

Members

Barnes H. Ellis, Chair
Shaun S. McCrea, Vice-Chair
James M. Brown
Henry H. Lazenby, Jr.
John R. Potter
Janet C. Stevens
Mike Greenfield



Ex-Officio Member

Chief Justice Wallace P. Carson, Jr.

Executive Director

Peter A. Ozanne

Public Defense Services Commission Meeting

Thursday, June 16, 2005
9:00 a.m. to 12:00 p.m.

Mt. Washington Room
Inn of the Seventh Mountain
Bend, Oregon

Agenda

1. **Action Item:** Approval of the Minutes of the Commission's April 2005 Meeting (*Attachment 1*)
Shaun McCrea

2. OPDS's Monthly Report:
 - Update on the budget
 - Reports from CBS and LSD
 - Report on Contractor Site Visits
 - Update on PDSC's Service Delivery Plans
 - Update on Lane County's new Court-Appointment Process
 - Discussion of October Management ConferenceOPDS's Management Team

3. **Action Item:** Approval of new and amended PDSC's Policies and Procedures (*Attachment 2*)
Kathryn Aylward
Lorrie Railey

4. Review of the Report to the Commission on Conflicts of Interest and Attorney Substitutions (*Attachment 3*)
Ann Christian

5. Review of the Executive Director's Biennial Report to the Legislature (*Attachment 4*)
Peter Ozanne

6. New Business
Shaun McCrea

Please note: Lunch will be provided at the conclusion of the meeting for Commission members and others in attendance who ordered lunches in advance

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

April 14, 2005 Meeting of the Commission

Office of Public Defense Services
1320 Capitol Street N.E.
Salem OR

MEMBERS PRESENT: Shaun McCrea
John Potter
Jim Brown
Mike Greenfield
Wallace P. Carson

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

[Tape 1, Side A] The meeting was called to order at 9:00 a.m.

01 Chair McCrea We don't have a quorum yet because Mike Greenfield is going to be about a half hour late. So why don't we defer approval of the minutes and go ahead with the OPDS monthly report.

Agenda Item No. 2 OPDS's Monthly Report

003-380 OPDS's Management Team reported on the following matters: the status of the Commission's 2005-07 budget before the Joint Ways and Means Committee and proposed strategies for hearings before the Public Safety Subcommittee of Ways and Means; legislative developments, including the status of bills proposed by the Commission, fiscal impact statements that Kathryn Aylward has prepared on behalf of PDSC and proposed legislation to address the impact of the U.S. Supreme Court's decision in *Blakely v. Washington*; new employees at CBS and that division's recent efforts to improve the cost-efficiency of its operations; personnel changes at LSD and that division's efforts to address the impact of *Blakely v. Washington* on the appellate courts' caseload; the progress of OPDS's contractor site visits; the final version of the Service Delivery Plan for Multnomah County; and the status of Lane County's new court-appointment system.

380 Chair McCrea Since we don't have a quorum, we are going to skip the Action Item at this point. Shall we go ahead and go down to No. 4, the review of the Strategic Plan for 2005-07?

- Agenda Item No. 4 Review of PDSC’s Strategic Plan for 2005-07**
- 381-405 The Executive Director presented minor changes to the Strategic Plan since its adoption at the last Commission meeting.
- Agenda Item No. 5 Review of the Executive Director’s Priorities for 2005**
- 415-[Tape 1: Side B] 246 [Mike Greenfield arrived at 9:45a.m.]
- The Executive Director presented his Work Plan for 2005-06, including his priorities from PDSC’s Strategic Plan for 2005-07. The Commission approved the that Work Plan and priorities.
- Agenda Item No. 1 Approval of the Minutes**
- 259 Approval of the minutes of the February, 2005 meeting.
- MOTION:** John Potter moved for approval of the minutes; Mike Greenfield 2nd; hearing no objection, the motion passed; **VOTE 4-0.**
- Agenda Item No. 3 Approval of the Contract for the Administrator of Lane County’s New Court-Appointment System**
- 263-340 Following introduction of Marc Friedman, who is the proposed Administrator of Lane County’s new court-appointment system, and remarks by Mr. Friedman, the Commission approved the contract with Mr. Friedman.
- MOTION:** John Potter moved for approval of the contract with Marc Friedman for the Administrator of Lane County’s new court-appointment system; M. Greenfield 2nd; hearing no objection, the motion passed; **VOTE 4-0.**
- Agenda Item No. 6 Proposed Early Disposition Guidelines**
- 340-[Tape 2; Side A] 459 Following discussion of the substance of the proposed Guidelines for the Participation of Public Defense Attorneys in Early Disposition Programs, the Commission directed the Executive Director to request further input and suggestions from the Chief Justice’s Criminal Justice Advisory of Council, recognizing that the Commission reserves the right to determine whether it will consider that input and to approve the final content of the guidelines.
- Agenda Item No. 7 New Business**
- 461-480 Due to the press of business in the legislature and probable lack of new business before the Commission next month, the Commission cancelled its May 2005 meeting.
- MOTION:** Mike Greenfield moved to cancel the May 12 meeting; J. Brown 2nd; hearing no objection, the motion passed; **VOTE: 4-0.**
- 502 The meeting was adjourned at 10:55 a.m.
- MOTION:** J. Potter moved to adjourn the meeting; M. Greenfield 2nd ; hearing no objection, the motion passed; **VOTE 4-0.**

TRAVEL EXPENDITURE AND MISCELLANEOUS BUSINESS EXPENSES
POLICIES AND PROCEDURES

Applicability:

Except as otherwise noted, the following Policies and Procedures apply to all Office of Public Defense Services (OPDS) employees, members of the Public Defense Services Commission (PDSC) and non-compensated volunteers working on behalf of the PDSC or the OPDS on and after _____, 2005.

Definitions:

As used in the following Policies and Procedures:

“Budgetary Authority” means the Executive Director, or designee of the Executive Director, with the responsibility for review and approval of expenditures made from a specific budget.

“Captive Rate” means a specific rate negotiated with a conference facility.

“Commuting Distance” means the distance between the workstation and the residence personnel normally travel in order for them to fulfill their job requirements during their normally scheduled work shift.

“Fiscal Year” means July 1 of one year through June 30 of the next year.

“In-State Organization” means an organization with headquarters within the state of Oregon.

“In-State Travel” means the cost of transportation, meals, lodging, registration fees, conference fees, and related expenses incurred when on official travel status to a destination within the Oregon border.

“Lobbying” means conducting activities aimed at influencing public officials and especially members of a legislative body on legislation, including time spent meeting with other groups of individuals to solicit them to influence the outcome of legislation.

“Meal Allowance” is the monetary allotment OPDS personnel may receive for meals when on official travel status.

“Normally Scheduled Work Shift” means the scheduled 40-hour period, or other period (i.e., part-time) for which the employee is paid a salary or wage by the OPDS.

“Official OPDS Business” are those duties and responsibilities stated in the position description which the employee currently is required to perform or as assigned by the administrative authority; e.g., OPDS-sponsored/staffed committees, for which the employee's salary or wage is paid by the OPDS.

“Official Travel Status” is when OPDS personnel are authorized by their budgetary authority or designee to participate in training or are required to conduct official OPDS business which is located other than at their assigned workstation or residence.

“OPDS Personnel” means all authorized Office of Public Defense Services (OPDS) compensated employees, Public Defense Services Commission (PDSC) members, and non-compensated volunteers working on behalf of the PDSC or the OPDS.

“OPDS Personnel Expense Form” means the form that OPDS personnel use to request reimbursement and by signing, attest to the validity and accuracy of the travel expenses claimed.

“Out-of-State Programs” means any activity held outside the boundary of the state of Oregon.

“Out-of-State Travel” means the cost of transportation, meals, lodging, registration fees, conference fees, and related expenses incurred when on official travel status to a destination in another state.

“Regular Assigned Workstation” means the place of employment where OPDS personnel are assigned and normally report for work on a daily basis. Place of employment may include, but is not limited to, a specific building(s) or satellite office located in a city or other location as determined by the Executive Director of the OPDS.

“Temporary Workstation” means the place of employment where OPDS personnel may be assigned on a temporary basis for an extended period of time; e.g., special projects.

“Training” means those expenses incurred where the primary intent is to learn new information or enhance existing skills that are job/career related. Participation in programs for the purpose of obtaining Continuing Legal Education (CLE) credits is not considered training.

Policy:

General Provisions

It is the policy of OPDS to keep the cost of travel and miscellaneous business expenditures as low as feasible. All OPDS personnel are encouraged to carpool, schedule meetings at appropriate times to reduce the cost of meal allowances and lodging, and to seek discount fares. OPDS personnel shall be reimbursed for reasonable and necessary authorized expenses incurred while conducting official department business.

The budgetary authority may establish lower travel expense reimbursement levels for attendance at specific nonofficial events that are attended by the employee on a voluntary basis.

Travel must be by the most direct route. If OPDS personnel travel by an indirect route, or interrupt travel for personal convenience, the additional time or distance may not be used to calculate distance traveled or time worked.

1. Non-reimbursable Expenses --Travel expenses that are specifically not reimbursable include, but are not limited to, alcoholic beverages; entertainment (e.g., in-room movies); cost to purchase traveler's checks; travel insurance; insurance on rented cars; laundry service; shoe shines; newspapers or magazines; medications; personal vehicle insurance and related deductibles; child, pet, or household care during the person's absence; and fines and penalties assessed for action or inactions of personnel (e.g., parking tickets). Room service is allowable only to the extent it does not exceed the meal allowance.
2. Accounting and Audit Control --To maintain effective accounting and audit control, personnel are responsible for their own travel expenses. Generally, the OPDS will not reimburse one employee for another employee's travel expenditures. A deviation from this policy may be granted for expenses related to shared lodging.

Expenses incurred on behalf of others (e.g., spouses, friends, colleagues, state or another governmental personnel, and professional associates of OPDS) are not reimbursable except as specifically authorized in writing by the budgetary authority.

3. OPDS Personnel Expense Form – OPDS personnel are required to submit an OPDS Personnel Expense Form to receive reimbursement of all allowable travel expenses in accordance with this policy statement. The form should be completed by each person incurring travel expenses in an official travel status and submitted within 30 days of the date the travel concluded. Claims are required to be paid within the fiscal year to which they apply and from funds appropriated for the applicable biennium.

The OPDS Personnel Expense Form shall be completed and signed by the person requesting the reimbursement. The detail sheet is then forwarded to the budgetary authority to be signed. Original signatures of both parties are required. *Unless there is express written approval by the Executive Director to the contrary, no person shall sign the OPDS Personnel Expense Form as both the claimant and the budgetary authority or designee.*

Eligibility for Travel Expense Reimbursement

- A. To be eligible for travel expense reimbursement, OPDS personnel must be authorized by the appropriate budgetary authority or designee to be on official travel status.
- B. Non-OPDS personnel who are providing services to OPDS under contract or other agreement may be reimbursed for related travel expenses incurred as the result of providing those services only to the extent allowed by the specific contract or agreement. Reimbursement rates are subject to this policy unless other rates are specifically authorized.

Authorization to be on Official Travel Status

- A. In-State Travel – Authorization to be on official travel status and eligibility for in-state travel expense reimbursement must be granted by the budgetary authority.
- B. Out-of-State Travel – For destinations outside the Oregon border, authorization to be on official travel status and eligible for out-of-state travel expense reimbursement must be granted by the appropriate budgetary authority and the Executive Director, or designee. Requests for approval should be submitted to the Executive Director, or designee, using the “Out-of-State Travel Request” form.

Meals and Lodging Expenses

I. Meal Allowance

A. Eligibility

OPDS personnel on official travel status shall be entitled to receive the meal allowance for the meals they are entitled to under this policy, regardless of actual cost of any individual meal. Meal receipts are not required except when special circumstances exist and a budgetary authority requires them. All meal allowances are subject to the limitations stated below.

B. In-State Meal Allowance

- | | |
|--------------|---------|
| 1) Breakfast | \$ 7.00 |
| 2) Lunch | \$ 8.00 |
| 3) Dinner | \$15.00 |

C. Out-of-State Meal Allowance

1) Breakfast	\$ 8.50
2) Lunch	\$10.00
3) Dinner	\$19.50

If use of land transportation, e.g., privately owned vehicle or bus, results in significantly longer travel time than would have been incurred if commercial air carriers had been utilized, the meal allowance will be limited to the meals which would have been covered if commercial air service had been used.

D. Taxes and Gratuities

Taxes and gratuities are considered part of the meal allowance and are not reimbursed separately.

E. Partial Day Meal Allowance

On the day of departure, OPDS personnel will be eligible for the meal(s) below if they depart from their assigned workstation or residence on or before the following times.

Breakfast	6:00 a.m.
Lunch	11:00 a.m.
Dinner	5:00 p.m.

On the day of return, OPDS personnel will be eligible for the meal(s) below if they return to their assigned workstation or residence on or after the following times.

Breakfast	9:00 a.m.
Lunch	2:00 p.m.
Dinner	8:00 p.m.

F. Non-Overnight Taxable Meals

These meal reimbursements are considered a taxable fringe benefit by the Internal Revenue Code and will be reported through payroll as taxable income. Generally, a meal allowance when travel is not overnight will not be approved. Exceptions may be made when exigent circumstances exist and the approval for the meal allowance was obtained from the budgetary authority in advance of the travel.

G. Non-Overnight Non-Taxable Business Meals

When a meal is part of an official agency meeting where attendance is mandatory and the choice of the meal is not within the employee's control, a meal reimbursement may be requested by the employee. The employee should write the words "Business Meal" on the meal receipt and submit the receipt with their expense report. Reimbursement for business meals is not taxable income to the employee and will not be included in an employee's taxable income.

H. Special Circumstances

1. When meals are provided to OPDS personnel attending an official state business meeting and the cost of the meal is included in the fee, the OPDS will not pay the meal allowance for that particular meal.

2. When OPDS personnel attend an official state business meeting where the meal is an agenda item but not included in the fee and the selections and the cost of the meal is beyond the control of the employee, the employee will be reimbursed for the actual cost of that meal. An original receipt must be provided.
3. When a lodging facility offers a complimentary breakfast with a night's lodging and the breakfast offered has a wide variety of foods and is more substantial than a continental breakfast, the OPDS will not pay the meal allowance for such breakfast.

II. Lodging

A. Eligibility for Reimbursement

Authorized OPDS personnel may be reimbursed for lodging expenses if they are on official travel status and the travel requires them to be away from their residence or assigned workstation overnight:

- in order to begin business the following day or
- to conclude official business from the day before or
- are unable to return to the residence or assigned workstation within a two-hour period following the end of their normally scheduled work shift.

The return to the residence or assigned workstation is subject to the common sense judgment of the authorized OPDS personnel when considering related factors such as fatigue and weather.

Reimbursement for lodging for OPDS personnel on official travel status may not exceed the single-occupancy lodging rate.

B. Amount of Reimbursement for Lodging Expenses

The cost of "room reservation guarantees" neither claimed nor canceled will not be reimbursed by the OPDS except as specifically authorized by the Executive Director.

1. In-State Commercial Lodging

OPDS personnel should inquire about government rates. Many businesses have a lower rate for government employees. Reimbursement for lodging in Oregon is limited to the following by county:

- a. \$70.00 per night including tax: Benton, Crook, Douglas, Gilliam, Grant, Harney, Jefferson, Linn, Malheur, Marion, Morrow, Polk, Sherman, Umatilla, Wallowa and Wheeler.
- b. \$80.00 per night including tax: Baker, Hood River, Lake, Lane, Union, Wasco, Washington and Yamhill.
- c. \$90.00 per night including tax: Clackamas, Clatsop, Columbia, Coos, Curry, Deschutes, Jackson, Josephine, Klamath and Tillamook
- d. \$100.00 per night including tax: Lincoln and Multnomah

2. Out-of-State Commercial Lodging

Reimbursement for single-occupancy rate lodging when traveling out-of-state is limited to the actual amount spent. Travelers are expected to obtain lodging at a reasonable rate for the area visited.

3. Captive Rates

When authorized OPDS personnel are attending a conference or seminar that is being held within or near specified hotels or motels, reimbursement for lodging expenses will not exceed the negotiated group (captive) rate for single occupancy, plus tax, irrespective of the limits in 1. and 2., above, unless specifically authorized by the budgetary authority.

4. Noncommercial Lodging Allowance

Noncommercial lodging allowance is for overnight travel when OPDS personnel do not use commercial lodging. Authorized OPDS personnel shall receive an allowance of \$25 per day for overnight lodging while on official travel status.

5. Direct Billing

With the approval of the budgetary authority, OPDS personnel may have a lodging facility bill OPDS directly for lodging only. Meals, telephone, and other non-lodging costs charged to the room shall be paid by the individual at the time of check-out.

III. Combining Official Business With Personal Business

When authorized OPDS personnel are combining official business travel with a holiday, weekend trip, vacation, or other personal travel, reimbursement for the allowable travel expenses will be based on the least expensive reasonable means of transportation, lodging rates for single occupancy (or captive rate if attending a conference), and the meal allowances to which OPDS personnel would normally have been entitled had there been no combination of travel.

When OPDS personnel are away on official business on a Friday and the business will continue on Monday, if it is more economical for the OPDS to pay allowable travel expenses for non-work days rather than pay transportation expenses, considering also the OPDS personnel's time, then the OPDS will pay allowable travel expenses for these days.

IV. Receipt Requirements

All OPDS personnel eligible to receive travel expense reimbursement while on official travel status are required to provide original receipts for commercial lodging, membership dues, registration fees, conference fees; commercial rail, bus or rental car travel; and any other miscellaneous allowable expenditures which individually exceed \$25.

Any expenses claimed for non-travel related purchases (e.g., supplies) must be accompanied by an original receipt regardless of the amount.

OPDS personnel are required to submit receipts for event-sponsored meals which exceed the meal allowance and are not included in the registration fees.

Original receipts must show merchant's name, amount, detailed description of purchase, and date. When receipts cannot be obtained or have been lost, a statement to that effect shall be

made on the OPDS Personnel Expense Form and the reason given. In the absence of a satisfactory explanation, the amount involved may not be allowed. Credit card receipts will not be accepted as a substitute for an original receipt unless the receipt is electronically generated with complete details of the purchase (e.g., daily room charge and dates).

V. Transportation Methods

The methods of transportation discussed below may be used for in-state or out-of-state travel. As a general policy, the method of travel shall be the least expensive, feasible method and shall be approved in advance by the appropriate budgetary authority or designee.

OPDS personnel, for purposes of commuting between their assigned workstation and residence for their normally scheduled work shift, shall not use a state-owned vehicle for such commute nor receive reimbursement for transportation costs.

OPDS personnel whose assigned workstation or residence is within a one-mile round trip of their destination are not eligible to use a state-owned vehicle, receive mileage reimbursement for use of their privately owned vehicle, or receive reimbursement for parking expenses.

A. Common Carriers

1. Airlines

The OPDS uses the State of Oregon's contracted fares. Employees are to contact the Contract and Business Services Division (CBS) for information regarding the procedure to obtain airfare. If the employee is able to find a fare lower than the contracted fare, an exception to the state contract fare will be requested by CBS. All personnel shall fly coach class regardless of funding source. First-class travel is not permitted.

2. Railroads and Buses

Travel by rail or bus is allowable provided it is less costly than other forms of transportation. If use of these forms of transportation results in significantly longer travel time than would have been incurred if commercial air carriers had been utilized, the meal allowance will be limited to the amount which would have been incurred if commercial air service had been used.

B. Automobile Transportation

Any traffic tickets, parking violations, and other related costs will be the responsibility of the employee and will not be reimbursed by the OPDS for either state-owned vehicles, rented vehicles, or private vehicles used while conducting official business.

1. Use of State-Owned Vehicles

State-owned vehicles may be used when on official travel status for official business in-state or out-of-state when it is more economical than using a privately owned vehicle or when a privately owned vehicle is not available or reliable. Carpooling in state-owned vehicles should be used whenever practical. Use of state-owned vehicles for purposes of commuting between the residence and assigned workstation or for any purpose other than official OPDS business is not authorized and is considered vehicle misuse by the OPDS. There may be occasional instances where OPDS personnel on official travel status benefit the state by leaving from their residence rather than their official workstation or motor pool. Good judgment should always be exercised and these decisions documented.

2. Privately Owned Vehicles

a. Authorization

The budgetary authority or designee may authorize OPDS personnel to use privately owned vehicles for official travel status when such travel is more practical because of cost, efficiency, or work requirements.

b. Insurance

OPDS personnel operating their privately owned vehicle: (a) must carry motor vehicle liability insurance on their vehicle with at least minimum coverage limits pursuant to ORS 806.070, and (b) should verify with their insurance agent that their private vehicle is insured for use when conducting official business.

Physical damage or collision or loss to their private vehicle is not covered by the state or reimbursable by the OPDS. Private auto insurance deductibles are not reimbursable. The mileage reimbursement rate includes the proportionate cost of the individual's insurance in addition to gasoline and maintenance costs.

Workers compensation insurance is provided the same as if the individual is using a state vehicle on state business.

c. Reimbursement Rate

Employees will be reimbursed at the state employee mileage rate OR will be reimbursed for the cost that would have been incurred in using a state-owned vehicle, whichever is less.

d. Allowable Mileage

When official travel status is undertaken during the normally scheduled work week (e.g., Monday through Friday) and the point of departure is other than the assigned workstation, mileage reimbursement shall be based on the point of departure or the assigned workstation, whichever is closest to the official travel status destination.

When official travel status is undertaken during non-scheduled work days (e.g., Saturday or Sunday) mileage reimbursement begins at the point of departure from the assigned workstation, residence, or other location and ends upon the return to the assigned workstation, residence, or other location.

Travel must be by the most direct and usually traveled route from the point of departure to the official travel status destination. The standard mileage chart or actual odometer reading shall be shown on the OPDS Personnel Expense Form for the distance traveled between the point of departure and the official travel status destination. The mileage chart will be used to audit actual mileage claimed. Any substantial deviation between the odometer reading and the standard mileage chart must be satisfactorily explained. In addition:

- 1) If OPDS personnel travel by an indirect route, or interrupt travel for personal convenience or other personal pursuits, OPDS personnel will bear the extra expense.
- 2) When OPDS personnel are authorized to be on official overnight travel status, local travel between the lodging facility, restaurant, and official travel

status destination shall be shown on the OPDS Personnel Expense Form as a separate line item in order to differentiate between local mileage and direct route mileage.

- 3) If a privately owned vehicle is used for out-of-state travel, the total reimbursement shall not exceed the lowest cost of a round trip airline ticket plus reasonable and customary airport expenses such as a taxi or airport parking.
- 4) If carpooling in a privately owned vehicle, the driver is presumed to be the owner of the vehicle and shall receive the allowable mileage reimbursement. Passengers are ineligible to receive mileage reimbursement.

3. Rental Cars

The OPDS will reimburse vehicle rental fees. OPDS personnel must arrange for a car rental through the State of Oregon's contract. Personnel are to rent compact or compact-sized economy vehicles, unless there is a compelling reason to rent a larger vehicle and approval by the budgetary authority is received prior to travel. Employees are to contact CBS for information regarding the procedure to obtain a rental car.

OPDS personnel should not purchase optional insurance when renting cars since the state self-insurance program provides needed coverage. If such optional insurance is taken, it will not be reimbursed. A Certificate of Insurance may be obtained from the Risk Management Division, Department of Administrative Services, if required by an auto rental agency.

4. Necessary Taxis and Other Hire Cars

OPDS personnel will be reimbursed for reasonable and necessary taxi and other hire-car travel expenses when on official travel status.

5. OPDS personnel authorized to use a state vehicle, other rental vehicle, or a privately owned vehicle for official travel status must possess a valid driver's license.

VI. Miscellaneous Travel Expenses

A. Telephone Calls

Business calls made while OPDS personnel are on official travel will be reimbursed upon itemization of the expense, including telephone number and person or business contacted. In addition, OPDS personnel away on official overnight travel status are allowed up to \$5 per day for personal calls.

B. Parking Fees

OPDS personnel may be reimbursed for parking fees incurred while on official travel of over one mile round trip. Receipts are required for expenses of \$10 or more.

C. Highway and Bridge Tolls

OPDS personnel may be reimbursed for highway and bridge tolls paid while on official travel status. Receipts for these expenses are not required.

VII. New Employee Relocation Expenses

With prior approval of the Executive Director, expenses incurred by a new employee of the OPDS related to relocating to Oregon from another state may be paid. The amount of reimbursement shall be determined on a case-by-case basis. Relocation payment requests must be processed by the Personnel Division through the Oregon State Payroll System (Internal Revenue Code Section 132, Omnibus Reconciliation Act of 1993 and IRS Announcement 94-2 dated 12-22-93).

VIII. Job Interview Expenses

With prior approval of the Executive Director, allowable travel expenses related to a prospective employee may be reimbursed at in-state rates.

IX. Employee Break Room Supplies and Equipment

The OPDS will not pay for the purchase of personal items that are for employee break rooms, such as plastic utensils, paper towels and dish soap.

The OPDS will not pay for bottled water and/or water dispensers unless the water at the facility has been officially tested and found to be unsafe for drinking purposes.

The division manager may submit a written request to the Executive Director for an exception to this section.

X. Recognized Work-Related Associations or Organizations for Employees

A. Authorization for employees to have membership dues or registration fees paid by the OPDS is subject to the following conditions:

1. the person must be a regular employee of the OPDS (not a temporary), and
2. the membership must be:
 - a. for an association or organization which is directly related to the employee's current position with the OPDS, or
 - b. membership is required in order for the employee to discharge their current duties and responsibilities to the OPDS (e.g., an employee in the position of accountant is not eligible to receive OPDS-paid membership to the American Institute of Certified Public Accountants nor is a person employed as a paralegal or in any position not requiring a law degree automatically eligible to receive OPDS-paid membership to the Oregon State Bar).

Exceptions may be based, as approved by the Executive Director or budgetary authority, on the added value that an employee's membership credentials brings to the execution of the duties or responsibilities of the position or to the organization.

B. Charges or fees for social events, charitable organizations, lobbyist activities, and section membership (e.g., Oregon State Bar Section Membership, Oregon Law Foundation) will not be paid by the OPDS unless membership or attendance has been expressly requested, approved, or required by the Executive Director. The request for membership or attendance must be documented in writing.

- C. Requests for payment of membership dues, registration fees, or other authorized fees must be received by the CBS at least 20 working days before the due date in order to ensure a timely remittance to the association or organization.

Employees are responsible for ensuring the timely remittance of all dues or fees payable to any work-related organization or association. Payment of all late charges or fees is the personal responsibility of the employee. Only the Executive Director, or designee, can authorize an exception.

- D. The OPDS will not reimburse expenses for out-of-state programs sponsored by in-state organizations unless the organization is joining a parallel organization in the state where the program is held and there is an agreement with the other state to alternate states for the program. Any other exception must be authorized by the Executive Director or designee.

SUMMARY OF REVISIONS
PUBLIC DEFENSE PAYMENT POLICIES AND PROCEDURES
June 2005 PDSC Meeting - If approved, to be effective 7/1/05

Additions underlined. Deletions [bracketed].

Section 1.5.2 - Caps on Co-Counsel Hours *Proposed new wording requires counsel to obtain preauthorization.*

Lead counsel may request preauthorization of an increase in the original cap on co-counsel hours by submitting a letter to the OPDS setting forth the name of co-counsel, date on which co-counsel was appointed by the court, the number of hours approved by the court, the number of additional co-counsel hours requested, and a statement of why additional co-counsel hours are necessary and reasonable in the particular case.

Section 2.2.2 - Compelling Circumstances (for increased hourly rate) *Proposed deletion of d) from section describing those circumstances which are not compelling.*

Circumstances that are *not* compelling include:

- a) the scheduled rate is less than counsel's standard billing rate;
- b) the case or client is difficult or unpopular unless that fact may cause counsel substantial financial hardship at the scheduled rate; and
- c) counsel has received higher rates in other public defense cases[; and
- d) the court is unable to find qualified counsel at the scheduled rate].

Section 2.6.2 - Interim Billings, All other Case Types *Revisions made so that a single interim billing may be approved, rather than multiple interim billings throughout the pendency of the case.*

As a general policy, the OPDS will not pay interim requests for attorney fees and expenses unless the OPDS has authorized interim billing. An interim request is any request submitted before appointed counsel has completed all services in a trial-level case; for appellate cases, an interim request is a request submitted prior to filing the original brief. An exception to this policy will be made when sentencing is delayed more than 60 days after a finding of guilt or entry of plea.

To request approval for interim billing, counsel must submit a letter to the OPDS. The request must document the compelling reasons that warrant authorization [of] to submit an interim billing[s] (e.g., a case has been pending for greater than six months). The OPDS will review counsel's request and will confirm in writing the decision and the terms of any exception the OPDS has allowed.

An [Each] interim billing will be reviewed on its own merits. When approving final payment requests, the OPDS will not reduce earlier-approved amounts except to:

- a) correct arithmetic or clerical errors; or
 - b) ensure total representation costs are not excessive.
- [If the OPDS allows an exception, counsel must submit separate billings for interim payment.

For each billing counsel must submit the fee statement form required of assigned counsel in other cases. Monthly billings are encouraged.]

An [Each] interim billing must include a statement that lists each of the following:

- a) limits (caps) set on fees, hours, or expenses, if any;
- [b) amounts paid and incurred to date for fees and expenses; and]
- b) [c)]amounts remaining within any limits.

The final request for payment also must include a statement of the total time spent for services rendered and the total fees requested in the case.

Section 3.2.2 - Routine Expenses for Assigned Counsel *Section b) revised to be more specific and to allow a one-hour minimum for non-certified interpreters. Removes the distinction between foreign language and sign language interpreters. Section h) revised to broaden the definition of "routine mileage". Section j) revised to require documentation of on-line research time.*

- b) Interpreter Services: For out-of-court attorney/client communications, counsel should use interpreters who are certified by the Office of the State Court Administrator, under ORS 45.291. If no certified interpreter is available, counsel should use a qualified interpreter, as defined in ORS 45.275(8)(b).

If the hourly rate for interpretation is within the guideline amount, and the service is for attorney/client communication, the services of an interpreter need not be preauthorized.

The OPDS will pay the hourly rate shown in the schedule for [foreign language] interpreters. In addition, the OPDS will pay travel time at one-half the current hourly rate and mileage at the current reimbursement rate. For [foreign language and for sign language] interpreters whose rates exceed the guideline amount, counsel must request preauthorization from the OPDS.

The OPDS will pay a one-hour minimum [for certified interpreters] if the appointment requires less than one hour of the interpreter's time. Travel time may be claimed in addition to the one-hour minimum.

Other interpreter services not related to attorney/client communication, such as translation and transcription of recorded interviews [written documents] or interpreter services to assist an investigator, must be preauthorized.

- h) Routine Mileage and Parking: Routine mileage does not include travel between office and courthouse when office and courthouse are within the same county unless specifically preauthorized. Parking costs, when the travel qualifies for mileage payment, may be reimbursed in an amount not to exceed the guideline amount shown in the schedule.

Section 3.3.4 - Services Ordered on the Court's Own Motion *ORS 161.365 allows the court to order a psychological evaluation, the cost to be paid from the PDS Account, if the defendant has court-appointed counsel or is without counsel but is eligible for expenses when the court is not able to determine if the defendant is able to aid and assist. No approval from the OPDS is necessary. For any other non-routine expense, court-appointed counsel or a person who is*

eligible for but is without court-appointed counsel must seek pre-authorization by the OPDS. There should not be any other expense, other than an aid and assist psychological evaluation allowed by ORS 161.365, ordered on the court's own motion. The section below would be deleted.

[If services are provided at the court's request *on the court's own motion* (or at the request of a client without counsel) and are properly payable from the PDS Account, the provider must obtain from the OPDS an authorization for the service.]

Section 3.4.1.1 - Rate (for transcripts) *Revision allows for reimbursement of delivery by means other than the USPS as long as the provider uses the most economical method available. Prohibits payment for expedited delivery. Deletes section which requires the scheduled rate to apply to all transcription services.*

For transcripts of court proceedings or other reporting services when requested by appointed counsel, the OPDS will pay *no more* than the scheduled rate per page for the transcription, creation and production of one original. Additional copies produced are paid at the rate shown in the schedule. In circumstances where an original transcript of a court proceeding has already been prepared (e.g., co-defendants tried together, consolidated hearings for multiple cases), the OPDS will compensate the transcriber for production of a subsequent "original" transcript at the guideline rate for copies of transcripts. The cost to send [mail] a transcript may be reimbursed when the expense is supported by a receipt. The provider should use the least expensive method available. Express mail or other delivery services that charge a higher rate for expedited service will not be reimbursed.

[The scheduled rates apply regardless of whether:

- a) the transcript is for appeal or other purposes;
- b) the court reporter is an official court reporter or "unofficial" court reporter (as defined in the Oregon Judicial Department Policy Statement on Court Reporters), or an independent contractor.]

3.4.1.3 - Number of Originals/Copies (of transcripts) *Revision deletes the automatic approval of payment for one original and two copies for post-conviction relief cases.*

In an appeal [or postconviction relief proceeding] where an appellant/petitioner who qualifies for a state-paid transcript has requested a transcript, the OPDS will pay for the transcription, creation and production of one original and two copies. When more than one appellate case is filed resulting from the same trial court proceeding or in juvenile appeals where there are multiple parties on appeal, the OPDS will pay for a sufficient number of copies so that counsel for each party to the case has one copy of the transcript.

Section 3.4.4- Investigation/Mitigation *Revision clarifies when parking expenses will be reimbursed.*

- c) Case-related mileage at the guideline amount. Parking costs when incurred during routine travel may be reimbursed in an amount not to exceed the guideline amount.

Section 3.4.10.3 - Airfare and Vehicle Rental *Adds rental vehicles to this section. Clearly states the requirement to seek an exception to the state contract prior to incurring the expense.*

Arrangements for airfare and vehicle rental must be made through the OPDS. When a request for airfare or vehicle rental is preauthorized, the OPDS will notify the travel agency having the state contract that the [airfare] expense for the provider has been approved. The OPDS will provide the travel agency with the pertinent information regarding the trip. The attorney or other provider must contact the travel agency to make [the] those travel arrangements [for the flight]. Authorizations for these expenses [airfare] expire after 30 days. The cost of airfare is billed directly to the OPDS. Vehicle rental expenses must be paid by the person authorized for travel and submitted for reimbursement after completion of the trip.

If a provider requests authorization and receives approval to purchase a ticket or rent a vehicle outside the state contract, the OPDS will approve such a request only in accordance with the state contracts for airfare and vehicle rental [services]. An exception to purchase a ticket or rent a vehicle outside the state contract must be sought and granted prior to incurring the expense. If an exception is approved for airfare, the provider should also obtain cancellation insurance. Additional costs incurred because the provider failed to obtain cancellation insurance are not reimbursable.

Section 3.4.10.4 - Mileage and Parking *Clarifies reimbursement for parking expenses related to non-routine travel and removes the dollar limit.*

Reimbursable mileage is paid at the guideline rate shown in the schedule. Parking costs[, when mileage is approved,] may be reimbursed without specific preauthorization [in an amount not to exceed the guideline amount] if the travel qualifies for mileage reimbursement or if other travel expenses have been preauthorized. Submission of an original receipt is required if the cost per day exceeds \$5.00.

If a private vehicle is used for a trip involving out-of-state travel, the OPDS will pay the lesser of mileage or the lowest cost of a regular-fare, round-trip coach airline ticket between the travel destination and airport nearest the traveler's home.

Section 3.4.10.5 - Meals *Allows for a meal allowance when lodging would have been reasonable and necessary, but the traveler chose not to incur that expense.*

Generally, a meal allowance will be approved only when lodging is authorized. Receipts for meals are not required. Meal allowance amounts should be entered on the Travel Claim Worksheet. An exception may be granted if the traveler's departure or return time and the distance traveled are such that lodging would have been justified.

Future and Recent Revisions to Exhibit 3 - Schedule of Guideline Amounts *The Commission gave their approval for revisions to exhibits to the policy without their having to review and approve each. Revisions to clarify, add or update are described below.*

The guideline amount for mileage reimbursement will be increased from \$0.325 to \$0.405 cents per mile for travel on and after July 1, 2005. This is the rate currently paid by other state agencies.

Guardian Ad Litem was added to the list of non-attorney fees with a cap of \$40 per hour.

The amount reimbursed for routine service of process was increased from \$25 to \$30.

Several types of routine expenses not previously included in the Schedule of Guideline Amounts were added, such as in-house photo production and OJIN Online usage.

Addition of Section 1.7

1.7 Substitution of Appointed Counsel

1.7.1 Need for Consultation with the OPDS

A court may substitute one appointed counsel for another only when:

- (a) in the exercise of its discretion, the court determines that appointed counsel who is seeking to withdraw cannot ethically continue to represent the client and, except as described in Section 1.7.2, the court consults with the OPDS regarding counsel to whom the case will be assigned, or
- (b) in other circumstances, when the interests of justice so require, and after consultation with the OPDS regarding the need for substitution of counsel and counsel to whom the case will be assigned.

1.7.2 Reassignment within Public Defender Office, Law Firm or Consortium

The court need not consult with the OPDS regarding counsel to whom the case will be assigned if appointed counsel and counsel to whom the case will be assigned are part of the same public defender office, law firm, or consortium under contract with the PDSC.

1.7.3 Limits on Matters Which May be Discussed Regarding Need for Substitution

In consultation with the court regarding the need for substitution, the OPDS may only:

- (a) obtain information regarding the reasons for substitution;
- (b) obtain information which may affect public defense planning in future cases;
- (c) provide information to the court regarding the cost of substitution; and
- (d) discuss options available to the court in terms of counsel to whom the case might be assigned and cost factors related to each option.

1.7.4 Consultation Regarding Substitutions for Case Types

Consultation between the court and the OPDS may include discussion of the procedure for handling substitutions in a category of case types as well as the procedure in an individual case.

Draft Report of the PDSC's Conflicts Work Group

Management of Conflicts of Interest and Substitutions of Counsel in Public Defense Cases
Conflicts Work Group Recommendations
May 2005

Brief Background

At the November 18, 2004 meeting of the Public Defense Services Commission (PDSC), Chair Barnes Ellis requested that Ann Christian convene a Conflicts Work Group to explore and propose more effective methods to manage conflicts of interest, withdrawals and substitutions of appointed counsel. The primary purpose of the work group was to identify implementation ideas to:

- reduce the number of “avoidable” withdrawals and generally, substitutions of appointed counsel;
- reduce the number of instances where counsel seeks to withdraw from representation relatively late in a case; and
- reduce the number of instances where public defense clients request to fire their appointed counsel.

Creation of such a work group was one of 13 recommendations made by Ann Christian in her November 12, 2004 report to the PDSC. That report is referenced hereafter as “Preliminary Review” and is attached for reference.

No one who was asked to serve on the work group declined or even hesitated to serve. Paul Levy agreed to co-chair the work group. Among many things, Paul is one of the state’s experts on the issue of former client conflicts and other ethical issues related to criminal and public defense, a member of the State Bar’s (OSB) Legal Ethics Committee, and the Attorney Trainer for Metropolitan Public Defender (MPD). In addition to Paul and Ann Christian, the following individuals volunteered their time, expertise, real life experiences, and insight to the work group effort.

Kathryn Aylward, Director, Contract and Business Services Division, Office of Public Defense Services
Downing Bethune, Attorney, Multnomah County Indigent Defense Consortium

Deb Burdzik, Private Bar Attorney, Multnomah and Washington Counties, former MPD attorney

Alex Hamalian, Administrator/Attorney, Rose City Defense Consortium and Private Bar Attorney
(Multnomah and Tillamook Counties)

Greg Hazarabedian, Executive Director, Public Defender Services of Lane County, Inc.

Bruce Liebowitz, Administrator/Attorney, Portland Defense Consortium and L & L, Inc.

Angel Lopez, President/Attorney, Portland Defense Consortium and Attorney, L & L, Inc.

Julie McFarlane, Supervising Attorney, Juvenile Rights Project, Inc.

Caroline Meyer, Analyst, Contract and Business Services, Office of Public Defense Services

Garrett Richardson, Senior Staff Attorney, Multnomah Defenders, Inc.

The Conflicts Work Group met monthly beginning in January 2005 and ending in May 2005.

Work group members understood the importance of and historical reasons for addressing issues revolving around conflicts and substitutions, both real and perceived. Members worked to best determine at least for Multnomah County and likely statewide the following:

- What potential issues are real, most significant, capable of improvement with minimal resources and change for public defense and the courts, and within the ability of the PDSC to effect or at least seriously influence? For example and discussed later in this report, education and training for public defense providers regarding conflicts, best practices for contractors including keeping data and monitoring individual attorneys' withdrawals, ensuring early and regular contact with clients, and early review of discovery and to a certain degree early provision of discovery.
- What potential issues are real, but not of greatest significance, at least at this time or within the work group members' collective experience? For example, additional provider resources to immediately check discovery upon receipt.
- What potential issues are real and of great significance, but not within the PDSC's ability to effect or seriously influence -- at least in the relative near future? For example, the mental health and substance abuse specter of many public defense clients in a criminal justice versus mental health system and the ease of physical access to in-custody clients.

The work group's recommendations are set forth at the conclusion of this report and are structured in two phases.

The first phase identifies and recommends those measures and best practices that we believe are most likely to most effectively and efficiently result in the greatest reductions in the number of withdrawals/substitutions and the lengths of time between appointment and withdrawal. That is, they are the best recommendations the work group can provide to the PDSC and Office of Public Defense Services (OPDS) for implementation of improvements and changes in the *near future* that will be most effective and least extreme or financially or resource expensive to PDSC or providers.

Next, the work group's second phase recommendations include additional measures for possible consideration in the future, if determined necessary after assessing the impact and effectiveness of more easily implemented and effective measures and practices recommended as Phase 1.

This draft report was prepared by Ann Christian. It has been reviewed by the co-chair and other members of the work group. It has been submitted for review and comment by the OPDS Contractor Advisory Group and others. The draft report will be an agenda item for discussion at the PDSC's June 16th meeting in Bend. Written comments and input received from members of the Contractor Advisory Group and others will be included with the report for additional discussion and action at the PDSC's July 13, 2005 meeting.

New Information, Improvements and Corrections Since the November 12, 2004 Preliminary Report

1. *New Oregon Rules of Professional Conduct (RPC) Relevant to Conflicts, Withdrawals and Substitutions of Counsel*

Note: The full text of the RPCs listed below is provided in Appendix A to this report.

- a. Rule 1.9 (Duties to Former Clients) and Rule 1.10 (Imputation of Conflicts of Interest to Firm) and Revisions to OSB Formal Opinion No. 2003-174

As discussed in Paul Levy's article in the September/October 2004 issue of *The Oregon Defense Attorney* (Appendix B) and the Preliminary Review at pages 8-12, former client conflicts are likely the most prevalent reason for attorneys filing motions for substitution of

counsel. And they likely are the most fertile ground for improvement with respect to the number of cases in which counsel withdraws. We recommend at the conclusion of this report that attention and resources be devoted within contract offices and on a statewide basis to educating and assisting attorneys in determining former client and other ethical issues.

There is important and very promising information to report on the former client front within the following context – common for many Multnomah County and other public defense contractors: the attorney who represented a firm’s former client is no longer with the firm, but the former client’s file remains with the firm (frequently, housed off-site).

OSB Formal Opinion 2003-174 (interpreting DR 5-105 and this fact situation) and the November 12, 2003 Written Advisory Ethics Opinion issued to MPD require the newly appointed attorney to pull the former client’s old file and review the file to determine whether there is a “matter specific” or an “information specific” conflict. Not only is this time-consuming, but upon review, the attorney possibly (or possibly not) learns adverse information that neither she nor any other attorney in the office would likely ever be aware of had the file not been pulled and reviewed.

As Paul Levy first suggested, new Rule 1.10 appears to change the imputation of information contained in an old, closed file where the attorney who represented the former client is no longer associated with the firm. (See the comparison of the provisions of former DR 5-105(J) and new Rule 1.10 at page 10 of the Preliminary Report.) As a member of the OSB Legal Ethics Committee, Paul has been instrumental in the final form of the revision of Formal Opinion No. 174.

It now appears likely the committee, at its June 11th meeting, will adopt a revised Formal Opinion No. 2005-174 and forward it and other revised opinions to the Board of Governors (BOG) for final adoption. BOG meetings are next scheduled for June 24 and August 19.

The revised opinion Paul anticipates will be adopted by the committee and the BOG provides there is no former client conflict where the attorney who represented the former client is no longer with the firm, so long as no lawyer remaining at the firm has protected confidential information and provided the files of the former client are in storage and appropriate safeguards are in place to prevent access to those files by any lawyer of the firm during the pendency of the new client’s case.

The anticipated revised opinion No. 2005-174 also will specifically address the albeit rare but not previously adequately addressed issue of a potential former client “matter-specific” conflict where a former client remains on probation and the new representation of the new client may adversely affect the former client’s probation. See Paul’s article, page 7. The present draft concludes, after discussion, that the former client on probation scenario does not involve a matter-specific former client conflict.

b. Other New RPCs Relevant to Conflicts and Withdrawals/Substitutions

In addition to recommending education and training to public defense providers on the topic of former client conflicts, the work group notes the following new RPCs that more explicitly address issues such as communication with clients and attorneys’ ethical responsibilities with respect to clients with diminished capacity. Both of these issues are common in defendants’ requests for substitution of counsel. Future education and

training should include these topics and may also serve as an opportunity to refresh providers' knowledge of the OSB's "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases" which already have provisions regarding client communication and accommodation of special circumstances of a client, such as youth, mental or physical disability, or foreign language barrier.

Rule 1.4 – Communication – see full text in Appendix A and see "Keeping in the Loop Communication is the key", OSB Bulletin, May 2005.

Rule 1.14 – Client with Diminished Capacity – see full text in Appendix A.

Rule 1.16 – Declining or Terminating Representation. The portion of this new rule with respect to withdrawing from representation appears to be effectively the equivalent of DR 2-110 Withdrawal from Employment (mandatory and permissive). The new rule does however explicitly provide the following in the case of a *permissive withdrawal* for good cause which was not provided in the text of DR 2-110: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

Rule 5.2 – Responsibilities of a Subordinate Lawyer. Of particular interest is (b) "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

Encouraging and adopting as a "best practice" regular consultation with supervisors or fellow attorneys on issues of conflicts of interest and withdrawals/substitutions is one of the work group's recommendations. Rule 5.2 supports this recommendation and should be actively used to provide protection at least for the subordinate attorney in determining to remain on a case.

2. Recent Relevant Cases

- a. *In re Complaint of Knappenberger*, 338 Or. ___ (2005-015), Oregon Supreme Court decision, filed March 24, 2005.

Issue #1 When an attorney conducts only an initial consultation with an individual (i.e., the attorney is not formally retained), is that individual a "former client" for purposes of DR 5-110 or merely a "prospective client"? The Supreme Court noted the following facts about the initial consultation to support a factual determination that the individual was a former "client" for purposes of DR 5-110:

- the consultation was approximately two hours;
- counsel provided substantive and legal advice on various aspects of the matters discussed;
- both counsel and the individual believed the consultation was confidential;
- both counsel and the individual expected payment to be made for the consultation;
- counsel never told the individual he was not the attorney's client, that the individual should avoid disclosing confidential information to him, or that the creation of a lawyer-client relationship would be deferred until some later date.

Although of likely limited application to most public defense providers, the new rules have a provision, Rule 1.18, regarding duties to prospective clients. This rule, included in

Appendix A, permits an attorney to have substantive discussions with a prospective client and then be screened if the firm is not hired and later becomes adverse to the prospective client. The rule obviously does not help a solo practitioner.

Issue #2 Does the fact that an attorney (in this case, a busy, solo practitioner) does not recall someone as a former client relieve the attorney of the duty to conduct a conflicts check prior to accepting employment from a prospective new client? Although the answer to most is evident, it is worth noting how the Court described a lawyer's responsibility to perform conflicts checks.

"... he had no real procedure for checking for conflicts. The accused did not conduct routine 'conflicts checks' to determine whether the representation of a potential new client might present a conflict. He kept a client address list, to which he added the names of potential clients if he thought that they might become clients. However, the accused checked his list or other files only when his memory alerted him to a potential problem. In our view, a lawyer in the accused's situation may not rely solely on his or her memory to avoid prohibited conflicts of interest."

- b. *State v. Estacio*, 199 Or. App. ___ (2005-134), Court of Appeals decision filed April 13, 2005, petition for review filed May 18, 2005 (S52440). Opinion attached as Appendix C.

The work group was able to review and at least begin discussing this recent Court of Appeals opinion at its final meeting in May. Although one could read the opinion to suggest there will be more frequent substitutions of counsel (at the defendant's request) granted, as well as more frequent attorney motions to withdraw once a client files a complaint against the attorney with the OSB, we believe the court's opinion should not so necessarily result.

There are however issues that require additional research, thought and discussion. Consideration of the following also need to be incorporated into discussions and review of the *Estacio* opinion. A client who files a bar complaint reportedly waives attorney/client privilege, at least to the extent the attorney determines necessary to defend against the complaint. Attorney disciplinary files generally are available to the public. Any colloquies between counsel and the court on the issue of the allegations contained in a bar complaint (necessary for the court to make a "full inquiry" in order to determine whether to allow a defendant's request for substitution of new counsel) need to be on the record for purposes of appeal, but covered by "protective orders" in instances where information disclosed may be adverse to the client in terms of the present prosecution or potential re-trial following a successful appeal or post-conviction relief matter. Work group member Alex Hamalian has a current case on remand from the Court of Appeals that involves many of these issues.

The co-chairs of the work group will consult with others and further review and research the issues raised by the *Estacio* opinion. An addendum on this topic will be provided for consideration at the PDSC's July 13th meeting.

3. *Centralized Data and How Big is the Conflicts/Withdrawals “Problem”?*

a. Background

The Preliminary Review noted the need for better data on withdrawals/substitutions of counsel; i.e., data on the number of cases in which counsel withdraws, the length of time between appointment and withdrawal, the number of successive substitutions in a single case and the reasons for withdrawals. Better data is necessary to factually assess the extent to which there is what has been termed the conflicts/withdrawals “problem.” Good data is necessary to address the concerns raised during the course of the recent review of Multnomah County completed by PDSC Executive Director Peter Ozanne/OPDS and concerns raised by some prosecutors and others in other counties. Such concerns generally include that there is a “gray market” in conflicts cases, that some attorneys use withdrawals to help manage their caseloads, and that last-minute withdrawals and substitutions cause delays in court proceedings.

The Preliminary Review recommended a survey be distributed for completion by public defense contractors to collect benchmark data. At its first meeting, the work group discussed the need for such data and reviewed the draft survey that was included in the Preliminary Review. The Portland Defense Consortium agreed to complete both parts of the survey to determine the amount of time required to answer the questions and provide the detailed case data. The survey questions generally addressed contractors’ practices and procedures surrounding conflicts checking and issues such as receipt of discovery.

At the work group’s February meeting, PDC reported that completion of the survey questions by the administrative office alone (not the individual consortium law offices) took one and one-half hours. The data compiled by PDC was extensive and clearly supported one of the advantages of a consortium in general -- the fact conflicts cases can be managed and reassigned within the consortium at no additional cost – and showed that substitutions outside of PDC indeed were minimal (three in a two-month period). There was discussion about what the survey’s data requirements did not provide (for example, information on multiple, successive substitutions) and other concerns.

In lieu of going forward with sending the survey out to all contractors statewide, the work group decided to conduct a survey of all OCDLA members regarding the time frames within which discovery is provided (see Appendix D), address the survey questions as a group (roundtable style), and work with existing data at the Contract and Business Services Division (CBS).

Because CBS now receives monthly appointment reports electronically from essentially all contractors and after brainstorming a methodology, CBS Director Kathryn Aylward was able to produce data for the:

- percentage of cases in which there is a substitution of counsel;
- number of cases in which there are multiple, successive substitutions of counsel (other than those within a contract consortium where no additional payment/case credit occurs); and

- times within which withdrawals/substitutions occur.

This data does not provide information on the “reasons” for withdrawals/substitutions. In our recommendations, we suggest that information on “reasons” is best compiled and maintained internally by contract providers. That information then would be available to CBS, upon request, under current contract provisions.

b. Number of Substitutions of Appointed Counsel (other than within a consortium) and Number of Cases with Multiple Sequential Substitutions

Data from CBS appointment records and methodology. Case appointment information was compiled in a data base for all contractors and private bar for criminal, contempt, extradition, post-conviction relief, and habeas corpus cases (i.e., juvenile and probation violation excluded) for the “core” time period January 1, 2004 through June 30, 2004. Of these appointments, appointment data for the previous six months (July 1, 2003 through December 31, 2003) and the subsequent six months (July 1, 2004 through December 31, 2004) was reviewed to determine the number of cases during the original six-month period that had an appointment of counsel (outside of substitutions within consortia) during the entire 18-month time period.

Of the case appointments during the core six-month appointment time period:

- 4.6% had one or more previous or subsequent appointments within the 18-month period *statewide*; and
- 6.3% had one or more previous or subsequent appointments within the 18-month period in *Multnomah County*.

Statewide, of the 40,457 case appointments during the core six-month appointment time period (again, not including internal consortium substitutions):

- five cases had a total of four attorneys appointed – that is, three substitutions of counsel;
- 100 cases had a total of three attorneys appointed – that is, two substitutions of counsel; and
- 1,771 cases had a total of two attorneys appointed – one substitution of counsel.

Of the five cases in which there were a total of four attorneys appointed to represent a defendant (three substitutions of counsel), two were in Multnomah County, two were in Washington County, and one was in Douglas County. The following summaries of three of these cases illustrate the nature of these types of cases. Although such cases are rare

in the context of the over 160,000 public defense cases per year, they are resource intensive and consumptive -- not only to the public defense providers involved and the Public Defense Services Account, but frequently to the jails/community corrections, courts, and prosecutors.

One case involved multiple victims, over 80 Measure 11 (M11) sex offense charges, and a concurrent federal prosecution. The state case was filed at a time when the Portland Defense Consortium was completely overwhelmed with M11 cases and private bar counsel was appointed after MPD and PDC were allowed to withdraw. OJIN indicates mental health issues, a number of letters written by the defendant to the court, and that the court denied substitution of a fourth attorney only to allow the request by the defendant approximately one month later. The case has been concluded at the trial level.

One case involved charges of Manufacturing/Delivery of a Controlled Substance and Possession of a Controlled Substance against a defendant who previously had been represented by counsel in juvenile dependency and delinquency matters and was involved in an Abuse Prevention Act matter. A confidential informant and body wire evidence appear to have been involved in the case. OJIN reflects the defendant requested her original attorney be withdrawn, which the court allowed. That attorney was a member of a consortium, but the court substituted a new contractor rather than other consortium counsel on the case. The defendant's next two attorneys filed motions to withdraw soon after their respective appointments, which would tend to indicate a conflict related to possible former representation of a witness or co-defendant. Although not included on the list maintained by CBS to log contacts by courts under the PDSC's substitution policy, it appears very likely this is a case where the court indeed contacted CBS and the final appointment of counsel from out-of-county "stuck"; i.e., the case was disposed.

One case with a total of four attorneys involved an individual charged in February 2004 with Offensive Littering, Drinking in Public and False Information to Police for issuance of a citation. Counsel was appointed at defendant's first appearance in March and requested the case be scheduled for "early disposition". That motion was denied. That same day and the subsequent day, the defendant filed motions to "set aside indictments" and to disqualify a particular judge. A few days later, defendant filed a request with the court that counsel be removed and that he be allowed to continue *pro se*. In the next few weeks, defendant was arrested and held in jail on a probation violation on a prior DUII case. By the end of April, the court allowed defendant's motion to proceed *pro se*, but left appointed counsel on the case as a legal advisor. By the second week of May, a different judge allowed substitution of counsel and subsequently in July and August, two private bar attorneys were substituted to represent this defendant. At trial in October, defendant was convicted only of the False Information charge. He was sentenced to 30 days jail, with credit for time already served and all fines, fees and assessments were waived. This case was next appealed by the defendant. That appeal is pending along with two other appeals by the defendant.

OJIN records show 66 trial level cases filed since 1989 against this individual just in the one county in which the case in which four attorneys were substituted occurred. Typical charges include Interference with Public Transportation, Drinking Alcohol in a Public Place, DUII, Theft III, Criminal Trespass II, Criminal Mischief and Possession of Controlled Substance. The majority of cases were misdemeanors and not infrequently

some cases proceeded at the prosecution’s request as violations and/or the accusatory instrument was dismissed. Three misdemeanor cases remain pending with two different defense attorneys appointed. The defendant also has had numerous probation violation cases where counsel was appointed, which are not included within the 66 cases referenced in OJIN.

c. Times Within Which Withdrawals/Substitutions Occur

One of the concerns regarding withdrawals/substitutions of counsel is the length of time that lapses prior to the request being filed. If appointed counsel has a conflict, it is in the best interests of the client, both defense attorneys and the system in general that original counsel identify the conflict and request substitution of new counsel as soon as reasonably possible.

With the data compiled to determine conflict percentage rates discussed immediately above, CBS determined the percentage of substitutions that occurred within weekly increments, as follows. While almost one-third of substitutions occur within two weeks of appointment, it takes a little more than four weeks for even one-half of substitutions to occur, almost three months for three-quarters of substitutions to occur and almost seven months for 95% of all substitutions on cases to have occurred.

Time frame for substitution	%-age of substitutions within time frame
1 week	15%
2 weeks	30%
3 weeks	40%
4 weeks	48%
5 weeks	55%
6 weeks	60%
7 weeks	64%
8 weeks	68%
9 weeks	70%
10 weeks	72%
11 weeks	74%
12 weeks	76%
13 weeks	78%
14 weeks	79%
15 weeks	80%
16 weeks	81%
30 weeks	95%

Generally, work group members were surprised with these figures; i.e., that the data does not reflect substitutions occurring more quickly. One must take into consideration that

police reports with state witness information, for example, often are not made available to defense counsel for one to two weeks after first appearance in court and the appointment of counsel. Other factors that influence the length of time include, for example, motions for substitution of counsel being heard in some courts on other than daily dockets. Or in Lane County, one attorney indicates motions for substitution frequently are filed at 35-day call court appearances. Even considering the potential that the data may be overstated to a certain degree as described in the “caveat” below, there is room for improvement in the area of length of time within which counsel seeks to withdraw.

CBS also compiled the following data by county showing the average and the median (50% lower, 50% higher) number of days between appointment and substitution of counsel. The median figures appear to be better indicators, because a very late substitution or substitutions will have a significant impact on the average. For example, for a county with only three cases where there was a substitution of counsel and where one substitution occurred in 10 days, one in 30 days and one in 240 days, the average is figured as 93 days or approximately 13 weeks. The median in the same example is 30 days.

County	Average # of days before substitution	Median # of days to substitution
Baker	114	115
Clatsop	81	59
Coos	19	9
Crook	41	15
Deschutes	37	11
Douglas	70	41
Hood River	62	20
Jackson	83	70
Jefferson	111	58
Josephine	43	18
Lane	61	36
Malheur	45	18
Multnomah	60	34
Polk	32	15
Umatilla	73	40
Wasco	26	13
Washington	74	41
Statewide	59	31

Although perhaps overly simplistic, the county with the smallest average and median lengths of time for substitution of counsel – Coos County – is a county where:

- the public defender contractor generally is appointed to all cases unless there is an apparent conflict (for example, co-defendants) at first appearance;

- discovery generally is available immediately for misdemeanor cases and within a day of a felony indictment;
- the defender's office actually has a discovery clerk who physically accesses the prosecution's file and makes copies of police reports and other discovery on a regular and routinely quick basis;
- the director of the public defender's office personally reviews staff attorneys' conflicts/requests for substitution prior to their submission to the court;
- a motion for substitution can be filed the next day a conflict of interest is determined to exist – there is no delay in scheduling a court appearance for this matter;
- a consortium of attorneys generally is appointed to cases in which the public defender has a conflict (limiting the number of subsequent substitutions); and
- the court is noted for its efficiency and rule compliance/enforcement.

Deschutes County, with the second shortest median number of days for substitution (11 days), has a number of factors similar to those noted for Coos, including a conflicts checking mechanism between the public defender, private law firm and consortium contractors and relatively early provision of discovery by the District Attorney's office.

- d. A caveat regarding the data used for and discussed in b. and c. above. Consider the example set out above of a county with what appear in the data to be three substitutions of counsel – one in 10 days, one in 30 days and one in 240 days. It is possible and in some counties, even likely, that the new appointment of a provider other than the original attorney appointed 240 days ago is, at least to some degree, the result of a bench warrant or multiple bench warrants being issued for a defendant during that time period – not that there was a motion and order substituting counsel. Rather, the court's appointment of a second attorney (240 days later) may have occurred because of two possible assumptions made by the court. To the extent this has occurred, the data presented in b. and c. above is overstated.
- If 180 or fewer days have passed since a bench warrant was issued when a defendant fails to appear in court and the defendant is arrested or otherwise appears again in court, the contractor originally appointed receives *no* additional contract case credit for reappointment to represent the individual on the case. *However*, if more than 180 days have passed, any contractor (even the one originally appointed) will receive a new case credit for the appointment.

The number of courts or number of instances where courts appoint new counsel when a defendant has had a bench warrant issued and is back before the court is not readily known, but one would assume minimal. However in some courts, particularly those where two different contractors pick up cases on different days of the week,

there may be instances where, particularly if more than 180 days have passed, whichever contractor is in court that day will receive the new appointment (regardless of whether that contractor previously represented the defendant before the bench warrant was issued). This appears to be particularly true if the following occurs.

- In some counties, the District Attorney's office may file a new criminal charge of Failure to Appear (FTA) against the defendant for failure to appear in court when the bench warrant originally was issued. Some courts and some attorneys apparently continue to assume that when a FTA crime is charged, that the defendant's original defense attorney will have a conflict of interest in continuing to represent the defendant on the underlying charge and the new FTA. The assumption, which should generally be incorrect (see ORS 162.193 which is discussed in the Phase 1 Recommendations below), is that the attorney will be called as a witness to testify against the defendant/client; e.g., that the attorney (or staff) will be called to testify that the attorney (or staff) personally or by letter notified the defendant of the court appearance at which the defendant failed to appear.

Two comments to summarize the concern about courts appointing new counsel other than when a motion for substitution is filed, affecting the data now established as "withdrawals/substitutions of counsel benchmark data" and future runs of that data for comparison purposes:

- inclusion of appointments of contractors or attorneys other than the contractor/attorney appointed prior to the defendant's failure to appear in court may result in the "benchmark data" now available being overstated with respect to both the percentage of cases in which there is a withdrawal/substitution of counsel and the length of time for substitutions to occur; and
- courts' assumptions that appointment of a new contractor or attorney is best or does not matter at least fiscally results in inefficiencies; e.g., former counsel having to provide case information to the new attorney and the new attorney starting relatively from scratch with the client and case.

We later recommend CBS continue to work with courts and providers to best ensure the re-appointment of the attorney/contractor who was representing a defendant when a bench warrant was issued (even if a FTA charge is filed or likely to be filed).

4. *Other Improvements*

- a. The information faxed by the Multnomah County DA's office to MPD for "appropriate case assignment" review the same day of felony first court appearances (described at page 4 of the Preliminary Review):

- increasingly has been more complete than during a computer transition in the DA's office; and
 - generally is received by MPD more quickly than previously and is now transmitted electronically by email rather than by fax.
- b. During the course of the preliminary review of conflict/withdrawal issues in Multnomah County, it was learned there was an issue with respect to how appointments initially were being entered in OJIN for the consortium (PDC) which generally is first to receive MPD conflicts. The manner in which the entries were made created a situation where an attorney within the consortium would be assumed by the court to have represented the person, for purposes of former client conflicts checking, when in fact that generally would not be the case. The attorney's OSB number simply was entered until the bar number for the specific attorney who actually was assigned by the consortium to the case could be provided to the court and entered in OJIN. Multnomah County court staff now initially enter "PDC" generically, rather than a specific OSB number, as the assigned attorney for every PDC appointment. The individual PDC attorney who is assigned each case then must return a letter of representation to the court within 48 hours, in order that that attorney's bar number is timely entered in OJIN.

5. *Corrections to November 12, 2004 Preliminary Report*

The Preliminary Report, at pages 4 and 16, references implementation of MPD's "appropriate case assignment" for felony cases as beginning in November 2000. In fact, this process was the second in a two-phase felony arraignment improvement project initiated by the Indigent Defense Services Division and MPD. The appropriate case assignment process began July 15, 2002.

Two tables on pages 14 and 15 of the report regarding Private Bar appointments in Multnomah and Lane Counties: Felony information for Multnomah County was inadvertently deleted by the author during finalization of the report and intentional murder cases were not included in the felony case counts in the Lane County table. Revised tables are included below with corrected information noted in **bold**. In addition, projected Private Bar appointment information has been added to the tables for Fiscal Year Ending 2005.

Multnomah County Private Bar (PB) Cases

(The vast majority of PB cases are conflicts cases from contractors. But PB cases are not the same as *all* conflicts cases, since conflict cases are substituted from one contractor to another contractor, as well as to PB.)

Case Type	FYE 2002		FYE 2003		FYE 2004		FYE 2005 (projected)	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Felony	403	4.4%	195	2.6%	80	1.0%	156	2.2%
Misdemeanor	402	3.4%	380	3.6%	206	1.6%	271	2.1%
Probation Violation	54	0.8%	29	0.6%	7	0.2%	14	0.3%
Juvenile	303	2.1%	263	1.9%	357	2.7%	481	3.3%
Other *	108	4.6%	42	2.0%	30	1.7%	22	1.2%
Total	1,270	2.9%	909	2.4%	680	1.7%	944	2.3%

Lane County Private Bar (PB) Cases

(not *all* PB cases are conflicts cases)

Case Type	FYE 2002		FYE 2003		FYE 2004		FYE 2005 (projected)	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Felony	1,697 [1,691]	38.9%	1,457 [1,451]	40.4%	1,141 [1,139]	26.0%	790	19.9%
Misdemeanor	925	31.3%	657	22.6%	435	14.8%	164	9.3%
Probation Violation	3	0.2%	4	0.3%	114	5.6%	48	3.3%
Juvenile	39	0.7%	53	0.9%	41	0.7%	30	0.5%
Other *	189	42.2%	197	41.2%	138	30.8%	130	22.2%
Total	2,853	18.4%	2,366	16.6%	1,869	11.9%	1,162	8.4%

Work Group Recommendations – Phase 1 for Consideration/Implementation Now

(Listed in order of priority and assumed significance in reducing the number and lengths of time of withdrawals/substitutions)

What is the goal? One must assume there will never be zero substitutions and there will always be some late substitutions that could not have been discovered more timely. An example of the latter recently occurred. The day before trial a client called his lawyer with good news. The person who the defendant had long maintained was a key defense witness, but for whom the defendant had no name or information other than a rather generic description, was just brought into jail. The defendant just talked to the witness and indeed that person has very favorable information. Unfortunately, counsel represented this new witness in the recent past and clearly recalls confidences that require the lawyer to withdraw from representing the defendant scheduled for trial the next day.

As stated at the beginning of this report, the goals for public defense providers and the PDSC are to:

- reduce the number of “avoidable” withdrawals and generally, substitutions of appointed counsel;
- reduce the number of instances where counsel seeks to withdraw from representation relatively late in a case; and
- reduce the number of instances where public defense clients request to fire their appointed counsel.

The work group reviewed various methods likely to reduce the number and time frames of withdrawals that were included in the Preliminary Review, as well as others identified during the course of work group meetings. The various methods were reviewed within the context of what methods are (or should be) the least difficult to accomplish in terms of resource/financial needs, and which methods will likely get the biggest bang for the effort. Or, as set out at the beginning of this report, what potential issues surrounding withdrawals/substitutions are real, most significant, capable of improvement with minimal resources and change for public defense providers and administrators and for the court, and within the ability of the PDSC to effect or at least seriously influence? Appendix E contains the working draft used by the work group of issues, factors/problems, improvements and what is needed to realize the improvements for the two primary reasons for substitutions: current/former client conflicts; and breakdown in attorney/client relationship.

The work group recommends the following first be considered for implementation by the PDSC and public defense providers. To the extent a recommendation is dependent on the courts or prosecutors changing something they do, the work group encourages education and outreach be initiated by PDSC/OPDS and local public defense providers to accomplish the change.

1. Education, Training, Tools and Ongoing Assistance

- For Attorneys Re: Conflicts of Interests, Substitutions, Best Practices and the RPCs

To the extent an attorney does not realize that simply knowing her firm previously represented a state's witness in her new client's case is not a sufficient basis to request new counsel be substituted, unnecessary substitutions will continue. We reasonably cannot expect public defense lawyers in the "trenches" to be expert in conflicts analysis (which is not particularly intuitive). Attorneys and their supervisors need to be provided educational opportunities and perhaps more importantly, "tools" to use when needed and a resource, in addition to the OSB, for assistance or brainstorming when needed.

Paul Levy's article in the September/October 2004 issue of *The Oregon Defense Attorney* was and remains an excellent "first step" toward providing public defense providers the education, training, tools and ongoing assistance they need. Paul has agreed to compile a checklist to assist attorneys in resolving former client conflict issues. Paul should be asked, along with his boss Jim Hennings, about compiling and providing training materials and trainings for new attorneys and about being available to consult with other public defense providers.

David Elkanich is scheduled on June 16, 2005 to present "The Ins and Outs of the New Ethics Code" at OCDLA's annual conference and will be asked to spend some time on former client conflicts and the other new rules addressed above that affect public defense providers. In addition, the work group recommends OCDLA and PDSC incorporate in the October 2005 Public Defense Management Conference time for a presentation and discussion regarding the new RPCs and other matters relating to conflicts and conflicts management for contract administrators and others attending that conference.

Finally, if there is no existing document that contains a compilation of summaries of appellate cases relevant to public defense related conflicts of interest and substitutions of counsel (e.g., similar to the summary provided above with respect to the *In re Complaint of Knappenberger* case), we recommend one be compiled and made available to public defense providers and others, perhaps on OCDLA's or PDSC's website.

- For Contractors/Attorneys Re: Communication and Contact with Clients

The OSB Bulletin article, referenced above, on the new RPC that explicitly addresses communication with clients is again a very good "first step" for attorneys recognizing they may be able to improve their communication skills and contacts with clients. Setting clear expectations with a client, as is suggested in the article, in many instances should reduce the number of "needy" calls placed by clients. To the extent public defense providers do not have legal assistants available to help with effective and efficient communication, consideration should be given to such use.

Providers should work together to identify those factors that interfere with their ability to effectively communicate with their clients and at least make those barriers known to the CBS and local courts - if for no other reason, to support the need for additional resources. For example, in Multnomah County there are persistent barriers presented by the jails to effective communication for clients who are in-custody. Video links between offices and jails or correctional institutions are available more and more, but are not a substitute for in-person attorney/client visits.

Best practices, preferably internally within contractor offices, should be established regarding communication and contact with clients. Attorneys and legal assistants should be made aware of the public defense contract provisions regarding client contact (24 hours in-custody and 72 hours out-of-custody; section 7.1.4 of the model contract) and the importance of complying therewith.

7.1.4 Client Contact

7.1.4.1 In-Custody Initial Interviews

Contractor shall, whenever possible, speak to and conduct initial interviews in person with in-custody clients:

- (a) within 24 hours of appointment; or
- (b) by the next working day if the court appoints Contractor on a Friday, weekend, or holiday.

7.1.4.2 Out-of-Custody Interviews

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

Similarly, in Multnomah County, attorneys should be informed of the court's substitution policy which requires attorneys who are substituted onto a case to make contact with the new client within 24 hours of verbal notice of appointment.

The work group heard credible evidence of instances where prior counsel failed to effectively communicate with a client for months; e.g., failed to visit an in-custody client for a number of months.

In instances of attorneys who are employees of or members of a public defense contractor where such an allegation or belief exists, the attorney, judge, client or other person who has good reason to believe it may be true can and should report the matter to the attorney's supervisor or contract administrator. If it's not true, that needs to be known. If it is true, that needs to be known.

In instances of attorneys who are individual, private bar attorneys, the attorney, judge or other person who has good reason to believe there has been such a lapse can and should report the matter to CBS, in accordance with the PDSC's complaint policy. Again, this is important not only to ensure the quality of representation, but also to provide attorneys facing such an accusation an opportunity to correct the record or rumor in the matter. Additionally, information and conclusions resulting from CBS investigations into complaints will be available to CBS when it initiates direct involvement in establishing private bar panels of attorneys. Further, information currently contained within CBS's accounts payable system will allow review of private bar attorneys' withdrawal rates and lengths of time between appointment and withdrawal which may be helpful (but of course not necessarily determinative) in considering applicants for private bar panels.

Finally, a tool that ought to be considered, both by public defense attorneys and CBS, in instances where a defendant is requesting substitution of counsel based upon the fact that he feels his attorney has not given enough of her time to properly advise him or is dissatisfied with the advice he has been given, is use of another attorney to review the case and provide a second opinion to the defendant. Although this may result in additional expense to the case, it might avoid the greater expense then or later of the court substituting new counsel onto the case.

- For Courts and Public Defense Providers – Failure to Appear (FTA)

To the extent CBS analysts identify counties where courts appear to automatically allow new counsel to be substituted onto cases when a defendant is charged with FTA, the courts (and if necessary, District Attorneys) should be encouraged to review ORS 162.193, set out below. This statute was purposefully enacted in 1989, as a product of the Bauman/Burton Indigent Defense Work Group to contain indigent defense costs.

“In no prosecution under ORS 162.195 or 162.205 shall counsel representing the defendant on the underlying charge for which the defendant is alleged to have failed to appear be called to testify by the state as a witness against the defendant at any stage of the proceedings including, but not limited to, grand jury, preliminary hearing and trial. However, upon written motion by the state, and upon hearing the matter, if the court determines that no other reasonably adequate means exists to present evidence establishing the material elements of the charge, the counsel representing the defendant may be called to testify.”

- For Courts Regarding Appointments of Same Counsel in Cases with Bench Warrants More Than 180 Days

As previously discussed, to the extent CBS analysts identify counties where courts are not appointing the same contractor/attorney to represent a defendant who is returning to court on a bench warrant issued more than 180 days ago, the courts should be encouraged to do so, unless there is a particular reason in the specific case to do otherwise. Reducing the number of these types of cases within CBS’ future “conflicts” data runs will provide an improved and truer picture of conflict rates and lengths of time between appointment and substitution of counsel.

2. Assistance, Supervision, Data and Monitoring **Within** Contractor Groups

The consensus of the work group is that contract providers need to accept and assume direct responsibility for ensuring:

- their attorneys and staff have the assistance and tools necessary to ensure motions to withdraw are properly supported in law and fact – i.e., are not used for purposes of case management;

- supervisors (or contract administrators) review or at least be available to review individual attorneys' motions for substitution of counsel;
- meaningful and complete data is collected by providers to obtain an accurate assessment of substitutions both to and from a contract office;
- the conflicts data is monitored for trends; and
- attorney supervisors or administrators monitor and provide feedback when determined helpful and necessary to individual attorneys with respect to their withdrawal from cases.

Throughout the course of the work group, the above, as opposed to PDSC dictating certain practices and data collection/provision to CBS requirements, was the clear consensus of the members. Contractors should be encouraged by PDSC to ensure the above responsibilities are met and provide support to contractors, if and when needed, in exercising these responsibilities.

3. Provision of Information that will Better Assist Courts in Determining Whether to Allow Substitution of Counsel and Whom to Substitute

The work group recommends the PDSC adopt a "best practice" or policy for public defense providers that in filing a motion with the court for substitution of counsel, the attorney provide at least the following:

- as much information about the nature of the conflict as is possible without revealing confidences or secrets or otherwise harming the client; and
- the number of attorneys previously appointed on the case.

The work group recommends the PDSC adopt a "best practice" or policy that provides, as does the current Multnomah County Substitution Policy:

"Attorneys shall provide the court with available information regarding other individual attorneys or firms who either currently or previously represented any of the alleged victims or witnesses, co-defendants or other potential adverse parties, to avoid creating a subsequent actual conflict."

And the work group recommends attorneys who are substituted off a case provide to new counsel, in addition to discovery and other case file materials, any listings of the name and DOB of victims, state witnesses, co-defendants, and possible defense witnesses previously compiled for purposes of conducting a conflicts check.

4. Improvements in Timely Receipt and Review of Co-defendant, State Witness, and Other DA Discovery Information

With no close second, the most crucial and most frequently cited barrier to the early identification of conflicts which require substitutions of counsel was delay in defense counsel receiving prosecution information/discovery. Delay in the provision of discovery to defense counsel also can hurt the establishment and maintenance of a favorable attorney/client relationship. Imagine if you were abruptly taken into custody, appointed counsel, denied release and heard from your attorney for more than a few days that she was still waiting for the police reports in the matter.

Appendix D to this report is a chart that records the responses to a survey conducted by the work group of retained and public defense counsel regarding attorneys' receipt of initial police reports from the prosecution. Other than the extent to which various attorneys' experiences differ even within a county (which may be a function of how quickly the attorney actually recognizes his office has received discovery as opposed to when it actually is received), it is significant that public defenders and private bar alike in Lane County generally report receipt of at least initial police reports the same day as their clients' first appearances. In most other counties and focusing on felonies, most attorneys report receipt of initial police reports within one to seven days of grand jury indictment. Grand jury indictment generally is close to a week after a person's arrest.

A small group from the conflicts work group met with Multnomah County District Attorney Mike Schruck and members of his senior staff on March 3, 2005 to discuss various aspects of earlier provision of discovery to defense counsel. We felt comfortable doing so for many reasons including the fact that Mike Schruck testified before the PDSC on September 9, 2004 as follows:

"I think we need to pay attention to this ['legitimate' conflicts versus client-requested substitutions] and we need to work hard. Now we don't as prosecutors come with completely clean hands, when I talk about conflicts. It is incumbent on us to make sure that we get early and complete police reports or investigative reports with a list of witnesses out. So we have to do that. But it is also incumbent upon appointed counsel to screen those things, to read them as expeditiously as possible, and to notify the court if they have a conflict."

Definite improvements have been made to ensure that MPD, for appropriate case assignment screening purposes, receives as much prosecution information as is possible and early on the day of defendants' first court appearances regarding co-defendants, victim and known state witness names. We are hopeful that when Multnomah County finishes its budget process, Mr. Schruck will be able to consider our request that the information currently being provided to MPD be allowed to be passed on to PDC (with of course the same constraints as agreed to between Jim Hennings and Mike Schruck). Otherwise, no changes in the provision of discovery in Multnomah County have been accomplished.

Perhaps the PDSC should consider requesting that the issue of provision of discovery at some point be a topic for discussion and review by the Chief Justice's State Criminal Justice Advisory

Committee (CJAC). One has to assume there will be a time when discovery is provided electronically throughout the state and efforts in some counties (such as Multnomah) to plan for this are ongoing. That too commends the topic to the Chief Justice's State CJAC. Lastly, the provision of discovery is an issue that frequently is raised by prosecutors when discussions about earlier provision of discovery to defense counsel occur and it was raised by Mike Schrunk at our March 3rd meeting. The concern expressed is that some, not all, attorneys fail to timely provide defense discovery to the prosecution.

Finally, the work group acknowledges that an absolutely critical corollary of receiving discovery early on in a case is the responsibility of defense counsel to ensure their staff or they timely review initial and ongoing discovery and potential defense witnesses for conflicts. To the extent contract offices currently do not ensure this occurs, changes should be made.

5. Preference for One or a Limited Number of Judges to Hear Motions for Substitution of Counsel

The work group acknowledges the fact that having one or a limited number of judges hearing motions for substitution of counsel is most effective in ensuring both that client-requested substitutions are carefully and consistently reviewed and that attorney-requested substitutions are properly supported by fact. The work group commends that practice to courts.

6. Public Defense Contractor Resources

Work group members concluded that the conflicts databases currently utilized by the contractors represented on the work group were sufficient to meet the need for timely and accurate conflicts checking to occur. Similarly, work group members did not view staff or attorney resources currently to be a problem or barrier to identifying conflicts early on (e.g., early review of discovery) or timely filing motions for substitution of counsel, when needed.

With added emphasis on withdrawals and substitutions data and practices, these assessments may change. The work group recommends that CBS take into account individual contractors' efforts to effectively and efficiently manage withdrawals and take into account any changes in contractor staff/attorney resources that will better assist with such efforts in the course of contract negotiations.

7. PDSC's Substitution Policy

As recommended in the Preliminary Review, the work group reviewed and discussed the PDSC's Substitution Policy, as well as the reasons for the 2003 legislation requiring courts to comply with the PDSC's policy.

The work group determined that no changes are necessary to that policy. The work group does recommend that CBS consider touching base with some courts for the purposes of best ensuring the courts understand:

- the underlying reasons for the policy;
- the fact that CBS can be a significant resource in helping the courts address client-based substitution requests; and
- the fact that CBS can be a significant resource in locating counsel for a client who needs special counsel appointed.

The work group finally recommends that CBS ensure court contacts are documented in the database CBS has established, provided CBS continues to find doing so worthwhile.

8. One Client/One Attorney Presumption – Exceptions

During the course of the work group’s meetings, the following situation was raised with respect to what should be the presumed best course of action for counsel and the court faced with the following situation:

If Attorney A who is appointed to represent a client on three cases, determines the attorney has a former client conflict in only one of the three cases, should new counsel be substituted only onto the one case or on all three cases? To the extent all three cases, versus only one, are transferred to new counsel, there is an additional cost to public defense for the two additional cases. However, to the extent the defendant winds up with two or even three lawyers representing him on multiple pending cases, there is assumed to be a greater potential for “harm” to the client. Even if no harm occurs, having multiple lawyers for one client is inefficient.

After much discussion and consideration of the pros and cons, the work group recommends that PDSC endorse a presumption that a conflict in one case should result in substitution of counsel in all pending cases, unless there are factors supporting the contrary. Although such a presumption will result in, at least for the short-term, additional substitutions of counsel, the work group concludes that the benefit of a client having one attorney with all of the client’s cases be the responsibility of that attorney as a legal matter in most instances outweighs the additional cost. The attorney seeking withdrawal and substitution of new counsel on all of the pending cases would be responsible for assessing and providing the court information, if requested, on the following factors.

General Policy: One Attorney for One Client

Factors to be Considered by a Judge in Deciding Whether to Substitute Counsel on All Pending Cases

- Nature of conflict – reason for substitution
- Types of cases involved

- Length of time counsel on cases
- Status of cases – next scheduled court appearance
(time and type of appearance)
- Client’s wishes

Potential Changes for Future Consideration (Phase 2) If Determined Necessary, After an Opportunity to Assess the Impact of the Improvements Recommended Above

The conflicts work group discussed and reviewed the subjects listed below for purposes of determining whether to recommend their immediate consideration, adoption or implementation. Topics 1 through 4 below were ones recommended for review in the November 2004 Preliminary Review.

The work group recommends that the following be reviewed in the future only after consideration and implementation of the work group’s Phase 1 recommendations, and an opportunity (e.g., at least one year) to assess the actual positive impact of those recommended improvements on the number of withdrawals/substitutions and timeliness of requested withdrawals/substitutions.

1. Amend Case Credit Provisions in Public Defense Contracts

The work group considered recommending to the PDSC that changes be made in the model public defense contract so that contractors, for example, lose credit if a motion for substitution is not filed in a timely manner. See pages 12 through 14 of the Preliminary Review for the history of model contract provisions regarding withdrawal of counsel in relation to case credit; i.e., financial impact of withdrawals.

In addition to the record keeping, logistical and administrative impact on contractors and CBS of instituting changes, such as those considered and set out below, there would be negative (as well as at least perceived positive) results of making such changes. Under current provisions, there is no financial disincentive to withdrawing from a case at any point in time, unless the case is a “complex case” and even in that instance, some limited case credit is maintained for the case from which counsel withdraws. The work group concludes this is as it should be so that counsel is not presented with the potential conflict of financial loss as a result of properly complying with the attorney’s ethical responsibility.

Further, contractor withdrawal rates were factored into the case credit amounts negotiated when the change in total loss of credit for withdrawals occurred in 1990. To the extent changes were made to reduce case credits for withdrawals, one should anticipate contractors seeking an adjustment to contract rates that at least keep them financially at status quo. Re-institution of loss of total case credit for withdrawals would result in a decrease in the total caseload

statewide and most likely, an increase in the per case cost statewide – even though the workload and total cost of representation would remain unchanged.

Other changes considered, such as differential or additional payments or credits to contract attorneys who are substituted onto cases for example more than 40 days after the first appointment of counsel, would not be justified in some instances. Similar to a recent instance in Multnomah County, what if a lawyer were required to withdraw from representation the day his client is scheduled to enter a guilty plea? The reason for the late withdrawal? The attorney recognizes the victim in the case who appears in court that day as a former client. The police report and charging instrument in the case incorrectly stated the victim's name. Newly appointed counsel inherits a case that was fully investigated and scheduled for entry of a negotiated plea. After new counsel's review and consultation with his new client, the negotiated plea in fact occurs.

The following are potential contract changes reviewed by the work group:

- contractor can choose: 1) pull closed file to determine whether there is an actual former client conflict and keep credit for appointment to case even if substitution is necessary; or 2) substitute off case without pulling former client file, but no case credit for appointment;
- differential payments for contract offices where the attorney is substituted onto an in-custody felony case more than 40 (or some other period of time) days after first appointment of counsel;
- contractors lose case credit if a motion for substitution of counsel is filed more than five court days after receipt by attorney's office of discovery that discloses the conflict; i.e., contractor keeps case credit if motion is filed timely; and
- contractors lose case credit if counsel seeks to withdraw more than 30 days after appointment, unless counsel includes in the motion information supporting the fact the conflict could not reasonably have been identified sooner.

The work group, including the Director of CBS, concluded not to recommend changes be made in the model contract terms. More straight-forward, management-based and less disruptive and extreme recommendations set forth above ought first to be implemented and tested.

2. Firm Unit Rule

As discussed previously, new RPC 1.10 and the anticipated revision to OSB Formal Opinion 2003-174 will result in fewer "former client" motions to withdraw; i.e., in those instances where the conflict for an attorney who is no longer with the firm historically has been imputed to the newly appointed attorney only because a file exists in storage.

Work group members who have been involved in making prior recommendations that the "firm

unit rule” be examined for public defense providers in particular do not anticipate much more can reasonably be accomplished in this area. However, the work group leaves this on the list of potential improvements for the future. For example, could the rule be “relaxed” in instances where the attorney who represented the former client:

- remains employed at the firm;
- is not the attorney appointed to represent the new client;
- remembers nothing about the former client or is effectively screened from discussions regarding the new client’s case;
- the former client file has been closed for greater than 10 or some other number of years; and
- the file is secured against access?

3. Appropriate Case Review in Misdemeanor Cases

Although recommended for consideration in the Preliminary Review, the resource demand to accomplish for misdemeanors what MPD currently does for felonies with respect to appropriate case assignment would be huge. This is due primarily to the sheer number of misdemeanors scheduled for arraignment each day. MDI and MPD already have established what appears to be a very effective process to pre-screen misdemeanor cases that need substitution of counsel for conflicts with the other public defender. For example, prior to an MPD attorney submitting a motion for substitution of counsel in a misdemeanor case, MPD’s staff will have consulted MDI’s staff to determine whether MDI has a conflict of interest in representing the defendant.

4. Central Substitution Review Attorney for Multnomah County

Although recommended for consideration in the Preliminary Review, the work group expressed no interest in the idea of contracting with an attorney to serve as the centralized substitution review attorney, as described at page 18 of the Preliminary Review. This is in large measure because Janet Frazier, the Multnomah County Circuit Court staff person who handles all withdrawals/substitutions for the court, is incredibly effective and efficient in her position. Also, it simply is the better practice, at this point in time at least, to place the responsibility on the contractors and their attorneys to ensure withdrawals/substitutions are kept to a minimum and to monitor the same internally.

5. 60-day Rule

With exceptions only for the most serious of felonies (e.g., aggravated murder), current law generally provides a defendant who is in custody must be released if not tried within 60 days of arrest. (ORS 136.290) There are limited exceptions to this “60-day rule” and of course, the

defendant can always consent to the trial being held greater than 60 days after arrest. In fact and particularly for Measure 11 offenses, most defendants understand it is in their best interest to waive his 60-day right to trial and do so.

The 60-day rule is most relevant to substitutions of counsel requested by a defendant, because the defendant is dissatisfied with counsel. Early, regular and meaningful communication between counsel and client is critical to establishing and maintaining an effective attorney/client relationship.

Members of the work group considered the fact that having to discuss and in most instances, advise a client to waive the “60-day right” relatively early on can sometimes adversely impact the relationship. This is particularly so in Measure 11 cases, where the charge(s) is so serious and where the defendant will not likely be released from custody pending trial.

The work group floated the idea of amending statute to provide a 120-day release rule for Measure 11 offenses past some members of OCDLA’s legislative committee. Ultimately, the work group decided against recommending a statutory change this legislative session, primarily due to the likely opposition of courts and prosecutors and the fact it would be a relatively extreme measure that likely would have very minimal impact on the actual number of substitutions of counsel.

6. File Retention

Even post-Rule 1.10 and the anticipated revision of OSB Formal Opinion 2003-174, former client conflicts likely will continue to be a primary reason for substitutions of counsel. This is because there are so many contractors, not only in Multnomah County but statewide, that have been public defense providers for decades. And their closed case files reflect that fact. Many contractors are paying not insignificant amounts to warehouse client files in perpetuity. When can a criminal, juvenile, probation violation case file “safely” be destroyed?

Appendix F is a “File Retention and Destruction” document prepared by the Professional Liability Fund which provides, in part:

“Most client files should be kept for a minimum of 10 years to ensure the file will be available to defend you against malpractice claims. Files that should be kept for *more* than 10 years include:

1. Cases involving a minor who is still a minor at the end of 10 years [e.g., dependency cases].

* * * * *

6. Criminal law – most of these files should be kept indefinitely.

* * * * *

9. Files of problem clients.”

Discussion of obtaining client permission to destroy the file at a certain time or ensuring the client has a complete copy of the file as alternatives to the necessity of keeping files for at least an extended period of time simply are not options for public defense cases.

In an effort to best ensure that public defense attorneys keep files for at least ten years and after consulting with the Federal Public Defender with respect to likely time frames for federal habeas corpus matters, the following provision was adopted many years ago for the model public defense legal services contract:

7.5.3 Retention Period

For purposes of this contract only, Contractor agrees to preserve all case files a minimum of ten (10) years from the date the case is closed for all cases except aggravated murder and Measure 11 cases. Case files in aggravated murder and Measure 11 cases shall be preserved a minimum of twenty (20) years from the date the case is closed.

As long as there is firm unit rule, post-conviction relief, federal habeas corpus and aggravated murder cases, the best practice for criminal and likely civil commitment, juvenile delinquency and dependency cases is, as the PLF suggests, “most of these files should be kept indefinitely.”

The primary issue for possible future review is whether off-site storage or electronic storage of files can somehow be arranged (location-wise and security-wise) so that files may be maintained forever, but at some point not be subject to former client ethical determinations.

New Oregon Rules of Professional Conduct
of Interest to Public Defense Conflicts Issues
Communication, Former Client Conflicts of Interest and Imputation, Withdrawal,
Clients with Diminished Capacity and Subordinate/Supervisory Lawyers
(most relevant sections of RPC 1.9 and 1.10 emphasized in **bold**)

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.¹

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter. For purposes of this rule, screening requires that:

(1) the personally disqualified lawyer shall serve on the lawyer's former law firm an affidavit attesting that during the period of the lawyer's disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other firm member; and the personally disqualified lawyer shall serve, if requested by the former law firm, a further affidavit describing the lawyer's actual compliance with these undertakings promptly upon final disposition of the matter or representation;

(2) at least one firm member shall serve on the former law firm an affidavit attesting that all firm members are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being followed to screen the personally disqualified lawyer; and at least one firm member shall serve, if requested by the former law firm, a further affidavit describing the actual compliance by the firm members with the procedures for screening the personally disqualified lawyer promptly upon final disposition of the matter or representation; and

(3) no violation of this Rule shall be deemed to have occurred if the personally disqualified lawyer does not know that the lawyer's firm members have accepted employment with respect to a matter which would require the making and service of such affidavits and if all firm members having knowledge of the accepted employment do not know of the disqualification.

(d) A disqualification prescribed by this rule may be waived by the affected clients under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in

the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

[similar to former DR 2-110, with one perhaps notable addition emphasized below in **bold**]

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. **When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. (Emphasis added)**

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

- (1) the disqualified lawyer is timely screened from any participation in the matter; and
- (2) written notice is promptly given to the prospective client.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

The Changing Landscape of Former Client Conflict of Interest Analysis

by Paul Levy

Without a doubt, sorting out conflicts of interest is the most frequently encountered ethical inquiry criminal defense lawyers make.¹ But it's an inquiry that we very often get wrong, at tremendous cost to our firms, the state's public defense system, local courts and jails, and especially our clients. And we get it wrong, I submit, because we're afraid to do the right thing.

Our reticence is a product of awkward rules, written without regard to a modern criminal defense practice, interpreted and applied by people who don't do or understand our work. But some recent developments give reason for hope. First, by the end of the year Oregon is likely to finalize adoption of the American Bar Association's Model Rules of Professional Conduct, replacing our current Code of Professional Responsibility.² And with these new rules may come a movement away from an archaic and crippling application of our existing "firm unit rule" and its concomitant requirement of vicarious disqualification.

Consider how often you have heard criminal defense attorneys tell a judge they must withdraw from representation because "our firm previously represented a witness," and that request is allowed without further inquiry or explanation. Indeed, we have often answered the conflict question at the very point where our analysis should really begin, thereby avoiding a difficult duty under the rules and too easily abandoning our clients.

After all, "an attorney is not required to decline employment or withdraw from a case merely because a former client will testify as an adverse witness." OSB Formal Ethics Opinion No. 1991-110.³ In fact, the first question we need to answer in a thoughtful conflicts analysis is whether our current and former clients' interests are in

fact adverse. DR 5-105(A). If they aren't adverse (and there are plenty of instances when a former client may be named in a police report but have nothing adverse to say about our client), then there is probably no need for further analysis and we should continue with our current representation.

If the interests of our current and former clients are adverse, then we're required to withdraw from representation only if the two matters are "the same or significantly related." DR 5-105(C). Figuring out whether matters are "significantly related," which has a specific meaning under the conflicts rules, is the heart of former client conflict analysis, and also an endeavor fraught with difficulty. Understanding why this is so difficult is key to appreciating why we're wrong so often on conflicts questions and how we might be able to do better.

Matters are "significantly related" if the representation of the current client might harm the former client in connection with the matter in which we represented the former client, commonly called a "matter-specific" conflict, DR5-105(C)(1); or, if representation of the former client provided the lawyer with confidences or secrets that are capable of adverse use on behalf of the current client, commonly called an "information-specific" conflict, DR 5-105(C)(1).⁴

The existing formulation of the matter-specific rule derives from *In re Brandness*, 299 Or 420 (1985), a case where a husband and wife consult a lawyer about purchasing a business. Not long after that, husband seeks same lawyer's assistance in getting a divorce, in the course of which the lawyer seeks to restrain wife from interfering with the business. Because the divorce representation "would, or would likely, inflict injury or damage" to wife in

connection with the prior representation concerning acquisition of the business, the attorney had a prohibited matter-specific conflict.

This type of conflict turns out to be rare in our line of work, with one frequently encountered area of difficulty. Since our representation is, by definition, concluded when we encounter a former client in a new case, it would be the exceptional instance where we might harm the former client in connection with his or her closed case. But what if that former client is still on probation or post-prison supervision from our former case, and an allegation of violation may result from our current representation? Is that the same matter or a new one? This is one of the areas where the Oregon State Bar's guidance on these rules for defense practitioners is particularly frustrating.

Until recently, the Bar's discussion of matter-specific conflicts has largely concerned civil cases. OSB Formal Ethics Opinion No. 1991-11, which is devoted to this topic, gives four examples, each one a civil matter. Last year, though, the Bar issued OSB Formal Ethics Opinion No. 2003-174, which purports to give guidance to public defender organizations on a variety of conflicts issues. And, indeed, among the scenarios, a lawyer encounters a former client who is said to be on probation arising from the former representation. No one at the Bar, though, recognized this as the one persistent problem in this area, as the opinion blithely concludes that a mat-

Continued on next page.

OCDLA Member Paul Levy is the Attorney Trainer for Metropolitan Public Defender in Portland. He serves on OCDLA's Legislative, Publication, Education and PAC committees and is editor of The Criminal Law Newsletter.

a substantial number of our potential conflicts are with former clients who were represented by attorneys no longer with the firm. In fact, for firms that have been around for a while—and we have quite a few in Oregon—most of the former clients were represented by lawyers no longer with those firms. Suppose for a moment that the closed files in these cases are in storage, either off site or at least under carefully controlled and monitored conditions that prohibit access by firm attorneys. Under these circumstances, might a firm attorney now be able to say that he or she is not in possession of confidential information from a former client?⁶

There is, in fact, ample support for such a position. The challenge, of course, is the firm unit rule, DR 5-105(C), which in the Bar's view imputes to current firm lawyers knowledge about every case ever handled by a firm, and vicariously requires disqualification of any attorney still with a firm. DR 5-105(G).⁷ Aside from begging common sense, disqualifying a firm today for work done years ago by a departed lawyer on a file that's inaccessible to the remaining lawyers seems to run counter to the intent of DR 5-105(J), which specifically allows lawyers to take adverse positions to former clients, when confidential information was obtained by a departed lawyer, so long as the closed file no longer "remains at the firm." See also OSB Formal Ethics Opinion No. 1991-128.

One would think that for a file to "remain at the firm," if that fact is to have any operative meaning, would entail some ability to access the file. Naturally, there was no discussion of this point in OSB Formal Ethics Opinion No. 2003-174, which posits a case where the former client's lawyer has left the firm and the file is in storage. The opinion simply observes that DR 5-105 does not provide for "screening" files, without asking what it should mean for a file to remain with a firm, noting that "screening" is only available under DR 5-105(I), the ruling governing lateral moves.

In fact, it's this latter rule that provides the best argument for accepting, as a reasonable resolution of potential information-specific conflicts, the promises of lawyers and law firms to observe safeguards so firm lawyers will not access closed files handled by attorneys no longer with the firm. For over twenty years, in the context of lateral moves, the Bar has accepted the promise of new hires and their new firms that confidential information known to

that lawyer about clients adverse to the new firm will not be shared or used. DR 5-105(I)(1) & (2). Having accepted the efficacy of such promises, in a circumstance far more tempting than that posed by files locked safely away in storage, it is hard to envision good faith objections to the notion that such files no longer remain available to firm lawyers.

Fortunately, we don't need to wait much longer for a new approach by the Bar, since the proposed new Rule of Professional Conduct 1.10(b), governing conflict analysis when the lawyer who represented the former client has left the firm, appears to make the change. The new rule no longer speaks of the closed file remaining at the firm and, instead, provides that "the firm" is not disqualified unless "any lawyer remaining in the firm" has protected information. According to Peter Jarvis, an editor of the Bar's *The Ethical Oregon Lawyer* and a leading expert on conflicts analysis, "the shift from the 'firm' to 'any lawyer' makes no sense if a firm can be knocked out by dead files that no one still there has ever seen."

There is every reason to adopt a new approach to this persistent problem. Rather than require lawyers to look at the confidences in former client files, thereby tainting the reader with the information and exposing their evaluation of the potential uses of it to second-guessing by the Bar, simply locking away the files can neatly resolve many information-specific former client conflicts. As a result, we would see far fewer substitutions, notably reduced public defense expenditures, less delay in handling our difficult cases, and better representation for our clients. And, we'd be sensibly and reasonably resolving our ethical responsibilities.

ENDNOTES

¹ It's an inquiry we should make at the beginning of every case, and then often during a case as we learn of new potential witnesses.

² Having been reviewed by the Oregon Supreme Court and revised according to their wishes, the Oregon State Bar's House of Delegates will vote (and adopt) the new rules at its meeting on October 16, 2004, after which they will return to the Supreme Court for final approval. The new rules, in place in roughly the same form in 45 other states, replace our Code of Professional Responsibility. They can be viewed at http://www.osbar.org/_docs/discipline/disciplinechanges/proposedorpc.pdf.

³ Some attorneys still hold to a totally unfounded view that we owe a duty of perpetual

loyalty to our former clients. Not only may we confront them and, indeed, harm them as adverse witnesses in the appropriate circumstances, we can even go so far as to prosecute them if we like. See OSB Formal Ethics Opinion No. 1991-120. This and other Formal Ethics Opinions can be viewed at <http://www.osbar.org/ethics/ethicsops.html>.

⁴ The proposed Rule 1.9 under the Rules of Professional Conduct replaces DR 5-105(C) and substitutes "substantially related" for "significantly related," and would not appear to change the analysis under current rules.

⁵ One of the most intriguing features of the proposed Rules of Professional Conduct is in the section governing Law Firms and Associations which, for the first time in Oregon, creates a defense for *some* lawyers who make a good faith effort to abide by the rules. First, Rule 5.1 requires that managerial and supervisory attorneys have measures in place to assure compliance with the rules by all firm attorneys. Then, Rule 5.2(b) provides that a "subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's *reasonable resolution of an arguable question of professional duty*" [emphasis added]. It remains a mystery why all attorneys, including supervisors and sole practitioners, aren't granted some deference for reasonable resolutions of arguable questions of professional duty.

⁶ One other obvious way to resolve former client conflicts, which I won't dwell on, is to obtain informed consent to continue with the current representation from both the current and former clients, under DR 5-105(F), which will be replaced by Rule 1.7. Aside from the practical difficulties of locating the former client and making meaningful the required advice that both current and former client seek independent legal advice, it would be expected that most former clients would refuse to give consent. Another approach, of course, would simply be to destroy many closed files. But there are good reasons to preserve even our oldest files, among them the possibility that a client may need them years later in the defense of an aggravated murder prosecution.

⁷ It's not immediately apparent why the firm unit rule has anything to do with the closed files of attorneys no longer with the firm, but the Bar seems to think otherwise. According to an Informal Written Advisory Ethics Opinion, dated November 12, 2003, from George Riemer, OSB General Counsel to John Connors, the Director of the Multnomah County office of the Metropolitan Public Defender, even when the former client's lawyer is no longer in the office, "it is important for you to understand that 'sealing' the file and putting it in storage does not alter the fact that any information in your office is imputed to everyone, hence the vicarious disqualification ('firm unit rule') of DR 5-105(G)."

ter-specific conflict would not exist when the two matters “involve different events and charges.” So the probation question remains unresolved.

Invariably, though, our conflicts questions involve the information-specific prong of the inquiry: did the former representation yield confidential information that is capable of adverse use on behalf of the current client? Our task, then, is not simply to ask whether we gained confidential information in the course of the former representation, but to answer whether that information is relevant in any way to our current client’s case. And, in fact, in providing guidance on this question, the Bar has talked in terms of “relevance,” OSB Formal Ethics Opinion 1991-17, although not making clear whether that means admissible in court or simply helpful in some way. It would seem to be the latter, since other opinions have talked in terms

of whether the information “may be useful” (OSB Formal Ethics Opinion 1991-110) or “helpful” (OSB Formal Ethics Opinion No. 1991-120) to the defense.

Again, the recent OSB Formal Ethics Opinion 2003-174 tries to be helpful on this issue, suggesting that a conflict would exist if information could be used to discredit the former client’s testimony (suggesting that admissibility might be required) or in “trying to argue” that the former client was culpable. The only actual example offered is an odd one for an opinion about public defender organizations: suppose lawyer learns, they say, about environmental problems at a site belonging to client, then another client retains lawyer to negotiate the purchase of the site. At least this tells us that we should be thinking about information useful in negotiations. The opinion concludes with the keen observation that whether an information-

specific conflict exists “depends upon the facts of the specific case involved.”

And therein, really, lies the greatest difficulty for practitioners. In resolving our professional responsibilities, we are asked to make very difficult judgments based “upon the facts of the specific case involved.” But recent experience has shown that Bar disciplinarians are neither willing to defer to good-faith efforts to perform this duty⁵ nor equipped to understand the real-life issues that might guide our analysis. As a result, many defense attorneys continue to take the apparently safe—but ultimately wrong—approach of simply withdrawing whenever they learn that a former client of their firm is involved in any way in a current client case.

But there is a better, and in fact easier, way to resolve many former client conflict questions. Especially for medium-size and larger public defender organizations,

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199 Or. App. ____ (2005-134); State v. Estacio; ____ P.3d ____

STATE OF OREGON, Respondent, v. FEDERICO DEJESUS ESTACIO, JR., Appellant.

Filed: April 13, 2005

IN THE COURT OF APPEALS OF THE STATE OF OREGON

0108-36054; A118666

Appeal from Circuit Court, Multnomah County.

Julie Frantz, Judge. (Hearing)

Jerome LaBarre, Judge. (Judgment)

Submitted on record and briefs August 4, 2004.

James N. Varner filed the brief for appellant. Federico Dejesus Estacio, Jr. filed the supplement brief pro se.

Timothy A. Sylwester, Assistant Attorney General, filed the brief for respondent. With him on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Before Edmonds, Presiding Judge, and Wollheim and Schuman, Judges.

EDMONDS, P. J.

Convictions vacated and remanded with instructions to inquire into the reasons for counsel's request to withdraw as defendant's attorney. If the trial court determines that defendant was entitled to substitute counsel or that counsel should have been permitted to withdraw, it shall order a new trial; otherwise it shall reinstate the previous judgment.

EDMONDS, P. J.

Defendant appeals from multiple convictions for robbery, ORS 164.405; and ORS 164.395, and makes numerous assignments of error. We reject defendant's assignments without discussion except for what follows in this opinion. We review for errors of law, ORS 138.220, and remand for a hearing on whether different counsel should have been appointed to represent defendant at trial. *State v. Smith*, [190 Or App 576](#), 80 P3d 145 (2003), *rev allowed*, [337 Or 160](#) (2004).

The incidents resulting in defendant's arrest and trial occurred on August 29, 2001. After appointment of counsel and arraignment on October 18, 2001, in late February 2002, defendant's trial counsel requested a hearing to determine defendant's ability to aid and

assist counsel, and in early March defendant requested an order for substitution of attorney.(fn1) The trial court ultimately found that defendant was able to aid and assist his counsel and denied his motion for substitution of counsel, finding no basis for his request.(fn2)

At the hearing on the motion for substitution of counsel, defendant explained that he believed that "[counsel's] not really looking for my best interest and she's not helping me as far as any legal work[.]" In response, the trial court pointed out that, because the evaluation had just been made about whether he was able to aid and assist in his own defense, it "would not judge [counsel's] attention to your case on the fact that up until last week she hadn't done much. Because, as I said, everything is kind of in limbo until a determination is made if you're able to aid and assist." After hearing from counsel, the trial court made its decision: "Mr. Estacio, your attorney has done everything and more than the court would expect at this point. She has been working very hard on your behalf. The motion is denied. No basis." Defendant responded:

"Can I say something? It's just the fact that, you know, I've had her since August. I just feel like she ain't--you know, I just feel like she got a heavy case load. I know she's doing a lot of work. That's what I'm trying to say is maybe she's too busy."

After a further exchange between the trial court and defendant, defendant explained, "I just feel she ain't looking for my best interest." The court responded that "there is absolutely no basis and no reason you would lead me to believe that."

On March 29, 2002, the trial court heard pretrial motions before selecting a jury and beginning trial. Both the prosecutor and defendant's counsel stated that they were ready for trial. Defense counsel then told the court that defendant wished to address the court before the beginning of argument on the pretrial motions. Defendant stated to the court:

"First of all, I do not want to proceed--go along with my attorney * * * and I also do not want to negotiate a plea for a crime that I didn't commit. Over the past seven months she has been deceiving me to taking a plea bargain and she has not submitted any motion or legal help to me. Every time I would ask her to do something, I'm being ignored or denied, or I'm not, you know, and I don't know if she's prejudiced against my case or if she's doing it intentionally. It seems that she's more interested in my personal life rather than trying to help me with my case, or focusing on what's important. * * * With all due respect, Your Honor, I could fix a lot of time because I didn't know what was happening here and there, and I should be able to know at least what I'm dealing with and what I'm going up against, and I really think that [counsel] is not looking out for my best interests. I think her caseload is too [heavy], too much stuff in her hands, but not enough time, and it seems like she's doing everything at the last minute, and I feel like I'm being forced to go to trial today *and instead I file complaint to the Bar section, but I'm still waiting for their response.* Right now, I'm going to trial today, and so there's some time limit. *I just wish to be appointed to another counsel so that my*

constitutional rights will be protected. * * * [S]ometimes there was trouble in communicating with her, whether my attorney's lying to me about everything we discussed, or what she puts in front of me."

(Emphasis added.)

The trial court asked if counsel had any statement that she wanted to make. She replied, "I guess, for the record, this is the first I knew that Mr. Estacio had filed a Bar complaint. He did ask for a substitution of counsel, and we had a hearing on that matter." The trial court reviewed the order from that hearing and asked defendant if "anything happened that's different between March 13 and today." Defendant asserted that he was given everything at the last minute and did not have time to consider matters before having to make a decision. Counsel then made an additional statement to the court:

"I wonder if Mr. Estacio's maintaining a Bar complaint against me puts me in actual conflict with his interests. Having not seen any correspondence from the Bar, nor yet been in a position to respond to it, I don't know to what extent I would need to divulge client confidences or secrets in order to defend myself in a Bar complaint. I know that that could become an issue, but as yet, I've got no notice yet from the Bar. * * * [H]is statements that he doesn't understand what's going on and he doesn't understand what he's up against baffle me because we've been discussing * * * all the evidence that the state can bring against Mr. Estacio. We've been discussing that for months. And, Your Honor, I think that's sort of part and parcel of my concerns that Mr. Estacio can't assist and cooperate. I think it's clear that he distrusts me and I'm not really sure why that is."

(Emphasis added.)

After some discussion about other matters, the trial court returned to the issue of the Bar complaint:

"JUDGE: Now, [counsel], getting back to your comments about the Bar complaint, you indicated that you were concerned that, because of what you've just learned today, * * * for you to defend yourself from the Bar complaint, you would need to divulge client confidences. I'm interested in the time frame. This has been estimated as a two-day trial and, if you had not even known of a Bar complaint, there would not be any defense or any divulging any client confidences that would occur during the course of this trial, would there?"

"DEFENSE [COUNSEL]: Right. I don't think so. I don't think so, Your Honor. I mean, I know--I'm aware--I've never been in this situation before. This will be my first Bar complaint. But, I know that a lawyer may, if necessary, divulge confidences to the extent necessary to defend against such a thing, so I don't know what the allegations are so I don't know what I would or could divulge, and maybe it might come around in a month or more. It might happen before a certain thing. It might not. I just don't know if that might change--"

"JUDGE: Well, if it would happen, say, a month from now, let's say, in connection with sentencing, then a motion for substitution may be appropriate at that time if a conflict comes up. Right?"

"* * * * *

"JUDGE: But nothing has been put in front of me right now to indicate a real conflict right now, unless I'm missing something, based on what you've said. [Referring to counsel.]"

The trial court then inquired of defendant further and ultimately ruled

"that the defendant has not made a sufficient showing of any specific reason why a substitution of counsel should occur and I don't find any reason for criticism of [defense counsel] at this time based on what has been presented to me, and therefore, I do not believe it would be appropriate under Oregon law for me to grant this motion and therefore, I am denying--respectfully denying Mr. Estacio's motion for substitution of counsel."

Based on counsel's prior request, the court then conducted a competency hearing under ORS 161.360 and found that defendant was able to understand the nature of the proceedings, aid and assist counsel, and participate in his own defense. After a recess, the court made its rulings on other pretrial matters and prepared for *voir dire*. Counsel then spoke up: "I think that I need to move to withdraw * * * *based upon Mr. Estacio's Bar complaint. I think that puts us in conflict.* That is a conflict of interest." (Emphasis added.) The trial court asked for any authorities and for evidence of what specifically the Bar complaint entailed. Counsel referred the court generally to the Oregon State Bar Disciplinary Rules regarding when representation of the client is in conflict with a lawyer's personal interests. She returned to the possibility that she might be required to disclose confidences or otherwise privileged material in response to the complaint and observed that "[t]his may have a chilling effect on his communication with me throughout the duration of the trial." She concluded, "I certainly, Your Honor, it's not going to affect my performance, that I am ready, willing, and able to try this case, and it won't affect me at all, the fact that he filed a Bar complaint."

The trial court denied the motion to withdraw, incorporating the statements made in its ruling on the substitution of counsel, and adding:

"[W]hat I see is before the court in this question is an unspecified Bar complaint. There's no detail at all regarding it except the two words, Bar complaint, so there's no indication at all that any betrayal or revealing of client confidences or secrets would occur or could occur, the Oregon Code of Professional Responsibility is filled with many, many provisions, and with this unspecified 'Bar complaint,' it's impossible to know what we're talking about here. Counsel has indicated that she's ready, willing, and able to proceed with this case and that this will not affect her ability to try the case, and so, it would require a lot of

speculation for me to say that, because something might or might not occur way down the line that that [*sic*] today could have a chilling effect or during the course of this trial could have a chilling effect, and I don't really see that anything new has been presented, nor has any further detail been given[.]"

Defendant argues on appeal that "under [Code of Professional Responsibility Disciplinary Rule (DR)] DR 5-101 * * * an actual conflict of interest existed due to the bar complaint disclosed by defendant, and, absent 'the consent of the lawyer's client', defendant's trial counsel was required to withdraw and the trial court was required to allow trial counsel's withdrawal."(fn3) DR 5-101 provides, in part:

"(A) Except with the consent of the lawyer's client after full disclosure,

"(1) a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial business, property, or personal interests. As used in this rule, 'a lawyer's own financial, business, property, or personal interests' does not include serving in a pro tem capacity on any court, board or other administrative body where such service is occasional or for a limited period of time and compensation therefor is incidental to the lawyer's other sources of income[.]"

The Supreme Court explained in *In re Knappenberger*, [337 Or 15](#), 27, 90 P3d 614 (2004):

"As with the other conflicts-of-interests rules, DR 5-101(A) is 'based upon the concern that, when a lawyer undertakes the representation of a client with interests differing from the interests of the lawyer * * *, the lawyer's judgment might become impaired or the lawyer's loyalty might become divided.' *In re Kluge*, [335 Or 326](#), 335, 66 P3d 492 (2003). To vindicate that concern and to prevent compromised representation, DR 5-101(A) requires a lawyer to look forward and to determine whether, in accepting or continuing representation, the lawyer's and the client's interests will conflict, in terms of DR 5 101(A), whether the lawyer's professional judgment 'will be or reasonably may be affected' by his or her own interests. That operative text expresses two degrees of certainty with respect to that determination. * * * That is DR 5-101(A) requires consent after full disclosure if, based on the facts in an individual case, (1) the exercise of the lawyer's professional judgment 'will be' affected by his or her * * * personal interests, regardless of whether the determination of an effect on the lawyer's professional judgment is reasonable; or (2) the exercise of the lawyer's professional judgment 'reasonably may be affected' by his or her * * * personal interests."

In some circumstances "it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk." *Id.* at 28. However, this appeal is not about whether counsel violated DR 5-101(A), and our role as an error-correcting court in a criminal case is

fundamentally different from an ethics adjudication.

State v. Edwards, [132 Or App 590](#), 890 P2d 423 (1995), provides the framework for our analysis. In *Edwards*, we said:

"The right to substitute court appointed counsel is not absolute, and we review the trial court's decision for abuse of discretion. *State v. Langley*, [314 Or 247](#), 258, 839 P2d 692 (1992) [*adh'd to on recons*, [318 Or 28](#), 861 P2d 1012 (1993)]; *State v. Heaps*, [87 Or App 489](#), 742 P2d 1188 (1987). The exercise of that discretion requires a balancing of a defendant's right to effective counsel and the need for an orderly and efficient judicial process, *State v. Wilson*, [69 Or App 569](#), 572, 687 P2d 800 [1984], *rev den*, [298 Or 553](#) (1985), but

"a defendant has "no right to have another court-appointed lawyer in the absence of a legitimate complaint concerning the one already appointed for him." *State v. Langley*, *supra* 314 Or at 257, (quoting *State v. Davidson*, [252 Or 617](#), 620, 451 P2d 481 (1969))."

"A request for substitution of counsel, therefore, requires a factual determination of whether a defendant has presented a 'legitimate complaint.' A 'legitimate complaint' is one 'based on an abridgement of a criminal defendant's constitutional right to counsel.' *State v. Langley*, *supra*, 314 Or at 258."

132 Or App at 593.

Applying the above principles, we conclude that it was an abuse of discretion to deny defendant's requests without making a full inquiry once the trial court was informed that defendant alleged that counsel had deceived and lied to him and that, as a result, defendant had filed an ethics complaint against counsel. At a minimum, the trial court should have made an affirmative inquiry of defendant concerning those allegations and the factual basis for them in order to ensure that defendant could be provided assistance of counsel in the upcoming trial that met the requirements of Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution. To fulfill its obligation, the trial court was required to determine if defendant's complaints were legitimate and, if legitimate, whether they would interfere with effective assistance of counsel.^(fn4) The trial court's failure to make such an inquiry was error. *Cf. Edwards*, 132 Or App at 593 (holding that an intimate relationship between a defense investigator and a state witness did not constitute an ethical violation as to defense counsel).

The next step of the analysis is to determine if the court's error requires reversal. On that issue, our decision in *Smith* is also instructive. In that case, the trial court failed to inquire into the defendant's complaints concerning appointed counsel after he requested new counsel. 190 Or App at 578. We originally rejected the state's arguments that we should remand to the trial court for it to determine whether the defendant's attorney had adequately represented him. *State v. Smith*, [187 Or App 562](#), 564, 69 P3d 787 (2003). However, on reconsideration, we held that Article VII (Amended), section 3, of the

Oregon Constitution(fn5) requires a showing of prejudice. *Smith*, 190 Or at 579-80. We explained:

"Because the trial court had an affirmative duty to inquire of defendant, the lack of an adequate record is its responsibility, not defendant's; defendant did all that he could do under the circumstances to make a record. The result of those considerations is that we cannot simply affirm the judgment.

"That we cannot affirm the judgment, however, does not mean that defendant is automatically entitled to a new trial. If the trial court, after inquiring, could properly have refused to provide defendant a new attorney, defendant has not been prejudiced. If, on the other hand, the trial court should have agreed to defendant's request for a different attorney, defendant has been prejudiced because he did not receive counsel provided in accordance with the applicable requirements. To remand for a new trial without a showing of prejudice is, in effect, to presume prejudice in substance from proof of error in the procedures designed to protect the substantive right. In *State v. Parker*, [317 Or 225](#), 233, 855 P2d 636 (1993), the Supreme Court expressly rejected a similar conclusion by this court. We conclude that the state is correct to the extent that defendant is not automatically entitled to a new trial as the result of the trial court's error. Rather, we vacate defendant's conviction and remand for the trial court to make the inquiry that it failed to make previously. If it determines that defendant should have received different counsel, it shall order a new trial; otherwise it shall reinstate defendant's conviction. This procedure is, admittedly, cumbersome, but it carries out the intention of the voters when they adopted section 3 by initiative in 1910. To the extent that our previous cases are inconsistent with this ruling, they are disavowed."

Id. at 580-81 (footnote omitted).(fn6) The same principles are applicable here.

Convictions vacated and remanded with instructions to inquire into the reasons for counsel's request to withdraw as defendant's attorney. If the trial court determines that defendant was entitled to substitute counsel or that counsel should have been permitted to withdraw, it shall order a new trial; otherwise it shall reinstate the previous judgment.

Footnotes:

1. A different judge than the judge presiding at defendant's trial considered both of those matters at separate hearings.
2. The trial court had already scheduled defendant's trial to begin at the end of March.
3. We refer to the rules in the Oregon Code of Professional Responsibility, not the Oregon Rules of Professional Conduct, which became effective on January 1, 2005.
4. As we recently noted in *State v. Crain*, [192 Or App 328](#), 333, 84 P3d 1092, *rev den*,

[337 Or 565](#) (2004), an attorney's motion to withdraw in a criminal case may involve "potentially overlapping, but analytically distinct, considerations from those implicated by a defendant's motion for substitute counsel." Here, as the discussion in the text makes clear, the two motions were significantly interrelated. We note, however, that under other circumstances it may be that consideration of counsel's motion to withdraw may require a different inquiry and analysis from the consideration of a defendant's motion for substitute counsel.

5. Section 3 provides, in pertinent part:

"If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, not withstanding any error committed during the trial[.]"

6. Consistent with *Smith* is the Supreme Court's recent discussion in *Ryan v. Palmateer*, [338 Or 278](#), 297, ____ P3d ____ (2005), where the court rejected the application to Oregon law of the structural error doctrine and reiterated the requirement that in direct criminal appeals we consider whether errors at trial require reversal under "harmless error" analysis.

Responses to DA Provision of Discovery (Police Reports) Survey
of OCDLA Members *
(March 2005)

Appendix D

County	Measure 11 (M11)	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Clackamas	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	M11/Felonies: Retained - sometimes advantage, get Police Reports (PR) before grand jury. PR occasionally available day of arraignment. Misdemeanors: Often available same day as 1 st appearance, if accusatory instrument is filed (except DUII generally) All: When prior counsel withdraws, provision of PR takes about a week in most cases.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	M11: Lots of variation between DDAs and cases - sometimes can get PR before indictment/arraignment, sometimes not but w/in 1-2 days. Homicide or otherwise "complicated" cases, may be more than 2 weeks. Generally, w/in 1-2 days indictment/arraignment.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Same day as 1 st appearance	Same day as 1 st appearance	Misdemeanor Domestic Violence: generally, within 2 days of first appearance. ** See additional notes re: DA discovery process in Coos County on final page.
Deschutes	After indict, > 7 days arraignment	After indict, w/in 1 day arraignment	Same day as 1 st appearance	Same day as 1 st appearance	
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Same day as 1 st appearance	Same day as 1 st appearance	
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Same day as 1 st appearance	Same day as 1 st appearance	
Douglas	After indict, > 7 days arraignment	After indict, > 7 days arraignment	More than 2 weeks	More than 2 weeks	M11: Motion to release client pending, since > 30 days since arrest and only PC affidavit provided so far. Not the 1 st time. Non-M11 Fel: 1 of main reasons cases are set over at CSC, waiting for PR. Practicing 15 years, this is worst it's been. No Pattern. Some get report w/in few days - others it literally takes months.
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	no response	no response	Douglas can be very slow. Coos may have PR by arraignment, but peculiar procedure - attempt to place burden on defense to continually check DA file for any new/updated discovery.

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Harney	After indict, > 7 days arraignment	After indict, > 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
Jackson	After indict, > 7 days arraignment	After indict, > 7 days arraignment	More than 2 weeks	More than 2 weeks	
Josephine	After 1 st appearance, but before GJ convened	After indict, w/in 7 days arraignment (see comments)	> than 5 days, but < 2 weeks 1 st appearance	Between 3 and 5 days 1 st appearance	Non-M11 Fel: if in-custody , generally PR provided before indictment. If out-of-custody , generally PR provided within a few days of arraignment on indictment.
	See comment	See comment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	All felonies: in-custody and out-of-custody: always after the 1 st appearance; usually takes a week or week-and-a-half.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
Lane	After indict, > 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	M11: Generally, greater than 7 days after arraignment on indictment, and although sometimes sooner, it is NEVER before the indictment arraignment.
	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	Non-M11 Fel: sometimes FTA disc not available day of arraignment. But DA has been making great efforts to streamline the discovery process, which ends up saving both offices time and work.
	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	M11 and Non-M11 Fel: We are also proceeding by information on many felony cases, except for M11. On M11 indictments , may be some delay in disc.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	W/in very few days of written request to citing officer	After indict, w/in 1 day arraignment	

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Lane (continued)	After 1 st appearance, but before GJ convened	After 1 st appearance, but before GJ convened	> than 5 days, but < 2 weeks 1 st appearance	No response	
	After indict, w/in 7 days arraignment	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	All: one jurisdiction (LE) notoriously slow getting PR filed with DA's office.
Linn	After indict, > 7 days arraignment	After indict, > 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
	After 1 st appearance, but before GJ convened	After 1 st appearance, but before GJ convened	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	
	After 1 st appearance, but before GJ convened	After 1 st appearance, but before GJ convened	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	All Misd: Sometimes w/in a day or two from first appearance.
Malheur	After 1 st appearance, but before GJ convened	After 1 st appearance, but before GJ convened	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	Extensive description of process. The DA gives us what they have when they get it. The hold up is when they do not receive reports in a timely manner from the police agencies.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Marion	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	More than 2 weeks	don't handle enough to fairly comment	All Fel: Discovery is a real problem, we often do not get it even before offers expire. Other times we get it the day before plea and continuances are troublesome even when there is nothing more we could have done short of a motion to compel. Timing is faster for in-custody, but disc is never complete which is just as problematic. Response from some ADAs that 'your client knows what he did, you don't need everything to make your decision' is inappropriate. Traffic Misd: In a recent DUI, disc took 6 weeks.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	All: DA policy - no PR until indictment (or arraignment on charges if misd) and appointment or appearance with client. Generally, PR start being available with 24 hours of arraignment on indictment/misd. All too frequently (about 1/4 cases), PR don't start arriving until 3-4 days of arraignment.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	All Fel: DA policy re: no PR before indictment. Thinks ORS require upon filing of information or indictment. More discussion. All Misd: May be quicker if client is in-custody. Thanks for taking on this topic!
	After indict, w/in 7 days arraignment	After indict, w/in 1 day arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Multnomah	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Unknown	Unknown	Initial police reports are often incomplete, subsequent discovery - additional reports, forensics, jail calls and the like vary significantly by DA. Detectives often have reports which DA claims to have never received. Yesterday for an anecdotal example I sent out a good felon in possession case for trial. My client had been in custody for 4 months, in part based on my advice that the state had a weak case. Yesterday afternoon I was provided a copy of a jail phone call made by my client in October or November after her initial arrest. In that call was a clear admission to possession of the weapon. This is becoming typical and I believe it is in part due to cuts in the DA's office.
	No response	No response	W/in 2 weeks, sometimes longer	Approx. 40% at arraignment; 40% w/in 3-5 days; 20% > 5 days but < 2 weeks	MPD's reported experience/estimates for misdemeanors
	No response	After indict, > 7 days arraignment	More than 2 weeks	More than 2 weeks	Non-M11 Fel: 2 or more weeks after arraignment. ** See additional comments at conclusion of Table.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	Response from retained counsel.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	More than 2 weeks	More than 2 weeks	Traffic Misd: It varies, but mostly not at 1 st appearance except for DUlls. If it is a DWS, the traffic record often doesn't come before Pre-trial Conference. Non-traffic Misd: It varies. Most PR comes with 1 st appearance. Notable exceptions are BW where disc goes to prior attorney and DV cases a bit slow.

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Tillamook	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Same day 1 st appearance	W/in 2 days 1 st appearance	
	After indict, > 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
Umatilla	No response	After indict, w/in 1 day arraignment	Same day 1 st appearance	Same day 1 st appearance	All: The only way to get disc is to pick it up. Occasionally, they will mail it, but usually not.
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	More than 2 weeks	More than 2 weeks	All Fel: Most cases, PR provided w/in one month. M11 in-custody PR generally arrive in 1-2 weeks. Comments re: other disc requiring 2-3 court appearances/requests. All Misd: Generally, more than 2 weeks but within one month.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	M11: Sometimes longer if arrested at time of crime.
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	No response	No response	
Wasco	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	All Fel: Depends on if client was indicted before or after being taken into custody, and if we were appointed before or after indictment. In general, takes 7-10 days after app'tment to get reports. M11 cases, it can be longer.
	After 1 st appearance, but before GJ convened	After indict, w/in 1 day arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Washington	No response	No response	More than 2 weeks	More than 2 weeks	
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	All Fel: The timing of disc is somewhat inconsistent, but averages 11 days from request. The greater the volume, the slower the speed.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	
	No response	See comment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	Non-M11 Fel: Generally, receive PR w/in 7 days of request for disc, which office mails out when get appointed. So, if client is in-custody, generally don't get PR until after indictment or preliminary hearing. Since WACO does prelims in several types of cases, often we have to do the prelim without having received PR. I always thought that was unfair.
	After indict, w/in 7 days arraignment	See Comment	> than 5 days, but < 2 weeks 1 st appearance See comments	> than 5 days, but < 2 weeks 1 st appearance See comments	Non-M11 Fel: If prelim hearing, get PR before hearing – in-custody in one week and out-of-custody in one to two weeks. If case goes to GJ, get PR approx one week after GJ. All Misd: Receive PR at about two weeks.
	After indict, w/in 7 days arraignment	Gen, 7 days after arraignment	Gen, 7 days after arraignment	Gen, 7 days after arraignment	
Yamhill	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	

* The email survey to all OCDLA members is attached on the final two pages of this document.

** Additional Comments/Notes:

Coos County – All Cases:

Our DA's office has an "open file" policy, which means that we pick up and copy DA's files. Our office has one discovery clerk. On the day of arraignment (except for Mondays, when arraignments are at 3 p.m.), our discovery clerk copies the discovery. For in-custodies, she gives the discovery directly to the attorney. The attorney is responsible for asking her or his secretary to do a conflict check. For out-of-custodies, the discovery clerk sends the discovery to the secretaries who do conflict checks. I [contract administrator] then decide all conflict questions.

This system works fairly well. There are a couple of problems: First, if the DA receives additional discovery, there is no notification process. We are expected to periodically check the DA files for new discovery. The attorneys, not discovery clerk, do this. Second, in the past, there were [instances when discovery apparently was hidden]. The issue was eventually resolved, but we are still a little wary of this.

Multnomah – Misdemeanors:

We get discovery 2 or more weeks later and also get additional discovery after 1 to 2 pretrial settings have gone by and sometimes even on day of trial.

We go through phases where we complain and it gets a little better. Then it gets worse and we start filing motions to compel. The most frustrating part is when we have a DUI case with a diversion entry deadline and we get no discovery prior to the hearing date or only partial discovery where we are missing a lab report and find ourselves in a situation where the client has to make an election but we have incomplete information from the district attorney's office for the client to make an informed choice. Usually in those situations we take a setover in diversion court. But the delay in getting discovery when we have filing deadlines is frustrating.

There has been local discussion about shortening the time frame between arraignment and the first pretrial setting to less than a month. If this occurs, then the current 2-3 week time frame that we have been getting discovery will be a disaster. In short, we need discovery provided to us at time of arraignment or within 3 business days, in my opinion.

NOTE: Two survey responses for Juvenile-type cases were not included in the above table.

To: OCDLA Members
From: annchristian@comcast.net
Date: Wed, 23 Feb 2005

Paul Levy and Ann Christian, co-chairs of a Conflict Work Group established by the Public Defense Services Commission, request your help. One significant aspect of public defense conflicts/substitutions of counsel is the time frame within which discovery is provided to defense counsel. We are asking BOTH attorneys who do public defense work and those who do not to give us information on how quickly POLICE REPORTS generally are provided to defense counsel in different counties.

Please respond to the four questions below directly to Ann. Please do not reply to OCDLA. You can send your response to Ann at annchristian@comcast.net by either:

1. hitting "reply" to this email, delete the ocdla address and paste ann's email address into the "to:" box, enter your responses, and hit "send"; or
2. hitting "forward" on this email, paste ann's email address into the "to:" box -- and prior to actually "sending" the email to Ann, be sure to include your responses below.

SURVEY

In state court cases in the county in which your office is located, Police Reports are provided (made available) to defense counsel in the vast majority of cases (over 90%) within which of the following time frames. (If there are differences, for example for misdemeanors, based upon whether a client is in-custody or out-of-custody, please briefly describe the difference in the comments section.)

1. For Measure 11 cases
 - The same day as my client's first court appearance
 - After first appearance, but before grand jury is convened
 - Not until after a client is indicted, but within a day of the arraignment on the indictment
 - Not until after indictment, but within 7 days of the arraignment on the indictment
 - Not until after indictment and greater than 7 days after the arraignment on the indictment

Comments:

2. For other Felony cases

- The same day as my client's first court appearance
- After first appearance, but before grand jury is convened
- Not until after a client is indicted, but within a day of the arraignment on the indictment
- Not until after indictment, but within 7 days of the arraignment on the indictment
- Not until after indictment and greater than 7 days after the arraignment on the indictment

Comments:

3. For Misdemeanor TRAFFIC cases

- The same day as my client's first court appearance
- After first appearance, but within 2 days of first court appearance
- Between 3 to 5 days of first court appearance
- More than 5 days after first court appearance, but less than two weeks
- More than two weeks

Comments

4. For Misdemeanor NON-Traffic cases

- The same day as my client's first court appearance
- After first appearance, but within 2 days of first court appearance
- Between 3 to 5 days of first court appearance
- More than 5 days after first court appearance, but less than two weeks
- More than two weeks

Comments:

Ethical Conflicts – Issues and Improvements

Appendix E

Current/Former Client Conflicts Chart #1

Issue	Factor/Problem	Improvement	What's Needed?
Early Discovery	<p>Felonies – 1. Complainant, co-defendant and known civilian witness information not consistently provided to MPD prior to first appearance.</p> <p>2. Discovery generally not provided until after grand jury indictment.</p> <p>Traffic (non-DUI) Misdemeanors – police reports not available at first appearance or soon thereafter.</p> <p>Non-Traffic Misdemeanors – generally, reports available at first appearance</p>	<p>1. DA provides complainant, co-defendant, known civilian state witness information to MPD no later than early morning of 1st appearance (just as is done with aggravated murder and murder case info to court pre-1st appearance).</p> <p>2. For all felonies (or as first step all property/drug felonies – as pilot), provision of discovery pre-grand jury.</p> <p>Just as with non-traffic misdemeanors, defense copy of PR should be in DDA file and provided at first appearance</p>	<p>1. a. Additional or redirected resources in DA's office and maybe MPD? b. Can information provided to MPD be provided to PDC?</p> <p>2. Change in DA policy and possible resource issue?</p> <p>Additional or redirected resources in DA's office? Or simply moving DUI/traffic discovery from DA office in courthouse to Justice Center?</p> <p>All: Electronic provision of police reports; e.g., Scan and Email versus Copying</p>
Ability of Contractors to Immediately Check for Conflicts	<p>Is there delay in reviewing discovery once it is received by Contractor? By staff? By attorney?</p> <p>Time/staffing?</p> <p>Office conflicts database and/or OJIN improvements?</p>	<p>Additional resources?</p> <p>Office database and/or OJIN improvements?</p> <p>Internal policy/direction re: importance of immediate and continuing review?</p>	<p>Additional resources?</p> <p>Office database and/or OJIN improvements?</p> <p>Internal policy/direction re: importance of immediate and continuing review?</p>

Issue	Factor/Problem	Improvement	What's Needed?
<p>Review/Assistance to Attorneys re: Determining if Actual Conflict</p>	<p>If prior representation by office, pulling and reviewing file – delay and potentially learn of a conflict not otherwise known to present attorney</p> <p>Potential for attorneys using possible conflict/withdrawal as caseload management tool</p>	<p>New Rule and Interpretation re: imputation of former client conflict if attorney no longer at firm</p> <p>Better training and resources (e.g., # of staff/attorneys and assistance of another attorney?)</p> <p>Improvements in Kor conflicts databases?</p> <p>Internal monitoring of attorney withdrawals?</p>	<p>Additional training for staff/attorneys?</p> <p>Review of potential conflict by supervisor/other attorney?</p> <p>Development of written guidelines or a model “things to consider” checklist?</p>
<p>Prior Representation -- Closed Files</p>	<p>OSB Formal Opinion No. 2003-174 Pulling closed file for review</p> <p>Retention of files (PLF, K provisions, where to store old files – Salem?)</p>	<p>New Rules and Interpretation</p> <p>PDF files</p> <p>Send files to Salem?</p> <p>Informed waivers – former and current clients – but further delay and right to independent counsel?</p>	<p>PLF and OSB Guidance</p>
<p>Appointment of New Counsel</p>	<p>How to best and expeditiously determine new attorney who most likely has no conflict</p>	<p>Attorney seeking substitution submits (to court or PDC or other Kor) list of known witnesses, co-defendants, potential defense witnesses?</p> <p>Attorney seeking substitution contact potential new attorneys prior to substitution hearing?</p> <p>Delay briefly official substitution to allow better conflicts checking?</p>	<p>Group endorses this, just need direction.</p> <p>Group does not endorse.</p> <p>Is done in limited instances now.</p>
<p>Issue</p>	<p>Factor/Problem</p>	<p>Improvement</p>	<p>What's Needed?</p>

<p>One Client/ One Attorney</p>	<p>If Attorney A is appointed to represent client on three cases, determines former client conflict on one of three cases, should new counsel be substituted onto only the one case or on all three cases?</p> <p>To the extent all three cases, versus only one, are transferred to new counsel, there is an additional cost to public defense for the two additional cases.</p> <p>To the extent the defendant winds up with two or even three lawyers representing him on multiple pending cases, there is assumed to be a greater potential for "harm" to the client. Even if no harm occurs, having multiple lawyers for one client is inefficient resource-wise.</p>	<p>In Multnomah for example, a client may have the Portland Defense Consortium appointed on a felony and later, but while the felony is pending, MDI is appointed to represent the defendant on two misdemeanors. If the MDI attorney determines she has a conflict requiring withdrawal/substitution on one misdemeanor case only, both cases should be transferred to new counsel, unless there is reason to believe it is not in the client's best interest to have one attorney handling all three cases. There are circumstances, however, where counsel should retain the non-conflict cases; e.g., non-conflict case scheduled for trial in one week.</p>	<p>If assume that generally (not always) it is better for a client to have one attorney on pending matters, need direction to attorneys and courts that new counsel should be substituted on all 3 cases in the example, provided withdrawing counsel assesses that transfer of all cases is in the best interest of the client and will not result in delay in resolution of pending cases that is not supportable.</p>
<p>OTHERS?</p>			

Breakdown in Attorney/Client Relationship Chart #2

Issue	Factor/Problem	Improvement	What's Needed?
Sufficient Communication Early and Regular Contact	<ol style="list-style-type: none"> No "Immediate" Contact with Client Failure or Inability to regularly communicate/consult with client – e.g., custody clients at Inverness (evening/weekend visits) 	<ol style="list-style-type: none"> Legal Assistant, at minimum, immediate contact Video? Transport to JC? Someone to review particular attorney contacts, if pattern of such withdrawals? 	Increase and/or redirection of Kor resources
Early Discovery	See topic Chart #1	See topic Chart #1	See topic Chart #1
Dissatisfaction with Advice	Even with early discovery, sufficient communication, excellent representation/advice, client may be "unhappy"	2d opinion availability?	Policy decision Occurs to a limited extent currently - formally (request NRE) and informally between some contractors or consortia members
Known "problem" defendants	Some defendants historically are "dissatisfied" clients	Initially or after first motion to withdraw, appoint experienced private bar attorneys or attorney contractors and compensate accordingly	Policy decision and court discretion to do so (i.e., skip other contractors)
60-day rule	One of relative early matters counsel must address with client – waive 60 days statutory "right" (aka right to be convicted within 60 days)	For Measure 11, amend ORS 136.290 to provide a 120-day rule	Legislation
OTHERS?			

FILE RETENTION AND DESTRUCTION

Most client files should be kept for a minimum of 10 years to ensure the file will be available to defend you against malpractice claims. Files that should be kept for *more* than 10 years include:

1. Cases involving a minor who is still a minor at the end of 10 years.
2. Estate plans for a client who is still alive 10 years after the work is performed.
3. Contracts or other agreements that are still being paid off at the end of 10 years.
4. Cases in which a judgment should be renewed.
5. Files establishing a tax basis in property.
6. Criminal law – most of these files should be kept indefinitely.
7. Support and custody files in which the children are minors or the support obligation continues.
8. Corporate books and records.
9. Files of problem clients.
10. Adoption files.

Whenever possible, do not keep original papers (including estate plans or wills) of clients. When closing the file, return original documents to clients or transfer them to their new attorneys. Be sure to get a receipt for the property and keep the receipt in your file.

The first step in the file retention process begins ***when you are retained by the client***. Your ***fee agreement*** should notify the client that you will be destroying the file and should specify when that will occur. The client's signature on the fee agreement will provide consent to destroy the file. In addition, your ***engagement letter*** should remind clients that you will be destroying the file after certain conditions are met.

The second step in the file retention process is ***when the file is closed***. When closing the file, establish a destruction date and diary that date. If you have not already obtained the client's permission to destroy the file (in the fee agreement and engagement letter), you can get written permission when you close the file. Or you can make sure that the client has a complete copy of the file. This includes all pleadings, correspondence, and other papers and documents necessary for the client to construct a file for personal use. If you choose the latter alternative, be sure to document that the client has a complete file. This means that the file you have in your office is *yours* (and can be destroyed without permission) and the one the client has is the *client's* copy.

The final step in the file retention process involves reviewing the firm's electronic files for client-related material. This data may be on servers, hard drives, laptops, home computers, zip drives, disks, or other media. Examples include email communications, electronic faxes, digitized evidence, word processing or other documents generated during the course of the case. Review these sources¹ to ensure that the client file is complete. If there are documents that exist only in electronic form, they should be printed and placed in the appropriate location in the client's file. You may then elect to permanently purge the electronic version of the client's file², or move it onto appropriate storage media. The retention policy for electronic data should be consistent with the retention policy for paper files, to the extent possible. Unfortunately, rapid obsolescence of computer hardware and software may make it difficult, if not impossible, to retrieve electronic data that is five or more years old.

¹ Intranets, Extranets, the Internet, or web-based servers may also contain client data.

² With proper technique, deleted documents can be retrieved and restored. Consult with a computer expert to determine what steps must be taken to ensure that client documents have been *completely* purged from your system, including back-ups, if applicable. For recommendations on how to store data for long-term archival needs, contact the Association for Records Management Professionals, www.arma.org

Closed files should be organized by years or organized into two groups: files that are ten years and older and files that are less than 10 years old. If possible, however, separate closed client files into groups according to the year the work was completed so that each year you know which files to review for destruction.

Keep a permanent inventory of files you destroy and the destruction dates. Before destroying any client file, review it carefully. Some files need to be kept longer than 10 years, as noted above. Others may contain conflict information that needs to be added to your conflict database or original documents of the client which should never be destroyed. Always retain proof of the client's consent to destroy the file. This is easily done by including the client's consent in your fee agreement or engagement letter, and retaining the letters with your inventory of destroyed files.

Shredding is generally the best method for file destruction. (See OSB Legal Ethics Op.1995-141.) Permanent destruction of electronic data requires special expertise .²

Preliminary Review of Conflicts of Interests in Public Defense Cases
Ethical, Resource and Client Issues
Recommendations
Ann Christian
November 12, 2004

Overview of Primary Issues Relating to Public Defense Attorneys and Conflicts of Interest and the Scope of This Preliminary Review

On an annual basis, public defense attorneys are appointed by Oregon's trial courts to represent persons determined financially unable to retain counsel in over 160,000 cases. The nature of these cases range from non-payment of a court imposed financial obligation (e.g., non-payment of child support or a criminal fine) to aggravated murder. Public defense cases also include those where a child has been removed from her parent's custody by the State due to alleged abuse and neglect and cases in which the person has been taken into State custody based on an allegation the person is psychologically a danger to oneself or others.

Of the more than 160,000 cases annually, some number have more than one attorney appointed to represent the client during the course of the case. In what appears in the total scheme of public defense representation to be a relatively few cases, a client entitled to public defense counsel may have, as was the case in one recent case in Multnomah County, six attorneys appointed to represent the individual prior to the court allowing the person to represent himself.

This preliminary review of public defense conflicts of interest is not intended to be a treatise on the case law, disciplinary rules and Bar opinions governing attorney conflicts. And it is not a legal review of the courts' authority to allow withdrawal and substitution of appointed counsel; i.e., how many attorneys is an individual entitled to in order to ensure the person receives "adequate" or "effective" representation required by the federal and state constitutions? At what point, after how many attorneys, can or should a court deny a person's request for new counsel? Or, legally and practically, at what point should a judge deny a request for new counsel, allow a person to proceed with his case with no representation or with the assistance only of a "legal advisor."

Rather, this preliminary review of public defense conflicts of interest is intended to:

- identify the *practical issues* and *adverse impacts* that result from attorneys' ethical obligations to current and former clients and ethical issues that arise in representing some individuals who have significant mental health or social issues;
- identify the *practical issues* and *adverse impacts* that arise and result from legal representation provided by multiple attorneys;
- assess the extent and nature of the multiple representation "problem" – to the extent current information allows such an assessment; and
- provide recommendations to public defense administrators and providers for what steps should next be taken to improve the practical issues and adverse impacts of multiple representation of public defense clients.

The primary issues relating to public defense attorneys' conflicts of interest and multiple public defense attorneys appointed to represent an individual appear to be:

1. the financial cost to the state;
2. the adverse impact on public defense attorneys (both the former and future appointed attorneys);
3. the adverse impact on the court, prosecutors, and others (e.g., victims) involved primarily in the criminal and juvenile justice systems; and
4. the adverse impact on clients of public defense services.

An Illustration of the Conflicts “Problem”

To illustrate the above primary issues related to “conflicts,” consider the following example.

Tom Smith is 40 years old and in custody at the Multnomah County Detention Center. Mr. Smith is charged with a Ballot Measure 11 offense and violating his probations on multiple drug, theft and firearms convictions.

Mr. Smith's OJIN court records in Multnomah County alone date to 1985 (the year to which the Court back loaded records into OJIN). *Excluding* numerous infraction and violation cases, Mr. Smith has 56 closed felony, misdemeanor, domestic restraining order, and other domestic relations-related cases, including contempt for non-payment of child support. Multiple violations of the many probations that Mr. Smith has served are not counted in the court's OJIN records. Mr. Smith also is listed as a party in his son's Minor in Possession of Alcohol case and his parental rights were recently terminated by the court. Finally, Mr. Smith is known to be a “difficult” client to represent.

The former Mrs. Smith has a similar OJIN record and is the named victim in Mr. Smith's new Attempted Murder/Assault I case. Both Smiths have been appointed counsel by the court on their criminal and juvenile court cases over the years.

Although this example is not the norm with respect to clients of public defense services, it is this type of scenario that does occur (seemingly, more and more frequently) and brings to everyone's attention within the system the difficulties presented in appointing an attorney to represent the “Mr. Smiths” and appointing an attorney that will be able to stay on the case from start to finish. In Oregon, there is an emphasis on appointing counsel at the defendant's first appearance. This is good for Mr. Smith and for the court and prosecution. In a county with multiple felony contractors and contract offices which handle juvenile cases, as well as criminal cases, the challenge has been and continues to be how best to determine which attorney should be appointed to represent Mr. Smith – today, at 1:00 p.m.

The example of Mr. Smith is primarily based on a real case for which counsel recently was appointed. In this example, Multnomah County public defense contractors whose attorneys previously have been appointed to represent Mrs. Smith in her criminal and juvenile court matters and those whose attorneys have been previously appointed to represent the Smith children in juvenile court all have an actual conflict of interest in representing Mr. Smith on his new felony case. The victim of the alleged assault is Mrs. Smith.

Prior to November 2000, what likely would have occurred with respect to the appointment of counsel for Mr. Smith?

Prior to November 2000, it is most likely Metropolitan Public Defender Services (MPD) would have been appointed to represent Mr. Smith at his first court appearance. This is because MPD is the county's primary major felony contractor and because no review occurred prior to Mr. Smith first court appearance, with respect to "conflicts" that may readily be identified by a review of OJIN case records.

Because MPD had represented Mrs. Smith previously, MPD would identify that conflict after having been appointed and would then file a motion for substitution and appointment of another public defense attorney. The court's staff, at this point and assuming time and resources are available that day, may be able to identify that Contractor X previously represented the Smith children and as a result, avoids the court appointing that contractor to represent Mr. Smith. But the court's staff does not and cannot know that Contractor Y, which is "next in line" for consideration of appointment, currently represents the state's primary witness to the alleged assault. Contractor Y is appointed, discovers the conflict after interviewing Mr. Smith, and requests the court substitute new counsel.

Attorney Homan with Contractor Z is substituted by the court. Mr. Homan reviews the discovery that became available today; e.g., two to three weeks after Mr. Smith's first court appearance. A check for conflicts based upon information included in the discovery results in no conflicts being identified. Mr. Homan interviews Mr. Smith and returns to his office with the name of a witness not listed in the discovery. This witness is identified by Mr. Smith as his self-defense witness.

That witness is a former client of Contractor Z's office eight years ago, well before Mr. Homan was employed by Contractor Z. The attorney who represented the defense witness is no longer employed by Contractor Z. Attorney Homan has the file on the former client retrieved from the office's storage unit. He reviews the file and determines the former representation creates an actual conflict, under DR 5-105(C)(2) and the OSB's Formal Opinion NO. 2003-174. Historically, the most difficult of ethical conflict issues for public defense counsel have been related to this "former client representation" type of scenario.

But DR 5-105(D) does allow the attorney to continue his representation of Mr. Smith if both Mr. Smith and the former client consent to the representation after full disclosure. Even if Attorney Homan were to seek such consent, assume that Mr. Smith would not consent, not because of disclosed conflict, but because Mr. Smith was not impressed with Attorney Homan, in part because he looks so young and has a 2001 bar number.

By now, four weeks have passed since Mr. Smith's grand jury indictment and there is a concern Mr. Smith may not consent to waiving "the 60-day rule." The court considers the third motion for substitution of counsel in this case. Mr. Smith now informs the court that he wishes to represent himself, as he knows well from experience that his court-appointed attorneys are "not real attorneys." He knows what happened that horrible evening and he simply wants to present his case to a jury. The court does not allow Mr. Smith to represent himself and appoints an attorney from the court's private bar list. That attorney files a motion for substitution two weeks later, based upon a "breakdown" in the attorney/client relationship.

This illustration, based on fact in again a relatively few but notable cases, could continue with even more attorneys being appointed or Mr. Smith eventually representing himself, with the assistance of a "legal advisor."

What actually occurred recently in Multnomah County with respect to the appointment of counsel for “Mr. Smith”?

Beginning in November 2000, MPD and the former Indigent Defense Services Division implemented an “appropriate case assignment” process within the MPD office. MPD staff reviews *felony* first appearance dockets the morning prior to the scheduled court appearances. Staff check OJIN to determine whether a defendant currently is represented by an appointed attorney. If that is the case, that attorney will be appointed on the new case, provided the contractor/attorney also takes felony appointments. One client, one attorney.

If a defendant is not currently represented by appointed counsel, MPD performs a conflicts check to determine whether (without benefit of formal discovery) MPD has an apparent conflict in being appointed to the case; e.g., OJIN and MPD records. In our example, this review would show that MPD previously has represented Mrs. Smith. To the extent the District Attorney’s office is able, information on co-defendants, victim names and prosecution witnesses may also be provided to MPD staff.

The goal of the “appropriate case assignment” process is to identify as many potential conflicts for MPD and other felony contractors as is humanly possible within a very limited time prior to defendants’ first court appearances.

In the recent *real* case on which the Mr. Smith illustration is fashioned, it appears MPD staff’s review of the defendant’s OJIN history (56 closed cases) also disclosed the fact that the vast majority of other contractors’ attorneys previously had represented the defendant. At the defendant’s first appearance in court later that day, the court appointed a non-contract, Private Bar attorney.

Of course, it remains to be seen whether the Private Bar attorney will remain on the case through its conclusion. But, the fact of having the “appropriate case assignment” process in place avoided the delay and disruptions resulting from many of the multiple substitutions that would have occurred prior to the implementation of MPD’s “appropriate case assignment” process four years ago.

The purpose of the Mr. Smith illustration and discussion is three-fold:

- to provide a sense of the nature of conflicts in public defense cases;
- to provide a broad sense of how conflict issues adversely impact public defense resources and providers, public defense clients, and the court system overall; and
- to explain one of a number of improvements already in place in Multnomah County that decreases the likelihood a client will have multiple attorneys appointed during the course of the client’s case.

Examples of How Competing Goals and Demands Affect Appointment and Substitution of Counsel

Contract and Private Bar Representation

In the Mr. Smith illustration, Private Bar counsel was first appointed to represent “Mr. Smith,”

based upon the appearance from OJIN records that all other contractors in Multnomah County likely would have a conflict of interest. Is that the answer? When in doubt about contractors' ethical ability to represent a client at the outset of appointing counsel, appoint Private Bar in every case? But even in Mr. Smith's case, if given the time (prior to actual appointment of counsel) and resources (e.g., available staff, state witness/co-defendant names), there likely may have been one of the ten law firms that are members of the two Multnomah County contract consortia that may have been able to accept Mr. Smith's case, without conflict.

Particularly in this time period when public defense caseloads are not those of the 1990s where there were more than sufficient numbers of cases available for all contractors and private bar, public defense administrators and contract providers want contractors to get as many cases as they possibly can. The two Multnomah County consortia were established for the very purpose of being able to accept appointment to cases in which MPD has a conflict. Consortia contracts are intended to decrease the need for Private Bar, hourly-paid attorneys.

But then, State Bar Task Forces and others have long advocated for the maintenance of a strong (well-trained and experienced) Private Bar component of public defense as a matter of good policy. If having a strong Private Bar is not given priority, who will handle the cases that continue to have substantial multiple conflicts?

The answer by some may be that contract attorneys from neighboring counties be appointed to such, again relatively rare, cases. But with the workload demands of most existing contractors and court docket issues in many courts, appointing out-of-county contract attorneys may not be the best solution, unless there is no other solution.

The goals of immediate appointment of counsel and continuous representation by appointed counsel (no periods of time where a client is unrepresented) and the goal of avoiding multiple appointments due to conflicts

If a person who is determined financially eligible for appointed counsel at that person's first court appearance could wait to learn who his specific attorney will be until the prosecution provides discovery, conflict appointments would decrease. However, the competing goals of best ensuring a public defense client actually has early contact with his attorney and makes his future court appearances is better attained if the client leaves his first court appearance having met his appointed attorney. At the first court appearance, at least preliminary legal advice and contact information can be exchanged. But by appointing a specific contractor or attorney at the first appearance, the potential for a conflict withdrawal of that public defense provider is greater than if counsel could be appointed after for example, preliminary discovery is available.

By raising these competing demands, I wish to make it clear that I am not suggesting or recommending the initial appointment of counsel, particularly for clients in custody, be delayed to sometime after first appearance. My point is simply that it is important to identify what are often different and competing demands and goals within the system that impact the potential for conflict substitutions of appointed counsel.

With respect to the appointment of counsel at the *outset* of a case, ORS 135.045 and 135.050 and constitutional mandates support appointment of a specific contractor or attorney immediately. In addition, the practical side effects of delaying appointment of counsel, such as the possible loss of a critical defense witness, support appointment at the first court appearance. However, for cases in which counsel has been appointed and there is a need to substitute new counsel, one may consider delaying the new appointment of counsel for what likely would be no more than 24 hours in order that other contractors or Private Bar being

considered by the court for substitution could review discovery and conduct a conflicts check prior to the court actually ordering appointment of new counsel. A trade off with this approach is that there may be out-of-custody clients who do not re-contact the court or who will be required to make yet another court appearance to learn who their new attorney is.

The Need to Retain Experienced, Quality Public Defense Attorneys and Firms

Another set of competing goals is minimizing the number of instances where multiple public defense attorneys are appointed to a case and retaining experienced public defense providers. More time and experience means more conflicts for individual attorneys and firms. Particularly with the issue of “former client” conflicts, public defender and law firm offices that have existed for decades are “ripe” for conflicts and withdrawals, particularly under existing Disciplinary Rules. Rather than recommend consideration be given to “shutting down” such offices and seeking out new attorneys and firms, I am pleased to discuss below that the historical issue and impact of “former client” conflicts will likely be mitigated with the adoption of new disciplinary rules, effective January 1, 2005.

Retention of Client Files

A final example of competing goals or demands that impact the number of instances where substitution of appointed counsel is necessary involves retention of public defense files. Clients, the Oregon State Bar, the Office of Public Defense Services under the contract terms, and subsequent lawyers for the client all want clients’ files to be preserved – for probation violation proceedings, and state and federal postconviction relief proceedings. But keeping files for extended periods of time creates often significant ethical issues. As is the case with the experienced attorneys and offices discussed above, the new disciplinary rules will likely lessen the adverse impact of retaining client files.

It also needs to be noted that lack of adequate resources within public defense providers’ offices, prosecution offices, and the courts impact the number of cases in which appointed counsel will need to be substituted and the time within which conflicts can be determined. Both result in delays in the resolution of a case and generally adversely impact the client and all others within the justice system. If the District Attorney’s office cannot provide discovery to defense counsel in a timely manner, there is a greater likelihood for a greater number of and more delay in substitutions of counsel. If a public defense office has insufficient resources to timely check for conflicts or to maintain regular contact with clients, there is a greater likelihood for a greater number of and more delay in substitutions of counsel. If a court’s docket is such that cases are repeatedly set over, attorney/client relationships can deteriorate or clients are more likely to eventually fail to appear in court, resulting in issuance of a bench warrant and beginning the appointment of counsel process anew months or years later.

Primary Reasons for Withdrawal by Appointed Counsel Due to a Conflict of Interest

- Current representation of two clients in any matters when such representation would result in an actual or likely conflict
- Prior representation by attorney or office of state’s witness under certain circumstances

- Prior representation by attorney or office of a defense witness under certain circumstances
- Prior representation by attorney or office of co-defendant or other party (e.g., juvenile case) under certain circumstances
- Breakdown of the attorney/client relationship

Representation of Multiple Current Clients

The first listed reason for withdrawal by appointed counsel due to a conflict of interest is best illustrated by a situation where two co-defendants are indicted and separate counsel is appointed to represent each of the co-defendants. The county's primary felony contractor is appointed to represent one of the co-defendants. Two months later and perhaps as a result of information provided to the prosecution by one of the co-defendants with the advice of counsel, a third co-defendant is indicted. Unless co-defendant #3's charging instrument or OJIN for the brand new case number indicates the "tie" between the earlier two cases and the new case, it is likely the county's primary felony contractor will be appointed to represent co-defendant #3. In reality, these conflict situations are rare.

The more frequent situation where one encounters the "current clients" representation conflict issue is in juvenile dependency cases. It may appear tempting, at least fiscally, for a court to appoint one attorney to represent both the mother and the father in a dependency proceeding. Even if there appears, at least at the outset of the case, to be no "actual conflict," there often will be a "likely conflict of interest" under DR 5-105(A)(2) of the Oregon Code of Professional Responsibility (ORCP).

Under DR 5-105(F), an attorney may represent multiple current clients in instances where there is no actual conflict, but there is a likely conflict, if each client consents to the multiple representation after full disclosure. Should there be independent counsel appointed to represent mother and father to ensure full disclosure and knowing and voluntary consent? What if a likely conflict later becomes an actual conflict, the court then will be requested to appoint two new attorneys, one each for the mother and father. In an effort to save the cost of appointing individual counsel for mother and for father in a proceeding that ultimately may result in their parental rights being terminated, a court may wind up appointing a total of three attorneys to represent the parents versus having appointed two separate attorneys at the outset of the case.

I believe the "best practice" with respect to cases in which there is a potential for current client conflicts (co-defendants, multiple parties) is for the court to appoint separate counsel at the beginning of the case. Every effort should be made to identify such multiple party cases at their outset.

The following is an excellent example of "the system" talking to and working together to avoid public defense conflicts. In one Racketeering case involving, I believe, 18 reportedly gang-affiliated co-defendants (almost all of whom had previously been represented by appointed counsel), the Multnomah County District Attorney's office contacted both the court and the Indigent Defense Services Division well in advance of serving the arrest warrants. This allowed all possible conflicts checks (which were very time consuming) to be made by court and IDSD staff to best ensure "appropriate assignment" of attorneys originally appointed to represent the co-defendants.

Former Client Conflicts, With Emphasis on Instances Where the Former Client Was Represented by Counsel No Longer With a Firm (Contractor) and the Closed Case File is in Storage

With respect to the next three reasons listed above for withdrawal of appointed counsel, Paul Levy, Attorney Trainer for MPD, recently wrote:

“Without a doubt, sorting out conflicts of interest is the most frequently encountered ethical inquiry criminal defense lawyers make. But it’s an inquiry that we very often get wrong, at tremendous cost to our firms, the state’s public defense system, local courts and jails, and especially our clients. And we get it wrong, I submit, because we’re afraid to do the right thing.

* * * * *

Consider how often you have heard criminal defense attorneys tell a judge they must withdraw from representation because ‘our firm previously represented a witness,’ and that request is allowed without further inquiry or explanation.”

The Oregon Defense Attorney, September/October 2004.

Paul, whom I view as one of the state’s experts on the issue of former client conflicts, is of course correct. During a visit of Multnomah County’s Criminal Procedure Court (CPC) to observe the handling of substitution of counsel motions in misdemeanor cases, I overheard an attorney inform his client he needed the court to appoint new counsel, because his office previously represented a witness in the client’s case. The attorney later informed me no review of the former client’s file had been done. His motion to withdraw was simply based upon a check of state’s witnesses against the office’s database of former clients. Of course, if the attorney had reviewed the former client’s file, there may have been a clear factual basis to request substitution of counsel. Or, there may not have been a basis to support the motion.

One of the recommendations included in the January 12, 2001 addendum to the OSB’s Indigent Defense Task Force #3’s report, included at my and others’ requests that the OSB consider a modification of DR 5-105 in regard to the “firm unit rule” for former client conflicts. The Legal Ethics Committee considered the recommendation and decided in 2001 to include the discussion and consideration of a change in the “firm unit rule” as a part of its then-new Model Rules of Professional Conduct review.

As stated at the beginning of this paper, a detailed review and discussion of the relevant Oregon Code of Professional Responsibility provisions with respect to conflicts of interest is outside the scope of this paper. This is due in significant part to the fine work done on the issues by individuals like Paul Levy. In addition to the article previously referenced, Paul’s written materials, “Ethical Minefields: The Changing Landscape of Client Conflict of Interest Analysis,” prepared for the May 1, 2004 OCDLA Trial Preparation and Investigation Conference are an excellent resource.

Based upon my review, I agree with Paul that at least some of the ethical “minefields” appear to have been destroyed with respect to former client conflicts by the adoption of Rule 1.10(b) of the Oregon Rules of Professional Conduct (ORPC).

Under current, soon to be replaced, DR 5-105(C) and DR 5-105(J), an attorney appointed to represent a client must pull a former client’s file to determine whether the attorney has a conflict

of interest in representing the new client. The question the attorney then must answer is: did the former representation provide the attorney confidential information about the former client that is capable of adverse use on behalf of the current client? If the attorney is the same attorney who represented the former client, he may know the answer to the question from memory or from reviewing the former client's file. Or if the attorney who represented the former client is another attorney in the office, the attorney with the new case can consult with that attorney and review the former client's file.

But what if the attorney who represented the former client is no longer employed with the office? Or what if the attorney who represented the former client is still employed at the office and has no memory of the former client's case? And with respect to the latter question, does it matter at all whether the former client's file remains on-site at the law firm's office or the file has been stored (often years ago) at an off-site storage facility? Under DR 5-105(C), DR 5-105(J) and OSB Formal Opinion NO. 2003-174, the newly appointed attorney must pull the closed file, unless the file "is no longer at the firm."

The question of whether a file is "no longer at the firm" if the file long ago has been archived for example, in the basement of the law office's building or at an off-site storage location is not addressed in the formal opinion. An email reply to a public defender director who directly asked this question of the OSB's General Counsel staff upon receiving a copy of the formal opinion in late 2003 suggests storing a file off-site does not mean the file is no longer at the firm. Similarly, OSB General Counsel George Riemer, in an Informal Written Advisory Ethics Opinion (November 12, 2003) to Metropolitan Public Defender Services states that even when the former client's lawyer is no longer in the office, "...it is important for you to understand that 'sealing' the file and putting it in storage does not alter the fact that any information in your office is imputed to everyone, hence the vicarious disqualification ('firm unit rule') of DR 5-105(G)."

Given the opinion and the above responses from the Bar, the attorney with the new case is required to retrieve and review the file (wherever the file may be or for how long) and even if the attorney who represented the former client is no longer employed at the law firm, the attorney must withdraw from the case if the file review discloses a conflict of interest.

All Oregon lawyers will be governed by the newly adopted ORPC, including public defense counsel, effective January 1, 2005.

A comparison of Rule 1.10 (ORPC) and DR 5-105(C) and (J) is provided on the following page.

**Current DR 5-105 Conflicts of Interest:
Former and Current Clients**

* * * * *

(C) Former Client Conflicts - Prohibition. Except as permitted by DR 5-105(D), a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:

(1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client; or

(2) Representation of the former client provided the lawyer with confidences or secrets as defined in DR 4-101(A), the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.

* * * * *

(J) Effect of a Lawyer's Departure. When a lawyer has terminated an association with a firm, **the firm** is not prohibited by reason of the formerly associated lawyer's work from thereafter representing a person in a matter adverse to a client that was represented by the formerly associated lawyer unless **one or more of the lawyers [any lawyer]** remaining at the firm would be disqualified pursuant to DR 5-105(C) **or unless the closed file or other confidential information remains at the firm** and consent is not obtained pursuant to DR 5-105(D).

(Emphasis added)

**Rule 1.9 Duties to Former Clients
(effective January 1, 2005)**

* * * * *

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known;

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10 Imputation of Conflicts of Interest; Screening (effective January 1, 2005)

* * * * *

(B) When a lawyer has terminated an association with a firm, **the firm** is not prohibited from thereafter representing a person with interests **materially** adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) **any lawyer remaining in the firm has information protected** by Rules 1.6 and 1.9(c) that is material to the matter.

(Emphasis added)

Of greatest significance, in my opinion, is the fact that new Rule 1.10 no longer references “closed files” as does DR 5-105(J). In addition, the new rule applies only to “any lawyer remaining in the firm” as opposed to DR 5-105(J) which applies to the firm as a whole. The focus appears to shift from lawyers and files with protected information to simply lawyers who remain employed at the firm who have protected information.

In response to an email from Paul Levy, Peter Jarvis, an editor of the OSB’s *The Ethical Oregon Lawyer* and expert on conflicts analysis, Mr. Jarvis submits that “the shift from the ‘firm’ to ‘any lawyer’ makes no sense if a firm can be knocked out by dead files that no one still there [at the office] has ever seen.” He goes on to say “but even if ... I am reading too much into the language of the new rule, the worst that could be said is that the new rule is arguable ambiguous.”

Further review and consultation with OSB General Counsel is warranted. But it appears that the new rule may no longer require that archived files be pulled and reviewed. It also appears that any attorney at a law firm, even the attorney who represented the former client, may continue representation in the new case in which the former client is a witness, if the attorney or another attorney in the office does not remember any protected information obtained from the former representation.

Cases in Which an Attorney/Client Relationship “Fails to Succeed” – Sometimes Despite Multiple Attorney Appointments

It is my belief that the most significant issue with respect to public defense conflicts of interests and substitution of appointed counsel is not with the cases where a contractor discovers a conflict, for example when discovery is received. But rather the most significant issue and challenge for courts and public defense administrators and providers involves cases where there are multiple, sequential appointments. These cases range from the most serious to the least serious of cases; e.g., from Measure 11 or Termination of Parental Rights cases to Criminal Trespass II cases involving homeless individuals.

Although relatively rare in comparison to the total public defense caseload, cases in which multiple, sequential attorneys are appointed tend to involve clients who have mental health or other social issues (e.g., distrust of government including “government attorneys”). They may also occur in instances where counsel is unable to (e.g., due to workload) or fails to establish a good, working attorney/client relationship early on and maintain that relationship.

The underlying impetus for the 2003 legislation that the PDSC adopt substitution of counsel policies and the amendment of relevant statutes that courts “...may not substitute one appointed counsel for another except pursuant to the PDSC’s policy” was based upon concerns raised about cases in which multiple attorneys are appointed, not the case where one counsel is substituted because a conflict is identified when discovery is received.

One recent misdemeanor case in Multnomah County in which a total of four public defense attorneys were appointed involved the son of an individual who has been before the court numerous times since the early 1980s and has been represented by numerous attorneys. Part of the attorneys’ difficulties in establishing and maintaining an attorney/client relationship with their client involved the client’s father.

Courts, correctly, wish to have counsel available to every defendant who is financially eligible and does not waive that constitutional right. This is so because it is the court’s responsibility, but also because a *pro se* individual is at substantial risk without counsel and frequently

demands more of the court's resources. However, at what point does a court refuse to appoint new counsel? After two attorneys have been appointed and the court is assured that the breakdown of the attorney/client relationships is not attributable to counsel? After four attorneys? And what about appointment of a "legal advisor" versus an attorney, which has been done in cases as serious as intentional murder?

Whenever contacted by a court in the past with a case in which multiple attorneys already had been withdrawn due to a "breakdown" in the attorney/client privilege, I would suggest the court allow one last substitution, making it clear to the client that this attorney would be his last. In addition, we would attempt to locate and appoint an attorney who without question is well qualified and who has the time to devote to the case, to be compensated on an hourly rate basis. This seems to be the best approach given all the circumstances, but is not something that can be accomplished in very many cases.

Historical and Present Public Defense Model Contract Provisions Re: Withdrawal of Counsel in Relation to Case Credit (Financial Impact of Withdrawals)

In addition to the disruption in representation of a public defense client and the added delay that generally occurs with substitution of counsel, substitutions (to the extent they might otherwise be avoided) are costly in public defense resources, both human and financial. The following chart provides a history of public defense contract provisions governing the financial impact on a public defense contractor, if contract counsel withdraws from a case.

Time Period	Public Defense Contract Provisions Regarding Withdrawal and Case Credit
7/1/83-6/30/85	If motion to withdraw is granted within one judicial day, contractor will accept on that day a case of equal value. If motion is granted within ten judicial days on a traffic or misdemeanor case, no case credit. If motion is granted within five judicial days in another other case type, no case credit
7/1/85-6/30/87	No credit for case if withdrawal occurs within two weeks of appointment; however, court may, in its discretion, approve credit up to the full unit value of the case if the court finds the degree of services already rendered in the case should merit credit. Full credit for case for withdrawals approved by court more than two weeks after appointment, except in murder cases where the court will determine the appropriate number of units earned based on services rendered, up to the total murder unit value.
8/1/87-6/30/88	No credit or other payment for a case where a request for withdrawal is filed within 14 calendar days of appointment, unless, upon request, the court otherwise expressly orders. For cases where a request is filed more than 14 days after appointment, the contractor who withdrew and the contractor (or private bar attorneys) who was substituted onto the case submits hourly fee certifications to the court. At the conclusion of the case, the court determines each contractors' pro-rata share of credit for one case based on the number of hours each contractor expended on the case; e.g., if each contractor expended 3 hours, each contractor receives one-half case credit.

7/1/88-6/30/89	If contractor withdraws and reassignment to other appointed counsel outside contractor's group is necessary, no case credit, but such cases will be reported as assigned. Murder cases are counted on a "credited" basis, so if withdraw, no credit. All other case obligations are on an "assigned" basis, so if withdraw on a non-murder case that case "counts" as a case under the contractor's caseload obligation. No withdrawal within 180 days of loss of contact or issuance of bench warrant. Contractor keeps credit for these cases.
7/1/89-6/30/90	Except for cases in which contractor withdraws due to loss of contact or issuance of a bench warrant after 180 days have passed, contractor receives no case credit (i.e., loses case credit) for all cases in which contractor withdraws where reassignment to another appointed counsel outside the contractor's group is necessary.
7/1/90-12/31/91	No loss of credit for cases in which contractor withdraws. Contracts were negotiated to factor in historical withdrawal rates. For example, if a contractor during the previous contract period was compensated \$300,000 per year for 1,000 credited cases (\$300 per case) and if contractor's withdrawal rate during the previous contract (where cases with withdrawals except for loss of contact/bench warrants were subtracted out of previously reported appointed cases) was 10% (100 cases), then contractor's base caseload was adjusted to 1,100 cases and compensation for those 1,100 cases remained at \$300,000.
1/1/92-12/31/93	Loss of case credit for cases in which counsel is withdrawn due to determination by court the client is not financially eligible for appointed counsel or client withdraws request for appointed counsel prior to completion of financial eligibility verification. Addition of "payback cases." If contractor withdraws from a "payback case" (generally, murder cases), contractor does not receive a payback case credit for that appointment. For Consortium contractors only, only one contract case credit for cases where another consortium attorney is substituted for another consortium attorney.
1/1/94-present	No significant changes with respect to withdrawals/case credits, except the following: 1. Loss of credit for an appointed case if contractor's attorney is subsequently retained on that case; and 2. "Payback cases" became "complex cases" and a complex case was defined as a case where the case value is \$1,000 or more. Withdrawal from a complex case changes the original case credit to "other."

For much of the 1980s, contract provisions ranged from loss of credit for cases in which contract counsel withdrew within certain periods of time (one, two, five judicial days, two weeks, 14 calendar days) to sharing of credit with other contractors or Private Bar attorneys. In 1988, contractors were allowed to keep credit for cases in which counsel withdrew, except murder cases. And in 1989 contracts, cases in which counsel withdrew resulted in loss of that case credit, with an exception only for loss of contact/bench warrant withdrawals.

The record keeping and reconciliation efforts necessitated by the provisions that based the "credit" or "no credit" (more properly, subtraction of credit previously reported to the court or IDSD) determination on the timing of a motion to withdraw were significant. In addition, such provisions at least created the perception that an attorney had a financial incentive to **not** check for conflicts in a timely manner. The era of sharing credits between counsel appointed in a single case was extremely time consuming for courts and contractors, as well.

The general rule of loss of all credit if counsel withdrew (regardless of the reason) that was adopted in 1989 was viewed as unfair by contractors. At the same time, IDSD was too dependent at that time, in my view, on relying on contractors to report to the office "withdrawal" cases, to be subtracted from appointed cases reported to the office often in previous months.

Beginning in 1990 and continuing today, contractors retain case credit for cases in which no attorney within the contract is able to represent the client. Consortium contractors do not receive additional credit for cases substituted within consortium members. As stated in the chart, the conversion from “loss of credit” in 1989-90 in the vast majority of withdrawal cases to “keep the credit” in the vast majority of cases was accomplished by determining historical withdrawal rates and adding those cases to the contractor’s quota. No additional compensation was provided for what appeared on paper to be an increase in quota. Basically, the contractors were paid the same amount of money for the same workload and the bookkeeping and adjustments previously required were no longer necessary.

Under this approach however there is no financial disincentive for an attorney to withdraw from a case – which can be viewed as both good and bad. This is an area that I recommend be reviewed by the work group I recommend at the conclusion of this paper.

How Big is the Conflicts/Withdrawal “Problem”?

One of the largest public defense contractors’ conflict data for CY 2004 to date indicates a projected conflict/withdrawal rate of 6.9% of cases for the year. That conflict rate is higher than other contractors based upon the fact the office has been in existence for decades and is a public defender office.

For counties with consortia contracts, the conflicts rate – cases in which counsel outside the consortium must be appointed – is substantially less. For example, the number of private bar appointments in Clackamas, Linn, Union, Wallowa Counties for FYE 2003 was zero. Private bar appointments in Lincoln, Josephine, Klamath, Lake, Douglas, Coos, Curry, Umatilla and Morrow Counties was less than one percent.

If the new “former client conflict” rule is as suspected less likely to generate conflict withdraws, a decrease in the financial part of the conflicts problem will occur. As alluded to elsewhere, there also are “system-related” methods to reduce the number of conflict/substitution cases (e.g., early discovery and assurance of early conflicts checks performed by public defense providers). Collectively, the system needs to work toward decreasing the reasons why public defense counsel discovers an ethical reason to withdraw and seek substitution in public defense cases.

No Centralized, Good Data on Cases from Which Public Defense Counsel Withdraws

In Multnomah County, for example, one generally can assume that any case where private bar, non-contract counsel is appointed is a case from which a contractor or multiple contractors have withdrawn. The following chart displays private bar appointment data for Multnomah County for the past three years.

Multnomah County Private Bar (PB) Cases
(not the same as *all* conflict cases)

Case Type	FYE 2002		FYE 2003		FYE 2004	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Misdemeanor	402	3.4%	380	3.6%	206	1.6%
Probation Violation	54	0.8%	29	0.6%	7	0.2%

Juvenile	303	2.1%	263	1.9%	357	2.7%
Other *	108	4.6%	42	2.0%	30	1.7%
Total	1,270	2.9%	909	2.4%	680	1.7%

* Other case types include postconviction relief, habeas corpus, civil commitment, contempt, extradition

Total public defense caseloads for Multnomah County for FYE 2002, 2003 and 2004, respectively: 44,356; 38,008; and 40,824.

However, the Private Bar number of cases does not reflect ALL of the cases in which appointed counsel has withdrawn. For example, if MPD withdraws and the Portland Defense Consortium is substituted on the case, there is no current electronic or OJIN-query system that readily captures the number of conflict substitutions that occur between Multnomah County contractors or the nature of the conflicts.

Further complicating any analysis on a county-by-county or statewide basis, one need only look at Private Bar data from Lane County.

Lane County Private Bar (PB) Cases
(not all PB cases are conflict cases)

Case Type	FYE 2002		FYE 2003		FYE 2004	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Felony	1691	38.9%	1451	40.4%	1139	26.0%
Misdemeanor	925	31.3%	657	22.6%	435	14.8%
Probation Viol.	3	0.2%	4	0.3%	114	5.6%
Juvenile	39	0.7%	53	0.9%	41	0.7%
Other *	189	42.2%	197	41.2%	138	30.8%
Total	2853	18.4%	2366	16.6%	1869	11.9%

* Other case types include postconviction relief, habeas corpus, civil commitment, contempt, extradition

NOTES:

1. Lane PD is the only contractor that handles criminal cases and probation violations. Therefore, all cases in which Lane PD has a conflict are assigned to Private Bar (versus another contractor, as is the case in Multnomah County).
2. Until June 30, 2004, Lane PD did not necessarily accept case appointments every single court day. As a result, some of the Private Bar cases included above are **not** cases in which Lane PD had a conflict. This is different from Multnomah County Private Bar case numbers where close to 100% of private bar appointments are the result of contractors' conflicts.
3. A consortium of attorneys under contract also handle Juvenile cases. Private bar appointments are limited to those cases neither Lane PD nor the consortium can handle.

In Lane County, unlike Multnomah County, it is not a safe assumption that the vast majority of Private Bar appointments were conflicts cases from which the Lane Public Defender's office withdrew.

My recommendations include two that address the critical issue of the current lack of good data that is needed to monitor attorney and contractor withdrawals and compare withdrawal rates between contractors and between counties. The latter comparative analysis would allow better

assessments of obstacles (e.g., late discovery) and “best practices” with respect to handling the issue of conflicts and substitution of counsel.

Systems in Place in Multnomah County and Lane County to Identify Conflicts Early On and Efficiently Handle Substitution of Counsel

The Lane County public defender’s office has an effective early and ongoing conflicts review process in place. Prior to court first appearances, the public defender’s staff checks the court docket prior to the attorney attending court. Any apparent conflicts are identified prior to court. At first appearances, the attorney from Lane PD has a computer in the courtroom that is linked to the office computer. Checks for conflicts based upon new information provided in the charging instrument or otherwise can be made immediately in the court room.

In addition to the “appropriate case assignment” process performed by MPD in Multnomah County since 2000, the court has made, in my estimation, every effort to establish the best possible system for the handling of motions for substitution of counsel. Key aspects of the court’s policy include the following.

- All motions for substitution of counsel in felony cases where the defendant is in custody and the motion is scheduled more than 21 days after the date of arrest and there is no signed waiver by the defendant of the 60-day rule are scheduled to be heard by Chief Criminal Judge Julie Frantz. Particularly in cases involving an allegation the attorney/client relationship is irreparably damaged, the assignment of such motions to one judge allows observation of attorneys who more frequently than others are involved in such cases, and allows continuity with respect to multiple requests made by a client for new counsel.
- Attorneys requesting to be withdrawn from a case are required to provide the court with available information regarding other individual attorneys or firms which either currently or previously represented any of the alleged victims or witnesses, co-defendants or other potential adverse parties, to avoid creating a subsequent actual conflict.
- Attorneys requesting to be withdrawn must provide a copy of the attorney’s file materials to the court at the court appearance or no later than 9 a.m. the following day, allowing substituted counsel to immediately review the case file to determine any conflicts that attorney may have immediately.

One may conclude that there are more questions than answers or more problems than possible solutions in the area of better addressing conflicts of interests in public defense cases. However, I can attest to the fact that many improvements have occurred (e.g., current Multnomah and Lane County procedures adopted in the 1990s and 2000s and the addition of a five-office felony consortium in Portland in 2002). As a clear example of progress, the number of private bar appointments in Multnomah County has decreased almost 50% since FYE 2002.

Many more improvements are within reach, given proper study and resources.

Recommendations for Improvements in the Handling of Public Defense Conflicts of Interest

1. A detailed review of new Rules 1.9 and 1.10 (ORPC), regarding representation of clients in

cases that involve a former client of that office, should be undertaken, including further consultation with the OSB and a review of:

- a. case law from other jurisdictions that have the Model Rules of Professional Conduct – including state appellate and postconviction relief and federal Habeas Corpus cases addressing related effective representation of counsel issues;
 - b. other “Model Rule” jurisdictions’ Bar Opinions and any available information on disciplinary actions related to former client conflicts; and
 - c. Restatement of Law: The Law Governing Lawyers, Conflicts of Interest.
2. Although Paul Levy’s article in OCDLA’s publication has alerted public defense counsel of the likely change in former client conflicts requirements, the fruits of the detailed review provided above should be communicated to all public defense attorneys.
 3. Attachment #1 to this paper is a draft survey I recommend be distributed to public defense contractors for completion. The survey is intended to gather “benchmark” data on withdrawals of counsel, as well as information from contractors on their local practices and environments relating to conflicts. With the likelihood that conflicts should decrease under new Rule 1.10, baseline data is critical to measure whether that occurs and to what extent that occurs.
 4. Consider requiring contractors provide reports to the Contract and Business Services Division on cases from which contract counsel withdraws. The reports would be similar to the report included at the conclusion of the attached draft survey, except consortia contractors would report only cases in which counsel outside the consortium was required for substitution. For a number of contractors I have talked to about their databases, such a requirement may likely result in a *de minimis* increase in cost or time to the contractor, particularly if for example, information is reported on a periodic basis.
 5. Consider requiring Private Bar attorneys to provide additional information for cases in which they withdraw, including the date the withdrawal was granted and the reason for requesting counsel be withdrawn from the case. Private bar attorneys previously were required to provide this additional information on their fee statements.
 6. Establish a “conflicts” work group comprised of public defense contractor staff, one private bar attorney who routinely is appointed to conflict cases, and CBS staff (I have recommendations with respect to specific individuals).

Among the issues for the workgroup’s review and recommendations, I suggest the following.

- a. Technological and human resource improvements that likely will decrease the number of instances in which counsel is substituted
 - within contractors’ offices (e.g., more staff resources at MPD in order that the morning check for appropriate case assignment includes more than just pending cases where counsel already is appointed or one court reports an inability to reach a live person when trying to reach a contractor to best determine whether that contractor has a conflict in accepting a substituted case;
 - the courts (e.g., possible OJIN improvements); and

- prosecutors' offices (for example, potential for electronic provision of discovery speeding the identification of conflicts and possibly reducing current discovery costs of approximately \$950,000 per year).
- b. Other contractor staff issues that would better ensure:
- early and regular client contact (phone, video and in person)
 - early review of discovery as it is received by the office, as well as information provided by any defense investigator; and
 - early interview of the client and defense witnesses.
- c. Possible methods to obtain court dockets sooner, particularly in misdemeanor, out-of-custody cases for "appropriate case assignment" review similar to that currently done by MPD.
- d. The possibility and efficacy of contracting with an attorney to serve as the centralized substitution review attorney for Multnomah County. This person would review motions for substitution prior to submission to the court, maintain a database with respect to conflicts, evaluate data and trends based upon the central database, and coordinate substitutions in an effort to better determine which contractor/attorney ought to be substituted.
- e. The relative advantages and disadvantages of delaying (for no more than 24 hours and only when necessary) the appointment of substituted counsel in order that contractors or Private Bar attorneys being considered by the court for substitution are able to conduct a conflicts check prior to the court actually ordering appointment of new counsel.
- f. The effectiveness of the PDSC's substitution of counsel policy.
- g. Changes in public defense model contract terms, including but certainly not limited to:
- differential payments for contract offices where the attorney is substituted onto an in-custody felony case more than 40 (or some other period of time) days after first appearance;
 - contractors lose case credit if a motion for substitution of counsel is filed more than five (or three?) court days after discovery disclosing the conflict is received by the attorney's office; i.e, contractor keeps case credit if motion is filed timely; and
 - contractors lose case credit if counsel seeks to withdraw more than 30 (21?) days after appointment, unless counsel includes in the motion information supporting the fact the conflict could not reasonably have been identified sooner.

Second Draft (11/9/04)
Public Defense Contractor Survey
Conflict/Withdrawal Cases

The following survey is a component of the Office of Public Defense Services' (OPDS) review of service delivery in Multnomah County. Please complete and return the survey to _____ (_____) by _____, 2004.

Contractor: _____

Name of Person(s) Completing this Survey: _____

1. At first appearance, how are co-defendants (or multiple parties in juvenile cases) identified (for example, same charging instrument/petition or sequential case numbers)?
2. What, if any, changes would better help identify inherent, clear conflicts (such as co-defendants) at first appearances?
3. How frequently is a case appointed under your contract where the client already is represented by a different contractor in another pending case?
 - rarely (less than twice a month)
 - sometimes (2-5 times a month)
 - frequently (6 or more times a month)

Comments:

4. Prior to the appointment of a contractor/attorney, what (if any) methods are in place to identify whether a person requesting appointment of counsel:
 - a. already is represented by a contractor in another pending case?
 - b. previously has been represented by a contract attorney?

5. How important is it that one contractor/attorney represent a defendant or probationer on all pending cases?

6. How important is it that one contractor/attorney represent a child if the child is subject to both dependency and delinquency proceedings?

7. What advantages and disadvantages are there (to the client and to appointed counsel) of having the attorney who originally represented the client appointed to represent the client on a probation violation matter?

Advantages:

Disadvantages:

8. If a client is appointed to contractor/attorney and it is learned the client is already represented by another contractor/attorney, what is done?

a. One attorney contacts the other attorney and a motion for substitution is submitted so the client is represented by one attorney?

- Always
- Only if: _____
- Rarely

Comments:

b. Each attorney remains on each case?

- Always
- Only if: _____
- Rarely

Comments:

9. Describe the process by which the FIRST check for conflicts is made.

a. When is the first check made?

- Prior to first appearance
- Immediately upon appointment (within one day)
- More than one day after appointment

Comments:

b. Who makes the first conflicts check and based on what information?

- non-attorney staff with benefit only of the charging instrument (or petition), OJIN and contractor's records re: former/current clients;
- non-attorney staff with benefit **also** of police reports or some other at least preliminary discovery (e.g., witness names);
- the assigned attorney with benefit only of the charging instrument (or petition), OJIN and contractor's records re: former/current clients;
- the assigned attorney with benefit **also** of police reports or some other at least preliminary discovery (e.g., witness names);
- the assigned attorney only after review of discovery and an interview with the client; OR
- Other (please describe):

Comments:

10. After the initial conflicts screening, appointed counsel discovers contractor's office previously represented a state's witness in the present case.

Describe how the attorney/contractor determines whether the present attorney will withdraw from the present representation or not?

What if any difference does it make if:

a. the file(s) for the prior representation is no longer available at the immediate office location?

- b. the attorney who previously represented the witness is no longer employed by contractor/a consortium office?

11. Is contractor's former and present client information maintained in a database?

- Yes
- No

If yes,

- a. what data is maintained; e.g., client name, DOB, case number, case type, attorney's name, withdrawal?
- b. data is available back to _____ (year)

What improvements in the database would improve contractor's ability to screen for conflicts?

12. Discovery – when generally is (at least initial) discovery received by appointed counsel for the following types of cases?

Drug Felony cases:

Property Felony cases:

Person Felony cases:

Misdemeanor cases:

Juvenile Delinquency cases:

Juvenile Dependency cases:

13. Generally, closed case files are archived (moved to a storage area outside the attorney's immediate office) on the following schedule:

Felony cases:

Misdemeanor cases:

Probation Violation cases:

Delinquency cases:

Dependency/TPR cases:

14. Please complete the information requested on the following page.

Code	Description of Reason
PWD	Attorney or Contractor's other attorney withdrew from representation of client in the past (for whatever reason)
WTA	Attorney previously represented a witness in the present case
WTO	Other attorney within or previously within Contractor's (or consortium member's) office previously represented a witness in the present case
CDA	Attorney previously represented a co-defendant in the present case
CDO	Other attorney within or previously within Contractor's (or consortium member's) office previously represented a co-defendant in the present case
CON	Ethical conflict of interest – only if a conflict other than WTA, WTO, CDA or CDO; e.g., “breakdown” in attorney/client relationship
CLN	Client's request – no clear ethical conflict
ONE	Withdrew so client represented by one (or at least one less) attorney on pending cases
RET	Client retained counsel
INL	Court withdrew counsel based on determination client not financially eligible for appointed counsel
LOS	Loss of contact with client or client failed to appear
OTH	A reason other than those listed above – please describe the nature of conflict, without disclosing any confidences or secrets, in Column #8

DRAFT

(06/05/05)

PUBLIC DEFENSE SERVICES COMMISSION

**The Executive Director's Biennial Report
to the Oregon Legislative Assembly**

(July 1, 2003 – June 30, 2005)

Executive Summary

The Public Defense Services Commission (PDSC) assumed full responsibility for overseeing and administering Oregon's public defense system during the 2003-05 biennium, including the delivery of legal services for the defense in criminal, juvenile and civil commitment cases across the state and in the appeals of those cases. In carrying out those responsibilities, PDSC's mission is to deliver quality, cost-efficient public defense services through skilled and accountable management, quality assurance and performance measurement.

The legal services provided by PDSC represent an essential component of Oregon's public safety system. Without public defense services, the State of Oregon could not prosecute crime, protect children and families or hold offenders accountable. Oregon's public defense attorneys also contribute directly to public safety by advocating for effective criminal sentences, correctional programs, family placements and juvenile dispositions that promote the reduction of crime and delinquency.

The Oregon and U.S. Constitutions and the statutes establishing PDSC require the Commission to ensure the effective assistance of court-appointed counsel in trial and appellate courts. PDSC delivers these constitutionally mandated legal services in criminal appeals directly through state-employed lawyers in its Legal Services Division and in all other cases through contracts with private attorneys administered by the Commission's Contract and Business Services Division.

In its first biennium as the new administrator of Oregon's public defense system, PDSC led that system through the aftermath of a fiscal and public safety crisis caused by disproportionate cuts in the public defense budget in 2002, undertook the reorganization of the state's public defense function, and started up its administrative operations with a new management team and new office space. The Commission also implemented a variety of statewide initiatives in 2003 and 2004 to improve the quality and cost-efficiency of public defense services, including a comprehensive planning process for local service delivery systems in every county of the state, new methods to appoint criminal defense lawyers and train juvenile defense lawyers, and a site-visit process involving teams of experienced, volunteer public defense lawyers and managers to evaluate PDSC's major contractors across the state.

PDSC's Major Challenges and Accomplishments in 2003-05

1. *Overcoming a fiscal and public safety crisis.* During the 2003-04 interim, the legislature allocated \$14 million in funds from the Legislative Emergency Board to replace a budget cut caused by the failure of Ballot Measure 30 in 2004 and to service the state's public defense caseload for the remainder of the biennium. As a result, PDSC was able to lead the public defense system through its recovery from a fiscal and public safety crisis caused by the drastic Special Session budget cuts in 2002, which had interrupted the delivery of public defense services throughout the state, cut off funding to many PDSC contactors, prevented the timely prosecution of thousands of criminal cases, and compromised the effectiveness of Oregon's entire public safety system.

2. *Establishing a new agency.* PDSC's statutory mandate to establish a new agency to oversee and administer Oregon's public defense system required the Commission to (a) assemble a new management team, (b) take over public defense contracting, payment and administrative functions from the Oregon Judicial Department and the state courts, and (c) form a new Contract and Business Services Division (CBS) to perform those former judicial functions and merge it with PDSC's Legal Services Division (LSD). To accomplish all of these tasks in the first year of the biennium, PDSC's management team recruited, hired and trained new attorneys at LSD and new contracting and administrative staff at CBS, acquired common office space for the two divisions, and developed new performance-based personnel policies and procedures, employee evaluation systems and performance measures for the agency.

3. *Ensuring accountability through strategic planning and performance measurement.* PDSC's mission is to ensure the cost-efficient delivery of quality public defense services in Oregon. To carry out that mission, the Commission adopted a comprehensive Strategic Plan for 2003-05 that articulated its long-term vision and values for the state's public defense system and committed PDSC to a set of specific goals and strategies for 2003-05. (A copy of PDSC's Strategic Plan for 2003-05 is attached as Appendix A.) To ensure that all of the strategies in PDSC's Strategic Plan were fully implemented, the Commission directed its management team to integrate the plan into the agency's day-to-day operations, use it as the basis for a performance-based employee evaluation system, and make the Plan a regular item on the meeting agendas of PDSC and its management team.

PDSC's Strategic Plan recognized the Commission's need to hold itself accountable to the public and the Legislature through performance measures:

PDSC . . . [is a] results-based organization with employees and managers who hold themselves accountable by establishing performance standards and outcome-based benchmarks and who implement those measures through regular performance evaluations and day-to-day best practices. (Strategic Plan at page 1.)

PDSC also laid the foundation for the establishment of a performance-based agency in 2003 by adopting new personnel policies and procedures for its two divisions. Those policies and procedures call for regular evaluations of every PDSC employee, using standards developed by the agency's employees that are linked to the mission, goals, strategies and performance measures of the Commission and to each employee's annual work plan. Performance rather than seniority is now the key to an employee's advancement and promotion at PDSC.

Finally, the 2003 Legislative Assembly directed PDSC as a new agency to "develop performance measures for direct and contract public defense services, and to present the draft performance measures to the Joint Legislative Audit Committee for review and approval" With regard to key performance measures for "direct public defense services," PDSC developed measures that track the key outcomes and outputs of its two divisions. LSD's performance measure tracks the number of cases in its appellate backlog, measuring its progress in ensuring the delivery of quality, cost-efficient public defense services in Oregon's appellate courts, as well as promoting the effective and efficient administration of justice. CBS's performance measures track the extent to which the division's internal operations promote timely and accurate approval and payment of expenses and, thus, effectively support the cost-efficient delivery of quality legal services.

PDSC's performance measures for "contract public defense services" track the overall performance of Oregon's public defense system and the Commission's progress in ensuring the delivery of quality, cost-efficient legal services. One key measure, based on PDSC's contractor site visit process described below, identifies best practices in public defense and law office management, and reports the extent to which contractors adopt and implement best practices in public defense management. Another performance measure confirms whether or not the Commission's contractor site visit process and other quality assurance programs are improving the quality and cost-efficiency of the state's public defense services by tracking the rate of complaints about the performance of public defense attorneys that, upon investigation, prove to be valid.

4. Improving the quality and cost-efficiency of PDSC's direct legal and administrative services. As noted earlier, PDSC provides public defense legal services in criminal appeals directly through attorneys employed by its Legal Services Division and all other public defense services through contracts administered by professional staff in its Contract and Business Services Division. PDSC's new management team took aggressive action to control LSD's appellate caseload and closely manage the productivity of the division's attorneys during the first year of the biennium. In October 2003, the management team reassigned cases among LSD's attorneys and created work plans and a performance evaluation process for every attorney. LSD's managers now meet regularly with each attorney to review individual productivity and performance in order to meet the Division's productivity goals. As a result, between September 2003 and June 2004, LSD's backlog of cases in the appellate courts was reduced by 48 percent.

Although LSD dramatically reduced its backlog during that time period, the recent landmark sentencing decision by the U.S. Supreme Court in *Blakely v. Washington* has significantly increased the Division's workload, posing a new challenge to controlling LSD's appellate backlog. During the three-month period following the *Blakely* decision in June 2004, LSD assigned 438 new cases to its attorneys, compared to 260 cases during the comparable three-month period in 2003 – a 68 percent increase in case assignments!

In anticipation of taking over responsibilities from the Judicial Department and the courts in July 2003, CBS hired and trained new personnel to perform the division's new functions. CBS also developed new policies and procedures to govern those functions, including (a) a centralized process staffed by accounts payable specialists to review attorney fee statements, (b) a systematic process to review and approve non-routine expenses, such as the costs of investigators, forensic experts and expert witnesses, that includes an outside peer review panel of attorney experts, and (c) a centralized complaint process to address the concerns of prosecutors, judges, clients and the public regarding the administration of PDSC's contracts and the performance of its attorneys.

5. Improving the quality and cost-efficiency of PDSC's contract legal services. As a central component of its Strategic Plan, PDSC initiated a statewide "service delivery planning process" in 2003, which includes holding public meetings in every region of the state, gathering information from judges, prosecutors, other officials and citizens, evaluating the need for changes in the structure and delivery of local public defense services and directing the Commission's management team to implement needed changes. PDSC has completed that planning process in Benton, Lane, Linn, Lincoln and Multnomah Counties and is about to begin the process in Marion and Yamhill Counties. This process has already resulted in a new system for administering court appointments of attorneys, development of new criteria for those appointments, proposed guidelines for early disposition programs and establishment of a formal process to handle complaints regarding the performance of attorneys.

As a result of its own investigations, as well as the findings of two previous task forces of the Oregon State Bar on indigent defense services, PDSC has undertaken an initiative to improve the quality and consistency of juvenile defense services across the state. As part of that initiative, PDSC is sponsoring a task force to develop a Juvenile Training Academy for Oregon's juvenile defense attorneys. This program should lead to training requirements for practicing juvenile law under PDSC's contracts.

PDSC also established a "Contractor Advisory Group" in 2003 to provide input and assistance to the Commission's Executive Director on a wide range of matters, including attorney qualification standards, early disposition programs, reform of post-conviction relief, regional training, improving the contracting system and legal developments affecting public defense. A subcommittee of that Group, the "Quality Assurance Task Force," assisted PDSC in developing a systematic process to review the organization, management and quality of services delivered by the Commission's

contractors. This “contractor site visit process” engages volunteer attorneys from across the state with expertise in public defense practice and management in a comprehensive statewide evaluation process. Teams of volunteer attorneys visit and evaluate the offices of the state’s larger public defense contractors, administer questionnaires and interview all relevant stakeholders in a contractor’s county, including the contractor’s staff, prosecutors, judges, other defense attorneys, court staff, corrections staff, and other criminal and juvenile justice officials regarding the contractor’s performance and operations. After a site visit and deliberations among the site visit team’s members, the team prepares a report to the contractor’s director and PDSC’s Executive Director outlining its observations and recommendations. In addition to improving the contractors subject to the site visits, the process is designed to improve the operations of public defense contractors in Oregon by identifying best practices for managing and delivering public defense services and by sharing that information with other contractors across the state. This process also provides the basis for key statewide performance measures for the state’s public defense system.

6. *Receiving a positive assessment by the Secretary of State’s Audits Division.* A recent performance survey of Oregon’s public defense system and PDSC’s legal and administrative operations by the Secretary of State’s Audits Division confirmed the Commission’s progress in successfully managing the public defense system and ensuring the delivery of quality, cost-efficient legal and administrative services. After concluding that a formal audit of PDSC’s operations and the state’s public defense system was unnecessary, the Audits Division issued a “management letter” on February 9, 2005. That letter confirmed the absence of any significant “management risks” or problems in performance that PDSC had not already addressed. (The Audits Division’s management letter is attached as Appendix B.)

Conclusion

During the 2003-05 biennium, PDSC (1) led Oregon’s public defense system through its recovery from the fiscal and public safety crises of 2003 and into a new era of accountable, performance-based management, (2) recruited a new management team and established an administrative agency that has demonstrated the skill and capacity to administer the public defense system prudently and cost-efficiently, and (3) implemented successful management strategies, comprehensive statewide quality controls and meaningful performance measures that ensure the Commission’s accountability to the legislature and Oregon’s taxpayers.

The challenge facing PDSC and the State of Oregon in future biennia will be to maintain the proper balance in funding between public defense and the other critical agencies and functions in Oregon’s public safety system as the state’s elected officials confront demands to save costs by “downsizing” that system and to improve public safety by expanding the system. Whether the state’s public safety system is downsized or “upsized,” it must be “right-sized” by the legislature in a manner that provides every key agency in that system with sufficient resources to perform its function. As the Legislative Assembly discovered as a result of disproportionate cuts to the state’s public

defense budget in 2002, imbalances in funding that disrupt the operation of any one agency or function in the public safety system can bring the entire system to a halt, thereby jeopardizing the safety of all Oregonians.

DRAFT
(06/05/05)

PUBLIC DEFENSE SERVICES COMMISSION

**The Executive Director's Biennial Report
to the Oregon Legislative Assembly
(July 1, 2003 – June 30, 2005)¹**

Introduction

In July 2003, the Public Defense Services Commission (PDSC) assumed full responsibility for overseeing and administering Oregon's public defense system, including the delivery of legal services for the defense in criminal, juvenile and civil commitment cases across the state and in the appeals of those cases. In carrying out those responsibilities, PDSC's mission is to deliver quality, cost-efficient public defense services through skilled and accountable management, quality assurance and performance measurement.

The legal services provided by PDSC represent an essential component of Oregon's public safety system. Without public defense services, the State of Oregon could not prosecute crime, protect children and families or hold offenders accountable. Oregon's public defense attorneys also contribute directly to public safety by advocating for effective criminal sentences, correctional programs, family placements and juvenile dispositions that promote the reduction of crime and delinquency.

The Oregon and U.S. Constitutions and the statutes establishing PDSC require the Commission to ensure the effective assistance of court-appointed counsel in trial and appellate courts. PDSC delivers these constitutionally mandated legal services in criminal appeals directly through state-employed lawyers in its Legal Services Division and in all other cases through contracts with private attorneys administered by the Commission's Contract and Business Services Division.

The 2003-05 biennium was a time of major challenges and accomplishments for PDSC. In the first biennium as the new administrator of Oregon's public defense system, PDSC led that system through the aftermath of a fiscal and public safety crisis caused by disproportionate cuts in the public defense budget in 2002, undertook the reorganization of the state's public defense function, and started up its administrative operations with a new management team and new office space. The Commission also implemented a variety of statewide initiatives in 2003 and 2004 to improve the quality and cost-efficiency of public defense services, including a comprehensive planning process for local service delivery systems in every county of the state, new methods to appoint

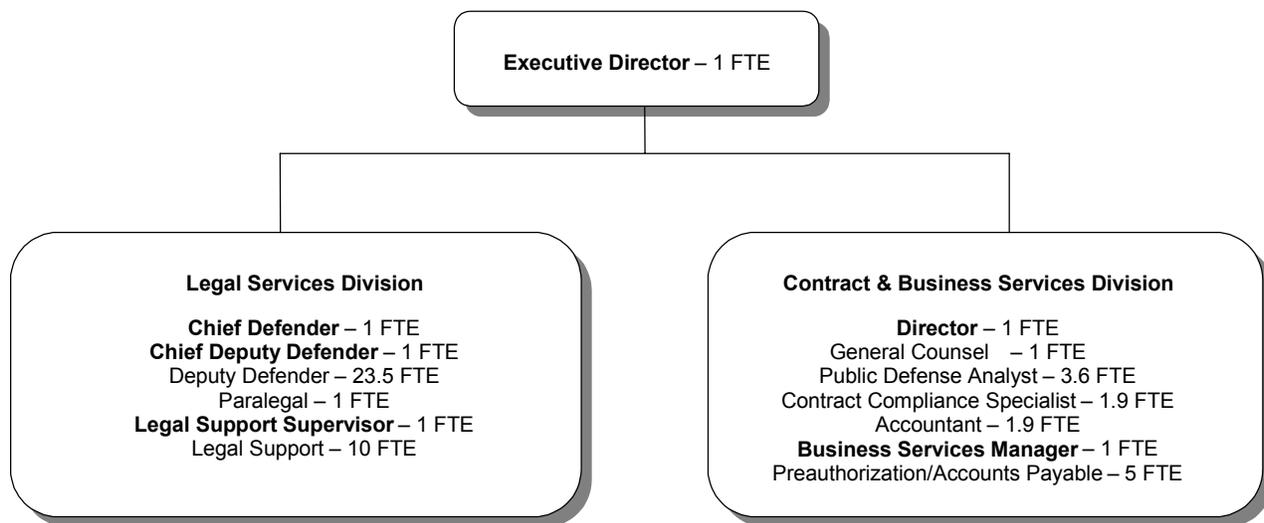
¹ ORS 151.219(1)(j) directs the Executive Director of the Public Defense Services Commission to "[p]repare and submit to the Legislative Assembly a biennial report on the activities of the office of public defense services." That report also serves as the Executive Director's annual report to the Commission for the year 2004. See ORS 151.219(1)(i).

criminal defense lawyers and train juvenile defense lawyers, and a site visit process involving teams of experienced, volunteer public defense lawyers and managers to evaluate PDSC's major contractors across the state.

PDSC's Organization and Operations

PDSC is a seven-member commission that serves as the board of directors for Oregon's public defense system, providing policy direction and oversight for the administration of the system.² Members of the Commission are appointed by the Chief Justice, who serves *ex officio* as a non-voting member. Two of the Commission's seven members must be non-attorneys and one member must be a former prosecutor. Another member must be an attorney engaged in criminal defense practice who does not serve as a court-appointed attorney compensated by the state.³ PDSC's Executive Director serves as the Commission's chief executive officer at its pleasure.

As the Organizational Chart below indicates, PDSC is comprised of two divisions: the Legal Services Division (LSD), which provides appellate legal services to financially eligible criminal defendants in the state; and the Contract and Business Services Division (CBS), which administers the Commission's contracting system for the rest of the state's public defense services. Each division is headed by a chief operating officer—the Chief Defender at LSD and Director of CBS—both of whom report to PDSC's Executive Director.



PDSC oversees the delivery of the direct appellate legal services through the 26 attorneys in LSD. As opposing counsel to the Department of Justice's Appellate Division, LSD's attorneys not only represent financially eligible clients in criminal

² See generally ORS 151.216 *et seq.*

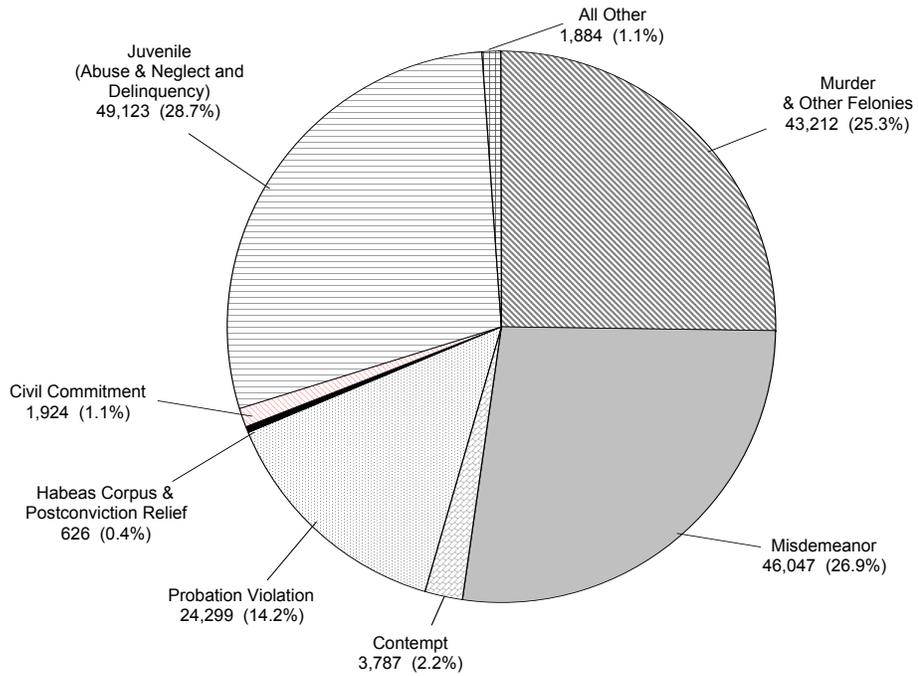
³ The current members of PDSC are listed in Appendix C.

appeals; they assist Oregon's appellate courts in the rational and consistent development of Oregon's criminal law and procedure.

PDSC reviews, approves and oversees the administration of contracts with private attorneys, law firms and non-profit organizations for the delivery of all other public defense services in the state. The Commission also oversees the selection of attorneys who are eligible for court-appointments and CBS's payment of the hourly fees to those attorneys. The Commission has delegated its authority to execute public defense services contracts to its Executive Director and has approved the Executive Director's delegation of his authority to negotiate and administer contracts and to pay for services out of the Commission's Public Defense Services Account to the Director of CBS. CBS's Director is assisted by four Contract Analysts and a Compliance Specialist, who negotiated and administered over 90 contracts in the 2003-05 biennium, and a Business Services Manager and five Preauthorization and Accounts Payable Specialists, who began performing the functions of approving and paying attorney fees and non-routine expenses in 2003-05, which were previously performed by the courts.

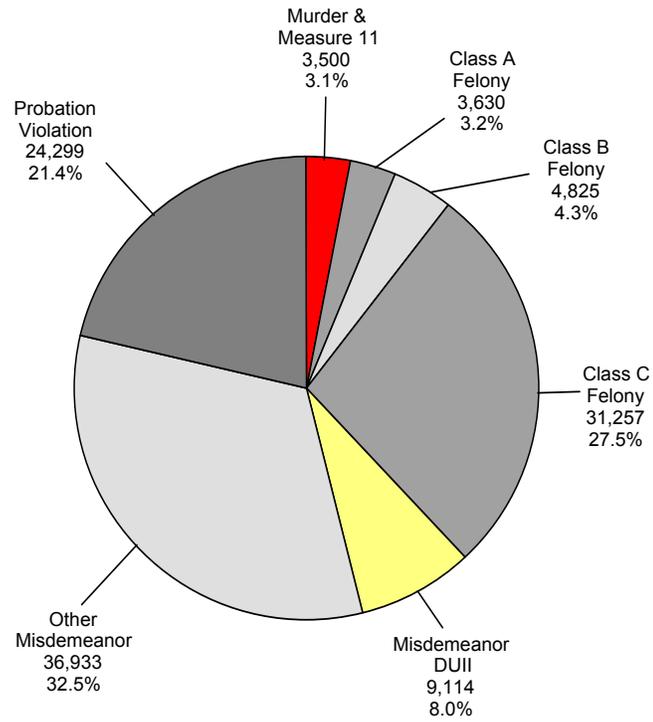
The charts on the following pages provide a breakdown by type of case and service provider of the state's public defense caseload for FY 2004.

PUBLIC DEFENSE TRIAL-LEVEL CASELOAD (NON-DEATH PENALTY)
By Case Type Categories
FYE 2004

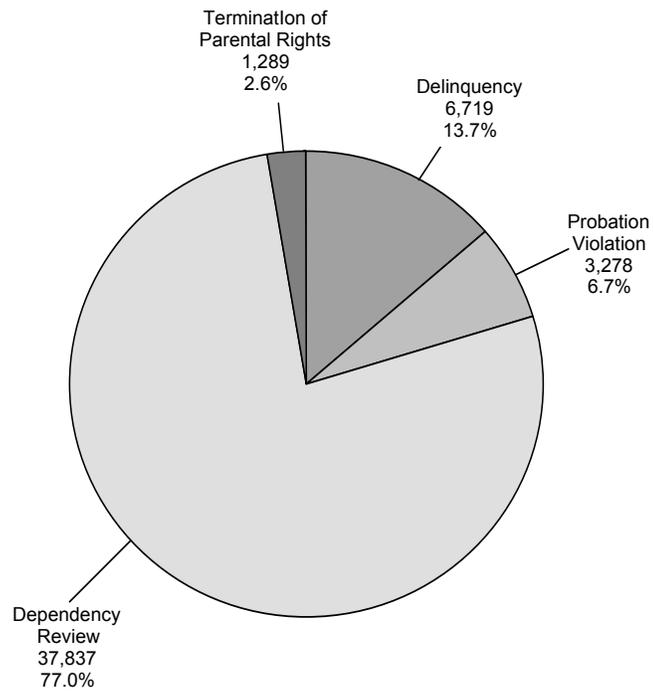


Total Trial-Level Caseload: 170,902

PUBLIC DEFENSE TRIAL-LEVEL CASELOAD (NON-DEATH PENALTY)
 Breakout of Criminal and Juvenile
 FYE 2004

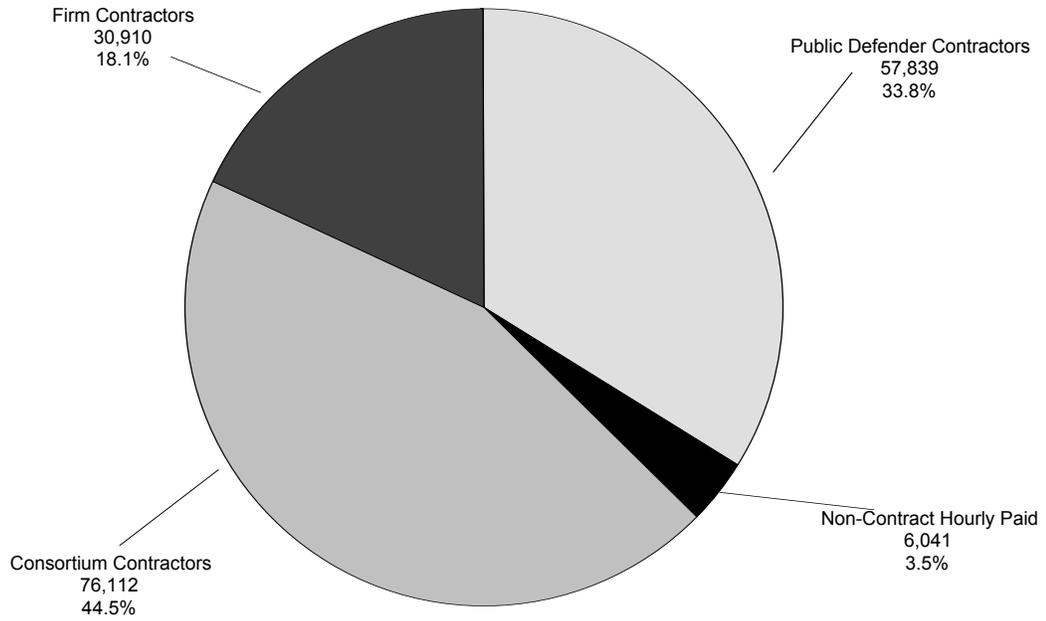


Criminal Caseload: 113,558



Juvenile Caseload: 49,123

PUBLIC DEFENSE TRIAL-LEVEL CASELOAD (NON-DEATH PENALTY)
By Provider Type
FYE 2004



Total Trial-Level Caseload: 170,902

In accordance with ORS 151.219(1)(j), this report reviews PDSC's major challenges and accomplishments in the 2003-05 biennium and outlines the Commission's goals and strategies for the 2005-07 biennium.

PDSC's Major Challenges and Accomplishments in 2003-05

1. Overcoming a fiscal and public safety crisis. By early 2003, Oregon's public defense and public safety systems had suffered unprecedented setbacks:

- a cut of over 16 percent in the 2001-03 budget for public defense services during three of the five Special Sessions of the Legislative Assembly in 2002;
- resulting disruptions in public defense services, catastrophic losses to public defense contractors and threats to the continued operation of the state's public defense system;
- postponement of the appointment of public defense counsel in over 27,000 cases until the 2003-05 biennium;
- delays in the prosecution of those 27,000 cases; and
- increased threats to the public safety of all Oregonians as a consequence.⁴

Once the full impact of the 2001-03 budget cuts became apparent and leaders of Oregon's justice system including the Chief Justice, certain lawmakers, law enforcement officials and the PDSC reported the results to the 2003 Legislature, enough funding was restored in PDSC's 2003-05 budget to permit the Commission to resume full operations of the state's public defense system in July 2003.

PDSC faced another potential fiscal and public safety crisis, however, at the outset of the 2003-05 biennium. The Commission's legislatively adopted budget for the biennium did not provide sufficient funds in the Public Defense Services Account to cover anticipated increases in the state's public defense caseload, as well as the "bulge" of criminal cases postponed from the 2001-03 biennium as a result of the 2002 Special Session cuts in the public defense budget. The 2003 Legislative Assembly recognized these realities by directing the Commission to report to the Legislative Emergency Board in July 2004 regarding increases in the public defense caseload and to request funds reserved in the Emergency Fund to cover those increases. With the failure in

⁴ The most obvious threat to Oregonians' public safety during the 2001-03 biennium arose from prosecutors' inability to proceed with the prosecution of the thousands of criminal cases in which the appointment of constitutionally required legal counsel was postponed until the beginning of the 2003-05 biennium. Perhaps an even greater threat to the public's safety resulted from the inability of probation officers to continue to sanction and control convicted offenders who were under correctional supervision in communities across the state. Without public defense counsel available to represent offenders charged with probation or post-prison supervision violations (which often include new crimes), there were significant limitations on the corrections sanctions that probation officers could threaten or impose.

February 2004 of Ballot Measure 30, which proposed additional tax revenue to balance the state's budget for the biennium, PDSC faced another shortfall in its budget. The combined effect of these budget shortfalls, without intervention during the interim by the Emergency Board, would be the exhaustion of funds to pay public defense lawyers by sometime in March 2005 – three to four months before the end of the biennium.

PDSC's ability to address these budget shortfalls on its own was extremely limited. First, the Chief Justice indicated that the state courts would not postpone constitutionally mandated court appointment of counsel as the courts had done during the final four months of the 2001-03 biennium. Second, such a strategy was no longer feasible because, with the transfer of authority to administer the public defense system from the Judicial Department to PDSC, the Commission lacked the legal authority to direct judges to postpone the appointment of defense attorneys for financially eligible clients with constitutional rights to appointed counsel. Third, the Commission had no legal authority to reduce or withhold payments to public defense counsel appointed by the courts.⁵ In other words, neither the courts nor the Commission were in a position to implement another "glide path" for deferring the appointment of counsel in selected cases and thereby "stretching out" the funds in the Public Defense Services Account over the 2003-05 biennium.

In light of its limited legal authority and policy options to address an impending fiscal and public safety crisis in 2005, PDSC directed its management team to pursue the only three available strategies to avoid or mitigate the consequences of shortfalls in the public defense budget:

- (1) continue to conserve existing public defense resources, explore any additional economies and implement all feasible cost-saving strategies;
- (2) communicate to legislators the potential impact of these shortfalls on the public safety of all Oregonians and the difficulty of cutting public defense costs, which are largely driven by factors beyond the control of PDSC like law enforcement policies of local city and county officials and legislative decisions to criminalize dangerous or antisocial conduct; and
- (3) collaborate with the courts, prosecutors and other justice agencies to develop strategies designed to reduce costs to the entire public safety system, like early disposition programs and drug courts.

The Legislative Emergency Board recognized the foregoing realities and challenges facing PDSC by releasing \$7 million in Emergency Funds for the Public Defense

⁵ ORS 135.055 authorizes the agency's executive director to pay court-appointed counsel "from funds available for the purpose." The executive director has no authority to pay counsel from those funds in some cases and not in others. Instead, payment of court-appointed counsel must continue under ORS 135.055 until there are no longer "funds available for the purpose." Furthermore, while PDSC's contracts with public defense attorneys authorize modifications in those contracts due to insufficient state funding, the terms of those contracts require PDSC to first exhaust available opportunities to request sufficient funding – in this case, from the Emergency Board and the 2005 Legislature.

Services Account in July 2004 and \$7 million more in January 2005. With these additional emergency funds, PDSC was able to ensure the continuation of public defense services, as well as the continued operation of the state's criminal and juvenile justice systems, for the remainder of the 2003-05 biennium

2. Establishing a new agency. One of PDSC's most important accomplishments in 2003 was the establishment of a new agency that merged the State Public Defender's Office with the State Court Administrator's Indigent Defense Services Division (IDSD) into two new divisions of the Commission: LSD and CBS. The first step in that process was the recruitment of a new management team with the skills and commitment to implement the Commission's vision for Oregon's public defense system. After nine years as a lead contract analyst for IDSD, Kathryn Aylward was the obvious choice to direct CBS. Peter Gartlan, one of the most experienced appellate lawyers in the State Public Defender's Office and the trainer and mentor of the office's new lawyers, was equally prepared to take over leadership of LSD. Becky Duncan, another exceptionally able lawyer at the State Public Defender's Office, agreed to serve as LSD's Chief Deputy. Finally, Ingrid Swenson's appointment as the agency's General Counsel brought a public defense attorney to the Commission with extensive law practice experience, including juvenile defense practice, as well as valuable experience with the legislative process.

With a management team capable of carrying out its mission and vision, PDSC's next step in establishing a new agency was to authorize the recruitment and hiring of employees to fill new or vacant positions and the reorganization of those employees' duties and functions. LSD hired five new appellate attorneys to fill vacancies and developed new systems to measure and report on the productivity of all of its attorneys. As noted above, on July 1, 2003 PDSC took over the public defense contracting and business responsibilities of the State Court Administrator's Office and the Circuit Courts, including existing personnel and new positions assigned to carry out those responsibilities. In order to perform the billing and expense authorization functions previously performed by the courts, CBS hired and trained four new employees. CBS also streamlined the administration of PDSC's contracts by reducing the number of public defense analysts and reassigning clerical and case-tracking functions to a lower job classification.

Because a common location for PDSC's two new divisions was essential to the successful operations of an agency designed to integrate all of the components of Oregon's public defense system, the Commission obtained the necessary legislative and administrative approval to relocate its offices and commenced a search for new office space early in the biennium. By August 2004, PDSC identified additional office space in the same building then occupied by LSD, which would minimize moving costs and employee dislocation. CBS's employees moved into that space from their old offices at IDSD without the expenditure of any new funds to support the move.

Finally, PDSC's management team laid the foundation for a new performance-based agency by adopting personnel policies and procedures in 2003. Those policies and

procedures call for regular evaluations of every PDSC employee, using standards developed by the agency's employees that are linked to the mission, goals and strategies of the Commission, and to the annual work plan of each employee. Although PDSC's employee evaluation system incorporates a process to address underperformance, the system emphasizes (a) positive feedback for the majority of employees whose performance is expected to be above average, (b) recognition of outstanding performance that contributes to the mission of PDSC, (c) development of personal management skills that promote personal initiative and self-evaluation by every employee and (d) planning and coaching to advance each employee's personal career plans and goals. PDSC's employee evaluation system, combined with the Commission's Strategic Plan and performance measures described below, is designed to address the Legislature's need to ensure an agency's accountability and performance and to establish PDSC as a model performance-based agency for other public agencies in the state.

3. Ensuring accountability through strategic planning and performance measurement. Early in 2003, in anticipation of assuming the responsibility for administering Oregon's entire public defense system, PDSC directed its new Executive Director to retain Geoff Guilfoy, a management consultant with Aldrich, Kilbride & Tatone in Salem, to jointly review the operation of the state's public defense contracting system, and make recommendations to improve the system. Following interviews with PDSC's contractors and judges, prosecutors and other justice officials throughout the state, as well as a nationwide review of best practices in public defense management, Mr. Ozanne and Mr. Guilfoy presented a report to the Commission in September 2003. The report outlined statewide concerns regarding the state's contracting process and presented a set of recommendations to (a) improve working relationships between the agency and PDSC's contractors, (b) strengthen and streamline the state contracting system, (c) allocate the state's scarce public defense resources cost-efficiently and (d) increase the quality of public defense representation in Oregon.

Most of the recommendations in the "Ozanne-Guilfoy Report" were adopted by PDSC as goals or strategies in its comprehensive Strategic Plan for 2003-05, which the Commission developed at the outset of the biennium. As part of that plan, the Commission identified its mission as ensuring the cost-efficient delivery of quality public defense services in Oregon. To carry out that mission, the Commission declared its long-term vision and values for the state's public defense system in the plan and committed itself to a set of specific goals and strategies for 2003-05. (A copy of PDSC's Strategic Plan for 2003-05 is attached as Appendix A).

As one of the primary strategies to improve the Oregon's public defense system, the Strategic Plan committed the Commission to a process of "service delivery planning" throughout the state. PDSC commenced this process in 2003 and plans to continue it throughout future biennia. The process engages the Commission in three phases:

- (a) a review of public defense services and service delivery systems within each county or region of the state for the purpose of improving the quality and cost-efficiency of those systems;
- (b) the development of a Service Delivery Plan that (i) gathers input from judges, prosecutors, defense attorneys and other local officials in each county, (ii) takes into account local conditions, practices and resources, (iii) identifies the objectives and structure of local service delivery systems, (iv) establishes the roles and responsibilities of the public defense contractors within those systems, and (v) proposes changes to improve local services and delivery systems; and
- (c) implementation of the Service Delivery Plan with eventual incorporation of facets of the plan into terms of PDSC's public defense contracts.

To ensure that all of the strategies in PDSC's Strategic Plan will be fully implemented, the Commission has directed its management team to integrate the Plan into its day-to-day operations, use it as the basis for PDSC's performance-based employee evaluation system, and make the Plan a regular item on the meeting agendas of PDSC and its management team.

In its Strategic Plan for 2003-05, PDSC also recognized the need to hold itself accountable to the public and the Legislature through performance measures:

PDSC . . . [is a] results-based organization with employees and managers who hold themselves accountable by establishing performance standards and outcome-based benchmarks and who implement those measures through regular performance evaluations and day-to-day best practices. (Strategic Plan at page 1.)

As described above, PDSC laid the foundation for the establishment of a performance-based agency in 2003 by adopting new personnel policies and procedures for its two divisions. These policies and procedures call for regular evaluations of every PDSC employee, using standards developed by the agency's employees that are linked to the mission, goals, strategies and performance measures of the Commission and to each employee's annual work plan. Performance rather than seniority is now the key to an employee's advancement and promotion at PDSC.

In addition, the 2003 Legislative Assembly directed PDSC as a new agency to "develop performance measures for direct and contract public defense services, and to present the draft performance measures to the Joint Legislative Audit Committee for review and approval" In December 2004, the Joint Legislative Audit Committee approved PDSC's performance measures, which are attached as Appendix D. Because these measures are so new, PDSC has just begun to collect the necessary data that, in accordance with the Legislature's directive, will measure the Commission's performance in delivering "direct and contract public defense services."

With regard to PDSC's performance measures for "direct public defense services," the Commission developed measures that track the key outcomes and outputs of its two divisions. For LSD, Performance Measure No. 1 tracks the number of cases in its appellate backlog, measuring LSD's progress in promoting the Commission's primary mission to ensure the delivery of quality, cost-efficient public defense services in Oregon's appellate courts, with the consequence of also promoting the effective and efficient administration of justice. For CBS, Performance Measures Nos. 2 through 5 track the extent to which the division's internal operations promote timely and accurate approval and payment of expenses and, thus, effectively support the cost-efficient delivery of quality legal services.

With regard to PDSC's performance measures for "contract public defense services," the Commission recognized that these measures should track the overall performance of Oregon's public defense system and the extent to which that system advances the Commission's mission of ensuring the delivery of quality, cost-efficient legal services. In developing these measures, the Commission first analyzed the core functions of criminal and juvenile defense attorneys: to ensure fairness and equal justice and to protect constitutional principles and individual liberties. Those functions result in the protection of the innocent from criminal convictions, the avoidance of wrongful or unlawful convictions, the enforcement of constitutional regulations governing law enforcement practices, the protection of children and parents in juvenile dependency cases, and the defense of the mentally ill in civil commitment proceedings. However, these outcomes are difficult to measure with the data and staff resources available to PDSC, and they depend on the performance of other justice agencies outside of PDSC's control.⁶ After conferring with its contractors, other justice stakeholders across the state and national experts on performance measurement, PDSC identified two performance measures that should (a) promote the accomplishment of those outcomes, (b) advance the Commission's mission to ensure the delivery of quality, cost-efficient legal services, and (c) be feasible to administer with the agency's limited staff and capable of verification with available data.

PDSC's Performance Measure No. 6 is based on PDSC's contractor site visit process which, as described in more detail below, identifies best practices in public defense and law office management to ensure the delivery of quality, cost-efficient legal services in

⁶ PDSC recognizes the Legislature's critical need to use performance measures to set priorities for funding and the delivery of services among state agencies. See David Osborne and Peter Hutchison, The Price of Government: Getting the Results We Need in an Age of Permanent Fiscal Crisis (Basic Books: New York 2004). For that purpose, however, the Commission submits that the performance of public defense, like that of all other justice and law enforcement agencies in the state, is dependent upon the performance of the other agencies in the public safety system. Moreover, to the extent one of those agencies' funding is reduced, the performance of the entire public safety system is compromised, as Oregon experienced during 2003 after the Judicial Department's budget (which then included the public defense budget) was singled out for reductions. Therefore, the performance of public defense and all other agencies or functions in the public safety system should be considered, measured and evaluated as a whole in determining funding priorities. PDSC is committed to working with the Chief Justice and his Criminal Justice Advisory Committee over the coming years to develop performance measures for Oregon's justice system as a whole.

local communities throughout the state.⁷ Examples of such best practices include regular and systematic evaluations of the contractors' attorneys and managers, law office and case management practices that conform to state and national legal standards, financial management practices that conform to applicable accounting standards, systematic processes to resolve complaints from local justice officials and stakeholders, private citizens and clients, and independent boards of directors with relevant business and management expertise. Performance Measure No. 6 will report the level of compliance by contractors across the state in terms of the percentage of contractors that have adopted and implemented best practices. Performance Measure No. 7 should confirm whether or not the site visit process and PDSC's other quality assurance programs are improving the quality and cost-efficiency of the state's public defense services by tracking the number of complaints over time regarding the performance of Oregon's public defense attorneys that are found to be valid.

All of these performance measures have been integrated into PDSC's Strategic Plan for 2005-07, since they measure the Commission's progress in implementing its key strategies and accomplishing its major goals.⁸ The Commission is convinced that these performance measures will also accurately measure the progress of Oregon's public defense system in carrying out PDSC's ultimate mission and in achieving that system's most essential outcome: the delivery of quality legal services, in the words of the Legislative Assembly, "in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice." ORS 151.216(1)(a).

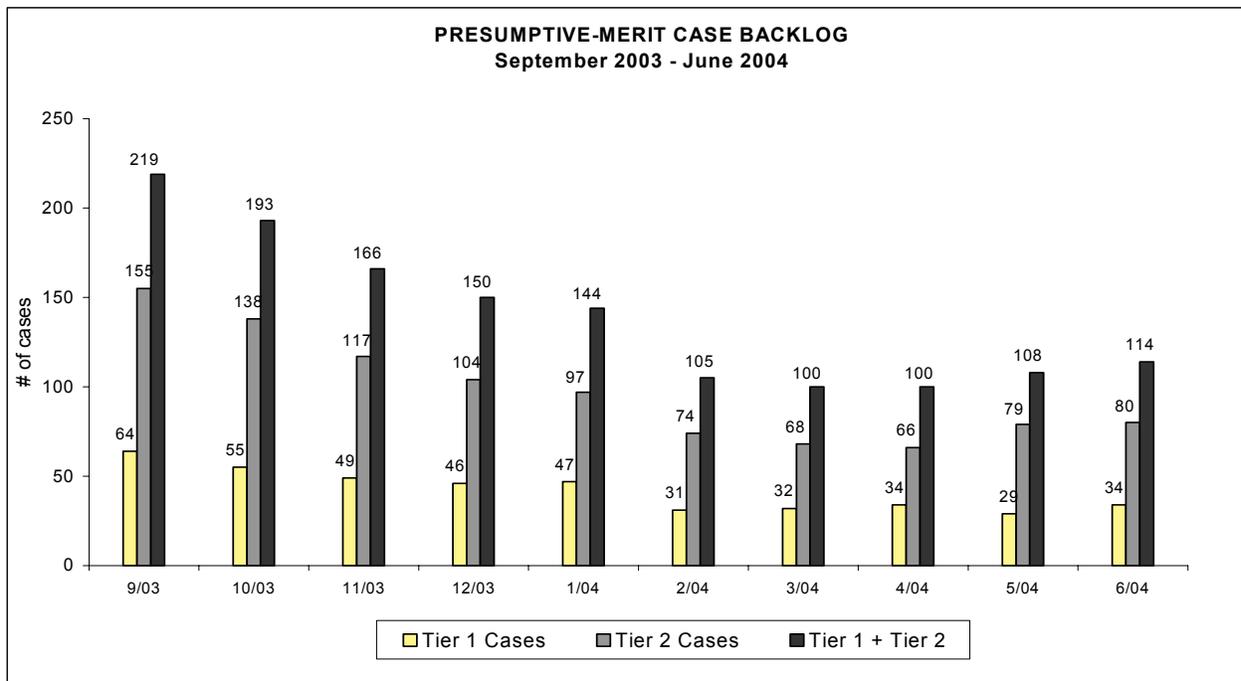
4. Improving the quality and cost-efficiency of PDSC's direct legal and administrative services. As noted earlier, PDSC provides public defense legal services in criminal appeals directly through the 26 attorneys employed by its Legal Services Division and all other public defense services through contracts administered by five professional staff in its Contract and Business Services Division. PDSC's new management team first took aggressive action to control LSD's appellate caseload and closely manage the productivity of the division's attorneys during 2003. Over the course of that year, LSD filled five attorney vacancies, hiring attorneys with from one year to twenty years of legal experience.

By September 30, 2003, due to the prior attorney vacancies, the office's appellate case "backlog" (defined as cases more than 210 days old from settlement of the trial record or transcript) had grown to 219 cases. In October 2003, LSD's managers reassigned cases internally and created individual attorney work plans. LSD then established an office-wide goal to file briefs in the Court of Appeals within 250 days of record settlement. LSD's managers also met with each attorney in January 2004 to review productivity and performance in 2003 and to monitor progress toward the goal of filing Court of Appeals briefs within 250 days of record settlement. Between September 30, 2003 and June 30, 2004 the office-wide case backlog was reduced by approximately 48

⁷ PDSC has secured the assistance and expertise of the Oregon State Bar's Professional Liability Fund to identify best practices in general law office management and practice.

⁸ PDSC's Strategic Plan for 2005-07 is attached as Appendix E.

percent (from 219 to 114). The following chart illustrates LSD’s appellate backlog during the current biennium, along with the 48 percent drop in the backlog due to LSD’s recent efforts.⁹



Although LSD dramatically reduced its backlog during that time period, the recent landmark sentencing decision by the U.S. Supreme Court in *Blakely v. Washington* has significantly increased the Division’s workload, posing a new challenge to controlling LSD’s appellate backlog. During the three-month period since the *Blakely* decision in June 2004, LSD assigned 438 new cases to its attorneys, compared to 260 cases during the comparable three-month period in 2003 – a 68 percent increase in case assignments!

In order to take over the billing and expense functions previously performed by the courts, CBS hired and trained four new employees in 2003. The division also developed new policies and procedures to govern those functions, including (a) a centralized process staffed by accounts payable specialists to review attorney fee statements, (b) a systematic process to review and approve non-routine expenses, such as the costs of investigators, forensic experts and expert witnesses, including an outside peer review panel of attorney experts, and (c) a centralized complaint process to address the concerns of prosecutors, judges, clients and the public regarding the administration of PDSC’s contracts and the performance of its attorneys. As a result of

⁹ LSD divides its appellate case backlog into two groups: “Tier One” cases are older than 300 days; “Tier Two” cases are between 210 and 300 days old. LSD’s total backlog reached its highest point in September 2003, with a total of 219 Tier One and Tier Two cases.

these actions, CBS has established more streamlined and cost-efficient methods to negotiate and administer contracts, non-routine expenses and payments of bills, greater consistency in the negotiation and administration of contracts, and better working relationships with PDSC's contractors, the courts and other stakeholders.

These accomplishments by LSD and CBS in 2003 and 2004 demonstrate that PDSC now has the management team, the employees and the organization required to carry out its primary mission to provide quality public defense services in the most cost-efficient manner possible.

5. Improving the quality and cost-efficiency of PDSC's contract legal services. As a central component of its Strategic Plan, PDSC initiated a statewide "service delivery planning process" in 2003 which, as described in more detail above, involves holding public meetings in every region of the state, gathering information from judges, prosecutors, other officials and citizens, evaluating the need for changes in the structure and delivery of local public defense services and directing the Commission's management team to implement needed changes. PDSC has completed this planning process in Benton, Lane, Linn, Lincoln and Multnomah Counties and is about to begin the process in Marion and Yamhill Counties. Upon the completion of its plans in Marion and Yamhill Counties, the Commission will have developed service delivery plans for 50 percent of Oregon's public defense caseload. This process has already resulted in the development of (a) a system for administering court appointments of attorneys, (b) new criteria for determining attorneys' eligibility for court appointments, (c) proposed guidelines for early disposition programs, and (d) a formal process to handle complaints regarding the performance and conduct of public defense attorneys.

As a result of its own investigations, as well as the findings of two previous task forces of the Oregon State Bar on indigent defense services, PDSC has undertaken an initiative to improve the quality and consistency of juvenile defense services across the state. As part of that initiative, PDSC is sponsoring a task force to develop a Juvenile Training Academy for Oregon's juvenile defense attorneys. This program should lead to training requirements for practicing juvenile law under contract with PDSC.

In its Strategic Plan for 2003-05, the Commission recognized the importance of close collaboration with its contractors in order to ensure that Oregon's public defense contracting system delivers quality legal services cost-efficiently. For example, while the Commission must maintain an arm's-length relationship with its public defense contractors in the course of negotiating and administering their contracts, the Commission must also take into account the day-to-day professional demands and business needs facing contractors across the state. Consequently, PDSC established a Contractors' Advisory Group to provide input and advice regarding the administration of the state's public defense contracting system and ways to improve the Commission's working relationships with its contractors and other defense attorneys.

Furthermore, to ensure that PDSC's efforts to improve the quality and cost-efficiency of public defense services are relevant and effective, the perspectives and expertise of

contractors and their staffs need to be taken into account. Therefore, the Commission established a Quality Assurance Task Force, made up of large and small contractors from across the state, to advise and assist PDSC in developing processes and standards to promote the quality and cost-efficiency of contractors' operations and their legal services.

Most notably, the Quality Assurance Task Force assisted the Commission in developing a systematic process to review the organization, management and quality of services delivered by PDSC's contractors. This "contractor site visit process" involves teams of volunteer attorneys with experience and expertise in public defense practice and management. These volunteer lawyers visit and evaluate the offices of the state's larger public defense contractors, administer questionnaires and interview all relevant stakeholders in a contractor's county, including the contractor's staff, prosecutors, judges, other defense attorneys, court staff, corrections officials, other criminal and juvenile justice professionals and stakeholders regarding the contractor's performance and operations. After a site visit and deliberations among the site visit team's members, the team prepares a report to the contractor's director and PDSC's Executive Director outlining its observations and recommendations. During the 2003-05 biennium, site visit teams evaluated PDSC contractors in Deschutes, Clackamas, Jackson, Morrow, Umatilla and Washington Counties. Once the planned site visit of the Portland Defense Consortium is completed in July 2005, PDSC's site visit process will have covered 19 percent of the state's public defense caseload.

In addition to improving the operations and performance of contractors subject to the site visits, the process is designed to improve the operations of all of PDSC's contractors and public defense attorneys throughout Oregon by identifying best practices for managing and delivering public defense services and by sharing that information across the state. This process also provides the basis for key statewide performance measures for the state's entire public defense system.

6. Receiving a positive assessment by the Secretary of State's Audits Division. A recent performance survey of Oregon's public defense system and PDSC's legal and administrative operations by the Secretary of State's Audits Division confirmed the Commission's progress in successfully managing Oregon's public defense system and ensuring the delivery of quality, cost-efficient legal and administrative services. After concluding that a formal audit of PDSC's operations and the public defense system was unnecessary, the Audits Division issued a "management letter" on February 9, 2005. That letter confirmed the absence of any significant "management risks" or problems in performance that PDSC had not already addressed. (The Audits Division's management letter is attached as Appendix B.)

The Audits Division did identify two management risks or performance problems in its management letter: the delivery of contract legal services in juvenile cases and in post-conviction relief cases. PDSC had already addressed these performance problems, however, with targeted quality assurance initiatives, which the Audits Division endorsed in the management letter. (See pp. 2-3 of the Management Letter.)

PDSC's Goals and Strategies for 2005-07

In light of the many new responsibilities PDSC assumed and the many new initiatives it began during the 2003-05 biennium, the Commission recognizes that it must devote the next biennium to ensuring that these responsibilities and initiatives continue to be carried out effectively. Accordingly, the following primary goals and key strategies in the Commission's Strategic Plan for 2005-07 build upon the goals and strategies in its Strategic Plan for 2003-05:¹⁰

Goal I: Secure a Budget Sufficient to Accomplish PDSC's Mission.

Strategy 1: In cooperation with the courts and other justice agencies, prepare informational and budget presentations to the Oregon Legislative Assembly that communicate the consequences to public safety of reductions in PDSC's budget.

Strategy 2: Follow-up on these informational and budget presentations with individual meetings with legislators.

Strategy 3: Refine and administer Performance Measurements that assure the Legislative Assembly that PDSC is spending and managing state funds wisely and cost-effectively.

Goal II: Assure the Quality of Public Defense Services.

Strategy 1: Continue to develop quality assurance standards and programs to improve public defense services across the state.

Strategy 2: Continue the Service Delivery Planning Process that addresses problems with the quality and cost-efficiency of local public defense services and with the methods of delivering those services.

Strategy 3: Develop and implement new court-appointment processes across the state.

Strategy 4: Encourage public defense contractors to establish active boards of directors or advisory boards that include outside members in order to (a) broaden the support and understanding of public defense in local communities, (b) strengthen the management of contractors, and (c) facilitate communication with PDSC.

¹⁰ PDSC's Strategic Plan for 2003-05 is attached as Appendix A. The Commission's Strategic Plan for 2005-07 is attached as Appendix E.

Strategy 5: Explore and test the feasibility of incentives for the delivery of legal services in areas of the state with shortages of qualified public defense attorneys.

Strategy 6: Continue efforts to reduce LSD's backlog of cases in the state's appellate courts.

Strategy 7: Expand PDSC's capacity to support its contractors and the state's public defense system.

Strategy 8: Continue to refine and manage panels of appellate attorneys to handle appeals that cannot be handled by LSD.

Strategy 9: Implement a new system to improve legal services in Post-Conviction Relief cases.

Goal III: Strengthen PDSC's Contracting Process.

Strategy 1: Develop a consistent contract rate structure that compensates contractors for actual work performed and establishes rational bases for any differences in rates.

Strategy 2: Develop a systematic process to evaluate the legal competency and ability of public defense contract attorneys prior to the time that PDSC's contracts are negotiated or renewed.

Strategy 3: Continue to improve the effectiveness and cost-efficiency of PDSC's administration of the contracting system.

Goal IV: Promote the Diversity and Cultural Competence of Oregon's Public Defense Workforce.

Strategy 1: Convene a Diversity Task Force to advise PDSC on innovative and culturally relevant methods to improve the recruitment of minority attorneys and staff and to increase the cultural competence of the state's public defense workforce.

Strategy 2: Develop working relationships with criminal law faculty, career counselors, and placement offices at Oregon's three law schools to identify and recruit law students of color who may be interested in internships and attorney positions in the state's public defense system.

Strategy 3: Establish a statewide directory of job openings in public defense offices across the state.

Strategy 4: Participate in job fairs and recruitment programs throughout the Pacific Northwest for law students and attorneys of color interested in careers in public service.

Conclusion

During the 2003-05 biennium, PDSC (1) with the support of the legislature led Oregon's public defense system through its recovery from the fiscal and public safety crisis of 2003 and into a new era of accountable, performance-based management, (2) recruited a new management team and established an administrative agency that has demonstrated the skill and capacity to administer the public defense system prudently and cost-efficiently, and (3) implemented successful management strategies, comprehensive statewide quality controls and meaningful performance measures that ensure the Commission's accountability to the legislature and Oregon's taxpayers.

The challenge facing PDSC and the State of Oregon in future biennia will be to maintain the proper balance in funding between public defense and the other critical agencies and functions in Oregon's public safety system as the state's elected officials confront demands to save costs by "downsizing" that system and to improve public safety by expanding the system. Whether the state's public safety system is downsized or "upsized," it must be "right-sized" by the legislature in a manner that provides every key agency in that system with sufficient resources to perform its function. As the Legislative Assembly discovered as a result of disproportionate cuts to the state's public defense budget in 2002, imbalances in funding that disrupt the operation of any one agency or function in the public safety system can bring the entire system to a halt, thereby jeopardizing the safety of all Oregonians.