result of a two-year study commission of which Senator Brown was a member, and we appreciated her work. Do you have some thoughts you want to share with us?
- 315 Senator Brown I just have some really brief comments. I believe I know all of you although, Mr. Brown, I don't believe you and I have met. I am Kate Brown and I represent a little bit of northeast Portland, a lot of southeast Portland and the City of Milwaukie. I have served in the legislature since 1991 and I am one of the old ladies in the legislature at this point. I am also a lawyer by training. I have practiced family law, done a bit of juvenile law and a bit of probation violation hearings in the early 90s, before the legislature took that practice away. I practiced juvenile law during the 90s until about 1998. I left, frankly because my legislative duties were getting to be overwhelming, but also because the caseload was higher. I remember I had over a 100 cases and I was practicing 20 hours a week. It just didn't feel like I could do a good enough job. I don't think, frankly, those caseloads are that uncommon today. I chose to come back to practice during this year and spoke to Juvenile Rights Project. They agreed to take me on for a year, half-time. My reason for doing that was that I know that the juvenile justice system is really struggling and I was hoping to find the silver bullet to fix the system. I am frankly overwhelmed by the enormity of the issues in the system at this point in time. I am really struggling about where do you start to fix the system. Two things that I would share with you – and I am representing mostly children. I represented parents the last time I was in juvenile court in 1998. Most of my caseload now is children. I have about 55 cases right now. The two things that have struck me in terms of my colleagues out here is the number and size of the caseloads that they have. It is just incredible. The other issue is the level of damage that we are seeing in children. I have a number of cases where they have 12, 13 and 14 reports on the family before the juvenile justice system gets involved and a petition is filed. By the time we see these children, they are very severely damaged. So firms like Juvenile Rights Project, with the School Works program on the side, really help to repair these kids. The last thing I would say is I am really in awe of my lawyer colleagues who handle these cases. They don't do it for the money. They do it because of the ability to put families or try and put families back together again. The judges also have these enormous caseloads. I know they bring these huge piles of file home every night, and they know their cases very well. I am very concerned about the DHS caseworkers as well. Both the qualifications and the number of cases the caseworkers have are just incredible. That is all the comments I have. I am happy to answer your questions. I am no means the expert that Professor Harris and Angela Sherbo are.
- 370 Chair Ellis I have a general question of all of you out there. Do you have any suggestions about how we could do our job better, or how PDSC could handle its contract relationship with providers better?

- 374 L. Partridge I have a couple of thoughts that, if I had a magic wand, I would like to see. The first is a more coordinated process for how we deal with appeals from juvenile court. It is a different process when you have a criminal case and how you effectuate that from the circuit court than in a juvenile case.
- 381 Chair Ellis Is your question how appeals are staffed? Whether it should be by the Legal Services Division?
- 384 L. Partridge I think the level of professionalism and quality of the lawyers who handle criminal appeals is very good in Oregon. I am concerned that, in juvenile issues, it is kind of an individual system and the quality varies greatly in those appeals. There are some people who do very excellent work and some who don't.
- 391 Chair Ellis Help me out because, on the criminal side, almost everything gets appealed since there is no downside. On the juvenile side, what percentage of the cases end up with some sort of appeal and who makes the decision about that?
- 395 L. Partridge I couldn't give you a percentage. But, for instance, if you have a termination of parental rights trial and I am representing a parent and the trial court judge agrees to terminate the parental rights, almost certainly that parent is going to file an appeal. What is going to happen actually is, as the trial court attorney, I have got to file the notice of appeal with the Court of Appeals. And I am going to file a motion with my trial court to appoint somebody to handle the appeal. I am not going to do the appeal myself. It is kind of the luck of the draw about who gets that case, so the quality of work that happens by chance.
- 405 Chair Ellis It is the juvenile court judge that appoints the appellate lawyer?
- 409 L. Partridge Correct. They have a list. I don't know how it works everywhere. It may be different other places but, in Marion County, they have a list of folks. I don't know how that list is generated or where it comes from, but there is a list of people who will do appeals. Peter or Ingrid may understand it much better than I do. I just wanted to say that is one of my perceptions I have. The other issue I would like to see, if I had a magic wand, would be some type of clearinghouse where, if I had a question there was some kind of process to address technical issues, I could call in and have some consultation with someone who was more knowledgeable. I don't know if that is as big an issue. For instance, if you practice at the Juvenile Rights Project, you can probably walk down the hall and talk to Angela. But if I was out in some place where it –
- 423 Chair Ellis Hood River.
- 423 L. Partridge Well, Jack does a good job, so that is probably not a good example either. But it would be good to be able to call in and say, "Well, I have this issue about what we call the Interstate Compact Agreement where I have got to figure out how to get this kid into some foster care here – you know, six miles across the river to Vancouver." That is a very complicated process. The problem is, when you are triaging cases – and that is basically what we are doing – we need the type of knowledge and skill that a more surgical qualification demands, so you could call into Salem or some resource and say, "How does this work?" or with an immigration issue, for instance. I know that is a hot topic, politically, but immigration issues permeate a lot of our work.
- 438 Chair Ellis In Marion County, I am sure it does.
- 438 L. Partridge If I have a kid that is in foster care and the parent has a criminal charge and faces deportation, are they really going to get deported or are they not? It makes a huge difference in your case planning on what you are trying to do with that child. If you had advice that was telling you, "Hey, that parent is going to wind up being deported to Mexico," you could do a permanent

plan under those circumstances. It would be a lot different if the parent is probably going to get released. Then we are going to try and work to reunite them.

- 447 Chair Ellis Let's take your first topic first. Is this an area where there would be an advantage to having the group that provides the trial services stay with the case on appeal or not?
- 453 A. Sherbo I think we are in a unique situation because we actually do have a contract to do appeals. There are some obvious situations where you can't handle the appeal. I just filed an appeal the other day and we asked to have our office appointed. I know that the public defenders are satisfied because they are able to quickly get appellate services.
- 471 Chair Ellis Let me ask this question. I have talked a lot about the range of conflicts that exist. I assume that probably makes it potentially difficult to have an LSD lawyer – the full-time lawyers that we have to do appellate work – as the predominant appellate provider for juvenile cases because we would still have those conflicts.
- 479 L. Partridge Absolutely, that is right.
- 480 Chair Ellis Aren't we almost driven, on the appellate side, to do this on a contract basis, rather than on an LSD basis?
- 483 A. Sherbo I don't know enough about it.
- 487 Chair Ellis What is your view as to the way appeals have been staffed to this point? Are you comfortable with it, or do you think that it is an area that could be done better?
- 491 A. Sherbo We did them internally, and I thought that was a good thing for office. It teaches you how to preserve error and it enabled us to identify issues. It was very helpful. None of the trial lawyers do it now. We have a woman on staff who is a fantastic lawyer, and she does them. I will say that I just recently read an appellate case in which the Court of Appeals, with respect to mother's counsel's filing of a *Balfour* in the appeal of a dependency case for which the court appointed a health care representative. It has a number of fascinating issues of law in it, and it was inconceivable to me that someone could have been handed that transcript and appellate file and said there was nothing to appeal. So that has sort of piqued my interest in the appellate process and how appeals of juvenile court cases are being handled. But I haven't really thought much more about it.
- 523 Chair Ellis Any other thoughts on the appellate process?
- 525 L. Harris I think the idea of having trial lawyers do their own appeals would probably not work.
- 528 Chair Ellis It might not be for particular trial lawyers. I know in private civil practice, a lot of us who do trial work like to stay through the appeals.
- 535 L. Harris There is contact between the appellate lawyer and the trial lawyer at some level. We can talk to each other, so it is not like there is no contact at all. I would guess the way it is organized, for example, in a place where you have a consortium –
- 540 Chair Ellis That is probably not a good model.
- 543 L. Harris I don't know that the various public defender offices around the country want to hire appellate lawyers to do their juvenile cases.
- 546 S. Gorham Even though you will have a lot of conflicts, having an appellate office that does them certainly wouldn't hurt -- kind of like LSD doing one of the appellate cases and then the other gets conflicted out.

- 558 Chair Ellis We, rightly or wrongly, feel that it is a very uphill battle for us to gain additional FTE positions, which is the model that we use to handle criminal appeals. There is a view within the Commission to have – but it hasn't decided yet – that PCRs do lend themselves to having FTE. We are probably reaching a point of a trade between expanding juvenile appellate FTE versus PCR FTE.
- 572 L. Harris I suspect, for quality purposes, you would better off having a dedicated office. DOJ certainly does it. They don't have random people doing their juvenile court appeals. They have lawyers who are specialized.
- 577 Chair Ellis I can certainly see getting a specialty contractor or two, where you have the benefit of specialization, but without the conflict problem. Let me ask the two providers a question, which I alluded to earlier and we haven't gotten back to. Given the nature of what is a case, are we contracting with you in the most rational way? Are there comments on how to do this more fairly? And from our point of view, fairness is a two-way street.
- 590 L. Partridge I have no idea how to answer that question.
- 592 A. Sherbo I was hoping he would answer it and talk about it for a very long time. I think with me you probably have the wrong person.
- 600 L. Partridge Are you talking in the context of a case counting system over a contracting method?
- 601 Chair Ellis Yes.
- 601 L. Partridge I have experience under both. The MCAD contract, as you know, is an hourly based system and the juvenile advocacy consortium is a case-count system. For me, what the biggest difference is, and I always come back to this, administratively, the cost to me is much less in a case-cost system than an hourly system. The amount of time that it takes to prepare hourly bills and do hourly statements is much more than it is with a case-count system. The other thing, in a case-count system, what I have found to be advantageous is what the state does. They project a caseload for a certain amount of money based on a certain case mix and then, every month, write a check. That makes it much easier to run your office because you have a much more steady case flow; whereas, if you are billing hourly, it might be that, if I am tied up in a trial and I am just a small one-person office, I may not have a period of time to get that together. So the cash flow goes up and down, and it makes it harder to run your office. I am a big proponent of the case-count system versus the hourly system. I know there is some perception that in a case-count system you are somehow selling your client out, and I think that is ridiculous.
- [Tape 2; Side B]
- 049 Chair Ellis Any other comments on how our contracting is going?
- 051 J. Connors My sense is the Multnomah contractors would say that it's better and fairer to count cases instead of hours. It's also important to decide which work needs to be covered and pay for it. For example, CRB's, school hearings, judicial settlement conferences, case planning meetings all seem to be important events and perhaps necessary appearances in the history of these types of cases. The Commission should consider increasing the cost of these cases to reflect the increased complexity and number of appearances in these cases.
- 057 Chair Ellis We did hear in one of the smaller communities that there were complaints by the CRB that the lawyers weren't coming to its hearings.

- 061 G. Hazarabedian I would add that, several years ago, I practiced juvenile law. I make sure our office sends bodies to CRB hearings. A whole lot of stuff gets brought up and talked about there.
- 082 Chair Ellis Do any of you have any benchmarks or gauges to give us an indication of how Oregon compares with other states, both in terms of how we are going about the provision of lawyers in dependency cases and the quality of services those lawyers provide – whether our state is approaching it differently, better or not as well?
- 090 L. Harris I could find those things out but, what I know is sufficiently vague not to answer at this point. I can tell you that this is a pervasive issue – the issue of how you provide the lawyers, whether they are appointed to children and the quality issue. Oregon is certainly not alone in struggling with this issue.
- 096 Chair Ellis I assume that.
- 096 Judge Welch My sense is there is a huge variation in the quality of services among the states. Recently at a meeting, a judge from another county basically said that they don't appoint lawyers for children, period.
- 103 Chair Ellis I think I know what you are saying is true.
- 104 Judge Welch In El Paso (this is all inaudible). Our process would be a whole lot more efficient if we didn't have to deal with attorneys. We could really get through that stuff a lot faster. Should parents have separate counsel (inaudible).
- 118 A. Sherbo I have never handled a case where I thought two parents could be handled by the same attorney.
- 121 I. Swenson I had such a case. It was a case where both parents insisted that they would not accept representation unless they had the same lawyers. But it doesn't work well.
- 129 Senator Brown Mr. Chair, I think in circumstances like this, we end up paying double in the end, when there isn't proper representation up-front. I know there was a case out of Coos County that one of my colleagues, Representative Krieger, and a special committee examined. They were very, very concerned about the inadequacy of counsel in that case. And Rep. Krieger is very concerned about our state paying the basic costs of representation up-front, and that the costs go up two or three times more by the time cases reach the Court of Appeals level because we failed to pay a nickel up-front. I know that the legislature is very concerned about this issue.
- 138 Chair Ellis Other questions for our panel?
- 139 M. Greenfield Without putting anybody on the spot, I would just offer an opinion that people could argue that the CRBs were created to solve the problems of DHS inefficiencies and some implications that the courts weren't paying attention. My view currently would be that, among all of the rats' nests and the confusion in the workload, that the CRBs would be a wonderful place to look to see if that is really something that is adding value commensurate with what it is costing us under the current system. I just would ask anybody's opinion.
- 148 Senator Brown Mr. Chair, I am happy to give my opinion. In Multnomah County, the CRB system is irrelevant. I don't know whether that is true in other counties, but in Multnomah County it is.
- 150 L. Partridge I think we attend CRB hearings more in Marion County than it sounds like in Multnomah County. We have not been able to cover them like we would like to because of the caseloads. By and large, a lot of those CRB hearings are not a valuable process, and I would agree that a lot of FTM and DTM hearings would be a much more valuable use of our attorneys' time. The problem is making a judgment call as to which ones are going to make a difference and

which ones aren't. A lot of times, I find that the CRB coordinators, at least in Marion County, are pretty knowledgeable about DHS rules and regulations. They are going through and reviewing whether DHS is in compliance with what they are supposed to do. Frankly, I have gone to a lot of CRB hearings where there were issues that I didn't even know were issues. The expectation is that attorneys show up for every CRB hearing, but even the CRB coordinators I think would agree that this is not appropriate.

166 L. Harris One thing that I learned from the Multnomah County review is that there are a lot of variations, even within that one county. So I am sure, across the state, the extent to which the offices have a well-educated legal assistant, and I understand that that is partly philosophical within the offices whether they are going to put their money into that, they do solve this issue partly by sending legal assistants to participate in these hearings. I don't know whether it is appropriate for the Commission to do more structuring of that decision-making than you do, but it is something that you might ask about and you might think about.

179 A. Sherbo If the requirement of a review is federal, the choice about whether it is an administrative body or not should be considered in light of the reality that there would still be periodic reviews before some kind of fact-finder. Those are occasions when attorneys ought to be present and prepared for them. The FTMs or the DTMs are things that have increased over time and added to our workload substantially, particularly in this county with the addition of the branch in Gresham. It is a long haul out to that branch. I think our office has kept track of the number of those events that we have added. There is a question of whether we ought to be compensated for adding that event, or whether the compensation that we get for handling a case up to the point is sufficient. I might decide that I am going to write some sort of memorandum. I am not billing you for that time. That is work that I am obligated to conduct between the two events. I think it is a wise thing for us to have these events. The bigger question is what is adequate compensation for the work that we do between court appearances that is necessary for you to properly represent your client.

213 Chair Ellis Any other questions or comments? I want to thank all of you. We appreciate it very much.

Agenda Item No. 1 Approval of Minutes

217 Chair Ellis There are a couple of action items. The minutes of the April meeting have been distributed. Is there a motion to adopt the minutes?

Motion: Chip Lazenby moved to approve the minutes; Mike Greenfield seconded the motion; hearing no objection the motion carried: **Vote 5-0**

Agenda Item No. 2 OPDS's Monthly Report

222 P. Ozanne Mr. Chair, in order to get to Action Items 3 and 4, I don't want to take your time with a full monthly report. I did want to say that there are a couple of matters pending. Jack Morris is here and perhaps there will be time for the last Action Item, which is review and approval of the Judicial District No. 7 report. I anticipate that this item may need to be carried over to your next meeting.

250 Chair Ellis Since Jack is here, why don't you step forward and give us your comments, Jack? Do you have any thoughts or observations?

255 J. Morris I don't know if I have anything additional to say, other than I appreciate the opportunity to address whatever questions you have today since the meeting in June is going to be difficult for some of us to attend. Thursday morning is the last day of school for a lot of school districts.

- 259 P. Ozanne I know you might have some reaction about the proposal for a legislative forum because it wasn't something we talked about during our visit to Hood River.
- 262 J. Morris I think it is a good idea and I think it is one that should be pursued. But I also think if you are going to do something like that as a pilot project, you want to do it in an area that has the greatest chance of success and I think that is the metropolitan area for a couple of reasons. If you do it in Eugene or Portland, for example, you have got multiple legislative districts in a fairly small geographic area. If you do it someplace like in my area, you are not going to be dealing with as many legislators, which I think is probably the biggest issue. In the metropolitan area, I think that you are going to have a better chance of succeeding there simply because you can pose to them to just stop by for a coffee and come in and see what we are doing. In my area it would be really difficult. If they are successful in other areas, we'll try anything once.
- I do think it is an excellent idea and I understand your reasoning. I just think, especially the first time, that it should be done in a larger county where you have the best chance for success.
- 292 Chair Ellis One of the proposals in the amended report, No. 2, is to look for your firm to formalize mentoring and training for some of the other providers. Are you okay with that?
- 297 J. Morris Absolutely. I think we have attempted to do that already, though not in the formal sense. Whenever we have a new attorney in town, I try to make it a point to go talk to him myself. So, if you want me to formalize it and you pay for it, you bet.
- 302 Chair Ellis Everything we do, we expect to pay for. We have talked about a lead provider concept and you are obviously the lead provider in your area. That is one of the roles a lead provider would do. Peter, if I may say, I would like to delete the last paragraph of the report. I say so for two reasons: one is I think it is repetitive, and I didn't quite like the analog of business development.
- 314 P. Ozanne Others didn't either.
- 314 Chair Ellis I have a few typos. The only other semi-substantive thing that I had was on page 19. It says, "... since the Commission recognizes that the single most important factor in successfully recruiting and retaining qualified public defense attorneys in any area of the state is adequate funding of the public defense function by the Oregon Legislature." That is fine. The next sentence says: "That remains PDSC highest priority. I would rather say "That remains one of PDSC's highest priorities." I don't know if other Commissioners have a reaction to that. Other than that, I thought the report captured what was for me a very positive experience.
- 334 J. Morris We make a real concerted effort to work outside the office. We go to CRB hearings, we go to Family Decision Meetings and we even go to school expulsion hearings, which is a whole lot of fun just to see the faces of an administrator when a lawyer shows up. I wanted to say, "Thank you to Peter and the Commission." I appreciate the compliments. It is nice to get an A on your report card, and it is also going to be real useful for me in my office because now I can say, "Look you guys, there was a reason we did some of this stuff, and here is the proof of it. Here is some other stuff now."
- 349 Chair Ellis I think we have lost our quorum. Janet are you still there?
- 349 J. Stevens I am. I'm listening.
- 350 Chair Ellis What is your pleasure? We could move to adopt the report at this point.
- 351 P. Ozanne That would be fine, with an understanding that I will make the changes you suggested.

- 353 Chair Ellis If people will trust me on the typos and are we okay deleting the last paragraph on page 24?
- 355 P. Ozanne Excuse me, Mr. Chair, I will also broaden the scope of the proposal about the legislative forum with additional language.
- 359 Chair Ellis Was that change I proposed on page 19 acceptable?
- 359 J. Brown Fine.
- 360 Chair Ellis Does somebody want to make a motion, including incorporating the changes we discussed to the report of Judicial District No. 7.

Motion: Mike Greenfield moved for approval of Judicial District No. 7 report with the understanding that some editing will occur as discussed above; Jim Brown seconded the motion; hearing no objection the motion carried: **VOTE 5-0.**

Agenda Item No. 3 Review and Approval of Proposed Contracts

- 377 K. Aylward There is one contract listed behind the mustard-colored divider.
- 378 Chair Ellis This is the Stoller contract?
- 380 K. Aylward That is correct. As the materials indicate, this is a scenario that we have seen before. Someone can afford to work for \$40 or \$55 an hour if they are only committing a portion of their work time toward that. They need to make the real money during the rest of their day. This was a situation where there was a death sentence case in which the Legal Services Division had a conflict, so we needed to find outside counsel. The fact was that this client already had an attorney. But in order to get the attorney to agree to take both cases, we had to make it a contract.
- 390 Chair Ellis I thought it was a PCR case?
- 391 K. Aylward Mr. Stoller is currently representing the client on in post-conviction relief. There is another case, a death sentence case, on direct appeal that now also requires an attorney.
- 395 Chair Ellis Any questions?

Motion: Mike Greenfield moved to approve the preliminary agreement; Jim Brown seconded the motion; hearing no objection the motion carried: **VOTE 5-0.**

Agenda Item No. 4 Approval of Change of Compensation Plan

- 401 K. Aylward As I explained in the materials, the Department of Administrative Services, principally as a result of union negotiations, made a determination that, for Executive Branch agencies, there would be a two percent cost-of-living adjustment on July 1, 2005, which was granted to Executive Branch agencies. We previously asked the Commission to approve that, which you did do effective July 1, 2005. In addition, Executive Branch agencies are adding a new top step to all positions effective July 1. This request before you includes that step for our agency as well. The final component is that Executive Branch agencies were going to provide a further cost-of-living adjustment on December 1. We would like to bring it forward to July 1. So the compensation plan in your materials includes the two percent cost-of-living adjustment and the additional top step, both to be effective July 1. This is a little bit different than what the Executive Branch is doing, but it is not quite as good as what the Judicial Branch is doing. So we are somewhere in between. The Judicial Branch has not followed the Executive Branch in terms of compensation, partly because their employees are unrepresented; but, in

addition, the history is different. For example, during the BRAC period, Judicial Department employees took a 10 percent reduction in pay for four months. Then, after that four months, they were looking at a biennium where step increases were frozen. That was too much for the Judicial Department, so they eased off their frozen steps just a little sooner. They have gone by their own path and I would have loved to have followed the Judicial Department, but we couldn't afford it.

- 432 Chair Ellis When the implementation comes, is this automatic or does it take action by Peter?
- 435 K. Aylward If the Commission adopts this attached compensation plan effective July 1, I send an e-mail to DAS payroll and they put the numbers in.
- 438 Chair Ellis So it is automatic. You are the expert.
- 440 M. Greenfield Have you had discussions, or at least notified LFO and DAS, about this?
- 442 K. Aylward Absolutely.
- 443 Chair Ellis **Motion:** Mike Greenfield moved to approve the compensation plan; Jim Brown seconded the motion; hearing no objection the motion carried: **VOTE 5-0.**

Agenda Item No. 6 Impact of House Bill 3511

- 452 Chair Ellis Jessica's law. Kathryn do you want to talk about that? We do have correspondence from two providers.
- 001 K. Aylward This is what is referred to as Jessica's law. Actually, a legislative concept was submitted for the special session last month, which became House Bill 3511 and which I included a copy of in the materials. Essentially, it changes the minimum sentence for first degree rape, first degree unlawful sexual penetration and first degree kidnapping in the furtherance or attempted furtherance of any of those crimes. It increased the penalty from 100 to 200 months.
- 009 Chair Ellis I thought it was all when the victim was 12 or younger?
- 010 K. Aylward Yes, you are correct, when the victim was under 12. House Bill 3511 passed. We submitted a fiscal impact statement, which estimated that we would need between \$1.2 and \$1.5 million to get through this biennium if the law passed. Nobody sent us a check. I did speak with the Legislative Fiscal Office to seek advice. As when Ballot Measure 11 passed, the process we go through is we say to contractors, "We need you to keep track of these cases separately, they need to be identified separately, and we need you to keep track of your hours so that we know how much of your time was involved in these cases." The issue here with these kinds of cases is how the district attorney uses these charges. If they are used as a hammer and someone is looking at 300 month sentence, they might be more willing to agree to plead to a lesser charge. It might work the other way. When you are looking at 300 months, you are going to go to trial. Both the Judicial Department and our office took the view that we don't really know which way it is going to go, and I don't think that defense attorneys will claim that they know either. So it is very difficult to put a price tag on these cases. The materials I have handed out indicate that some people would like to put a price tag on them. I think, at the very least, we are going to have to send a memo to contractors to ask them to report these cases separately and keep track of their hours, so that we can come up with a fair rate. We may have some contractors who would refuse to take these cases, in which case, having them go to an hourly provider is maybe just as good as a solution because then we get time records that we need anyway. So I am not terribly concerned about this.
- 036 Chair Ellis I would think that creates a quality issue. These are murder-equivalent sanctions.

- 037 K. Aylward That is true.
- 037 Chair Ellis I am not too comfortable having the selection of who the lawyers are driven by your description of what we do.
- 040 K. Aylward There is some good news. The other thing that our office has been working on is the recertification of attorneys. It has actually been a really grueling process because the court is putting pressure on us to get them more names, but not bad names. The court will say, "I have concerns about the quality of these attorneys." Then I look at what I have and I have a very limited number of names left. The court will say, "We want more names." I am fighting hard not to include people on the list about whom we have concerns. Now the list in Multnomah County, for example, is tiny for major felonies. But our office and the court is 100 percent confident that those attorneys will do a great job. It is a little less of a concern there.
- 051 Chair Ellis I am not necessarily advocating this, but the two letters which I read were pretty persuasive to me that this is a murder-equivalent. Is there a problem with amending the contracts to re-characterize cases as the equivalent of a murder case and compensate accordingly?
- 056 K. Aylward I think the problem is (a) we would run out of money; and (b) we might have some difficulty justifying the costs to the legislature without some kind of supporting data. To just say "Well, it is 300 months so it ought to be the same price as a murder," I don't know if that is enough justification.
- 061 Chair Ellis Well, here is my worry, because I understand how you are approaching it, which is to get an experience data base and then go forward. But what I fear is there will be a big lag time. I do think we could quite credibly go to the E-Board soon and say, "Okay, a policy judgment was made that does, in our system, convert these to a magnitude of sanctions that is equivalent to murder, and the level of lawyer responsibility and involvement is going to be similar." The problem is estimating how many of these cases there could be. But I don't think I have a problem with the approach that the two letters proposed. Is there a way to estimate the volume of cases, because I am reluctant to miss this moment? By special session, they agreed on four things. All this euphoria about Jessica's Law – Bill O'Reilly likes to talk about it on T.V. -- but there is a price to be paid. And now would be a better time to have the E-Board face the price to be paid.
- 080 M. Greenfield It sounds like you did make an estimate of what it would cost and the legislature, for whatever reason, didn't deal with it. Strategically, I think what you want to do is engage the E-Board in a solution. It may be a matter of educating them to say "Here are the steps we are taking and here is our report" because I am suspecting the kind of data you are talking about is currently unavailable.
- 089 Chair Ellis I'm with you on this.
- 089 M. Greenfield In asking for more money, the difficulty is committing money before we actually have the E-Board's approval. It is a balancing act because what you will end up with at the end of the interim is going to them and saying, "We overspent."
- 093 Chair Ellis Don't we have some data on victims under 12?
- 095 K. Aylward Our office and the Judicial Department do not keep any data on the ages of victims. We did used to have a separate case category called "SO 12," where contractors would report to us when they had a case with a victim under 12. I did some rough projections from the data at that time to estimate the number of Measure 11 cases that might possibly involve a victim

under 12. You have to be aware that, in a murder case, there is generally one incident per case; whereas, with sex abuse cases, you have multiple incidents.

- 104 Chair Ellis That was one of the points in the letters.
- 104 K. Aylward You will have multiple incidents and separate counts on separate dates, which are separate credits under our contracts.
- 108 C. Lazenby My guess, Mr. Chair, is also that the historic data in this situation is going to be invalid for us, now that it has become a much more political issue. It is like what we saw in Measure 11. We saw a lot of cases that the prosecutor's office, before the leverage Measure 11 gave them, might charge the cases lower. I think you are going to see more of these cases charged at this massive level, if only to get the leverage on folks to plead guilty and not go to trial. You are going to see a larger number of them and that is coupled with the letters and people saying, "Well look, because the downside is so steep now, we are going to demand high fees."
- 123 K. Aylward The way our contracts operate, one possible solution – and I don't necessarily have an opinion at this point on the best solution – without actually increasing the amount that we are spending on contracts, we could say, "Okay, we agree that these are special cases. Instead of just the Measure 11 rate, when they might have been worth \$1,600, they are now worth \$5,000 or whatever. We will waive the multiple count complexities and just agree to amend the contracts to include those. But we don't spend any more money. We just say that they will be valued when the contracts end six months into the next biennium. You should not push expenses into another biennium, but you can give contractors the comfort now of knowing they are not going to get shorted and they will get a fair deal. Then we can go to the E-Board at some point and say, "We had to make this agreement. They would not continue to do these cases unless the rate went up to this. This is the number of cases we have. Therefore, we need \$1.5 million from the E-Board this biennium." Then we get it and pay it.
- 141 Chair Ellis That sounds better to me than I thought I heard the alternative, which is to assume that some of our existing contractors will not take these cases and, therefore, get them assigned to hourly compensated court-appointed lawyers.
- 146 K. Aylward In one of these letters, they are actually saying they won't take these cases. I haven't sorted it all out yet.
- 148 M. Greenfield This might not be the best forum to develop a legislative strategy but perhaps, given the concerns, the one strategy that you suggested – pushing expenses into the next biennium – was pioneered by the legislature. The other alternative is to engage the legislative fiscal staff to help in solving the problem. This conversation would be greatly improved by you having this conversation with legislative staff.
- 162 K. Aylward That was LFO's recommendation; collect the data.
- 167 Chair Ellis To be honest, of the options we have that we heard, I really do prefer to keep the work with our main contractors. I wonder if, between now and our June meeting, we couldn't put together a proposal that would include an amendment to their contracts?
- 170 K. Aylward I can certainly do that.
- 173 J. Brown Just to build on that line of thought, I am wondering for the benefit for third party observers to perhaps take testimony from some prosecutors to share with us their proposed charging policies regarding this new law.
- 182 Chair Ellis I'm okay with that.

- 183 J. Morris I have a couple of thoughts on this. The first is with respect to Kathryn's idea. I hope that we don't lose sight of the reason that we ask for more money. It isn't just to get salary increases; it is to secure the use of resources and to expand the number in our offices. So, while that is a viable idea, I am not certain that it is fantastic. If we don't get the money now, we don't have the resources. With respect to Chip's comment about there being more of these cases, I think that is exactly right. The last thing that I will share with you is that I hope we don't also lose sight of the fact that, when you are valuing these things, it is not just how many hours of work that we have; it is also an emotional issue and the level of responsibility. Responsibility has always been the basis for compensation.
- 202 Chair Ellis I agree with that.
- 202 J. Morris I had a case a few months ago that would have fallen under this statute. I had a 20-year-old retarded girl who was charged with having sex with underage boys, one of whom was a sex offender in juvenile court. It was amazing that they ever charged her; but nonetheless they did. I recall thinking that, if we go to trial on this and she gets seven years, I don't think I want to do this anymore. Fortunately, the case was dismissed.
- 211 A. Christian I was just going to comment on Jim Brown's idea about including prosecutors. First, I think that is a good idea to at least get them on the record before any Emergency Board appearance. They certainly will take the position with the Emergency Board that the fiscal impact of SB 3511 is not significant. Steve Duin ran a column about Oregon's new Jessica's Law right after the special session. His column included a comment from Mike Schrunk to the effect that we'll all be glad that we have the new Oregon law for the one or two cases in the next 10 years that will be subject to that law.
- 225 C. Lazenby I think you are going to have to go through that process anyway. They said the same thing about Measure 11, and then the experience everybody had about Measure 11 was that the cases that previously had been disposed of at a certain level got charged up with Measure 11.
- 230 A. Christian That is why I do think it is a good idea to get them on record before the Commission before we go to the E-Board.
- 240 C. Lazenby I think it might be helpful to make this an agenda item at the next Commission meeting. I don't see how, politically, they can avoid charging this new law in every circumstance where it is possible.
- 246 K. Aylward My fiscal impact statement estimated between 260 and 390 cases.
- 248 J. Brown It would be of interest if the prosecutors were to assure us, and the local funding authorities, that they aren't going to charge these new crimes at every opportunity.
- 253 J. Connors Our office feels very strongly that these cases should be equivalent to murder cases.
- 263 M. Greenfield I agree with that, but we have to figure out a way to put this problem where it belongs. I would suggest an agenda item next time so Peter can have conversations and develop a strategy.
- 271 G. Harazabedian I think that, in the interest of consistency, there is a statute out there now that gets a third time felony sex offender locked up for life. I think that certainly ought to be included. Right now, there is no additional compensation for those.
- 278 Chair Ellis Is that enough guidance?
- 278 K. Aylward It means I don't have to do anything for a month.

- 281 J. Morris I think most practitioners will tell that it is interesting that we are comparing these to murder cases, because I think most practitioners will tell you these are much more difficult.
- 286 Chair Ellis Just on the face of it, with murder, at least you normally have no question that somebody died. Here there is going to be questions if the offense occurred.
- 291 G. Hazarabedian Plus, in a murder case, there is not the complaining witness to cross-examine.
- 292 C. Lazenby I remember not very long ago, as recently as four years ago, that there was a lot of conversations, and prosecutors and crime victim representatives were an active part of them, around the notion that these sorts of violators were inappropriate for these long terms of incarceration, and we were looking for alternatives for sex offenders. We were actually celebrating that that they were being reasonable and rational about criminal justice issues. I think now that they ought to share in figuring out the solution to what is now a significant fiscal problem.
- 306 Chair Ellis Part of my thought process is that I want to get in front of the E-Board early. Even if we get rejected, I want to push our case. So, as part of this 30-day process, give some thought to putting together an E-Board submission.
- 315 K. Aylward I am thinking of the September E-Board meeting, with meeting materials due in late August.
- 318 Chair Ellis Any other thoughts or comments? Any new business?

Motion: Mike Greenfield moved to adjourn the meeting; Jim Brown seconded the motion; hearing no objection, the motion carried: **Vote 5-0**

[The meeting was adjourned at 12:30 p.m.]

Attachment 2

**OPDS's Final Report on Service Delivery in Judicial District No. 7
& PDSC's Service Delivery Plan for the District
(Hood River, Wasco, Gilliam, Sherman & Wheeler Counties)
(June 8, 2006)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004, 2005 and 2006, the Commission completed investigations of the local public defense systems in Benton, Lane, Lincoln, Linn, Multnomah, Marion, Klamath and Yamhill Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report presents the results of OPDS's preliminary investigation of conditions in Hood River and Wasco Counties, in particular, and in Gilliam, Sherman and Wheeler Counties to a lesser extent. It also contains the comments during PDSC's April 13, 2006 public meeting in Judicial District No. 7 from judges, prosecutors, public defense contractors and other justice professionals in the district, and reflects the deliberations of PDSC leading up to its adoption of a service delivery plan for the district. In conclusion, the report sets forth PDSC's Service Delivery Plan for Judicial District No. 7.

PDSC's Service Delivery Planning Process

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

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

Third, after considering OPDS's preliminary draft report and public comments during the Commission's meetings in a county or district, PDSC develops a "service delivery plan," which is usually set forth at the conclusion of the final version of OPDS's report. That plan

may confirm the quality and cost-efficiency of the local public defense delivery system and services in the area or propose changes to improve the delivery of the region's public defense services. In either event, the Commission's service delivery plans (a) take into account the local conditions, practices and resources unique to the area, (b) outline the structure and objectives of the area's delivery system and the roles and responsibilities of local public defense contractors and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts in the area.

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

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

Background and Context to the Service Delivery Planning Process

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

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

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Columbia, Jackson, Klamath, Multnomah and Umatilla Counties and, in 2006, teams have visited the juvenile contractors in Multnomah County and the principal contractor in Linn County. During the remainder of this year, the Quality Assurance Task Force plans to send site visit teams to Lane, Washington, Lincoln and Columbia Counties. In accordance with its Strategic Plan for 2003-05, PDSC has also developed a systematic process to address complaints over the behavior and performance of public defense contractors and individual attorneys.

Numerous Oregon State Bar task forces on public defense have highlighted the unacceptable variations in the quality of public defense services in juvenile cases across the state. Therefore, PDSC has undertaken a statewide initiative to improve juvenile law practice in collaboration with the state courts, including a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission plans to devote two of its meetings to investigating the condition of juvenile law practice across the state and to develop a statewide Service Delivery Plan for juvenile law representation.

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that impact of such shortages are greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

“Structure” versus “performance” in the delivery of public defense services. Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service

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

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

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

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

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

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

delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of taxpayer dollars available for public defense services in Oregon. Accordingly, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to those proposals. As the largest purchaser and administrator of legal services in the state, the Commission is committed to ensuring that both PDSC and the state's taxpayers are getting quality legal services at a fair price. Therefore, the Commission does not see its role as simply continuing to invest public funds in whatever local public defense delivery system happens to exist in a region but, instead, to seek the most cost-efficient means to provide services in each region of the state.

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

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

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

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an

employment relationship between the attorneys and the office.² Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of

² Spangenberg and Beeman, *supra* note 2, at 36.

³ *Id.*

interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

Consortia offer the advantage of access to experienced attorneys, who prefer the independence and flexibility associated with practicing law in a consortium and who still wish to continue practicing law under contract with PDSC. Many of these attorneys received their training and gained their experience in public defender or district attorney offices and larger law firms, but in which they no longer wish to practice law.

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

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

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

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

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

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

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

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

5. Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as "overflow" from other types of providers. This organizational structure does not involve a contractual relationship between the attorneys and PDSC. Therefore, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, carefully administered

qualification process for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation in Judicial District No. 7

The primary objectives of OPDS's investigations of local public defense delivery systems throughout the state are to (1) provide PDSC with an assessment of the strengths and weaknesses of those systems for the purpose of assisting the Commission in determining the need to change a system's structure or operation and (2) identify the kinds of changes that may be needed and the challenges the Commission might confront in implementing those changes. PDSC's assessment of the strengths and weaknesses of a local public defense delivery system begins with its review of an OPDS report like this.

PDSC's investigations of local delivery systems in counties or judicial districts across the state serve two other important functions. First, they provide useful information to public officials and other stakeholders in a local justice system about the condition and effectiveness of that system. The Commission has discovered that "holding a mirror up" to local justice systems for all the community to see can, without any further action on the Commission's part, create momentum for local reassessments and improvements. Second, the history, past practices and rumors in local justice systems can distort perceptions of current realities. PDSC's investigations of public defense delivery systems can correct some of these local misperceptions.

On April 13, 2006, PDSC held a public meeting in the Hood River County Courthouse. The purpose of that meeting was to (a) consider the results of OPDS's investigation in Judicial District No. 7 as reported in a preliminary draft of this report,⁴ (b) receive testimony and comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the public defense system and services in the Judicial District and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Judicial District No. 7.

The preliminary draft of this report was intended as a framework to guide the Commission's discussions about the condition of the public defense system and services in the Judicial District, and the range of policy options available to the Commission — from concluding that no changes are needed in the district to significantly restructuring the district's delivery system. The preliminary draft of this report also provided guidance to PDSC's invited guests at its April 13th meeting in Hood River, as well as the Commission's contractors, public officials, justice professionals and other citizens who were interested in this planning process, about the kind of information and comments that would assist the Commission in improving public defense in Judicial District No. 7.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the judicial district's justice system is probably the single most important

⁴ Relevant portions of the preliminary draft of this report, which differ significantly from this version of the report, are set forth in Appendix A.

factor contributing to the quality of the final version of this report and PDSC's Service Delivery Plan for counties in the district. Accordingly, OPDS invited written comments from any interested public official or private citizen prior to the Commission's April 13th meeting in the district for inclusion in the final version of this report.⁵

A Demographic Snapshot of the Counties in Judicial District No. 7⁶

Hood River County

With a population of 20,500 residents, Hood River County is located at the center of the Columbia River Gorge National Scenic Area, extending from Mt. Hood north to the Columbia River. Agriculture, lumber and recreation are the County's primary sources of revenue and industry. With fertile valley soils of exceptional quality, Hood River County leads the world in Anjou pear production. More than 14,000 acres of commercial pear, apple, cherry and peach cover the county, with acreage of wine grape vineyards growing at a rapid pace.

Hood River County also has two ports and two boat basins which service commercial traffic, as well as recreational boating. Due to its wealth of natural and recreational resources, the county attracts many tourists during the summer months, which swells its permanent population of 20,500 significantly.

The recorded history of Hood River County began with the arrival of Nathaniel Coe and his family in 1854, who were the first white settlers to file a land claim in the area where the City of Hood River is now located. By 1880, there were seventeen families living in the valley. Hood River was originally part of Wasco County until 1908, when a separate county was established. George Prather published the first newspaper in the county in 1889 and the Columbia River Highway was completed in 1922.

The 1980's and 1990's saw tremendous growth in Hood River County, largely due to Columbia Gorge winds and the sport of windsurfing, in particular during tourist seasons. Many windsurfers consider Hood River to be the "Windsurfing Capitol of the World." And the September 2005 issue of Skiing magazine named the City of Hood River one of the "Top Ten Ski Towns in America."

The influx of new residents may explain the higher education level of Hood River County compared to other less populous, rural counties in the state. Just over 15 percent of its adult population holds a Bachelor's Degree and 7.8 percent with a graduate degree (compared to statewide averages of 16.4 percent and 8.7 percent respectively).⁷ The

⁵ Other than written responses to a questionnaire from one of the Commission's contractors in the district, OPDS did not receive any written comments in response to this invitation.

⁶ The following information was taken from the official websites of the counties in Judicial District No. 7 and from data compiled by Southern Oregon University's Southern Oregon Regional Services Institute, which is contained in the Institute's Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

⁷ The respective numbers in Yamhill County, for example, are 13.4 and 7.2 percent. In Klamath County, they are 10.6 and 5.4 percent.

county has an average proportion of its adult population employed in management and professional positions at 32.5 percent (compared to the state's average of 33.1 percent). Only 70.4 percent of its residents over the age of 25 graduated from high school or its equivalent, however, compared to the statewide average of 78.6 percent.

In 2000, Hood River County had the ninth highest unemployment rate among Oregon's 36 counties at 7.8 percent, compared to the state's average rate of 4.9 percent. Its per capita annual income was \$17,877 compared to a statewide average of \$20,940, although 20 Oregon counties had lower per capita incomes. The county also had the 13th highest rate of residents living in poverty at 14.2 percent, compared to an 11.6 percent average in Oregon and 12.4 percent in the United States. The teen pregnancy rate in the county is below average at 14.5 per 1,000 residents, compared with the statewide average is 16.7, and its high school dropout rate is Oregon 14th lowest during the past decade.

The diversity of Hood River County's population is the third highest in the state. Its non-white and Hispanic residents make up 29.3 percent of the county's population, compared to 16.5 percent for Oregon as a whole.

With juveniles (aged 18 years old or younger) making up 28 percent of its total population, the county's "at risk" population (which tends to commit more criminal and juvenile offenses) is the fourth highest in the state. Nevertheless, Hood River County ranked 29th in "index crimes" in 2000 among Oregon's 36 counties with a rate of 27.6 index crimes per 1,000 residents (compared to a statewide rate of 49.2) and 24th in juvenile arrests at 52 per 1,000 residents compared to Oregon's average rate of 53.⁸

In 2005, the public defense caseload in Hood River County totaled 1,219 out of 170,987 cases in the state. That amounted to 0.71 percent of Oregon's public defense caseload in 2005.

Wasco County

Thousands of years before anyone conceived of Wasco County, Native Americans carved petroglyphs on rocks overlooking the Columbia River in this area. Later, Native American tribes, including the Wasco, Paiute, and Warm Springs, gathered for centuries near Celilo Falls to trade and fish. Wasco County's Native American heritage is most apparent today with the Confederated Tribes of the Warm Springs Reservation in the southern county

Wasco County was created by proclamation of the Oregon Territorial Legislature and approval by Congress on Jan. 11, 1854. It was the largest county in U.S. history. The county comprised 130,000 square miles and was named for the Wasco tribe of the Chinook occupying some of the area, though most of the area was apparently controlled by the Shoshone. The county stretched from the Cascades to the Rocky Mountains

⁸ For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122.

including parts of what are now Idaho, Montana, and Wyoming. The northern border was Washington Territory and the southern border was California. The county seat was The Dalles, which was the only white settlement east of the Cascades with approximately 35 permanent residents, which gained fame as the end of the Oregon Trail.

Now the trading hub of north-central Oregon, The Dalles remains the county seat, but the county now covers 2,387 square miles. While still a comparatively large county geographically, its population is small and virtually the same as Hood River County at 22,500.

Wasco County's economy is based primarily on agriculture (orchards, wheat farming, livestock ranching), lumber, manufacturing, electric power, transportation, and tourism. Aluminum production was previously a major support of the local economy, but electrical price fluctuations and a slump in global aluminum prices has forced the closing of a number of local aluminum foundries.

Wasco County also claims windsurfing as one of its foremost recreational attractions, with a popular windsurfing launch site at Celilo Park, nine miles east of The Dalles.

In Wasco County, 10.5 percent of its adult population holds a Bachelor's Degree and 5.2 percent holds a graduate degree (compared to statewide averages of 16.4 percent and 8.7 percent respectively). Twenty-seven percent of the county's residents are employed in management and professional positions, compared to the state's average of 33.1 percent. Seventy-six percent of its residents over the age of 25 graduated from high school or its equivalent, which is just below the statewide average of 78.6 percent.

Wasco County ranked 16th in unemployment among Oregon's 36 counties in 2000 with a rate of 6.5 percent compared to an average rate of 4.9 percent. Per capita annual income in the county was \$17,195, about \$700 below Hood River County. Wasco County had a lower rate of residents living in poverty than Hood River County, but its teen pregnancy rate is the seventh highest in the state at 18 per 1,000 residents and its high school dropout rate is the eighth highest at 7.5 percent of the county's high school graduates.

The diversity of Wasco County's population is about average, with a non-white and Hispanic population of 16.1 percent compared to a 16.5 percent average for the state.

Juveniles (aged 18 years old or younger) make up 25.4 percent of Wasco County's population in comparison to a 24.7 percent average for the state. Nevertheless, Wasco County ranked 12th in "index crimes" in 2000 among Oregon's 36 counties with a rate of 39.5 index crimes per 1,000 residents (compared to a statewide rate of 49.2) and second in juvenile arrests at 89.9 per 1,000 residents.

In 2005, the public defense caseload in Wasco County was 1,649. That amounted to 0.98 percent of the state's public defense caseload in 2005.

Gilliam, Sherman and Wheeler Counties

Gilliam County was established in 1885 from a portion of Wasco County and was named after Col. Cornelius Gilliam, a veteran of the Cayuse Indian War. The first county seat was at Alkali, now Arlington. At the general election of 1890, voters chose to move the county seat to Condon, known to early settlers as "Summit Springs."

Gilliam County is in the heart of the Columbia Plateau wheat area. The economy is based mainly on agriculture, with an average farm size of about 4,200 acres. Wheat, barley and beef cattle are the principal crops. The largest individual employers in the county are two subsidiaries of Waste Management Inc., Chemical Waste Management of the Northwest and Oregon Waste Systems, Inc., two regional state-of-the-art waste disposal landfills. The estimated population in 2004 was 1,817. This was a decrease of 5.12% from the 2000 census.

Sherman County lies between the John Day River on the east, the Deschutes River on the west and the Columbia River on the north. Much of the boundary on the south is defined by the canyons of Buck Hollow, a tributary of the Deschutes.

The county's first white settler was William Graham, who settled at the mouth of the Deschutes River in 1858. Innkeepers and operators of ferries, toll bridges and stage stations followed, and then stockmen with their herds of horses, cattle and sheep. Homesteaders arrived in the 1880s by steamboat, stagecoach and wagon, settling on nearly every quarter section, plowing grass and fencing fields.

As the area's population grew, so did sentiment for independence from Wasco County. In 1889, legislation created a new county to be called Fulton after a pioneer family. The county's name finally became Sherman after Civil War General William Tecumseh Sherman.

The county seat of Sherman County is Moro. The county's economy is still based on wheat, barley and cattle and, increasingly, tourism. Its current population is approximately 1,800, which also represents a decrease from the 2000 census population of 1,934.

Wheeler County was established in 1899 from parts of Grant, Gilliam, and Crook Counties and was named after Henry Wheeler, who operated the first stage line through the county. The county seat is Fossil. The town's name was derived from the first postmaster's discovery of fossil remains on his land in 1876, which still serves as the basis for what the county claims is an international reputation.

In addition to fossils as a tourist attraction, portions of two national forests lie within Wheeler County's boundaries. Forest lands cover nearly one third of the county. The county reports its principal industries as agriculture, livestock, and lumber.

Wheeler County's 2000 population was 1,547, representing a 10.82 percent increase from 1990, but a substantial decrease from a peak population of 3,313 in 1950.

With a combined population of approximately 5,000, Gilliam, Sherman and Wheeler Counties enjoy relatively low crime rates. Gilliam and Wheeler Counties were tied for the second lowest index crime rates in Oregon in 2000 (13.6 per 1,000 after Wallowa County's

6.2). Sherman County had the 12th lowest rate of 30.5 per 1,000 (compared to a state average of 49.2). Wheeler, Sherman and Gilliam Counties also had some of the lowest juvenile arrest rates in Oregon with rankings of first, fifth and seventh, respectively. As a result of such low crime and arrest rates, the three counties' public defense caseload in 2005 was 206, or 0.15 percent of the state's total caseload for that year.⁹

OPDS's Preliminary Findings in Hood River and Wasco Counties

On March 20 to March 23, 2006, John Potter and Peter Ozanne visited Hood River and Wasco Counties on behalf of the Commission and OPDS to gather preliminary information for PDSC's April 13th meeting in the Judicial District. They interviewed all four Circuit Court Judges and the Trial Court Administrator in the District, both counties' District Attorneys and Sheriffs, representatives of both counties' community corrections and juvenile departments and local offices of the Department of Human Services, the police chief of The Dalles, two CASAs and all three public defense contractors in the District.¹⁰

As a result of the foregoing interviews, OPDS found a general consensus among justice officials and professionals about the quality of the public defense delivery systems in Hood River and Wasco County. With the exception of the reservations described below, and while noting obvious differences between the two counties, they expressed a high level of satisfaction with the quality of public defense services. Although their assessments of the competence and performance of PDSC's individual contractors and public defense attorneys varied, they were generally complimentary of PDSC's contractors, as well as most of the private attorneys on the counties' court-appointment lists. The main concerns expressed during OPDS's interviews related to the limited supply of attorneys in Hood River and Wasco County and the problems in the quality of justice that would result if lawyers who currently take court-appointments leave the area or stop taking appointments. Several observers expressed their belief that a few attorneys on the counties' court-appointment lists either lack the experience or ability to handle public defense cases or do not have adequate staff or access to training and collegial support to operate an effective law practice.

PDSC contracts with three organizations to deliver public defense services in Judicial District No. 7. With four shareholders, three associates and over 20 years of experience as a public defense provider, Morris, Olson, Smith & Starns, P.C. (Morris Olson) is the largest contractor in the District, providing services in all five of its counties.¹¹ The firm's responses to a questionnaire developed by OPDS's contractor site visit teams, which provides additional information about the firm's governance and quality assurance practices, is attached in Appendix B.

⁹ In 2005, the total public defense caseload for the five counties in Judicial District No 7 was 3,128 cases, which represented 1.83 percent of the state's caseload for last year.

¹⁰ OPDS is currently conducting additional telephone interviews with representatives of the courts and local adult and juvenile justice agencies in Hood River and Wasco Counties, as well as in Gilliam, Sherman and Wheeler Counties. The results of these interviews will be included in the final draft of this report, which will be submitted to PDSC prior to its review and approval of a Service Delivery Plan for Judicial District No. 7.

¹¹ Morris Olson's current contract with PDSC for the delivery of services through December 2007 is for 2,437 cases per year at an annual amount of \$879,468.

Aaron and Associates has been, until recently, the solo practice of Brian Aaron, who has practiced in the District for approximately 15 years.¹² Mr. Aaron provides services in Hood River County under contract with PDSC,¹³ and handles court-appointments in other counties in the District.

The Wasco/Sherman Indigent Defense Corporation (WSIDC), as the name implies, provides defense services in Hood River and Sherman Counties. WSIDC currently has two associates in the law firm of VanValkenburgh & Associates. One associate, who also serves as the consortium administrator has approximately five years of experience and the other associate has less than two years of experience.¹⁴

Morris Olson is consistently regarded as a well-established law firm of first-rate, knowledgeable public defense professionals who are zealous advocates, but generally easy to deal with as well. As the primary contractor in the Judicial District, Morris Olson appears to fill the role as the “go to” organization for cooperation in addressing systemic issues in a county, with its senior attorneys assuming active roles in policymaking groups and local projects to improve the administration of justice.

There is a perception in both Hood River and Wasco Counties, however, that the turnover rate of Morris Olson’s lawyers over the years has been high. The apparent result is the arrival of new lawyers in the District who lack the necessary training and experience to handle cases effectively for some period of time. Opinions vary about the level of training and supervision that new lawyers receive at Morris Olson, though virtually all observers complemented the firm’s lawyers for their professional skills and ethics once they gained some experience.

Jack Morris has frequently reported the difficulties his firm faces in retaining younger lawyers once they have been trained, including skyrocketing housing prices in the area (now in Wasco County as well as Hood River County) and greater professional opportunities for young lawyers in the Willamette Valley.¹⁵ Mr. Morris indicated during OPDS’s March visit that, more recently, lawyer turnover at his firm has decreased and the firm’s membership has stabilized.¹⁶ The firm’s responses to the site visit teams’ questionnaire in Appendix B describe its effort to train and supervise its lawyers in some

¹² Mr. Aaron hired a new associate a day or two before OPDS visited his office in March.

¹³ Aaron and Associates’ current contract through December 2007 is for 228 cases per year at an annual rate of \$74,784.

¹⁴ WSIDC currently has a contract for 204 cases per year at \$62,628. Neither Aaron and Associates nor WSIDC responded to OPDS’s request to complete relevant portions of the questionnaire contained in Appendix B.

¹⁵ As the questionnaire in Appendix A indicates, OPDS’s contractor site visit teams have increasingly taken an interest in the issue of attorney retention and its relationship to the distribution of contract funds and other revenues by PDSC’s contractors as salaries for their attorneys. This information has historically not been accessible to OPDS or its predecessor agency on the ground that its contractors are independent. In response to this questionnaire, Morris Olson indicates that the salary scale is “approximately \$50 to \$100 less per month compared to that of Metropolitan Public Defender.” Appendix A, Morris Olson’s “Response to Questionnaire for Public Defense Firms,” p. 8.

¹⁶ At the Commission’s April 13th meeting in Hood River, Mr. Morris presented data which suggested that his firm’s turnover rate is relatively normal for a law firm of seven lawyers. See Appendix C.

detail.

The only potential problem regarding Morris Olson's performance that came to OPDS's attention during its March visit was a personal disagreement or conflict between the senior lawyer in the firm and a juvenile court counselor in Hood River County, which has apparently manifested itself in the courtroom. Mr. Morris first brought the matter to OPDS's attention, indicating that the disagreement stemmed from differences in the philosophy and treatment of juveniles, particularly with regard to their commitment to juvenile facilities or incarceration in prison. During an interview with OPDS, the director of the county's juvenile department noted the disagreement and expressed her willingness to resolve the matter in any reasonable manner, fearing that the attitude of Morris Olson's clients toward her department or the counselor in question would affect the course of their rehabilitation. OPDS concludes that Mr. Morris's perspective as an advocate for his juvenile clients is a valid one that should not be questioned by OPDS or the Commission. On the other hand, the concerns of the county's juvenile department director, if true, would be understandable. To the extent that this matter does in fact pose problems in the administration of juvenile justice in Hood River County, OPDS is confident that the Presiding Judge or the Juvenile Court Judge will resolve the matter.

The work of Aaron and Associates generally received positive reviews, though relations between Mr. Aaron and the Hood River County District Attorney appear somewhat strained. During his meeting with OPDS, Mr. Aaron's primary concern was the amount of compensation he receives under his contract with PDSC and whether he can afford to continue his public defense practice, despite his commitment to the work. In the absence of additional information about his firm's internal operations in response to the questionnaire in Appendix B, it remains to be seen how much training and supervision Mr. Aaron's new associate will receive.

Most of the justice officials and professionals interviewed by OPDS in March offered favorable comments about the services provided by WSIDC. While admittedly not the most aggressive advocates, the majority of observers felt they had good relations with their clients and served the interests of those clients. A number of those observers questioned the level of lawyer training and supervision available at WSIDC and noted that the least experienced attorney frequently lacked the technical knowledge to advance his clients interests in juvenile court.¹⁷ A few questioned the interest or commitment of WSIDC's attorneys to public defense work. To his credit, in the face of the announced intention by the Juvenile Court Judge in Wasco County to appoint another attorney on the court-appointment list to represent children in juvenile dependency cases, WSIDC's administrator expressed his view that this attorney did an excellent job in representing children and encouraged OPDS to enter into a contract with her at WSIDC's expense.

The District Attorneys in Hood River and Wasco Counties expressed general satisfaction with their counties' public defense systems and their offices' working relationships with the

¹⁷ Based upon comments from the administrator of WSIDC at PDSC's April 13th meeting in Hood River, OPDS understands that, while Mr. VanValkenburgh no longer has an active public defense practice, he does make himself available to provide mentoring and advice to the two associates in his firm that currently constituted WSIDC.

counties' defense attorneys.¹⁸ While they emphasized that their office's settlement offers do not vary depending on the identity of the attorney for a defendant or juvenile client, they did report variations among public defense attorneys with respect to their willingness to accept settlement offers or proceed to trial, and in their level of experience and competence. Variations in the experience and competence of defense attorneys appear to be most pronounced between contract attorneys and attorneys on court-appointment lists. Both prosecutors also reported that, among PDSC contractors, Morris Olson generally had lawyers with the greatest skills and abilities as advocates in their counties.

Hood River County's District Attorney emphasized that he has good working relationships with the senior lawyers and management at Morris Olson and a higher level of trust and confidence in them than other public defense attorneys and organizations. He did say, however, that he has encountered some resistance from them to changes in policies and administrative practices that he considered improvements in the local justice system, such as video arraignments and early disposition programs. He also expressed concern over conflicts between the senior lawyer at Morris Olson and a juvenile court counselor and his or anyone else's apparent inability to resolve the matter.

Wasco County's District Attorney expressed particular concern about the lack of "back up" in the public defense bar. He also emphasized the need for training and mentoring programs for the county's defense attorneys and wondered whether anyone in the state offered such programs.

The law enforcement officials, probation and parole officers and juvenile court counselors with whom OPDS spoke in March noted the professionalism of the public defense attorneys in Hood River and Wasco County, particularly the attorneys at Morris Olson. Several interviewees volunteered that the approach to advocacy of most defense attorneys in the District rarely became "personal" by attacking a professional witness's character, and that their agencies' procedures and practices improved as a result of the fair but vigorous advocacy of public defense attorneys.

Preliminary Findings in Gilliam, Sherman and Wheeler Counties

OPDS is aware of the Commission's commitment to providing quality, cost-efficient public defense services in every county of the state, no matter what the county's population or public defense caseload is. OPDS shares that commitment.

However, due to limitations on the time and staff available to OPDS to conduct investigations, the fact that the judges who sit in Hood River and Wasco County also preside over cases in Gilliam, Sherman and Wheeler Counties and because PDSC's contractors in Hood River and Wasco Counties also handle court-appointed cases in those counties, OPDS has relied on the information it collected during its interviews in Hood River and Wasco Counties on March 20 to March 23 for preliminary findings regarding the

¹⁸ Both District Attorneys handle a full caseload and have two deputies.

quality of public defense services in Gilliam, Sherman and Wheeler Counties.

OPDS finds, in general, that levels of satisfaction with the quality of public defense services and the performance of lawyers in these counties are comparable to the levels of satisfaction that OPDS found in Hood River and Wasco Counties. Furthermore, concerns about the inadequate supply of competent public defense attorneys in these counties may be even greater.

To help verify these findings, OPDS has invited the District Attorneys in Gilliam, Sherman and Wheeler Counties to attend the Commission's April 13th meeting in Judicial District No. 7 or, alternatively, to submit their comments about the quality of public defense services and lawyers in their counties before that meeting. As of the date of this report, Gilliam County's District Attorney has confirmed that he will attend the meeting.

PDSC's Public Meeting in Judicial District No. 7

As noted earlier, PDSC held a public meeting in the Hood River County Courthouse on April 13, 2006 from 11:00 a.m. to 4:00 p.m. The purpose of that meeting was to (a) consider the results of OPDS's preliminary investigation in Judicial District No. 7 as reported in a preliminary draft of this report, (b) receive comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the public defense system and services in the district and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Judicial District No. 7.

The Commission received comments on April 13th from the following guests, in order of appearance: Presiding Circuit Court Judge, Hood River County District Attorney John Sewell, Jack Morris, a senior partner in Morris Olson, Wheeler County District Attorney Tom Cutsforth, Circuit Court Judge John V. Kelly, Kevin Hashizume, the administrator of WSIDC and Brian Aaron of Aaron & Associates. An edited transcript of their comments and discussions with the Commission's members and staff is included in Appendix C.

PDSC's Service Delivery Plan for Judicial District No. 7

PDSC agrees with OPDS's conclusion in the preliminary draft of this report that the public defense delivery system and the Commission's contractors in Judicial District No. 7, in general, are operating effectively and cost-efficiently and that its primary contractor, Morris, Olson, Smith & Starns, P.C., in particular, is a well-established, well-run law firm made up of knowledgeable, first-rate public defense attorneys.¹⁹ The Commission shares local concerns in the district, which were expressed to OPDS during its preliminary investigations, that the limited supply of qualified public defense attorneys poses problems

¹⁹ This section in the preliminary draft of this report, entitled "Preliminary Recommendations for a Service Delivery Plan for Judicial District No. 7," is set forth in Appendix A.

for the quality of justice and a threat to public safety if the lawyers who currently take court-appointments leave the district, retire or stop taking appointments for economic reasons.²⁰ The Commission also concludes, as OPDS suggested, that there may be a shortage of available training and supervision for new lawyers entering public defense practice in the district.

Because of the generally high quality of public defense services and providers in the district and relatively few immediate problems facing its public defense delivery system, this Service Delivery Plan for Judicial District No. 7 offers only a few suggestions for improving the delivery of public defense services. The plan does, however, address several issues of organizational structure that were raised by OPDS in its preliminary draft of this report, not because they have any immediate application to service delivery in the district, but because they may be relevant there in the future or, currently, in other parts of the state.

1. *OPDS, in close collaboration with Morris Olson and other contractors in Judicial District No. 7 should, whenever necessary and feasible, pursue PDSC's strategies designed to increase the number of qualified public defense attorneys in the district.*

The Commission recognizes that the single most important factor in successfully recruiting and retaining qualified public defense attorneys in any area of the state is adequate funding of the public defense function by the Oregon Legislature. That remains one of PDSC's highest priorities. Nevertheless, the Commission has identified a number of strategies designed to encourage qualified public defense attorneys and new attorneys interested in public defense practice to consider moving to underserved areas of the state like Judicial District No. 7.²¹ The Commission itself is pursuing some of these strategies, like the establishment of student loan forgiveness programs, through its official role as an advocate for an effective state public defense system before policymaking bodies like the state legislature and the United States Congress.

Even in the absence of additional resources, PDSC firmly believes that a coordinated strategy by OPDS and its contractors to actively recruit graduating law school students for legal practice in underserved areas of the state will produce results. In particular, new lawyers will be drawn to regions of Oregon like Judicial District No. 7 by (a) a statewide directory of job openings administered by OPDS and (b) recruitment teams made up of lawyers from less populous areas of state, who can impress upon anxious law students facing a highly competitive job market that places like Hood River and Wasco County offer professional opportunities and a quality of life that many law school graduates will be unable to find along the I-5 corridor. PDSC urges OPDS and contractors like Morris Olson to coordinate such efforts with OPDS's new Diversity Task Force, which will likely be designing and implementing similar strategies to encourage attorneys and legal staff of color to consider practicing in areas of the state with professional opportunities and welcoming communities.

²⁰ Indeed, one of PDSC's two contractors in Hood River County, Brian Aaron, informed the Commission that he plans to discontinue his public defense practice because he can no longer support his law practice or his family with the revenue he receives from a contract with PDSC. See Appendix C.

²¹ See the list of six strategies set forth in Appendix A.

During the course of OPDS's preliminary investigation and PDSC's public meeting in Judicial District No. 7, it became obvious that this part of the state offers a quality of life and accessibility to other parts of the state – most notably, the Portland Metropolitan Area – than many Oregonians may not appreciate. This leads the Commission to wonder if those in the local legal community who have participated in this planning process may be underestimating the area's attractiveness and opportunities for new lawyers. While the good fortune of local home owners' rapidly growing equity presents an obstacle to homeownership for newcomers and entry-level job seekers, those circumstances are by no means unique to Judicial District No. 7. And, as Jack Morris noted, salaries in his firm are commensurate with the salaries of Portland's public defenders offices, where the housing market may be equally inflated. More importantly, while PDSC is not eager to promote commuting, distances from The Dalles or Hood River to East Portland and other more affordable housing markets are no greater than the common commuting distances along I-5. In short, the opportunities for a fulfilling law practice and quality of life in the district, and the chances of attracting to new lawyers to the area, appear equal to or greater than most areas of the state.

Of course, any "pipe line" of new lawyers will quickly disappear if a local legal community greets new arrivals with indifference, or fails to offer them meaningful opportunities for training and mentoring. Hence, the Commission offers the following recommendation.

- 2. When, in the estimation of the Circuit Court, PDSC's contractors and local district attorneys, there is a need for additional training and mentoring for private attorneys who take court appointments in Judicial District No. 7, Morris Olson should propose a formal training and mentoring program to the Commission, to be performed and compensated pursuant to contract.*

PDSC concludes that current conditions in Judicial District No. 7 do not call for more formal training and mentoring programs for new public defense attorneys. The Circuit Court judges with whom the Commission and OPDS have spoken indicate that, while all of the lawyers currently on the district's court-appointment lists are qualified, some are excellent but others have less than ideal work habits and office practices. While local perceptions vary over the number of new or untrained lawyers that Morris Olson has employed in the past, no one in the district questions the skill and experience of their current lawyers, who are generally regarded as excellent. Finally, while some in the district question the current depth of experience at WSIDC, the consortium's administrator reports that the lawyers at Morris Olson and throughout Wasco County are willing and able to offer their advice and assistance.

In the event new lawyers happen to arrive in the district or the foregoing recruiting strategies prove successful, and these new lawyers fill the district's greatest need by taking court-appointments that Morris Olson cannot handle due to conflicts, PDSC believes that a more systematic training and mentoring program will be necessary to ensure the continuing quality and cost-efficiency of public defense services in the district. Thus, the Commission proposes that, when local justice policymakers identify

the need for more training and mentoring of new lawyers, Morris Olson, which admittedly performs most of the functions of a public defenders office in the district, should, in accordance with that role, design and propose to PDSC a formal training program for new public defense lawyers practicing outside of its offices. The Commission recognizes that such a program would need to be recognized and agreed to under the terms and conditions of its contract with Morris Olson.

3. *The organizational structure of PDSC's primary contractor in Judicial District No. 7 as a private, for-profit law firm (a) has not interfered with the performance of its role as PDSC's primary contractor in the district, (b) may have preserved and promoted its performance of that role in a manner well suited to local circumstances and (c) may offer an organizational model for primary contractors in similar circumstances.*

In its preliminary draft of this report, OPDS posed the question of whether the organizational structure of a private, for-profit law firm was best suited for carrying out the obligations of a primary public defense contractor and the mission of PDSC. For the purposes of providing guidance for similar-situated contractor and regions of the state and the development of plans for the future of Oregon's public defense system, OPDS suggested that a private law firm may not be as willing to accept the degree of transparency in its operations and accountability to a public agency like PDSC as a not-for-profit corporation headed by a board of directors with outside members and staffed by full-time, salaried public defense attorneys under the direction of a professional public defense manager.

During the Commission's April 13th meeting in Hood River, Jack Morris forcefully defended the structure of the Morris Olson law firm, highlighted the many ways in which the firm has served the role of a public defenders office in Judicial District No. 7 and offered a number of persuasive reasons why the organizational structure of Morris Olson was essential to establishing and maintaining that role in the district – most notably, the ability to supplement the income of the firm's members with privately retained cases and to establish rapport with clients who trust private defenders more than public defenders. Because OPDS's preliminary draft report communicated consistently favorable reports of the superior performance of Morris Olson and its lawyers, and the relevant observations in OPDS's draft were aimed at the development of future plans for Oregon's public defense system and for other areas of the state, PDSC interpreted Mr. Morris's remarks primarily as a claim that private, for-profit law firms offer a superior organizational model for the delivery of public defense services outside of Oregon's urban areas in the state, rather than a defense of his firm's particular structure and performance in Judicial District No. 7.

Notwithstanding his persuasive arguments in support of this claim, Mr. Morris's presentation to PDSC on April 13th, along with other information that OPDS and PDSC have been able to gather about the Morris Olson firm, leads the Commission to reach two separate but related conclusions. First, the performance of Morris Olson or any organization, whatever its structure, depends primarily on the quality of the people it employs. Morris Olson, indeed, Oregon's entire public defense system, have benefited from the firm's ability to attract a core group of first-rate attorneys, including senior

lawyers who have been imbued with standards of management and a commitment to excellence through prior professional experiences at places like Metropolitan Public Defender, Inc. In the absence of an employment relationship with public defense attorneys, PDSC and OPDS must recognize that their role in promoting incremental improvements in the quality of public defense services by changing the structure of local delivery systems or by establishing quality assurance programs are no substitute for successful efforts to employ highly qualified lawyers.

Second, the advantages that Morris Olson's organizational structure offers in Judicial District No. 7, including the ability through retained work to supplement the income of lawyers who may not otherwise be able to remain with the firm and the ability through revenue from that work to continue providing services in outlying areas like Gilliam, Sherman and Wheeler Counties or during state budget shortfalls like "BRAC," demonstrate once again the truth of the maxim that "one size does not fit all" in terms of local delivery systems for public defense services in Oregon. When it assumed responsibility for administering the state's public defense system and initiated this planning process in 2003, PDSC recognized that no one organizational structure for delivering public defense services is superior to all other structures in every county of the state, and that each county has a unique set of circumstances, including its own legal culture and community, unwritten practices and procedures and local resources, that requires an organizational structure tailored to the needs and history of the county. The organizational structure and outstanding performance of Morris Olson in Judicial District No. 7 reaffirms the wisdom of this approach to administering and structuring Oregon's public defense system.

Finally, PDSC is left with the conclusion that *depending on local circumstances* it may well be that a non-profit corporate structure may ensure professional management, transparency in its operations and accountability to the Commission and the community is the most suitable organizational structure in some counties. On the other hand, the flexibility and resilience offered by a private, for profit law firm like Morris Olson, particularly when its lawyers are excellent, may be the most suitable organizational structure in other counties.²² Moreover, when there is an adequate supply of available lawyers, a consortium may be the most suitable organization in some counties due to its capacity to handle conflict of interest cases cost-efficiently. In short, the answer to which organizational structure is the best one for a particular county or judicial district is "it depends."

4. *PDSC urges public defense contractors like Morris Olson to collaborate with OPDS and OCDLA in offering public forums or open houses for public officials in their counties or judicial districts for the purpose of providing information about the realities and challenges of public defense practice.*

²² The fact that a law firm shared other positive attributes of Morris Olson, like the implementation of office policies and procedures developed at established public defense offices like MPD in Portland and a recognition that the role as PDSC's primary contractor in a county or judicial district calls for open and responsive working relationships with OPDS and the Commission, would add to the suitability of that organization in another county or district.

PDSC could make this recommendation to almost any public defense contractor in Oregon; however, the recommendation is made to Morris Olson for three reasons. First, the firm offers a model in the state of what can be done to provide excellent legal services with inadequate resources, and what will be lost if the level of state funding continues to fall behind the rate of inflation and cost of living in Oregon. Second, the particular skills and experiences of Morris Olson's attorneys increase the chances that communications with local elected officials will have positive effects. At least two of the firm's senior attorneys have management experience in other public defender offices, one has recently been recognized by the Citizens Review Board for excellence and contributions to children and families in the district, and another has experience as legal counsel to a key legislative committee. Finally, the firm forthrightly admitted to the Commission that it has not devoted its efforts and talents to informing local public officials about the accomplishments and mission of Morris Olson and the other public defense firms and attorneys in Judicial District No. 7.

At the Commission's May 11, 2006 meeting in Portland, Morris Olson expressed the view that these public forums should be held first in more populous counties and judicial districts in the state because more public officials and public defense attorneys reside there and, therefore, the participation in and impact of forums held in those areas would be greater. That may be true. PDSC will defer to the collective judgment of OCDLA's staff and members and OPDS staff and advisory groups with regard to the appropriate location, structure and schedule for these events; however, the Commission also accepts Morris Olson's offer to lend its talents and support to the first public forums, wherever they are held.

PDSC can offer some suggestions about the form a public forum or open house for local public officials might take. The lawyers in the Commission's contractors, the staff of OPDS and the staff and members OCDLA, will obviously have many other ideas.

The Commission suggests that a report like this one accompany letters of invitation to state and local officials in the counties or judicial districts where the forums will be held. In addition to state legislators and city and county officials, judges and other justice officials should be invited to these events in order to offer their perspectives on the essential role and precarious condition of the local public defense system. The staff of OPDS and appropriate representatives of OCDLA should attend and, depending on the date and location of these events, members of PDSC should be invited too.

Given the likelihood that these public forums will succeed in conveying the importance of Oregon's public defense system and the threat that inadequate state funding poses to the system's continued existence and, as a consequence, to the public safety of all Oregonians, PDSC intends to urge public defense contractors throughout the state to sponsor these forums. Because the 2007 legislative session is just six months away, PDSC hopes that several forums can be organized and presented during the fall and winter of 2006.

This proposal is based on the Commission's conviction that Oregon's public defense community cannot expect OPDS's small staff, PDSC's volunteer members and the few

lobbyists retained by OCDLA to secure increased state funding for public defense without more widespread participation in legislative and political processes by individual public defense attorneys and organizations across the state. PDSC believes that communication in local communities between public defense attorneys and their state and local elected officials is among the most effective strategies to develop greater understanding and support for public defense in Oregon.

Appendix A

Preliminary Recommendations for a Service Delivery Plan
for Judicial District No. 7

OPDS concludes that the public defense delivery system and PDSC's contractors in Judicial District No. 7 are operating effectively and cost-efficiently in light of the available resources. As in many areas of the state, problems in the level of attorney training and supervision appear to exist in the District. Depending on the information PDSC gathers at its April 13th meeting in Hood River County, those problems may justify specific recommendations or directions by PDSC in the final version of this report and the Commission's Service Delivery Plan for Judicial District No. 7. At this point, however, OPDS recommends that the Commission consider the following strategies for the District's public defense system in the future.

1. *This service delivery planning process provides PDSC with the opportunity to reconsider the wisdom and feasibility of strategies to increase the supply of public defense attorneys in less populous regions of the state like Judicial District No. 7, including the strategies proposed in its Strategic Plan for 2003-05.*

During its 2003 Retreat, PDSC identified the following policies and practices to encourage public defense attorneys to practice in areas of the state experiencing a shortage of public defense services, which were included in the Commission's Strategic Plan for 2003-05:

- 1) Identify and actively recruit defense attorneys in the offices of current contractors, who have approximately three to five years of experience and are interested in establishing law practices in underserved areas of the state;
- 2) As a primary incentive, offer these attorneys four-year contracts with guaranteed caseloads, supplemented by appellate and PCR cases if necessary;
- 3) Advocate for the forgiveness of student loans and housing allowances as additional incentives;
- 4) Recruit interested law students and, in cooperation with larger contractors' offices, provide apprenticeship training upon graduation, in exchange for a commitment to practice in underserved areas;
- 5) Offer technical and administrative support for new offices in these areas; and

6) Assign FTE from OPDS to fill gaps in services and to provide technical support in underserved areas of the state.

2. *This service delivery planning process also provides PDSC with an opportunity to consider the wisdom and feasibility of planning for the future of public defense delivery systems in jurisdictions like Judicial District No. 7, where the primary contractor is a privately held, for profit law firm that may not possess the organizational characteristics necessary to implement and perpetuate the Commission's mission and best practices.*

OPDS is not suggesting the need for any immediate changes in the organization or structure of the public defense delivery system or the primary public defense contractor in Judicial District No. 7. As the foregoing report indicates, Morris Olson is a group of first-rate public defense lawyers committed to effective advocacy and public defense that has provided quality, cost-effective legal services throughout the District for 20 years. Any improvements that might result from short-term changes in this organization, in OPDS's view, would be far outweighed by the disruption and potential loss of morale of this key service provider.

Furthermore, OPDS is aware that at least some members of the Commission are troubled by any potential intrusion into what they view as the management and administrative prerogatives of independent professional contractors. Thus, OPDS does not anticipate the possibility of significant changes in the structure of the public defense delivery system or the Commission's primary contractor in Judicial District No. 7 for perhaps a decade or more.

Nevertheless, OPDS suggests that a planning process like this one provides an opportunity to discuss the future directions of a local public defense system, as well as similarly situated systems across the state. OPDS believes such a discussion is appropriate for at least four reasons.

First, OPDS is skeptical that any private, for-profit law firm can serve as a primary vehicle for implementing and perpetuating the kinds of "best practices" in public defense management that PDSC has begun to identify over the past three years and has increasingly sought to implement. Those best practices include (a) the establishment of boards of director to bring greater management and financial expertise to contractors' operations, (b) county-wide or regional training and mentoring programs and active participation in policy making by primary contractors, (c) periodic evaluations of attorneys and staff, (d) periodic evaluations of management that are made available to the Commission and (e) fair, rational and transparent compensation systems. While it is certainly conceivable that a private law firm might adopt and promote these practices, the resistance that OPDS has observed from such organizations is understandable and perhaps reasonable, in light of the traditional organization, purposes and culture of forprofit law firms.

Second, for those on the Commission who have reservations about intruding into the prerogatives of independent contractors, PDSC may have greater justification and authority to influence the organization and direction of entities like Morris Olson, where 95 to 99 percent of their revenue is derived from a public defense contract with the Commission.

Third, without changing any of the attorneys who deliver public defense services in a county or the compensation they are paid (other than to hopefully raise it) reorganizing a primary contractor into a not-for-profit corporation, which either operates a full-time law office or a consortium, may increase the likelihood that the Commission's best practices in public defense management will be implemented and promoted. Obviously, a board of directors is necessary for a not-for-profit corporation. The culture and expectations fostered by a not-for-profit organization may be more conducive to the provision of system-wide training and mentoring programs and participation in policy making groups. In addition, a not-for-profit may be less likely than a private law firm to (i) refuse membership in its organization for the kinds of personal reasons that may understandably influence a for-profit entity, (ii) reject outside influence over its management and internal operations by a board of directors or advisory group, (iii) perpetuate inequitable compensation systems and (iv) disband when its principals leave or retire.

Finally, such a discussion by the Commission will have important policy implications for the state public defense system, from providing guidance to similarly situated contractors and local delivery systems that are interested in the future, to testing the scope and feasibility of some of the best practices that the Commission has begun to promote in the absence of additional organizational or structural changes in the state's delivery systems.¹

¹ For example, can the Commission expect to improve management practices or increase accountability significantly by recommending to private law firms that they form "advisory groups" in lieu of boards of directors or subject their firm's management to periodic formal evaluations?

Appendix B

QUESTIONNAIRE FOR PUBLIC DEFENDER OFFICES AND PUBLIC DEFENSE FIRMS

Please respond as completely as possible to the following questions. Questions in some categories may overlap with questions in other categories. Some questions may not be relevant to your office. Please feel free to refer to previous answers when appropriate. Please provide any written materials that are responsive to the questions set forth below. If the requested information is contained in a document being provided with the responses, no additional response is necessary. Finally, please provide the Office of Public Defense Services with any comments or recommendations you might wish to make regarding this questionnaire or any other part of the Public Defense Services Commission's planning process.

Appeal:

How and when are clients advised of their appellate rights in criminal and juvenile cases?

Availability

1. Under what circumstances are your office's attorneys made available to members of the public seeking information about criminal and juvenile matters?
2. When is an attorney in your office first available to an indigent person suspected of a law violation?
3. Is an attorney present for the initial court appearance in criminal and juvenile cases? If not, why not?
4. Does your office have a policy requiring contact with in-custody and out-of-custody clients within a specified period of time? What is the policy? Does your office monitor compliance with this policy? How? Is the policy generally followed?

Board of Directors

1. Does your office have a board of directors?
2. Who serves on your board of directors?
3. How are board members selected and how long do they serve?
4. How often does the board meet?
5. What are the functions of the board?
6. Does the board have written policies and procedures?

Case Management

1. What is your case file protocol?

2. What is your case assignment process?
3. How do you determine whether cases are being distributed fairly among attorneys?
4. What policy or procedure do you have for case relief when needed?
5. What is your procedure for identifying and handling conflicts?
6. Do you maintain records of conflicts for each attorney?

Community Education

1. How is your office involved with the local community (local government, local criminal and juvenile justice systems, and local legal community)?
2. Does your office provide trainers to the local community? If so how and on what topics?
3. If not described in response to items 1 and 2, how does your office participate in efforts to improve the local public safety system?

Competence

1. What standards do you use for the hiring, monitoring, and management of the professional competence of your staff?
2. How do you review the casework of your staff? How is that review shared with the staff?
3. Do you have a complaint process for use by staff, clients, others? How is it used?
4. Do you have a procedure in place to obtain regular feed-back from public defense clients regarding the representation they received from your office? Please describe.
7. Have any post-conviction relief petitions been granted against attorneys in your office? What were the circumstances?
8. Have any attorneys in your office been disciplined by the Oregon State Bar for violation of the Rules of Professional Conduct or the former Disciplinary Rules? What were the circumstances?

Cultural Competence

What steps have you taken to provide culturally competent representation to clients of diverse backgrounds?

Personnel

1. Do you have written policies and procedures for handling personnel matters? If not, do you have a system you use? Please describe.
2. Do you have written job descriptions? If not, please outline the functions of each category of employee.

3. Do you have written policies regarding supervision of your staff? If not, describe your system of supervision.
4. What is your staff evaluation process?
5. How do you address issues of underperformance?
6. How do you acknowledge and reward excellence?
7. Do your salary scales compare to other local attorney offices?
8. Do you have a plan in place to permit new attorneys to join your office?
9. How do you monitor the general quality of the working environment in your office? Are there regular staff meetings? Is there a process for obtaining feed-back from staff regarding the working environment?

Training

1. How do you orient new staff to your office?
2. How do you insure that attorneys are familiar with and abide by the Oregon Rules of Professional Conduct?
3. What ongoing professional development training is offered to staff by your office?
4. What assistance or support do you provide to staff in order to encourage participation in professional development training outside the office?

Zeal

What steps have you taken to inspire and support your staff in providing zealous representation to public defense clients?

Conclusions:

1. In what areas do you believe your office excels?
2. Are there any areas in which improvement is needed? What are they? How do you intend to address them?

Morris, Olson, Smith & Starns, P.C.
Response to Questionnaire for Public Defense Firms
March 2006

APPEAL

1. How and when are clients advised of their appellate rights in criminal and juvenile cases?

Clients are advised of their appellate rights immediately upon the case being finalized. Additionally appellate rights are often discussed with clients well in advance of their case being finished, particularly when there may be a legitimate appellate issue in the case such as the denial of a motion to suppress.

AVAILABILITY

1. Under what circumstances are your office's attorneys made available to members of the public seeking information about criminal and juvenile matters?

We occasionally get calls from the public (sometimes when they are looking for an attorney and sometimes when they just want information) and we often play the role of a general information source. We take these calls and try to answer questions about the justice system generally to the best of our ability without giving specific legal advice since no attorney client relationship exists at that point. There are also times when we take calls from the press concerning matters involving the justice system and in particular indigent defense.

There are occasionally other opportunities to provide information to the public as well. For example there are occasions when one of the judges will entertain a class from a school or a group of individuals visiting the courthouse. On those occasions we have often been asked to talk about the role of defense counsel.

2. When is an attorney in your office first available to an indigent person suspected of a law violation?

From time to time we remind other players in the system, notably the courts and corrections, that we are available to take calls from people prior to being charged particularly when they are being interrogated and wish to have the benefit of counsel. Not surprisingly, the law enforcement folks don't pass that information out very freely and therefore we only rarely get those types of calls. Other than that we make ourselves available as soon as we are contacted. Many former clients call us immediately after being arrested or cited. In cases where it appears likely that the person will be receiving appointed counsel we handle the case generally as if we had already been appointed.

3. Is an attorney present for the initial court appearance in criminal and juvenile cases? If not, why not?

We are available and present at first appearances for virtually every case. We always have an attorney present for the regular in-custody docket. This applies to initial appearances in Hood River and Wasco County and to the three eastern counties, since those are usually done by video with a judge either in Hood River or Wasco County. First appearances on juvenile cases are not always regularly scheduled, however, when we are made aware that a case is coming up we attend those personally as well.

4. Does your office have a policy regarding requiring contact of in-custody and out of custody clients within a specified period of time? What is the policy? Does your office monitor compliance with this policy? How? Is the policy generally followed?

Our policy with respect to in-custody clients is consistent with what we believe is, and should be, statewide policy. We try very hard to see all of our in-custody clients within 24 hours of appointment and in those cases where that proves to be impossible we nonetheless make at least telephone contact and then follow it up with personal contact. Attorneys are made aware that this is the office policy and that it is expected to be followed. Compliance with the policy does prove to be problematic at times because the jail is a 42 mile round trip from the Hood River office and our schedules make getting there difficult. However, even with that problem we are in compliance with the policy probably 95% of the time at least. Out of custody clients are told to call immediately to schedule an office appointment.

BOARD OF DIRECTORS

1. Does your office have a board of directors?

We are a private law firm and as such do not have an actual board of directors. Having said that, the firm consists of four named shareholders and three associates. Most decisions are made after discussion amongst the shareholders and on occasion the associates as well. Matters involving policy decisions are made only after shareholders come to some consensus, and specific matters such as hiring etc. are also made on a group basis.

CASE MANAGEMENT

1. What is your case file protocol?

Files are preassembled and include a face sheet for contact and charge information as well as separate sheets for background information (including family relations, immigration status and length of time in the United States), employment information, educational background, drug and alcohol issues and prior criminal history. We also obtain a copy of the booking sheet with the client's photo from the Northern Oregon Regional Correction Facility web site for the file. In many instances potential conflicts are caught at this point. With respect to in-custody clients, at

the time of the first appearance the attorney (or in some cases one of the legal assistants) fills out at a minimum, the information needed to contact the client and information regarding the charge. We usually attempt to gather any information that may be relevant to a release decision by speaking with the person in-custody during the actual appearance and we present that information as soon as possible. Although the size of the courtrooms and equipment being used make simultaneous contact with the client nearly impossible, we have insisted on having an opportunity to speak with our clients during appearances by phone and have done so since the implementation of video system. Although not a perfect situation, this has actually worked out quite well.

Unlike many jurisdictions around the state it is common for us to make a release pitch at that initial appearance and we are often successful in having clients released at that time. The charging instrument is received and placed in the file. In Hood River county approximately 80 or 90% of the time we receive discovery consisting of police reports, etc. at that time as well.

After the initial court appearance, whether it is in or out of custody, the file is then returned to the office where staff updates it with any other information that is available, checks for conflicts and opens the file. The files on in-custody clients are expected to be returned to the attorney the same day and files on out of custody clients are expected to be returned to the attorney within 24 hours.

2. What is your case assignment process?

The case assignment process differs between the two counties somewhat, however, it is still geared toward the goal of having the attorney who will actually be assigned the case present at the initial appearance. In Hood River because other appearances are mixed in with initial appearances for new clients, we typically have two of the three attorneys present. The 11:00 in-custody calender is a routine part of our day. Typically the misdemeanor cases and minor felony cases are given to the most junior attorney with other cases going to the other two. While there is no set assignment schedule the system works quite well and constant monitoring of individual case loads results in an equitable distribution.

In Wasco County the four attorneys each have an individual pick up week. The attorney whose week it is, takes responsibility for being at initial appearances or if he/she is tied up, for instance in trial, for making arrangements for one of the other attorneys to cover for the 1:00 docket. Often times more than one attorney is actually present and again we endeavor to have the attorney who is actually going to be assigned the case present at that time. It is a relatively rare occasion when only one attorney is present. In some cases, however, the case may be passed to a different attorney in the office. For instance, when one of our junior attorneys is picking up cases and a serious felony comes in that case is given to one of the more senior attorneys and the reverse is true as well.

3. How do you determine whether cases are being distributed fairly among attorneys?

4. What policy or procedure do you have for case relief when needed?

In both counties the senior attorney is responsible for monitoring the caseloads to make sure that there is an equitable distribution. If for some reason the usual assignment process results in someone's case load being out of proportion arrangements are made to alleviate that situation. For instance, in Wasco County the individual attorney may skip an assignment week or perhaps have it delayed. In Hood River County, simply being aware of each other's case loads and making allowances for the same achieves an equitable distribution. In both counties the case list is monitored as well.

5. What is your procedure for identifying and handling conflicts?

In the Hood River office we ordinarily get discovery at the initial appearance upon the attorney's return from court the staff goes through the police reports and checks all names against our database. This results in most conflicts being discovered the same day we pick the case up and we immediately notify the court if we have a conflict that prevents us from representing the individual. Often times the person is assigned new counsel the same day. Because of the brief period of time that we have these cases we forgo taking credit.

In The Dalles office although discovery is not available immediately, victim's and co-defendant's names are ran for conflicts even before we appear in court. When discovery becomes available it is immediately checked for conflicts in the same fashion. Again, when a conflict is discovered that prevents us from representing the individual, we notify the court immediately and the defendant is usually assigned new counsel quickly.

6. Do you maintain records of conflicts for each attorney?

The meaning of this question is unclear, however, we will assume that it is asking whether some record of the number of conflicts that each attorney has is kept. The answer is generally no, however, we don't believe there is a need to keep a record of the number of conflicts for each attorney since the conflict decision is usually done on a group basis. As stated before, the staff initially brings the conflict to the attorney's attention and in each county the case attorney is required to run the potential conflict past the senior attorney for his input as to whether it is an actual conflict or not. (Requests for extraordinary expenses are also reviewed by the senior attorney). Only in the most clear cases is that step skipped, for instance when we represent a co-defendant. Even those cases are fairly rare since we usually are aware at court whether we have a co-defendant or not and we simply advise the court not to assign us the new case from the beginning.

COMMUNITY EDUCATION

1. How is your office involved with the local community? (Local government, local criminal and juvenile justice systems, and local legal community)?

2. Does your office provide trainers to the local community? If so, how and on what topics?

Our office is almost always represented by someone with respect to any justice system meetings that may take place. We always attend CRB hearings and we have a presence on the LIPSIC committee in Hood River. We also almost always have a presence at any meetings that are designed to deal with specific components of the system. For instance, we attend meetings about domestic violence and local treatment options, meetings regarding improvements in the juvenile justice system and any meetings the court may have to deal with procedural issues.

While we have not specifically provided trainers to the local community we have made it known in both counties that we are available to serve as a resource to the other attorneys in town in terms of sharing our expertise and we are often asked for advice as well as materials such as forms and plea petitions. We also act as a resource for other attorneys when they have clients that are eligible for the Drug Court programs that we have in each county. We have made it known that we are available and willing to help other attorneys who may not be familiar with that process and procedure. Additionally, the courts generally do a good job in including us in ongoing planning and decision making for the courts and we are very appreciative of that fact. For instance, in Hood River county when the video appearance room was being planned we were advised of the same and asked for our input.

Finally, because of our continuing involvement with OCDLA and association with PDSC, as well as other bodies, the firm often plays the role of an informal liaison between those decision making bodies and the local court community.

COMPETENCE

1. What standards do you use for the hiring, monitoring, and management of the professional competence of your staff?

2. How do you review the casework of your staff? How is that review shared with the staff?

Of the seven attorneys in the office, five have been with the firm for five years or more. With respect to the hiring and monitoring of newer attorneys we start by attempting to hire new attorneys that have demonstrated interest in criminal defense. We have found over the years that while an opening in the firm may attract a number of applicants, many of those applicants are applying simply because they need a job and have been unsuccessful in finding one. While these applicants may profess an interest in criminal defense we have found that interest may be exaggerated or in some cases totally absent. Therefore we look for professional and work histories that actually demonstrate an interest in what we do. Our most recent hire, Conor Sullivan, for example, worked in the Lane County Public Defender's office as both a certified law student and a clerk. While over the last few years we have found that it is more and more difficult to find applicants with a demonstrated interest in criminal law, we feel that nevertheless it is essential to attempt to locate those individuals and to give them a strong preference in our hiring process.

New attorneys are monitored primarily by the senior attorney in each office. We attempt to

educate the attorneys with respect to office systems and procedures so that they immediately begin performing their task in the way we want them to. Court appearances are observed and we make it a point to try to have one of the other attorneys present and available as a resource to the new attorney whenever possible. After the new attorney has been with us for a short time we typically will talk to the judges to get their feedback and occasionally will talk to court staff as well so that we can get their perspective on how the new attorney is doing. At about the 90 day mark we have in the past sat down with the new attorney and gone through his/her case load, file by file, to see if he/she is keeping files in an appropriate manner, whether appropriate investigation and funding requests are being made, and whether the attorney is catching the issues that are present.

We share whatever information that is gathered with the new attorney and while we do have a formal evaluation process in place we have found that sharing that information informally and in a constructive manner is usually superior.

- 3. Do you have a complaint process for use by staff, clients, others? How is it used?**
- 4. Do you have a procedure in place to obtain regular feed-back from public defense clients regarding the representation they received from your office? Please describe.**
- 5. Have any post-conviction relief petitions been granted against attorneys in your office? What were the circumstances?**
- 6. Have any attorneys in your office been disciplined by the Oregon State Bar for violation of the Rules of Professional Conduct or former Disciplinary Rules? What were the circumstances?**

Office staff and attorneys are directed to speak with the lead attorney in each office if they are having some kind of issue. If the problem can't be resolved at that level then it is referred to the senior shareholder to address.

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that we use in the office for everything from putting a file together to conducting a client interview to appearing in court. Attorneys and staff are encouraged to ask questions constantly and it is the occasional attorney or staff person who doesn't ask questions that sets off a red flag for the rest of us and consequently gets more attention.

Attorneys are provided with a copy of the Oregon Rules of Professional Conduct as part of the package of materials they get when they join the office. Attorneys are educated about the importance of abiding by the rules and in conducting themselves in an ethical manner generally. Attorneys are, in fact, advised that because the nature of our work we must hold ourselves to a higher standard of ethical responsibility than our colleagues on the prosecution side because of the fact that we are subject to more intense scrutiny and suspicion.

3. What ongoing professional development training is offered to staff by your office?

4. What assistance or support do you provide to staff in order to encourage participation in professional development training outside the office?

This is an area that I believe our firm excels in. We recognize that because we are not in a major metropolitan area educational opportunities for attorneys can be limited. Because of this and because our firm has always been closely associated with the Oregon Criminal Defense Lawyers Association (the senior shareholder is a former president) we encourage and expect attorneys to go to OCDLA training conferences on a regular basis. Typically in the past we have encouraged attorneys to attend the Spring conference, the annual conference in June, the late summer conference and the winter conference at the Benson. One of these is usually a juvenile conference.

The firm typically reimburses attorneys for their tuition and occasionally provides some allowance for housing as well in order to ensure that all attorneys can afford to go, particularly the newer attorneys. There is an expectation that attorneys when they go to conferences will, of course, attend classes, however, attorneys are also encouraged to introduce themselves to the other attorneys and socialize so that we stay integrated with the criminal defense bar of Oregon as a whole. We probably attend more conferences on a per capita basis than any other firm in the state.

In the past we have also encouraged the non-attorney staff to attend the annual management conference when that program includes a significant amount of education aimed specifically toward firm staff.

ZEAL

1. What steps have you taken to inspire and support your staff in providing zealous representation to public defense clients?

Perhaps our most significant success is in the area of creating a culture in the office of zealous

representation. (We fly the Jolly Rodger whenever we win a trial or motion). While this is intangible it is nonetheless very real. Our attorneys are appropriately aggressive and understand that part of our role is to ensure the integrity and fairness of the system as a whole and that our responsibility, attention and concern is not, and should not be, limited solely to the individual clients.

CONCLUSIONS

1. In what area do you believe your office excels?

As stated our office excels in creating the same or superior atmosphere or culture of zealous advocacy, often found in larger organizations. We encourage and reward aggressive advocacy and attempt to constantly recognize the necessity of it by encouraging each other in the office. We also stay tied into the larger defense bar primarily through channels made available by the Oregon Criminal Defense Lawyers Association. Each attorney is a member of OCDLA and as such has available to him or her all of the resources of the organization including the information shared on the internet site and list serve. (The Pond).

We have had the good fortune of having a firm that for 15 years now has operated aggressively and effectively and yet has had almost a complete absence of problems requiring the attention of any indigent defense administration in Salem. We do our work well, although as is the case with everyone else doing indigent defense, we are chronically underfunded.

Indigent defense has traditionally been subsidized by idealism and principle. Individuals who grew up in the 60's or 70's understood the need for professional criminal defense and understood that there is a need for checks and balances against the power of the government. As the individuals of that era become fewer, and student loan debt of new attorneys becomes higher making job choices based on idealism impossible, lack of adequate funding from the state becomes even more critical. There must be new and creative ways found to make individual firms or entities more attractive to new attorneys and better able to fulfill our duties. We believe that by combining the atmosphere, training and zealousness of a classic public defender's office with the increased flexibility and potential for a small level of additional income of a private firm, that we have achieved this goal in a unique fashion.

2. Are there any areas in which improvement is needed? What are they? How do you intend to address them?

There is always room for improvement no matter how well an office performs. Ours is no different. We would like to see an increase in the level of social service type assistance that we are able to provide to clients and we specifically would like to see an increase in our ability to handle juvenile, particularly dependency cases effectively. (We already provide some representation that could be considered atypical, for instance attending school suspension and expulsion hearings.)

We would like to have one trial assistant in each office whose primary responsibility is working dependency cases and acting as a liaison with DHS, CASA and the respective CRB boards. We will continue to work towards that goal and hopefully be able to provide the increased level of attention those cases deserve.

There are of course a limitless number of other ways that we can continue to improve and we will continue to look for them. We do, however, firmly believe that we provide a high level of indigent defense, and that we are not only an asset to the indigent defense system, but that we can and should, serve as a model to other indigent defense providers who are similarly situated.

Respectfully submitted,

Jack Morris

Morris, Olson, Smith & Starns, P.C.
Response to Questionnaire for Public Defense Firms
March 2006

APPEAL

1. How and when are clients advised of their appellate rights in criminal and juvenile cases?

Clients are advised of their appellate rights immediately upon the case being finalized. Additionally appellate rights are often discussed with clients well in advance of their case being finished, particularly when there may be a legitimate appellate issue in the case such as the denial of a motion to suppress.

AVAILABILITY

1. Under what circumstances are your office's attorneys made available to members of the public seeking information about criminal and juvenile matters?

We occasionally get calls from the public (sometimes when they are looking for an attorney and sometimes when they just want information) and we often play the role of a general information source. We take these calls and try to answer questions about the justice system generally to the best of our ability without giving specific legal advice since no attorney client relationship exists at that point. There are also times when we take calls from the press concerning matters involving the justice system and in particular indigent defense.

There are occasionally other opportunities to provide information to the public as well. For example there are occasions when one of the judges will entertain a class from a school or a group of individuals visiting the courthouse. On those occasions we have often been asked to talk about the role of defense counsel.

2. When is an attorney in your office first available to an indigent person suspected of a law violation?

From time to time we remind other players in the system, notably the courts and corrections, that we are available to take calls from people prior to being charged particularly when they are being interrogated and wish to have the benefit of counsel. Not surprisingly, the law enforcement folks don't pass that information out very freely and therefore we only rarely get those types of calls. Other than that we make ourselves available as soon as we are contacted. Many former clients call us immediately after being arrested or cited. In cases where it appears likely that the person will be receiving appointed counsel we handle the case generally as if we had already been appointed.

3. Is an attorney present for the initial court appearance in criminal and juvenile cases? If not, why not?

We are available and present at first appearances for virtually every case. We always have an attorney present for the regular in-custody docket. This applies to initial appearances in Hood River and Wasco County and to the three eastern counties, since those are usually done by video with a judge either in Hood River or Wasco County. First appearances on juvenile cases are not always regularly scheduled, however, when we are made aware that a case is coming up we attend those personally as well.

4. Does your office have a policy regarding requiring contact of in-custody and out of custody clients within a specified period of time? What is the policy? Does your office monitor compliance with this policy? How? Is the policy generally followed?

Our policy with respect to in-custody clients is consistent with what we believe is, and should be, statewide policy. We try very hard to see all of our in-custody clients within 24 hours of appointment and in those cases where that proves to be impossible we nonetheless make at least telephone contact and then follow it up with personal contact. Attorneys are made aware that this is the office policy and that it is expected to be followed. Compliance with the policy does prove to be problematic at times because the jail is a 42 mile round trip from the Hood River office and our schedules make getting there difficult. However, even with that problem we are in compliance with the policy probably 95% of the time at least. Out of custody clients are told to call immediately to schedule an office appointment.

BOARD OF DIRECTORS

1. Does your office have a board of directors?

We are a private law firm and as such do not have an actual board of directors. Having said that, the firm consists of four named shareholders and three associates. Most decisions are made after discussion amongst the shareholders and on occasion the associates as well. Matters involving policy decisions are made only after shareholders come to some consensus, and specific matters such as hiring etc. are also made on a group basis.

CASE MANAGEMENT

1. What is your case file protocol?

Files are preassembled and include a face sheet for contact and charge information as well as separate sheets for background information (including family relations, immigration status and length of time in the United States), employment information, educational background, drug and alcohol issues and prior criminal history. We also obtain a copy of the booking sheet with the client's photo from the Northern Oregon Regional Correction Facility web site for the file. In many instances potential conflicts are caught at this point. With respect to in-custody clients, at

the time of the first appearance the attorney (or in some cases one of the legal assistants) fills out at a minimum, the information needed to contact the client and information regarding the charge. We usually attempt to gather any information that may be relevant to a release decision by speaking with the person in-custody during the actual appearance and we present that information as soon as possible. Although the size of the courtrooms and equipment being used make simultaneous contact with the client nearly impossible, we have insisted on having an opportunity to speak with our clients during appearances by phone and have done so since the implementation of video system. Although not a perfect situation, this has actually worked out quite well.

Unlike many jurisdictions around the state it is common for us to make a release pitch at that initial appearance and we are often successful in having clients released at that time. The charging instrument is received and placed in the file. In Hood River county approximately 80 or 90% of the time we receive discovery consisting of police reports, etc. at that time as well.

After the initial court appearance, whether it is in or out of custody, the file is then returned to the office where staff updates it with any other information that is available, checks for conflicts and opens the file. The files on in-custody clients are expected to be returned to the attorney the same day and files on out of custody clients are expected to be returned to the attorney within 24 hours.

2. What is your case assignment process?

The case assignment process differs between the two counties somewhat, however, it is still geared toward the goal of having the attorney who will actually be assigned the case present at the initial appearance. In Hood River because other appearances are mixed in with initial appearances for new clients, we typically have two of the three attorneys present. The 11:00 in-custody calendar is a routine part of our day. Typically the misdemeanor cases and minor felony cases are given to the most junior attorney with other cases going to the other two. While there is no set assignment schedule the system works quite well and constant monitoring of individual case loads results in an equitable distribution.

In Wasco County the four attorneys each have an individual pick up week. The attorney whose week it is, takes responsibility for being at initial appearances or if he/she is tied up, for instance in trial, for making arrangements for one of the other attorneys to cover for the 1:00 docket. Often times more than one attorney is actually present and again we endeavor to have the attorney who is actually going to be assigned the case present at that time. It is a relatively rare occasion when only one attorney is present. In some cases, however, the case may be passed to a different attorney in the office. For instance, when one of our junior attorneys is picking up cases and a serious felony comes in that case is given to one of the more senior attorneys and the reverse is true as well.

3. How do you determine whether cases are being distributed fairly among attorneys?

4. What policy or procedure do you have for case relief when needed?

In both counties the senior attorney is responsible for monitoring the caseloads to make sure that there is an equitable distribution. If for some reason the usual assignment process results in someone's case load being out of proportion arrangements are made to alleviate that situation. For instance, in Wasco County the individual attorney may skip an assignment week or perhaps have it delayed. In Hood River County, simply being aware of each other's case loads and making allowances for the same achieves an equitable distribution. In both counties the case list is monitored as well.

5. What is your procedure for identifying and handling conflicts?

In the Hood River office we ordinarily get discovery at the initial appearance upon the attorney's return from court the staff goes through the police reports and checks all names against our database. This results in most conflicts being discovered the same day we pick the case up and we immediately notify the court if we have a conflict that prevents us from representing the individual. Often times the person is assigned new counsel the same day. Because of the brief period of time that we have these cases we forgo taking credit.

In The Dalles office although discovery is not available immediately, victim's and co-defendant's names are ran for conflicts even before we appear in court. When discovery becomes available it is immediately checked for conflicts in the same fashion. Again, when a conflict is discovered that prevents us from representing the individual, we notify the court immediately and the defendant is usually assigned new counsel quickly.

6. Do you maintain records of conflicts for each attorney?

The meaning of this question is unclear, however, we will assume that it is asking whether some record of the number of conflicts that each attorney has is kept. The answer is generally no, however, we don't believe there is a need to keep a record of the number of conflicts for each attorney since the conflict decision is usually done on a group basis. As stated before, the staff initially brings the conflict to the attorney's attention and in each county the case attorney is required to run the potential conflict past the senior attorney for his input as to whether it is an actual conflict or not. (Requests for extraordinary expenses are also reviewed by the senior attorney). Only in the most clear cases is that step skipped, for instance when we represent a co-defendant. Even those cases are fairly rare since we usually are aware at court whether we have a co-defendant or not and we simply advise the court not to assign us the new case from the beginning.

COMMUNITY EDUCATION

1. How is your office involved with the local community? (Local government, local criminal and juvenile justice systems, and local legal community)?

2. Does your office provide trainers to the local community? If so, how and on what topics?

Our office is almost always represented by someone with respect to any justice system meetings that may take place. We always attend CRB hearings and we have a presence on the LIPSIC committee in Hood River. We also almost always have a presence at any meetings that are designed to deal with specific components of the system. For instance, we attend meetings about domestic violence and local treatment options, meetings regarding improvements in the juvenile justice system and any meetings the court may have to deal with procedural issues.

While we have not specifically provided trainers to the local community we have made it known in both counties that we are available to serve as a resource to the other attorneys in town in terms of sharing our expertise and we are often asked for advice as well as materials such as forms and plea petitions. We also act as a resource for other attorneys when they have clients that are eligible for the Drug Court programs that we have in each county. We have made it known that we are available and willing to help other attorneys who may not be familiar with that process and procedure. Additionally, the courts generally do a good job in including us in ongoing planning and decision making for the courts and we are very appreciative of that fact. For instance, in Hood River county when the video appearance room was being planned we were advised of the same and asked for our input.

Finally, because of our continuing involvement with OCDLA and association with PDSC, as well as other bodies, the firm often plays the role of an informal liaison between those decision making bodies and the local court community.

COMPETENCE

1. What standards do you use for the hiring, monitoring, and management of the professional competence of your staff?

2. How do you review the casework of your staff? How is that review shared with the staff?

Of the seven attorneys in the office, five have been with the firm for five years or more. With respect to the hiring and monitoring of newer attorneys we start by attempting to hire new attorneys that have demonstrated interest in criminal defense. We have found over the years that while an opening in the firm may attract a number of applicants, many of those applicants are applying simply because they need a job and have been unsuccessful in finding one. While these applicants may profess an interest in criminal defense we have found that interest may be exaggerated or in some cases totally absent. Therefore we look for professional and work histories that actually demonstrate an interest in what we do. Our most recent hire, Conor Sullivan, for example, worked in the Lane County Public Defender's office as both a certified law student and a clerk. While over the last few years we have found that it is more and more difficult to find applicants with a demonstrated interest in criminal law, we feel that nevertheless it is essential to attempt to locate those individuals and to give them a strong preference in our hiring process.

New attorneys are monitored primarily by the senior attorney in each office. We attempt to

educate the attorneys with respect to office systems and procedures so that they immediately begin performing their task in the way we want them to. Court appearances are observed and we make it a point to try to have one of the other attorneys present and available as a resource to the new attorney whenever possible. After the new attorney has been with us for a short time we typically will talk to the judges to get their feedback and occasionally will talk to court staff as well so that we can get their perspective on how the new attorney is doing. At about the 90 day mark we have in the past sat down with the new attorney and gone through his/her case load, file by file, to see if he/she is keeping files in an appropriate manner, whether appropriate investigation and funding requests are being made, and whether the attorney is catching the issues that are present.

We share whatever information that is gathered with the new attorney and while we do have a formal evaluation process in place we have found that sharing that information informally and in a constructive manner is usually superior.

- 3. Do you have a complaint process for use by staff, clients, others? How is it used?**
- 4. Do you have a procedure in place to obtain regular feed-back from public defense clients regarding the representation they received from your office? Please describe.**
- 5. Have any post-conviction relief petitions been granted against attorneys in your office? What were the circumstances?**
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2. How do you insure that attorneys are familiar with and abide by the Oregon Rules of Professional Conduct?

Typically attorneys walk into a caseload that is relatively small and are advised of the procedures

that we use in the office for everything from putting a file together to conducting a client interview to appearing in court. Attorneys and staff are encouraged to ask questions constantly and it is the occasional attorney or staff person who doesn't ask questions that sets off a red flag for the rest of us and consequently gets more attention.

Attorneys are provided with a copy of the Oregon Rules of Professional Conduct as part of the package of materials they get when they join the office. Attorneys are educated about the importance of abiding by the rules and in conducting themselves in an ethical manner generally. Attorneys are, in fact, advised that because the nature of our work we must hold ourselves to a higher standard of ethical responsibility than our colleagues on the prosecution side because of the fact that we are subject to more intense scrutiny and suspicion.

3. What ongoing professional development training is offered to staff by your office?

4. What assistance or support do you provide to staff in order to encourage participation in professional development training outside the office?

This is an area that I believe our firm excels in. We recognize that because we are not in a major metropolitan area educational opportunities for attorneys can be limited. Because of this and because our firm has always been closely associated with the Oregon Criminal Defense Lawyers Association (the senior shareholder is a former president) we encourage and expect attorneys to go to OCDLA training conferences on a regular basis. Typically in the past we have encouraged attorneys to attend the Spring conference, the annual conference in June, the late summer conference and the winter conference at the Benson. One of these is usually a juvenile conference.

The firm typically reimburses attorneys for their tuition and occasionally provides some allowance for housing as well in order to ensure that all attorneys can afford to go, particularly the newer attorneys. There is an expectation that attorneys when they go to conferences will, of course, attend classes, however, attorneys are also encouraged to introduce themselves to the other attorneys and socialize so that we stay integrated with the criminal defense bar of Oregon as a whole. We probably attend more conferences on a per capita basis than any other firm in the state.

In the past we have also encouraged the non-attorney staff to attend the annual management conference when that program includes a significant amount of education aimed specifically toward firm staff.

ZEAL

1. What steps have you taken to inspire and support your staff in providing zealous representation to public defense clients?

Perhaps our most significant success is in the area of creating a culture in the office of zealous

representation. (We fly the Jolly Rodger whenever we win a trial or motion). While this is intangible it is nonetheless very real. Our attorneys are appropriately aggressive and understand that part of our role is to ensure the integrity and fairness of the system as a whole and that our responsibility, attention and concern is not, and should not be, limited solely to the individual clients.

CONCLUSIONS

1. In what area do you believe your office excels?

As stated our office excels in creating the same or superior atmosphere or culture of zealous advocacy, often found in larger organizations. We encourage and reward aggressive advocacy and attempt to constantly recognize the necessity of it by encouraging each other in the office. We also stay tied into the larger defense bar primarily through channels made available by the Oregon Criminal Defense Lawyers Association. Each attorney is a member of OCDLA and as such has available to him or her all of the resources of the organization including the information shared on the internet site and list serve. (The Pond).

We have had the good fortune of having a firm that for 15 years now has operated aggressively and effectively and yet has had almost a complete absence of problems requiring the attention of any indigent defense administration in Salem. We do our work well, although as is the case with everyone else doing indigent defense, we are chronically underfunded.

Indigent defense has traditionally been subsidized by idealism and principle. Individuals who grew up in the 60's or 70's understood the need for professional criminal defense and understood that there is a need for checks and balances against the power of the government. As the individuals of that era become fewer, and student loan debt of new attorneys becomes higher making job choices based on idealism impossible, lack of adequate funding from the state becomes even more critical. There must be new and creative ways found to make individual firms or entities more attractive to new attorneys and better able to fulfill our duties. We believe that by combining the atmosphere, training and zealousness of a classic public defender's office with the increased flexibility and potential for a small level of additional income of a private firm, that we have achieved this goal in a unique fashion.

2. Are there any areas in which improvement is needed? What are they? How do you intend to address them?

There is always room for improvement no matter how well an office performs. Ours is no different. We would like to see an increase in the level of social service type assistance that we are able to provide to clients and we specifically would like to see an increase in our ability to handle juvenile, particularly dependency cases effectively. (We already provide some representation that could be considered atypical, for instance attending school suspension and expulsion hearings.)

We would like to have one trial assistant in each office whose primary responsibility is working dependency cases and acting as a liaison with DHS, CASA and the respective CRB boards. We will continue to work towards that goal and hopefully be able to provide the increased level of attention those cases deserve.

There are of course a limitless number of other ways that we can continue to improve and we will continue to look for them. We do, however, firmly believe that we provide a high level of indigent defense, and that we are not only an asset to the indigent defense system, but that we can and should, serve as a model to other indigent defense providers who are similarly situated.

Respectfully submitted,

Jack Morris

Appendix C

PUBLIC DEFENSE SERVICES COMMISSION

EXCERPTS FROM THE UNOFFICIAL MEETING TRANSCRIPT

April 13, 2006 Meeting
Hood River County Courthouse
Courtroom 301
309 State Street
Hood River, Oregon

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Jim Brown
John Potter
Chip Lazenby
Paul J. De Muniz

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Ingrid Swenson
Laura Anson

Agenda Item No. 3 Introduction of the Preliminary Report on Service Delivery in Judicial District No. 7

217 P. Ozanne I see we have Presiding Judge Hull in the audience. I would like to ask him in a moment to come up and speak with you. Throughout the day, I see a number of people who we hope will speak. I see that we have representatives for our contractors here and I know the Hood River County District Attorney will be here to speak in the next hour. Let me just offer some broad-brush strokes with regard to the result of our preliminary investigation. Then Judge Hull, as presiding judge, can speak first and answer the questions you may have. The preliminary draft report is really an attempt to frame some of the issues we noted during our initial assessment by talking to a number of key players in the counties in the judicial district. When I say "the counties," I am talking about all five counties in the judicial district. Although, as I indicated in the report, given our time and resources, we didn't get to spend as much time as I would have liked in a perfect world to cover Gilliam, Sherman and Wheeler counties. We spent our time in this county, Hood River, and in Wasco County. When I say "we," Commissioner John Potter was kind enough to join me for our preliminary investigation and spent two of the three days in the district talking with folks. As I indicated in the report, we talked to all four judges, to the district attorneys in Wasco and Hood River County, to both sheriffs and the police chief of The Dalles, and representatives of the Department of Human Services and community corrections in both Wasco and Hood River County. To the extent these offices, like the courts, have relationships or operations in Wheeler, Sherman and Gilliam Counties; we asked questions and received information regarding those counties as well. We also spoke with the Trial

Court Administrator, Chuck Wall, who has been kind enough to provide his hospitality and these accommodations. I also talked by telephone to the three district attorneys in Sherman, Gilliam and Wheeler Counties. I understand that, this afternoon, Tom Cutsworth from Wheeler County will be attending our meeting. In a period of three days, we were able to develop a pretty good picture of defense services in Judicial District No. 7. And, as I hope the preliminary report makes clear, things are going well here. I think people are generally very satisfied with the public defense services in the district. Once again, we encountered good working relationships among the people in the district's justice systems. The advocacy is zealous when necessary, but relationships are not jeopardized in general by personal issues or conflicts. I thought it was particularly interesting that probation officers and police said that our contract lawyers are tough advocates – “they cross-examine us intensely, but they are professional and they are not tempted to get into personalities when it isn't necessary and they maintain professional relationships.” As I indicated in the report, these people said that the lawyers make them more effective in terms of their own agencies' practices and procedures. I think that, in general, the lawyers in this district are doing the work that we ask them to do. The primary problem, as noted in the report, is a shortage of qualified public defense lawyers. After the courts get past the “starting lineup” – our contractors and the more experienced private attorneys – “the bench” is very thin. Jack Morris, who will speak to you today, has spoken about this issue in the district many times before. We have discussed it many times with regard to what we have called underserved areas of the state – areas where there isn't a sizable population of lawyers and there are problems of recruiting lawyers and getting them to stay in the area. So, once they get past our contractors and a number of good people on the list, the judges in this district worry about who they can appoint and what they are going to do when qualified lawyers retire or move on. So the supply of lawyers is a big issue here. The report does address one other issue. As you know, we have a great opportunity to come to a county and learn through our investigations of their justice systems. And I think most counties appreciate the fact that someone from the outside looks at their operations and reports on the effectiveness of those operations, keeping in mind that we also try to mind our own business. One issue that a lot of people reported, and though it wasn't a matter the Commission was going to act on I wanted people in the district who had read the report to know that we were aware of the issue, was an ongoing disagreement between a senior lawyer at the Morris Olson firm and a juvenile court counselor in Hood River County. Though I mentioned it in the report, I'm confident that the judges in the district will resolve this issues if it disrupts the administration of justice or proceedings in the courtroom. Since the report was written, I understand that there may be a unique practice in the county that may call for gathering more information and that may suggest that we want to be careful about discouraging vigorous but fair advocacy by our defense contractors. In this instance, there is apparently a practice in Hood River County involving a team approach to sex offender treatment of juveniles where the therapist and the juvenile court counselor work together with an individual juvenile in order coordinate their efforts to rehabilitate and treat the juvenile. Although this is considered a best practice in the corrections profession, I understand in Hood River County that the juvenile court counselor sits in during therapy sessions where self-incriminating statements may be made that are conducive to treatment, but which may result in corrections sanctions. I understand the best practice envisions separate therapeutic sessions with the therapist and the juvenile where secrets and confidences can be freely revealed and separate case management sessions with the court counselor and the therapist to share appropriate information and track a juvenile progress. So there may be a true philosophical or professional disagreement in this county

about this matter which no doubt will be resolved through leadership from the bench. Finally, another issue that I raised in the report for discussion today is an issue of planning for the future of Oregon's public defense system. In counties such as this, and there are probably not that many, where a private law firm is our primary contractor, is this the structure that you wish to perpetuate in the future. As the draft report hopefully makes clear, the law firm in this district – the Morris Olson firm – is doing an excellent job. I am impressed with their implementation and administration of best practices. For example, Jack Morris sent me the firm's office manual, which I am going to share with our Legal Services Division because it is a very good office manual. We also know that the firm has conducted a survey of court personnel to see how its lawyers are doing. You know from the appendix to our draft report that Jack and his partners conduct lawyer evaluations on a periodic and systematic basis. Therefore, I am not suggesting that there is any problem with the primary private law firm in this county that currently needs addressing. But in terms of planning for the future throughout the state, I am raising the issue for discussion. I suggested in our report that a private law firm may be less receptive to the influence and the suggestions of the Commission with regard to best practices than a non-profit corporation that operates as a consortium or a full-time public defender. Not surprisingly, Jack Morris disagrees with these observations and I said "Great, we'll have a discussion here at the Commission meeting." After three years, it is my impression that sometimes our conversations about best practices, boards of directors, connections with the community, periodic management and attorney performance reviews and lawyer accountability amount to a dialogue between the Commission and non-profit public defenders and consortia, with private law firms and attorneys looking on as disinterested or uninvolved observers. If I were in that position, I would certainly be thinking, "I have a law firm and I'm running it the way I want to without outside meddling." With that I suggest, Mr. Chair, that we invite Judge Hull to come up as our first guest, followed by Hood River County District Attorney John Sewell.

421 Chair Ellis

Judge Hull, thank you very much for coming. Let me just mention from the Commission's point of view, we started about a year ago on a program of trying to go to areas in the state and meet with the people who are involved in the system. We are here to learn. We are here to get a good understanding of what is happening in this area and we don't start with a presumption that there is only one way to provide quality defense service. We have actually got a range of ways throughout the state that we are using. I think the other lesson that we have learned is this is a very diverse state. The law enforcement issues vary a lot because you have got different levels of population, you have different types of population and you have got a different economic base in different parts of the state. We just think it is healthy for us to get around and learn. It is also healthy for the different counties to get a chance to interact with us and give us some of their thoughts and observations. It is in that spirit that we are here and we look forward to hearing from you.

446 Judge Hull

It is too bad you weren't up here yesterday because it was beautiful. The clouds are coming in today. I don't have a lot to talk about because I talked with Mr. Ozanne and Mr. Potter when they were here three weeks ago. What I told them was where to go fishing and apparently they didn't follow up. Let me just talk to you a little bit from the perspective of a judge. If I'm not incorrect, Mr. Brown, you were a district attorney many years ago?

454 J. Brown

Many years ago.

- 455 Judge Hull In Corvallis, correct? The same time I was district attorney here.
- 456 J. Brown I am remembering that as you speak.
- 457 Judge Hull We used to share information about operating our district attorney offices many years back in the early 70's. Just to give you some history so you understand my comments, I come from a background of being a prosecutor back in 1970 until 1974.
- 462 Chair Ellis With Judge Jeldricks?
- 462 Judge Hull I followed Judge Jeldricks in the district attorney job, when he went into private practice and then went on the bench in 1973. Then I was in private practice from 1975 through 1990, and I did a substantial amount of criminal defense work in those days when they would put horse collars on us to get us in to do criminal work. I did my share of criminal work both at the misdemeanor level and the felony level.
- 470 Chair Ellis So you come from a hermaphroditic background?
- 481 Judge Hull Yes, and I became a judge in 1990. So I have a full gambit of the operational experience. And from what I have seen and my experience, I am very satisfied with what is going on here in terms of the quality of the legal services provided, the timeliness of them and the professionalism of them in dealing with others in a professional capacity. But at the same time, when there is an issue to litigate it is done in way that is not offensive, but also represents the client to the fullest. The only problem we have, and I think Peter mentioned it, is occasionally we get into situations where – and this is not a fault of our providers, it is just the numbers – a case has multiple defendants and we start running out of attorneys because we have co-defendants or there are children involved. We have attorneys for children and the parents and lot of the attorneys just don't do criminal defense work anymore. At my old law firm, there is not a lawyer that does criminal defense work anymore. Judge Jeldricks, when he was the presiding judge, had a rule that "If you are going to practice law in this jurisdiction and do any courtroom work, you are also going to provide criminal defense services when I call you." I don't subscribe to that philosophy because I think if you call up a lawyer and he doesn't want to do the case, he is not going to put his heart and soul into it. If the lawyer doesn't want the case and won't take it, I am not going to require him to provide defense services.
- 511 Chair Ellis If I can ask, I would think in a smaller county with the law firm as the predominant provider, you are going to have conflict situations where it is going to be very hard to provide counsel in these situations. How do you deal with that?
- 518 Judge Hull We just start figuring out who is representing whom, and then we know Morris Olson is representing one of the parties and Mr. Aaron is involved because his firm is the backup provider. Then there are other lawyers who do criminal defense work or juvenile work on a regular basis in addition to doing private practice. We call them. Then sometimes we go to The Dalles and bring attorneys in from there to cover those situations where we need multiple lawyers involved. It doesn't happen a lot, but it happens enough to where we need to address those coverage situations. That is just the problem of a small community. A lot of lawyers start developing a good civil practice and they don't want to be in the courtroom anymore.

536 Chair Ellis Is there a seasonal component to the caseload here?

538 Judge Hull That is an excellent question, and I haven't thought about that and haven't really analyzed it. Even though we are a tourism area, I have not found that it increases during the summer. Mr. Morris can address this better. I don't find that to be a big issue based on tourism. Probably just because of numbers, we probably have more cases in the summer because of more traffic going through the area. So, to some extent, yes, but I don't find it a big swing in terms seasonality. I am open for other questions. I am satisfied with how the public defense system is operating. I think it is much better than it used to be when I was a prosecutor. And things are different today. The volume is much greater than when I was a prosecutor. Drugs didn't exist much in the 70's. Now, eighty percent of the cases are drug-related. When I was doing defense work, we didn't have this system. The judge just went out and tried to get various private attorneys to provide services. But again, the numbers have increased in the drug cases and everything else related thereto. It has just exponentially increased from about the late 80's. I can't speak to Mr. Ozanne's comment about having a board of directors because that is an internal matter as to how you folks operate and I have never been involved in that situation. I know when I was practicing law and providing legal services, I would not have liked to have a board. Can I just digress a bit about the issue that was raised in The Oregonian. I felt a little bit uncomfortable this morning when I had the Chief in my courtroom and I had that very situation. It is really tough when we are doing an hour or an hour and a half of arraignments and we are doing them one right after the other. Somebody is charged with a very serious crime, you look at their questionnaire and they have some assets.

[Tape 1; Side B]

081 Judge Hull If you don't understand the framework in which this all works, somebody would say, not sitting in my chair, "Sure, they can afford a lawyer." But my comment is, "How are they going to afford a lawyer when they are self-employed and now they are sitting in jail subject to a \$50,000 bail?" How are they going to sell assets to pay for a lawyer when they are sitting in jail on \$50,000 bail? I appoint a lawyer for them because I have a 60-day speedy trial issue. I have to get the case moving. I have got to get a defense lawyer on board, if they are not able to hire a lawyer right away. I have got to get discovery moving, if there are going to be motions, because I have a 60-day issue. They are going to be released unless they waive the 60-day issue on the speedy trial. So those are ramifications that weren't even discussed in the newspaper article that trial judges face as a reality. As a practical matter, the case has to start marching pretty quickly. We can't be waiting two or three weeks to get a lawyer on board. I have a trial docket that I need to fit this case into, especially if they don't waive their 60 days. That, I don't believe, was really addressed in the article by The Oregonian. I read that article and thought, "Boy, I wish they would come to my court sometime and just see some of the practical issues that we deal with to try and keep the cases moving." It is not as easy as recouping all this money and making better choices. I think trial judges have a difficult time in that regard just because they have a very short time frame to deal with cases. That is my comment on that.

103 Chair Ellis Questions for Judge Hull?

103 C. Lazenby I am just wondering, in general, outside the criminal defense delivery system, is the county facing infrastructural stresses in terms of a lot more cases of drugs. Are there treatment programs in place or are they flooding your docket? Is it

more backed up than, say, 10 years ago, in terms of the number of judges that you have here to process cases?

- 109 Judge Hull I think we are doing a fairly decent job in terms of dealing with what I call the social aspects of the cases. It is hard to generate services that fit all the types of cases because we don't have hard numbers to support to have services for all of those cases. Sometimes it is difficult to deal with this situation. We are running a drug court both in Wasco County and Hood River County now. We held that court this morning and we are getting more people involved. Everybody – the district attorney's office and the defense lawyers – are involved. We are up and running in that regard. I don't see us being flooded with cases.
- 124 Chair Ellis Let me go back to the conflict area for a moment. We have learned in some areas that the system for identifying conflicts is not perfect. You get part way into a case and it turns out there is a conflict with another witness or co-defendant, and then you have to change lawyers.
- 130 Judge Hull Then you have to find a back up.
- 131 Chair Ellis From our point of view, that is a real problem because we have to pay one and then pay another. How much of that are you doing?
- 132 Judge Hull Not much. That happens occasionally, but I think very rarely. I must say that, in terms of the two major providers, Mr. Morris's office and Mr. Aaron's office, they do a very good job of keeping some sort of a diary or logging of information. So they know right up front. I'll make an appointment and they will get back to me either that day or the next morning and say, "We have a conflict." They look at the computer and see if there has been any prior representation and let me know immediately. Sometimes it is that day. We have the beauty of not having 14 attorneys in Mr. Morris' firm where the left hand does not know what the right hand is doing. We have two or three lawyers from their firm that work in Hood River and two or three that work in Wasco County. They keep pretty good tabs and have a good tracking system of who they have represented. They let me know and Mr. Aaron does the same thing. Even the lawyers who are not part of that group let me know right away. I can call up Mr. Gellar and say "I have a case. Are you able to handle that?" He'll do a quick computer check and say he has a prior conflict and can't do it. We don't run into a problem very often. We sometimes run into the problem where we discover that this person is a witness and the witness comes into the case later on. Then we have that problem. But that is very rare.
- 158 Chair Ellis This is a hard question for you to answer, I'm sure. But I'll float it out there. One worry we have, obviously is: are cases being tried when they shouldn't be tried? Are pleas being made that really shouldn't be made, or is there about the right mix between those?
- 164 Judge Hull I guess I can rely on my opinion based on 36 years. I think the cases that are being tried need to be tried and the cases that are getting resolved, short of a trial, should be getting resolved. Some cases have to be tried and I learned that early on. I don't find we are spending a lot of time in the courtroom that we shouldn't spend in the courtroom. I think cases are getting plea bargained when they should be. I have been satisfied with that. If I am not satisfied with that, normally I will make some comment, and I have done that very rarely because I question how much I want to get into the process. But on the whole, I think the cases that should be tried are being tried and the cases getting resolved should be getting resolved. I have been satisfied with that. I think Mr. Morris and Mr.

Aaron and those that work in the system know what cases need to be tried and what cases don't need to be tried. They deal with the system enough that we are not spending time in the courtroom that we don't need to and spending money in that regard. When it is being spent it is being spent pretty well. I have been satisfied with that.

- 187 Chair Ellis One of the comments in the preliminary draft report is there has been a lot of turnover among younger lawyers and another passage indicates it is harder than perhaps I would have thought to attract new lawyers to the community who are interested in providing defense services. Do you have an observation about those issues?
- 193 Judge Hull I haven't really thought about that.
- 195 Chair Ellis This is otherwise known as the graying of the defense bar.
- 196 Judge Hull Practically speaking, I have a son at the University of Oregon, and he is a mountain climber and a skier. I'll just tell you a family story and my comment to him, and then it will explain some of the answers to that. He said "Dad, someday I hope to come back and practice law in Hood River." I said, "Jeremy, I'm not sure how you are going to do that because I don't think you can afford to live here." Housing today in this town is expensive. You cannot buy a dog house for \$275,000 to \$400,000. To live here in Hood River, the cost of living has just gone bananas because of the pressure and what is going on in the community.
- 206 Chair Ellis When you say that, you are talking about the recreational sports?
- 207 Judge Hull Housing here – and maybe that is true throughout the state and I'm sure it is – housing here has gotten difficult to buy. You can't buy a two or three bedroom house for much less than \$300,000 to \$400,000. I don't know how a young lawyer could come in and afford to make a down payment and a house payment. In the summertime, I can rent a bedroom out of my house for \$600 a month. I did that 12 years ago, and it has gotten worse today. I don't know how people can afford to rent a place to live on what young lawyers make; plus make their debt service from law school. and if they are married and have children. Economically, it is a very difficult situation. Then again, I think a lot of lawyers say, and I remember my days, "I'll get my experience in the courtroom and then I am going to go out and make some money in the private practice." Working in the district attorney's office and working in defense services is not where you make a substantial income down the road. The pay is much greater in private practice than in working for a public agency. It is hard to keep people unless you are real dedicated. I think that explains why there is some turnover to whatever extent there is. I don't know if I have answered your question or not.
- 232 Chair Ellis Do you have any suggestions about how we can perform our job better or how either Peter or Kathryn can interact better?
- 235 Judge Hull I don't. Your function is to oversee this entire process statewide, is that correct? I think you have a very difficult job because, as you indicated when I first came in and as you were going around the state, things are different. Things are different here than when you talk to Wasco County. We do things differently than 20 miles up the road. They do things differently than we do. I think it is a function of how we have done things in the past. Maybe it is time to change all that but, over the years, small communities east of the Sandy River and south of Portland, and in eastern and central Oregon, have had there own framework of

how they have done things, and it is not easy to change. Maybe some of them are resistant to change. But we have just developed the habit of doing things that way. I have been here for 36 years and we are still doing things somewhat the same way. Wasco County does things their own way. I think you have a difficult job to try and provide services or oversight when you have all these different competing things. It is really interesting when I go to the judge's conference, and I just came back from one. It is fun to talk to other judges because, when you listen to how they run their courts and know how we run ours, we get some ideas, but everything is different. It was also interesting when I went to the National Judges School in Reno, Nevada 16 years ago. I was shocked that not everybody ran their justice system the way Oregon does. There are 50 states and they all run them differently. We are so accustomed to thinking this is the way it is done, when in fact this isn't the way it is always done at all. It is unique to Oregon, and it is unique to Hood River and unique to The Dalles. So you have a difficult job, and I can't tell you how to do a better job. I'm glad you are doing it and not me.

- 266 Chair Ellis You know our door is open. So if you come up with any suggestions, please let us know.
- 267 P. Ozanne Judge, are there any unique issues in other parts of the district? As I mentioned, and if you had a chance to look at the draft report, we haven't given as much attention to Sherman, Gilliam and Wheeler Counties as we would have liked in a perfect world. Are there issues in those three counties, even though they have a much smaller caseload?
- 275 Judge Hull Not really. I will say that we get prompt coverage in those counties and I have been satisfied. The only problem that I have in those counties is when I try a case there is that I ask the jury if anyone has heard anything about the facts of this case and everybody on the prospective jury panel has already heard about the case and discussed the case. It is difficult to get 12 people who haven't already heard everything about the case. I have more problems with jurors in those counties than I do with getting defense coverage. We have a consortium in The Dalles and I think the Morris Olson firm covers Gilliam and Wheeler also?
- 284 J. Morris All three counties.
- 284 Judge Hull So we see them on the road, and now we are using the video a lot for arraignments. And that saves a lot of travel time. We get good coverage and I have been satisfied with it. I had a trial two weeks ago and I am not going to mention names. But in Gilliam County, in Condon, John Olson was defending in that case and Scott Jackson from the Attorney General was prosecuting that case. It was probably the best case I have seen tried in 25 years, including my own involvement as a defense attorney. I always thought I was a pretty good attorney. But I walked back to my office the next day and talked to Marsha, my JA, and I said, "You know, I had to go to Condon to observe some of the best legal work I have seen in 25 years." I firmly believe that. And I have tried as a judge cases in Multnomah County, Washington County, Linn County and Lane County. That case was tried better than any case I have seen in a long, long time. I think you are getting the bang for the buck with this sort of work. That is my view.
- 305 Chair Ellis Any other questions for Judge Hull?
- 306 Judge Hull Thank you very much. I appreciate the time.

316 John Sewell

I may need just a moment to collect myself. I was hoping in my heart of hearts that some of the best work that Judge Hull had ever seen had actually been when I was in the courtroom. I'll get over that. I know that most of you haven't met me. Just real quickly by way of background, I am John Sewell. I am the district attorney for this county. I have been a prosecutor for 26 years. The last 14 years I have been the elected district attorney here; for 12 years, as a deputy. For the last 20 years I have been appearing in this courtroom, such as it is. I worked for four years on the coast before I came here. I worked for a year in Coos County and three years in Lincoln County. I am not going to reiterate the comments that I made to Mr. Ozanne and Mr. Potter. They are in the report. I would state simply that I am of the opinion that the community is well served by the public defense services that are being provided. I should comment on a couple of things. I think there is still a seasonal aspect to the workload here in that it does go up in the summer months a little bit. I don't think that is any different though than a lot of communities in the state. When the weather is nicer, the criminals are more active. Another aspect is, in the winter when there is snow on the ground, it slows down a little bit. I think another point not to be overlooked, and I think you would probably hear this around the state. If communities are on the I-5 corridor or on the I-84 corridor, they get a lot of work off of that freeway. It is not just a matter of whether there are 20,000 people or 40,000 in the summer. I have spent a lot of time prosecuting cases, as do my deputies, that arise on Interstate 84 and that involve defendants that aren't residents of this community. Following up on one point that was made about the cost-of-living, I have two deputy district attorneys that work for me; they both live in the greater Portland area and commute here. This is a god awful expensive place to live because of what has gone on with the surfing industry and what it has done for the property values in the community. Addressing the issue of the juvenile department and their participation in the sex offender treatment programs that go on here, I would observe that it has always been the practice here that anything that is said in treatment stays in treatment. And by that I mean there are no charges ever filed based on any, for lack of a better word, confessions or admissions that are made during those treatment programs. In other words, if a young person acknowledges that there are two or three other victims that they have had that we didn't know about, that is the end of it. We find out about them outside of that venue, of course, and they are in play. I would note that the juvenile counselor or counselors that participate in those sessions aren't doing it simply as an observer, but actually play a role in the process and participate in that process. I would also point out that they do not sit in on individual counseling sessions. They sit in in the group sessions that sometimes occur and, any suggestion that practice be discontinued, I would suspect would be met with stern resistance by my office, the juvenile department, and the treatment provider. It is a very workable situation. It does not work to the detriment of any of the young people that are participating in those programs. And again, we do not file charges based on any admissions that are made in these counseling sessions. This is a matter of fact and just for your information. There was a question to Judge Hull about cases being pled out as opposed to cases being tried. Over the years here, I have seen a shift in the number of cases that go to trial. I think that is attributable to a number of things.

386 Chair Ellis

Shift in what direction?

386 J. Sewell

More cases plead out now than go to trial. I think that is for a number of reasons. One is that some cases just don't ever end up in the system. First time DUIs go to diversion. We are one of the first jurisdictions in the state to have a domestic violence diversion program, so first time domestic violence cases go to

diversion. First time drug possession cases, as a matter of policy in my office, regardless of what the rest of their criminal history might be, if they don't have a prior drug arrest, they are eligible for a conditional discharge on their first PCS. So some cases are being funneled off initially because of those alternative programs that exist. I think sentencing guidelines, Measure 11, have had an effect somewhat on the number of cases that go to trial. In the language of the street, when there is real money on the table, defendants think twice about rolling the dice. Then, finally the fact that we have a jail here, a real honest-to-god working jail, that presents the possibility of people actually being incarcerated if they are convicted, and being incarcerated for a longer period time if they turn down the deal. The fact that people aren't released unless they are really, honestly a good release risk without the posting of cash bail has greatly diminished the number of failures to appear that we have in this community; the number of cases that just never get resolved and it also, I think, compels the defendants to make decisions. I think it is just human nature that we have some of the people that by nature are somewhat irresponsible in their day-to-day lives. You have a person that is charged with a crime. They are not paying for their lawyer because they have a court-appointed attorney, so they don't have a lot to think about immediately; they don't have a lot to worry about; they don't have to make a decision. Sometimes they don't keep the appointment with their lawyer once they are out. Those cases are hard to resolve. When they are sitting in jail because they can't make bail and they are not from here and their lawyer is sitting across the table from them, they get the offer on the table and they have to make up their mind. They want a trial; that is fine. We will have the trial. If they want to take the offer, they'll take the offer. But that results in not just more cases being resolved quickly; but a lot more cases being resolved with pleas because it is in front of them and a decision is mandated. I think I have addressed all of the things that caught my ear when I was sitting in the back of the room. I know you are waiting on your lunch, so I will just simply ask at this point if there are any questions.

431 Chair Ellis

Tell us a little bit about the size of your office.

431 J. Sewell

There is me. I am a working district attorney, in that besides administering the office, which happens more or less, I handle the bulk of the felony caseload in the office. The cases I don't handle involve child abuse or child neglect. I have one deputy district attorney that is funded by the county. That is the same number of deputy district attorneys that the county has paid for since the day that Judge Hull was the district attorney back in the 1970's. I think I had the first deputy district attorney that was funded full-time by the county. That deputy district attorney does all of the misdemeanor caseload, except for cases that involve child abuse or child neglect or domestic violence. I have another deputy district attorney that is not paid for by this county. It is funded through our CAMI program. Are you familiar with that program? Every defendant convicted in this county – not every, but almost all defendants – is ordered to pay some sort of unitary assessment to the court. Part of the money that is collected goes into this program; that is, the Child Abuse Multidisciplinary Intervention Program. Those monies then are used in this county in approved programs to address the issues of child abuse and child neglect. The bulk of those funds received in this county go to fund the other prosecutor that I have in my office. The funds do not support a full-time position, but they support a position where I have a deputy district attorney that works four days a week or 80 percent. Her responsibility is solely addressing cases that involve child abuse, child neglect and domestic violence in a home where children are present. She will do misdemeanors or felonies that fall into that area. Any felonies she

- doesn't do, I do. Any misdemeanors that she doesn't do, the other deputy district attorney does. That is how it works.
- 473 Chair Ellis That first district attorney, the one that is funded by the county, is 100 percent of his or her time misdemeanors?
- 477 J. Sewell That is because, at this point in time, that deputy district attorney is new to the office. As they develop more experience, then I would expect, for a variety of reasons including job satisfaction, that they will be given an opportunity to do more felony work.
- 483 Chair Ellis How did you recruit?
- 483 J. Sewell My typical method of recruiting a new deputy district attorney is to advertise the position in The Oregonian, which is required by the county. But more significantly, we advertise it in the District Attorney Association's monthly newsletter. For an entry level position, I will typically get somewhere between 50 and a 100 resumes or applications. Of those, there might be 20 percent --
- 491 Chair Ellis People that are in district attorney offices elsewhere?
- 492 J. Sewell Some of them will be in other district attorney offices that are interested in a move. Some of them are recent graduates from law school that just know through the grapevine that the District Attorney's Association publishes job openings.
- 499 Chair Ellis That is a pretty large number of responses.
- 501 J. Sewell Sure. It is not uncommon to get 50. That is pretty typical. It was a different time economically, but the first time I ever had to hire a deputy right after I became the elected district attorney, I think I got 110.
- 506 Chair Ellis You would describe it as a buyer's market?
- 508 J. Sewell It still is for district attorneys. That is changing. Every time I have an opening, and I don't have openings every day, I get a few less: from 110 down to 60 down to 50 down to 40. It is dropping. I think there is less interest because of the economic factors in being a prosecutor. I think philosophically there is still more interest in being a prosecutor than there is in being a defense attorney. That is just my take on it.
- 519 Chair Ellis When you were going through that process, did you develop any information on comparable incomes for entry-level district attorneys and defenders?
- 522 J. Sewell Every year the District Attorney's Association does a salary study. From that I know what every district attorney office in the state is paying. I have just the rudimentary knowledge of what is going on out in the private sector. I think state secrets should be guarded as well as private attorneys guard their income figures.
- 531 Chair Ellis So, to put it out on the table, what do you pay an entry-level district attorney?
- 534 J. Sewell I am embarrassed to admit that, right off the top of my head, I don't know. What are you getting?
- 537 C. Rasumussen For a four-day work week I am getting \$45,000.

- 539 J. Sewell She is paid as well as I am. It is just that she only works four days a week, so she gets \$45,000. That is just about what we pay an entry-level deputy to be here five days a week. You know what I make? I make \$67,000 and some change. For kids just out of law school with stars in their eyes, we can compete very well with a private law firm. Then you get some people like me that just stay on because they don't know any better. In terms of where they are, a couple of years into this game and we can't compete.
- 559 Chair Ellis Can't compete with the private firms doing defense work or the private firms doing –
- 561 J. Sewell General work; the civil work. The first deputy district attorney I ever hired left after four years to go to Clackamas County to do the exact same job that he was doing here for a 50 percent pay raise at the district attorney's office there. That is another way we can't compete, and by "we" I mean the smaller counties. We cannot compete with the district attorney offices in the I-5 corridor in terms of what they will pay for an experienced prosecutor. I could leave tomorrow and get a job working for one of my buddies and make substantially more money.
- 575 Chair Ellis Within this area of Hood River and The Dalles, which way do you think the parity pipe runs? Are the entry-level district attorneys doing better or not as well as the entry-level defenders?
- 581 J. Sewell They are very, very close. The district attorney and I make the same salary and I think the deputy district attorneys are very close. We might just pay a little bit more.
- 585 Chair Ellis You are comparing prosecutor to prosecutor, and I am trying to get a handle –
- 586 J. Sewell Defense attorneys? In the private sector?
- 587 Chair Ellis You don't know?
- 587 J. Sewell Might as well be where they have nuclear weapons stashed in terms of what I know about what they make. I have suspicions, but I really don't know. I'm sorry I can't address that. I tell you where one of my windows of knowledge comes from. For years we have had a program where new associates from private firms in Portland come out and do some misdemeanors –
- 603 Chair Ellis Get some courtroom experience?
- 603 J. Sewell Yes, with a real judge and a real jury. I know what they make from talking to them, these entry-level associates.
- 608 Chair Ellis They make more than you make?
- 609 J. Sewell Oh yeah, by 40 percent. Even though we are working with a bit smaller firm now, and principally because a couple of associates moved on, they still make substantially more than anything I can pay; and for that matter, more than I make. The gal that comes up here right now to try a drunk drive once in awhile, makes more than Judge Hull.
- [Tape 2; Side A]
- 001 Chair Ellis . . . He announced that some of the Trail Blazers were making more than the President of the United States. But I pointed out to him that the President didn't

have a very good outside shot. I do want to say that one of the things that happened in the last few years has been much better, and in many ways, very healthy communication between the Commission and district attorneys, and between the defense community and the prosecution community, in our common interest of getting adequate legislative support for the criminal justice system as a whole. I want to commend you, as an individual, and your group within the district attorney community. I think that this has been a very healthy thing. It used to be almost a cannibalistic process, and now it is the opposite. I really think since the crisis of 03, both sides have recognized that we are part of a broader system and, if either function is under-funded, neither function can work very well.

- 019 J. Sewell I apologize for digressing into a discussion about what I make or what my deputies make. I know that is not your purpose here, and it is not that I think anybody in this system makes too much. I think there are some of us that don't make enough. I did want to make one observation, and this is not any reflection on how law is practiced here, the people involved or how well services are delivered. But I worked in counties that have had both kinds of systems and, in terms of the big picture, or where indigent defense might be going in the future, from having worked with both systems and seen both up close, it is my opinion that a delivery system that involves public defender offices is more efficient and more effective than the contract system or the consortium system, in terms of how the services get delivered.
- 031 Chair Ellis Are you comparing service provision from an office that is distinguished from appointed individuals? Is that the point you are making?
- 032 J. Sewell If I want to annoy Jack Morris, I refer to him as the Public Defender's Office because, the fact is, that is what they do here. They are the primary contractor and that is really what they do. I worked in Coos County where they had a public defender's office. Working there, I think I had a very intimate knowledge of how it was organized and how it was operated; and I saw the results in terms of how their clients were defended. I worked in Lincoln County for three years before the days of this Commission, of course, and before the state had actually taken over indigent defense. It was the judge sitting up on the bench going down the list, trying to figure out who was available to take the next case for \$40 an hour, which was a very ineffective way to do it. That is where we have problems here in this community. Once we have been through the primary contractor and the secondary contractor, it is who is next on the list. I just think that, in terms of who is first up to do the work, I think it works more effectively and efficiently when it is in a public defender's office in a community, rather than a contract firm or consortium.
- 050 Chair Ellis Treating Morris Olson as a public defender?
- 050 J. Sewell I tend to believe that, much to their irritation. But they are; that is what they do.
- 052 Chair Ellis You are a specialist and your two deputies also specialists. Do you feel that the degree of specialization that you're seeing in your counterparts is comparable to your own or less? How would you describe it?
- 056 J. Sewell I would say it is comparable. Not to belabor this, but how they operate is basically as a public defender's office. It is because of that that I see that level of expertise, if you will. It is difficult, and this is no comment on the individuals, but it is difficult to see that level by others. I guess a better way to put it is, it is difficult for individual practitioners to maintain that same level of

expertise while they are also trying to practice law in a number of other areas, particularly when you are talking about the firms in town that still have somebody that participates in indigent defense. It is usually the youngest, newest member of the firm. You are not going to see the same level of expertise as in a the firm where that is pretty much all they do.

- 070 Chair Ellis Any questions for John?
- 071 S. McCrea I just have a comment, because you covered pretty much the questions that I had. John, I wanted to compliment you. I am sort of the designated criminal defender position on the Commission and I want to compliment you on the programs that you have with the domestic violence diversion and the conditional discharge on drug offenses. What I am inferring in terms of the effort at rehabilitation of offenders is that, if there are other disclosures, those don't get charged, which would encourage people to be able to disclose and hopefully move on. Those are wonderful programs, and I hope that you can persuade some of your colleagues around the state to take a look at them.
- 078 J. Sewell One thing that is encouraging is the statewide efforts now to promote drug courts, for instance. I think that would be a help. I would echo what Judge Hull said with respect to what meth has done to our caseload.
- 084 S. McCrea We appreciate all your comments.
- 084 J. Sewell Well, hopefully they were helpful. Thanks a lot.
- 095 Chair Ellis Let's break for a half an hour and will resume again at 1:00.
- [Break at 12:30 p.m.]
- 101 Chair Ellis [The meeting was called back to order at 1:10 p.m.] Jack, if you would step forward and share your perspectives with us.
- 104 J. Morris I have been looking forward to this meeting, particularly since about 11:00 this morning when it looked like the meter was going toward favorably, rather than the other way.
- 107 Chair Ellis Was that in doubt?
- 108 J. Morris Well you never know, Barnes. With some of the folks on this Commission, anything could happen. Thanks for coming and visiting with us in Hood River. We appreciate it. Those of us who are in eastern Oregon living and working here sometimes feel a little neglected. So it is nice to have you here. I think all of you know me. I want to tell you a little bit about the firm. We have two offices, and there are seven attorneys and seven staff. I want to deal with a couple of things that have been mentioned with respect to the staff makeup. But let me introduce some folks first. John Olson, the 25-year wonder with that trial several weeks ago, is my senior partner. John is 40 and he has been with us about seven years. Prior to that, he was a public defender and head of the office in Twin Falls, Idaho. Lonnie Smith is just a hair over 50 and has been with us five years. He was a civil lawyer in Florida. He was also, in a prior life, a CPS worker for child protective services. That has led him into being our secret weapon when it comes to juvenile law. He is our resident expert. Just two years ago, he received the blue ribbon award for person of the year from the CRB. And rumor is, and I'm not sure if I believe this part or not, that is the first time it has ever been awarded to a criminal defense lawyer. We are pretty pleased with

that so we can have a little sound bite we can point to to say, “Hey, juveniles, that is our specialty.”

126 P. Ozanne Jack, we frequently get complaints from CRBs about lawyers not showing up, so that is especially noteworthy.

128 J. Morris I don't think we ever miss them. Brian Starnes is the other shareholder. He is here in the front row. He is 34-years-old and he has been with us eight years. He was from Nebraska and we felt sorry for him because of that and I gave him a job. We have three associates. Heather Clark, who has been with us five years and she is 30. Jennifer Robins is 31 and has been with us a year. I should mention Heather Clark is our drug court specialist out in Wasco County. Jennifer was a court clerk in Multnomah County. And we have our most recent addition, Conor Sullivan, who is 27 and an alumnus of Lane County Public Defender, having been a certified law student and clerk there. I think I forgot to mention, John, in addition to myself, were both alumni of Metro in Portland. He was a certified law student there. I have been here 15 years. It has been a fun ride. Prior to being here, I was a trial lawyer at Metro under Jim Hennings, which was a unique opportunity that I am still appreciative of. I was a felony group leader and I dabbled in Senate Judiciary Committee in the '85 and '89 sessions. That is where probably, originally, I know most of you from. It may seem a little odd that I mention ages and length of time with the firm, but I am doing that for a reason. The reason is there was a mention in the preliminary report that a comment was made that seemed like we had a lot of turnover. The fact is I don't believe we do. We went back and checked and we have had, since 1993, about one vacancy per year with seven attorneys, and two of those were due to the BRAC problem. I think that is just about right. That is subject to disagreement, but any of you who have ever run an office similar to ours know that there has to be a certain amount of turnover. We can't have seven people all with 10 years of experience simply because we can't afford it. The other thing that is good about that, and I think it addresses one of the Commission's concerns, is it has given us the opportunity to get some new attorneys in and get them trained. Probably the stranger thing I mentioned is ages. I have done that on purpose as well because there is constant concern voiced to the Commission and elsewhere about the graying of the defense bar. Our average age is 38 and we have a wide range of ages. So we are only a little tiny bit gray. We can still serve this Commission and indigent defense for a good 20 to 25 years, I think.

162 J. Potter I didn't catch your age, Jack?

162 J. Morris Well, 50 is fast approaching, but not quite as fast as your Vice-Chair.

165 S. McCrea Two months is not that big of difference.

166 J. Morris When I received the preliminary report on Monday I was, as you might expect, very pleased. It was extremely complimentary, and I appreciate the work that Peter did. As some of you know, I have been at several of the Commission hearings. I think I have read all of the reports that have been done so far. With probably some room for disagreement, I think the things that were said about our firm are probably about the most complimentary passages that have been found in those reports, and I appreciate that very much. Peter is obviously a fine judge of legal talent and I think the Commission should keep him on for at least awhile. The one area of disagreement that we do have – and I'm not really clear if we are still even disagreeing on this – but you saw from the e-mails that were included the objection that I made to Peter's language about the Commission being skeptical about whether a private firm can play this role. I know, when

we spoke last toward the end of the conversation, you said something to the effect of “Jack, I think you have convinced me of your position.”

- 181 P. Ozanne Yes. In fact the report didn’t say “the Commission;” it said “OPDS.” And most people know that, when I say “OPDS” in the context of these preliminary draft reports, it is really mostly me.
- 184 C. Lazenby Then why are we here?
- 185 P. Ozanne That is just in the preliminary report, Chip.
- 185 J. Morris So I am hoping that I changed your mind; and I am hoping that I have changed your mind to the degree that you will feel it is appropriate to perhaps delete that language.
- 187 Chair Ellis Can you share with us the dialogue you are referring to?
- 188 J. Morris I believe you have copies of a couple of e-mails in your materials.
- 190 P. Ozanne We sent Jack’s survey of court staff with that.
- 191 Chair Ellis I am not starting with any agenda, but it is a subject that I find interesting because you have had experience in an MPD office, and because you have the private firm model you are using here. How would you describe the differences between an MPD model and the private firm?
- 196 J. Morris Barnes, I am really glad you asked that question; and the reason for that is because, as John Sewell acknowledged a little while ago, we are in fact basically a de facto public defender’s office. Having had the good fortune of working for Jim Hennings at Metro, I think there are very few differences between our office and a public defender. The differences that we do have are all positive ones. That is the theme of what I want to tell you and my response to the questionnaire. What we have done is combine what I think is the best things of a public defender’s office with some of the advantages of a private firm. I really think that is where we are at, and that is the primary message that I wanted to give to you folks today. To the extent that I need to address that, I don’t know how big of an issue that is. Does that answer your question?
- 208 Chair Ellis That is the conclusion, give me the buildup.
- 209 J. Morris What we do have, partially out of just good fortune and partially out of our structure, is a core group of experienced, talented lawyers. As I said, we have five people who have been here longer than five years. The other three shareholders are all extremely talented. We work on the team concept model, as we did at Metro with respect to our support staff. None of our support staff is simply a clerical worker. When they are hired, they are told they are going to play a lot of different roles such as trial assistant, social services hunter and all of those types of things. That is what we have. What we have done is combine the best features of a public defender. We have the zealotry of not just a public defender’s office, but a good public defenders’ office. We have the commitment to indigent defense that might typically be found in a PD’s office and, as I think I have pointed out in the questionnaire, we participate in the system as one might expect.
- 225 Chair Ellis What percentage of your firm’s revenues are public defense versus private?

- 226 J. Morris The little bit of retained work that we do over the last couple of years resulted in an average of about another 15 percent of income for our attorneys. Our salary scales --
- 229 Chair Ellis Let me see if I understand that. Does that mean 85 percent of your revenues are indigent defense services and 15 percent are private?
- 232 J. Morris About 11 percent of our revenues is private and that results in about a 15 percent increase for the attorneys.
- 235 Chair Ellis Private revenues, is that all retained criminal work?
- 235 J. Morris Yes it is.
- 236 Chair Ellis So you guys are 100 percent criminal defense but, of the 100 percent criminal defense, 89 percent is public defense --
- 238 J. Morris Criminal and other areas that are connected, like juvenile and that kind of thing. So it results in about a 15 percent increase on average. It also results in us being able to have things that we probably wouldn't have otherwise. It gives us some flexibility. If we are over budget and we have a little bit of extra money from retained work, that helps a lot. It helped us get through the BRAC experience and, as I said, it helps us have some extra things that we probably wouldn't have otherwise. An example is, when we have an attorney or staff that celebrates their fifth year anniversary with us, we buy them a plane ticket to someplace within reason as a reward. It has allowed us to do some other things, and this one might resonate a little bit better with you. One of the things we were able to do two years ago when we started drug court is we contributed \$1,000 from the firm toward drug court start-up costs. If we were strictly state revenue, we wouldn't be able to do those kinds of things.
- 253 Chair Ellis I should know this, but what is your contract configuration? Is that on a bulk basis or a unit basis?
- 256 J. Morris It is on a unit basis with differing case values and caseload projections for a two-year period. Is that what you are asking me?
- 258 Chair Ellis Yes.
- 259 J. Morris A typical contract, as I understand it. It is fairly uniform around the state. I have told you what we have and what we have done and how we see ourselves. Again, I think at least in some part, I have Jim Hennings to thank for this. We see ourselves as having responsibility to indigent defense that extends outside our firm. We play the role that Jim does in his shop in Multnomah County or that Greg does in Lane County. We see ourselves as being responsible for participating in policy decisions that are made. We do that on a regular basis. I myself am involved in a number of different things like the LPSCC Committee and the drug court. We had a juvenile work group not too long ago. We see ourselves, probably to our detriment, being responsive to the needs of indigent defense and the Commission, probably even more than we should be at times. I'll return to that in a minute. As I said, the little bit of revenue that we get allows us to do other things. The other thing it does is it helps us avoid the stigma of being a public defender. When I say that, I suspect that you all know what I am talking about. There is a stigma that is completely undeserved by clients who don't know any better; who when they hear the term "public defender" count it against you. I was present at the Lane County meeting and I

thought Doug Harclerod, the Lane County District Attorney, put it real well. He was asked a question along the lines of who gets the most complaints, the PD's office or the court-appointed list. His response was, "Well it seems to be the PD's office," which he found somewhat amazing because he found them to be by far the most skilled and talented group of lawyers in Lane County. My point is it allows us to kind of sidestep some of that stigma that makes it easier to deal with our clients. Again, the stigma is completely and totally undeserved in every area of this state that I am familiar with. A moment ago, I told you that we probably put indigent defense's needs above our own to a degree that we shouldn't. I guess the best example of that is a few years ago the state, I think it was Ann Christian, asked us to cover the eastern counties, what we call the "eastern front." That is Gilliam, Sherman and Wheeler. We stepped up to the plate and we have been doing that ever since. And believe me, it does not pencil out cost-wise. We do it because somebody needs to do it, and it might as well be us. For those of you who are geographically challenged, from The Dalles, and the attorneys in The Dalles are the ones primarily responsible for those counties, the county seat, Morrow, is 80 miles round trip; Condon is 140 round trip and Fossil is 180 miles round trip. We get a little bit of a travel allowance, but we still come out on the short end. Again, the reason we have always done that is because you guys need somebody to do it, and it is us. So we shoulder that burden with some hesitation I suppose, but I think in return we have been treated well and it works both ways. So we are happy to do that. That brings up another issue. Until the BRAC crisis, I was naïve enough to think that all the contractors had wonderful relationships with indigent defense like we do. I found out during that crisis that this is not the case. I mention that only as an example of the cooperation we have, for instance covering the eastern counties; but also because you can't say it too often: we have had the best luck of the draw with indigent defense analysts that we could ever hope for. We had Larry Craig to begin with, we had Lorrie Railey and now we have Laura Weeks. Our relationship with the state has probably been the least troublesome and the most mutually beneficial of any contractor in the state. Maybe that it is an exaggeration, but I don't think so. That is the way I feel about it. Our willingness to help out has almost gotten us into trouble at times. Ann Christian approached me a few years ago and asked me if we would be willing to help out in another jurisdiction and open an office if the need arose. I almost committed ourselves to doing that. It wasn't until a few months later that we ran into each other and I raised the issue again that she mentioned: "You know Jack, I might have neglected to mention that, if you open that office, it is going to be doing PCR work and nothing else." So what I learned from that is sometimes you have to watch your good friends the closest. I really do strongly disagree with the idea that there is any reason for skepticism. We not only can fill a niche as the primary contractor that might typically be done by a public defender or a consortium; I think we are already doing it. And I think we are meeting most of the best practices that the Commission is interested in pursuing. I do agree, as Peter wrote in the preliminary report, that, given the percentage of income that we have from the state contract, it is probably appropriate for indigent defense to be a little bit more involved in our affairs than in a typical law firm. To the degree that there is any hesitancy, and perhaps there is not as much as I think, I think the hesitancy of having a private law firm is this idea that here is a firm with 10 attorneys and maybe a couple of guys are doing criminal defense and some appointed work and everybody else is doing divorce and that kind of thing. That is not us because we are strictly criminal defense. The only difference is we do a little bit of retained work on the side, which is basically the icing on the cake. Our salary scales for staff and attorneys both – and one of the side benefits of this hearing is I went back and looked at the salary scales for Metro again – our attorney's salary scale was right on the mark. They are virtually

identical. Our staff salary scale was lagging a little bit behind, so just this last week I made some adjustments to that so both the scales are basically identical now. The beauty of it is we have the same salary as our colleagues in Metro; but on top of that, there is a little icing, and that little bit of icing makes the difference. I think it has made the difference in being able to retain the really talented lawyers that I have, so it has worked well. In any event, I guess I do agree with Peter to an extent that perhaps you guys should be a little bit more involved with us. I think personally the way to do that is when there is a question you pick up the phone and ask. One of the things that Peter mentioned was that historically, for instance, salary scales haven't been available. If you want to know what we make, pick up the phone and ask. It was just up until a few years ago that part of the contract, the RFP, included a budget; and it also included salary figures that were dropped for some reason. I'm not privy to why that was but I never had a problem with that. We are doing the job that you want us to do, and the fact that we are a private firm shouldn't cause you any concern.

- 384 Chair Ellis It sounds like your hiring has been more lateral than entry level.
- 386 J. Morris I don't think that is accurate.
- 387 Chair Ellis How do you handle training?
- 388 J. Morris As I mentioned in the materials, one of the ways that we handle training is that there are always colleagues talking to each other in the office. When I started at Metro, I was one of six misdemeanor lawyers. I learned real quick that it is nice to have a trainer and all that kind of stuff to look to. But you learn from each other the most, so we encourage that. The biggest red flag that I ever see with a new attorney in the office is somebody that doesn't ask questions. If they are not asking questions, I am asking them why they are not asking questions. The other thing – again this is partly because we have a little bit more leeway budget wise than other folks – we send our lawyers to probably more OCDLA conferences than anybody else. We typically go to at least four a year. Those registration fees are paid by the firm and there are usually or sometimes a little bit of a housing allowance. I think you will see us at more conferences than just about anyone else.
- 408 Chair Ellis One question I have is, I'm not sure I know the percentage, I think your firm does the majority of the defense work in the two counties –
- 411 J. Morris I'm just guessing about 80 percent.
- 412 Chair Ellis As a firm, you are subject to the unit rule for conflicts. Judge Hull seemed to believe you are doing okay. You are able to identify these conflicts early and resolve them; but I want to get your take on that.
- 416 J. Morris I think Judge Hull's comments were right on the mark. I think we identify them early and, a good portion of the time, we identify conflicts before we ever pick the case up and we simply don't pick the case up. We take a look at the possibility of conflicts when we get the in-custody list in the morning. Hood River is particularly easy to deal with that issue because we are extremely fortunate to be able to get discovery at the first appearance. We go up, we get a charging instrument, we get discovery on the spot. If we have a conflict, often times we are aware of it before we ever leave arraignments. One thing I would disagree with Judge Hull on, he was saying maybe that day or maybe the next

day. Often times it is addressed before we even leave the courtroom. Conflicts are just not a big issue for us.

- 429 Chair Ellis Apparently, not at the stage of identifying the conflicts early in the process but, given the high percentage of the volume that your firm does, what is your observation on the ability of the system to represent the conflicted party?
- 437 J. Morris Are you talking about co-defendant situations?
- 438 Chair Ellis Could be a co-defendant or a key witness; or it could be any number of things that created a conflict. In your observation, does the system have enough alternatives in it that the party you can't represent gets decent representation?
- 443 J. Morris That is kind of several different questions. I don't think we have any more problems with conflicts than we would, for instance, if we were a public defenders office. The same rules apply in the same situations.
- 447 Chair Ellis That is true. I'm more concentrating –
- 448 J. Morris You are asking me about resources?
- 450 Chair Ellis Right.
- 451 J. Morris I don't think there is a shortage of attorneys in Hood River, but Wasco County is another matter. It is difficult to get good people in Wasco County. And it is also difficult to get them anywhere, but Wasco County is a little bit tougher. I was kind of surprised to hear some of the figures that John Sewell tossed out as far as applicants. Ten, twelve, thirteen years ago when we had a vacancy and ran an ad, we would get 30 or 40 resumes. The last vacancy, I think we had fewer than 10; and that has been the way it has been for several years. That has changed dramatically. I don't think you can under-emphasize the fact that there has been a huge philosophical change with people coming out of law school. It is not just a money issue. The pool of people who are interested in doing criminal law and the sub-pool, which is much smaller, of people wanting to do criminal defense has shrunk dramatically. Out of that shrunken pool, it has narrowed even more by the fact that people are coming out with huge student loan debts and they can't afford to accept an offer. We have also in the audience, and I am so appreciative of the fact that she reminded me of this, Ginger Mooney, who actually has a home in Hood River and commutes to Salem. Last time we had an associates position open, we made her an offer – and again, our salaries our commensurate, almost identical with public defender offices. As much as it made sense for her to accept that offer and work for us, and we would have loved to have had her, she had to turn it down simply because of money. So it is an issue. Does that answer your question?
- 484 Chair Ellis Partially. The issue I am trying to make sure I am comfortable with is the percentage of the volume that one firm is doing and whether that creates problems.
- 489 J. Morris Well, I think we do about 80 percent, and I think that is a huge advantage for indigent defense.
- 490 Chair Ellis It is, unless you have this problem of conflicts and an inadequate ability to represent the conflicted parties.

- 493 C. Lazenby You live in a small community and you are doing 80 percent of it. You are bound to come up with a lot of witnesses in some of the cases that you have represented.
- 499 J. Brown That provokes me to wonder about the Judge's comments on the impact of your freeway. How many of your clients are actually county residents? Is that a factor?
- 501 J. Morris It is, and we get a fair amount and it has changed dramatically since I first started up here. We used to get a whole bunch of folks that were here seasonally. These were folks coming up from Mexico to work the orchards. That population has been assimilated quite a bit and they are here more year round. But we do get a lot of folks from out of the county. You have to remember that, geographically, these are tiny counties. So it is not uncommon to have folks who have no relationship to a county here. It is not like we are in Lane County and you have a population that never crosses the county line. It makes sense that it might seem to be huge issue, but isn't hasn't proven to be one. I think Judge Hull's comments were completely accurate.
- 517 Chair Ellis I asked him and I'll ask you, any suggestions how we can do our job better? Any thoughts on how Kathryn and Peter can do their jobs better?
- 523 J. Morris When I was asked that question in the questionnaire the answer was, you could always do things better. I guess the one suggestion that comes to mind is, you have already in most areas identified key people or key persons, or someone you can talk to find out what the situation is locally. I think maybe that should be pursued a little bit more. If you are going to think about bringing somebody else in, or something of that nature, make a phone call and find out what is going on. Other than that, I can't think of a lot of things that I would suggest. I think PDSC is doing a decent job.
- 541 Chair Ellis You strike me as one who really has your lines out around the state –
- 542 J. Morris My lines out? Is that like a fish analogy?
- 543 Chair Ellis Your trap lines. You seem to have pretty good communication. Are you getting advice, help, or ideas from other public defender groups around the state?
- 550 J. Morris As to management?
- 551 Chair Ellis Just straight criminal law practice.
- 552 J. Morris Barnes, I am glad you asked me that too. That ties into the fact that we spend a lot of time at conferences. As most of you know, at the annual conference, I make it a point of meeting people out by the pool and getting advice. No Barnes, seriously, every one of my newer lawyers I have ever had is told, "Go to the conference, we are footing the bill. I expect you to go to classes but not every one. It is really important, and this is on a serious note, that you meet lawyers from other areas." I make it a point to try and introduce my new lawyers to other lawyers around the state. That way, when they get a case where there is someone that needs particular expertise, instead of having to reinvent the wheel, or feeling kind of lost if they pick up a sex case, I can say: "Call Shaun. She had that issue three weeks ago in a case of hers." Or if it a traffic case, "Call David McDonnell." That works out real well. I am a firm believer that informal training and informal passing of knowledge really works better than formal.

- 577 C. Lazenby Go back to the private law firms. One of the things the Commission has been wrestling with, and it permeates a lot of our conversations, is: what is the best form to deliver the services and how do we structure those in different places? We have obviously learned that every county is different. What strikes me about this conversation today regarding private law firms is that it really is a matter of form over substance because, substantially, you function as the local public defender. And I appreciate what you said about the private sector part, allowing you to build a little bit of a cushion. Do you think that that is a unique development with your law firm and this location, or is it something that might be transplanted elsewhere – where you have a private law firm that predominantly provides criminal defense services with a modest amount of privately retained, but largely a publicly supported firm; or are you in a unique circumstance?
- 601 J. Morris No offense, Barnes, but I think that is the best question that has been asked so far. My feeling is, quite honestly, that in an area similar to ours that, what we have been fortunate enough, in all honestly to kind of stumble into; it works well enough that I think it should be copied in other parts of the state. We are in a sense a de facto public defenders’ office will all the good things that go along with that, and we get a little bit of extra money. What can possibly be wrong with that? I consider ourselves really fortunate.
- 615 Chair Ellis How do you handle cases within your group? Is it who is available or by subject matter specialty?
- 619 J. Morris It is a little bit different in the two offices. In The Dalles office, we have four attorneys and they rotate a pick-up week and then adjustments are made. So, if the new attorney picks up a serious case, of course, it goes to a more experienced attorney, and vice versa. That is a little bit of a variation from one of my goals, which has always been that the attorney who actually picks up the case sees it all the way through. In the Hood River office, there are three of us. Usually, two of us are here, if not all three of us, for in-custody arraignments; and we pick them up as they come down the pike. One of the things that has been really nice with my experience and the other attorneys in the office is, if there are three of us there, there is never any of this “you pick it up, I’ve got too many cases.” I have lawyers that are willing to jump up and take a case, and I am real appreciative of that.
- [Tape 2; Side B]
- 052 J. Morris One of the things we have always done is to be present at first appearances. Years ago, when I first got here, that was a challenge in Wasco County because they never did arraignments at the same time every day. We fought for a couple of years, at least to get the court to set it at the same time so we could be present. Before that, attorneys had not been present at a first appearance. The compromise position that we originally reached was they would still do arraignments whenever they wanted to, but they would call us. That didn’t work out all that well. Sometimes when they called us, arraignments would already be starting and we would have to drop everything and run over there. But we finally got a system now where they are at a set time; so we are there. I could be mistaken about this, but I brought this up before. I thought the contracts before provided that a contractor had to be present at first appearances. Maybe I am imagining that, but I thought they did. I think that should be in there now. I think it is important to be there at first appearances.

- 066 Chair Ellis If there is a particularly serious case and you got someone less experienced who happens to be at arraignment, does that find its way to the more experienced lawyer?
- 068 J. Morris Every time. And usually we know if there is a serious case on the docket. “Serious” is a relative term, but we take a look at the dockets before arraignments and we have a pretty good idea of what is on before we ever go to court. So the appropriate attorney is there.
- 071 Chair Ellis You heard the district attorney’s response to my question about cases being tried and cases being pled. Do you have any thoughts on that? I thought he gave a very interesting answer.
- 075 J. Morris I would like to think that we are trying the right amount of cases. That is one of those things that you debate internally all the time. I think John and I both give a lot of thought to that. Are we being too easy or are we being too hard? I think we’ve struck a pretty decent balance. John [Sewell] and I have, on occasion, beaten the hell out of each other in court. I think we have both learned that the other one can do some harm if we let them. So I think that helps resolve cases. In Wasco County, I think we may try a few more cases; but that varies by lawyer, of course. John [Olson] probably tries more cases than any of the other folks, and I think that is partly due to the unbelievable success that he has. Looking at him, he never says a word; but when he tries cases, he wins.
- 090 Chair Ellis The Chauncey Gardiner of the trial bar. One of the things that we are interested in on the appellate side and the LSD group handles that –
- 093 J. Morris You know, I just can’t get past that analogy.
- 094 Chair Ellis I can’t either. I am interested from your perspective on the trial side how that relationship works. Are you okay with how the appellate part of the practice is being handled?
- 097 J. Morris You know, we don’t have all that much contact. But I guess the thing that strikes me is I am impressed with how efficiently they take on cases. You make a call down there or go to their website and you get an immediate response, and that is real nice. I think they work really well from what I see, and I know there are some real talented people there.
- 104 Chair Ellis A lot of lawyers, at least on the civil side, hate to give up cases when they go on appeal. Do you feel we should continue this relationship we have now where the appellate work is all done or primarily done by FTE in Salem, and trial lawyers kind of lose touch with their cases when they go on appeal?
- 110 J. Morris I think that is the best system because I think appellate work is real specialized just like trial work, and I don’t think the two necessarily lend themselves to cross-pollination or whatever.
- 112 Chair Ellis You don’t feel like they screw up your case?
- 112 J. Morris I have found the appellate counsel in Salem to be extremely helpful. If I have a particular issue that I want to talk to them about, I get the impression that they are real appreciative of that.
- 115 Chair Ellis Even before the appeal is started and you have a hot legal question in a case that you are dealing with, do you get support from them?

116 J. Morris Absolutely. I always thought there has been a real good exchange.

117 Chair Ellis I had actually not heard of much of that occurring.

119 J. Morris Well, technology isn't my strong suit. I don't like to e-mail stuff down there. I like to talk to a human being. Maybe that is why I feel there is a good exchange. But I found that they have been really receptive to ideas and, if I have a case or issue that I am excited about, then they get excited too.

123 Chair Ellis I should know this, but has your office been involved in the site visit program?

126 J. Morris As a recipient?

126 Chair Ellis Either as a recipient or as a participant.

127 J. Morris I participated on the site visit team that looked at the PDC consortium in Multnomah County.

130 Chair Ellis Would you welcome a site visit, or would you resent it?

133 J. Morris In a jurisdiction where we are the primary contractor, I see this as a site visit, basically. There is not very much difference from what I did in Multnomah County. So if you want to do it again, sure, come on down.

141 J. Potter The line of succession: can you do a little historical review for us? You took over from Pitcher & Wright?

143 J. Morris I did.

144 J. Potter They were the primary provider here before you took over?

145 J. Morris The reason that I am here is because Paul Crowley went on the bench back in 1989 or 1990 and Ken and Ellen had an associate position open. I applied for it, they gave it to me and I had to turn it down because they couldn't pay me enough.

148 Chair Ellis You were at MPD at the time?

149 J. Morris It was actually even less than MPD, so they had the same problem back then that we have now. There was some competition for that judicial seat. There were actually four people in the firm there was Wright and Pitcher, who were the partners and two associates. Paul Crowley was one of the associates and he got the judicial seat. Understandably, there were some feelings that you might not want to appear in front of your former associate, so they decided that they wanted to make a change and called me up and asked me to take over the firm. Initially I said "no," but they eventually talked me into.

158 J. Potter If we were to ask you -- were there any hiccups in the system between the transition of Pitcher & Wright and the new Morris firm?

160 J. Morris Oh, I would have to say there were. But that was a real unique situation too because what happened is Ken and Ellen left and moved to the Metropolitan area. Paul went on the bench and the other associate was his wife who, for whatever reason, didn't want to be there anymore. So basically, all four people left. I took it over, but how often is that going to happen?

- 165 J. Potter You understand that some of these questions that have been asked before about private law firm and public defenders is about continuity. We just saw this in another county: a long-time public defender there leaves and gets replaced by someone else; but there is not a hiccup in the system. The public defender office was still intact. So what happen when you decide that Mexico calls?
- 173 J. Morris Oh, you are on thin ice there. I don't see a problem because I have three very capable shareholders, and I think any one of them is capable of stepping in.
- 176 J. Potter Have you talked about that? Would that be something that would be the most feasible scenario? It would seem to be to me, but have you talked about it? When you say, "I have had it and I'm done with this," and you ask the shareholders if they are interested in taking this over, is there is a succession plan?
- 180 J. Morris Have we sat down and written out a plan? No. Do I have three capable attorneys, all of whom I am confident could step in and take over? Yes. We make management decisions together, at least to some extent, even though physically we are in two offices. The attorneys get together every Wednesday morning and talk about management issues, as well as other things. I just don't envision a problem there at all.
- 187 J. Potter Is it reasonable for me to be asking the question? Is it one of the things that should be addressed by a Commission like this when we are looking at service delivery in a community?
- 189 J. Morris Is it a reasonable question? Sure. Have we got it covered? I think so.
- 191 J. Potter Who is going to be the head?
- 192 J. Morris Well, that would be decided by a democratic process among the three of them. I have always considered John to be my senior partner and I suspect it might be him. But there is always room for democracy.
- 195 J. Potter
be turned There is going to be a buyout, right? This is a private law firm. It just wouldn't over to someone.
- 198 J. Morris Would there be a buyout? That would nice.
- 200 J. Potter I'm trying to help you, Jack.
- 201 J. Morris I don't know, John. Like I said before, you have to watch your friends the closest.
So far, these three folks that I call shareholders have not had to buy anything. It is basically their status, for whatever it was worth, in recognition of their contribution to the firm.
- 208 J. Potter I think it is a legitimate concern for the Commission. What happens when we have a major provider, who is doing a great job in the community; and then the lead partner goes on to do other things?
- 211 J. Morris Number one, I don't think it is clear that I am the lead partner. I am up here by myself because Peter took the other chair. I was thinking of having John come up as well; but I don't see that as an issue. I like to think that I have created an

office or culture where the way we do things now follows with the other people. You have probably noticed that I have referred to Jim Hennings' office a couple of times. I do the things the way I do things in large part because of the experience I had there. I would like to think, and I feel relatively comfortable with this, that things would continue in the same vein here because of the fact that we have worked together as long as we have, and because we have done things the right way for a long period of time.

- 224 C. Lazenby Is your concern, John, springing from the perception that perhaps Jack is the key to this and, if he were suddenly to decide that he was going to have his new address, that we would be left with having to grapple with succession; or are you moving that the Commission should start thinking about, in some of these circumstances where there are key people, that we contractually require them to give us a substantial amount of notice before there is any significant management changes? Is that what you are asking?
- 231 J. Potter I am not even suggesting a solution. If Jim Hennings leaves, they will go out and recruit a replacement for Jim Hennings. When Jack Morris leaves, it seems to me to be different. Do we now have one of the partners, who steps in, takes over and buys out; or does the partnership go up for sale and somebody else steps in?
- 238 J. Morris I guess the way I envision it is – to kind of answer that scenario – if Jim drops dead on the way home today, there is a recruitment process that is going to take some time. There is an application process that is going to take some time. If I drop dead walking down the steps of the courthouse, I have got three guys who can pick up the ball tomorrow. That is the way I see it.
- 243 S. McCrea It is really a philosophical question that we have talked about previously: that is, who is our contract with? Is our contract with the person or with an entity because whoever signs the contract is doing so on behalf of the firm, right?
- 249 J. Morris Right.
- 250 S. McCrea So it comes down, I think, to a philosophical question for the Commission. Are we going to insist that the entity be the same entity that we contracted with, or is it up to that entity to fill the requirements of the contract? I am not claiming that I have an answer to this, but this is what we went through with some of those other contracts that we have dealt with at our last meeting. I'm not sure how far involved with our providers we need to or should get.
- 258 Chair Ellis Jack, the answer to that is you have been doing this for 16 years and there is not a whole lot of indication of instability here. I am sure you will give us indications if there are going to be some major shift, and then we will just have deal with it. One of the largest assets your firm has is the goodwill and the relationships you have with us. If things take any wild or drastic turns, then we will have to look at what we do.
- 267 J. Morris I would agree with that.
- 268 Chair Ellis I am interested in the fact that to practice at the level you do there is a fair amount of capital investment required. I am sure you have computer systems. I gather that such an asset is essentially yours?
- 274 J. Morris John is also a part owner as well.

- 276 Chair Ellis That creates its own complication when we get to transition.
- 278 J. Morris Are you asking for a bequest in my will or something?
- 278 Chair Ellis No, I am just stating an observation and will leave it at that. Any other questions for Jack?
- 280 J. Brown Judge Hull reminded me of the days many years ago when I thought I had an impact on the criminal justice culture in a county. A couple of years we went in that county and, as far as I could see, there wasn't a trace of it left. I think as we look at building on the effort and energies of folks that have gone before us – Barnes and the study group he chaired and all of that – it seems to me that part of what we have to be looking at is how do we imbue a statewide system with persisting values? I would be curious about your thoughts, now or in the future, about how you see what is going on here and how in your absence you would have a sense that, when there was an issue of a client that thought he or she got less than a real defense – and we are all very, very mindful of how many of those complaints are groundless and one of the things that a client gets told is go to the law library and file a complaint against your lawyer – in terms of the quality of services, how in a small operation there can be a feeling of both comfort and candor in terms of whether people are free to tell the leadership that the services aren't quite what they should be, especially in a small community. How do you stay in touch with community values? What I am leading up to is, when we look at the model that has the board of directors outside the organization that represents different interests in a community, or even an advocacy of different parts of a community, how does that sustain itself when you are gone?
- 326 J. Morris I don't think by any means that I am not irreplaceable, particularly with the other partners that I have. I am just really, really valuable, but not irreplaceable. I think again, if I were to leave tomorrow for some reason, I think they would pick up where I left off. And I think that is a certainty because, if you have a good practice and do things the right way, I think that carries over. Again, I guess the thing that I can point to is that I got my legal education, and John did to some extent too, at the PD's office where things were done a certain way. You can find pieces of Jim Hennings all over my office in the way that we do things. From our team approach with staff to just the way we feel about clients. I think there is a carryover and I think that, when you have a positive culture in the office that it can't help but carry over. I'm not sure if that actually answers your question.
- 345 J. Brown I think I am sort of answering with your help my own question – that a culture is created and maintained by associations, through relationships. By selecting people that you are comfortable working with, you have confidence that you have the capacity, talent and commitment and the same kind of values. Maybe that is enough of an answer. If the leadership of your firm got wiped with one drunk driver – maybe we will all agree not to travel again, but Barnes is in the will so it is covered – then maybe the staff works closely with a successor, try to remind them of the way it used to be and trust for the future, rather than look to an institutional thing.
- 362 J. Morris Well, I think the relationships that we have in the office and the fact that we share the same values will carry over. I think that is more effective than any outside influence. We know what the day-to-day thing is and I think that is what is important. More importantly perhaps, we know what the attitude is.

- 371 S. McCrea I have a question as part of the scenario of wiping out the firm. What I want to ask you about, Jack, is what Jim is talking about: imbuing values. One of things that you talked about here today is your concern about being able to attract applicants and good people to the firm. I am looking at the response that you made on page five of the questions that we gave you. You said: “We have found over the years that, while an opening in the firm may attract a number of applicants, many of those applicants are applying simply because they need a job and have been unsuccessful in finding one.” You go on to talk about looking for people who have an interest in criminal law –
- 385 J. Morris A demonstrated interest –
- 387 S. McCrea Is it getting harder to find those people; is that what I am correct in inferring from what you have written?
- 389 J. Morris Absolutely, it is much harder. As I said before, ten years ago if we ran an ad, we would get 40 or 50 responses. Now we typically get less than 10. Things have changed dramatically, and I think there is a natural assumption to think that it is all money. Money is a big part of the issue, but it is not all money. Law school, back when some of us went, was sort of a culture in itself for people that had a commitment to ideas. I am painting with too broad of a brush but, just for purposes of looking at it, it seems to me that it is much more of a substitute anymore for an MBA. Those same social values aren’t there to the same degree. There has been a huge drop off in interest in doing criminal defense. I think what John [Sewell] was saying is that there has been a huge drop off in interest in criminal practice period. But it has been more extreme on the defense side.
- 405 S. McCrea So what can you suggest to us that we can do? Obviously, money would be one thing. Are there any other suggestions you can give as to how the Commission can attempt to generate interest in criminal defense?
- 410 J. Morris I think programs like the program at Lane County Public Defender are good. The Certified Law Student Program that Jim has at his office is good. But I think the reality is that you can try to come up with a lot of different ideas to stir up interest; but really, to a large degree, that interest is either there or it is not. What you are left with, and I think it is just a fact, is a much smaller pool of applicants. And you cannot afford to have a situation where those applicants who are interested cannot accept jobs for monetary reasons. I think that is what is happening. We have a much smaller pool of applicants and some of those folks, based on the stories that I hear, have student loan balances that are just frightening. They are like house mortgages and they can’t go to work for \$37,000 or \$38,000 a year. They shouldn’t have to. Indigent defense will always be under-funded. That is just the nature of the beast. But it has always been subsidized by idealism and that idealism, for the most part, is gone. For those few people that are left, there is going to have to be a monetary situation where they can join in, and it is just as imbalanced now as it ever was. I heard from a good source that one of the district attorney offices in Central Oregon is starting people right out of law school at \$60,000 a year. I know people who have been doing criminal defense for 20 years that aren’t making that.
- 437 C. Lazenby I think there is another unspoken piece that I know I experienced early in my career when I tried to make the transition out of being a criminal defense lawyer into doing other kinds of law. It was much more pronounced twenty years ago when I was doing that, but it still exists. There is just this sense that, if you choose to do criminal defense, then there is either something inadequate about your skills as a lawyer or you have inadequate values to make the transition. I

have seen other criminal lawyers in Portland having a difficult time making a transition out of criminal defense into other kinds of litigation. They almost end up trapped there. That is a little inarticulate, and I see the Chief Justice shaking his head, because I know he made that transition. But I think you are probably the exception rather than the rule. I have watched a lot of criminal lawyers in Portland, young criminal lawyers, struggle to get out of that field. It is sort of unspoken, but there is this resistance to them migrating over to places where maybe they can make more money. Out of the prosecutor's office, I have seen prosecutors that I started out practicing with easily make the migration over to insurance defense, and then on to other more lucrative types of civil work. I think that is unsaid, but I think the law students and younger lawyers coming out of schools feel that. It is a resistance for them going into this practice as a career path.

- 461 J. Morris I agree with all of that. I also think there has always been an attitude on some fronts that, if you make the choice to do criminal defense, then you should be prepared to make a sacrifice. Why should we have to make a sacrifice if want to do criminal defense? Why should I get paid \$40 an hour doing criminal defense, when the guy that cleans my drain from Roto Rooter makes \$80? It doesn't make any sense. We shouldn't be expected to make that sacrifice. We make sacrifices in terms of our families, time with them and our emotional and mental health. We make enough sacrifices as it is without having to make monetary ones.
- 473 Chair Ellis Do you have good relationships with your legislators?
- 475 J. Morris I can't honestly say that. I have been involved in a number of things on the state level.
- 482 Chair Ellis Other questions for Jack?
- 483 J. Potter Are we brainstorming here a little bit?
- 483 Chair Ellis I thought we were philosophizing and we were doing estate planning. We were doing virtually everything.
- 484 J. Potter I want to get into the will too. Jack, you had mentioned that maybe what you are doing should be a model for the system and that we should use your model around the state in other places. Take that a little bit further. Do you think it would be constructive to have the legislature allow public defense or public defenders to do retained work and still maintain a non-profit status, so that they can –
- 499 J. Morris That wouldn't be possible if they were a non-profit.
- 500 J. Potter But if you could change the way that it was defined, would you advocate for a system that did allow public defense to move to a model like you have? You would have Jim Hennings' office doing what they are doing, except they could take up to 11 percent of privately retained work, thereby paying their people more and letting the legislature off the hook.
- 510 J. Morris I don't think that would work in a number of respects. One, the first that comes to mind is the size of the office. I just don't think, as a practical matter, it would work. The beginning of your question, would it be political suicide? I can't answer a hypothetical involving non-profits because that is pretty far-fetched. But would I advocate that something like my firm be copied and would that be

political suicide? I don't think so at all. I think it could be presented as: "We can pay these people enough because indigent defense is under-funded. We have to give them and we want to give them the opportunity to have at least a small part of their caseload at the going market rate." If you use the \$40 figure – and I realize we are not using that a whole bunch around the state anymore – then that is 20 or 25 cents on the dollar. I think the system that we have set up works, and I think it works well. Can you apply it to Lane County Public Defender? No. Can you apply it Jim's shop? No. If it can be presented the right way, and the right way is saying that we can't pay these people enough and they have got to be allowed to make a living some other way.

- 534 Chair Ellis What percent of your personal time is spent on direct lawyering versus management? How do you divide your time?
- 538 J. Morris All seven of the attorneys, including myself, has a full caseload.
- 542 Chair Ellis The management that you do?
- 542 J. Morris I do that in my spare time.
- 545 Chair Ellis I think it is pretty obvious that one of the talents you have brought to this process is management skills that not every lawyer has.
- 547 J. Morris I have never been accused of that before.
- 548 Chair Ellis This is an important day in your life. Anything else? Thanks a lot.
- 551 J. Morris Thank you very much.
- 551 P. Ozanne Barnes, there are a number of people here I think the Commission would like to hear from.
- [Tape 3; Side A]
- 001 P. Ozanne Tom Cutsforth has come here from Wheeler County.
- 004 T. Cutsforth I hate following Jack because he is so astute and has so much experience in this area, that he is so hard to follow. Mr. De Muniz, Your Honor, and others – I think I met Mr. Potter somewhere because he looks familiar -- but the rest of you I have no clue. Mr. Lazenby I have heard your name, but I don't believe I have ever met you.
- 009 P. Ozanne Well, we can go down the line and provide introductions.
- 010 J. Brown Jim Brown, I am a lawyer out of Salem.
- 010 Chair Ellis Barnes Ellis, nice to see you.
- 010 S. McCrea Shaun McCrea, based out of Eugene.
- 011 J. Potter John Potter from the Oregon Criminal Defense Lawyers Association.
- 012 T. Cutsforth And Justice De Muniz. I'm Tom Cutsforth and I am one of three part-time attorneys in the State of Oregon – or at least we are called part-time, although none of us carry a private practice now because we don't have time – to serve as a district attorney. I think I may be preaching to the choir here. I have already

heard all of the things that I was really going to talk about. And even though the \$40 per hour that Jack said wasn't used around the state much, I know we are using that figure, and it is insane. If you use that figure, and let's say you can bill eight hours a day – and we all know better than that; you are not going to bill \$40 an hour for eight hours a day – you make \$1,600, \$6,400 a month and \$76,800 a year. And guess what? That is \$2,000 less than John Sewell makes and John Sewell's secretary is paid for and his office is paid for –

- 022 Chair Ellis I was going to say, you hadn't talked about overhead yet.
- 023 T. Cutsforth All of his overhead is covered and his medical benefits are paid for. This guy, who just spent all of his time doing criminal law and made \$76,800, has to come up out-of-pocket for his secretary, for his office. It isn't right and, if there is anything I can do to support the defense bar and get that number changed, I am all for it.
- 027 Chair Ellis I understand you have been hard at work with Senator Wyden recently?
- 028 T. Cutsforth How do you know that?
- 029 Chair Ellis Well, I have my sources.
- 029 T. Cutsforth I have been trying to get some forgiveness for student loans because I know that these people are coming out of law school with a \$100,000 debt and they can't come work for us. They can't come to work for the district attorney. Not in my position. I only make \$53,000 and some change. In this part of the state, 15 years ago, I would say, was one of the most stable. If you were a DA in this part of the state, you were probably a lifer. Boy, has that changed. We have got a DA in Gilliam who came practically right out of law school without any trial experience and still has none or very little. We have a DA in Sherman County who has very little law practice and very little trial practice. In Grant County, you can't put a DA there and make them stick. In Morrow County, he gets a \$36,000 stipend and he has so much to do that he threw his hat out. He is gone and going back into private practice. You are paying them that. What about the poor defense attorneys?
- 041 Chair Ellis Is he going back to private practice there?
- 042 T. Cutsforth He is going back to the private practice there. He is going to take on the County Counsel, which is going to pay him a little more, and then he is going to do a private practice on the side.
- 044 Chair Ellis You describe yourself as a part-time prosecutor –
- 045 T. Cutsforth I did private family law practice for 10 years. I gave it up in 2000.
- 046 Chair Ellis How do you divide your time now?
- 046 T. Cutsforth Well, right now I am doing almost all criminal and county counsel work. Back when I was doing private practice, it was a very difficult. There were lots of conflicts because most people who I was representing either got beat because they were the woman or they were beating them because they were the man. Then I would have to prosecute one or the other. It just wasn't working because the conflicts were incredible. I didn't have a Chinese Wall or somebody else I could go to when the other offices became unstable. It would be like Jack having a serious murder case and turning it over to his new graduate from law

school, who is an associate. So I go to the AG. If you go to the AG, you lose your home court advantage. Now you have a Salem attorney and maybe John Olson shows up. You have a Salem attorney against somebody the jury might know. If you lose your home court advantage, you lose a lot of ground.

- 061 Chair Ellis We are obviously interested in the defense side. From your prospective, how would you describe the quality and adequacy of defense services in Wheeler County?
- 064 T. Cutsforth Okay, let me just back up a bit. I have been doing this for 19 years. I started in Lane County as a law student. I prosecuted Jesus Christ and John Lennon on the same day, at least that is who they said they were. But, of course, then they went to the mental hospital. They had a public defender there and it was a meat grinder. Then I went to work for Union County. What I did in Union County is they had a bunch of private attorneys that had a law practice, and they would just go down a list and pick one. They did it that way and sometimes you got good services and sometimes you got bad, and it just wasn't necessarily their main area of practice. They weren't necessarily really experienced in that area. When I came here, except for maybe two occasions when they threw somebody brand new at me, and I know it wasn't intentional and they didn't last long, I have been very, very pleased with the people that show up for criminal defense. I feel that the defendant has his constitutional rights adequately represented and that the defendant has been adequately represented.
- 079 Chair Ellis How is it handled at the early stages in the less populous county where you have remote providers?
- 080 T. Cutsforth Well, it is a problem. I run two justice of the peace courts and neither one of the justice of the peaces are attorneys. Gilliam County has one justice of the peace court and she is not an attorney. Sherman County has one and he is not an attorney either. Then I also have a juvenile judge who is not attorney. He is my county judge; same in Sherman County and in Gilliam County. So you end up in the original proceedings with no attorney except me on those cases. On circuit court cases, if I get lucky and I happen to already have somebody on the docket so that John is out there – and he is good about coming out there; it is 110 miles from here – I am lucky, and then we can get that case rolling. If not, we are stopped. “I want an attorney here.” “Fill out the form.” A month later we are back for a re-arraignment with an attorney. So now we have already lost a month. Then a month later, we do an entry of plea. The case is three months old now. The victim isn't interested in the case. Age is not good for the prosecutor and the victim; and the defendant may be in Mitchell and Mitchell is 160 miles from here. So the ability for attorneys to contact their clients is difficult. They do well, considering the hurdles they have to get over.
- 100 Chair Ellis What advice do you have for us as to how we should be looking at the Eastern Oregon low population counties?
- 102 T. Cutsforth I think what I see with Jack Morris and his law firm is they have done and handled what the legislature thought they would do. They should be allowed to do criminal practice as a public provider and then carry a private caseload on the side to make up the difference. The reality of the situation is, I wish our crime rates hadn't gone up, but they have gone up tremendously over the last 15 years. I have been the district attorney in Wheeler County for 16 years now.
- 109 Chair Ellis Is that all drugs?

- 109 T. Cutsforth It is drugs, domestic violence, sex offenses that you wouldn't believe could happen in small communities. And it is transients that are going through mainly for drugs. But in that entire 16 years the defense attorneys' rates have remained the same. I don't know how they drive and make it work, unless they subsidize the practice. I use to subsidize mine that way, until it got to the point where I just couldn't handle it anymore. I don't know whether Jack will burnout on his core group, but they at least have the ability to say "I would like to go to Hawaii for a week." If I go to Hawaii for a week and I come back, everything that happened that week is right in the middle of my desk. If somebody was in custody in front of John and has to be arraigned in 24 or 48 hours, good luck. They have to release them, unless they can get a hold of me and do it by telephone. We do a lot of telephone work and, with this video thing, I have seen more of the judges in the last two months since they put that in than I had in the last five years. I don't know whether that is good or bad, but that is how it is. The video thing has really helped and I want to thank Chuck Wall for that. I don't know why, and maybe it is not in the court budget, to set up one of those in a room where the defense can use it, and then I could just leave the room. The defendant is in the room, so they can have a face-to-face over this couple of miles, so that John doesn't have to drive. I don't just mean John either, because Mr. Hashizume drives out there and he has volunteered to do some of our juvenile cases; which is wonderful because we have to appoint those straight out of the bar book. John comes and does one of those for \$40 an hour, I can't believe he would do that, but he does sometimes. That should be pro bono. He should get a big plus for pro bono because that is what that is for him. It is outside the contract for \$40 an hour. Like you said, you can't get the Roto Rooter man for \$40 an hour. I think what Jack has is working. I just hope he doesn't burn out a bunch of his people. I hope they can get some money for this because it is a mess.
- 141 Chair Ellis Well we have already decided to take out a new life insurance policy. Any other questions for Tom?
- 144 T. Cutsforth Somebody was talking about wages and I brought a list of all the entry level deputy district attorneys for the State of Oregon. I brought how many deputies each county has and also how much they pay the office managers, which exceeds my salary. Thank you.
- 149 Chair Ellis They don't have the prestige that you have.
- 150 T. Cutsforth Oh, prestige, that is what I have. I'm all for that. There are only three pay scales for the elected DA's. One is roughly \$54,000. The other is \$78,000, and the last is \$92,000. They are subsidized variously by various counties.
- 155 Chair Ellis Is Senator Wyden ready to help us get relief on the student debt?
- 156 T. Cutsforth Yes, he is ready to push that one.
- 157 Chair Ellis We're ready to push him. We'll tell him you said that.
- 159 T. Cutsforth Good.
- 161 P. Ozanne Tom, thank you for traveling all this way.
- 161 T. Cutsforth You're welcome. Thank you for having me.

- 165 Judge Kelly My name is John Kelly and I am one of the four judges in the district. I can't tell you how much I hate being a witness.
- 168 Chair Ellis I can't tell you how much we enjoy being judges.
- 169 Judge Kelly I came without remarks, but I am happy to answer your questions.
- 171 Chair Ellis Maybe you can give us an idea of how Wasco County varies from Hood River?
- 172 Judge Kelly It is prettier. Very little, I would guess. I think the spread is a little broader here. There are more secondary contractors, and I'm not sure if that is even the appropriate term. We all have the same primary contractor, Morris Olson Smith & Starnes. We in Wasco County then go to a secondary contractor, which is the Wasco/Sherman Indigent Defense Corporation and Mr. Hashizume primarily the attorney there. It has been other folks over the years. Then we just start looking around to see who will do the indigent defense work. In The Dalles itself, there are only three or four other lawyers who are willing to take appointments. We often go to them looking for a lawyer and, when that fails, we are off to Portland, Salem or wherever we can find somebody.
- 186 Chair Ellis How often does it happen that the two principal providers either are conflicted or for some reason not available?
- 188 Judge Kelly Daily to weekly we are looking for a third lawyer where there are co-defendant and conflicts. The inability to find someone for a single defendant, that doesn't happen very often. When it tends to happen, conflicts seem to be greater for both. So the more difficult the defendant and the more difficult the case, I think the more likely you are to find a conflict. But that doesn't happen very often. I would guess a few times a year where we are actually going further than Hood River to find a lawyer. I am not sure I addressed your question.
- 198 Chair Ellis Well, you are close to it. When you say a few times a year we are talking five times?
- 199 Judge Kelly I would think that is a fair guess. I don't have a number, but I could probably get you a number.
- 201 Chair Ellis It is almost always in the multiple-defendant case category?
- 201 Judge Kelly To go further than Hood River? No, I would say it is mostly in the type of the case, especially if Morris Olson has had a conflict, a significant Measure 11 case, a murder case or a extraordinarily difficult defendant case; that tends to be when we have to go further.
- 207 Chair Ellis The latter group you are talking about are defendants that reject their lawyers?
- 207 Judge Kelly Turn them into the Bar. I may be wrong about this, but my experience is that an affidavit of prejudice against your lawyer is a conflict because you can't stay on the case with that.
- 211 Chair Ellis Have you had many instances where you have had to have substitutions part-way through the prosecution?
- 213 Judge Kelly Yes, less than 10 percent of the time.
- 213 Chair Ellis I would hope so.

- 214 Judge Kelly Sure, defendants will dislike lawyers and all of a sudden – and I’ll pick Jack because he is here – everybody will decide, and it gets round our local jail, that Jack is not the guy you want. So all of a sudden everybody wants a new lawyer. We are not required to let lawyers out simply because a defendant doesn’t like that particular person. But eventually, that reaches the point where the lawyer wants out and, generally, when the lawyer asks to be excused, it is allowed.
- 230 Chair Ellis How you would describe the communication between the court and defense counsel? We have been in some communities where that is not going well.
- 233 Judge Kelly My sense is it is good. Now, if I left the room and you asked the defense lawyers, you might hear a very different story. Now let me ask you a question that will probably give you a better answer. What do you mean by communication?
- 236 Chair Ellis We have had some instances where lawyers are not appearing on a timely basis and there are defaults on cases.
- 240 Judge Kelly We have that problem and I will begin that by saying, when I look around the room, I don’t see anybody in this room who I have that problem with. There are certain lawyers who are chronically late, not only by not being to court on time, but by not making pleadings on time and not seeing their clients on time. That is a problem. It tends to be a greater problem the further you go from the contractor defense lawyers, like Morris Olson or Wasco/Sherman. Generally speaking, I think we have a fairly decent relationship between the judges and the defense bar. One of the characteristics of being a judge is everybody tells you you are funny and wise. They never tell you how poorly you are doing. So we may not be doing as well as we think, but it seems okay.
- 256 Chair Ellis Other questions for Judge Kelly?
- 256 P. Ozanne I don’t suppose the Commission knows this fact but I understand that you do most of the juvenile work in Wasco County. We have found, though we haven’t found anything like this in your county, around the state that the quality of juvenile practice varies. While there are many able lawyers, sometimes there is an attitude that you take juvenile cases because you have to or, when you become a “real lawyer” you will leave this practice and become a criminal defense lawyer. How do you feel about the quality of work in your court?
- 266 Judge Kelly It is very high. There are primarily three groups of lawyers that we are using for juvenile work. Morris Olson usually gets one of the parents. The Wasco/Sherman group gets the other parent and Jennifer Hinman gets the child. That is the way we have worked it lately. I don’t see any problem with the level of service and the level of dedication. It is very different because it is less technical. There is less procedure and tends to be less motion practice and usually a faster time limit. In dependency cases, we are federally mandated to get things done at a certain speed. The lawyers that I am dealing with have a really good sense of significant differences between what juveniles need and what adults need and what resources are available. I am really pleased with what I see in the court.
- 291 C. Lazenby You mentioned the further you get away from the established firms that there was chronic lateness. Are those lawyers compensated by our system?

- 294 Judge Kelly Yes, and I don't mean this as a criticism of indigent defense. But retained lawyers are usually punctual. Yes, these are lawyers who are being paid on the indigent defense budget. In small communities, I don't think it is any surprise that lawyers are a limited resource and lawyers who are willing to do criminal defense are a really limited resource. People who have done trial work for years and years don't want to do criminal defense. I'm sure that is no surprise to you. They don't want appointed criminal defense and, if you have your choice of working for a guy who is middle class and has a good income and kids like yours, and went to schools like you did, or working for some crack addict out of a trailer park, you will favor the middle class client even if the money is the same.
- 314 Chair Ellis When you have that experience, do you know how to find us and let us know that is happening?
- 315 Judge Kelly Well the honest answer is "no." I am aware of your existence.
- 318 Chair Ellis Peter give him a card. That is an invitation to let us know.
- 318 Judge Kelly I will, but let me tell you what my reservations might be about that. I am talking probably about a group of three to five individual lawyers. It is a small community and, if all of sudden I don't have those three to five individual people available, I don't know where I would go next. Then I would have to get a lawyer from Hood River and, frankly, Hood River lawyers never get the nice cases. They get the dogs and usually the mean dogs too. They burn out and they don't want to drive to The Dalles, if they can stay in Hood River. So then I have to go to Portland probably. That would be the next closest lawyer, and that creates more problems than having a lawyer that is late from my point of my view. But I'll call.
- 342 J. Brown Speaking totally for myself, one of things we have struggled with, in terms of dealing with the legislature and seeking adequate funding for indigent defense, is from time-to-time there have been statements made that have been derogatory about indigent defense. Some relate to inappropriate use of funding and excessive or unneeded experts. Believe it or not, there are actually people in the political community that enjoy being critical of the indigent defense function. I am sure that is a shock and is appalling. But when we express a concern about lawyers being punctual and the like, it is from that kind of perspective, again not speaking for the Commission.
- 358 Judge Kelly I don't mean to make light of it. Obviously, it is unprofessional to not show up on time and not file pleadings on time. I try not to give folks a free pass on that. These folks are underpaid, making \$40 an hour. My primary practice 20 years ago was criminal defense, and I think then I was making \$40 an hour. It is a bargain. Experts can be used and they probably are overused at times.
- 378 P. Ozanne Judge, what you identified poses the same problem for us when you call Kathryn or me and ask for a solution. We are faced with the same shortage of lawyers that you identified. It is a supply issue again and, of course, that is related to inadequate defense funding. I have learned over the three years I have been here that, when I see unacceptable lawyering from time-to-time and I say, "This has got to end," Kathryn or someone else on our staff says "There is no alternative!" So I certainly appreciate your perspective. And we can't magically create a new supply of lawyers in the district when you call us.

- 388 Judge Kelly Let me back up one step. The fact that some lawyers are late or not punctual, actually, they are pretty good advocates for their clients. They know the law, they know the facts and they do a good job. I don't want to leave the impression that these people aren't good lawyers. That isn't fair to them.
- 396 Chair Ellis Thank you very much for driving over here. Let's take about a 10 minute break.
[Break at 2:45 p.m.]
- 403 Chair Ellis [The meeting was called back to order at 2:55 p.m.] The Chief Justice said he wanted to meet with some of the court staff people, so that is why he will not be here for the rest of our session.
- 407 P. Ozanne Kevin, do you want to come up, and your colleague too?
- 416 Chair Ellis Welcome. Maybe you can tell us a little bit about yourself and your background.
- 417 K. Hashizume My name is Kevin Hashizume and I'm not sure how I got in charge of Wasco/Sherman Indigent Defense Consortium. I think it is because the other attorneys left and I was the one that was left at that point in time. Prior to that, my first job was working with Jack Morris, doing work in The Dalles. After a little bit of time, I went off and started working for Meredith Van Valkenberg. At that point in time, one of the attorneys that was working there had just left and gone to the district attorney's office in Wasco County and was working there as a deputy district attorney. Shortly thereafter, one of the other partners left and went down to California.
- 433 Chair Ellis So how many years have you been in practice?
- 433 K. Hashizume Since October of 1999; so maybe five or six years, somewhere around there.
- 435 Chair Ellis How many of those were with Jack?
- 436 K. Hashizume Right around a year or maybe a little less.
- 439 Chair Ellis Describe where you are now?
- 439 K. Hashizume When I went to Meredith Van Valkenberg's office, part of what their work was involved in a share of Wasco/Sherman Indigent Defense. Wasco/Sherman Indigent Defense is a separate corporation that has the contract with the state to provide public defense services when Morris Olson has a conflict. In the past, that was made up of a lot of different attorneys from different firms. When I first went to Van's office, there was basically Van's office and one other office. Andy Carter worked there. He took half of the contract and our office took half of the contract. In the past, it had been split up among other offices as well. About a little over a year ago, Andy decided it was no longer financially feasible for him to keep the contract and he wanted out. Right around that time, I had actually left Van's office and gone out on my own. So for a short time, we were splitting up the contract work with my own office, Van's office and Andy Carter's office. I ended up going back to Van's office to help out and Andy left the contract. Now, Van's office is the only office that is taking any cases from Wasco/Sherman Indigent Defense. We have tried approaching some of the other attorneys in the community that take the hourly appointments, but none of them were interested.

466 Chair Ellis So you are functioning essentially as a two lawyer consortium?

471 K. Hashizume Yes, right now.

471 Chair Ellis You are the manager?

471 K. Hashizume Yes, I ended up with that.

473 Chair Ellis What percentage of your personal time is spent on this? 100 percent?

476 K. Hashizume I would say probably 60 percent of my time.

477 Chair Ellis The other 40 percent is private?

477 K. Hashizume I am one of the only people that will take the cases in the municipal court in The Dalles. That probably takes up another 10 or 20 percent of my time. The remainder of it is private retained work.

482 Chair Ellis How is the municipal court funded?

482 K. Hashizume It is out of the city's budget and they pay us \$40 an hour.

486 J. Potter Private retained criminal work?

486 K. Hashizume No civil.

487 Chair Ellis How are you able to keep current from a CLE point-of-view.

489 K. Hashizume I let my membership in the OCDLA lapse. Then about a year ago, I got back on again and am starting to go to the seminars again. In the meantime, I subscribe to the newsletters to get the updates on criminal law. Van's office has a season ticket for the State Bar CLEs, so we go to those CLEs; although, granted, there are very few of them that have anything to do with criminal law.

499 Chair Ellis One of the things we have been talking about with Jack and others is the difference between a public defender structure and a private firm structure. The PD model, certainly it's true with Metro and Lane County and I believe it is true with the other PDs, that they often will share their resources with the other practitioners. How does that work here?

509 K. Hashizume Whenever I have an issue that I wasn't familiar with or I felt another attorney had more experience with, the attorneys in The Dalles office of Morris Olson have always been very welcoming to me when I have questions. Other attorneys in private practice have also always been willing to assist me as well, when I hit a point that I don't know the answer.

517 Chair Ellis Given your experience, which is good but not as much as some others, the cases you end up doing, do you feel comfortable doing?

522 K. Hashizume I feel comfortable because, through the years, whether I liked it or not, I ended up involved in cases. I think it was real early on and it was a retained case, I ended up with Meredith Van Valkenberg co-counseling a kidnapping, robbery and a few other charges out in Pendleton. I think it was second or third year and I was assisting at the trial. When I was at Morris Olson, right away I jumped in with both feet doing trials in the first month. I think all along I have always been used to having to try cases and kind of learn on the run and ask a lot of

questions. Quite honestly, Mr. Van Valkenberg doesn't do a lot of criminal law anymore. In the past, he did work for the district attorney's office and he did do criminal defense work. Judge Kelly used to be one of the partners as well. The office has always done a certain extent of criminal defense work. But when I needed moral assistance or somebody to sit there with me and help me with clients, he has always been willing to do that. And he has been very good about working through personality problems, when one develops between a client and myself.

- 556 Chair Ellis Did you grow up in the area?
- 556 K. Hashizume I grew up in Los Angeles.
- 558 Chair Ellis When did you move to the Northwest?
- 559 K. Hashizume I moved to Portland after I finished law school and took the Bar and then I happened to really like the way the Gorge looked.
- 564 Chair Ellis Other questions?
- 567 K. Hashizume One of things, and I am very new to this idea and process of meeting with all of you, but I did find the initial report – I guess it wasn't everything I would have liked for it to say about us. But at the same time, I appreciate seeing the comments and I was going to talk to Peter more about it in the next week. After seeing the report, one of the things I did today was I saw that there were some concerns, so I went ahead and made phone calls to both of our local judges to see if I could sit down and find out what their concerns are explicitly, and then figure out how we can try to address them.
- 579 Chair Ellis We have actually had the experience in two or three communities that it helps to have us come to a county. I think it gets people talking.
- 585 K. Hashizume The court has been good because they have had some concerns in the past about certain things. They brought it to my attention and I have tried to address them. I think there has always been a very comfortable and open relationship there. I have always been very open to listening to what they are trying to implement. I have been trying to work very closely with the court when there are areas of concern.
- 601 Chair Ellis We would obviously continue to encourage you in that direction. Any other questions? Thank you very much. We appreciate it.
- 609 B. Aaron I am one of the lawyers that is doing the conflicts contract; and is transitioning out, primarily because of the money. I have hired a new associate and I am embarrassed to tell you what I am paying her right now. I would really like to be able to go back to my office and tell my staff that she is getting a raise. I can't do that. It is driving me out right now. My retirement plan is to work until I die because that is what I am going to do.
- 624 Chair Ellis Give me a little of your history.
- 627 B. Aaron I was born in Southern California. When I was very young, I moved to a town that was smaller than Hood River, so I have always wanted to live in a rural area. I went to law school in the Bay Area at Santa Clara and did undergraduate there as well. My first job was with the Metropolitan Public Defender. I worked there just about two years starting in 1990. Then, in 1992, I came out

here and worked briefly with Jack Morris' office. In 1993, I hung out my own shingle and contracted with the state to do conflicts and have been doing that ever since.

- 641 Chair Ellis So currently you are in private practice here in Hood River with one associate. What percentage of your work is indigent defense?
- 645 B. Aaron For about the first six years of my practice, I had an associate with me at the time, but I was doing strictly contract work or privately retained criminal work. You get by on it. The \$70,000 would be fine, if I didn't have an office and support staff. I was doing predominantly criminal defense work. I dabbled in a little bit of domestic relations, but my heart was with criminal defense and I am sad that I am leaving it now. I am transitioning out if it.
- 663 Chair Ellis What will you transition to? Will it be predominantly retained criminal?
- 666 B. Aaron I will still be doing retained criminal, but the associate I was working with most recently, before I hired Sherri here, did the civil end of the practice. He went out on his own and many of those cases stayed at my office. So I am going to be focusing on the civil end. Working at the contract rate of \$320 per case, or even outside the contract at \$40 an hour, I look at that and say, "I could be doing that, but I can make \$150 to \$200 in civil." I would rather stay doing criminal work, if you guys give me some more money.
- 692 Chair Ellis Don't be surprised if we use you as an example of what the state is facing?
- 697 J. Potter Brian, is your associate going to be doing court-appointed criminal work?
- 699 B. Aaron Yes she will. She is an '05 graduate, and right now she is handling some juvenile and some misdemeanors. I also have her doing some court appointments. I have her signed up for some CLEs coming up. I have to echo what Jack says and that is, if she wasn't there asking questions every day, I would be very concerned. She has been real good about asking questions.
- 718 Chair Ellis Will she do that as an associate for you? So your firm will still be taking the cases. Who is taking the work?
- 722 B. Aaron For the next year, I will be transitioning out of my caseload.
- [Tape 3; Side B]
- 002 B. Aaron What I am reading is there is a problem with some of the conflict attorneys and you are not getting the quality of attorneys. There were some attorneys here in town that quit taking court-appointed work because why would they continue at \$40 an hour work when there is \$150 an hour work out there? You are losing money to do that. What you should probably do is set up a consortium, where there is a group of attorneys who are doing criminal work and, where there is a minimum requirement, have standards set and then pay them a decent amount of money to come in and take these cases.
- 011 C. Lazenby I don't want to put you on the spot, but I will. Earlier, Tom Cutsforth was talking about the possibility of a federal program, and he didn't flesh it out. But it sounded like Americorp for law students. Basically, they would get some sort of federal compensation to cover their law school debt in exchange for working in the criminal field either on the defense side or the prosecution side. On the

defense side what concerns me about that idea is the supervision piece. Do you think that practitioners such as yourself, that is where I get you off the spot, practitioners such as yourself would be willing to sort of pro bono supervise those law students or would you want to be compensated for supervising them and teaching them the ropes.

- 021 B. Aaron We do that pro bono as it is. Of course we would love to get compensated for that. I know Jim has offered his office to new attorneys coming to train them. If there could be compensation for it then yes and I am certainly more than willing to answer any questions. Jack's office has always been very good about that. When I have had questions his attorneys have always had an open-door policy that I can call them and ask them questions and I think most people that do criminal defense are that way. I think you can go to the bigger public defender's offices and get the mentoring and training there.
- 031 C. Lazenby I think I just saw Greg volunteer.
- 031 B. Aaron The philosophy has been changing as noted earlier. I think there are more recent grads coming out and I don't know whether it is television or what it is the philosophy now that they want to be prosecutors. Twenty or thirty years ago it would have been public defenders. I think some sort of forgiveness program, and I don't know what pull you have, but it would certainly be beneficial to talking to state law schools about some sort of program for them to forgive student loans.
- 037 Chair Ellis Thank you very much.
- 037 B. Aaron Thank you folks for being here.

Attachment 3

Presenter: Kathryn Aylward

Public Defense Services Commission
Meeting Discussion Item
June 15, 2006

Issue

Impact of HB 3511 (Jessica's Law) on the public defense system.

Discussion

HB 3511 modifies ORS 137.700 to increase the mandatory minimum sentence for First Degree Rape, First Degree Sodomy, First Degree Unlawful Sexual Penetration, and First Degree Kidnapping (in the furtherance of commission or attempted commission of the preceding charges) from 100 months to 300 months when the victim was under 12 years old and the defendant was at least 18 years of age at the time of the offense.

OPDS submitted a fiscal impact statement estimating that the cost of representation for such cases would increase three-fold (corresponding to the three-fold increase in the sentence). The estimate for the number of cases cannot have a high degree of accuracy because neither OPDS nor the Judicial Department keep statistics on the age of the victim. In any case, the Special Session did not appropriate additional funds to OPDS to cover any increase in costs associated with HB 3511.

After consultation with Legislative Fiscal Office, OPDS was advised to gather actual data as cases arose so that a request for additional funds could be made to the Emergency Board.

In addition to tracking the number of cases, OPDS will also need to negotiate an appropriate rate of payment for these cases.

Recommendation

At the Commission's meeting in May, there was some testimony from contractors to the effect that the Jessica's Law cases should simply be valued at the rate for murder cases. There are several drawbacks to such an approach. As a practical matter, many contracts do not include murder and therefore there is no established rate for murder cases. In addition, the appropriateness of such a rate will vary substantially from county to county depending on district attorney charging practices – both the frequency of issuing such charges and whether multiple counts are alleged. Finally, PDSC is likely to have a better chance of success in obtaining additional funding if rates are negotiated with contractors rather than OPDS simply choosing a rate administratively.

Regardless of how rates are determined, OPDS may not need to increase contract payments during this biennium. Each contract has an established quota for the number of cases expected during the term of the contract (generally two years). All case types are considered fungible in terms of their value. At the end of the contract term, a final reconciliation is made to compare the value of the caseload actually received with the value of the quota. As most of our contracts do not end until well into next biennium, any anticipated overages that OPDS would be required to pay would be part of the Essential Budget Level for the 2007-09 biennial budget.

However, if contractors are generally already running over quota, it may not be possible for them to continue operating without additional funds. And, to the extent that Jessica's Law cases go to hourly paid attorneys, we will see that impact during this biennium.

OPDS proposes sending a memo to contractors indicating that we are open to negotiating an appropriate rate if and when they are appointed to a Jessica's Law case. Contractors will be able to choose from a variety of options that best suit their organization: keep the credit at the M11 rate but provide additional hourly funding if a certain number of hours is exceeded; compensate entirely on an hourly basis; request additional credit under Section 4.3 of the contract at the conclusion of the case; or set a separate rate for Jessica's Law cases. One contractor has already contacted OPDS and has agreed to accept Jessica's Law cases on an hourly basis at an increased rate of \$50 per hour.

Attachment 4

OPDS QUALITY ASSURANCE TASK FORCE SITE VISIT SUMMARY

June, 2006

1. **Crabtree & Rahmsdorff** (Deschutes County) – criminal, juvenile and civil commitment cases. May, 2004. Team members: Marty Cohen (Clackamas County), team chair; Tom Sermak (Lane County); Doug Fischer (Umatilla County).
2. **CIDC** (Clackamas Indigent Defense Consortium) – criminal cases. September, 2004. Team members: Tom Sermak (Lane County), team chair; Dave Audet (Washington County); Robert Elliott (Washington County); Guy Greco (Lincoln County); Cathy Ruckle (Multnomah County); Robert Thuemmel (Clackamas County)
3. **Metropolitan Public Defender Services, Inc.** (Washington County) – criminal, juvenile and civil commitment cases. November, 2004. Team members: Janise Augur (Lane County), Ann Christian, Tom Crabtree (Deschutes County), Ron Gray (Clackamas County), Carole Hamilton (Coos County), Julie McFarlane (Multnomah County) and Bert Putney (Jackson and Josephine Counties).
4. **Jackson County Public Defense Contractors**, February, 2005. Team members: Carole Hamilton (Coos County), chair; James Arneson (Douglas County); Angel Lopez (Multnomah County); Karla Nash (Deschutes County); Janet Miller (Multnomah County); Keith Rogers (Washington County); Kathy Wood (Benton County).
 - a. **Southern Oregon Public Defender, Inc.**, Jackson County office – criminal cases
 - b. **Los Abogados** – criminal cases
 - c. **Jackson Juvenile Consortium** – juvenile and civil commitment cases
5. **Umatilla/Morrow Counties**, April, 2005. Team members: Tom Sermak (Lane County), chair; Tom Crabtree (Deschutes County); Jamesa Drake (LSD attorney); Lynn Holguin (Multnomah County)
 - a. **Intermountain Public Defender, Inc.** -- criminal, juvenile and civil commitment cases.
 - b. **Umatilla/Morrow Consortium** – criminal, juvenile and civil commitment
6. **Portland Defense Consortium** (Multnomah County) – criminal and juvenile cases, July, 2005. Team members: Lisa Greif (Jackson County), chair; Tom Collins (Washington County); Hollis McMilan (Multnomah County); Shawn Wiley (LSD attorney); Jack Morris (Gilliam, Hood River, Sherman, Wasco and Wheeler Counties); Steve Krasik (Marion County)
7. **Douglas County** – September, 2005. Site team: Paul Levy (Multnomah County), chair; Gary Berlant (Josephine County); Jeni Feinberg (Jackson County); Carole Hamilton (Coos County); Jennifer Kimble (Crook, Jefferson Counties); Janet Miller (Multnomah County) Bert Putney (Jackson County)

- a. **Umpqua Valley Public Defender** – criminal, juvenile, and civil commitment cases
 - b. **M.A.S.H.** – criminal, juvenile and civil commitment cases
 - c. **James A. Arneson, PC** – criminal and juvenile cases
 - d. **Richard Cremer** – criminal and juvenile cases
8. **Multnomah County Juvenile Contractors** – January, 2006. Site team: Leslie Harris (University of Oregon, chair), Mike Clancy (Clackamas County), Daphne Mantis (Lane County/statewide appeals), Jennifer Nash (Benton County), Holly Preslar (Josephine County), Tahra Sinks (Marion County), Karen Stenard (Lane County)
- a. **Bertoni & Todd**
 - b. **Alan Karpinski**
 - c. **Ronnee Kliewer**
 - d. **Juvenile Rights Project**
 - e. **McKeown & Brindle**
 - f. **Metropolitan Public Defender**
 - g. **Multnomah Defenders, Inc.**
 - h. **Native American Program Oregon Legal Services Corporation (NAPOLS)**
9. **Linn County** – March, 2006. Site team: Jim Hennings (Multnomah and Washington Counties), chair; Janan Billesbach (Clackamas County); Jeff Carter (Marion County); Steve Krasik (Marion County); Valerie Wright (Deschutes County)
- a. **Linn County Juvenile Defense Consortium** – juvenile cases
 - b. **Linn County Legal Defense Corporation** – criminal and civil commitment cases
10. **Lane County Juvenile Contractors** – June, 2006. Site team: Sibylle Baer (Multnomah County), chair; Dan Cross (Washington County); Valerie Eves (Deschutes County); Dick Garbutt (Klamath County); Liz Sher (Multnomah County); Dean Smith (Washington County)
- a. **Lane Juvenile Lawyers Association**
 - b. **Public Defender Services of Lane County**

Contract offices evaluated to date handle approximately 40% of the trial level non-death penalty caseload.

Attachment 5



LANE COUNTY PUBLIC DEFENSE PANEL

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LANE COUNTY PUBLIC DEFENSE PANEL

ANNUAL REPORT

April, 2005 – March, 2006

I. Overview

This report summarizes the process and progress of the Lane County Public Defense Panel (LCPDP) since its establishment in April of 2005 through March, 2006. The report includes a brief summary of:

- the creation of LCPDP,
- LCPDP policies and procedures
- Organization and coordination with OPDS, Lane County Circuit Court and the Panel Attorneys
- Operations since commencement in September, 2005
- Volume and types of cases
- Panel oversight and complaint management
- Billing procedures and issues
- Mentoring, training and CLE opportunities

II. Formation of the Lane County Public Defense Panel

In April, 2005, OPDS contracted Marc Friedman as the Administrator of the LCPDP. Between April, 2005 and September, 2005, the structure and policies of LCPDP were developed. The Policies and Procedures for the operation of the LCPDP were generated by the Administrator, adopted by the Oversight Committee and confirmed by OPDS.

The LCPDP Oversight Committee was established by OPDS to provide intermediate review of decisions, policies and activities of LCPDP administration. The Committee is comprised of a diverse group of members of the Lane County Bar. Included on the Committee are Hon. Jack Mattison, Tony Rosta, Shaun McCrea, Tom Sermack, and Liane Richardson.

In June - July, 2005, applications were solicited for Panel Membership. All Lane County private bar attorneys then taking court appointed cases were asked to submit an application for membership on the new Panel. The majority of attorney's taking court appointments applied for admission to the Panel. There were many questions, but limited resistance to the new process.

In August, 2005, the Oversight Committee convened to review and recommend the final qualifying Panel Members. Each applicant was determined to be qualified or unqualified for Panel Membership. Further, each applicant's eligibility for particular case types was determined. Most attorneys qualified for all of the case types for which they applied. A few attorneys who had been receiving appointments of higher magnitude were restricted in their case appointments types; removed from major felonies or Measure 11 cases.

On August 17, 2005, the Oversight Committee, Administrator, Kathryn Aylward and Peter Ozanne met in Eugene for a final review and determination of which applicants would be selected for Panel membership. Additional input was received from OPDS and the final determinations were made for Panel membership.

Input from the Committee members included:

- Recommendations from the Lane County Bench based upon attorney performance in the courtroom;
- Recommendations from OPDS appellate attorneys based upon appeals of applicants cases;
- Recommendations of OPDS;
- Past experience working with applicants.

A breakdown of the applicants is as follows:

- Total Number of Applicants:	32
- Former Court Appointed Attorneys who did not apply	8
- Number of applications accepted for membership	31
- Number of applications not accepted	1
- Number of former court appointed attorneys not accepted to Panel	1

In general, the constitution of the court appointed attorney system did not significantly change as a result of the transition to the Panel. Attorneys who chose not to apply made that choice based upon factors such as increased case load or relocation to other areas.

Attorney applications were reviewed based upon their qualifications for particular case types. Cases are divided between misdemeanors, lesser felonies, major felonies and Measure 11, murder, mental commitments, post-conviction, and habeas.

Discussions regarding the final number of Panel Attorneys centered on concepts of quantity versus quality, with OPDS advocating for a smaller group of more seasoned and experienced attorneys. The final decision was to allow Panel

membership to tailor itself as time went on. This has proven to work as predicted. There has been some degree of attrition with participating attorney's moving out of the area and removing themselves from the Panel. Other attorneys have chosen to restrict the volume of cases they will accept.

The Panel remains an open group. Applications for Panel membership can be made at any time. Since the initial formation two attorneys have been added to the Panel, and two current Panel members were moved up in their qualifications.

III. ORGANIZATION AND OPERATIONS OF LCPDP

1. Organization and Startup

Operations of the LCPDP began on September 26, 2005. The month prior was spent developing and coordinating procedures between the Lane County Circuit Court staff and Panel Administration. Practice dockets were faxed to the Panel office each day to permit familiarization with the timing and nature of appointments, and to develop the most efficient way of selecting attorneys to appoint cases. The practice runs proved extremely useful in transitioning into actual implementation of the appointment process.

Since September, 2005, LCPDP's appointment process has run very smoothly. This is largely due to the generous assistance and teamwork of the Lane County Circuit Court Staff and the staff of Public Defenders of Lane County.

2. Operations: Appointment Procedures

At the request of the Lane County Circuit Court it was determined that a Panel attorney be present at all arraignments to ensure that clients would never be required to appear without counsel. To accommodate the need, attorneys are scheduled two months in advance to appear for 1-3 arraignments per month.

Court appointments generally occur at arraignments, from cases resulting conflicts from Lane County Public Defender Services. Appointments also arise from conflicts discovered after arraignment, but before trial.

Arraignments:	Panel staff receives preliminary and final dockets from the Court twice a day, (a.m. / p.m. arraignment proceedings) checks the docket for conflicts and assigns an attorney for the court to appoint. The arraignment attorney, if qualified, will generally receive all or most of the Panel appointments from arraignment. If a defendant is previously assigned an attorney, that attorney will receive the additional appointments.
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Other appointments: Panel staff receives an email from PDS or phone call from the Court advising Panel staff of the need to appoint a new attorney is includes substitutions and withdrawals.

Attorneys are appointed from the established lists based upon their qualifications for particular case types. Appointments are made from the qualification lists on a rotating basis.

3. Substitutions and Withdrawals

The majority of case substitutions and withdrawals occur at 35 day call. When a substitution or withdrawal is necessary the court, Lane County PD's or Panel attorney's contact the Panel office for the determination of the new Panel attorney. Special cases, difficult clients, quick sets require special handling. The Panel administration contacts Panel attorney's to arrange appropriate assignments and appointments.

IV. VOLUME AND TYPES OF CASES

The Panel averages 5 appointments per day. The majority of court appointed cases are lesser felonies. Because of budget issues the Lane County District Attorney is currently rarely prosecuting misdemeanors. Major felonies, in particular Measure 11 cases, generally become panel cases when the Lane County PD's have a conflict. It is unclear whether the Public Defenders are finding fewer conflicts, or whether fewer major crimes are coming through the District Attorney's office. The circuit court determined that multiple count property crimes, i.e. ID thefts and similar cases, will be assigned directly to Panel attorneys due to the frequency of conflicts. Concerns have been shared by some Panel Attorneys regarding the lack of Measure 11 appointments. The concerns are based on the fact that Measure 11 cases are more challenging and bill at a higher hourly rate.

V. PANEL OVERSIGHT AND COMPLAINT MANAGEMENT

There has been ongoing coordination with the Lane County Circuit Court, particularly with the Presiding Judge. The Panel Administrator meets with the PJ on a regular basis to discuss the handling of cases by Panel attorneys. Since inception there have been 4-5 cases that have required particular oversight and review by the Administrator. Efforts are made to mediate issues between the court and Panel attorneys, or resolve issues between counsel and clients. We have met with mixed success. New appointments have been made where issues cannot be resolved.

VI. BILLING PROCEDURES AND ISSUES

Panel Attorneys are paid on an hourly basis, \$40 (\$50 for M11's). All Panel attorney billings are reviewed by the Administrator. In addition to the standard OPDS Providers Fee Statement and the itemized attorney time record and expense records, each attorney is required to provide a voucher with information detailing the work performed on the case and outcome. The voucher sheets (copy attached) are maintained by the Administrator. A statistical data basis is under development.

While final payment of all attorney bills is subject to OPDS review and approval the Panel Administrator determines and approves the acceptability of case billings. Billings which are questionable or seem excessive have been subject to further inquiry.

VII. MENTORING, TRAINING AND CLE OPPORTUNITIES

We have had considerable success to date in providing mentorship opportunities for Panel attorneys. Experienced attorneys (higher qualified) have been willing to work with newer or lesser qualified attorneys. A direct result has been to move these attorneys from misdemeanor qualification to lesser felony. To date mentorships have been on a request basis, matching compatible new attorneys with experienced attorneys. The lesser qualified attorneys have worked as unpaid assistants with the experienced attorney on their higher level cases. We have also assisted in coordinating attorney questions with attorneys qualified to answer.

To a limited extent the panel has worked with Lane County PD's to publicize and coordinate changes in local criminal procedure, i.e. settlement conferences at 35 day call. This is a significant change in local practice which began in January, 2006.

The Panel has not yet held its own CLE's for panel members. Panel attorneys are encouraged to participate in OCDLA, OSB and NCDLA sponsored CLE's. We are also working with the Lane County PD's and hope to coordinate local CLE's specifically directed to Lane County criminal practice in the near future.

VIII. COURT / PANEL / OPDS COORDINATION

The Panel Administrator has participated in the court procedure coordinating group, comprised of the PJ, the lead criminal judge, the DA, and the PD's. The group provided input on the changes to 35 day call and settlement conferences.

The Administrator has also been the means for Panel attorneys to air their concerns with the court.

Attachment 6

Presenter: Kathryn Aylward

Public Defense Services Commission
Meeting Discussion Item
June 15, 2006

Issue

Provision of counsel in juvenile dependency appeals.

Discussion

Chief Judge Brewer has formed a juvenile appeals work group to develop strategies for shortening the timelines and improving the quality of representation in juvenile dependency appeals.

The work group agreed at its meeting on June 1st that it would be beneficial to have counsel appointed and transcript production initiated as soon as possible after a notice of appeal is filed. The procedure that Legal Services Division uses works so efficiently for criminal appeals that it was suggested that a similar procedure could be developed for juvenile appeals.

An online intake form could be designed for trial-level attorneys to complete and thus more quickly discharge their obligation to perfect an appeal. OPDS would then file the notice of appeal and an order appointing counsel who would be selected from an appointment list of private attorneys. A fee statement for the production of the transcript would be emailed directly to the county transcript coordinator.

This approach has several advantages:

- 1) It eliminates the need for trial-level attorneys to prepare the notice of appeal (which is filed in the Court of Appeals) and the order appointing counsel and request for production of transcript (which is filed in the trial court).
- 2) It eliminates the need for the trial-level court to find appellate counsel.
- 3) It reduces the miscommunication that sometimes occurs when an attorney has prepared an order that requests more copies of transcripts than OPDS is authorized to provide.

In order to accomplish this, OPDS would need to hire a paralegal to administer the intake and distribution of cases (there is currently a vacant paralegal position). Some modifications to the online form would need to be made and procedures would need to be established, but this is an improvement OPDS could effectuate in a reasonably short time frame.

The work group also discussed the possibility of shifting a portion of the juvenile appellate work to OPDS employees. We estimate that approximately 75% of the dependency appeals (representing parents) could be handled without conflict by 4 FTE attorneys. The remainder would then be assigned to attorneys on the private bar list. The table below shows the additional cost of using FTEs, offset by the reduction in the amount currently being paid to private bar attorneys.

Net Cost of Adding 4.0 FTE to the Office of Public Defense Services

	Annual Cost	Biennial cost
4.0 FTE Deputy Defender 2 at Step 2 (\$4,669)	\$224,112	\$448,224
OPE at 42%	\$94,127	\$188,254
Total personal services	\$318,239	\$636,478
Services & supplies at 16%	\$50,918	\$101,836
Total cost	\$369,157	\$738,315
Less 75% reduction in non-employee attorney expenditures	\$216,190	\$432,380
Net cost of adding FTEs	\$152,967	\$305,935

This model assumes that the caseload is set at 25 appeals per attorney per year (in accordance with the standard adopted by many states), which would be about 70-80 hours spent on each appeal. Private bar attorneys currently bill an average of 47 hours per appeal. So either private attorneys do not spend enough time on a case (which may account for some of the quality issues) or FTE attorneys could handle more than 25 appeals per year.

There were discussions that doubling the private bar hourly rate would be necessary in order to improve the quality of representation to an acceptable level. The private bar hourly rate of \$40 per hour is approximately \$80,000 per year. OPDS employees, plus services and supplies, would cost \$92,289 per year. Therefore the additional cost of using state employees would range between a 15% increase and a 50% increase, depending on the appropriate number of hours per appeal. Although this approach would only provide improved representation in three-quarters of the cases, it is still a more economical approach than doubling the hourly rate for all dependency appeals.

Because OPDS will have the ability to regulate workload by adjusting the number of appeals that are sent to private bar attorneys, the FTE attorneys will be better able to meet the tight timelines required in dependency appeals. In addition, the supervisory infrastructure and the support of colleagues will improve the quality of representation.

Recommendation

OPDS recommends that PDSC include a policy package in the 2007-09 budget to provide for the addition of 4 FTE attorneys to handle juvenile dependency appeals.